CONSTITUTIONAL REVIEW MECHANISM FOR AFGHANISTAN IN COMPARATIVE PERSPECTIVE

Thesis Submitted for the Award of the Degree of

DOCTOR OF PHILOSOPHY

in

Law

By

Mohammad Ayub Yusufzai

Registration No: **42000505**

Supervised By

Dr. Geeta, UID 26154

Associate Prof. School of Law

Lovely Professional University

Co-Supervised By

Dr. Gaurav Kataria

Professor of Subodh Law

College Jaipur

LOVELY PROFESSIONAL UNIVERSITY, PUNJAB

2025

DECLARATION

I, at this moment, declare that the presented work in the thesis entitled "Constitutional Review Mechanism for Afghanistan in Comparative Perspective" in fulfillment of degree of **Doctor of Philosophy (Ph. D.)** is outcome of research work carried out by me under the supervision Dr. Geeta, working as Associate Professor, in the Law School of Lovely Professional University, Punjab, India. In keeping with general practice of reporting scientific observations, due acknowledgements have been made whenever work described here has been based on findings of other investigator. This work has not been submitted in part or full to any other University or Institute for the award of any degree.

(Signature of Scholar)

Name of the scholar: Mohammad Ayub Yusufzai

Registration No.: 42000505

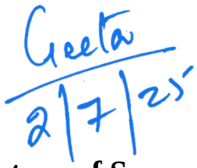
Department/School: School of Law

Lovely Professional University,

Punjab, India

CERTIFICATE

This is to certify that the work reported in the Ph. D. thesis entitled "Constitutional Review Mechanism for Afghanistan in Comparative Perspective" submitted in fulfillment of the requirement for the reward of degree of **Doctor of Philosophy (Ph.D.)** in the Law, is a research work carried out by Mohammad Ayub Yusufzai, (Registration No.42000505), is bonafide record of his original work carried out under my supervision and that no part of thesis has been submitted for any other degree, diploma or equivalent course.



(Signature of Supervisor)	**(Signature of Co-Supervisor)**
Name of supervisor: Dr Geeta	Name of Co-Supervisor: Gurav Kataria
Designation: Associate Professor	Designation: Professor & Principle
Department/School: School of Law	Department/school: Law College
University: Lovely Professional University	University: Subodh Law College Jaipur

List of Abbreviations

Abbreviations	Meaning
ICOIC	Independent Commission for Overseeing the Implementation of the Constitution
SCA	Supreme Court of Afghanistan
WJ	*Wolesi Jirga* (House representatives)
MJ	*Meshrano Jirga* (Senate)
HDSFDO	High Directorate for Supervision and Follow-up of Decrees and Orders
LJ	Loya Jirga (Constitutional Assembly)
MOJ	Ministry of Justice
IRA	Islamic Republic of Afghanistan
DFGT	The de facto government of the Taliban

List of Constitutional Cases

- Case of No-Confidence Vote of Afghanistan's Foreign Minister in 2007 (Kamali, 2015, pp. 13-18).
- Case of Conflict between the National Assembly and the Supreme Court on the Law of ICOIC (Timory, 2019, pp. 253-258)
- Case on the Law of Diplomatic and Consular Employees (Pasarlay & Mallyar, 2019, pp. 26-28)
- Case of Law on Media (Official Gazette No. 986, 2009).
- Case of the Law on Issuance of Legislative Decrees (Official Gazette No. 986, 2009).
- Opinion of ICOIC on Special Election Court (ICOIC, 2014, pp. 41-44).
- Opinion of ICOIC on Quorum of the National Assembly (ICOIC, 2014, pp. 58-59).
- Opinion of ICOIC on National Assembly's Oversight of the Independent Administrative Reforms Commission (ICOIC, 2014, pp. 79-80).
- Opinion of ICOIC on the Constitutionality of the Draft Criminal Procedure Code (ICOIC, 2020, pp. 124-125).
- Opinion of ICOIC on International Treaties (ICOIC, 2020, pp. 130-131).
- Opinion of ICOIC on Ethnic Identity Inclusion in Citizenship IDs (ICOIC, 2020, pp. 186-187).
- Opinion of ICOIC on Accountability of the Attorney General to the National Assembly (ICOIC, 2020, pp. 249-252).
- Opinion of ICOIC on Limits of the Government's Competence and Interference in Private Sector (ICOIC, 2020, pp. 282-286).

Abstract

The Constitution is the first and most prominent achievement of the constitutionalist movements, and in terms of hierarchy, it is at the forefront of all laws and regulations. The constitution's drafters have always considered constitutional protection mechanisms and guaranteeing its superiority essential. They have tried to ensure its protection and implementation by anticipating the necessary mechanisms from this perspective. Constitutional review involves two factors: the methods of guaranteeing the Constitution and the supremacy of the Constitution. The particular task of the constitutional review mechanisms is to give the Constitution precedence over disputed laws by monitoring and protecting the Constitution. Therefore, for the protection and supremacy of this supreme law, regulatory elements or reference norms should be provided to comply with government decisions and legal actions according to the principles of the constitution. In the meantime, the role of the Constitutional Review is to provide the necessary mechanisms to guarantee the principles enshrined in the Constitution. According to their country's specific conditions, governments adopt one of a centralized model (commonly associated with Europe), the decentralized model (Typically in the United States), or a mixed model that incorporates elements of both.

The components of constitutional review appear in most of Afghanistan's twentieth-century constitutions. However, no constitution, except the 1987 constitution, has included constitutional review in the Constitution, nor has it delegated the jurisdiction of constitutional review to any institution. In Afghanistan, as in many countries, the mechanism of checks and balances under Afghanistan's Constitutions did not have the necessary effectiveness in balancing and controlling government powers. For this reason, it was necessary to establish precise constitutional review mechanisms in the 2004 Constitution. However, an effective constitutional review mechanism was not adopted due to different opinions and internal and external interference. Based on the 2004 Constitution, the Supreme Court was responsible for reviewing the compliance of the laws, legislative decrees, and international treaties with the Constitution and their interpretation. On the other hand, the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) was also responsible for monitoring the implementation of the Constitution. For this reason, these two institutions' jurisdiction and scope of work faced ambiguities, which is known as one of the weak points of the 2004 Constitution.

An overview of constitutional review mechanisms in Afghanistan shows that the constitutional review has not only remained conceptual and vague in the text of the Constitution but has also proven to have institutionalized the constitutional review. This ambiguity of the 2004 Constitution caused a conflict between the executive, legislative, and judiciary. There was no institution to say the last word and make the final decision on disputes related to constitutional matters. This situation caused a violation of the constitution and abuse and violation of citizens' rights.

There are many pieces of research on constitutional review, but there are only a few studies concerning constitutional review in Afghanistan. Constitutional review is fundamental, especially since Afghanistan’s constitutional law system has always faced problems. First, constitutional review has never been institutionalized in Afghanistan. Secondly, the constitution in Afghanistan has not had the necessary stability. The constitution has been abolished seven times due to political change in the past hundred years, and a new constitution has been adopted. On August 15, 2021, when the Taliban came to power, they canceled the 2004 constitution, and a constitution has not been approved until now.

The lack of an institutionalized constitutional review mechanism has been one factor of political and constitutional instability in the country. The importance of the subject caused attention and research in this field. This study investigates constitutional review in Afghanistan, which has not previously been thoroughly investigated. The researcher examined the problem in Afghanistan exploratory, understanding existing problems and achieving a fresh experience to narrow down the problem. This research has studied constitutional review from the perspective of constitutionalism theory. The data collection methods are two-fold: first, through doctrinal research, and second, through interviews and questionnaires. In this research, (284) professors, students of law and Shariah faculties, judges, defense lawyers, and civil rights activists participated and responded to questionnaires. In addition, (30) interviews were conducted with domestic and foreign constitutional law experts, people involved in the constitution-making process in Afghanistan, members of the ICOIC, and former members of the Supreme Court. Moreover, this thesis also has a historical perspective on some democratic countries' Constitutional Review, so the historical methodology is also used in the library's data collection section.

It was assumed that an Independent Constitutional Court with special conditions in its members' appointment procedures could effectively protect the Constitution and

citizens’ rights and fulfill the goals of constitutional review in Afghanistan. However, the results of questionnaires with research participants and interviews with experts showed that 184 (64, 69%) people who participated in the questionnaires supported the Constitutional Council as an effective mechanism for protecting the Constitution in the future government and the Constitution of Afghanistan. Most interviewees also emphasized the name of the Council (*Shura*) because, according to Afghan tradition, the *Shura* has more legitimacy than a court. Nonetheless, most experts emphasized the Constitutional Council's judicial nature. The research results show that an independent constitutional council (European model) with a judicial nature, based on the Afghanistan context, can play a decent role in protecting the constitution, resolving constitutional disputes, and protecting citizens' rights.

In the current situation, Afghanistan does not have a constitution, which is supposed to be drafted in the future. Based on the research results, it is suggested that a suitable mechanism for protecting the Constitution, a "Constitutional Council with a judicial nature," be considered. In addition to expertise, this council should mirror all aspects of Afghanistan, especially women. The independent constitutional council can play a significant role in ensuring democracy, the rule of law, constitutional stability, the resolution of constitutional disputes, and the protection of citizens' rights.

Acknowledgment

I dedicate this thesis to the kindest companions in my life, my beloved wife and daughters, whose presence has always warmed my soul.

Now, with the guidance of my great supervisor and co-supervisor, at the end of this dissertation, I consider it my duty to express utmost gratitude to all who have guided and helped me in this way. First, I would like to thank my supervisor, Dr. Geeta, for all her support and unstinting efforts. This research would not have been possible without her guidance. I learned many issues about research and constitutional law from my supervisor during the study. She will be the torch of my life forever. She is an example of high morals and good behavior.

Also, I want to express my gratitude and appreciation to my co-supervisor, Dr. Gaurav Kataria. Without his support, guidance, and encouragement, an essential part of this thesis would not have been possible. I thank him for his kindness, good behavior, and unreserved support and pridefully wish him a long life.

In the same way, I want to express my gratitude and appreciation to the leadership of the Lovely Professional University. They cooperated by giving me a scholarship to advance in this field. Their services in serving the students are appreciated and admired. In addition to their compatriots, they provided opportunities to countries like Afghanistan, and we will never forget this service. I learned from them how to work and operate in strengthening education.

Furthermore, I am incredibly grateful to the SAS and ETPs committee members. Their guidelines have played a significant role in the development of research. Also, I would like to express my gratitude to the Pre-submission and Final Viva jury. Their guidance helped me complete and enrich this thesis.

Finally, I would like to thank the University of Central Asia for helping me reach my destination by cooperating to pay two-semester fees and travel fare for the final viva.

M. Ayub Yusufzai

Table of Contents

Topics	Pages
Declaration	I
Certificate	II
List of Abbreviations	III
Abstract	IV
Acknowledgment	VII
Chapter 1 **Introduction**	
1. Introduction	1-4
2. Statement of Problem	4-5
3. Research Objectives	5
4. Research Questions	5-6
5. Research Hypothesis	6
6. Significance of Research	6-7
7. Research Methodology	7-12
8. Research Gap	12
9. Research limitation	13
10. Literature Review	13-25
11. Chapterization	25-27
Chapter 2 **Constitutional Review in Afghanistan: Historical Background**	
1. Introduction	28-29
2. The Evolution of Constitutional Review in Afghan Constitutions, 1923-2004	29-31
2.1 The Monarchy Constitutions in Afghanistan	31
2.1.1 The Constitution of Afghanistan 1923	31-32
2.1.2 The Constitution of Afghanistan 1930	32-33
2.2 The Parliamentary Monarchy Constitution in Afghanistan (1964)	33-34
2.3 The Republic Constitutions in Afghanistan	34
2.3.1 The Constitution of Afghanistan 1977	34-35
2.3.2 The Constitution of Afghanistan 1980	35-36
2.3.3 The Constitution of Afghanistan 1987 (First Constitutional	36-40

Council in Afghanistan)	
2.4 The Constitution of Afghanistan 1993 (Islamic Government of Afghanistan)	40-41
2.5. The Constitution of Afghanistan 1998 (The Taliban 1.0 Government 1996- 2001)	42-45
2.6 The Constitution of Afghanistan 2004	45-52
3. Chapter Summary	53
Chapter 3 **Models of Constitutional Review in Different Jurisdictions**	
1. Introduction	54
2. Theoretical Foundation of Constitutional Review	54-60
3. Evolution of Constitutional Review	60-61
3.1 Constitutional Review Before the World War I	61-67
3.2 Constitutional Review between 1914 and 1945	67-68
3.3 Developments of Constitutional Review after Second World War	68
4. Constitutional Review Models in Different Countries	68-71
4.1 Countries Adopting Decentralized Constitutional Review Model (American Model)	71
4.1.1 Constitutional Review in the United States of America	71-74
4.1.1.1 Foundation of Decentralized Constitutional Review in the United States of America	74-76
4.1.1.2 Attributes of Decentralized Constitutional Review the United States of America	76-78
4.1.2 Constitutional Review in Union of India	78-80
4.1.2.1 Constitutional Basis for Constitutional Review in India	80-82
4.1.2.2. Scope and Constraints of Constitutional Review in India	82-84
4.1.3 Other Countries Adopting Decentralized Constitutional Review Model	84-86
4.2 Centralized Constitutional Review Model (European System)	86-89
4.2.1 Foundation of the Centralized Constitutional Review Model	89
4.2.1.1 The Roman-Germanic Legal System Principle	89-90

4.2.1.2 Parliamentary Sovereignty Principles	90
4.2.1.3 Judges Professionalism Principle	90-91
4.2.2 Attributes of Centralized Constitutional Review Model	91-92
4.2.3 Countries Adopting Centralized Constitutional Review Model	92
4.2.3.1 Centralized Constitutional Review Model in Germany	92-93
4.2.3.2 Constitutional Court of Germany	93- 94
4.2.3.2.1 Structure of the German Constitutional Court	94-95
4.2.3.2 Centralized Constitutional Review Model in France	95-96
4.2.3.2.1 Attributes of the Constitutional Review in France	96-98
4.2.3.2.2 Functions of the Constitutional Council of France	98-103
4.2.3.3 Centralized Constitutional Review Model in Belgium	103-104
4.2.3.3.1 Structure of Belgian Constitutional Court Structure	104105
4.2.3.3.2 Powers of the Belgian Constitutional Court	105-108
4.2.4 Centralized Constitutional Review model in other Countries	108-109
4.3 Mixed Constitutional Review Model	110-111
4.3.1 Attributes of Mixed Constitutional Review Model	111-113
5. Chapter Summary	113
Chapter 4 **The Role of Competent Institutions in Constitutional Review in Afghanistan (2004-2021)**	
1. Introduction	114-115
2. Role of the Supreme Court in Implementing the Constitution of Afghanistan (2004 to 2021)	115-118
2.1 Independence of the Judiciary under the Constitution of Afghanistan 2004	118-120
2.2 The Supreme Court of Afghanistan and Constitutional Review	121-122
2.2.1 Case of No-Confidence Vote of Afghanistan's Foreign Minister in 2007	122-124
2.2.2 Case of Conflict between the National Assembly and the Supreme Court on the Law of ICOIC	124-128
2.2.3 Case on the Law of Diplomatic and Consular Employees	129-130
2.2.4 Case of Law on Media	130-132
2.2.5 Case of the Law on Issuance of Legislative Decrees	132-136

2.3 Appraisal of the Supreme Court Performance Concerning Constitutional Review	136-138
3 Role of the Independent Commission in the Implementation of the Constitution of Afghanistan (2008-2021)	138-139
3.1 ICOIC & The Constitution of Afghanistan 2004	139-143
3.2 ICOIC & Method and Procedure of Constitutional Review	143-144
3.3 ICOIC & Performance and Decisions	144-145
3.4 COIC and the Constitutional Review in Afghanistan	145
3.4 .1 Opinion of ICOI on the Special Election Court	145-148
3.4 .2 Opinion of ICOIC on Quorum of the National Assembly	148
3.4.3 Opinion of ICOIC on National Assembly's Oversight of the Independent Administrative Reforms Commission	148-150
3.4.4 Opinion of ICOIC on the Constitutionality of the Draft Criminal Procedure Code	150-152
3.4.5 Opinion of ICOIC on International Treaties	152-153
3.4.6 Opinion of ICOIC on Ethnic Identity Inclusion in Citizenship IDs	153-155
3.4.7 Opinion of ICOIC on Accountability of the Attorney General to the National Assembly	155-157
3.4.8 Opinion of ICOIC on Limits of the Government's Competence and Interference in Private Sector	157-159
3.5 An Appraisal of ICOIC	159-161
4 Chapter Summary	161-163
Chapter 5 **Review of the Laws under the Taliban De Facto Regime (2021-2024)**	
1. Introduction	164-165
2. Legal and Institutional Developments during the Taliban Regime	165-166
2.1 Structure of The Taliban De Facto Government	166-168
3. Review of Laws under the Taliban De facto regime	169-170
3.1. The Taliban Supreme Court and Review of Laws	170-172
3.2 High Directorate for Monitoring and Follow-up of Decrees and Orders	172-177
3.3. Ministry of Propagation of Virtue, Prevention of Vice and	177-179

Hearing Complaints (*vazart emr balmaruf ve nehi az manker va sameh shiakayat*)	
4. The Taliban Regime and Rule of Law	179-182
5. Chapter Summary	182-183
Chapter 6 **Constitutional Review Model for Afghanistan: An Empirical Study**	
1. Introduction	184-185
2. Significance of the Constitutional Review Mechanism for Afghanistan	185-191
3. Impact of Past Political Systems on the Constitutional Review Mechanism	191-196
4. Performance of Afghanistan's Constitutional Review Mechanism from 2004- 2021	196-201
5. An Appropriate Constitutional Review Model for the Future Constitution of Afghanistan: Discussion	201-202
5.1. The American Model (Decentralized Model)	202-204
5.2 The European Model (Centralized Model)	204
5.2.1 Constitutional Court	204-209
5.2.2 Constitutional Council	209-214
5.3 Mixed Constitutional Review Model (European and American)	214-216
5.4 Religious Scholars Council	216-218
6. Chapter Summary	218-220
Chapter 7 **Suggestions and Conclusion**	221-227
List of References	228-265
Appendices	266-275

Chapter 1

Introduction

1. Introduction

Modern constitutional law consists of three basic elements: Separation of powers, rule of law, and constitutional review[1]. In the meantime, constitutional review plays an important role in establishing, institutionalizing, and balancing the two principles of separation of powers and the rule of law because the task of constitutional review is to supervise and evaluate the laws to perceive how much compliance with the constitution[2] The purpose of constitutional review is to protect the rights and freedoms of citizens[3].

In modern constitutional law, political power and government are established in fair and just legal forms and within the framework of basic concepts of freedom, democracy, welfare, individual rights, justice, and equality have been reviewed[4]. In this regard, the principles of separation of powers, the rule of law, oversight of the exercise of government, and the recognition of people's fundamental rights play an important role in monitoring the exercise and performance of government. Therefore, a mechanism for constitutional review in any country is necessary to protect citizens' rights and freedoms[5].

Constitutional review is a process in which constitutional courts, acting as deliberative institutions, evaluate and interpret laws from the perspective of their compliance with the constitution, to achieve constitutional justice through rational and institutionalized dialogue between the powers.[6] It means judging, commenting, and issuing a ruling on the behavior and actions of public officials in terms of compliance or non-compliance

---

1 M. A. Mohammadi, *Constitutional law of Afghanistan* 12 (Saeed Publication, Kabul, 2018).

2 T. Ginsburg, "The Global Spread of Constitutional Review" K. E. Whittington and R. D. Kelemen (eds.), *Law and Politics* 85 (Oxford University Press, London, 2008).

3 P. M. Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court" 2 *Constitutional Review* 105 (2016).

4 *Supra* note 1 at 14.

5 D. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* 13 (Oxford University Press, 2017).

6 J. Ferejohn and P. Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice", W. Sadurski (ed.), in *Constitutional Justice, East and West* 22 (Kluwer Law International, London, 2002).

with the Constitution and constitutional rules[7]. Also, constitutional review means that a specific state institution or institutions review and decide the constitutionality of laws with the constitution of a country. Constitutional review means the power of an institution or a court to review the constitutionality of laws, decrees, and regulations[8].

In 1987, a new constitution was adopted, in which a constitutional council was proposed using French experience. The council was established in 1988 and continued its work until 1991. In 1991, with the fall of the regime and the formation of the Islamic State, the basis of the political system and laws in Afghanistan was dismantled and Afghanistan entered a phase of civil war[9]. Afghanistan has experienced seven constitutions in the last hundred years. The first constitution was adopted in 1923[10], the second in 1930[11], the third in 1964[12], the fourth in 1976[13], the fifth in 1980[14], the sixth in 1987[15] and its amendment in 1990[16], and the seventh in 2004[17].

Today, most countries have a written and rigid constitution, and there is a hierarchy between legal rules according to the institutions that make these rules[18]. The constitution is a national covenant and a common idea that unites all the nation and creates a spirit of solidarity, which is necessary for the nation's authority. The Constitution must take precedence over all laws, regulations, and bills[19]. Establishing a Constitutional Review mechanism to protect the principles of the Constitution is the

---

7 T. Ginsburg and M. Versteeg, "Why Do Countries Adopt Constitutional Review?" 30 *The Journal of Law, Economics, and Organization* 589 (2014).

8 T. Ginsburg, "Comparative Constitutional Review" 1(United States Institute of Peace, 2008)

9 M. T. Nasiri, "The Impact of Religion and Culture on the Supremacy of the Constitution in Afghanistan" 12 *ICR Journal* 331-346 (2021).

10 The Basic Regulations of the Supreme Government of Afghanistan "Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan", 9 April 1923.

11 The Basic Principles of the Supreme Government of Afghanistan "Osol-e-Asasi-e-Daulat-e-Aliyah-e-Afghanistan" 1930.

12 The Constitution of Afghanistan "Qanoon-e-Asasi-e-Afghanistan" Official Gazette No. 12, 1964.

13 The Constitution of the Republic of Afghanistan "Qanoon-e-Asasi-e-Daulat-e-Jamhori Afghanistan" Official Gazette No. 360, 1976.

14 The Constitution of the Democratic Republic of Afghanistan "Qanoon-e-Asasi-e-Jamhori-Democratic-e-Afghanistan" Official Gazette No. 450, 21 April 1980.

15 The Constitution of Afghanistan Republic "Qanoon-e-Asasi-e-Jamhori-e-Afghanistan" Official Gazette No. 660, 30 November 1987.

16 The Constitution of Afghanistan Republic "Qanoon-e-Asasi-e-Jamhori-e-Afghanistan" Official Gazette No. 728, 6 November 1990.

17 The Constitution of the Islamic Republic of Afghanistan "Qanoon-e-Asasi-e-Jamhori-e-Ialami-e-Afghanistan" Official Gazette No.818, 2004.

18 S. Danish, *Constitutional Law of Afghanistan "Hoqooq-e-Asasi- Afghanistan*" 74 (Kabul: Ibni Sina University, 2015).

19 M. A. C. Andreescu, "Supremacy of the Constitution Theoretical and Practical Considerations" 15 *LESIJ - LEX ET SCIENTIA International Journal* 116 (2018).

initiative of modern legal systems. Subsequently, today, fewer countries have yet to consider a place for constitutional review mechanisms[20]. Each country chooses one of the "centralized, decentralized, or mixed" models based on its political, social, and cultural conditions.

Afghanistan has had an unstable legal system due to non-democratic systems and crises caused by imposed wars and internal conflicts. During a century (1923-2024), the country witnessed numerous constitutions and different forms of political system, from the monarchy and communist republic to the Islamic State of Mujahidin, the Islamic Emirate of Taliban, the Islamic Republic, and finally, the Islamic Emirate again in 2021. According to the 2004 Constitution, Constitutional review was provided to the highest judicial institution (the Supreme Court) to review the constitutionality of ordinary laws, legislative decrees, and international treaties and conventions. The ambiguity of the 2004 constitution, the existence of two institutions, the lack of independence of the judiciary, and other factors caused the Supreme Court to fail in this field.

The 2004 Constitution delegated the review of the compliance of laws with the Constitution and their interpretation to the Supreme Court. In addition, the Constitution, without due diligence, added Article 157 to the Constitution without amending Article 121 due to the differences that existed regarding the review mechanism of the Constitution. However, after the approval of the 2004 Constitution, a law should have been approved to define the limits of the powers of the Supreme Court and the ICOIC concerning constitutional review, but this law was not approved. This negligence and delay created doubts about the Supreme Court's and ICOIC's jurisdiction[21]. The vagueness of Article 121 of the Constitution regarding its interpretation and the lack of clarification of the ICOIC's duties in Article 157 caused a difference of opinion between the government and the National Assembly. The ambiguity of the law caused many problems in practice[22].

---

20 M. H. Kamali, "Afghanistan's Constitution Ten Years On: what are the Issues?"4 (Afghanistan Research and Evaluation Unit, 2014).

21 A. Rofii, "Islam, Islamic Law and Constitution Making: International and Domestic Engagement in the Constitution-Making Process in Afghanistan" 19 *Mazahib* 28 (2020).

22 A. Their, "Constitutional Decision Rules, Who Decides?", 2 (United States Institute of Peace, 2020).

During, the Taliban Regime 2021 -2024 has no constitution currently[23]. With the return of the Taliban to power in 2021, Afghanistan's judicial system collapsed. The Taliban canceled the previous laws, dismissed the judges, prosecutors, and professional employees of the Ministry of Justice, and selected the people they wanted, who were mostly graduates of religious schools (*Madrasa*)[24]. By canceling the previous laws, especially the laws governing judicial proceedings, there are now no effective legal mechanisms to determine the limits of judicial institutions' powers and authorities[25]. The Taliban do not have any special mechanism to review the laws. They have appointed a committee in the Ministry of Justice to check the conformity of laws with Islamic principles.

2. Statement of Problem

Afghanistan has been facing multiple challenges, including corruption, human rights violations, and political instability, and needs a strong constitutional review mechanism to implement the constitution. The absence of an effective constitutional review mechanism weakens the rule of law, the increase of public distrust in government institutions, and the abuse of power by various government institutions. As a result, there is an urgent need to examine different models of judicial supervision and adapt them to the conditions of Afghanistan to create a stable and effective structure for protecting the constitution.

Despite the provisions of the 2004 constitution in Afghanistan that refer to constitutional review, the ambiguity of these provisions and the absence of an independent and efficient mechanism have created significant challenges. Also, political differences and imbalances between powers had weakened the ability of regulatory institutions to play their role. The mechanism of checks and balances under the 2004 Constitution did not effectively balance and control government powers. For this reason, it is necessary to establish precise constitutional review mechanisms[26]. For this reason, examining different constitutional review models can

---

23 B. Mobasher, M. Qadam Sha, and S. Pasarlay, The Constitution and Laws of the Taliban 1994-2001,19 (Stockholm: International Institute for Democracy and Electoral Assistance, 2022).

24 United States Department of State, "Afghanistan 2022 Human Rights Report"10 (2022).

25 Rawadari, "Justice Denied: an examination of the legal and judicial system in Taliban-controlled Afghanistan" 44 (2023).

26 A. R. Hearavi, " Methods of protecting the constitution" in Persian "*Shiawa hai Siayanat Az Qanoon Asasi*". *Constitutional Journal* 30 (2018).

help to solve these problems. However, this requires careful examination of these models and their compatibility with Afghanistan's cultural, social, and political context.

This thesis will study constitutional review from a comparative perspective to suggest an appropriate constitutional review mechanism for Afghanistan's future constitution.

3. Research Objectives:

1. To examine the historical context of constitutional review in Afghanistan, including the pre-Taliban period and the current situation.
2. To understand the evolution of the legal framework for constitutional review in Afghanistan from 1923 to 2023.
3. To evaluate the different models of constitutional review and their strengths and weaknesses.
4. To analyze the role of the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) in the constitutional review process through disk review and empirical observations.
5. To identify the significant challenges that have prevented the institutionalization of constitutional review in Afghanistan through empirical evidence.
6. To propose a comprehensive and effective constitutional review mechanism for Afghanistan, drawing on domestic experiences and best practices from democratic countries.
7. To assess the future potential of the proposed constitutional review mechanism in ensuring democratic governance and constitutional compliance in Afghanistan through empirical analysis.

4. Research Questions

1. What is the legal framework for the Constitutional Review in Afghanistan from 1923 to date?
2. What are the pros and cons of the different models of constitutional review?
3. To what extent has the Supreme Court successfully carried out its constitutional review task?
4. To what extent the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) successfully carried out its constitutional review task?

5. What were/are the significant challenges that have prevented the institutionalization of constitutional review in Afghanistan?
6. What could be an appropriate Constitutional Review mechanism for the future of Afghanistan based on its past experiences and the experiences of democratic countries?
7. What will be the future potential of the proposed constitutional review mechanism in ensuring democratic governance and constitutional compliance in Afghanistan?

5. Research Hypothesis

It is assumed that an Independent Constitutional Court with special conditions in its members' appointment procedures can effectively protect the Constitution and citizens' rights and fulfill the goals of constitutional review.

6. Significance of Research

As a post-conflict country, Afghanistan needs a constitutional review mechanism to protect the constitution and prevent political instability by continuing the tradition of respecting the constitution. The constitution makes legal and political basis and is important in ensuring the rule of law and creating a stable political system. Therefore, research on the constitutional review mechanism is fundamental. The first reason for the importance of this research is the lack of a robust constitutional review mechanism in implementing the constitution. Especially in Afghanistan, which has faced extensive political and legal challenges, the issue of effective monitoring of the implementation of the provisions of the constitution has always been one of the main concerns of legal and political researchers and activists. If the people of Afghanistan want a stable political system, an independent constitutional protection mechanism is needed to prevent violations of the constitution's provisions and closely monitor the compliance of the government's performance with the country's laws. A constitutional review mechanism strengthens democratic institutions and reduces corruption and abuse of power.

Second, research on the appropriate form of constitutional review is significant in a transition society like Afghanistan. A constitutional review mechanism is also essential to ensure justice and implementation of human rights principles. Afghanistan has faced numerous social and political crises and continues to struggle with serious

challenges in human rights and social justice, so constitutional review can act as an efficient tool to protect the rights of citizens. For example, the Constitutional Court or the Constitutional Council can stand against the illegal actions of governments or powerful institutions and defend the people's fundamental rights. A constitutional review mechanism becomes more critical, especially in situations where the political system is weak and a temporary or transitional government is supposed to be formed; in such a situation, an independent constitutional review mechanism can act as a bastion to defend people's rights and freedoms and deal with systematic violations of the constitution.

Finally, research on constitutional review in Afghanistan can help develop the country's legal and political system. Comparative studies and familiarity with the methods of constitutional review in other countries help policymakers and legislators make informed decisions based on scientific research about the appropriate method of reviewing the constitution in the Afghan constitution. Therefore, the research on constitutional review in Afghanistan effectively strengthens the rule of law, but it can also act as a tool to promote democracy, protect the rights of citizens, and strengthen independent institutions.

This research is important because it is the first time the viewpoint of academics about constitutional review models is comprehensively studied. So far, there has been no comparative research on Afghanistan in this field.

7. Research Methodology

The study investigated constitutional review in Afghanistan that has not previously been thoroughly investigated. The researcher examines the problem in Afghanistan exploratory, understanding existing problems and achieving a fresh experience to narrow down the problem. The objective of exploratory research is to understand a subject more deeply. It begins with a general concept. The results of the qualitative data are utilized to identify concerns related to the significant challenges to the Constitutional Review mechanism for Afghanistan.

A mixed research methodology i.e. doctrinal and non-doctrinal methodology has been applied for the purpose of the study. The data collection methods are two-fold: first, through doctrinal research, and second, through interviews and Google Forms (questionnaire). This thesis also has a historical perspective on some democratic

countries' Constitutional Review, so the historical methodology is also used in the library's data collection section.

According to this method, laws, decrees, regulations, constitutional cases discussions of constitution drafting commissions and constitution reviewing Commission and commissions of the Constitutional *Loya Jirga* and decisions of the Supreme Court and ICOIC, laws of several democratic countries, and domestic and foreign research articles and books was studied and data was collected. Laws, regulations, discussions in constitutional commissions, constitutional cases, scholarly articles, and related books studied in great detail. The data was collected and written after analysis.

Second, the research adopted an empirical method based on (30) interviews with domestic and foreign constitutional law experts, people involved in the constitution-making process in Afghanistan, members of the ICOIC, and former members of the Supreme Court. Using Google Forms, a questionnaire was arranged, and 300 people in different provinces of Afghanistan and abroad were partnered to check their opinions about this research and the appropriate model for Afghanistan, of which 284 answered this questionnaire. An initial study focuses on discovering new data and insights, followed by a descriptive and comparative analysis to identify current trends and developments in Afghanistan during the 20th and 21st centuries. The outputs of this study answer research questions.

This thesis also has a historical perspective on the constitutional review in some democratic countries (United States, India, Germany, France, and Belgium) and Afghanistan. Although historical methodology was used to collect some of the data, it should be noted that this is not a historical study. In this section, data related to foreign countries are collected by referring to laws and research sources such as academic articles, and data related to Afghanistan by referring to laws, cases, discussions held in *Loya Jirgas,* and scientific articles. Every effort was made to refer to reliable and credible sources.

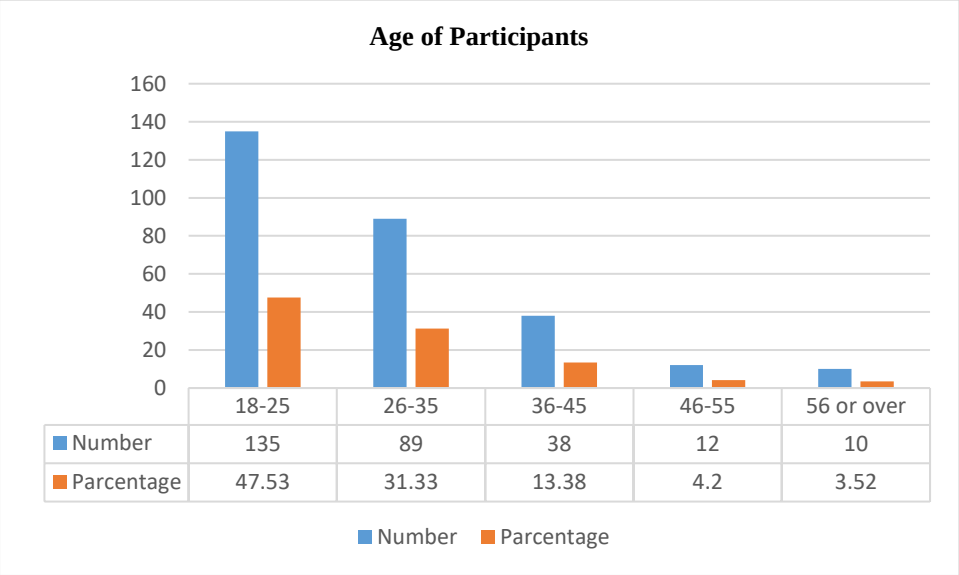
In this section, to obtain useful data, an attempt was made to consider the appropriateness, scientific capacity, and involvement in the law-making processes in Afghanistan and the relevant institutions related to the constitutional review of the interviewees. Therefore, to obtain data related to Afghanistan members of the commissions for drafting and reviewing the constitution, members of the *Loya Jirga* of the constitution, members of the National Assembly, members of the commission for monitoring the implementation of the constitution, members of the Supreme

Court, University professors, constitutional law researchers are interviewed. Moreover, international professors and researchers are interviewed to obtain data on comparative constitutional review models.

In the first step, information was collected and then classified. In the next step, the data was analyzed, and the final report or thesis was prepared based on the research findings.

In distributing questionnaires, an effort was made to refer to different age groups. In terms of age, the participants in this research include the following groups:

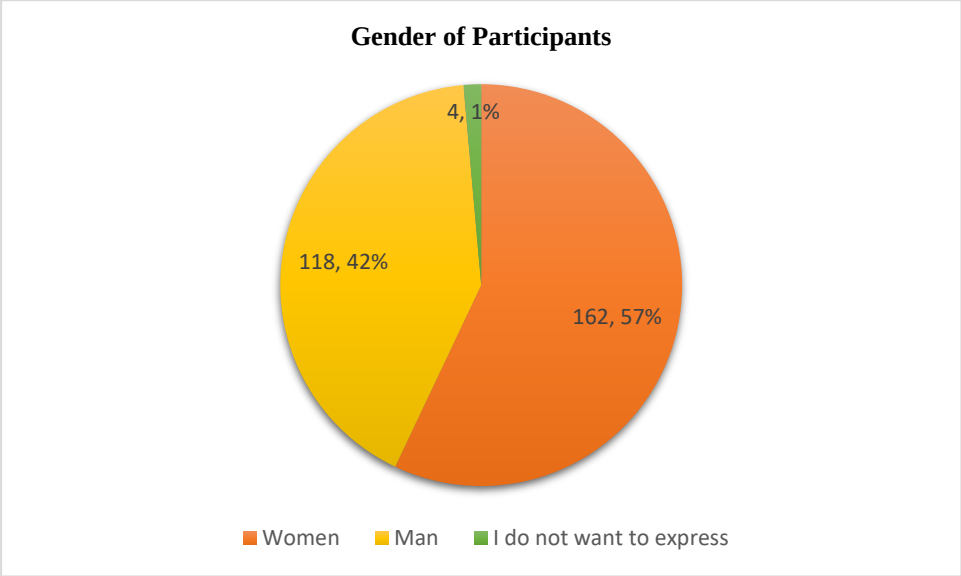
Chart 1.2: Age of questionnaire participants



As Table 1.2 shows, efforts have been made to include different categories in terms of age in the research so that the opinions of different age groups are taken into consideration.

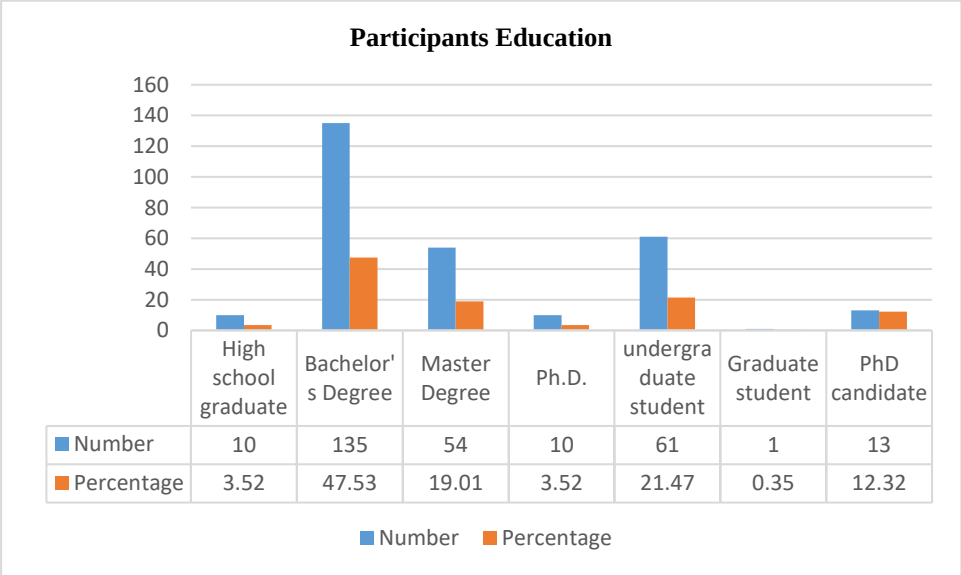
Questionnaires were distributed to both women and men. In terms of gender, this research has considered both groups of women and men. In terms of gender, the research participants are as follows:

Pie 1.2: Gender of questionnaire participants



In this research, an attempt has been made to refer to people with different degrees of education who have the necessary familiarity with constitutional supervision. The participants of the research in terms of education level include the following groups:

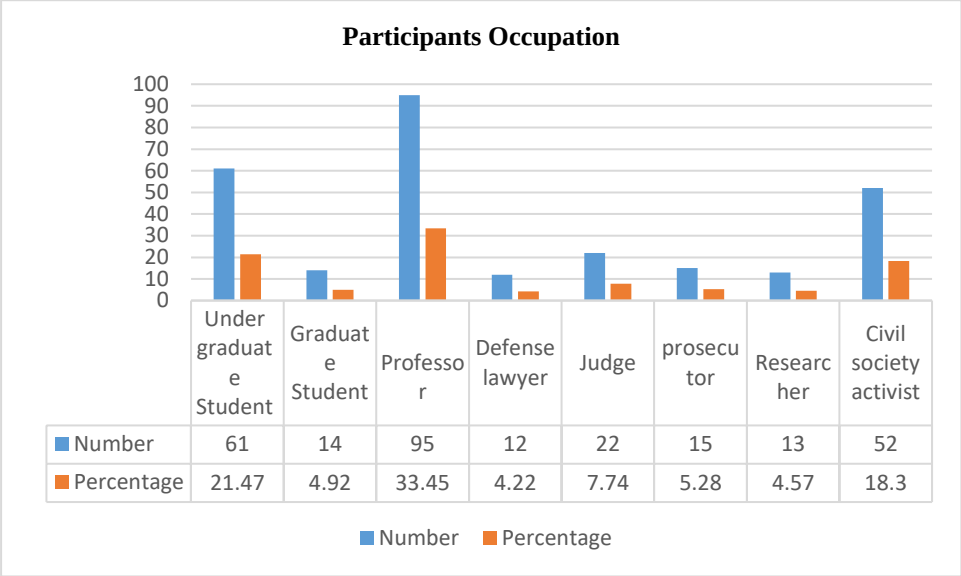
Table 1.3: Education of questionnaire participants



	High school graduate	Bachelor's Degree	Master Degree	Ph.D.	undergraduate student	Graduate student	PhD candidate
Number	10	135	54	10	61	1	13
Percentage	3.52	47.53	19.01	3.52	21.47	0.35	12.32

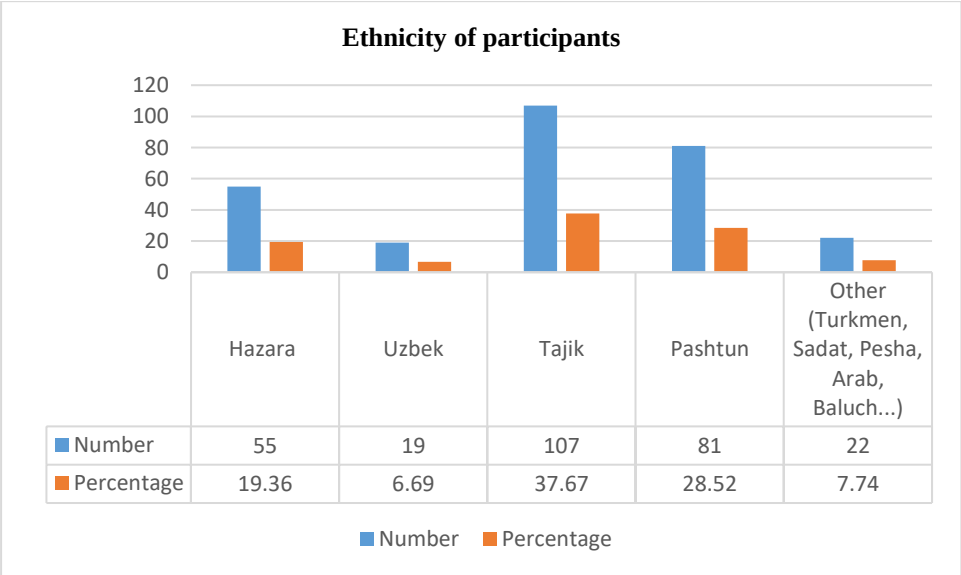
Research participants usually include students of the Faculty of Law, professors of the Faculty of Law and Sharia, judges, prosecutors, defense lawyers, legal researchers, and civil society activists. In terms of duties, the participants include these groups:

Table 1.4: Occupation of questionnaire participants



In Afghanistan, there is no accurate population statistics and the exact percentage of ethnic groups. Different ethnic groups live in Afghanistan. The four relatively larger ethnicities are Pashtun, Tajik, Hazara, and Uzbek. In the research, an attempt has been made to distribute the questionnaire to different ethnic groups and collect their opinions. Subscribers can be divided into these categories in terms of ethnicity:

Table 1.5: Ethnicity of questionnaire participants



According to the contents of this chapter. The absence of an effective constitutional review mechanism is one of the gaps in the Afghan constitutional law system. The

second chapter reviews the Historical Background of the Constitutional Review in Afghanistan.

8. **Research Gap**

The available literature on constitutional review in Afghanistan lacks a comprehensive comparative study. Some articles written in Persian failed to fulfill the research aspect. Mostly available literature represented the study touching the political aspects and perspectives lacking the other aspects. Therefore, it is necessary to conduct comprehensive research to fill the gap. The lack of a constitutional review mechanism is the main problem in the constitutional law history of Afghanistan. Thus, this problem of the Afghan constitutional system shows the lack of research in this area.

The constitutional review mechanism is extremely important for the stability and continuity of the tradition of the supremacy of the constitution and the authority for resolving disputes in conflict between government institutions and important constitutional rights issues. Afghanistan is a heterogeneous country, the existence of an institution that provides the final solution in problem situations and is accepted by the majority is extremely important.

In recent years, a few scholars of Afghanistan's constitutional law, such as Dr. Pasarlay, Dr. Mobasher, Prof.Timory, and others, have done excellent research. However, these studies are very few. Most of them have dealt with other issues. There is little research on constitutional review. The reason for that is the lack of institutionalization of the protection of the constitution in Afghanistan and the lack of stability of the constitution and the legislative system in Afghanistan.

Consequently, the gap in research requires extensive research on constitutional review. Especially since Afghanistan must approve a new constitution soon, it is extremely important to pay attention to the constitutional protection mechanism for the continuity of the political system, the stability of the constitution, the rule of law, and the protection of citizens' rights.

9. Research Limitations

This research has faced many limitations. First, at the beginning of the work, the Republican system was overthrown, and the Constitution was abolished. Inevitably, the research objectives changed.

Second, the researcher was forced to leave the country, which made access to resources difficult. Living in the camp under a tent with 72 people also made working conditions difficult. The researcher had to go to public libraries to do research. Despite all the problems, the researcher did not give up research work and continued there until Utrecht University provided favorable research facilities.

Third, the lack of political stability in Afghanistan due to frequent government changes and political crises has made it impossible for researchers to find a stable and documented framework for examining laws, especially the constitution, and their compliance with social realities. This makes it difficult to find scholars and writers who have studied the country's constitutions in-depth and analytically. This issue creates problems for the correct understanding of constitutional law issues. At the same time, access to historical documents and sources is difficult.

Fourth, the absence of a constitution in Afghanistan after August 2021 has raised the question of why the research on the revision of the constitution is important. In addition, cultural and social barriers, including traditional attitudes towards laws and rights, made it difficult for me to access information and cooperation.

10. Review of Literature

There has been much research on constitutional review, but only a few studies have been done on constitutional review in Afghanistan. However, thousands of studies have been conducted on constitutional review and comparative constitutional reviews worldwide, which cannot be reviewed in this research. In this study, I have reviewed 180 sources (books, journal articles, and research reports) about constitutional review worldwide. Here, I discuss only a few of them as a sample.

Books

Danish, who was a member of the 2004 constitution drafting and review commissions, has analyzed issues related to constitutional law, including the constitutional review by the Supreme Court and the ICOIC, in his book Constitutional

Laws of Afghanistan[27]This book can be a good source for this research because the author's information directly contributed to the drafting of the constitution and later, as the minister of justice and vice president, played a crucial role in governance in Afghanistan.

The book "Constitutional Courts in Asia: A Comparative Perspective" systematically analyzes the Asian experience of Constitutional Courts and related developments and introduces historical, comparative, and theoretical perspectives in East and South East Asia[28].

The book "Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes" analyzes the evolution of the Indonesian Constitutional Court. This book discusses the evolution of the Indonesian[29] Constitutional Court. Afghanistan can learn many lessons from Indonesia's experience in constitutional review.

The book "Constitutional Review and Democracy" is a collection of articles. The first part deals with theoretical issues, the second part examines constitutional review in the European Union, and the third part examines countries without constitutional review mechanisms, such as the United Kingdom and the Netherlands. Finally, the fourth section examines constitutional review in transitional democracies such as Romania, Spain, Hungary, and Serbia[30]. The findings of this research can be good sources for this as well.

The History and Growth of Judicial Review, in two volumes, examines the evolution of constitutional review and its development in different countries. It is a very informative book[31]. It can be used to find some sources about the constitutional review.

Articles

Shamshad Pasarlay, in his research, examines the flaws and duality of constitutional review in the 2004 Constitution and states that the existence of two institutions in this field caused the executive and parliament to take advantage of it. This paper examines

---

27 *Supra* note 18.

28 Constitutional Courts in Asia: A Comparative Perspective, Albert H. Y. Chen and Andrew Harding (eds). (Cambridge University Press, 2018).

29 S. Hendriannto, Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes (Routledge, 2018).

30 M. Jovanović, Constitutional Review and Democracy, (Eleven, 2015).

31 S.G. Calabresi, The History and Growth of Judicial Review (Oxford University Press, Vol.1 2021).

constitutional review in Afghanistan in detail and discusses some cases. Pasarlay concludes that delegating constitutional review to the Supreme Court could fill the gap. However, this article does not address how the judicial method will work in Afghanistan[32]

Shamshad Pasarlay, in his second article, examines the postponement of the powers of the Supreme Court and the ICOIC by the legislators during the drafting of the 2004 Constitution. The findings of this article show that postponing some issues in the constitution weakens the government and reduces its legitimacy. The 2004 Afghan Constitution is a good example of this. This article can be effective in the pathology of the 2004 constitution in the field of constitutional review[33].

Shoaib Timory's article describes the importance of constitutional review and then discusses the legal framework, implementation, and flaws of constitutional review and constitutional interpretation in Afghanistan. Timory states that there were gaps in Afghanistan's constitutional system regarding constitutional review and that reform was needed[34]. He proposes four suggestions: First, the 2004 constitution must be revised, and the authority of each institution to oversee the constitution must be determined. Second, he proposes the American model and states that the Supreme Court should have jurisdiction over constitutional review. Third, he argues that the European model is better and more efficient. Fourth, it is appropriate that the Supreme Court and the ICOIC reach an agreement until the constitution is revised[35]. He has not examined a specific model for compelling reasons. It has only examined the gaps in the Afghan constitutional system and made a few suggestions.

Research has compared substantive procedures in Afghanistan and the United States. This research has compared the constitutional review between these two countries using the descriptive-analytical method. The authors conclude that despite the differences between these countries, they consider the commonality to be the jurisdiction of the constitutional review, and the difference is that in the United States, all courts have the jurisdiction of the basic proceedings, but in Afghanistan, only the Supreme Court has. In addition, it has been concluded that the courts have good

---

32 "Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan", 26 *Michigan State International Law Review* (2018).

33 "The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan" 27 *Washington International Law Journal* (2018).

34 "Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency" 42 *Loyola Los Angeles International and Comparative Law Review* (2019).

35 *Id*, 286-290.

independence, but this is not the case in Afghanistan[36]. The noteworthy point is that these two countries are not comparable at all. In Afghanistan, the 2004 constitution did not have the necessary clarity in the constitutional review part and the issue of constitutional review was one of the unsolved problems during the twenty years of the republic. The comparison is very general and the purpose of the comparison is not clear.

Rezaei, in his article, explains the constitutional review in Afghanistan. He states that the authority to review the compliance of laws and other legal documents with the Constitution was given to the Supreme Court. However, the formation of the ICOIC created complications. The 2004 Constitution is silent on the authority to interpret the Constitution, and the powers of the ICOIC are unclear. This had caused problems in practice. In addition, he has compared the powers of the Supreme Court with the Guardian Council of the Constitution of Iran. The author said the reason for this comparison is the common article between the constitutions of Afghanistan and Iran. The concept of the common article is that in these two countries, according to the constitution, the laws must be in accordance with Islam. Although the source of legislation in Iran should be Islam, the Afghan constitution states that it should not conflict with Islamic principles. In Iran, the laws are reviewed by the Guardian Council of the Constitution, but the 2004 constitution of Afghanistan was silent on the issue of which authority has jurisdiction in this matter. The author concludes that because, according to Article 121, the Supreme Court has the authority to review the compliance of laws with the Constitution, the authority to review documents is also related to the fact that they are not in conflict with Islam. This research concludes that Afghanistan and the US have both judicial methods of constitutional review while America is decentralized, but in Afghanistan, this authority is only entrusted to the Supreme Court. In the US, individuals have the right to complain about violating their rights and the conflict of laws with the constitution, but according to the 2004 constitution, only the government and the courts have the authority to request the review of the laws with the constitution[37]

---

[36] A. Molaee and M. R. Dolaty, "A Comparative Study of the Constitutional Review in Afghanistan and the US Legal Systems" in Persian "*Barresi moqaaiseyi Dadarsi asasi Dar nezam hoqooqi afghastan ve eyalatmathadeh amrika*" 5 *Comparative Law Biquarterly* (2021).

[37] H. K. Rezaei, "Constitutional justice in the Islamic Republic of Afghanistan", in Seyed Mohammad Mehdi Ghamami (ed), *Comparative constitutional justice: the study of the foundations, structures, and competencies of the institution of constitutional justice* (Guardian Council Research Institute, 2014).

Famous Italian lawyer Maurco Cappelletti studied the adoption and philosophy of the emergence of Constitutional Review from a comparative perspective. Developments in Europe caused the people's trust in the parliament's laws to decrease, and as a result, they tried to create a guarantee for rights and freedoms by supporting the judiciary. This process has been done in three stages. The first step was the drafting of the constitution. Later, it gave the Constitution an inflexible character, and finally, it adopted mechanisms that would force the government to follow the Constitution. Later, he discusses the formation of constitutional review in European and American countries. Using the comparative method, he found the core and common basis for two European and American methods. One of the most important common bases between these two legal systems is the methods of guaranteeing the supremacy of the Constitution[38].

In his article, Ginsburg analyzes the global spread of the Constitutional Review in detail. He discusses the factors that caused its formation and why countries have chosen different forms[39]. This article does not discuss the advantages and disadvantages of different constitutional review models.

However, Ginsburg and Versteeg, in another research, have studied the reasons why countries adopted the Constitutional Review mechanism in the framework of their constitutional law system. Collecting data from 204 countries from 1781 to 2011, this research examined the main reasons for adopting the constitutional review. This research has observed various theories in the Constitutional Review and concludes that factors such as federalism and the diffusion of international rules do not impact the adoption of the constitutional review. The main reason for adopting this mechanism is the national electoral politics [40].

An article studied the role of the Constitutional Court of Tunisia in the process of democratization. It states that the existence of a constitutional monitoring body is very important for democracy. This country's experiences can have good lessons for

---

38 M. Cappelletti, "Constitutional Review in Comparative Perspective" 58 *California Law Review* (1970).

39 *Supra* note 2 at 88.

40 *Supra* note 7 at 30.

Afghanistan. Afghanistan can benefit from Tunisia's constitutional court's experiences regarding the formation and role of constitutional review mechanisms[41].

In his article, Blerton Sinani studied constitutional review models, especially American and European models. Also, this article examines how countries adopt one of these models, considering their legal traditions, history, and political systems. Meanwhile, some countries have tried to combine these two models in a mixed form, considering the realities of their society. The emphasis of this research is that the existence of a constitutional review mechanism in any country is considered necessary. It states that 61 percent of countries have adopted the European model, 34 percent of the American model, and 5 mixed models. Only 8 countries do not have a specific mechanism for constitutional review[42].

Sadurski, in his research, examines the role of judicial review in protecting constitutional rights. This article analyzed how judicial institutions, especially courts, can guarantee people's fundamental rights by reviewing government laws and actions. He concludes that judicial review is a necessary and effective tool for protecting citizens' constitutional rights, but this tool must be carefully regulated to avoid abuse or undermining of democracy[43].

Another article by Landau and Dixon studied the misuse of constitutional review by courts, which impacts democracy in a country. They call this kind of judicial review "abusive judicial review." The focus of the study is the United States, but it refers to some other examples from different countries. The article defines abusive judicial review, and it shows how courts can use their power to support authoritarian governments that undermine electoral democracy in the US and any other country. The researchers conclude that constitutional review is a crucial tool for protecting

41 F. Tamburini, "The Ghost of the Constitutional Review in Tunisia: Authoritarianism, Transition to Democracy and Rule of Law" 57 *The Journal of Asian and African Studies* (2021).

42 B. Sinani, "Global Patterns of Constitutional Judicial Review Systems: Two Major Models of Constitutional Judicial Review in the World" 14 *Review of Comparative and International Law* 169 (2024).

43 W. Sadurski, "Judicial Review and the Protection of Constitutional Rights", 22 *Oxford Journal of Legal Studies* (2002).

democracy and citizens' constitutional rights, but if it is misused, it can damage democratic principles in a society[44].

In his article, Fleming tried to express the importance of natural rights in legitimizing judicial review. He states that natural rights are a good basis for judicial review and protection of citizens' rights. Natural rights are eternal and universal principles that can play a good role in interpreting the US Constitution. He states that the Constitution should be interpreted so that rights are protected[45].

Samsudin, in his article, has compared the constitutional review in France and Indonesia. This research compares the similarities and differences of these two institutions. The author has found that although both countries have constitutional review mechanisms, there are significant differences in the structure, procedures, and effectiveness of the Indonesian Constitutional Court and the French Constitutional Council. He described that these differences are caused by the unique historical and political contexts of each country. The performances and activities of the Constitutional Council have been more successful because of its historical background and solid institutional structure. But this does not mean that the Indonesian Constitutional Court did not have the necessary efficiency. This research demonstrates that the Indonesian Constitutional Court has had a decent performance despite its short history and adaptation to local conditions[46].

In their article, Prakasha and Yoo explore the roots and development of judicial review in the American legal system. The authors tried to show that judicial supervision was accepted and supported as a basic principle in the Constitution during the formation of the American government. They analyze the history and theoretical underpinnings of this concept and show how judicial review as a tool to protect individual rights and limit the state's power was gradually formed and institutionalized in the American judicial system. The article also deals with the

---

44 D. Landau and R. Dixon, "Abusive Judicial Review: Courts Against Democracy", 53 *Davis Law Review* (2020).

45 J. E. Fleming, "The Natural Right-Based Justification for Judicial Review", 69 *Fordham Law Review* (2001).

46 M. I. Samsudin, "A Comparison of Judicial Review in Indonesian Constitutional Court and French Constitutional Council" 5 *Indonesian Comparative Law Review* (2022).

effects of this process on the development of fundamental rights and separation of powers[47].

In his research, Gardbaum deals with a very important issue that has been a problem in the history of Afghanistan, which is the separation of powers. In this research, he tries to answer why Legislative supremacy has gradually changed, and judicial supervision has grown. Gardbaum explains that the increased focus on individual rights and the limitation of government power through judicial mechanisms has, over time, strengthened the role of courts in monitoring the laws and actions of government. The results indicate that constitutional review has found a special place in democratic countries as a tool to maintain the balance of power and protect constitutional rights[48]. The important thing learned from this research is that the supervision of the Constitution has a great effect on the separation of powers. Afghanistan faced serious problems in this field throughout history, especially during the republic period.

Langford has questioned constitutional review in his article, why do we need constitutional review? How can we encourage society to form a constitutional review institution and solve the concerns that judicial monitoring conflicts with democracy? He examines the justifications for constitutional review and analyzes its role in modern countries' legal systems. Langford contends that constitutional review is a key mechanism for protecting constitutional rights and maintaining the rule of law. Moreover, constitutional review allows courts to check the legislative and executive branches' activities. He also discusses criticisms such as concerns about judicial overreach and the balance of power between elected officials and the judiciary. Finally, he defends constitutional review as an important tool for maintaining democratic governance and ensuring the rule of law[49].

Interesting research has dealt with judicial review in ancient times. This research examines the mechanisms of constitutional review in ancient Athens. The authors show that in ancient Athens, the people had the role of judicial review and reviewed and interpreted the laws and government decisions through collective democratic

---

47 S. B. Prakash and J. C. Yoo, "The Origins of Judicial Review", 70 *The University of Chicago Law Review* (2003).

48 S. Gardbaum, "Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?", 62 *The American Journal of Comparative Law* (2014).

49 M. Langford, "Why Judicial Review?" 1 *Oslo Law Review* (2015).

processes. The research shows that monitoring by people, as a type of judicial review, played a significant role in preventing possible abuses of power and preserving the rule of law in Athens. Also, monitoring by the people not only affected stabilized democratic principles but also political transparency[50]. It is learned from this research and similar research that judicial supervision is essential in strengthening democracy and the rule of law and protecting people's rights.

Fontana's article examines the importance of Docket Control in the success of constitutional courts. The purpose of Docket Control is for constitutional courts to review cases based on their priorities. First, they examine the most important issues and then examine other issues. Fontana argues that the ability of constitutional courts to select and control cases plays an important role in shaping the effectiveness and authority of constitutional courts. Docket Control allows courts to more effectively protect constitutional rights by focusing on important and impactful cases and strengthening their role in constitutional interpretation. He shows that better control over proceedings can lead to greater independence of courts and strengthen the rule of law[51].

The article "Understanding judicial review and its impact" by Cane examines the concept and function of judicial review. After explaining the general issues about judicial review, this article compares judicial review in the United States, England, India, and the Austrian system. Cane states that first, we should know that most common law countries have some kind of judicial review, but the purpose differs from country to country. Also, when we discuss the effect of judicial supervision, we should know who is our target of the effect of judicial review. At the same time, the effect of judicial supervision should be considered and studied according to the conditions of the countries[52]. This research teaches that the concept, purpose, and effect of judicial supervision should be considered with a country's conditions in mind. During the study, attention should be paid to the country's internal conditions.

---

50 F. R. Carugati - Calvert and B.R. Weingast, "Constitutional Litigation in Ancient Athens: Judicial Review by the People Themselves" 39 *Journal of Law, Economics, & Organization* (2023).

51 D. Fontana, "Docket control and the success of constitutional courts", in *Comparative Constitutional Law* (Edward Elgar, 2011).

52 P. Cane, "Understanding Judicial Review and Its Impact" in *Judicial Review and Bureaucratic Impact* (Cambridge University Press, 2009).

In his article, Dorf examines the two main methods of judicial review "abstract and concrete review". The research method of the article includes comparative analysis between different legal systems and checking the efficiency of each approach. The purpose of this research is to compare these two approaches to evaluate and review laws before or after implementation. In abstract review, laws are reviewed without regard to specific cases, while in concrete review, laws are evaluated in response to a specific case or dispute. The results of the article show that both methods have their strengths and weaknesses; Abstract review effectively prevents the adoption of unjust laws, but concrete review can better respond to the real needs of society and resolve conflicts[53].

In his article, Yowell studied Kelsen's theory about the formation of constitutional courts. He examined the practical aspect of Kelsen's theory in European countries and concluded that constitutional courts have been formed. In practice, they are a little different from Kelson's opinion, and each country has formed a court considering its conditions and defined its duties in its laws.[54]

Reports

John Dempsey and J. Alexander Their discussed and analyzed the crises in constitutional interpretation. The findings of this study indicate the lack of an appropriate mechanism for constitutional review in Afghanistan's legal system and the gap in the 2004 constitution in this regard. This research has discussed only one aspect of the constitutional review: constitutional interpretation. Indeed, constitutional review involves examining the conformity of ordinary laws with the Constitution, monitoring the performance of the ruling powers, and interpreting the Constitution[55].

In his article, Professor Kamali discusses 10 issues related to the 2004 Constitution. One of these issues is the interpretation and review of the 2004 constitution. He first explains the models of constitutional review and later briefly reviews the Afghan constitutions. Kamali states that one reason for the lack of institutionalization of constitutional review in Afghanistan is the existence of Hanafi jurisprudence. If

---

53 M.C. Dorf, "Abstract and Concrete Review", in *Global Perspectives on Constitutional Law* (Oxford University Press, 2009).

54 P. Yowell, "The Negative Legislator: On Kelsen's Idea of a Constitutional Court" *in Court, Politics and Constitutional Law* (Routledge, 2019).

55 Resolving the crisis over Constitutional Interpretation in Afghanistan (United States Institute of Peace, 2009).

judges do not find a subject in law, they refer to Hanafi jurisprudence[56]. Kamali's article is not a comprehensive study of constitutional review. He has tried to briefly examine the shortcomings of the constitution after ten years of implementation.

A former member of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) has analyzed the constitutional review in Afghanistan. First, the paper examines the constitutional review in the past constitutions. She describes that no constitution of Afghanistan, except the 1987 constitution, has enshrined constitutional review in the constitution, nor has it delegated constitutional review to an institution. The 2004 Constitution adopted the constitutional review and gave jurisdiction to the Supreme Court and the ICOIC to ensure the law's constitutionality and public litigation complied with the Constitution. In the first years, there was no problem in implementing the constitution, but over time, the flaws in Articles 121 and 157, which delegated constitutional review to the Supreme Court and the ICOIC, became the most controversial articles in the constitution. In practice, the shortcomings of these 2004 Constitution articles have led to conflicts between government institutions[57].

Many cases show that the Supreme Court has made political decisions while exercising constitutional review instead of issuing legal decisions. Constitutional review has not been a mechanism to protect citizens' rights but has, in many cases, led to human rights violations. Correspondingly, the ICOIC has failed to protect the values and principles of the Constitution. The ICOIC has not been able to successfully prevent violations of the Constitution by government institutions. On the other hand, the ICOIC has always suffered from power struggles between the three powers[58].

With these findings, she first makes short-term and then long-term suggestions. She proposes the establishment of a Constitutional court in the long term, but in the short term, she suggests that the Supreme Court should formulate a law that sets out the objectives and procedures of constitutional review. Also, the Supreme Court should strengthen the judicial reasoning in the constitutional review process. The Supreme Court and the ICOIC shall cooperate and coordinate on implementing constitutional review. The ICOIC should review the specialized law of this institution to determine

---

56 *Supra* note 20.

57 G. Haress, "Judicial Review in Afghanistan: A Flawed Practice" (Afghanistan Research and Evaluation Unit, 2017).

58 *Id.*, at 11-12.

its authorities. The ICOIC should establish effective mechanisms for implementing and monitoring the Constitution. The research data has been collected through disk review and interviews with experts[59]. The researcher in this study has not done a comparative study. She has relied only on domestic sources. Moreover, she could not give a precise reason for forming the Constitutional Court. Meanwhile, this research is silent on establishing the Constitutional Court and how it functions.

Afghanistan Constitutional Studies Institute analyzed the constitutional review under the 2004 Constitution in its article. This is qualitative research, and data is collected through disk review and experts' round tables. The research proposes the creation of a constitutional court without providing any convincing reason[60] (ACI, 2019, pp 51-61). In addition, this study has not been a comparative study. It has proposed the Constitutional Court only with the views of some scholars.

This dissertation will comparatively review constitutional reviews from domestic and foreign sources to suggest an appropriate model for Afghanistan based on research data and the country's actual situation.

The research literature on constitutional review in Afghanistan shows no comprehensive comparative study. Some articles written in Persian failed to fulfill the research aspect. These articles are from a political perspective. Therefore, it is necessary to conduct comprehensive research to fill the gap. The lack of a constitutional review mechanism is the main problem in the constitutional law history of Afghanistan. Thus, this problem of the Afghan constitutional system shows the lack of research in this area.

Thus, the history of Afghanistan's constitutional law from 1923 to 2024 demonstrates that the lack of an effective mechanism of constitutional review has been one of the major shortcomings of the Afghan constitutional law system. Considering the problems in the last twenty years and the second Taliban government (15 August 2021 to the present), a specific and clear constitutional review mechanism is necessary for the future constitution of the Afghan government. The interviews with experts, members of the Wolesi Jirga, the Supreme Court, the ICOIC, and foreign experts, and 284 questionnaires reveal that a constitutional review mechanism is necessary according to Afghanistan's conditions. 183 people (64.69%) of the research

---

59 *Id.*, at 38-39.

60 "Towards a Constitutional Court in Afghanistan: A Proposal" (Afghanistan Constitutional Studies Institute, 2019).

participants favored the independent and centralized model (European model) of the constitutional review mechanism (Constitutional Council). It can be the Constitutional Court or the Constitutional Council, but this institution must be independent and judicial. To conclude, the research shows that due care should be taken in selecting the members of the Constitutional Council, and this council should reflect the majority of people living in Afghanistan. Emphasis was placed on the membership of women in the council and the legal guarantee of its independence. As a result, if the institutional protection of the constitution is institutionalized in Afghanistan's constitutional system, it can impact the strengthening of the rule of law, the stability of the constitution, and the political system, and the rights of the citizens will be protected. To attain the objectives, the study is divided into eight chapters i.e.,

Chapterization

Chapter 1: Introduction

This chapter provides the theoretical and conceptual background of constitutional review in Afghanistan. Therein the country legal system has been facing various challenges in the absence of a specific and independent authority to review the constitutionality of laws, weakness in constitutional interpretations, and structural and institutional gaps. The chapter discusses the problem, research objectives, research questions, research hypothesis, and the significance of the research. This chapter then includes the research methodology, gaps in previous research, and the literature review.

Chapter 2: Constitutional Review in Afghanistan: Historical Background

This chapter examined the historical background of constitutional review within the framework of various Afghan constitutions. First, constitutional review during the monarchy is studied, which includes the constitutions of 1923 and 1930. Next, the 1964 Constitution, considered a turning point in the history of Afghan constitutional law, is analyzed. Also, the 1977 Constitution, adopted during the Republic of Afghanistan, and the 1980 Interim Constitution are examined. The chapter then analyzes the 1987 Constitution, which established the constitutional council for the first time in the country. Finally, the period of the Islamic State of Afghanistan and the Taliban Islamic Emirate (first period) from 1992 to 2001 is examined. During this period, two draft constitutions were prepared, but neither was approved.

Correspondingly, this chapter has studied the debates and controversies surrounding constitutional oversight in the process of approving the 2004 constitution. Overall, this chapter provides a historical picture of the status of constitutional review in different periods, providing a basis for a better understanding of the challenges and gaps in Afghanistan's constitutional law system.

Chapter 3: Models of Constitutional Review in Different Jurisdictions

The chapter first discusses the concept of constitutional review, followed by its history and the usual models of constitutional review (Centralized Constitutional Review Model, Decentralized Constitutional Review Model, and mixed model). While studying its models, examples of countries such as the United States of America, India, Germany, France, and Belgium have also been reviewed in the chapter.

Chapter 4: The Role of Competent Institutions in Constitutional Review in Afghanistan (2004-2021)

Chapter four examined the role of key institutions in constitutional review during the period 2004-2021. First, the role of the Supreme Court is examined. The structure, powers, and functioning of this institution are analyzed, and a number of cases related to the constitutional review that were heard by the Supreme Court are reviewed. Later, the role of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) is studied. In addition to examining the structure and functions of the ICOIC, a number of ICOIC's views and interpretative positions on specific cases related to constitutional review are examined. The analysis of these cases represents that the lack of binding authority in constitutional interpretation limited its practical role in the constitutional review. By studying the performance of the two aforementioned institutions, this chapter has provided the necessary basis for proposing amendments to the country's future Constitution in subsequent chapters.

Chapter 5: Review of the Laws under the Taliban De Facto Regime (2021-2024)

Chapter five discussed the structural and legal changes after 15 August 2021. It studied the Islamic review of laws under the Taliban de facto government in Afghanistan in detail. Finally, it explained the impact of these changes on human rights of the Afghan citizens.

Chapter 6: Constitutional Review Model for Afghanistan: An Empirical Study

The chapter suggests an appropriate constitutional review model based on the opinions of constitutional law experts with the help of data collection. A Constitutional Council as an independent, specialized, and impartial institution could be an appropriate and effective model for monitoring the implementation of laws and regulations with the Constitution in Afghanistan's future. Most of the respondents considered the Constitutional Council more suitable than other models (American model, constitutional court, and mixed model). The constitutional council guarantees institutional independence, diverse composition of members, and the ability to provide an authoritative interpretation of the constitution. However, it is worth noting that alongside this dominant view, other ideas were also put forward, including the proposal to transfer constitutional review authority to the Supreme Court or to form a mixed body. This chapter attempted to carefully analyze these perspectives, evaluate their legal and practical feasibility, and ultimately propose a model that best suits the legal characteristics and needs of Afghanistan.

Chapter 7: Suggestions and Conclusion

This chapter conclude the concept of the constitutional review in Afghanistan. The lack of an effective mechanism for constitutional review has been a fundamental problem in Afghanistan’s constitutional system from 1923 to 2024. After the adoption of the 2004 constitution, despite the establishment of an oversight commission, the lack of transparency, political disagreements, and overlapping jurisdictions between the Supreme Court and the commission led to repeated violations of the constitution and the weakening of citizens’ rights. By examining constitutional oversight models in different countries, the research suggests that Afghanistan needs to establish an "independent constitutional council" with a judicial nature and a diverse composition (including scholars, jurists, women, and different ethnic groups). It suggested that the active role of politicians and the public in the legislative process, the promotion of human rights, strengthening the training capacity of constitutional review institutions, civil society participation, and impartial cooperation of the international community may pave the way for the establishment of the rule of law, political stability, and effective protection of citizens' rights in the future Afghanistan.

Chapter 2

Constitutional Review in Afghanistan: Historical Background

1. Introduction

The Constitution is the first and most prominent achievement of the constitutionalist movements, and in terms of hierarchy, it is at the forefront of all laws and regulations[61]. Therefore, the constitution's drafters have always considered the issue of protection and guaranteeing its superiority as essential. They have tried to ensure its protection and implementation by anticipating the necessary mechanisms from this perspective. Constitutional review implies two organizational and material factors based on one or more institutions through the techniques of guaranteeing and maintaining the supremacy of the constitution. The specific task of the constitutional review mechanisms is to give the constitution precedence over other laws by monitoring and protecting the constitution. Therefore, to maintain the supremacy of the constitution, regulatory elements or norms must be provided to oversee the decisions and actions of the government based on the principles of the Constitution. Meanwhile, the role of the constitutional review mechanism is to provide the necessary mechanisms to guarantee the principles contained in the constitution[62].

Afghanistan's legal system has not been successful in protecting the constitution[63]. Afghanistan has experienced seven constitutions in the last hundred years. All the Constitutions of Afghanistan have been divided into different categories for the purpose of study including (i) The Monarchy Constitutions in Afghanistan (1923 and 1930), (ii) The Parliamentary Monarchy Constitution in Afghanistan (1964)[64], (iii) The Republic Constitutions 1977 to 1990 (iv) The Islamic constitutions (draft of Afghanistan Islamic state constitution in 1993 and draft of the Taliban Islamic Emirate constitution in 1998) (v) Islamic republic constitution in 2004[65].

---

61 M. Andreescu and C. Andreescu, "Constitution and Constitutionalism Contemporary Issue" 17 *Lex ET Scientia International Journal* 48 (2017).

62 C. B. Lombardi and S. Pasarlay, "Constitution-Making for Divided Societies: Afghanistan" in *Constitutionalism in Context*, David S. Law (ed) 91 (Cambridge University Press, 2022).

63 S. Q. Hashimy, "The Constitutional Failures in Afghanistan: A Narrative of Agonising Constitutional Death" 56 *The Indian Journal of Politics* 113 (2022).

64 A. Tarzi, "Islam and Constitutionalism in Afghanistan" 5 *Journal of Persianate Studies* 210-240 (2012).

65 S. A. Arjomand, "Constitutional Developments in Afghanistan: A Comparative and Historical Perspective" 53 *Drake Law Review* 943-944 (2005).

This chapter studies constitutional review under different constitutions of Afghanistan. First, the Constitutions of the monarchy period (constitution of 1923, 1930) are studied. Then the chapter studied the 1964 constitution, which laid the foundation for the parliamentary constitutional system and democracy in Afghanistan. After that, the constitution of the first republic in 1977, was adopted by the republic of Afghanistan. The chapter continues with an examination of the interim constitution of the People's Democratic Republic of Afghanistan which was adopted in 1980.

In the same way, it examines the constitutional review under the 1987 Constitution. A constitutional council was established for the first time in Afghanistan based on the 1987 constitution. Finally, this chapter ends with an overview of the constitutional review during the period of the Islamic State and the Islamic Emirate of the Taliban 1.0 1992 to 2001. During the Afghanistan period, there was no constitution. However, it should be noted that the draft of the two constitutions was approved but did not reach the final approval.

Constitutional review under the 2004 Constitution and current conditions studied in the following chapters.

2. The Evolution of Constitutional Review in Afghan Constitutions, 1923-2004

A study of Afghanistan's history reveals that the country is full of complex social events and processes[66]. With the emergence of political developments beyond Afghanistan, especially in the years before the achievement of political independence, simultaneously with the developments and reforms in Turkey and Iran, measures have been taken to draft laws, especially in the time of King Shir Ali Khan and King Habibullah Khan. The core of the legislative body in the country was renamed the council during the reign of King Habibullah, but these limited measures at that time could not meet the needs of the people in this area[67].

After gaining political independence during the time of Amanullah in 1919, when he considered legal and the first constitution was adopted under the title of the

---

66 S. Pasarlay, "The Making and the Breaking of Constitutions in Afghanistan" 40 *Arizona Journal of International and Comparative Law* 62 (2023).

67 H. Mehraban, "History of Parliament in Afghanistan" in Persian "Tarikh-i-Shora dar Afghanistan" 4 (Kabul: Afghanistan Senate Publication, 1989).

Constitution of the Supreme Government of Afghanistan and many statutes and bills during the time of Amanullah[68].

The constitution provided for a State Council (*Shoray Dowlat*), but it did not have the authority to pass laws. It only reviewed draft laws and sent them for approval to the Council of Ministers and the Shah himself. However, with the passage of the second constitution in 1930, a bicameral parliament was established in Afghanistan, passing laws for the first time. This constitution lasted until 1964 when King Mohammad Zahir adopted a new constitution based on the changes in the country[69]. This constitution laid the foundation of the constitutional monarchy in the country. The fourth constitution was adopted in 1976 after the 1973 coup. The country did not have a constitution for two years, but in 1980, the Revolutionary Council approved an interim constitution [70].

Moreover, none of the constitutions mentioned proposed a specific mechanism for constitutional review. In 1987, a new constitution was adopted, in which a constitutional council was proposed using French experience. In 1991, with the fall of the regime and the formation of the Islamic State, the basis of the political system and laws in Afghanistan was dismantled, and Afghanistan entered a phase of civil war, and the Taliban gained power in 1996[71].

The Taliban's authoritarian rule lasted until 2001, when it was overthrown by the US and international forces. The result was the convening of the Bonn Conference in Germany, based on which an interim and later transitional government was formed, and the constitution was adopted in 2004. In this way, the foundation of the new political system and laws in Afghanistan was laid. But constitutional review remained a problem in the system[72].

The republic government also fell as a result of the withdrawal of foreign forces by the Taliban in August 2021, and Afghanistan is currently in a state of disarray.

Furthermore, the researcher examined the constitutional review in different Afghanistan constitutions in separate discussions.

---

68 M. G. M. Ghubar, „*Afghanistan in course of History*" in Persian "Afghanstan dar MasierTarikh" 234 (Tehran: Markaz Nashir Enqilab, 4th, 1989).

69 *Supra note* 18 at 228.

70 F. Halliday and Z. Tanin, "The communist regime in Afghanistan 1978-1992: Institutions and conflicts" 50 *Europe-Asia Studies* 1358 (2007).

71 M. T. Nasiri, "The Impact of Religion and Culture on the Supremacy of the Constitution in Afghanistan" 12 *ICR Journal* 334 (2021).

72 C-D. D. Hyun, "A War that Never Ends: Internal conflicts, External Interventions, and the Civil Wars in Afghanistan" 8 *Armstrong Undergraduate Journal of History* 78 (2018).

2.1 The Monarchy Constitutions in Afghanistan

Afghanistan has experienced many constitutions during the last hundred and twenty years. In this section, the two constitutions approved by King Amanullah and King Nader Shah are examined. These constitutions laid the foundation of the Monarchy system in Afghanistan, which is why they are named the Monarchy Constitution[73].

2.1.1 The Constitution of Afghanistan 1923

Afghanistan got its independence from the British government in 1919[74]. The country had no constitution before independence; The Afghan society was sensitive to the term of law (*Qanoon*), so *Nazamnama* (Regulation or Statute) was used instead of law[75]. The first constitution was adopted in 1923[76].

According to the 1923 Constitution, Afghanistan was a monarchy. The government consisted of a prime minister and ministers who carried out the government under the king's supervision.[77]

This was Afghanistan's first step towards constitutionalism. Therefore, the constitution has not provided any specific institution to protect it and review the conformity of statutes (Nazamnama ha) with it[78]. However, the 1923 Constitution introduces an institution under the title of the Council of State, "Shoray-e-Daulat."[79] Its members had to be appointed and elected.[80]

Moreover, the Constitution of 1923 describes the duties of the Council of State; in addition to the duties outlined in the Statute on the Basic Organization of the Government, its duties were to provide the necessary recommendations to the government in the field of industry, trade, agriculture, and tax[81]. Also, if the rights recognized in the 1923 constitution were violated by the government official, this council can appeal to the government.[82]

---

73 *Supra* note 65 at 946-948.

74 M. B. E. Samimi and M. J. Nazari, "The three big wars between Afghanistan and England" 2 *Sprin Journal of Arts, Humanities and Social Sciences* 24 (2023).

75 M. M. Rahimi, Constitution of the Supreme Government of Afghanistan 1923 in Persian "Nizamnamah-ye-Asasi-e-Dawlat-e-Aliyah-e-Afghanistan 1301" 3 (Afghanistan Science Academy, Kaubl, 2021).

76 F.M. Alam, Afghanistan National Grand Jirgas: Loya Jirgas in persian "Jirga hai Mili Bozirg Afghanistan: Loya Jiraha" 50 (La1989).

77 The Constitution of Afghanistan 1923, Art. 25

78 *Supra* note 34 at 228.

79 *Supra* note 10 at Art.93.

80 *Id.,* at Art.40.

81 A. F. G. Stanikzai- Shinwari and T. Hemat, "Introduction to Ghazi Amanullah Khan's Administrative and Economic Reforms" 1 *American Journal of Social Development and Entrepreneurship 1*8 (2022).

82 *Id.,* at Art.42.

This council was the first House of Lords in Afghanistan, but in practice, it did not have the actual competence of a parliament because the cabinet and the King approved the proposals of the Council of State[83].

The Council of State had no clear mandate for the constitutional review. It could advise the government only before the laws were passed. But after the approval of the laws by the cabinet and the king, the authority of the government council in the part of monitoring their implementation and reviewing the performance of the government was not clearly stated in the 1923 Constitution. The suggestions and opinions of the Council of State to the Government were advisory, and the Government was not required to follow them. Consequently, the Council of State was an advisory body, not a real parliament, and not an institution to oversee the compliance of laws with the constitution[84].

Despite all the gaps in the 1923 constitution, this was the first step in limiting the king's and government's power and the beginning of a separation of powers in Afghanistan's history. More importantly, the recognition of a series of rights and freedoms for the country's citizens is also one of the positive achievements of this constitution.

2.1.2 The Constitution of Afghanistan 1930

The reforms of King Amanullah Khan caused some clerics (*Mullahs*) and people to revolt against him because Amanullah's reforms were seen against the religion of Islam. As a result, Amanullah Khan left Afghanistan in 1929, and Habibullah Kalkani came to power. He repealed the 1923 constitution and all laws and regulations of the Amanullah Khan period, and he did not adopt any constitution. His term was concise, and after nine months, Mohammad Nader Khan came to power[85].

Given the experience of the Amanullah Khan era and the opposition of religious conservatives, Nader Khan proceeded with the passage of some laws and even the formation of the National Assembly with great caution and emphasis on religious issues. In 1930, the *Loya Jirga* ratified the second constitution of Afghanistan, composed of 301 clerics, tribal leaders, and intellectuals, under the Basic Principles of

---

83 A. Arvin, "Amani State Council; The core of the National Assembly in Afghanistan" in Persian "*Shoray Dolat Amani; Hastai Majlis Shoray Mili dar Afghanstan*" 17/08/2021, *available at:*: https://www.bbc.com/persian/afghanistan/2010/08/100817_k02-afghan-gov-council-amanullah-khan (last visited on 15 June 2022).

84 *Supra* note 57 at 7.

85 S.M. Farhang, "Afghanistan in the last five centuries" in Persian "Afghanstan dar Painj Qarn Akhir" (Ariana Publication, 1988).

the Supreme Government of Afghanistan (Osol, ye *Asasi-e-Dawlat-e-Aliyah-e-Afghanistan after that we refer as the the1930 Constitution).* It used the term principles (*Osol)* instead of *Nizamna* and law. Some historians have called the passage of the Constitution and other laws in this period "the display of laws." Because the rules were not passed for implementation, the laws were adapted for the pleasure of a particular group [86].

The 1930 constitution, similar to the 1923 Constitution, did not provide the duty of Constitutional Review to a specific institution. Meanwhile, the 1930 Constitution forbade the National Assembly and the House of Lords from passing laws contrary to the provisions of Islam and the politics of the country.[87] There was a repugnancy clause[88]; however, the constitution did not clearly describe which institution would assess the conformity of laws with the provision of Islam and government policies. Consequently, a significant shortcoming of this constitution was that it failed to establish the supremacy of the constitution. In practice, Mohammad Nader sent laws to the community of religious scholars to examine their conformity with religion[89].

2.2 The Parliamentary Monarchy Constitution in Afghanistan (1964)

Unlike its predecessors, the 1964 constitution was the product of extensive negotiations and public discourse. The draft constitution began only a few weeks after the prime minister's (Daud Khan's) resignation in March 1963. Mohammad Zahir Shah decided that he should make new reforms through the constitution to maintain the monarchy; hence, Mohammad Yusuf was instructed by the King to form his cabinet and draft a new constitution. He appointed a seven-member draft committee. After the draft was prepared, it was handed over to a commission of scrutiny consisting of 28 members, and after lengthy discussions in the *Loya Jirga,* it was approved in 1964[90] .

Like the 1923 and 1930 constitutions, the 1964 constitution does not provide for a specific constitutional review body. However, its elements are visible in different ways in this constitution. First, one of the king's duties was to guard the Constitution, but the Constitution does not specify any specific mechanism for safeguarding it. It

---

86 *Supra* note 68 at 117.
87 *Id.,* at Art. 65
88 *Supra* note 57 at 7.
89 *Supra* note 65 at 950.
90 L. Dupree, "Afghanistan" 565-567 (Princeton University Press, New Jersey, 1980).

does not describe how the king could protect it. Second, there was a repugnancy clause in the 1964 constitution.[91] The constitution mandated that the National Assembly (Parliament) enact laws in accordance with its principles, and no law should be against Islamic rules.[92] The Constitution did not provide any specific institution to examine the conformity of laws with the principles of Islam and the Constitution[93]

2.3 The Republic Constitutions in Afghanistan

The constitutional monarchy formed under the 1964 constitution was overthrown by a coup carried out by Mohammad Daud in collaboration with the People's Democratic Party of Afghanistan on July 17, 1973, and the republican system was proclaimed[94]. It should be noted that until the formation of the democratic government (Islamic Republic of Afghanistan) after the Bonn Agreement in 2001, three Constitutions were adopted. This section studies the method of constitutional review in these three laws.

2.3.1 The Constitution of Afghanistan 1977

The Decade of Democracy was a failed reform experience, as left-wing parties called it "Crown Democracy." In the decade of democracy, the contradictions and conflicts seen in the slogans and actions of the government, especially the king himself, provoked the anger of different classes of society, each of whom wanted to improve their living conditions[95]. The decade of democracy faced tensions because of the mass protests in cities, especially in Kabul, and the lack of coordination between parliament and the government[96].

The 1964 Constitution Art. 24 prohibited the membership of the royal family in government, parliament, and the judiciary. With the support of the People's Democratic Party, Daud Khan, through a coup, overthrew the monarchy in 1973. In a statement, he announced the presidential system [97].

---

91 *Supra* note 12 at Art.7

92 *Id.*, at Art.64

93 *Supra* note 64 at 219.

94 C. F. Ridout, "Authority Patterns and the Afghan Coup of 1973" 29 *Middle East Journal* 165 (1975).

95 Ch. W. M. Johnson, A. Their and A. Wardak, "Afghanistan's political and constitutional development" (the UK Department for International Development, 2003).

96 Z. Lutfi, "Government of Mohammad Daud Khan in Afghanistan 1973-1978 And Iran's policy towards him in this historical period" in Persian "Hokomat Mohamad Daud khan dar Afghanstan wa Siyasat Aeran dar Qeabal ho dar ein doora tarikhi" 5 *Quarterly Bulletin of Greater Khorasan* 66 (2014).

97 S. Kushkaki, "Decade of Democracy" in Persian "Dahai Democracy" 29 (Maiwand Publication, 2005).

The Daud government abolished the the1964 constitution in 1973. However, a new Constitution was not approved until 1977. He convened a *Loya Jirga* in 1976, and the Loya Jirga approved a constitution[98]. The *Loya Jirga* also elected him as president of Afghanistan[99].

The 1977 constitution failed to introduce the constitutional review mechanisms. Still, the 1977 Constitution had a "repugnancy clause" (Ahmed & Ginsburg, 2014, p. 35) that states that "no law may contradict the principles of the holy religion of Islam, the republican system and other values enshrined in this constitution." [100] The constitution did not provide for any institution to examine the conformity of laws with the rules of Islam and the values of the constitution.

It should be noted that the 1976 Constitution delegated the power of interpretation of the Constitution to the Supreme Court. "The institution with the authority to interpret this constitution is the Supreme Court."[101] But did the Supreme Court have jurisdiction to review laws and other legislative documents? The Constitution is silent in this regard. The 1977 Constitution was short-lived, and then-President Mohammad Daud could not establish the Supreme Court. In April 1978, a coup was carried out by the People's Democratic Party, supported by the former Soviet Union. As a result, the Republic government fell[102]. The Revolutionary Council announced a new political system under the People's Democratic Republic of Afghanistan. The 1977 constitution was also repealed, and no new constitution was passed until 1980. In the next section, we will study the 1980 constitution.

2.3.2 The Constitution of Afghanistan 1980

On May 27, 1978, a coup was carried out by the People's Democratic Party led by Noor Mohammad Taraki, and the Republic of Mohammad Daud was overthrown. The new political system was called the People's Democratic Republic of Afghanistan (PDRA). The PDRA did not approve any constitution until 1980[103]. The

98 B. Shah, "Loya Jirga and The Present Day Afghanistan" 20 *Strategic Studies* 147 (2000).

99 M. Q. Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan" in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Roder Tilmann J and Rainer Grote (eds) 666 (Oxford University Press,2012).

100 *Id.,* at Art.64

101 *Ibid.*

102 J. Sierakowska-Dyndo, "The state in Afghanistan's political and economic system on the eve of the April 1978 coup" *9 Central Asian Survey* 86 (1990).

103 R. Mostchaghi, "Max Planck Manual on Afghan Constitutional Law" 42-43 (Max Planck Institution for Comparative Public Law and International Law, Heidelberg, 2009).

Revolutionary Council adopted a constitution entitled Basic Principles of the Democratic Republic of Afghanistan (*osol-i-Asasi Jamhori Democratic Afghanistan*). This constitution was heavily influenced by communist ideology[104].

The 1980 Constitution is entirely silent on constitutional review and does not consider any institution. The Revolutionary Council had the authority to interpret the Constitution.[105] The word law in this article is general, including the Constitution. The 1980 Constitution did not allow an institution to review whether laws conformed to the Constitution because the Revolutionary Council approved the laws. There was no superior institution than the Council.[106] This institution also approved the constitution. The 1980 Constitution did not provide any clear mechanism for constitutional review. The Revolutionary Council argued that "this constitution is temporary and has raised general issues. Fundamental issues will be raised in the constitution that will be approved later"[107]. Although this constitution is called temporary, it has raised issues in a very detailed and long way. The principles of legislation have not been observed in it. Its articles are more descriptive and explanatory than the articles of law.

2.3.3 The Constitution of Afghanistan 1987 (First Constitutional Council in Afghanistan)

After Babrak Karmal resigned from power in 1986, Najibullah was first appointed as general secretary of the People's Democratic Party and later, in October of that year, as chairman of the Revolutionary Council[108]. To advance his plan of national reconciliation, Najibullah raised the issue of the constitution, which must be rewritten[109]. In line with Afghanistan's traditional policy, Najibullah convened a *Loya Jirga* to ratify a new constitution and legitimize his government, which in December 1987 adopted a new constitution with 13 chapters and 149 articles. The *Loya Jirga* also elected Najibullah as President of Afghanistan[110].

---

104 R. L. Ehler, "An Introduction to Constitutional Law of Afghanistan" 17 (Afghanistan Legal Education Project at Stanford Law School, Stanford, 2014).

105 *Supra* note 14 at Art. 43.

106 *Id.*, at Art. 36.

107 M. A. Rasoli, "An overview of the constitutions of Afghanistan" in Persian "Morori bar Qowanin Asasi Afghanstan" 68 (Saeed Publications, Kabul, 2009).

108 *Supra* note 113 at 24.

109 A. Giustozzi, "Afghanistan: Transition without end: An analytical Narrative on State-Making" 26 (Crisis States Research Centre, 2008).

110 *Supra* note 64 at 230.

Chapter 10 of the 1987 Constitution provided for a Constitutional Council to review the compliance of laws, other legislative documents, and international treaties with the Constitution. The Constitution Council's powers were as follows: Review the compliance of laws, legislative decrees, and international treaties with the Constitution. And providing legal and judicial advice to the President on matters arising from the Constitution.[111] It is understood from the content of the Constitution that the competence of the Constitutional Council was a priori review. The Constitutional Council only advises the President on the conformity or non-conformity of the legal documents and the President takes the final decision. The Constitutional Council did not have the final authority. However, the law of this council also considered the posterior review authority, which I will discuss in the next paragraphs.

This was the first time in Afghanistan's constitutional law that a specific institution of constitutional review mechanism has been enshrined in the constitution. Today's knowledge of constitutional law has reached this conclusion: the concept of constitutional review must be distinguished from executive actions. Separation of powers requires constitutional systems and a democratic system of government. In democratic societies, the state consists of three branches: the legislature, the executive, and the judiciary, and the primary function of the state, "enacting and enforcing the law and resolving disputes or prosecuting and punishing violators," is implemented through these powers. The institution that oversees these three powers must be independent of these powers[112]. However, according to the 1987 Constitution, the Afghan Constitutional Council was accountable to the President.[113] Therefore, this institution was part of the executive branch and did not have the independence to perform its duties.

As stated in the models of the Constitutional Review mechanisms, countries have adopted one of two methods of political or judicial constitutional review model. The Afghan Constitutional Council was included in the category of the political model. According to the 1978 Constitution, the council had a chairman and eight members, who the president appointed for six years.[114]

---

111 *Supra* note 15 at Art. 123

112 A. Shafaee, "Constitutional Council; Unfinished experience" in Persian "Shorai Qanoon Asasi Tajrobai Natamam" 3 *Constitution Magazine* 5 (2019).

113 *Id.,* at Art. 126

114 *Id.,* at Art. 125

The constitution was silent on the terms of membership of the Constitutional Council. However, in addition to citizenship, the Constitutional Council Law states: that having the age of 35, having knowledge and experience in social sciences, mainly in the religious and legal fields, and areas of political and civil rights.[115] As can be seen, although education and experience were set as a condition for membership in the council, the level of education and experience was not precisely specified. This ambiguity may have been intentional for the president to be more open in selecting members from among the people. On the other hand, the enjoyment of civil and political rights means that the ruling of the Court has not revoked them. Otherwise, the principle of enjoyment of civil and political rights is the primary situation, and the deprivation of these rights has a unique aspect.

As stated, it is understood from the content of the Constitution that the Constitutional Council only had a priori jurisdiction. But the law of the Council had increased the authority of the Council. According to this law, if the judicial institutions or other government institutions and individuals considered a legislative document to be contrary to the Constitution, they would share the issue with the Constitutional Council, and the Council would review the legislative document. If it was against the principles of the constitution the Constitutional Council informed the President for further action.[116] Thus, the law of the Council also gave the Council a type of a posteriori review authority.

The Constitutional Council Law had an administrative structure that tainted the President's approval of the proposal of the President of the Council. The organizational structure and budget of the council were part of the government budget that the Council implemented.[117] The researcher could not find enough sources about the council's administrative structure, so it cannot be discussed further.

Although the Constitutional Council did not have an independent organizational structure, it did have a constitutional status. The high position of the Constitutional Council in the theories it has put forward is understandable. The credibility of the Constitutional Council was mainly due to the precise and efficient mechanism provided for in the Constitution[118].

---

115 Afghanistan Constitutional Council Law, Official Gazette No.682, 10 January 1989, Art.5.

116 *Id.*, at Art. 12

117 *Id.*, at Art. 19

118 *Supra* note 122 at 7.

Likewise, the mechanism that led the Constitutional Council to become independent of other government institutions could be seen in its organizational independence, budget, non-removal of council members, judicial immunity, and the possibility of inviting law enforcement officials to the council.[119] In the same way, the publication of the council's views in official gazettes can indicate its independence.

As stated, the constitutional review can be either priori or posteriori. With this in mind, The process of law review in Afghanistan was as follows: first legislative documents and international treaties were referred to the Council. The President signed or rejected these documents after review by the Constitutional Council.[120] Moreover, whenever law enforcement agencies, other government agencies, or individuals deem a legislative document unconstitutional, they can submit the matter to the Constitutional Council. If the Constitutional Council found the document unconstitutional, it had raised its proposal to the President to repeal the legislative document.[121]

Two points are noteworthy: First, all legislative documents, including laws and legislative decrees and international treaties that the President should have signed, should have been sent to the Constitutional Council for comment. The Constitutional Council was required to comment on its compliance or non-compliance with the Constitution within ten days. The Constitutional Council was required to comment on the conformity of laws with the Constitution is significant. The council had no right to remain silent. At the same time, the ten-day deadline for the council to comment on the constitutionality of laws and other legislation change this organ into an active and severe body. Second, the council's authority to review the conformity of legislative documents with the constitution was an exclusive one. No other body could review the conformity of legislative documents and treaties with the Constitution, and the Constitutional Council's decisions were not binding[122].

The Constitutional Council was established in 1988 and continued to function until 1991 when Najibullah's government was overthrown by the *Mujahideen* (extremist Islamist groups based in Pakistan and Iran)[123]. During this period, forty-six legal views from the Constitutional Council were published in the official journal. As long

---

119 *Supra* note 125 Art. 17, 18 & 19.
120 *Id.,* at Art. 11
121 *Id.,* at Art. 12
122 *Supra* note 105 at 675.
123 Supra note 26 at 37.

as Afghanistan was in a state of imposed war, the legal opinions presented by the Council were at an acceptable level, quantitatively and qualitatively[124]. The remaining views of the council show the high level of legal knowledge of its members. On the other hand, the government's respect for maintaining and promoting the position of this institution has been significant.

With the rise of the *Mojahedin* Islamic State, all government structures, including the Constitutional Council, the police, the armed forces, the parliament, and the judiciary, were demolished. Afghanistan entered a civil war that caused significant financial and human resources damage. The Civil Wars and other factors led to another extremist group called the *Taliban* (Students of religious schools)[125]. In 1996, the *Taliban* terrorist group captured Kabul and much of Afghanistan. The Taliban declared their system under the Islamic Emirate of Afghanistan[126].

2.4 The Constitution of Afghanistan 1993 (Islamic Government of Afghanistan)

Afghanistan was placed on the agenda of the Soviet rulers in 1978, just when the Cold War between the Western and Eastern blocs was at its peak. Kremlin leaders decided to make Afghanistan their satellite by supporting a bloody coup and increasing their sphere of influence in Southeast Asia. The coup scenario was implemented on the morning of April 27, 1978, and Dawood Khan's rule ended with the death of him and his family in the presidential palace[127].

The leftist regime in Kabul was still in its first weeks and months of its birth when it faced widespread opposition and uprisings[128]. The United States and its allied bloc supported the Islamists (*Mujahedeen groups*) against the pro-Soviet government in Afghanistan[129].

---

124 "Collection of opinions, approvals, and laws of the Constitutional Council From 1988 to 1991" in Persian "Majmohai Nazaryat , Tasawib and Qawanin Shorai Qanoon Asasi az 1367 ta 1370" 4 (Afghanistan Independent Commission of Overseeing of the Implementation of Constitution, Kabul, 2019).

125 *Supra* note 113 at 44.

126 S. Danish, Collection of Articles: "The Mujahedin Government and the Taliban Emirate: A Decade of War and Failure" in Persian " Hokomat Mojahdin wa emirate Taliban: Eak dah Jang wa Nakami" 18 (Andisha Foundation, Kabul, 2021).

127 M. A. Rezwani, "The Tragedy of Seven and Eight Thor" in Persian "Teragedi haft wa hasht soor" *Hasht e Subh Daily*, 28/04/2022 availible at https://8am.media/fa/tragedy-seven-and-eight-of-sawr/ last visited 05/ 06/2022.

128 M. N. Sharani, "War, Functionalism and State in Afghanistan" 104 *American Anthropologist* 718 (2002).

129 A. Imran and D. Xiaochuan, "The Hidden Hands Soviet-Afghan War 1979-89, U.S Policy, and External Actors" 6 American International Journal of Contemporary Research 146 (2016).

The former Soviet Union was forced to leave Afghanistan in 1989 as a result of the resistance of Islamist groups and the support of Western countries. Dr. Najib president of Afghanistan stepped down from power on April 11, 1992, according to the Geneva Agreement, to prepare the ground for the formation of a government by Mujahedeen in Kabul. *Mujahedeen* entered Kabul on April 28, 1992[130].

There was no consensus among the Islamist groups regarding forming a temporary government headed by Sibghatullah Mojaddedi and then Burhanuddin Rabbani. Political differences quickly led to military tensions, and war broke out between different Islamist groups in Kabul. Since our research topic is unrelated to this, further discussion is omitted. A significant issue in this period was the draft of the constitution of the Islamic State of Afghanistan, which was prepared, but due to the differences between the Afghan *Mujahedeen* groups, it was not approved[131].

The draft of the constitution during the *Mujahidin* regime was different from previous laws, especially the 1964 constitution, which recognized laws' supremacy[132]. However, Article 5 of the 1993 draft constitution states that Islamic Sharia is the only source of legislation, and laws and regulations against the principles of Sharia cannot be enacted in any way[133].

In the third chapter of the draft constitution 1993, a temporary council, the "Supreme Council" of 70 people, which approved the laws until the elected council's establishment, was considered an article. According to Article 47, the members of this council should be composed of jihadi leaders, religious scholars, jihadi warlords, and jihadi figures[134].

According to Article 50, one of the Supreme Council's tasks was to monitor the legality of government bodies' actions. However, this constitutional draft did not consider any type of constitutional regulatory body, and the authority to interpret this constitution was not stated.

---

130 R. Reuveny and A. Prakash, "The Afghanistan war and the breakdown of the Soviet Union" 25 *Review of International Studies* 697 (1999).

131 *Supra* note 114 at 25.

132 *Supra* note 64 at 231.

133 S. Pasarlay, "Islam and the Sharia in the 1993 Mujahideen — Draft Constitution of the Islamic State of Afghanistan: A Comparative Perspective" SSRN, 11/01/2016 available at:: http://dx.doi.org/10.2139/ssrn.2714049 last visited 12/07/2022.

134 S. Danish, Collection of Afghanistan's Constitutions 300 (Benyad Andisha, Kabul, 2019).

2.5 The Constitution of Afghanistan 1998 (The Taliban 1.0 Government 1996-2001)

During the continuation of the civil wars, another government emerged under the title of "*Islamic Emirate of Afghanistan*" as a result of gaining victory on the battlefield and capturing many cities outside of Kabul. In 1994, a group of religious students founded the Taliban movement. They were tired of the pain and suffering caused by the war between *Mujahedeen* groups, the general insecurity in the country, and the kidnapping of women[135]. Under the leadership of Mullah Muhammad Omar and reportedly funded by the United States, Pakistan, and Saudi Arabia, they formed their movement. As a result of their struggle in September 1996, Kabul fell, and most of the territory of Afghanistan came under their control[136]

Talibanism refers to a way of thinking that emerged with the emergence of a movement called the Taliban. Reviving the caliphate model, fighting against the innovations of Western civilization, returning to the era before modernity, strict interpretation of religious concepts, and militant self-righteousness are among the basic components of the Taliban[137].

They quickly started to implement their interpretation of the laws of Islam and Sharia. International organizations sanctioned them due to violence against women and the support of terrorist groups[138].

As the Taliban came to power, they changed the name of the Islamic State of Afghanistan to "Islamic Emirate of Afghanistan" and created a two-level government[139]. A Supreme Council in Kandahar province and a Council of Ministers in Kabul. The important internal and foreign affairs of the country were decided by

---

135 A. Misra, "The Taliban, radical Islam and Afghanistan" 23 *Third World Quarterly* 580 (2002).

136 *Supra* note 113 at 25.

137 A. B. Ardestani and P. R. Mirlotfi, "Role of Political Socialization in Forming Talibanism in Afghanistan" in Persain "naqsh jameh paziri siasi da shekl giri talbanism dar Afghanstan" 4 *Scientific-Research Quarterly Journal of Political Science and International Relations* 41-42 (2011).

138 N. Zahedi, R. Qasemian and R. Dehghani, "The role of the Taliban in the power structure of Afghanistan and its impact on the future of Iran-Afghanistan relations" in Persian "naqsh talban dar sakhtat ghodrat afghanstan ve tasir an bar ravabet ayandeh iran va afghanstan" 15 *Scientific Quarterly Journal of International Relations Studies* 139 (2022).

139 Q. Fatima, "The Rise and Fall of Taliban Regime (1994-2001) in Afghanistan: The Internal Dynamics" 19 *IOSR Journal of Humanities and Social Science* 40 (2014).

the Supreme Council, and the political and legislative duties were entrusted to the Council of Ministers[140].

The leader of the Taliban ordered the creation of government agencies and offices similar to those of Mohammad Daud's presidency with Decree No. 12 dated August 15, 1997. According to this decree, the Ministerial Competencies Law was later approved. The duties and powers of the ministers are stated in it. Since the functions and duties of the ministries are not related to this research, the researcher ignored them.[141]

The judiciary was not an independent institution during the Taliban 1.0 period. Rather, the judiciary carried out its duties under the supervision of the Taliban leader "*Amirul Momineen*". There were two types of courts: First, civil courts worked under the supervision of the Supreme Court. The civil courts investigated and decided ordinary crimes and political crimes, including the crimes of the employees of the emirate, except for the crimes of the leadership members of the three forces of the emirate, according to *Hanafi* jurisprudence and Islamic Sharia. Second, the military courts had the duty to investigate the crimes committed by the employees of the Ministry of Defense, the Ministry of Internal Affairs, and the General Directorate of Intelligence in accordance with *Hanafi* jurisprudence and Islamic Sharia.[142]

The Taliban did not approve any constitution in the first years of their coming to power[143]. Despite the absence of the constitution, there was a kind of supervision of the laws. According to Decree No. 18 of the Taliban leader, all laws and regulations had to be passed by a panel of scholars under the supervision of the Supreme Court. The duty of this board was to review the laws and regulations, remove or revise non-Sharia and non-religious articles, and check their compliance with Islamic Sharia

---

140 S. Y. Ibrahimi, "The Taliban's Islamic Emirate of Afghanistan (1996-2001): 'war-Making and State-Making' as an Insurgency Strategy" 28 *Small Wars & Insurgencies* 952 (2017).

141 Law on the Major Principles of Formation and Duties of Ministries and Departments of the Islamic Emirate, Official Gazette No. 797, 2001.

142 Taliban Leader's Decree No. 70, Official Gazette No. 788 on March 6, 1997.

143 H. Rahimi, "Afghanistan Laws and Legal Institutions under the Taliban" *Melbourne Asia Review*, 6 June 2022 *available at:*: https://doi.org/10.37839/MAR2652-550X10.17 (last visited on 22/ 11/2022).

rules. After the review of this committee, the law or regulation was signed by the Taliban leader and published in the official gazette[144].

In 1998, the leader of the Taliban invited a number of traditional religious scholars to Kabul to work on the draft of a constitution. After studying the past constitutions, they compiled the draft constitution under the title "Order of the Islamic Emirate of Afghanistan". This law was not officially approved until the fall of the Taliban in 2001. But in 2005, after the approval of the 2004 constitution of the Islamic Republic of Afghanistan, the Taliban introduced this law as their constitution. This constitution is the first document that expresses the Taliban's view of governance and constitutional order [145].

The constitution did not mention a specific body for reviewing the conformity of laws with the constitution. Only at the end was the name of 52 mentioned as the council, which had the task of checking the conformity of laws with Islamic rules. The 1998 Taliban Constitution assigned the authority to interpret the constitution to the Islamic Council, a legislative institution considered in this constitution.[146]

Another notable point in the Taliban 1.0 period was that they revised the Constitutional Council Law of 1987 and it was published in the official gazette.[147] The Constitutional Council was considered part of the General Directorate of the Islamic Emirate of Afghanistan, responsible for ensuring compliance of laws, other legal documents, and international treaties with the rules of Islamic Sharia and reporting to the Taliban leader.[148] This council was responsible to the Taliban leader. This council should have a chairman, deputy, secretary, and eight members, all of whom were appointed by the Taliban leader.[149]

The Law of the Constitutional Council considered two major tasks for this body: first, checking the compliance of laws, legislative decrees, and international treaties with Islamic *Sharia* rules and law. Second, providing legal advice on constitutional issues

---

144 C. B. Lombardi, and A. F. March. "Afghan Taliban View on Legitimate Islamic Governance: Certainties, Ambiguities, and Areas for Compromise" 15 (United States Institute of Peace, 2022).

145 *Supra* note 23 at 10-11.

146 *Id.,* at 12.

147 The Law of the Constitutional Council of Islamic Emirate, Official Gazette No.797, 2 May 2001.

148 *Id.,* at Art.2.

149 *Id.,* at Art.3

to the Emirate authorities.[150] Also, the law stated that the Constitutional Council has the authority to review the legal documents submitted to the Taliban leader for ratification and to express an opinion on their compliance with Islamic *Sharia* rules and the law.[151]

Moreover, the judiciary and other departments of the emirate, if they found a law to be contrary to Islamic *Sharia* and the law, could submit the matter to the Constitutional Council. If the council finds a legislative document contrary to the rules of Islamic Sharia and the law, it should share its opinion with *Amirul Momineen* (the leader of the Taliban). The law did not consider the authority to cancel laws and legal documents for this institution.[152]

The term "law" was used in a general form in the law of the Constitutional Council because it was said that this institution examines the conformity of legislative documents with Islamic *Sharia* and the law. It was not clear which law the legislator was aiming for. It is not clear whether the Constitutional Council was not fully formed, and only one member, Mohammad Musa Nemat, was present as a member of the Constitutional Council without any qualification. The council did not have any special activity during this period[153].

2.6 The Constitution of Afghanistan 2004

There is no clear position in the 2004 constitution about the constitutional review mechanism. On the one hand, Article 121 of the Constitution entrusts the Supreme Court to review the constitutionality of laws, legislative decrees, international treaties, and international conventions with the Constitution and interpret them at the government's or the courts' request. On the other hand, Article 157 of the Constitution stipulates a commission called the "Independent Commission for Oversights of the Implementation of the Constitution"(ICOIC)[154]. The President appointed the members of ICOIC with the approval of the House of Representatives (*Wolesi Jirga*)[155].

The constitution's contradictory statement and ambiguity in determining the constitutional review body (Supreme Court or Commission) create a confusing

150 *Id.,* at Art. 8.
151 *Id.,* at Art. 9.
152 *Id.,* at Art.11.
153 *Supra* note 34 at 234.
154 *Supra* note 17 at Art. 121 and 157.
155 M. H. Sadat, "The Implementation of Constitutional Human Rights in Afghanistan" 11 *Human Rights Brief* 48 (2004).

statement that adopts a mixture of judicial and political constitutional review models. As a result, Afghanistan's constitutional system faced challenges in this regard[156]. Looking at the draft history of the constitution and the discussions of draft and scrutiny commissions and the Constitutional *Loya Jirga* committees, it could be found that the constitutional review had been one of the most important and painful issues in this process. The importance of the issue, the lack of background in the country's constitutional system, mechanisms, methods, and various models were important issues that made it difficult to make decisions and agreements[157].

In addition, interference from international partners, international bodies, and external powers in Afghanistan's affairs doubled the problems. The different opinions between the United States and Europe, especially during the drafting of the Constitution, were visible. Likewise, the differences between them on the definition of the constitutional review system impacted the drafting process, the negotiations of the political groups, and the deliberations of the Constitutional *Loya Jirga*[158].

An examination of the 2004 Constitution drafting process shows that the current text of Article 121 did not exist at all in the Judiciary chapter until September 10, 2003. Before that date, Chapter eight of the draft law was devoted to the "Supreme Constitutional Court," which stated in Article 146: The Supreme Constitutional Court of Afghanistan has the following powers:

> "1. Reviewing the compliance of international laws, legislative decrees, treaties, and treaties with the Constitution;
>
> 2. Interpretation of the Constitution, laws, and legislative decrees "[159].

The Constitutional Court was based on the European model of constitutional review. Still, after a short time, there was a strange turn in the work of the Constitutional Drafting Commission. The draft, released in October 2003, did not mention Chapter eight of the Constitutional Court. Jurisdiction for the Constitutional Court was vested in the Supreme Court. Article 121 of the draft stated: The Supreme Court examines the conformity of laws, legislative decrees, international treaties, and international conventions with the constitution only at the government's request or the courts. The

---

156 *Supra* note 1 at 86.

157 *Supra* note 105 at 676.

158 M. A. Mohammadi, "Constitutional Review Mechanism in the Afghan legal system" in Persian "szijar bezar asasu dar bezam hoqoqi afghanstan" *Hasht e Subh Daily*, 12/07/2014 *available at:*: https://8am.af/afghanistan-law-monitoring/ (last visited on 25/12/2022).

159 F. Hamidi and A. Jayakody, "Separation of Powers under the Afghan Constitution: A Case Study" 18 (Afghanistan Research and Evaluation Unit, 2015).

Supreme Court interprets legislative statutes and decrees. Later, the draft text, published on December 28, 2003, during the Constitutional *Loya Jirga*, [Historically, Afghans have had a special platform called the Loya Jirga to make significant political, security, economic, and social decisions and solve their problems. When governments and people face problems, they turn to the national and ethnic grand jirga to find solutions. The majority of Afghanistan's constitutions, including the 2004 constitution, have been approved through the Loya Jirga. Over time, this institution has evolved from a traditional institution into a legal one, and there is a chapter in the constitution on this matter.] presented the previous text in summary form as the current text of Article 121 of the 2004 constitution[160].

Correspondingly, during the discussions of the Constitutional *Loya Jirga* and its committees [During the debate on the constitution, the members of the Loya Jirga are divided into separate commissions to discuss and decide on it. The final decision is made in the general session of the Jirga by majority vote.], differences of opinion could be realized. From the study of the meetings of the ten committees, it is inferred that the European model and the establishment of a particular constitutional review body for the Constitution have had many supporters; As published in the draft review of Article 121, the First, Fourth, Fifth, Seventh, Eighth and Ninth Committees have considered the removal of the interpretative jurisdiction of the Supreme Court and emphasized the establishment of a Constitutional Court. The Reconciliation Committee also voted to reject the interpretative jurisdiction of the Supreme Court without proposing an alternative, only by deleting the second paragraph of Article 121[161].

In the same way, in reviewing the first paragraph of Article Sixty-four, which places "oversight of the implementation of the Constitution" among the powers of the President. Issues related to oversight and its mechanism were raised. From the views expressed in the committees of the Constitutional *Loya Jirga*, it is understood that the formation of an independent oversight body was common to all, and the only noticeable difference was in its name. Some proposed the Constitutional Council, some the Supreme Court of Constitutional Protection, and some the Constitutional Court and the like. Eventually, the Understanding Committee approved the formation

---

160 *Supra* note 117 at 122.

161 Constitutional Loya Jirga Secretariat, "New Constitution of Afghanistan" in Persian "qanoon assasi nawin afghanstan" (2004).

of an "Independent Commission for the oversight of the Constitution." Finally, the current text of Article 157 of the 2004 Constitution was adopted in the *Loya Jirga*, which is mainly a sign of the superiority of the European model in the eyes of the members of the *Loya Jirga*[162].

The adoption of two different models of constitutional review in the 2004 constitution is due to two factors; One is the competition and influence of Americans and Europeans in presenting their constitutional review models, and second, the inexperience of the members of the *Loya Jirga* in examining the advantages and disadvantages of American and European models and, worst of all, the production of a model of both, which not only did not solve a problem but also caused additional problems in this regard; Objective evidence, including a dispute between the president and parliament and the Supreme Court and parliament, confirms this claim[163].

Irrespective of what has been said about drafting and approving the 2004 Constitution, the above articles (the first paragraph of Article 64 and Articles 121 and 157) are vague regarding the interpretative and supervisory jurisdiction of the Supreme Court and the ICOIC. Article 121 has delegated the authority to review compliance and interpretation of legislative documents and treaties to the Supreme Court. The ambiguity in this article led to various interpretations[164].

In 2009, the National Assembly approved the ICOIC law, which states in article eight: "The Commission, to better oversee the implementation of the provisions of the Constitution, shall have the following duties and authorities: [1. Interpret constitutional provisions at the request of the President, the National Assembly, the Supreme Court, and the government.][165] 2. Overseeing observance and implementation of the provisions of the Constitution by the president, Government, National Assembly, Judiciary, administrative units, and governmental and non-governmental organizations. 3. Providing legal advice to the President and Parliament regarding issues arising from the Constitution. [4. Study the enforced laws to find the contradictions with the constitution and present it to the President and the National

---

162 *Supra* note 169.

163 *Supra note* 18 at 139.

164 M. A. Rasoli, "Analysis and criticism of the constitution of Afghanistan" in Persian "tahlil ve naghad qanoon asassi afghanstan" 88 (Saeed Publication, Kabul, 2013).

165 The first and second paragraphs have been translated by myself. These two paragraphs are considered unconstitutional by the Supreme Court. Therefore, it is inserted in a footnote in the text of the law. Other paragraphs are copied from the ICOIC's official website, *available at:* https://icoic.gov.af/en/commissions-law (Last visited on 15 September 2021).

Assembly to take measures to eliminate them.] 5. Providing specific recommendations to the President and National Assembly to take necessary measures to develop legislative affairs in the areas stipulated by the Constitution. 6. Presenting the report to the President in case of observing violations and infringements of provisions of the Constitution. 7. Approval of relevant rules and procedures."[166]

The Supreme Court, in Judicial Decision published in Official Gazette together with the Law of the ICOIC, considered Article 8 of the Law of the Independent Commission for Overseeing the Implementation of Constitution (hereafter refer as ICOIC Law) to be against Article 121 of the 2004 constitution and argued for the interpretative jurisdiction of the Supreme Court as follows: first, according to the historical background of this article in the constitution-making process and the will of the constitutional legislators, Article 8 is contrary to Article 121[167].

Second, Interpretation of the constitution and other laws requires issuing a judicial order, and nobody other than the court has jurisdiction over the binding agreement (judicial order).[168] Third, the word "them," used in Article 121, refers to all previous cases, including the Constitution. It means "their interpretation" and refers to the interpretation of laws, legislative decrees, international treaties and conventions, and the constitution. Article 121 was drafted instead of Articles 146 to 148 of the previous draft. It means that Article 121 was created when there was no indication from Article 157 about the ICOIC in the draft of the 2004 constitution[169].

The Supreme Court's first argument does not seem justified, given the differences between American and European approaches. Because based on the Supreme Court's augment, it is clear from the draft process that the constitutional legislature intended to define a European model of constitutional review. According to the European model, a special authority (the Constitutional Court or the Constitutional Council) would be established. This body has constitutional review authority, which includes the constitution interpretations. For example, the first paragraph of Article 93 of the German Constitution (*Grundgesetz)* delegates the power of constitutional

166 The Law on the Structure and Jurisdictions of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), Official Gazette No.986, 6 July 2009.

167 The Supreme Court, Judicial Decision No. 5, 14 April 2009, Official Gazette No. 986, 2009.

168 S. Q. Hashimy, "Afghanistan's Constitutional Journey: Hazards of Adopting Foreign Models" 58 *The Indian Journal of Politics* 93 (2024).

169 Supra note 175 at 93.

interpretation to the Federal Constitutional Court[170]. Also, the South Korean constitution[171] and Indonesia's Constitution[172] delegate the interpretation of the constitution to the constitutional court. But, under pressure from the Americans, the constitution's drafters recklessly resorted to the American model, regardless of the consequences of the system change. In addition, they imitated the European model and proposed the ICOIC. This has caused many problems in Afghanistan over the past 16 years. A detailed discussion of all these conflicts is beyond the scope of this article[173].

Moreover, the Supreme Court has argued that nobody other than the court can issue a binding order, which may be accurate. Still, different types of interpretation of the law (legal, judicial, and personal interpretation) are valid in their place. The interpretation of the law does not always require issuing a judicial order[174] For instance, Article 62 of the 1958 French Constitution empowers the Constitutional Council to review the disputed laws, which must be amended if unconstitutional[175]. The decision of the Constitutional Council in this regard is binding on all official authorities. Another important issue here is whether the decisions of the Supreme Court on the non-compliance of legislative documents with the Constitution were advisory or binding. This issue is not clearly defined in the Afghan constitution. Some cases show that even the Supreme Court considers its decisions advisory[176].

Likewise, it is clear from the content of Article 121 that only the review and interpretation of legislative laws, presidential decrees, and international treaties and conventions are left to the Supreme Court. Because the word "them" is a pronoun and refers to ordinary law, legislative decrees, and international treaties and conventions, it does not include the interpretation of the Constitution[177]. However, it should be noted that the review and interpretation of ordinary law are impossible without

---

170 Basic Law for the Federal Republic of Germany, 1949, *available at:* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (last visited 20/12/2022).

171 The Constitution of the Republic of Korea, 1987, Art.111, *available at:* https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=1 (last visited 20/12/2022).

172 The Constitution of the Republic of Indonesia, 1945, Art.24C, *available at:* https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf (last visited 20/12/2022).

173 S. Timory, "Judicial Independence in Afghanistan: Legal Framework and Practical Challenges" 43-44 (Afghanistan Research and Evaluation Unit, 2021).

174 N. Katozyan, "An Introduction to Law" in Persian "moqademai ber hoqooq" 219 (Ganj-e-Danish, 1990).

175 The French Constitution, 1958 *available at:* https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 (last visited on 25/12 /2202).

176 *Supra* note 20 at 19.

177 *Supra* note 175 at 97.

interpreting the Constitution. Sarwar Danish, who was involved in the constitution-making process, stated in this article that the primary purpose of the Constitutional Drafting and Scanning Commissions was that all jurisdictions belonged to the Supreme Court. Because from the point of legal logic, it is not right to leave the interpretation of ordinary laws and their compliance with the Constitution to one institution and the interpretation of the constitution to another body. Such a system is not common in any country[178].

Furthermore, it assumed that the Supreme Court had jurisdiction over the interpretation of the constitution. This jurisdiction would be at the request of the government or the courts. This means that until the government or courts did not demand the interpretation, the Supreme Court would not be able to interpret the constitution or even ordinary laws directly[179]. This dilemma and gap existed in the Afghan constitutional system, which posed serious problems in Afghanistan.

Additionally, it should be mentioned that Article 121 of the 2004 Constitution allows the Supreme Court to conduct both concrete and abstract constitutional reviews. Concrete constitutional review occurs when the lower courts request it, but abstract review is conducted only at the government's request[180]. Also, the 2004 constitution only allows for a posteriori review. The Supreme Court can only review legislative documents after their approval. As well, Article 121 is vague about international treaties and conventions; when can the Supreme Court review them? Before the government signs or signs, it should check its compliance with the constitution. But it is clear that the review, in any case, must be at the request of the government or the lower courts[181].

In addition, the same problems apply to Article 157 of the Constitution. This article explicitly indicates the ICOIC's authority to oversee the implementation of the constitution. Therefore, it does not imply the interpretive competence of the ICOIC. This article of the constitution implicitly states the interpretative authority of the ICOIC. To carry out its duties, the ICOIC needed to interpret the constitution in some cases. As a result, both the Supreme Court and the Commission's competence in

178 *Supra* note 18 at 138
179 *Id.,* at 151
180 *Supra* note 57 at 10.
181 *Supra* note 32 at 280.

interpreting the constitution are vague. This has led to confusion and, as a result, an atmosphere of abuse of the law in favor of politics[182].

Finally, the US-European conflict in defining the constitutional review mechanism in the Constitution ended in favor of the American model. In practice, Afghanistan's constitutional system was based on the American model. Accordingly, the Supreme Court had jurisdiction over part of the constitutional review, and the ICOIC had no significant role[183]. The most obvious reason for this claim was that the Supreme Court mutilated the law of the Commission at the request of the President. As stated, two clauses of Article 8 of the Commission Law were found by the Supreme Court to conflict with the Constitution and prevented its implementation. To clarify the matter, it should be said that the National Assembly initially approved the commission in 2008 as usual. Still, the President vetoed it, and the National Assembly re-approved it with two-thirds of the votes of all members. However, the president referred the law to the Supreme Court, claiming that some of its provisions were inconsistent with the constitution. Based on Judgment No. 5, which was previously stated, the Supreme Court declared the first and fourth paragraphs of Article 8, the first paragraph of Article 5, Article 7, the first paragraph of Article 11, and Article 15 unconstitutional and declared them invalid.

As a result, it can be argued that the Supreme Court did not have good judicial independence, and in many cases, the decisions favored the government. Judicial oversight, therefore, aimed at the rule of law, the protection of civil rights and freedoms through the mechanism provided for in Article 121 of Afghanistan was not adequate[184].

182 *Id.*, at 275.
183 *Supra* note 55 at 2.
184 *Supra* note 182 at 43.

3. Chapter Summary

We may say that various reasons have prevented the institutionalization of constitutional review. One factor may be the tendency among a group of Afghan judges to turn to ready-made Islamic sources to find a solution to the ambiguity in the law. Most of Afghanistan's past constitutions, including the 2004 constitution, refer judges to Islamic law and jurisprudence if they are not clarified in official law. Article 130 of the 2004 Constitution states: “The courts shall apply the provisions of this Constitution and other laws in the cases under consideration. Whenever there is no provision in the constitution and other laws for one of the cases, the courts can refer to Hanafi jurisprudence within limits set by this constitution and shall resolve the case so that Justice should the law be provided in the best manner.” Thus, Judges have referred to Hanafi jurisprudence without any effort, which has prevented the institutionalization of constitutional review. Also, the absence of the constitutionalism tradition in Islam has caused this issue to be ignored . In addition, the ambiguity of the 2004 constitution has prevented the Supreme Court and the Commission from making binding decisions. They have become advisory bodies to political orangs.

As a result, it can be seen that the supervision of the constitution has not developed normally. Most Afghan constitutions of 1923, 1930, 1977, and 1978 have been completely silent regarding the Constitutional Review. They have not considered any specific institution in this regard. Only the 1987 Constitution considered the Constitutional Council for the first time, but this body was more of an advisory aspect to the president than an institution that oversees the Constitution and protects citizens' rights. Finally, the constitution of 2004 considered the mixed political and judicial approach, the lack of clarification of the competencies of the Supreme Court and ICOIC caused many problems in the country, whose performance is studied in the fourth and fifth chapters. In chapter three, entitled “The Historical Development and Models of Constitutional Review, explains about the concept and history of Constitutional Review models.

Chapter 3

Models of Constitutional Review in Different Jurisdictions

1. Introduction

Constitutional review is an accepted principle in democratic societies. A constitution as a supreme law, regulates the political system, defines the limits of the government's powers, and guarantees the freedoms of the citizens[185]. Protecting the Constitution is one of the important parts of constitutional law in any country. Many debates have been raised about applying for Constitutional Review, and different legal systems have used different models of Constitutional Review mechanisms[186].

This chapter first discusses the concept of constitutional review, followed by its history and the usual models of constitutional review (Centralized Constitutional review model, Decentralized constitutional review model, and mixed model). While studying its models, examples of countries such as the United States of America, India, Germany, France, and Belgium have also been reviewed.

2. Theoretical Foundation of Constitutional Review

Today, most countries have a written and rigid constitution, and there is a hierarchy between legal rules according to the institutions that make these rules[187]. The constitution is a national covenant and a common idea that unites all the nation and creates a spirit of solidarity, which is necessary for the nation's authority. The Constitution must take precedence over all laws, regulations, and bills[188]. To maintain supremacy and guarantee the proper implementation of the Constitution, it is necessary to adopt protection mechanisms according to which the unconstitutional regulations, laws, and political and administrative actions should be annulled or at least prevented from being implemented[189].

185 *Supra* note 30 at 46.
186 Supra note 7 at 3
187 *Supra* note 18 at 74.
188 M. A. C. Andreescu, "Supremacy of the Constitution Theoretical and Practical Considerations" 25 *LESIJ - LEX ET SCIENTIA International Journal* 116 (2018).
189 *Supra* note 36 at 200.

Constitutional Review refers to the jurisdiction of a court or similar body to review the conformity of laws with the Constitution[190]. Constitutional Review refers to procedures, methods, and institutions that value the Constitution as a legitimate law for the democratization of a legal system and the implementation of the provisions of the Constitution, and it ensures the protection of the fundamental values of a political system[191]. In other words, Constitutional Review is a set of organizations, methods, and processes used to review and deal with possible violations of the Constitution and to ensure the supremacy of the Constitution over other laws and regulations governing a society[192].

It should be noted that jurists of the civil law system and Common Law have different understandings of Constitutional Review. In common law countries, the examination of the conformity of ordinary laws and the actions of government by the courts means that they interpret and perform the Constitution. Common law jurists think the Constitution is enforceable by all courts and judges like ordinary law. On the contrary, in Civil Law countries, Constitutional Review means law-making by the Constitutional Courts[193].

The Constitutional Review is the joint response of different countries to the legislature's obligation and other public powers to observe the rule of the constitution as the highest legal and political document of any country[194]. Generally, it means a set of solutions, methods, and institutions guaranteeing the constitution. Indeed, constitutional review tries to protect fundamental rights and freedoms and prevent the majority's possible freedom violations[195].

Establishing a Constitutional Review mechanism to protect the principles of the Constitution is the initiative of modern legal systems. Subsequently, today, fewer

---

190 M. Tushnet, "New Forms of Judicial Review and Persistence of Rights -and Democracy-Based Worries"38 *Wake Forest Law Review* 814 (2003).

191 M. P. Fashkhami and B. Abasi, "The position of the High Dispute Resolution Board and the regulation of power relations" in Persian "jaiga hait haly hal ekhtelaf wa tanzim rawoabet qowai sia gana dar dadrasis asasi" 4 *Quarterly Journal of Public law Knowledge* 67 (2019).

192 P. Khiṛullah, "A Survey on Constitutional Justice in the World" in Persian "jastary bar andyshĥ dadarsi asasi dar jacpehan" 6 *Study of Comparative Law* 61 (2015).

193 *Supra* note 31 at 23.

194 J. E. Ferejohn, "Constitutional Review in the Global Context" 6 *Legislation and Public Policy* 52 (2002).

195 S. M. Ghamami, M. Mansoorian, et. Al., "*Comparative Constitutional Justice: Study of the principles, structures, and competencies of the constitutional review institution*" in Persian "dadarsi asasi tatbighi:motaleh mobani sakhtarehya ve salahiat cpehei nehad cpehei dadarsi asisi " 2 (Iran's Constitution Guardian Council Research Institute,2014)

countries have yet to consider a place for constitutional review mechanisms[196]. According to a 1951 survey, about 38% of countries had a constitutional review mechanism, and in 2011, about 83% of countries had one. Constitutional review was once a significant feature of the American political system, but today it is a hallmark of almost every country[197].

The duties and competencies of constitutional review institutions vary in different legal systems. The most important ones are monitoring the constitutionality of laws within the constitution, interpreting the constitution, monitoring elections and referendums, acting as observers and arbitrators between the executive, Parliament, and Judiciary, and protecting the fundamental rights and freedoms of citizens[198].

In addition, the purpose of the constitutional review today is not merely to examine the conformity of laws with the Constitution. Instead, the historical events and recent developments in European countries testify that mere attention to reviewing the constitutionality of ordinary laws with the constitution in an age where human rights concepts are growing significantly cannot meet the needs of today's societies[199]. Methods to guarantee individual rights and freedoms must be considered. The experience of countries like Germany and Italy in the pre-World War II era illustrates this fact[200]. Accordingly, most post-war governments paid particular attention to the competence of these institutions to uphold fundamental freedoms; Today, the protection of human rights has become the primary basis for the legitimacy of the constitutional review mechanisms[201].

A judicial review (constitutional review) can be divided into three kinds: the first is an abstract review, in which the constitutional protection institution reviews the constitutionality of the law without a judicial session[202]. The second is a concrete

196 *Supra* note 20 at 4.

197 *Supra* note 7 at 578.

198 *Supra* note 20 at 5.

199 A. Harding, "The Fundamentals of Constitutional Courts" 3 (International Institute for Democracy and Electoral Assistance, 2017).

200 A. S. Sweet, "The Politics of Constitutional Review in France and Europe" 5 *International Journal of Constitutional Law* 90 (2007).

201 A. A. Gurgi Arzanderyani, "*In pursuit of Constitutional Law*" in Persain "dar takapoi hooqi asasi" 34 (Jangal publication, Theran, 2015).

202 O. Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective" 6 *European Constitutional Law Review* 234 (2010).

study that challenges the law's constitutionality during a lawsuit in a court[203]. Third, an individual constitutional complaint allows citizens to sue for their fundamental rights by a decree or government official[204].

Furthermore, in terms of time, the review of the constitution can be done first by priori review of the law, in which the review is done before the mandatory implementation of the law, and any law that is declared contrary to the constitution cannot be signed. Second, posterior review, which takes place when a law has come into force. Therefore, until a judge has not expressed an opinion about the law, there is not much certainty about its compliance with the constitution[205].

In addition, Constitutional Review theorists are divided into two categories regarding the necessity and non-necessity of constitutional review: those who disagree and those who agree[206].

Here, first, the views of the supporters of constitutional review have been studied. Later, the opinions of the opponents have been reviewed.

First, Rights-based theories believe that judges are superior to other government departments and that courts can protect citizens' rights. This view has its roots in the United States, especially in Alexander Hamilton's speeches[207].

Second, the Democracy-enhancement theory believes that the Constitution protects representative government. All the structures considered in the constitution are constructed for this purpose[208].

Democracy can provide a strong justification for protecting the constitution. The people appoint their representatives to exercise power. The constitution specifies the method of appointing these representatives, the area of their competence, and the limits of these competencies[209]. Transgressing the limits stipulated in the constitution about other areas violates the principle of representation and failure to exercise the

---

203 *Supra* note 53 at 3-4.

204 *Supra* note 57 at 5.

205 Z. Tavadze, "A Priori Model of Constitutionality Review in Georgia: Systemic Aspects and Potential Shortcomings" 14 *European Scientific Journal* 18 (2018).

206 A. Harel, "Rights-Based Judicial Review: A Democratic" 22 *Law and Philosophy* 248 (2003).

207 A. Harel and A. Shinar, "The Real Cas of Judicial Review" in *Comparative Judicial Review*, E. F. Delaney and R. Dixon (eds) 15 (Edward Elgar Publishing Limited, 2018).

208 J.H. Ely, "Democracy and Distrust: A Theory of Judicial Review" 74 (Harvard University Press, 1980).

209 S. Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" 9 *Law and Philosophy* 339 (1990).

power of representatives by the people. Constitutional review is also important to ensure compliance with this. The election of parliamentarians does not mean the complete representation of public opinion. In addition, due to the available advertising tools to influence public opinion, it cannot be absolutely and with certainty that the real representatives of the people will be elected in a free and fair election[210]. Therefore, there is no guarantee that the people's representatives always stick to their promises and that all the laws approved by them and generally their actions in the legislature are in line with guaranteeing the rights and freedoms of the citizens. In other words, the democratic nature of the process of electing the members of the legislature does not guarantee the inviolable and permanent "democratizes" of their actions and decisions. Hence, in a system based on the constitution, the belief is emphasized that the government's authority, even if it is a democratic government, should be limited and controlled. Institutions and mechanisms are needed to monitor the representatives' adherence to the representation and prevent decisions or persons from violating the legal authority[211].

According to Kelsen's theory about democracy, democracy preserves the freedom of individuals as much as possible. It is the conditions for the realization of freedom in which the individual is under the control of the norms that the has consented to, and due to the impossibility of fulfilling the mentioned assumption and the necessity of unanimous approval of all general norms, a system that is closer to the will of the majority should be accepted[212]. In this way, it is necessary to foresee the methods of guaranteeing the continuation of such a thing, as well as the methods of forming the majority. This issue can be applied in support of the constitution. If democracy is based on the majority's desire to respect fundamental values, which means limited democracy and is a means of protecting the Constitution, then we should look for a way for the majority to be a means of ensuring adherence to fundamental values[213].

---

210 C. F. Zurn, "Deliberative Democracy and Constitutional Review" 21 *Law and Philosophy* 478 (2002).

211 M. Loughlin, "The Contemporary Crisis of Constitutional Democracy" 39 *Oxford Journal of Legal Studies* 437 (2019).

212 C. Chwaszcza, "Kelsen on Democracy in Light of Contemporary Theories of Human Rights" in *Kelsenian Legal Science and the Nature of Law* P. Langford, I. Bryan and J. Mcgarry (eds) 195 (Springer International Publishing, 2017).

213 K. Bass and S. Choudhry, "Constitutional Review in New Democracies" 2 (The Center for Constitutional Transitions, 2013).

On the other hand, Ronald Dworkin presented another model of democracy under the title "Democracy based on the Constitution" and argued that the principle of making political decisions, including the decisions of the interpreter of the Constitution, based on the opinion of the majority should be abandoned. According to his theory, judicial control over approvals can be justified as the most effective procedure for protecting fundamental rights. That is, the combined term "democracy based on the constitution" is an assignment to the democratic system, and this issue is important because mere democracy harbors the risk of the emergence of a majority dictatorship system, and therefore, it is necessary to solve this shortcoming somehow. The majority may be suspicious or tolerant of their interests for reasons such as advertisements or pressures[214]. This issue is explored in the constitutional review model's section.

Third, based on the theory of constitutional supremacy, a written constitution is considered the most significant source of fundamental rights, the most enforceable indicator for all social actors, and superior to all country laws. Therefore, the idea of constitutional review is based on the acceptance of the constitution at the top of the hierarchy of rules contained in a country's legal system, which on the one hand, shows the acceptance of the idea of offering freedom and, on the other hand, dominance is a social contract[215]. According to the social contract theory, it is assumed that before the formation of the political society, humans had absolute freedom in managing their affairs. But to achieve a better life, the people, through a social contract, transferred part of their freedom to the political system and ruler. Now, the Constitution explains and limits the theory above; it states the scope of public rights and the cases of necessity and justifies the intervention of political power and the method of its realization[216]. Hans Kelsen also states in the explanation of "Pure Legal Theory" that the legal system is a set of legal norms whose source of validity goes back to one norm, as the final basis of validity. What is considered the main valid norm, which is based on the dynamics of law; other legal norms have emerged due to higher-level norms[217]. As a result, a hierarchical legal system

---

214 R. Dworkin, "Equality, Democracy, and Constitution: We the People in Court" 27 *Alberta Law Review* 328 (1990).

215 G. Romeo, "The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition" 21 *German Law Journal* 907 (2020).

216 P. J. S. Stieglitz and K.Van der Straeten, "Social contract theory in light of evolutionary social science" 3 *Evolutionary Human Science* 5 (2021).

217 M. Bolton, "Three theories of separation: Kelsen, Schmitt and Pashukanis and the historical development of the legal form" 50 *Philosophy and Social Criticism* 3 (2024).

consisting of different layers of legal norms emerges. Therefore, in the substantive sense, the constitution indicates the highest level of subject rights. Its main function is to determine the organs and the process of creating general rules and legislation[218].

The logical result of the principle of the supremacy of the constitution is that an authority should be appointed to have the authority to review all the rules in force in the country based on the constitution, and if that authority finds the laws and regulations against the constitution, declare it invalid or prevent its approval[219]. If ordinary laws were to violate the Constitution, first of all, the principle of legal hierarchy and the supremacy of the Constitution would be disturbed. Secondly, these two types of laws, which are not from the same source due to the dual nature of the situation, were practically on the same level. Approving a normal law that violates the constitution would expose it to change and transformation, and the fundamental rights of individuals would be at the mercy of harmful fluctuations. In addition, the principle of stability and continuity of the country's political structure, achieved by the general will and reached the stage of emergence and emergence based on special ceremonies, was destroyed[220].

Conversely, opponents of the constitutional review raise the issue of parliamentary sovereignty. They claim that constitutional review conflicts with parliamentary sovereignty. Opponents of the protection of the constitution oppose the justification of self-control by the parliament with the basic proceedings. According to them, due to the importance of the parliament, the theory itself should accept a limit about it, and other institutions should not be given the power to be higher than the parliament[221]. But it must be said that this is the argument of scholars in America. In other countries, the discussions are different, considering why they created the institution of constitutional protection.

3. Evolution of Constitutional Review

This section briefly discusses the history and evolution of constitutional review. The study overviewed the history before World War I and later World War II until today.

---

218 D. A. Strauss, "Does the Constitution Mean What it Says?" 129 *Harvard Law Review* 14 (2015).

219 M. C. M. De La Torre, "Overcoming Judicial Supremacy through Constitutional Amendment: Some Critical Reflections" 34 *Ratio Juris* 165 (2021).

220 A. Orakhelashvili, "*Domesticating Kelsen"* 91-92 (Edward Elgar publication, 2019).

221 J. C. A. De Poorter, "Constitutional Review in the Netherlands: A Joint Responsibility" 9 *Utrecht Law Review* 90 (2013).

The history of constitutional review worldwide is not the main research subject, thus the researcher tried to make the topic brief.

3.1 Constitutional Review Before the World War I

In today's sense, the constitution (written constitution) is not very old. But in terms of content and nature, the Constitution is ancient[222]. For example, in ancient Athens, a distinction was made between the Constitutional norms and other laws[223]. The fundamental principle was based on the fact that laws with any content should not contradict the Constitutional norms in terms of form or substance. Its difference from today's judicial supervision was that instead of judges, the people through direct democracy decided whether or not the rules complied with the basic principles[224]. In the same way, some basic components of constitutional review can be found in the Weimar Republic[225].

Moreover, the history of constitutional review goes back to ancient Greece, which was found in the form of people's monitoring of some of the acts and actions of their representatives. In ancient Rome, the issue of monitoring had attracted the attention of Roman experts and thinkers, as Cicero, believing in the existence of a difference between the fundamental rules and regulations governing the society and the normal rules and regulations, emphasized the necessity of adapting the latter laws to the laws Fundamentally, he knew it for granted[226].

In the following periods, the monitoring of laws in the constitutional law system of many countries has been of interest, including during the Reich rule in Germany, where a form of judicial review was applied to normal laws and regulations. In addition to this, the theoretical explanation of the reasons and justifications for monitoring normal laws and regulations can also be seen in the opinions and thoughts of scientists such as Thomas Aquinas, Grotius, and Pufendorf in this period, referring

222 Supra note 18 at 64.

223 A. Lanni, "Judicial Review and the Athenian 'Constitution'" 2 (Harvard Law School, 2010).

224 F. R. Carugati-Calvert and B. R. Weingast, "Judicial Review by the People Themselves: Democracy and the Rule of Law in Ancient Athens" 39 *Journal of Law, Economics, & Organization* 2 (2023).

225 B.J. Hartmann, "The Arrival of Judicial Review in Germany Under the Weimar Constitution of 1919" 18 *B. Y. U. Journal of Public Law* 112 (2003).

226 K. Rosenn, "Judicial Review: Old and New" 81 *The Yale Law Journal* 1413 (1972).

to the high position of divine and natural laws and they emphasized the necessity of not contradicting the relevant laws with these laws[227].

Although the history of developing these theories in France was more than in other countries, the legal and political developments in England provided the basis for the regular design of the basic legal theory before other countries[228]. However, from the beginning, some experts and legal scholars of this country delayed the official acceptance of this theory for a long time, referring to the violation of the parliament's sovereignty in the case of monitoring its approved laws. Despite this, the important position of judges in the English legal system caused the theory of judicial review to be applied and implemented for the first time in this country[229]. After the revolution in England and the increasing authority of the judges in this country, this authority was delegated to them to vote for the annulment of the conflicting normal laws if they found a conflict between the normal laws and the fundamental principles and rules governing this country[230].

At the same time as these developments, the British government in its colonial countries also emphasized the superiority of laws approved by Parliament over local laws; By specifying the hierarchical nature of the laws, it led to the development of the idea of monitoring the conformity of ordinary laws with the constitution in the former colonies of England, and at the same time, it opened the field of transfer of this idea from the former colonies of England to other countries, especially European and American Latin countries provided[231]. The French thinker de Tocqueville pointed to this transition process and paid attention to its important role in the tendency of Latin American legal systems to follow the American model[232].

Following the expansion of the theory of justice in different parts of the world, European experts proposed different views on the theoretical foundations of this idea

---

227 M. Vacura, "Three Concepts of Natural Law" 33 *Philosophy and Society* 607 (2022).

228 M. S. Bilder, "The Corporate Origins of Judicial Review" 116 *The Yale Law Journal* 503 (2006).

229 P. Lindseth, "Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England" 55 *University of Toronto Law Journal* 660 (2005).

230 P. Craig, "*Proportionality and Judicial Review: A UK Historical Perspective*" 7 (European and Comparative Perspectives, 2016).

231 *Supra* note 241 at 538.

232 A. de Tocqueville, *Democracy in America* (The Pennsylvania State University, 2003).

and analyzed its justifications[233]. Even in England, the discussions related to this issue once again attracted the attention of experts and lawyers in this country, and criticisms such as the conflict of this theory with the sovereignty of the parliament and the impossibility of its implementation due to the non-separation of the essence of the constitution and ordinary laws were raised again[234].

However, the increase in the authority of judges in the field of monitoring the laws in England caused that, contrary to the theoretical areas, in practice, the implementation stages of the judicial review thought in this country went quickly. This issue entered a new phase, especially in the 17th century, following the issuance of a famous judgment by one of the English judges[235]. The common customs in England were clearly emphasized over the current laws and even the king's orders. From this time, the idea gained strength that according to the customary and undocumented basis of the English Constitution, only judges with the most knowledge of the laws mentioned above and customs should be approved of their competence in this regard[236].

On the other hand, the attention of the British constitution to the development of political and judicial supervision in the form of applying issues such as impeachment and declaring crimes against government officials, some of which even go back to the late Middle Ages, made the importance of the idea of supervision and the necessity of applying It should be brought to the attention of the experts of this country on persons and laws[237]. In any case, the idea of monitoring laws after England was taken into consideration in the United States of America and European countries, respectively, in this section, we briefly study the history of monitoring laws in the United States, later in Europe, and finally in the continent of Africa and Asia. To see how constitutional review has evolved, the historical monitoring record goes back to ancient Greece, which was found in the form of people's monitoring of some of the acts and actions of their representatives. In ancient Rome, the issue of monitoring had attracted the attention of Roman experts and thinkers, as Cicero, believing in the existence of a difference between the fundamental rules and regulations governing the society and

---

233 A. S. Sweet, "Why Europe Rejected American Judicial Review and Why it May Not Matter" 101 *Michigan Law Review* 2751 (2003).

234 G. Dietze, "Judicial Review in Europe" 55 *Michigan Law Review* 541 (1957).

235 D. E. Edlin, "From Ambiguity to Legality: The Future of English Judicial Review" 52 *The American Journal of Comparative Law* 386 (2004).

236 J. Finnis, "Judicial Power: Past, Present and Future" (Judicial Project, 2015).

237 A.H.Y. Chen, "The Global Expansion of Constitutional Judicial Review: Some historical and comparative perspectives" 2 (University of Hong Kong, 2013).

the normal rules and regulations, emphasized the necessity of adapting the latter laws to the laws Fundamentally, he knew it for granted[238]

In the following periods, the monitoring of laws in the constitutional law system of many countries has been of interest, including during the Reich rule in Germany, where a form of judicial review was applied to normal laws and regulations. In addition to this, the theoretical explanation of the reasons and justifications for reviewing laws and regulations can also be seen in the opinions and thoughts of scientists such as Thomas Aquinas, Hugo Grotius, and Pufendorf in this period, referring to the high position of divine and natural laws on They emphasized the necessity of not contradicting the relevant laws with these laws[239].

Although the history of the development of these theories in France was more than in other countries, the legal and political developments in England provided the basis for the regular design of the constitutional legal theory in this country before other countries; However, from the beginning, some experts and legal scholars of this country delayed the official acceptance of this theory for a long time, referring to the violation of the parliament's sovereignty in case of monitoring its approved laws. Despite this, the important position of judges in the English legal system caused the theory of judicial review to be applied and implemented for the first time in this country [240].

After the revolution in England and the increasing authority of the judges in this country, they were delegated to vote for the annulment of the conflicting normal laws if they found a conflict between the normal laws and the fundamental principles and rules governing this country. At the same time as these developments, the British government in its colonial countries also emphasized the superiority of laws approved by Parliament over local laws. By specifying the hierarchical nature of the laws, it led to the development of the idea of monitoring the conformity of ordinary laws with the constitution in the former colonies of England, and at the same time, it opened the field of transfer of this idea from the former colonies of England to other countries,

---

238 K.Wherhan, "Poplar Constitutionalism, Ancient and Modern" 46 *UC Davis Law Review* 75 (2012).

239 C. Boisen, "Pufendorf's Enduring Legacy for International Law" in Peter Schröder (ed), *Pufendorf's International Political and Legal Thought, The History and Theory of International Law* 252 (Oxford Academic, 2024).

240 C. Eric, "The judicial review of legislation in the United Kingdom: a public choice analysis" 37 *European Journal of Law and Economics* 223 (2014).

especially European and American Latin countries provided. The French thinker Alexey de Tocqueville has pointed to this transition process and paid attention to its important role in the tendency of Latin American legal systems to follow the American model[241].

Following the expansion of the theory of justice in different parts of the world, European experts proposed different views on the theoretical foundations of this idea and analyzed its justifications. Even in England, the discussions related to this issue once again attracted the attention of experts and lawyers of this country, and criticisms such as the conflict of this theory with the sovereignty of the parliament and the impossibility of its implementation due to the non-separation of the essence of the constitution and ordinary laws were raised again[242].

However, the increase in the authority of judges in the field of reviewing the laws in England caused that, contrary to the theoretical areas, in practice, the implementation stages of the judicial review thought in this country went quickly. This issue entered a new phase, especially in the 17th century, following the issuance of a famous judgment by one of the English judges. The common customs in England were clearly emphasized over the current laws and even the king's orders. From this time, the idea gained strength that according to the customary and undocumented basis of the English Constitution, only judges with the most knowledge of the laws mentioned above and customs should be approved of their competence in this regard[243].

On the other hand, the attention of the British constitution to the development of political and judicial supervision in the form of applying issues such as impeachment and declaring crimes against government officials, some of which even go back to the late Middle Ages, made the importance of the idea of judicial review and the necessity of applying It should be brought to the attention of the experts of this country on persons and laws. In any case, the idea of monitoring laws after England was taken into consideration in the United States of America and European countries, respectively, in this section, we briefly study the history of monitoring laws in the

---

241 J. Auburn and J. Moffett et. al., *Judicial Review: Principles and Procedure* 20 (Oxford University Press, 2013).

242 S. D. O'connor, "Reflections on Preclusion of Judicial Review in England and the United States" 27 *William & Mary Law Review* 649 (1986).

243 G. S. Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less" 56 *Washington and Lee Law Review* 790 (1999).

United States, later in Europe, and finally in the continent of Africa and Asia. To see how the supervision of the constitution has evolved[244].

The constitutional review mechanisms have emerged as a concept of monitoring based on the constitution in France; The theory of constitutional review first appeared in the 1760s in France among a group of Enlightenment writers known as the Physiocrats. They claimed that before enforcing laws, judges should be sure that they correspond to the natural laws of social order and justice. At the beginning of the 19th century, the King of France, contrary to the provisions of the 1814 Constitution, restored authoritarian rule to France, dissolved the French Parliament, and issued unfair and unjust laws regarding the freedom of the press and elections. These measures led to the July Revolution of 1830, the overthrow of the previous government, and the appointment of a new king[245].

In addition, in this replacement, the king was required to obey the nation's will, and the French political system became a constitutional monarchy. These actions caused the French Minister of Science to create the scientific idea of protecting the constitution in 1834 by creating the first constitutional law course at the University of Paris. At the same time, France has long held that no judicial body should be given the power to monitor the conformity of laws with superior law. Therefore, as a symbol of national sovereignty, the legislature was considered the best guarantor of fundamental rights. Thus, the development of constitutional review in the European continent, France, has always been against such a concept that the actions of higher institutions and especially legislative assemblies as representatives of national sovereignty are monitored by the judiciary[246].

In Europe, the theory of parliamentary sovereignty has long been accepted and considered one of the practical principles of democracy. The autocratic power of the sole king was considered a limitation to fundamental rights. As a supporter of national sovereignty, Parliament had the authority to enact laws. Parliament's sovereignty was rooted in the theory of national sovereignty of Jean-Jacques Rousseau, who believed

---

244 *Supra* note 52 at 19.

245 M.A. Rogof, *French Constitutional Law* 168 (Carolina Academic Press, Durham, 2014).

246 D. Baranger, "French Constitutional Law" in Roger Masterman and Robert Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* 93 (Cambridge University Press, 2019).

that the people's will is the source of sovereignty and parliament is the manifestation of people's sovereignty[247].

The development of constitutional review in the United States of America also goes back to the case of "*Marbury v. Madison*" in 1803, in which, despite the lack of specification of the 1789 American Constitution, the Supreme Court recognized the right of judicial control regarding the conformity of ordinary laws with the Constitution. Thus, the US Supreme Court established the institutional, practical grounds of "judicial protection of the conformity of ordinary laws with the Constitution.". Over time, the review of the constitution has been accompanied by developments that is discussed in the American model section[248].

3.2 Constitutional Review between 1914 and 1945

This period, known as the Austrian period, is associated with the emergence of constitutional courts; Thus, the Austrian Constitution in 1920 established the foundation of the Austrian Constitutional Court with the exclusive jurisdiction of constitutional review by the views of Austrian legal scholars. The Austrian legal theorist Hans Kelsen invented a model of constitutional review that has become famous in recent decades[249]. As mentioned, throughout the 19th century, parliamentary sovereignty became widespread in Europe as a new system of governance, and Austria also adopted this method after the First World War. Kelsen, who wanted to preserve the legislature's position in the new Austrian government system, invented the "Constitutional Court," which, as a result, was placed outside of the three powers of government and supervised the laws approved by the parliament. In other words, this idea effectively deprives parliament of the possibility of total legislative sovereignty. In other words, in practice, this idea denies the absolute sovereignty of parliament -as the British Parliament benefits from it- in legislation[250].

After Austria, the constitutional court model was promoted in former Czechoslovakia (1920), Liechtenstein (1925), Greece (1927), Egypt (1941), Spain (1931), and Ireland (1937) before World War II. However, the Second World War interrupted countries'

247 T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 1 (Cambridge University Press, 2003).

248 E. S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* 2 (Routledge Taylor & Francis Group, London, 2014).

249 T. Ehs, "Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review" 72 *Heidelberg Journal of International Law* 452 (2013).

250 *Supra note* 207 at 52-53.

desire to expand constitutional review, and established constitutional courts could not be implemented. For example, Austria from 1933 to 1945 and Czechoslovakia after 1938 continued to work without a constitutional court[251].

3.3 Developments of Constitutional Review after Second World War

Constitutional review became theoretically possible only when the theory of the constitution's supremacy prevailed instead of the principle of parliamentary sovereignty. In this way, the task of constitutional review was entrusted to an independent and special body separate from the parliament and the executive. After the Second World War, the Southern and Eastern European countries that had overthrown their authoritarian regimes established the Constitutional Court or the Constitutional Council and entrusted the task of constitutional review to a special institution[252]. This way, different countries introduced constitutional review mechanisms in their legal system. Austria established the Constitutional Court in 1945, followed by Germany in 1949, India in 1951, Italy in 1955, Turkey in 1969, the former Yugoslavia in 1963, Belgium in 1980, Afghanistan in 1987, and other countries[253] .

4. Constitutional Review Models in Different Countries

Today, due to various political, historical, and legal reasons, governments have accepted different models of constitutional review. In fact, monitoring legislation is a tool to protect the Constitution because only "power" can monitor "power," and whether the power of monitoring is delegated to courts or other independent institutions depends on each nation's legal tradition[254].

In countries like the United States, where the judiciary is considered the "least dangerous branch of government" in terms of violating the rights and freedoms contained in the constitution, "judicial review" is considered a suitable model for

---

251 J.Mazák, "The European Model of Constitutional Review of Legislation" in *Veniece Commission, available at:*: https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm (last visited on 22/05/ 2023).

252 R. F. Utter and D. C. Lundsgaard, "Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective" 54 *OHIO State Law Journal* 570 (1993).

253 G. Buquicchio and S. R. Durr, "Constitutional Courts-the living heart of the separation of powers/the role of the Venice Commission in promoting constitutional justice" in Luis López Guerra, and Guido Raimondi (eds) *Human Rights in a Global World: Essays in Honour of Judge Luis López Guerra* 516 (Wolf Legal Publishers, Oisterwijk, 2018).

254 *Supra* note 207 at 50.

constitutional supervision, and vice versa in Europe, especially France. The courts have been accepted with great suspicion for a long time, and establishing a separate and independent institution has been deemed necessary to moderate such thinking. This skepticism is so dominant in France that the supervision of the behavior of the administrative bodies has been granted to the State Council (administrative court) and not to the judicial courts in a separate institution[255].

In any case, each of the aforementioned models, despite their fundamental and functional differences, also has some commonalities. All existing models play a very important role in protecting the principles and fundamental rights contained in the Constitution. They also create a balance between the central government and government institutions. Also, the constitutional monitoring institutions are responsible for the main monitoring of powers. In this way, they protect the principle of separation of powers to prevent the concentration of power[256].

The governments have adopted different models of constitutional review for various political, historical, and legal reasons[257]. Constitutional review first appeared in the United States in the early nineteenth century, when the Supreme Court of the United States, in its famous decision in the Marbury case against Madison, stated that the judiciary has the power to cancel laws that contradict the constitution[258]. Since then, Supreme Court decisions have become a central part of the US constitutional system and have spread worldwide in various forms and methods. In the United States, constitutional review is decentralized. In other words, all courts can exercise constitutional review, but the Supreme Court of the United States has the final jurisdiction[259].

Unlike in the United States, constitutional review in Europe is centralized. The European model was designed based on Hans Kelsen's opinion. It was first used in the Austrian constitution in 1920. It was then accepted in Germany and Italy after the Second World War. Also, once the Third Wave of Democracy began in the late

---

255 T. Öhlinger,"The Genesis of the Austrian Model of Constitutional Review of Legislation" 16 *Rajio Juris* 208 (2003).

256 D. Arhur, "Technocracy and Distrust: Revisiting the Rationale for Constitutional Review" 13 *International Journal of Constitutional Law* 32 (2015).

257 F. D. A. Gustavo, "Comparative Constitutional Law: Judicial Review" 3 *Journal of Constitutional Law* 987 (2001).

258 A. B. Rubin, "Judicial Review in the United States" 40 *Judicial Review in the United States* 68 (1979).

259 *Supra* note 60 at 10.

1970s, almost all Third Wave Democracies used the centralized model of constitutional review enforced by a Constitutional Court as a vital tool for democratization[260]. Centralized constitutional review means that a constitutional court has been established in most European countries and that only this constitutional court has jurisdiction over constitutional review[261].

Furthermore, some countries have assigned the constitutional review to a political institution. For example, the French Constitutional Council is a political institution established under the 1958 Constitution. According to Article 56 of the French Constitution, the council is composed of nine members and elected by the president and the speakers of the Senate and the National Assembly[262]. Under Articles 58 to 62, the powers of the Constitutional Council are as follows: It monitors the conduct of the presidential and the parliamentary elections and the referendum. Also, the French Constitutional Court examines the complaints arising from elections. Furthermore, if a court finds an applicable law during a trial unconstitutional, the matter is referred to the Constitutional Council for review. A law that is declared unconstitutional is not enforceable. In addition, the decisions of the Constitutional Council are not subject to appeal and are binding for the government, parliament, and the judiciary[263].

It should be noted that in addition to the models that is mentioned, the main means of control that potentially acts as a deterrent to any violation and encroachment on the rights contained in the Constitution is "public opinion and public will"[264]. It is about condemning the violation of their rights in an environment where their constitution has become meaningful. This means the more the public opinion of a nation insists on guaranteeing the constitution, the better the strength, continuity, and stability of that law are guaranteed. It must be acknowledged that this guarantee is not enough by itself because the issue of compliance of the ordinary law with the constitution is technical and complex, and another authority or institution is needed that can

260 V. F. Comella, “The European model of constitutional review of legislation: Toward decentralization?” 2 *International Journal of Constitutional Law* 461 (2004).

261 S. Lalisan, Classifying Systems of Constitutional Review: A context-specific analysis” 5 *Indiana Journal of Constitutional Desing* 4 (2020).

262 S. Le Du, “The French Constitutional Council: the gradual emergence of a co-legislator?” in Pocza, Kalman (ed) *Constitutional Review in Western Europe: Judicial-Legislative Relations in comparative Perspective* 109 (2024).

263 *Supra* note 46 at 33.

264 A. Harel and A. Shinar, “Two concepts of constitutional legitimacy” 12 *Global Constitutionalism* 84 (2023).

understand the conflict or non-conflict of these two types of laws with all its problems and difficulties. and make an appropriate decision about it[265].

4.1 Countries Adopting Decentralized Constitutional Review Model (American Model)

In a decentralized constitutional review model, several courts or judicial bodies are authorized to interpret the Constitution, check the constitutionality of laws, and decide whether a government action is based on the Constitution[266]. This contrasts with a centralized model, in which this power is vested in a single entity, typically a constitutional court or constitutional council[267].

The decentralized constitutional review model was first developed in the United States, which is why this model is called the American model[268]. Today, in addition to the United States, other countries such as India, Canada, Australia, Brazil, Mexico, Argentina, Switzerland, Japan, and the Philippines also have a decentralized model of constitutional review. For example, in Canada, Australia, Argentina, Switzerland, and Japan, besides the Supreme Court, lower courts have jurisdiction to review the constitutionality of ordinary laws[269].

It is difficult to study in detail all countries with a decentralized constitutional review model. Thus, two countries, the United States of America and India, are studied here as examples, and other countries are briefly reviewed.

4.1.1 **Constitutional Review in the United States of America**

The US Constitution is silent regarding constitutional review mechanisms, for the first time in 1803, the Chief Justice of the US Supreme Court exercised the power of constitutional review in the case of "*Marbury v. Madison*".[270] In this case, the US Supreme Court declared that a law passed against the US Constitution is not considered a law. The court has to determine what the law is. In the aforementioned case, "Marbury" was a justice of the peace appointed by the former president in the

---

265 T. Ginsburg, Z. Elkins et. al., "Does the Process of Constitution-making Matter?" 5 *Annual Review of Law and Social Science* 205 (2009).

266 *Supra* note 42 at 164.

267 *Supra* note 270 at 979.

268 D. Lustig and J.H.H. Weiler, "Judicial review in the contemporary world: Retrospective and prospective" 16 *International Journal of Constitutional Law* 321 (2018).

269 S. G. Calabresi, "The Global Rise of Judicial Review Since 1945" 69 *Catholic University Law Review* 415-422 (2021)

270 *Supra* Note 7 at 590.

federal district, based on Article (3) of the procedural law of 1789, which allows individuals to directly refer to the Supreme Court and request the issuance of orders to the administrative authority on behalf of this institution. Requests the Federal Supreme Court to order his appointment based on the law[271]. But Judge Marshall, as the head of the Federal Supreme Court, says the court lacks "competence" to issue the said order because, according to the US Constitution, the Supreme Court is only an appeals court, except in special cases. Marberi's request from the Supreme Court Upon the issuance of his appointment order, except for special cases, it is not for direct reference. Therefore, Article (3) of the Law of Procedure, which had considered the above-mentioned authority for the court, was declared to violate the principle mentioned in the Constitution, and thus, the principle of judicial control from the 19th century was later recognized as one of the most important principles of the United States Constitution[272].

It should be noted that the legitimacy of Judge Marshall's claim regarding the possibility of canceling laws was disputed for a long time. Although everyone recognized the principle of the Constitution's supremacy, there was no consensus regarding its implementation, and therefore, the Supreme Court did not issue a decision in this regard until 1857[273].

Also, the supervision and control of the Supreme Court on the actions of the executive branch were recognized and approved by the Court. This opinion of the Supreme Court was inferential based on the history of philosophical views as well as the legal tradition of this country. Subsequently, this view entered the American legal system[274].

The American version, adapted from the old English model, was based on the revision of the rules and has retained its unique features for over two decades. Moreover, it is also necessary to mention that American judicial control differs from common judicial control in the English legal system. The aforementioned judicial control can

---

271 Nagel, "Marbury v. Madison and Modern Judicial Review" 38 *Wake Forest Law Review* 615 (2003).

272 D. E. Engdahl, "John Marshall's Jeffersonian Concept of Judicial Review" 42 *Duke Law Journal* 281 (1992).

273 W. F. Pratt, "The Rhetoric of Judicial Review in the Supreme Courts of the United States and the United Kingdom" (University of Notre Dame, 2022)

274 M. Rosenfeld, "Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court" 4 *International Journal of Constitutional Law* 620 (2006).

be mentioned as an alternative to the United States of America, which refers to the jurisdiction of the courts to control the conformity of ordinary law and the decisions of the executive branch with the Constitution[275]. In England, judicial review controls administrative action by the courts because that action was taken within the scope of powers delegated to a local authority or a minister. In this sense, judicial review is a matter of administrative law, not constitutional law. The reason is that in countries like England, where the parliament has both an establishment aspect and a legislative aspect, and the constitution is the same as the ordinary laws (both are products of the legislature); naturally, the formal hierarchy or control of the ordinary law with the constitution is based on the constitution is not mentioned[276].

In the United States of America, constitutional review is applied decentralized, which means that in addition to the Supreme Court, all federal and state courts can review the constitutionality of laws and government actions within the scope of their competence in a concrete manner[277]. In the American reading of sovereignty, "the people" are known as rulers, and the theory of popular sovereignty has been accepted. In this theory, "sovereignty" is the sum of the various components of sovereignty that each person has for her or his share in society. The government reflects all the interests within society, and as a result, the law also manifests the will of the majority and responds to its needs[278].

In other words, the law is less understood due to the assumed public interest and is primarily measured by the criterion of individual interest of the voters. The public interest is determined only by placing individuals and their preferences as a basis, and accordingly, in this century, the natural compatibility of representatives with voters in the egalitarian society of America collapsed. The thinking of Americans was formed on the basis that the rights of representative assemblies do not reflect the will of the people, and few people can claim the right to make decisions for everyone. As a result of this suspicion, all appropriate measures were considered necessary to limit the

275 Jain, "Judicial Review: A Comparative Analysis of India, USA & UK" 1 *International Journal of Law Management and Humanities* 10 (2018).
276 W. M. Treanor, "Judicial Review before Marbury" 58 *Sandford Law Review* 523 (2005).
277 *Supra* note 7 at 590.
278 *Supra* note 42 at 162.

influence of the representatives, and the American people welcomed these measures[279].

In other words, a presupposition arose in American society, according to which what is done in Congress is not necessarily the pursuit of good and public interest but can be in line with private interests. In this way, a completely novel approach to the constitution emerged in America, and the constitution was recognized as the supreme law of the country in the opinion of the sovereign people; In this way, the principles of the American Constitution were considered a contract or agreement between the government and the citizens, based on which the sovereignty was delegated from the people to the government, and therefore the principle of the supremacy of the Constitution somehow reflects the basis of the sovereignty of the people[280]

The result of the new understanding of the constitution was that without constant monitoring of the boundaries drawn between the three powers of the government, there is always a risk that one of these powers will encroach on the others or dominate them. It was considered necessary to limit the power and after many theoretical developments regarding the limits and loopholes of the separation of powers, by creating obstacles in absolute legislation, one in the hands of the head of the executive branch (the right to veto laws) and the other in the hands of judges (constitutional review) the separation of American forces was achieved. In this way, the Americans, with their perception of sovereignty, the Constitution, and the separation of powers, implemented the basic procedure by giving power and authority to the judges[281].

4.1.1.1 Foundation of Constitutional Review in the United States of America

First, the principle of separation of powers is considered one of the fundamental principles of the political system of the United States of America, and it is based on the idea of "*popular sovereignty and the power of limited government*"[282]. It means that the government is subject to and following the public will and the powers of the government are only things that have been explicitly delegated and people have the

279 M. Elliott, *The Constitutional Foundations of Judicial Review* 18 (Hart Publication, Portland, 2001).

280 D. E. Edlin, *Judges, and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* 79 (University of Michigan, 2008).

281 S. Gardbaum, "Separation of Powers and the Growth of Judicial Review in Established Democracies" 62 *The American Journal of Comparative Law* 615 (2014).

282 S. Lesinson, "Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program" 123 *The Yale Law Journal* 2648 (2014).

right to decide on the establishment, cancellation or change of their government organizations and in this way, the founders of the American government, inspired by the teachings of Montesquieu and of course going beyond his theory, invented a model of the republic that gives power to the individual (each and every people) and does not consider it specific to the nation and society. Over many years, the United States of America has moved from the "absolute separation of powers" system to the "check and balance" system and has institutionalized this importance by adapting the well-known and current English institutions and customs in front of the legislature. To achieve this goal, it has left the "veto power" to the executive branch and the "judicial control" to the judges[283].

In the system of separation of powers, since the concentration of political power in the hands of a single person or a single board is likely to lead to tyranny and autocracy and the freedom and rights of individuals and society are endangered, executive and legislative duties and powers must be separated from each other and be distinguished, and each department should perform the task assigned to it as much as possible (in the form of separation of relative forces); In other words, all the three powers deal with their specialized task, and each one is independent of the other[284]. However, the monitoring and balancing system of power relations is set so that despite the more or less clear separation of duties and powers, each power has tools to control and adjust the other branch. These tools are mainly the same powers that are not considered part of the duties of that branch in the system of absolute separation of powers. The power is not "divided" among the three powers, but each power performs its tasks far from the "interference" of other powers. The presidential system of the United States of America is also among the regimes of absolute separation of powers, to prevent the possible arbitrary separation of powers, it has considered arrangements for the balance of powers, and in this regard, it has delegated the said authority to the judges[285].

Second, in the United States of America, judges have been considered the most reliable people to protect the constitution, and for this reason, the courts have been

283 L. Beckman, "Popular sovereignty facing the deep state. The rule of recognition and the powers of the people" 24 *Critical Review of International Social and Political Philosophy* 958 (2021).

284 N. Bowie and D. Renan, "The Separation-Of-Powers Counterrevolution" 131 *The Yale Law Journal* 2026 (2022).

285 J. L. Marshfield, "America's Other Separation of Powers Traditions" 73 *Duke Law Journal* 555 (2023).

given such authority. This issue is not considered as the superiority of this power over other powers, and the courts are only the protectors of the will of the people against actions that lead to deviation from it, and this will is also brought to the fore by the people in the constitution[286]. The advent has arrived. In proof of this claim, we can refer to Article 78 of the Federalist Letters expressed by "Alexander Hamilton", which explains well the position of the judiciary and its role: "*Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments*."[287]

In this way, the protection of the Constitution and the fundamental rights of individuals by the judiciary, in light of the opinions of the founders of the United States of America Constitution, are considered the most suitable mechanism, as judges can be more independent and fairer than protecting the rights of individuals. Deal with and examine them in light of the events of a particular case.

4.1.1.2 Attributes of the Constitutional Review in the United States of America

The essential features of the American model are as follows: First, the main feature of the American model is the "decentralization of review" and the extensive jurisdiction of the courts to judge various issues[288] In other words, the courts have general jurisdiction, and the declaration of non-compliance of the laws with the constitution

---

286 Z. P. Ahdout, "Enforcement Law Making and Judicial Review" 135 Harvard Law Review 46 (2022).

287 A. Hamilton, "Federalist Papers: No. 78, the Judiciary Department 1788" *Library of Congress available a:t* https://guides.loc.gov/federalist-papers/text-71-80 (last visited on 25/05/2023).

288 C. Saunders, "Courts with Constitutional Jurisdiction" in Roger Masterman and Robert Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* 419 (Cambridge University Press, 2019).

by the courts does not require the approval of the Supreme Court, although these decisions can be reviewed in the Supreme Court. Thus, in the United States of America and other countries that have adopted this model, the courts exercise judicial control by considering the "principle of unity in the judicial system," and the judges of ordinary courts, like the judges of the Supreme Court, are responsible for the compliance of the acts of the legislative powers and Executives comment on the constitution. Therefore, no special investigation is conducted in relation to the issues related to the constitution, and the investigation is done by filing a lawsuit in normal courts. In other words, there is no special court or tribunal with the exclusive jurisdiction to deal with the compliance of laws with the Constitution[289].

Second, the objectivity of the control is another feature of this model, according to which the validity of the law is checked during the hearing of a personal lawsuit. The government's action must have harmed the petitioner in violation of the constitution. Therefore, "the words of the law are measured in practice and considering its practical effects in an objective relationship, and it is not enough to match the words of two general propositions (constitutional law and ordinary law)"[290]. For this reason, the review of laws and regulations is applied retrospectively, meaning that it is possible to review laws and regulations after their publication, and after that, at any time, you can request to review the contradictions of the laws and regulations. Brought up the above with the constitution[291].

Third, another main characteristic of the American model is that the authority to interpret the constitution is not limited to one court, which is considered by many state and federal courts as an inherent requirement of the judicial process. In fact, according to the text of the Constitution as a fundamental document for the protection of fundamental rights and freedoms, the judges of the American courts, in every lawsuit based on specific circumstances, regarding the conformity or contradiction of the parliament's resolution or the executive power's resolution and decisions They make substantive comments and make decisions[292].

---

289 *Supra* note 44 at 1375.

290 P. D. Carrington, "Checks and Balances: Congress and the Federal Courts" 4-5 (Duke Law School Legal Studies, 2008).

291 *Supra* note 281 at 320

292 A. J. Bellia and B. R. Clark, "The Constitutional Law of Interpretation" 98 *Notre Dame Law Review* 525 (2022).

Finally, an important feature is the "relative validity of the review authority's vote." The value of the judge's decision is limited to the same case, and there is no requirement to invalidate the unconstitutional law in other cases. It is also necessary to mention that the aforementioned decisions can be reviewed in the Federal Supreme Court, and in this case, the court's decision has absolute validity in overturning conflicting laws[293].

Countries like Canada, India, Australia, Norway, the Philippines, Argentina, Ireland, Japan, Kenya, and some others have been influenced by the American model, but they differ in legal and administrative details from the American system[294]. It is not possible to study all countries with the American model in this thesis, after the United States of America only constitutional review in India has been studied here. Afghanistan can learn good lessons from India about constitutional review.

4.1.2 Constitutional Review in Union of India

The Indian legal system can be considered a unique system in the area of constitutional review because, on the one hand, it has adopted the American model from the perspective of the supremacy of the judiciary, and on the other hand, the Indian parliament has the authority to amend the constitution, and its approvals are controlled and review by a judicial body[295]. Then again, due to the demographic structure that dominates this country from the perspective of minorities and ethnicities, constitutional review has demonstrated the level of respect for the supremacy of fundamental rights, which is one of the ideals of every nation and is also a criterion for measuring and evaluating the performance of the Indian judiciary in protecting the fundamental rights and freedoms enshrined in the Constitution[296]. Also, constitutional review in India, which is a place of confrontation between the

293 L. Langer, *Judicial Review in State Supreme Courts: A Comparative Study* 6 (State University of New York Press,2002).

294 A. Mav, "Constitutional Courts: Models of Operation as Regards Federal systems" 6 (European Commission for Democracy Through Law, 1997).

295 A. A. Gorji and M. Khademi,"A Comparative Study of the Scope of Supervision of the Constitutional Guardian Institution over Ordinary Laws in the Legal Systems of Iran and India" in Persian "motaleh tatbighi gostereh nezart nehad nageiban qanoon asasi bar qawanin adi dar nezam hoqoqi iran ve ind" 8 *Comparative Law Review* 680 (2018).

296 B. Sharma, " The rights of minorities under the constitution of India: An analysis" 4 *International Journal of Law* 32 (2018).

judiciary and parliament, presents an interesting horizon for researchers in the field of constitutional justice[297].

This section first examines the historical background of constitutional review in India, then the constitutional foundations of constitutional review, and finally, its scope and limitations.

Constitutional review in India has historical and evolutionary roots, influenced by English legal traditions and American legal principles. This concept was not present in India during the British colonial period, but after independence, the 1950 constitution of India, as a comprehensive document, accepted constitutional review as one of the vital tools for maintaining the rule of law and the separation of powers[298]. At the top of the Indian judicial system is the Supreme Court, followed by the High Courts of each state or group of states. A series of subordinate courts also function at a lower level. Among them, only the Supreme Court and the High Courts, as the guardians of the Constitution, have the authority to monitor compliance of laws with the constitution[299].

The Supreme Court of India has developed a framework for judicial review since its inception in 1950, with a broad interpretation of the Constitution. In Shankari Prasad v. Union of India (1951), the Supreme Court held that the Indian Parliament has the power to amend the Constitution, including the Fundamental Rights[300]. But this view changed in Kesavananda Bharati v. State of Kerala (1973), where the Supreme Court introduced the Basic Structure Doctrine. According to this doctrine, Parliament cannot change the fundamental features of the Constitution such as democracy, separation of powers and the rule of law. This development was a turning point in the history of constitutional review in India and established the role of the Supreme Court in upholding the fundamental principles of the Constitution[301].

---

297 M. P. Singh and S. Deva, "The Constitution of India: Symbol of Unity Under Diversity" 53 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 70 (2005).

298 R. Raman, "A Comparative Study of Judicial Review in India and the United States and the United Kingdom" 3 *Law Mantra a Quarterly Online Journal*11 (2016).

299 H. Ghafari and M. Khademi, "Judicial Independence of Supreme Court of India" in Persian "Esteqlal qazai dadgai qanoon asasi ind" 48 *Public Law Quarterly* 382 (2018).

300 P. Kumar, "Doctrine of Basic Structure of Indian Constitution" 5 *Journal of Global Research and Analysis* 282 (2016).

301 M. Makireddy, "Case Analysis of Kesavananda Bharati v. State of Kerala" 3 *International Journal of Legal Science and Innovation* 635 (2021).

In the following decades, judicial review in India expanded further to encompass various areas of public law. The Supreme Court in Minerva Mills v. Union of India (1980) reiterated that the power of Parliament to amend the constitution was limited and could not change its democratic nature. Also, the development of Public Interest Litigation (PIL) in the 1980s enabled ordinary citizens and non-governmental organizations to raise constitutional issues in court without having a direct personal interest. This process extended the scope of constitutional review beyond traditional disputes and became a tool for the enforcement of social and economic justice[302].

Currently, constitutional review in India continues to play a key role in protecting fundamental rights, checking government power, and ensuring the separation of powers. The Supreme Court and state high courts have the power to review and strike down unconstitutional laws. Although criticized for its occasional interference in policy-making, the system remains a pillar of Indian democracy. With the expansion of concepts such as digital rights, the environment, and corporate governance, constitutional review in India has moved towards more dynamic and broader interpretations, playing an effective role in maintaining a balance of power and protecting citizens.

4.1.2.1 Constitutional Basis for Constitutional Review India

Constitutional review in India is based on the principles of the Constitution, which guarantees the supremacy of the Constitution, the separation of powers, and the protection of fundamental rights[303]. The Constitution of India, as a supreme document, has given the courts the power to review government actions and laws and to strike them down if they are inconsistent with the Constitution. The Indian constitution, which is partly influenced by the American model, specifically stipulates in Article 13 that any law that violates fundamental rights shall be null and void[304]. This principle enabled Indian courts to play an active role in reviewing the conformity of laws and government practices with the constitution from the earliest years of independence[305].

---

302 S. Deva, "Public Interest Litigation in Indi: A Critical Review" 28 *Civil Justice Quarterly* 24 (2009).

303 P. Choudhary and K. Kalra, "Judicial Review and Fundamental Rights: Key features of Constitutionalism" 6 *International Journal of Law and Social Sciences* 11 (2020).

304 The Constitution of India, art 13.

305 P. Singh and G.K. Sharma, Judicial Review in India: A study" 6 *Legal Express: an International Journal of Law* 10 (2020).

Moreover, Article 32 of the Constitution of India is one of the most important instruments for protecting fundamental rights and allows citizens to approach the Supreme Court of India directly in case of violation of their fundamental rights. This article mandates the Supreme Court to intervene in such cases and take appropriate decisions[306]. Similarly, Article 226 of the Constitution of India empowers the State High Courts to issue writs within their jurisdiction for the protection of fundamental rights and other statutory rights. This Article extends the scope of judicial review beyond Article 32, as it includes not only fundamental rights but also other statutory rights[307]. Likewise, the Constitution of India defines the limits of the legislative powers of the Parliament and the State Assemblies and states that no law shall be inconsistent with the Constitution; otherwise, the courts have the power to strike it down. This section is directly related to the supervision of the Constitution[308].

Separation of powers is one of the fundamental principles of judicial review in India, which is reinforced through various articles of the Constitution. The three branches of the Indian government, the legislature, the executive, and the judiciary, have specific powers, but the judiciary has a supervisory role over the other two branches to prevent them from exceeding their powers[309]. The connection between separation of powers and judicial review in India is particularly evident in the Supreme Court, where the judiciary, using the principle of separation of powers, exercises its broad powers to restrain unlawful actions of the executive and legislature to protect individual rights and freedoms[310].

The dynamic and evolutionary interpretation of the Constitution is another foundation of judicial review in India. The Supreme Court of India, using the Basic Structure Doctrine, which was developed in Kesavananda Bharati v. State of Kerala (1973), held that any amendment to the Constitution that changes its fundamental features is invalid[311]. This doctrine placed a limit on the powers of Parliament to amend the Constitution and reinforced the supremacy of the Constitution. Furthermore, the

306 The Constitution of India art.32.

307 *Id.,* art.226.

308 *Id.,* art 245.

309 R. Abeyratne and D. Misri, "Separation of Powers and the Potential for Constitutional Dialogue in India" 5 *Journal of International and Comparative Law* 364 (2018).

310 B. Neuborne, "The Supreme Court of India" 1 *International Journal of Constitutional Law* 478 (2003).

311 M. Mate, " Public Interest Litigation and the Transformation of the Supreme Court of India" in D. Kapiszewski, G. Silverstein and R. A. Kagan (eds) *Constitutional Courts: Judicial Roles in Global Perspective* 268 (Cambridge University Press, 2013).

development of Public Interest Litigation (PIL) in the 1980s expanded the scope of judicial review, allowing courts to review constitutional violations even without direct complaint. This development allowed the judiciary to play a more active role in correcting social ills and protecting the rights of vulnerable groups[312].

In general, constitutional review in India is based on fundamental constitutional principles such as the rule of law, separation of powers, and protection of fundamental rights. These principles establish the courts as the guardians of the Constitution and its final interpreters[313]. Although some critics believe that constitutional review in India has sometimes veered toward interference in executive and legislative affairs, the system continues to serve as an effective tool in maintaining a balance of power and preventing government abuses. In recent decades, as legal and social issues have become more complex, the Indian judiciary has continued to expand its scope of oversight and has maintained its central role in interpreting and implementing the Constitution[314].

4.1.2.2 Scope and Constraints of Constitutional Review in India

Constitutional review in India is broad and includes reviewing laws passed by Parliament and state assemblies, executive decisions of the government, and even macro-policies. The Supreme Court of India and state high courts have the authority to review laws and government actions for their constitutionality and to strike them down if they are inconsistent with the Constitution[315]. Article 13 of the Constitution empowers the courts to declare any law that violates fundamental rights null and void. In addition, Articles 32 and 226 allow the Supreme Court and High Courts to issue specific writs to protect the fundamental rights[316]. The development of Public Inquiry

312 Z. Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations" 19 *Indian Journal of Global Legal Studies* 558 (2012).

313 K. Khan and J. Hamdard, "Imperatives of Judicial Review in India" 6 *Indian Journal of Law and Legal Research* 1169 (2024).

314 M. Mate, "The Rise of Judicial Governance in the Supreme of India" 33 *Boston University International Law Journal* 186 (2015).

315 S. Mandal, *Judicial Review Under Indian Constitution: Its Reach and Contents*, 33 (2017) (Unpublished Ph.D. Thesis, University of North Bengal).

316 S. Biswakarma, "Subtle Differences Between Article 226 and Article 227 of the Constitution of India" *Daslegal Advocates, available at*: https://www.daslegal.co.in/subtle-differences-between-article-226-and-article-227-of-the-constitution-of-india/ (last visited on 05/03/2025).

Law (PIL) has also expanded the scope of judicial review, such that courts can hear cases where the public interest is at stake, even without a direct complainant[317].

However, constitutional review in India also faces structural and legal limitations. One of the most important of these limitations is the principle of separation of powers, which prevents the judiciary from interfering in the executive and legislative affairs[318]. In some cases, such as S. R. Bommai v. Union of India (1994), the Supreme Court has held that its jurisdiction is limited only to reviewing the constitutionality of laws and cannot interfere with policy decisions that are within the purview of the executive[319]. The Justiciability Doctrine also prevents courts from addressing inherently political issues. As a result, issues such as foreign relations, budgeting, and some macro-policies are removed from the realm of direct judicial oversight[320].

Another challenge to constitutional review in India is the issue of judicial activism versus judicial restraint. Some judges and lawyers believe that the Supreme Court and high courts sometimes overstep their authority and interfere with the functioning of the executive branch by issuing sweeping rulings[321]. For example, in some cases, such as Vishaka v. State of Rajasthan (1997), the Supreme Court directly issued guidelines to protect women's rights in the workplace, effectively filling gaps in the legislation. While these rulings have played an important role in legal development, the question has always been whether the judiciary should play a role in determining public policy or should simply interpret the law[322].

Consequently, If Afghanistan implements constitutional review in its future constitution based on the European model, namely the establishment of an independent constitutional court or constitutional council, it could also learn from India’s experience in several key areas. First, the principle of constitutional

317 V. Kumar, “Judicial Review and its Scope in India” 8 *Journal of Emerging Technologies and Innovative Research* 381 (2021).

318 S. P. Sathe, “Judicial Review in India: Limits and Policy” 35 Ohio State Law Journal 889 (1974).

319 A. Pushkar, “S.R. Bommai vs Union of India – The Relevance of the Judgement Against the Test of Time” *SSRN available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951636 (last visited on 05/03/2025).

320 P. Sharma, “Doctrine of Judicially Discoverable and Manageable Standards: Who Draws the Line in India?” SSRN 2019, *available at:*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435940 (last visited on 05/03/2025).

321 Z.A. Khan, “Judicial Activism V. Judicial Restraint: An Appraisal” 6 *Society and Politics* (2016).

322 N. Pathak and A. Vyas, “Caste comment on Visaka vs State of Rajasthan” 3 *Supremo Amicus* (2018).

supremacy, implemented in India through Article 13 and the doctrine of fundamental structure, could serve as a model for Afghanistan to prevent disruptive changes to the constitution. Second, the interaction between the constitutional body and other courts is an experience that India has gained through the parallel jurisdiction of the Supreme Court and state high courts; Afghanistan can maintain institutional balance by designing effective communication mechanisms between the constitutional adjudication body and other courts. Third, the institutionalization of public interest litigation (PIL), which in India has strengthened citizen oversight of the government, could allow the Afghan Constitutional review mechanism to play an active role in protecting fundamental rights.

Finally, India has shown that a strong constitutional review mechanism must be accompanied by a separation of powers; Afghanistan should also follow this principle to prevent excessive interference by the Constitutional Court in executive and legislative affairs while maintaining its independence.

4.1.3 Other Countries Adopting Decentralized Constitutional Model

As mentioned, besides the United States of America different countries have adopted the decentralized model of constitutional review. However, its implementation is different from the United States. For example, Australia, like the United States, is a federal country. Federal and state courts have the right to interpret the constitution and review the conformity of laws with the constitution[323]. In Australia, only the High Court can declare laws passed by Parliament to be invalid if they are unconstitutional. Other courts review executive and administrative decisions of the government and overturn them if they violate the law. This method has helped protect citizens' rights and strengthen the separation of powers[324].

Moreover, constitutional review in Switzerland, although decentralized, differs from that of many other countries. In this country, constitutional review generally focuses on the correct implementation of laws and is more concerned with protecting the fundamental rights of citizens and the area of administrative law[325]. In Switzerland,

---

323 M. Stubbs, "A Brief History of the Judicial Review of Legislation Under the Australian Constitution" 40 Federal Law Review 241 (2019).

324 Administrative Review Council, "The Scope of Judicial Review" 10 (2003).

325 J. Reich, "Switzerland- 2021 Review of Constitutional law: realm, limits, and legitimizing capacity of direct democracy" in R. Albert, D. Landau and P Fraraguna (eds) *2021 Global Review of Constitutional Law* 338 (2021).

federal courts can review laws passed by state parliaments and invalidate them if they are not in accordance with the constitution. In Switzerland, courts cannot review laws passed by the federal parliament. This is a major difference between Switzerland and other countries[326].

Constitutional review in Japan was introduced after the Second World War. The Japanese Constitution states: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[327] Constitutional review in Japan is similar to that in the United States because, in addition to the Supreme Court, other courts can declare a law invalid if they find it to be contrary to the principles of the constitution. The courts base their decisions on the principle of the supremacy of the constitution and the guarantee of the fundamental rights of citizens[328].

The Argentine Constitution recognizes constitutional supervision. According to it, the Constitution is superior to other laws and regulations[329], and the courts, especially the Supreme Court of Argentina, have the authority to review the compliance of laws and executive decisions with the Constitution and declare them invalid if they are inconsistent with it[330]. Constitutional review in Argentina is carried out through the examination of specific lawsuits[331]. The court can only rule on the constitutionality of a law when a specific case has been brought to its attention. It means that Argentina follows the concrete review. The Supreme Court plays a fundamental role in interpreting the constitution, and the final decision on the conformity or non-conformity of a law is within the jurisdiction of the Supreme Court[332].

As stated at the beginning of this section, some other countries such as Canada, Mexico, and Brazil also have this model, but a discussion of each of them is beyond

---

326 A. Mashhadi, "Principles and Criteria of Administrative Judicial Review in Switzerland Law" in Persian "konterl edari edari dar hoquq savis" 42 *Law Quarterly* 298 (2012).

327 The Constitution of Japan (1946) art 81.

328 N. Kawagishi, "The birth of judicial review in Japan" 5 International Journal of Constitutional Law 321 (2007).

329 The Constitution of Argentina (1853) art. 31

330 *Id.,* art.43.

331 H. J. Etchichury, "Argentina: Social Rights, Thorny County: Judicial Review of Economic Policies Sponsored by the IFIs" 22 American University International Law Review 102 (2006).

332 A. M. Garro, " Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions" 45 Duquesne Law Review 420 (2007).

the scope of this thesis. It is sufficient with this summary. The next section discusses the centralized model of judicial supervision or the European model.

4.2 Centralized Constitutional Review Model (European Model)

After constitutional review was introduced in the United States, the influence of this theory once again reached Europe. This important development resulted from many historical factors, and in applying its gradual process, it spread in the constitutional law system of most European countries[333]. The ideas of Hans Kelsen and Charles Eiseman regarding the need to protect the constitution and adapt subordinate laws to it played an important role in accelerating this process. These two, by emphasizing the principle of the mutual relationship between the supremacy of the constitution and the principle of parliamentary sovereignty, provided the basis for the harmony and compatibility of the idea of constitutional review with the political structures governing European countries. In his writings, Kelsen made suggestions regarding the Austrian Constitution of 1920, which led to the development of a new model of constitutional review completely different from the American model of constitutional review[334].

Kelsen's theory is based on the premise that the constitution is the foundation of legal rules, and other rules and regulations are derived from it. Therefore, this legal document needs more protection. From Kelsen's point of view, in addition to regulating the duties of executive authorities, public powers, and legislative principles and superiority over normal laws, the constitution also protects people's rights and public freedoms[335]. The constitutional review is done on the same basis to ensure the compliance of the laws approved by the legislative bodies with the basic principles governing the political system to provide the basis for the protection of the rights of individuals. Basically, the requirement to protect the constitution is the existence of an authority that can nullify and cancel the laws that are against the constitution. But according to Kelsen, the authority to cancel laws cannot be delegated to the institutions that approve the law. For this reason, this authority should be delegated to a council independent of the parliament and other powers. This council is the

333 A. R. Brewer-Carías, *Judicial review in comparative law* 24 (Cambridge University Press, 2023).

334 A. Kustra-Rogatka, "The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features" 19 *ICLR* 8 (2019).

335 T. Tetzlaff, "Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justice in Taiwan" 75 *Nottingham Law Journal* 80 (2006).

constitutional court. Eiseman emphasized the validity of Hans Kelsen's theory regarding the absence of conflict between monitoring the compliance of ordinary laws and the constitution with the principles of ruling on the political system[336] .

Despite this, Kelsen's and Eiseman's ideas, which were largely coordinated with the conditions of the European society due to previous developments such as the French Revolution and the views of the Enlightenment school, were on the way to having a legal form and entering the legal system for a long time. European countries were faced with important obstacles, among which it can be pointed out that it opposed the sovereignty of the people in the form of the institution of parliament, which, especially considering the political conditions of that time, made it difficult to accept the supervision of non-judicial institutions over normal laws. Therefore, the idea of constitutional review based on the principle of the supremacy of the constitution, even though it seems obvious at the moment, was a source of doubt among experts for a long time, and while some of them consider it to be in conflict with the sovereignty of the people and the parliament, in many cases, It was also opposed due to the fear of stagnation and lack of change in legislation. According to the experience of the Supreme Court of the United States of America, which, relying on its inconsistent thoughts with the new requirements, opposed any legislation contrary to its views, European experts also consider this as one of their reasons for opposing the implementation of the theory of constitutional review[337].

Despite the criticisms, today, the fact has been revealed that due to the popular nature of the legislative assemblies and the constitution-making assemblies, any argument that implies the limitation of the people's sovereignty in the case of applying the theory of supervision of the laws will be selective. In contemporary political systems, the Parliament is responsible for legislation, and the Constitutional Court is responsible for supervising the legislation. The fulfillment of these institutions will not conflict with the people’s sovereignty. With this definition, not providing a constitutional authority not only does not lead to the preservation of the people's sovereignty but also considers the important role of the constitutional authority in

336 L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* 148 (Oxford University Press, 1st ed, 2007).

337 P. Techet, “The role of the judiciary: Interpreting vs creating law – or how Hans Kelsen justified “judicial activism” 8 *Oñati Socio-Legal Series* 10 (2023).

guaranteeing the people's rights and establishing a balance between the government's sovereignty and the nation's rights[338].

All constitutions written after World War II imposed enforceable limits on governmental powers. Except for a few countries, all of these constitutions, unlike the American model, guaranteed fundamental oversight by a "constitutional court." Constitutional review in this model, which was established by Hans Kelsen, is applied in a centralized manner by special courts outside the regular judicial system and has exclusive jurisdiction over issues based on the constitution[339].

Hans Kelsen faced two important problems in the conceptualization of constitutional review in continental Europe; The first problem is that prior to the Second World War, the courts of the customary legal system were not suitable institutions for the discretionary granting of constitutional review, because on the one hand, delegating the constitutional review to the same parliament that approved the law is not logic. On the other hand, it was believed that ordinary courts are not capable of such supervision, because the courts of the judiciary are created to apply the laws, not to judge them. Therefore, the success of constitutional review in Europe depended, on the one hand, on persuading the politicians' suspicion towards the judiciary, and on the other hand, on the determination of prominent European thinkers to apply the American model of constitutional review in the continent. For this purpose, Kelsen, while considering the constitution as having a political nature, declared the non-compliance of laws with the constitution as a type of legislation, "negative legislation." As a result, he suggested a special constitutional court with the same authority and dignity as the legislature[340].

The centralized constitutional review model reflects a different concept of the separation of powers theory and is based on a theory that is fundamentally different from the decentralized constitutional review model. The centralized model grants a single judicial body the authority to review the conformity of ordinary laws with the Constitution. The main centralized model is based on the Austrian Constitution of

338 M. De Visser, *Constitutional Review in Europe: A Comparative Analysis* 42 (Hart Publishing, 2014)

339 H. Schwartz "The New East European Constitutional Courts the New East European Constitution" 13 *Michigan Journal of International Law* 745 (1992).

340 L. Garlicki, "Constitutional courts versus supreme courts"' 5 *International Journal of Constitutional Law* 65 (2007).

1920, while other countries such as Germany, Italy, Cyprus, Turkey, and the former Yugoslavia have adopted such a model in Europe[341].

4.2.1 Basic Principles of Centralized Constitutional Review Model

Centralized constitutional review model which is also known as European model is based upon certain principles as follows:

4.2.1.1 The Roman-Germanic Legal System Principle

Since the principle of "acting according to judicial procedure" has been accepted in a limited way through the Supreme Court and administrative courts in the Romano-German legal system, the theory of granting exclusive jurisdiction to the Constitutional Court seems necessary to protect the Constitution. In fact, "predictability" and "unity of procedure" are essential tools of any legal system, and a decentralized constitutional review without the principle of adherence to judicial procedure undoubtedly exposes these two important factors to deterioration. The conflict between the judges' decisions and each other, under the assumption of granting jurisdiction to all the judges, destroys the entire legal system. Therefore, creating a single authority with specific competencies is required in such a system where the judicial record does not have the necessary credibility[342].

At the same time, in the legal system of the United States of America, judicial review is "case-by-case," and unlike the European system, it is not "general and abstract." The judge of the Constitutional Court in Europe, unlike the American judge, prevents the emergence of the said law or removes the said law from the legal system with his decision that a constitutional law contradicts the constitution; As Kelsen called the Constitutional Court "negative legislation" as opposed to "positive legislation". In addition, in this model, the Constitutional Court may exercise authority even over the judiciary and ordinary courts in compliance with the Constitution for example, according to Article 93 of the Constitution of the Federal Republic of Germany, the

---

341 J. Komarek, "National constitutional courts in the European constitutional democracy" 12 *International Journal of Constitutional Law* 526 (2014).

342 T. Herzog, "Germanic or Roman? Western European Narratives of Legal Origins" 28 *Rechtsgeschichte– Legal History* 18 (2020)

Constitutional Court can review the courts' decisions regarding contradictions with the Constitution[343].

4.2.1.2 Parliamentary Sovereignty Principle

One of the main reasons for the establishment of constitutional courts to monitor the constitution is based on the fact that the traditional separation of powers is no longer possible, and on this basis, many European countries have adopted the parliamentary system as a result of the theory of the supremacy of the parliament. In such systems, a significant part of the powers of the executive branch rests with the prime minister, who is usually a member of the legislature or its elected representative. In this way, there is no inflexible separation of powers in the European parliamentary systems, as far as part of the duties and powers of the executive and legislative powers are given to the prime minister. Now, to deal with the power of the majority in the legislature, there is a need for an "institution" to supervise that majority. Legislation and protection of individual rights and freedoms are not there; they may lack protection[344].

4.2.1.3 Judges Professionalism Principle

The legal training of professional judges in the Roman-Germanic legal system plays a very important role in the Europeans' perception of constitutional review. Ordinary judges in most countries with the Roman-Germanic legal system are usually selected after graduation through a difficult test, and after that, they undergo more specialized professional training by official institutions and finally obtain a judge's license. These judges are then sent to small towns and judge less important cases before they reach their highest positions. In these systems, the appointment of a judge is more than a political matter, it is a technical choice among qualified law graduates who exercise judicial duties[345].

In addition, the attempt to separate the legal system from politics, religion, economy, and everything else that is not completely legal is a Roman-Germanic tradition and a part of the Westphalian government; Therefore, it is assumed that ordinary judges do not have a major role in determining these policies, and this is the important task of

---

343 D. Paris, "Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review" 24 *Maastricht Journal of European and Comparative Law* 815 (2017).

344 J. McGarry, "The principle of parliamentary sovereignty" 32 *Legal Studies* 579 (2012).

345 G. P. C. Magalhaes and N. Garoupa, "Judicial Performance and Trust in Legal Systems: Findings from a Decade of Surveys in over 20 European Countries" 101 *Social Science Quarterly* 1750 (2020).

the "legislative" branch, which enjoys superiority. Thus, the duty of judges is the professional and technical implementation of legal provisions, and they should not be effective in discrediting the law. As a result, a separate judicial institution is required to perform the task of constitutional review[346].

4.2.2 Attributes of the Centralized Constitutional Review Model

First, the main characteristic of this model is the "centralization of constitutional review" that only one institution has the authority to evaluate and give a final opinion on the validity of ordinary law based on the constitution. In fact, constitutional courts in this model have special authority to make decisions about issues related to the constitution[347].

In the European model, unlike the American model, a distinction is usually made between different types of lawsuits, such as administrative, civil, commercial, and criminal lawsuits, as well as lawsuits based on the constitution, as a result, different courts Lawsuits are heard, and in the same way, the procedure for supervising the proceedings of the constitutional courts is different from other courts. Because judicial review in Europe is linked to a certain extent with the concepts of "parliamentary supremacy" and "skepticism about the authority of judges to set aside laws approved by parliament, judges of ordinary courts in the Romano-Germanic legal system usually cannot ignore the claim of contradiction with the legal law and only the constitutional courts have such authority[348]. For example, in Italy, ordinary courts (civil, administrative, and commercial) refer constitutional issues to the Constitutional Court regardless of their validity. In Germany, only the Federal Constitutional Court has the jurisdiction to examine laws in terms of compliance or non-compliance with the Constitution[349].

Second, constitutional review in this model is "abstract and subjective," and such a review is associated with "prior" consideration. In other words, the reviewing authority examines the conformity of ordinary law with the constitution without the

---

346 J. Bell, *Judiciaries within Europe: A Comparative Review* 2 (Cambridge University Press, 2006).

347 *Supra* note 273 at 463.

348 P. Passaglia, "Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way" 2 *The Italian Law Journal* 410 (Italian Cultural Institute, 2016).

349 A. Von Bogdandy and D. Paris, "Building Judicial Authority: a comparison between the Italian Constitutional Court and the German federal constitutional court" (Max Planck Institute for Comparative Public Law and International Law, 2019).

existence of a case. Obviously, it should be noted that in this model, there may also be a retrospective review, and according to the concerns of each legal system, each one can be used in proportion[350].

The Constitutional Court's decision is universal and binding for all powers. Unlike the American model, the decision annuls ordinary law or a part of it that is considered contrary to the Constitution and removes it from the legal system. For this reason, Hans Kelsen called the Constitutional Court "the passive legislator."[351]

Third, in the United States of America, all courts can interpret the constitution, but the Supreme Court has the final word on this issue. However, in the European model, only the Constitutional Court and no other courts have the authority to interpret the Constitution, and the interpretive opinions of the Constitutional Court, like its decisions, are mandatory for all courts and institutions[352].

4.2.3 Countries Adopting Centralized Constitutional Review Model

Most European countries and several other countries in Asia and Africa have a centralized constitutional oversight model. It would be very difficult to study all the countries with this approach. Therefore, first Germany, France, and Belgium are studied and then briefly review by some other countries.

4.2.3.1 The Centralized Constitutional Review Model in Germany

This section briefly discusses the constitutional review in Germany, France, and Belgium to better understand the centralized model of constitutional protection.

The Federal Republic of Germany is a federal country with 16 states called *Lander.* The sovereign powers are divided between the federation and the *Länder*; Each of them has its rights and governing institutions. This division is not just an administrative division like common divisions in unified governments, but state governments have sovereign authority and basic institutions such as parliament, executive and administrative authorities, courts, and the state constitution. At the same time, these state governments are integrated into a federation and form the

350 *Supra* note 42 at 276.

351 T. Negara, A. Setia et. al., "The Confrontational Role of the Constitutional Court's" 17 *International Journal of Criminal Justice Science* 191 (2022).

352 *Supra* note 213 at 71.

territory of the federal government. They are obliged to follow federal laws, and the federal constitution has defined the boundaries of these powers[353]

The Constitutional Court was established in 1951 as a supervisory body of the Constitution to ensure that all institutions of the country follow the Constitution. This court is introduced as a mechanism to guarantee public order, especially the principle of democracy and fundamental rights[354]. In this section, the Constitutional Court is studied.

4.2.2.2.1 Constitutional Court of Germany

The German Constitutional Court has been established as an interpreter and supervisor of implementing the Constitution in the framework of the Austrian jurist Hans Kelsen's model. One of the reasons the German legislators followed Kelsen's model and left the task of the constitutional review to a special court was the traditional structure of the German judicial system and the unfamiliarity of its judges with a thorough understanding of the constitution. The German judicial system consisted of a hierarchy of administrative, labor, financial, and social courts, and of course, dealing with ordinary civil and criminal matters accounted for the bulk of legal claims. In addition, investigations and appeal procedures were pursued at the federal level and were under the jurisdiction of the federal courts[355].

The deliberations of the Constituent Assembly in 1948-1949 led to the drafting of the German Constitution (basic law). The basis and structure of the court have also been extensively discussed in the deliberations of the Constituent Assembly. In the deliberations of the Constituent Assembly regarding the constitutional review, there was a discussion about whether the institution in charge of this matter should be a court that acts as an institution to resolve disputes between branches and different levels of the government or whether, in addition, the authority to review the compliance of the laws with the constitution. The framers of the constitution finally agreed to establish a constitutional court independent of other public law courts[356].

---

353 Lembcke, "The German Federal Constitutional Court" in Constitutional Review in Kálmán Pócza (ed) *Western Europe: Judicial-Legislative Relations in Comparative Perspective*142 (Routledge, 2024).

354 W. Reutter, *Constitutional Courts in the German States: History, Structure, and Functions* 3 (Springer, 2024).

355 "The Beginnings of Germany's Federal Constitutional Court" 16 *Ratio Juris* 157 (2003).

356 D. Kommers, "An Introduction to the Federal Constitutional Court" 2 *Notre Dame Law Journal* 2 (2002).

However, they did not agree on how much authority to delegate to this court despite the existence of other federal high courts. The place of conflict and controversy was over the jurisdiction of the Constitutional Court and the separation between the political roles of such a court, and the more objective issues of interpreting the Constitution, which was pursued in ordinary courts. Some members of the founding parliament thought that for this purpose, two separate courts, one in charge of reviewing the legality of laws based on the constitution (judicial review) and the other to decide on disputes of a political nature between government institutions (constitutional review)[357].

On the other hand, others emphasized the formation of an institution with multi-purpose goals and tasks, with different committees or branches, each of which plays a role in a specific field of public law or constitutional law. Many German judges opposed this approach and seriously warned against mixing law and politics in one institution. However, it was agreed that a constitutional court with exclusive jurisdiction over all disputed constitutional issues, including the jurisdiction, review the legality of laws from the perspective of the constitution. Both factions in the Constituent Assembly were in favor of limited rules for access to this newly established court, both to protect political minorities both inside and outside the parliament (the opinion of the social democrats) and to protect federalism in Germany. But, the interests of both factions were considered in the selection of the judges of this court, and it was decided that the court should be composed of federal judges and other members in such a way that half of them would be appointed by the Bundestag (Federal National Assembly)[358].

The Bundesrat (Assembly of States) should elect the other half. Finally, after months of debate, the German constitution was approved, in which an independent constitutional court was considered. The court's headquarters was established in the city of Karlsruhe and started to work in September 1951[359].

---

357 P. E. Quint, "Leading a Constitutional Court: Perspectives from the Federal Republic of Germany" 154 *University of Pennsylvania Law Review* 1855 (2006).

358 J. Limbach, "The Role of the Federal Constitutional Court the Role of the Federal Constitutional Court"53 *SMU Law Review* 430 (2000).

359 C. Schonberger, "Karlsruhe: Notes on a Court" in Matthias Jestaedt, Oliver Lepsius et.al. (eds) *The German Federal Constitutional Court: The Court Without Limits* 2 (2020).

4.2.3.2.1 Structure of the German Constitutional Court

The Constitutional Court was established based on the constitution. It is a fundamental institution and is not under the supervision of any ministry. The court formation law deals with formulating and detailing the provisions of the constitution in relation to the court's structure, powers, and procedure[360].

According to Article 94, half of the members of the Constitutional Court are elected by the Bundestag and the other half by the Bundesrat with a two-thirds vote. The Federal President signs the ruling and notification of judgment in the Constitutional Court. The tenure of the court justice post is 12 years, and there is no possibility of re-election. According to Article 4 of the Court Formation Law, the maximum age of court judges is 68 years, and after this age, the judges will sit again. In addition, according to the third article, the judges of the Constitutional Court must not have membership and employment in the Bundestag, Bundesrat, the federal government, or their corresponding institutions at the state level. Judges must not be employed in any job or professional position except as law lecturers in universities and higher education institutions in Germany. In these cases, the position of judging have priority[361].

The Constitutional Court is an independent institution with an independent administrative organization and budget. The employees of this institution are under the management of the President of the Constitutional Court and are appointed, dismissed, and retired by him. The Constitutional Court did not take any action on its initiative, and fulfilling its duties depends on the request of a person or a competent institution. The Constitutional Court is a judicial institution, but it is separated from other courts and does not act as an appeals court from the decisions of other courts. In other words, the Constitutional Court is the primary and appellate (final) court[362].

Although the Constitutional Court can be compared with the Supreme Court of the United States of America in terms of its duties and powers, in addition to having more powers, unlike the Supreme Court, it is not an appellate authority in the field of federal laws. The main task of the Constitutional Court is to ensure the compliance of

---

360 *Supra* note 328 at 22.

361 P. Niels, "The German Constitutional Court and Legislative Capture" 12 *International Journal of Constitutional Law* 654 (2014).

362 H.G. Rupp, "Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure" 44 *Notre Dame Law Review* 552 (1969).

state institutions with the Constitution[363]. Amendments to the constitution passed by the German parliament are also subject to the supervision of this court; Because they have not violated the immutable principles of the constitution. In addition, guaranteeing the fundamental rights of individuals as one of the pillars of the German legal system is one of the most important duties of the Constitutional Court. The duties of the Constitutional Court are stated in Article 93 of the Constitution and Article 13 of the Court Formation Law[364].

4.2.3.2. The Centralized Constitutional Review Model in France

Contrary to the American model, France, since 1790, based on the principle of separation of powers and with the justification that when a nation exercises its legislative power through a permanent body of representatives, it cannot delegate to the court the authority to review the conformity of laws with the constitution. They insisted that "judges cannot participate in the legislative function." Based on this, the constitutions of 1799, 1852, 1946, and 1958 accepted the possibility of monitoring the compliance of ordinary laws with the constitution and delegated it to the political-non-judicial institution[365].

The French model has its roots in the era of the Republic and is even the means of its victory. Its success lies in the fact that this institution is not implemented by a judge but by an institution, namely the Constitutional Council, which can be implemented in contrast to the American model. Because, on the one hand, it does not necessarily consist of judges, and on the other hand, it does not decide on specific lawsuits. In other words, it does not pay attention to the material interests of private individuals and local institutions; rather, it does not judge[366].

It is necessary to explain that what is meant by the political nature is that nature is opposed to the judicial nature, not the political institution in its literal and general sense. In this sense, the political institution establishes affairs and programs with a general, impersonal, abstract nature. The judicial act is special and generally oversees

---

363 Grote, "Constitutional Courts in the Federal States: the case of Germany" 17 *Fédéralisme Régionalisme* 2 (2017).

364 How to Lodge a Constitutional Complaint in The Federal Constitutional Court *available at:* https://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html (last visited on 28/06/2023).

365 F. Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation" 9 *German Law Journal* 1298 (2008).

366 *Supra* note 46 at 32.

specific and detailed cases. The judicial act is arbitral, and in the event of a dispute, it is brought forward and followed by the filing of a lawsuit[367].

In addition, the Constitutional Council is a political institution that participates in law formation and is not an anti-legislative power in exercising its authority. For example, according to Article 61 of the French Constitution, the French Constitutional Council can examine the organic laws before their ratification and the internal regulations of the parliaments before their implementation in terms of inconsistency with the Constitution. At the same time, the Referral of other laws to the Constitutional Council is optional, which is done at the request of some officials[368].

Finally, the founders of the Fifth Republic founded the Constitutional Council in 1958 with the opinion that the parliament should not leave the areas under its authority. In this way, it is clear that the French constitutional review model is older than the other mentioned models. It has benefited from the innovative structure and has been affected by a strong suspicion of judges[369].

4.2.3. 2.1 Attributes of the Constitutional Review in France

First, like other European countries, the French model is also centralized. But the difference is that France has a constitutional council, a political institution, unlike other European countries, which have an independent judicial institution called the Constitutional Court**.** In the political model of constitutional review, the compliance of ordinary laws with the constitution is checked before publication or implementation. In case of non-compliance, the publication or implementation of the laws will be prevented[370].

Second, the political model is usually protective and preventive, prevents the issuance of laws that contradict the constitution, and operates in the stage after the law is enacted and before its publication and implementation. This kind of constitutional review may not include all laws. As in France, according to Article 61 of the Constitution, "Organic laws" before ratification and the internal regulations of the

367 M. C. Ponthore and H. Fabrice, “The French Council Constitutional: An evolving Form of Constitutional Justice” 3 *The French Conseil Constitutionnel* 271 (2008).

368 *Supra* note 275 at 109.

369 L. Rubinelli, *Constituent Power: A History* 141 (Cambridge University Press, 2020).

370 M. L. Paris, “The French Constitutional Council: Another ‘Work-In-Progress’ Paris” 2 (Universit College Dublin, 2017).

parliament must be submitted to the Constitutional Council for compliance, and the referral of other laws is optional, which is done at the request of some authorities[371].

Third, the main feature of the aforementioned model is that the institution of the Constitutional Council is organizationally independent and is outside the framework of the judiciary, and financial and administrative independence is the main condition for the independence of the Constitutional Council. Also, countries with the French model believe in the possibility of monitoring the constitution by referring to the constitution to review legal documents (laws, legislative decrees, regulations). But this right has not been given to citizens but to the most important political officials. The "theory of limitation in litigation based on the constitution" is accepted in this model as this theory is accepted in Lebanon[372].

4.2.3. 2.2. Functions of the Constitutional Council in France

According to Article 55 of the 1958 constitution, the Constitutional Council has nine members, three appointed by the President, three appointed by the President of the National Assembly, and three appointed by the President of the Senate for nine years. Every three years, each of the three appointing bodies appoints a new member. In addition, the former presidents of France are ex-office lifetime members of the Constitutional Council. The revision of the French Constitution in 2008 brought changes to the process of appointing members of the Constitutional Council. According to the new article 56, from now on, the permanent commissions have some participation in appointing the president and other parliaments. It is obvious that adopting this method has increased the participation of parliament representatives in political management on the one hand and has brought the French political system closer to the American political system on the other hand[373].

According to the Constitution of 1958 and the amendments made, the duties and powers of the French Constitutional Council are numerous and are not limited to reviewing the compliance of laws with the Constitution. In addition to the review of laws, according to Article 58-63, the council is responsible for monitoring the

---

371 M. Bossuyt and W. Verrijdt, "The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment" 7 *European Constitutional Law Review* 360 (2011).

372 R. Espinosa, "Constitutional Judicial Behavior: Exploring the Determinants of the Decisions of the French Constitutional Council" 13 *Review of Law and Economics* 6 (2017).

373 G. Halmai, "Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective" 13 *Wake Forts Law Review* 120 (2016).

regularity of the procedures for holding the constitutions and the elections of the representatives of the two parliaments and the presidential elections.[374]

Also, the Council is asked to advise the President on the implementation of Article 16 of the Constitution in relation to powers in times of crisis and on the measures to implement this principle, and according to Article 7 of the Constitution, the Council can decide whether the presidential post is vacant or there are obstacles in Comment on the implementation of presidential duties. As the constitution states: *"*In the case of a vacancy, or where the incapacity of the President is declared to be permanent by the Constitutional Council, elections for the new President shall, except in the event of a finding by the Constitutional Council of force majeure, be held no fewer than twenty days and no more than thirty-five days after the beginning of the vacancy or the declaration of permanent incapacity.''[375]

Reviewing the compliance of laws with the Constitution is considered the main task of the Constitutional Council. Therefore, the cases in which the council can intervene in this field are listed in the constitution. This intervention is sometimes mandatory and sometimes optional. According to the Constitution, before ratification, organic laws[376] and the internal procedures of the two parliaments must be submitted to the Council before they are implemented to make a decision and express an opinion on their compatibility with the Constitution[377].

In the case of ordinary laws, the review of the Constitutional Council is optional. In this case, it should be said that intervention is possible in two ways: First, normal laws are reviewed *prio*r and sometimes *posterior*. Priori intervention is in the cases that are foreseen in Article 41 of the Constitution: if, during the legislative process in one of the two houses, it is determined that a bill or a legal amendment is not placed in the

374 The Constitution of France (1958).

375 *Id*., at art.7.

376 In the French legal system, there are three types of laws: constitution, organic law (Institutional Acts), and ordinary law. Organic laws are a measure for the implementation of the constitution. According to French lawyers, the need to approve such laws is foreseen in the constitution, for instance, the election law. On the other hand, ordinary laws are established according to the interest of the society and the existing needs and according to the competence of the parliament in approving the laws. Source: Practical Law Corporate France, Lawmaking in France, accessible at https://www.gide.com/sites/default/files/law-making_in_france_w-023-69321.pdf

377 *Supra* note 387 at art. 16.

territory of the parliament, the executive branch can object to incompetence[378]. If there is no agreement between the government and the speaker of the parliament in question (one of the two houses of the parliament), in this case, one of these two authorities can refer to the Constitutional Council. In such a situation, the Constitutional Council must decide the case within eight days[379].

Posterior review occurs in two ways. The first premise is mentioned in Article 37, Paragraph 2: Laws approved after the rule of the 1958 Constitution that have encroached on the special territory of government regulations can be changed by decree. But this is only if the Constitutional Council, after being referred by the Prime Minister, determines that the legal texts have entered the special territory of government regulations and exceeded that limit[380].

The second assumption, provided in Article 62, paragraph 2, is more general. This assumption covers all cases of non-compliance of law with the provisions mentioned in the Constitution. Contrary to the previous assumption, the start of monitoring, in this case, is only after the law's approval and before its ratification. The original text of the constitution (before the amendment) provided that only the president, prime minister, and the heads of the two houses of parliament have the right to refer laws to the council. In this system, which seemed to be limited to a large extent, monitoring compliance with the constitution did not have much scope. It was logically rare for the Prime Minister to refer to a text for compliance with the Constitution that he had authored. This issue is also true for the Speaker of the National Assembly because she is always one of the majorities to which the Deputy Minister also belongs. Therefore, the council rarely commented and announced decisions regarding the conformity of the laws with the constitution, Except the cases related to commenting on the law's scope and this letter mentioned earlier[381].

---

378 S. Brouard, "Concrete Constitutional Review in France: Institutional Setting and Effects", *ECPR*, 04/07/2013 *available at*: https://ecpr.eu/Events/Event/PaperDetails/3268 (last visited on 30/07/2023).

379 R. Levush, "The Constitutional Council and Judicial Review in France", *Library of Congress Blogs*, 04/11/2020 *available at*: https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france/ (last visited on 14/08/2023).

380 G. L. Neuman, "Anti-Ashwander: Constitutional Litigation as a First Resort in France" 43 *International Law and Politics* 18 (2010).

381 S. G. Calabresi, *History and Growth of Judicial Review* 160 (Oxford University Press, vol. 2, 2021).

From 1965 onwards, the majority and the opposition (minority) needed to expand the right to refer to the Constitutional Council. It seemed that the executive branch, although it enjoyed a kind of submissive majority in the National Assembly since 1962, nevertheless wanted a balanced weight in favor of the minority. The intended amendment of the minimum solution was brought to the fore by the constitutional revision law dated October 29, 1974. After that, 60 representatives of the National Assembly and 60 representatives of the Senate have the right to refer to the Constitutional Council[382] .

The Constitutional Council can also optionally review the compliance of laws with the Constitution, but this review of the Constitution is not in its narrow sense. Based on the Constitution, at the request of the President, the Prime Minister, the Speakers of the two Houses of Parliament, and at the request of 60 members of the National Assembly or 60 members of the Senate, the Constitutional Council can be asked to determine whether an international treaty contains a contrary clause with them or not.[383] In such a case, they can refer to the council before the law ratifying a treaty. Therefore, the text of the treaty is reviewed, not the law of its ratification. If the text of the treaty is considered unconstitutional, the treaty can be ratified when the constitution is amended[384].

Another noteworthy point is the Constitutional Council's voting process. The French constitution provides various time frames for the council's consideration, varying from eight days to one month. In terms of legislation, this period is one month, but if the government requests an urgent hearing, the period will be reduced to eight days[385].

In the process of constitutional review, the Council has broad powers in filing and handling cases. This method is the same as the administrative review in France. The Chairman of the Constitutional Council selects one of the members as a reporter. With the help of the council's legal department, she or he prepares the request and the petitioner's bill, documents and reasons and the answers given to them, parliamentary

382 S. Wright, "The French Conseil Constitutionnel and Constitutional Reform" 1 *European Public Law* 24 (1995),

383 *Supra* note 387 at art.54.

384 J. Mouchette, "The French Constitutional Council as a law-maker: from dialogue with the legislator to the rewriting of the law" in Monika Florczak-Wator (ed) *Judicial Law-Making in European Constitutional Courts* 10 (Routledge, 2020).

385 L. Imbert, "Endorsing Migration Policies in Constitutional Terms: The Case of the French Constitutional Council" 14 *European journal of legal studies* 71 (2022).

dialogues, laws, legal doctrines, the council's procedure, and administrative reports to file a case. After that, the reporter writes the conclusion as a draft vote, which makes the basis of the discussion in the council meeting[386].

For the Constitutional Council to be recognized, at least seven members must be present unless there is a force majeure. Since the hearing is not public, the reporter begins by reading his report and defending the leak. After that, council members discuss the details and especially the final vote. After that, the writing of the other parts of the vote is discussed individually. If the members disagree with the main text proposed by the reporter, a vote is taken until the opinion of the absolute majority is accepted. In case of equality of votes for and against, the vote of the council's chairman will be constructive[387].

Due to the protection of the independence of the Constitutional Council, the voting is secret and the names of the opponents and supporters are not mentioned in the text of the vote. Accordingly, another feature of the Council's votes, compared to the German Federal Constitutional Court or the US Supreme Court, is that the minority or individual votes of the Council members are not included in the final vote.[388]

This voting method can be a good lesson for the institution of protection of the constitution in Afghanistan. This method can effectively maintain this institution's independence in a country like Afghanistan, which is discussed in the sixth chapter of the thesis.

The activities of the Constitutional Council show that from the beginning of its formation until the amendments in the constitution, it has played a more important role than the previous similar institutions during the Third Republic. There are two reasons for this increase in activities: firstly, the reform of the way of referring to the Council, and secondly, the change of the ruling majority in the parliament after 1981[389].

The control exercised by the Constitutional Council has made political life peaceful. This issue has been proven in many cases. In these cases, political inflammations have

386 *Supra* note 308 at 243.

387 "Discover the Constitutional Council" 3 (The Constitutional Council of France, 2022).

388 M. Rosenfeld, "Constitutional adjudication in Europe and the United States: Paradoxes and contrasts" 2 International Journal of Constitutional Law 638 (2004).

389 S. Brouard and C. Honnige, "Constitutional courts as veto players: Lessons from the United States, France, and Germany" 56 *European Journal of Political Research* 550 (2017).

subsided after the issuance of the Constitutional Council's theory. The reason why the monitoring of fundamentality can make political life peaceful and reduce inflammation is that the opposition minority groups, by filing a complaint against the parliament's approvals, are assured that the ruling majority has not violated the limits stipulated in the constitution[390].

4.2.3.3. The Centralized Constitutional Review Model in Belgium

Belgium is a constitutional monarchy with a federal government. Due to the multitude of ethnicities and minorities, Belgium is always facing a crisis of unity and identity. In this sense, territorial division in this country has special characteristics. According to first Article of the Belgian Constitution, the federal government is composed of communities and regions. According to the second article, Belgium consists of "French, Flemish, and German communities." According to the third article of the constitution, the country is divided into three parts: Flemish, Walloon, and Brussels. States are divided into cities, counties, and municipalities. The states have extensive independence, including legislation[391].

The king is the head of the country, but the real power is in the hands of the prime minister and state governments. According to Article 106 of the Constitution, the king's decree becomes legal after the signature of the relevant minister. For this reason, only the ministers have political responsibility in front of the parliament. Regarding regulating the ruling powers, it can be said that Belgium has a relatively complex political system. According to Article 33 of the Constitution, all the powers of the state are derived from the nation. The aforementioned powers are applied in the manner intended by the Constitution. Belgium has a bicameral parliament, the House of Representatives and the Senate[392]

Article 40 of Belgian law describes the judiciary as composed of courts and tribunals, in which, according to the kingdom's tradition, judgments and decrees are issued in

390 L. Imbert, "Endorsing Migration Policies in Constitutional Terms: The Case of the France Constitutional Council" 14 *European Journal of Legal Studies* 70 (2022).

391 P. Popelier and K. Lemmens, *The Constitution of Belgium: A Contextual Analysis* 35 (Hart Publishing, 2015).

392 L. Lavrysen, J. Theunis et. al., "2018 Global Review of Constitutional Law" 23 (I•CONnect and the Clough Center, 2018).

the name of the king. According to the Constitution, the Belgian judicial system is based on civil law and originates from the Napoleonic code of laws.[393]

Article 141 of the Belgian Constitution states that The Constitution establishes a procedure according to Article 134 for the resolution of disputes and review of the constitutionality of laws. Although the constitutional law and judicial system in Belgium has a long history and significant stability, the institutionalization related to the protection of the constitution and the establishment of the constitutional review mechanism until 1980 in the constitution of this country was less taken into account. This year, with the approval of the "Special Law on Institutional Reforms," the "Arbitration Court" was foreseen in Article 107 of the 1980 Constitution. This court was created when its opponents asked why a new tribunal should be established[394].

The court of arbitration gradually turned into a constitutional court. To expand the jurisdiction of the Court of Arbitration, changes were made during the revision of the 1988 Constitution and with the special law of 15 January 1989, as well as the revision of the 2007 Constitution. In such a way that the "Constitutional Court" and its general powers are stated in 142 of the Constitution. With these changes, the authority to review the compliance of laws with the Constitution was delegated to the Constitutional Court[395].

4.2.4.3.1 Structure of the Belgian Constitutional Court

The Constitutional Court has 12 lifetime members, divided into two groups of six members: The French language group and the Dutch language group. According to Article 151 of the Belgium Constitution, are 6 members in each group. The king appoints the members of the Constitutional Court, but the king must choose these members from among the lists prepared by the Senate and representatives[396].

---

393 The Belgian Constitution, 2007, Art.144, *available at:* https://www.partylaw.leidenuniv.nl/party-law/4c8b5e51-c490-454c-8582-16387287acdc.pdf (last visited on 29/08/ 2023).

394 B. Halvarsson, "Report on Local Democracy in Belgium" Council of Europe,2008 *available at:* https://rm.coe.int/report-on-local-democracy-in-belgium-strasbourg-20-22-may-2003-/1680718ec1 (visited on 18/09/2023).

395 J. Goossens and M. Decock, "Belgium" in Luis Roberto Barroso and Richard Albert (eds) *The International Review of Constitutional Reform* 32 (The Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism, 2020).

396 The Constitutional Court of Belgium, 2014, *available at*: https://www.const-court.be/public/brbr/e/brbr-2014-001e.pdf (visited on 12/10/2023).

Members must be at least 40 years old and have 5 years of experience as a high-ranking judge of the State Council, the Supreme Court, or a law professor. Of course, people with a history of at least 5 years of membership in the House of Representatives or the Senate, the City Council, or the province are also qualified to be members of the Court. The independence of the Belgian Constitutional Court is guaranteed by several mechanisms: first, according to Article 152 of the Constitution, membership is for life, but members can apply for retirement at the age of seventy[397].

The advantage of lifetime membership is that it provides immunity and independence for the members, but the old age of the members may distance the Constitutional Court from the developments of the time and the requirements of the day and cause it to stagnate. Second, the system of banning the collection of jobs is also strictly regulated and members cannot have any other responsibilities or professional employment. This condition eliminates the possibility of accumulation of power and privileges among the members of the Constitutional Court. Also, it is not possible to guarantee the principle of neutrality without the prohibition of gathering of businesses. Third, judges of the Constitutional Court cannot be dismissed or transferred. But exceptionally, in the case of a serious disciplinary violation, they can be removed by the decision of the general board of the court. Finally, it can be said that despite some weaknesses, the above three mechanisms are effective to a large extent in establishing the independence of the Belgian Constitutional Court[398].

4.2.4.3.2 Powers of the Belgian Constitutional Court

Article 55 of the Special Law of 1989 states that the Constitutional Court operates as a single branch with seven judges. In addition to the two presidents of the language groups present in all lawsuits, the rest of the judges also take turns in the proceedings and decide based on the majority's opinion. At the request of two presidents or two judges, important lawsuits are heard in the general panel with the presence of 12 members of the Constitutional Court. Decisions are made with a three-fourths majority. In case of a tie, the opinion of the court's chairman will prevail. The meeting

397 C. Behrendt, "The Belgian Constitutional Court" in A. Von Bogdandy, P. Huber and C. Grabenwarter (eds) *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* 73 (Oxford University Press,2020)

398 B. Opeskin, "Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges" 35 *Oxford Journal of Legal Studies* 630 (2015).

minutes are also considered confidential, and the rival and minority opinions are not included[399].

According to Article 35 of the Special Law of 1989, the court can hire assistants as lawyers or secretaries to carry out its affairs. The number of assistants should not exceed 24 people, and equality between French and Dutch speakers should be observed in their selection. They must have a legal education and be at least 25 years old. According to articles 36 and 37 of the special law, they are selected through a special exam. Moreover, the Constitutional Court has two secretaries and several administrative members who perform administrative tasks such as bookkeeping, secretarial work, translation, accounting, and computer work. According to Article 43 of the special law of 1989, the appointment and dismissal of administrative employees is within the court's jurisdiction. The appropriations necessary for the functioning of the Constitutional Court are also provided annually in the budget law by the federal legislature[400].

The procedure of the Constitutional Court is regulated by the special law of 1989. Proceedings in the court are basically arbitration. First, a case may be raised in the court in the form of a request for revocation, which may be made by any authority designated by law or any person with justifiable interests (beneficiary), and second, whenever the court may question the application or refer the non-compliance of the implemented law with the Constitution to the Constitutional Court[401].

As with many constitutional judicial systems, the judgments of the Belgian Constitutional Court are final and non-appealable. But the legal effects of the judgments of the Constitutional Court are not the same. According to Article 9 of the Special Law of 1989, the effects of opinions issued in the context of the annulment process are absolute, that is, if the Constitutional Court declares a law to be invalid in whole or in part, this annulment will be valid as soon as it is published in the official

399 Lavrysen, "The Belgian Constitutional Court and the separation of powers" in 50th *Anniversary of the Constitutional Judiciary in the Republic of Macedonia* 2 (Constitutional Court of the Republic of Macedonia, 2014)

400 L. Lavrysen and A. S. Vandaele, "The Legal Consequences of Constitutional court Decisions in Belgium: Judgment in Cases of Actions for annulment. Trilateral Meeting between the Czech, Latvian, and Belgian Constitutional Courts" in *The Trilateral Meeting Between the Czech, Latvian and Belgian Constitutional Courts* 4 (Constitutional Court of Belgium, 2019)

401 *Supra* note 412 at 7.

newspaper. It is a sealed matter, and all national and local authorities are required to comply with it[402].

According to articles 29 and 30 of the special law, the effects of opinions issued in the framework of the fundamental question process are relative. That is, only the main court hearing is required to follow the ruling issued by the Constitutional Court. Despite the court's ruling, the contested law has not lost its enforceable aspect and continues to exist in the legal order; the referring court does not have the right to enforce it. Therefore, other courts are not required to follow the decision of the Constitutional Court[403].

In conclusion, the Belgian Constitutional Court has good lessons for Afghanistan in many ways: despite its relatively short life, this court has been able to take advantage of various global models and pay special attention to its native litigants, which include a complex linguistic and regional structure such as Afghanistan, to achieve good functions in the basic monitoring process. The general model of basic proceedings in Belgium should be considered a combination of the European model and the American model. Because, on the one hand, the Constitutional Court is defined outside of the independent and tripartite power, and on the other hand, its procedure, structure, and organization are in the form of a court. Especially considering the necessity of the presence of judges among the members of the court, it can be considered as an institution with a judicial function. But it is not a court in the judicial system, and it is not an appeal authority of ordinary courts. Therefore, in the end, it belongs more to the European model.

Considering the historical requirements of the formation of this court, it can be seen that a limited jurisdiction has been considered for it. As stated, its area of jurisdiction is limited to resolving conflicts related to the area of jurisdiction of the federal government and regions and language communities with each other and, on the other hand, protecting the fundamental rights of citizens, which is done through the adaptation of laws and regulations to the constitution. The monitoring process is retrospective and progressive. The guarantee of the court's independence has been

---

402 B. Peeters, "European Law Restrictions on the Temporal Effect of National Judicial Decisions: The Case of the Belgian Constitutional Court" 29 *EC Tax Review* 108 (2020).

403 P. Peeters and J. Mosselmans, "The Constitutional Court of Belgium: Safeguard of Autonomy of the Communities and Regions" in Nicholas Aroney & John Kincaid (eds) *Courts in Federal Countries: Federalists or Unitarists*? 73 (University of Toronto Press,2017).

provided in a relative form by the lifetime and non-dismissal of the judges. In the end, it should be said that respecting the sensitivities related to the linguistic and identity plurality of Belgium, as well as the detailed and relatively complete proceedings of the Constitutional Court, can be studied and modeled for countries with similar conditions.

4.2.4 Centralized Constitutional Review Model in other Countries

In the above section, we studied three countries, Germany, France and Belgium, which have centralized constitutional review as examples. As mentioned, today the majority of European countries such as Austria, Albania, Belarus, Bosnia and Herzegovina, Bulgaria, and Estonia as well as other countries like South Africa, Namibia, Mozambique, Montenegro, Morocco, Lebanon, Korea, and Jordan have a centralized model of constitutional review[404].

In this section, a few other countries are briefly reviewed as examples.

First, Like Germany, Türkiye has a Constitutional Court. According to the constitution, the Constitutional Court is responsible for reviewing laws passed by the Grand National Assembly of Türkiye as well as executive decisions of the government for compliance with the constitution[405]. In addition, the Constitutional Court is responsible for hearing lawsuits to dissolve political parties, examining individual complaints about violations of fundamental rights, and some cases involving high-ranking government officials Despite its important role, the independence of the court has always been a matter of debate. Its members are appointed by the president and parliament, which has raised concerns about the influence of the executive branch. However, in recent years, the court has tried to highlight its judicial independence by protecting citizens' human rights[406].

Second, Indonesia, like European countries, has a centralized model of constitutional review. According to the constitution of Indonesia, the Constitutional Court is responsible for overseeing the implementation of the constitution. The most important duties of this court are to review the compliance of laws passed by parliament with the constitution, interpret the constitution, resolve electoral disputes, and consider

404 Council of Europe, Venice Commission official website, *available at*: https://www.venice.coe.int/webforms/courts/ (last visit 24/03/2025).

405 The Constitution of Turkey (1982) art. 148.

406 Y. Hazama, “From activism to resilience: the Turkish constitutional court in comparative perspective” 24 *Turkish Studies* 573 (2023).

requests for the dissolution of political parties[407]. Furthermore, the independence and impartiality of the Constitutional Court in Indonesia have been questionable. Although it has issued rulings in some cases that have strengthened civil rights and democracy, allegations of corruption against some of its judges have affected public confidence in it. However, the institution has played an important role in upholding the rule of law and protecting citizens' rights[408].

Third, the Italian Constitution entrusts the Constitutional Court with the jurisdiction to review the constitutionality of laws and, in some cases, the constitutionality of treaties. It also examines allegations or complaints of treason or constitutional violations against the President and other high-ranking officials[409]. The Constitutional Court consists of 15 members appointed jointly by the President, the Supreme Court, and Parliament, which to some extent maintains a balance between the three branches of government[410].Despite the important role of the Italian Constitutional Court in safeguarding the constitution, it has faced challenges such as the complexity of the case process and its susceptibility to political developments. However, the institution has played an important role in protecting citizens' rights and preserving the structure of the Italian Republic[411].

Fourth, Austria was the first country to establish a constitutional court in 1920. According to the constitution, it has the authority to review the constitutionality of laws, resolve disputes between the federal government and the states, and hear complaints from citizens about the role of their fundamental rights[412]. Despite its important role in ensuring the rule of law, the separation of powers, and the protection of citizens' rights, there are debates about the political influence on its rulings. It therefore plays an important role in maintaining democracy[413].

Having briefly reviewed these four countries, the mixed model of constitutional review is now studied in the next section.

---

407 The Constitution of Indonesia (1945) art. 24C.

408 S. Isra and P. M. Faiz, "The Indonesian Constitutional Court: An Overview" 12 *Brill's Asian Law Series* 82 (2024).

409 The Constitution of Italy (1947) art. 134.

410 *Id*., art. 135.

411 F. Musella and L. Rullo, "The Italian Constitutional Court under stress. How to respond to political inefficiency" 25 *European Politics and Society* 486 (2023).

412 The Constitution of Austria (1920) art. 144-147.

413 C. Bezemek, " A Kelsenian model of constitutional adjudication: The Austrian Constitutional Court" 67 *ZOR* 118 (2012).

4.3 Mixed Constitutional Review Model

Most countries have adopted the European model and sometimes the American model. However, some countries adopted a mixed form of constitutional review. The mixed constitutional review model is the third type; when judicial authorities review one type of legislation and other judicial institutions review another type of legislation, a mixed model is obtained. Latin American countries have a hybrid model[414].

For example, in the Republic of Colombia, regarding the protection of the fundamental rights contained in the constitution, the American decentralized model has been accepted, and according to Article 86 of the Colombian Constitution, any person whose fundamental rights have been violated or threatened to be violated, It can request the protection of these rights from courts, and the judge of these courts can issue any order that they deem necessary to prevent these fundamental rights; On the other hand, the Constitutional Court of Colombia was established in 1991, and it deals with public requests for non-compliance of laws with the Constitution, direct supervision of certain types of laws, including presidential decrees in a state of emergency, laws that lead to the formation of the Constituent Assembly or holding Referendum is in charge of the laws approving the treaties and related laws, and therefore, in addition to the centralized model, it has adopted the decentralized model of constitutional review[415].

In addition to the three constitutional review models (American, European, and hybrid constitutional review models) described, the commonwealth countries have a special type of constitutional review that differs from these models. In these countries, the constitutional review is centralized and under the jurisdiction of the highest court in the judicial hierarchy, composed of ordinary judges. The supervision of the constitution in these countries is a priori, and there is also the possibility of posterior. Also, the decisions of the court can be applied to everyone. For example, in the

414 *Supra* note 274 at 11.

415 N. Nggilu, M. Riyldi et. al., "Judicial Review of Constitutional Amendments: Comparison Between India, Germany, Colombia, and Relevancy with Indonesia" 8 *Lex Scientia Law Review* 277 (2024).

Commonwealth of Australia, the "High Court of Australia", established under Article 71 of the Australian Constitution, has the power of constitutional review[416]

In some countries, other institutions, such as the National Assembly, the Parliament, or a special legislative body, have the authority of constitutional review. For example, the Republic of Finland is one of these countries where the "Constitutional Committee," according to Article 74 of the Constitution of Finland, as one of the institutions affiliated to the Parliament, reviews the compliance of laws and regulations with the Constitution. It should also be noted that in Article 106 of the Constitution of Finland while specifying the supremacy of the Constitution, it is stipulated that if the implementation of a law is in clear conflict with the Constitution, the courts are obliged to respect the supremacy of the Constitution, which of course It does not mean that the law is null and void, and only in these cases, the disputed law is set aside[417].

Furthermore, Colombia also has a mixed or hybrid model of constitutional review. According to the Colombian Constitution, ordinary courts can hear requests to protect constitutional rights. Subsequently, the Constitutional Court is responsible for reviewing the decisions of these courts[418].

As a result, constitutional review can be divided into three general models and some other exceptional methods.

4.3.1. **Attributes of Mixed Constitutional Review Model**

In the mixed constitutional review model, ordinary courts and a specialized court or body, such as a constitutional court, can review laws for constitutionality. This combination allows for greater flexibility in the exercise of constitutional review, as it allows for both the possibility of assessing laws in the normal judicial process and for a specialized body to centrally decide on whether laws are unconstitutional[419].

---

416 M. Stubbs, "A Brief History of the Judicial Review of Legislation under the Australian Constitution" 40 *Federal Law Review* 238 (2019).

417 T. Ojanen, "Constitutional amendment in Finland" in Xenophon contiades (ed) *Engineering Constitutional Change* 98 (Routledge,2012).

418 L. E. Nagle, "Evolution of the Colombian Judiciary and the Constitutional Court" 6 *Indian International & Comparative Law Review* 84 (1995).

419 Y. Roznai, "Introduction: Constitutional Courts in a 100-Year Perspective and a Proposal for a Hybrid Model of Judicial Review" 14 *The Vienna Journal on International Constitutional Law* 366 (2020).

Another attribute of the mixed constitutional review model is the increased efficiency of constitutional review. In some countries, such as Portugal, both ordinary courts have the power to set aside unconstitutional laws, and the Constitutional Court can annul unconstitutional laws[420]. The Portugal constitution describes that "In matters that are submitted for judgment the courts may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein.[421]"

Additionally, in this model, in some countries, if a court, during hearing a case, believes that a law is inconsistent with the constitution, it can refer the matter to the constitutional court. This feature prevents arbitrary judicial review[422]. The Spanish Constitution states that if the judiciary determines that a law is unconstitutional in the course of a lawsuit, it can refer the matter to the Constitutional Court[423].

However, the hybrid model also has challenges, including the possibility of conflict between the decisions of ordinary courts and the Constitutional Court. This may delay the administration of justice or create ambiguity in the interpretation of laws[424]. To solve this issue, countries with mixed models have tried to find a solution. For example, the Mexican constitution states that if courts encounter unconstitutional laws, they must refer them to the Supreme Court of Justice of the Nation[425].

From the above discussion of constitutional oversight models, it can be concluded that each country should choose a model based on its actual circumstances. The effectiveness of the mixed model will be less in countries with weak judicial systems such as Afghanistan.

The constitutional review models can be shown by the chart as follows:

420 J. D. S. Ribeiro, "Constitutional Court as Positive Legislators" 6 (International Academy of Comparative Law, 2010).

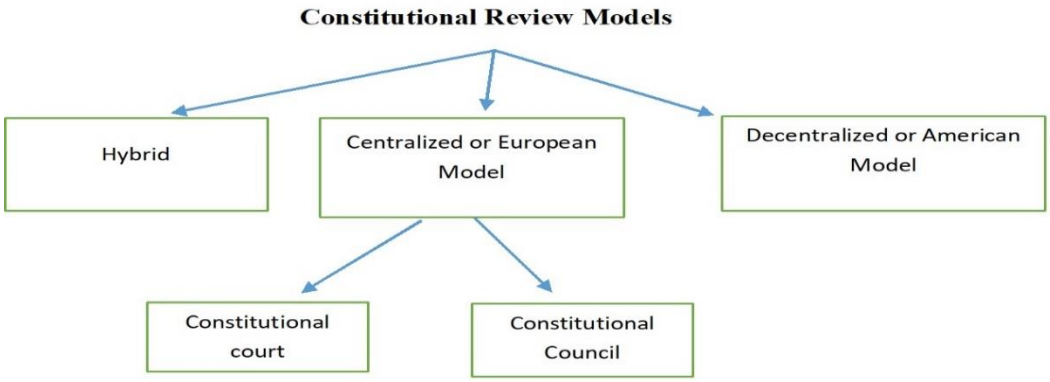
421 The Constitution of Portugal art.204.

422 K. S. Rosenn, "Judicial Review in Latin America" 35 *OHIO State Law Journal*

423 The Spain Constitution art 163 (1974)

424 G.D.A.Ribeiro, "Judicial Review of Legislation in Portugal: Genealogy and Critique" in F. Biagi, J. O. Frosini and J. Mazzone (eds) *Comparative Constitutional History* 204 (2020)

425 The Constitution of Mexico art. 107.



5. Chapter Summary

In summary, creating higher institutions to protect the principles of the constitution and the fundamental rights of citizens is one of the innovations of contemporary legal systems. Today, most countries have set aside a place for Constitutional Review. The reason for this should be found in the principle of "constitutional supremacy". Despite the differences, the method of constitutional review mechanisms in most countries has many common features that allow them to imitate and adapt to each other. As studied in general, there are three models: First, the decentralized or American model with posterior and judicial methods. In this model, the supervisory body depends on the judiciary, like the USA, India, and Canada. Second, the European or centralized model where the supervisory body is independent and not dependent on any of the three powers. This institution can have a judicial aspect, like a Constitutional court in Germany, Belgium, Turkey, Syria, and Indonesia, or a political institution, like the Constitutional Council in France and Lebanon. Third, the mixed or hybrid method in this method is that the Constitutional Review body is independent of the three powers. However, some members must be selected from among the judges, and the proceedings in this court are completely based on the judicial method, like Portugal, Colombia, South Korea, and Egypt.

In the following chapter, the role of the Supreme Court in Implementing Constitution in Afghanistan from 2004 to 2021 has been discussed in detail under chapter four i.e., “Role of the Supreme Court in Implementing Constitution in Afghanistan (2004-2021)”.

Chapter 4

The Role of Competent Institutions in Constitutional Review in Afghanistan (2004-2021)

1. Introduction

Afghanistan has had an unstable legal system due to non-democratic systems and crises caused by imposed wars and internal conflicts[426]. During a century the country witnessed numerous constitutions and different forms of political systems, from the monarchy and communist republic to the Islamic State of Mujahidin, the Islamic Emirate of Taliban, the Islamic Republic, and finally, the Islamic Emirate again in 2021[427].

According to the 2004 Constitution[428], the constitutional review was provided to the highest judicial institution (Supreme Court) to review the constitutionality of the ordinary laws, legislative decrees, and international treaties and conventions. The legal system of Afghanistan has adopted the judicial model of constitutional review. However, besides this particular task, the 2004 Constitution requires the ICOIC to oversee the implementation of the Constitution[429]. The ambiguity of the 2004 constitution caused severe differences of opinion among Afghan jurists regarding the institution in charge of interpreting the constitution[430].

On the one hand, the Supreme Court was responsible for reviewing the compliance of the laws with the Constitution and their interpretation. On the other hand, ICOIC was also responsible for overseeing the implementation of the Constitution. For this reason, these two institutions' jurisdiction and scope of work faced ambiguities, which is known as one of the weak points of the 2004 Constitution. In some countries with a judicial model of constitutional review, individuals can refer to the judiciary or constitutional court to claim the violation of their fundamental rights. However, in Afghanistan, according to the 2004 constitution, the Independent Human Rights Commission of Afghanistan (AIHRC) was established to monitor, improve and

426 A. De Lauri, "Law in Afghanistan: A critique of post-2001 reconstruction" 6 *Journal of Critical Globalization Studies* 8 (2013).
427 *Supra* note 66 at 62
428 *Supra* note 17 art.121.
429 *Id*., art. 157.
430 E.M. Ahmadi, "Foundations of legislation in Afghanistan" in Persian "Mabani Qanoon Guzari dar Afghanstan"118 *Marefat* 162 (2007).

protect human rights.[431] Any person could refer and complain to AIHRC in case of violation of their human rights. The AIHRC could refer instances of human rights violations to legal authorities and assist in defending their rights[432]. Therefore, the legal system of Afghanistan had several parallel institutions responsible for monitoring the observance of the constitution in the field of legislation, implementation, and human rights of citizens.

After this introduction, the second section of this chapter studies the Supreme Court and its performance. First, it studies the position of the Supreme Court and its role in the constitutional review process from 2004 to 2021. Second, the cases related to the Constitution are studied, and the Supreme Court is reviewed and given an opinion. Finally, it briefly analyzes the function of the Supreme Court concerning the supervision of the Constitution in the light of doctrinal sources and interviews.

The third section of this chapter discusses the ICOIC's structure and functions and then analyzes only a few cases the ICOIC has investigated between 2009 and 2021.

2. Role of the Supreme Court in Implementing the Constitution of Afghanistan (2004-2021)

The seventh chapter of the 2004 constitution, from articles 116 to 135, is dedicated to the judiciary structure and duties. The judiciary comprised the Supreme Court, Courts of Appeal, and Primary Courts. The law regulated the judiciary's organization and jurisdiction.[433] The Supreme Court was the highest judicial body and was at the head of the judiciary[434]. The Constitution guarantees the judiciary as an independent pillar of the government. The independence of the judiciary can be understood from the principle of the rule of law, which is one of the principles of the Constitution[435].

The Supreme Court was composed of nine members, whom the President elected from among those with legal qualifications through the approval of the *Wolesi Jirga* for ten years. To preserve the judiciary's independence, the Constitution prohibited the dismissal of the members of the Supreme Court until the end of their term of office

---

431 *Id*., art. 58.

432 Law on the Establishment, Duties, and Competencies of the Afghanistan Independent Human Rights Commission, official gazette no. 855, 2005, art. 23.

433 *Supra* note 17 at art. 116.

434 L. Armytage, "Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War" 67 *Heidelberg Journal of International Law* 186 (2007).

435 R. Mostchaghi, *Max Planck's Guide to the Organization and Jurisdiction of Afghan Courts* (Max Planck Institute for Comparative Law and International Law, Heidelberg, 2009).

without legal cause.[436] Supreme Court justices were accused of crimes if more than one-third of the members of the *Wolesi Jirga* requested the trial of one justice. Nevertheless, the *Wolesi Jirga* approved this request with a majority of two-thirds of all members. The Supreme Court dismissed the accused, and a special court was assigned to investigate the case.[437]

The Supreme Council headed the Supreme Court and included the following divisions: General Criminal Division (Dewan), Public Security Division, Civil Law and Public Law Division, Commercial Division, and Military Crimes and Crimes Against Internal and External Security Division. A member of the Supreme Court headed a division that was appointed based on the approval of the Supreme Council.[438]

Moreover, the Supreme Court also had judicial advisors. The advisors should have at least 15 years of actual judicial service experience.The law has not specified the [439] number of advisers and has given the Supreme Court the authority to consider their number when setting the judiciary's budget. This issue could create grounds for abuse. The advisers analyzed and evaluated the cases brought to the Supreme Court, then prepared a report and presented it to the judicial session.[440]

The 2004 Constitution describes the judiciary's jurisdiction, which includes handling all lawsuits filed by natural or legal individuals, including the government, as plaintiffs or defendants, by the provisions of the law.[441] Furthermore, the Constitution states that no law can, under any circumstances, exclude a case or an area from the scope of jurisdiction of the judiciary as defined in this chapter of the 2004 constitution and assign it to another authority.[442] The constitution stated the jurisdiction of the judiciary in general. Likewise, the 2004 Constitution guaranteed the Supreme Court the power of constitutional review.[443] Accordingly, the Supreme Court had jurisdiction to examine the conformity of laws, legislative decrees, interstate treaties,

436 *Supra* note 17 art. 117.
437 *Id*., art. 127.
438 Afghanistan Judiciary Structure and Jurisdiction Law, official gazette no. 1109, 2013, art. 42.
439 *Id*., art. 22.
440 *Id*., art. 45.
441 *Supra* note 17 art.120.
442 *Id*., art. 122.
443 *Id*., art. 121.

and international covenants with the Constitution and their interpretation based on the request of the government or the courts, by the provisions of the law[444].

Article 121 indicates two important norms: first, examining the compliance of legislative decrees, interstate treaties, and international covenants with the Constitution and their interpretation. Second, based on this article, the jurisdiction of the Supreme Court is conditional to the request of the government or the courts. This principle of the constitution shows that the review of the compliance of legislative documents with the constitution was subject to the request of the government or the courts. The Supreme Court did not have this jurisdiction on its initiative or at the request of the people[445].

Moreover, article 121 does not mention the interpretation of the Constitution. The topic under discussion is the examination of the compliance of the laws with the Constitution and their interpretation. Because the word (them) in this article is equal to (laws, legislative decrees, inter-state treaties, and international covenants), not the constitution, if it is argued that the constitution is one of the laws, then the authors of the constitution should have had such legal literacy that they would at least explain the name of the constitution in this article[446]. The Supreme Court's review of ordinary laws is based on judicial and posterior reviews. However, some jurists interpret this article as if the interpretation of the Constitution is one of the competencies of the Supreme Court[447]. This issue has caused widespread dispute[448].

In posterior review, the request for review is limited to the government and the courts, and individuals cannot request a review, and it is a retrospective review. Therefore, laws that contradict the Constitution may implemented for years. As a result, individuals lose their rights because of the shortcomings of this kind of review[449]. Besides, the Constitution has established ICOIC in Article 157 to monitor the implementation of the Constitution. This issue caused more theoretical differences among jurists. Because the text of Article 157 is vague, it says that ICOIC is

444 *Supra* note 115 at 160.

445 D. F. Batchelor, "Renewal and Reform for a Post-Karzai Afghanistan: A Critical Appraisal of the 2004 Constitution" 5 *ICR Journal* 31 (2014).

446 *Supra* note 175 at 187.

447 M. Lau, "The Independence of Judges Under Islamic Law, International Law, and the New Afghan Constitution" 64 *Heidelberg Journal of International Law* 924 (2004).

448 M. J. Hakimi, "The Judiciary and the Rule of Law in Afghanistan" 105 *Judicature* 26 (2021).

449 Q. A. Sadaqat, "Supreme Court and protection of the constitution" in Persian "sterah mahkama wa seyanat az Qanoon-i-asasasi" 1 *Afghanistan Legal Studies Journal* 4 (2006).

established by the President and approved by the *Wolesi Jirga* according to the provisions of the Constitution[450]. The next chapter of this thesis discusses about ICOIC.

Finally, Article 121 is one of the vague articles of the Constitution and has given the Supreme Court minimal jurisdiction in constitutional review. This Article has three significant defects: First, does the Supreme Court have jurisdiction to interpret the Constitution? This issue is ambiguous in this article. Second, does the Supreme Court have the authority to study the government's performance? This article is also vague in this regard. Third, it is unclear whether another institution can become a partner of the Supreme Court's constitutional review jurisdiction[451].

Some scholars believe that entrusting the Supreme Court with the examination of whether laws and other documents comply with the Constitution means that the Court has the authority to interpret the Constitution[452].

The constitution and the law on the judiciary's structure and jurisdiction also state other Supreme Court duties. These are outside the thesis discussion's subject; thus, they would not be discussed in detail. Instead, the independence of the judiciary is briefly studied in the following section.

2.1 Independence of the Judiciary under the Constitution of Afghanistan 2004

The independence of the judiciary and, at the top of it, the Supreme Court is of particular importance due to its special judicial function, which must fulfill its duties in making decisions regardless of political tendencies and without pressure[453]. The importance of judicial independence and the right of individuals to a fair, public, and impartial trial by an independent court has been considered since the beginning of the development of human rights documents and essential documents such as the

450 A. Y. Adili, R. Sorush, and S. A. Sadat, "The Stagnation of Afghanistan's State Institutions: Case studies of the Supreme Court, Senate, Provincial Councils and the Constitutional Oversight Commission" (The Afghanistan Analysts Network, 2021).

451 G. Hashimi, "Defending the Principle of Legality in Afghanistan: Toward a Unified Interpretation of Article 130 to the Afghan Constitution" 18 *Oregon Review of International Law* 197 (2016).

452 *Supra* note 114 at 27.

453 M. Christensen, "Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies" 4 *The Berkeley Journal of Middle Eastern & Islamic Law* 102 (2011).

Universal Declaration of Human Rights[454] In addition, the International Covenant on Civil and Political Rights (1966) has specified it.[455]

The 2004 constitution had no clarity about the principle of separation of powers. However, accepting the principle of separation of powers is inferred from the constitution's chapters (Chapter IV: Government, Chapter V: National Assembly, and Chapter VII: Judiciary). Moreover, the constitution emphasized the independence of the judiciary.[456] Research conducted on judicial independence shows that judicial independence in Afghanistan has been weak, but individual judicial independence has been weaker than organizational judicial independence primarily due to the excessive authority of the president and other factors[457]. Although the constitution guarantees the independence of the judiciary, this independence is relative because the president had a stronger position than the judiciary. The president's excessive authority affects the institutional and individual independence of the judiciary[458] .

A transparent method of choosing the Supreme Court members can guarantee this authority's independence[459]. The 2004 Constitution of Afghanistan gives the president the power to appoint the president and members of the Supreme Court. However, the President's appointment of Supreme Court justices raises the possibility and doubt of the impartiality of the Supreme Court[460]. Therefore, the 2004 Constitution makes the president's appointment subject to the approval of the *Wolesi Jirga* to remove this doubt.[461]

Despite a severe mechanism for appointments in the Supreme Court, in practice, the appointed judges still needed to meet the conditions stipulated in the constitution or did not respect the duration of their duties. The president mainly controlled the appointment and dismissal of judges in the lower courts. The competence of the

---

454 The Universal Declaration of Human Rights, 1948, art. 10.

455 The International Covenant on Civil and Political Rights, 1966, art. 14.

456 The Constitution of Afghanistan 2004, Art. 116.

457 H. Moazenzadegan, S. M. Hoseini, and A. Arsin, "A Qualitative Assessment of Judicial Independence in the Islamic Republic of Afghanistan" in Persain "sanjesh kifi esteghalal ghazayi dar jamehori eslami afghanstan" 25 *The Quarterly Journal of Public Law Research* 117 (2023).

458 A. Khordad, "Judicial independence in Afghanistan: Domestic and international view on judicial independence" in Persain "esteghalal ghazayi dar afghanstan: didegah dakhli ve bin olmollli dar moord esteghalal ghazayi" 7 *Justice* 108 (2020).

459 M.L. Volcansek "Appointing Judges the Europe Way" 34 *Fordham Urban Law Journal* 367 (2007).

460 *Supra* note 184 at 18.

461 *Supra* note 17 atr.117.

president influenced the formation of the entire judiciary. In addition, the jurisdiction of the courts was limited in some crucial areas[462]. For example, the courts did not have jurisdiction to try the officials of the executive branch. Although the courts' decisions were final, important exceptions gave the president the authority to reduce or pardon punishments, including death sentences. The most problematic of all were the rulings that limited the jurisdiction of judicial review, which, as a result, impairs the capacity of this branch to supervise other branches[463].

In addition to the method of appointing justices, the method of removing them has a significant influence on their independence or dependence if the justices know that their removal is simple and the president can remove them whenever, in this case, the justices will consider the demands and wishes of the officials for fear of removal[464]. In this regard, the Constitution of Afghanistan has considered the appropriate method to some extent. The President did not have the authority to dismiss the members of the Supreme Court. One-third of *Wolesi Jirga* members could request the trial of the head or members of the Supreme Court based on the accusation of a crime resulting from the performance of duty or committing a crime [465]. However, the *Wolesi Jirga* had to approve this request with a two-thirds majority of all members. In this case, the accused would be dismissed from duty, and the matter would be assigned to a special court.[466]

The main topic of discussion in this thesis is not the independence of the judiciary. The goal was to perceive what effect the method of appointing members of the Supreme Court had on their independence because the President played a role in their appointment. For this reason, the decisions of the Supreme Court were mainly influenced by the government, especially the President. The following section studies the examples of the Supreme Court's performance under Article 121.

---

462 A.S. Amin, *Judicial Independence in Afghanistan: A Study of the Legal System in Light of International Standards, Islamic Principles and the Afghan Legal Tradition* 112 (Berlin Science Publishing House, Berlin, 2020).

463 *Supra* note 170 at 17.

464 M. M. Mirzaei, "Judicial independence in Afghanistan's legal system" in Persian "esteghalal ghazayi dar nezam hoquqi afghanstan" 3 *Law and policy studies Biquarterly Journal of Religion and Social Sciences* 107 (2023).

465 A. W. Karimi, "The necessity of the National Assembly" in Persian "zarvarat mojals shoraye moli" 4 *Contemporary Thought Quarterly* 31 (2018).

466 *Supra* note 17 art 127.

2.2 The Supreme Court of Afghanistan and Constitutional Review

Although the authority interpreting the constitution was ambiguous, after the constitution's approval from 2004 to 2007, the Supreme Court interpreted the constitution without any clear opposition from the executive branch or the National Assembly[467]. However, the situation changed when the Supreme Court overturned the decision of the *Wolesi Jirga* to disqualify Foreign Minister Rangin Dadfar Spanta. The dispute over the dismissal of Sepenta raised the question for the first time about the jurisdiction of the Supreme Court under Article 121 of the Constitution and the powers of the ICOIC. This issue started disputes about the authority to interpret the Constitution and apply various types or models of constitutional review[468].

Moreover, following the Spenta case, the Afghan National Council approved a law based on which the ICOIC had the authority to interpret the constitution. Although the Supreme Court annulled the ICOIC law, the National Assembly did not accept the court's decision and approved the candidacy for the ICOIC in 2009. This issue complicated the protection of the constitution and constitutional review in Afghanistan[469].

The National Assembly of Afghanistan has always considered the ICOIC the only body interpreting the constitution. However, the executive and the Supreme Court considered the judiciary the only body to interpret the Constitution and implement constitutional review. Two institutions interpreted the Constitution and were responsible for constitutional review. This dual structure of protection of the constitution had always created severe political crises by forming questions about the interpretation of the constitution and appointing or dismissing one of the senior government officials. In many cases, this issue has been the cause of weakening the political stability of the country and weakened the legitimacy and institutional authority of the protection of the Afghan constitution[470].

---

467 C. Wang, "Rule of law in Afghanistan: Enabling a constitutional framework for local accountability" 55 *Harvard International Law Journal* 220 (2014).

468 *Supra* note 20 at 9

469 C. B. Duryea, "The Roots of Collapse: Imposing Constitutional Governance" 146 (Penn Carey Law: Legal Scholarship Repository, 2022).

470 A. Y. Adili and E. Qaane, "The Constitutional Oversight Commission in a Standoff with President Ghani: Defending their independence or covering up mistakes?" *Afghanistan Analysts Network*, 2017 *available at*: https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-constitutional-oversight-commission-in-a-standoff-with-president-ghani-defending-their-independence-or-covering-up-mistakes/ (last visited on 17/ 08/2023).

The gap in the constitutional review mechanism had weakened the structure of the rule of law[471]. This problem needed a suitable solution, but no appropriate action occurred before the Islamic Republic's fall in 2021. Therefore, a proper constitutional review mechanism is urgently needed to protect the Constitution and prevent political crises and the rule of law. The following subsections discuss some cases to explain the matter as much as possible.

2.2.1 Case of No-Confidence Vote of Afghanistan's Foreign Minister in 2007

On May 12, 2007, the *Wolesi Jirga* passed a no-confidence vote on Rangin Dadfar Spanta, the Minister of Foreign Affairs of Afghanistan. Earlier, the *Wolesi Jirga* had given a no-confidence vote for Akbar Akbar, the Minister of Repatriation of Afghan Immigrants. The impeachment of these two Afghan cabinet ministers took place after Iran implemented the plan to deport illegal Afghan refugees from its territory[472]

However, what was significant in these developments and could affected these positive aspects of the democratic process in Afghanistan was the statement that the office of the President of Afghanistan issued after Spanta's no-confidence vote. Based on this statement, the President of Afghanistan accepted the no-confidence on Akbar, but he did not accept the vote of no-confidence on Spanta and asked the Supreme Court to express its opinion regarding the doubts concerning the vote of no confidence by the Afghan *Wolesi Jirga* to Rangin Dadfar Spanta, the minister of foreign affairs[473].

The statement of the presidential office stated that the President of Afghanistan, considering the direct working relationship of the Afghan Minister of Refugees with the issue of the impeachment of the, "has full respect for the decision of the *Wolesi Jirga* to express a vote of no confidence." Nevertheless, he raised two questions about the vote of no confidence in the foreign minister:

1. "Is it justified to impeach the Minister of Foreign Affairs in a matter that is not directly related to his work?"

---

471 S. Worden and S.Q. Sinha, "Constitutional Interpretation and the Continuing Crisis in Afghanistan" 3 (United States Institute of Peace, 2011).

472 C. Gall, "Afghan Legislators Vote Out Foreign Minister" New York Times 13 May 2007 *available at*: https://www.nytimes.com/2007/05/13/world/asia/13kabul.html (last visited 15/09/2023).

473 M. Mateen, "Wolesi Jirga's lack of trust in Spanta and Karzai's reaction" *BBC Persian* 13 May 2007 *available at*: https://www.bbc.com/persian/afghanistan/story/2007/05/070513_v-spanta-karza-analysis (last visited on 28/9/2023).

2. "What is the clarification and interpretation of the country's constitution regarding the impeachment of the two-time Minister of Foreign Affairs?"[474]

To explain the issue, it is necessary to describe the case briefly. The *Wolesi Jirga* had stated that since these two do not defend their functions in preventing the forced departure of immigrants from Iran, the *Wolesi Jirga* would approve the vote of no confidence for these two ministers[475]. Both ministers were called to the *Wolesi Jirga* session and faced many questions about their actions to prevent the deportation of immigrants from Iran and what measures they had taken to welcome the deported immigrants. Finally, the statements of these two ministers apparently could not satisfy the members of the *Wolesi Jirga*, and it was decided that they both would be impeached in the next meeting[476].

The *Wolesi Jirga* gave a vote of no confidence to Akbar Akbar due to his poor performance regarding the forced deportation of immigrants from Iran. Akbar Akbar's qualification as Minister of Immigration was rejected by receiving 136 votes against, 54 votes in favor, and five invalid votes, while the final announcement of rejecting or confirming the foreign minister's qualification was postponed to the next day. Foreign Minister Spenta received 124 votes against, 67 for, and one questionable vote. According to the principles of the internal duties of the *Wolesi Jirga*, each cabinet minister must receive at least 125 votes against the removal of confidence. Controversy arose over a questionable vote on Spenta's continuation in the Foreign Ministry. Supporters of Spanta in the *Wolesi Jirga* said that this vote was invalid and that he should remain a foreign minister with a difference of one vote, but his opponents said that this vote was not invalid and indicated the voter's opposition. If this vote counted among the dissenting votes, Spenta's dissenting votes would be 125, leading to Spenta losing confidence in *Wolesi Jirga* as Foreign Minister[477]

---

474 Z. Daryai, "War in the Dark; Where will the fate of the Independent Commission for Overseeing the Implementation of the Constitution lead?" Etilaatroz 01/08/2017 *available at*: https://www.etilaatroz.com (last visited on 30/ 11/ 2023).

475 F. Foschini, "Parliament sacks key ministers: Two birds with one stone?" *Afghanistan Analysts Network available at*: https://www.afghanistan-analysts.org/en/reports/political-landscape/parliament-sacks-key-ministers-two-birds-with-one-stone/ (last visited on 1/11/2023).

476 H. Kamali, "The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years"14 (Hamida Barmaki Organization for the Rule of Law, Kabul, 2015).

477 *Supra* note 57 at 21.

In its opinion, the Supreme Court stated that firstly, according to the 2004 Constitution, there must be a "convincing reason"[478] for the vote of no confidence, and secondly, to what extent was the second round of *Wolesi Jirga* voting for the foreign minister "legitimate and legal"?[479]

After demanding the documents from the Ministry of Foreign Affairs and studying them, the Supreme Court concluded: The documents show that the Ministry of Foreign Affairs has been in constant contact with the Iranian government. However, the Ministry of Foreign Affairs of Afghanistan does not have a direct role in controlling the Iranian government. Consequently, the *Wolesi Jirga* has no convincing reason for his vote of no confidence. Based on the regulations of the internal duties of the *Wolesi Jirga*[480], the Supreme Court argued that the presence and participation of new members during the second voting made this voting illegal[481]

This case shows that the Supreme Court has argued based on the Constitution and the internal regulations of the *Wolesi Jirga* in this context and has considered the vote of no confidence contrary to the accepted principle of the Constitution and the internal regulations of the *Wolesi Jirga*. *Wolesi Jirga* did not accept the court's decision because there was a perception that the Supreme Court issued this decision under the influence of the government.

Correspondingly, this case demonstrates that due to the instabilities in Afghanistan and the lack of the rule of law and democracy, the government institutions did not trust each other. Institutional relations were not legal relations. At the same time, this indicated the ambiguity of the Constitution in the context of the final authority for resolving constitutional disputes.

2.2.2 Case of Conflict between the National Assembly and the Supreme Court on the Law of the ICOIC

This ICOIC officially began its work on 24 July 2010 due to a dispute over the commission's law between the government and the National Assembly. The government was not interested in forming the ICOIC because it considered the judicial review carried out by the Supreme Court to be in its interest. From 2005 to

478 *Supra* note 17 art. 92.
479 *Supra* note 170 at 24.
480 Regulations on the internal duties of the *Wolesi Jirga*, 2013, art. 65.
481 *Supra* note 461 at 26.

2007, the Supreme Court tried to establish its competence through constitutional review and wanted to resolve conflicts between the National Assembly and the government[482]. On the other hand, the representatives in the *Wolesi Jirga* considered the ICOIC the competent authority in interpreting the constitution; *Wolesi Jirga* had set a deadline for the president to introduce the ICOIC's members[483]. Finally, the government prepared the ICOIC's draft law and sent it to the National Assembly for approval; this draft had no interpretation authority. However, the *Wolesi Jirga* amended the relevant article and added the authority of interpretation, among other powers, to the ICOIC[484].

The ICOIC law delegates the interpretation of the constitution's provisions to the ICOIC based on the request of the president, the National Assembly, the Supreme Court, and the government.[485] The government opposed delegating the authority to interpret the constitution to the ICOIC. Consequently, the president vetoed the law. However, *the Wolesi Jirga* overruled the president's veto based on Article 94 of the constitution and re-approved the ICOIC law [486]. The 2004 Constitution Article 94 states that if the president disagrees with the National Assembly's resolution, he can return it to the *Wolesi Jirga* within fifteen days from the submission date, stating the reasons. If the *Wolesi Jirga* approves it again with two-thirds of the votes of all members, the resolution is considered ratified and adequate. The President considered the delegation of authority to interpret the Constitution to the ICOIC was contrary to Article 121 of the Constitution and referred the law to the Supreme Court to review its compliance with the Constitution. The ICOIC Law was the first law referred to the Supreme Court for review[487]

In its decision, the Supreme Court declared several articles of the ICOIC law unconstitutional[488]. The government published the decision of the Supreme Court with the ICOIC law in the official gazette.[489] It is essential to study the opinion of the Supreme Court to see how the Supreme Court analyzed the case.

---

482 *Supra* note 32 at 145.
483 *Supra* note 18 at 140.
484 *Supra* note 55 at 4.
485 *Supra* note 177 art. 17.
486 *Supra* note 464.
487 *Supra* note 34 at 253.
488 A. Shafaee, "Centralism in the 2004 Constitution of Afghanistan" 6 *Nuovi Autoritarismi e Democrazie: Diritto, Istituzion, Societa* 1274 (2024).
489 Afghanistan Supreme Judicial Order no. 5, Official Gazette, No.986, 2009.

The Supreme Court has tried to maintain the authority of interpretation to itself and has stated several reasons in its decision. First, in its opinion, the Supreme Court states that the ICOIC Law[490], which delegates the interpretation of the Constitution to ICOIC, is against the provision of Article 121 of the Constitution. The Supreme Court stated that the historical record of the 2004 constitution drafting process shows that this jurisdiction belongs to the Supreme Court. Since there was another chapter called (the Supreme Constitutional Court) in the draft of the 2004 Constitution, Article 146, besides the other authorities, entrusted this Constitutional Court with the power to interpret the Constitution. During the constitution drafting, when the chapter of the Constitutional Court was removed from it, the competencies of the Constitutional Court in Article 121, which did not exist before, were delegated to the Supreme Court. Subsequently, it is clear that in addition to examining the compliance of laws, legislative decrees, treaties, and international conventions with the Constitution, interpreting all of them is one of the competencies of the Supreme Court[491].

In addition, the Supreme Court states that Article 157 was entered into the Constitution without any amendment in Article 121 by accident on the last day of the *Loya Jirga*. If the goal of the *Loya Jirga* members were to delegate the authority to interpret the constitution to the ICOIC, they would have revised Article 121. Thus, based on Article 121, the constitutional review and interpretation of the constitution is one of the primary duties of the Supreme Court, and ICOIC has to monitor the implementation of the constitution[492]Considering the history of the constitution drafting process, this jurisdiction belonged to the Supreme Court, but the Afghan parliament was against this issue.

Furthermore, the Supreme Court argued similarly; paragraph 4 of Article 8[493] states: "studying the laws in force to find contradictions with the constitution and presenting them to the president and the national council to take measures to resolve them." This paragraph is also in direct conflict with Article 121 of the Constitution because, in the article above, the interpretation of the Constitution and other laws and the

490 *Supra* note 177 art. 8(1).

491 *Supra* note 33 at 207.

492 S. Qazi Zada, "Legislative, institutional and policy reforms to combat violence against women in Afghanistan" 59 *Indian Journal of International Law* 207 (2021).

493 It states: "Examination of existence laws to find contradictions with the constitution and presenting them to the President and the National Assembly for adopting measures to resolve them." ICOIC Law 2009, art. 8 (4).

interpretation of decrees, treaties, and international covenants is the duty of the Supreme Court[494] (Sakhizada, 2020). Everything has been registered with the constitution to clarify the competencies of the Supreme Court. While in the law approved by the parliament based on paragraph 4 of article 8, this authority has been given to the ICOIC.[495]

In addition, the Supreme Court declared some other articles of this law contrary to the Constitution. For example, the Supreme Court declared Article 7 of this law contradicted the Constitution. This article empowered the members of ICOIC to decide on the removal of members of the ICOIC, as they would first decide and then send it to the *Wolesi Jirga* for approval.[496] The Supreme Court recognized this article unconstitutional for the following reasons. First, the Supreme Court argued that the ICOIC is not a company or a commercial institution where members decide to remove a member from membership. Second, the Supreme Court reasoned that the *Wolesi Jirga* is not the executive branch that decides on the membership of the executive branch members. Third, to support its argument, the Supreme Court has given an example of dismissing ministers; they are appointed with the approval of the Wolesi Jirga, but their dismissal is directly under the president's authority. Finally, they relied on Constitution[497] and argued that although the approval of *the Wolesi Jirga* was a condition for appointing these officials, their dismissal and resignation were only under the authority of the President[498].

Fourth, the Supreme Court reasoned that this mechanism that the members of the ICOIC recommend to the *Wolesi Jirga* to revoke the membership of a member is a severe blow to the independence of the ICOIC, and there is a fear that the *Wolesi Jirga* will heavily influence the ICOIC. This reasoning of the Supreme Court was logical because, in this case, the ICOIC would become a subordinate body of the *Wolesi Jirga*.

---

494 F. Sakhizadah, "Supreme Court vs Constitution Commission: Which administration has the authority to interpret the constitution?" Afghanistan Center in Kabul University 03/02/2020 *available at*: https://acku.edu.af/supreme-court-vs-constitution-commission/ (last visited on 20/11/2023).

495 Afghanistan's Supreme Court *Judicial* Order of No. 5, Official Gazette, No.986, 2009.

496 *Supra* note 177 art.7.

497 It states: "the appointment of ministers, the Attorney General, the head of the Central Bank, the head of security, and the head of the Afghan Red Crescent Society with the approval of the *Wolesi Jirga* and their removal and acceptance of their resignations. " The Constitution of Afghanistan 2004, art. 64 (11).

498 *Supra* note 34 at 255.

In the same way, the Supreme Court ruled on paragraph 1 of Article 11, which states: "A member of the ICOIC cannot be arrested, detained, and prosecuted without the consent of the president. The state of obvious crime is excluded from this." The Supreme Court stated that this paragraph is also against the provisions of the Constitution because Judicial immunity is a privilege granted by the Constitution to the President, Parliament members, and judges, and no other person can benefit from these privileges by ordinary laws. It seems that this reasoning of the Supreme Court is not logical because even though Articles 121 and 157 of the 2004 Constitution are ambiguous and even contradict each other, as soon as an institution was considered to monitor the implementation of the Constitution, judicial immunity should also be considered for its members. This issue was forgotten at that stage, but the parliament still had the authority to delegate it[499].

Although neither the Constitution nor the Law on Organization and Jurisdiction of Afghan Courts determines what will happen if the Supreme Court decides that a law or order is not by the Constitution, it seems satisfactory to conclude that in such cases, that law or legislative order has been declared invalid [500]. The exact order as Article 162 of the Constitution states that with the implementation of this Constitution, laws and decrees contrary to its provisions are canceled. This point is explicitly noted in most European countries, which have a particular procedure for checking the compliance of laws with the Constitution. This conclusion is inevitable in all legal systems that cannot rely on the theory of precedence if the supremacy of the Constitution in such cases generally does not create any concrete effect[501] Therefore, the inference and understanding of the Supreme Court in the above decision is that according to Article 121 of the Constitution, these decisions are merely advisory and non-binding[502].

499 M. Arizad, "Comparative Study of the Constitutional Review Mechanism in the Legal System of the Islamic Republic of Afghanistan and Iran" 9 *Social Science Studies Quarterly* 85 (2023).

500 *Supra* note 448 at 68.

501 M.K. R. Afshar, Constitutional Practice and Human Rights 9 (Max Planck Institute for Comparative and International Law, 2007).

502 *Id* at 8.

2.2.3 Case of Law on Diplomatic and Consular Employees

The National Assembly of Afghanistan approved the law on diplomatic and consular employees in 2013.[503] After the law was adopted, the Ministry of Foreign Affairs asked the Supreme Court that paragraph 1 of Article 5 and Article 8 of this law were not by the constitution and requested a review of these articles.[504] The Supreme Court confirmed the inconsistency of these articles with the Constitution.[505]

The law states that persons designated as diplomatic and consular employees can have only Afghan citizenship.[506] This law also states that, with its enforcement, the diplomatic and consular duties of persons with second and third citizenship will end.[507] The Ministry of Foreign Affairs states in its letter that if this law is implemented, in the first step, 25 ambassadors, 50 Afghan diplomats in different parts of the world, and in the next step, 50 employees of the Ministry of Foreign Affairs, whom all have high education and sufficient experience, would have been dismissed and their fundamental rights violated[508].

The Supreme Court argued in its opinion that the Constitution regulates general principles and general rules and that understanding the will of the legislator, its content, and implications is considered important and necessary because every condition, word, and phrase in the Constitution has a special meaning that can be understood by referring to the will of the legislator. Contradicting and adding to the conditions established in the Constitution is not allowed and has no legal validity.[509] The Constitution considers having single citizenship a condition for the following persons: First, according to the Constitution, the president and his deputies must have only Afghan nationality.[510] The president and his deputies must have Afghan citizenship and be born to Afghan parents[511].

---

503 The Afghanistan Law on Diplomatic and Consular Employees, official gazette No.1105, 2013.

504 Afghanistan Ministry of Foreign Affairs Letter No. 498, March 20, 2013.

505 The Afghanistan Supreme Court Resolution No. 20, Official gazette no. 1114, 2013.

506 *Supra* note 516 art. 5 (1).

507 *Id* at art. 8.

508 S. Z. Saeedi, "How Afghanistan's Judiciary Lost its Independence" *The Diplomat* 5 June 2019 *available at*: https://thediplomat.com/2019/06/how-afghanistans-judiciary-lost-its-independence/ (last visited on 14/12/2023).

509 *Supra* note 487.

510 *Supra* note 17 art. 62.

511 S. Pasarlay and Z. Mallyar, "The Afghan Parliament: Constitutional Mandate versus the Practice in the Post-2001 Context" 27 (Afghanistan Research and Evaluation Unit, 2019).

Second, the optionality of the second citizenship is the right of the ministers and delegating the authority to reject or approve it to the *Wolesi Jirga*. The Constitution states that the person appointed as a minister should have Afghan citizenship. If the ministerial candidate has second citizenship, the *Wolesi Jirga* can reject or approve it.[512] The legislator has specified a single citizenship for the minister. However, it was subject to the will and competence of the *Wolesi Jirga* that the president of the country had the authority to introduce a person with dual citizenship as a ministerial candidate to the *Wolesi Jirga*, and the *Wolesi Jirga* had the authority to approve or reject it[513].

The Supreme Court reasoned that except for the above two cases where the constitution stipulates the condition of single citizenship, no such exclusive condition had been established in the case of other high-ranking government officials, including diplomats and counselors. Therefore, according to the constitution, it is clear that the legislature has not considered high-ranking officials, including ambassadors and diplomatic staff; that is, persons with dual citizenship should be appointed to other government duties[514].

The Supreme Court concludes that adding the single citizenship requirement for diplomatic and consular employees, mentioned in the first paragraph of Article 5 and Article 8 of the Law on Diplomatic and Consular Employees[515] is against the Constitution. Therefore, based on the ruling of Article 121 of the Constitution, the Supreme Council of the Supreme Court ruled to cancel the two articles mentioned as inconsistent with the Constitution.

2.2.4 Case of Law on Media

The media law was amended four times from 2005 to 2009 after the establishment of the National Assembly. The National Assembly approved the Fourth Amendment in

---

512 *Supra* note 17 art. 72.

513 A. Athayi, "Report on Citizenship Law: Afghanistan" 13 (Global Citizenship Observatory Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School, 2017).

514 BBC Persian, *Afghan Supreme Court: Afghans with dual citizenship cannot become diplomats*, 2013 *available at*: https://www.bbc.com/persian/afghanistan/2013/04/130415_k04_afghan_diplomatic_law (last visited on 24/11/2023).

515 *Supra* 512 note art. 24.

2007, but the president vetoed the media law amendment[516]. The president considered the first paragraph of article 13 of the media law, which was about the vote of confidence for the head of National TV by *Wolesi Jirga* against the constitution[517].

According to the provisions of the 2004 Constitution, in the event of the President's veto, the *Wolesi Jirga* could approve the vetoed law with two-thirds of the total votes.[518] Therefore, in this case, the President should send it for publication in the official gazette. However, after the veto, the media law was again approved by two-thirds of the members of the *Wolesi Jirga* and sent to the presidency for publication. Nevertheless, the government sent it to the Supreme Court for review[519]. This issue was also unclear in the 2004 constitution. It was unclear whether the president could refer the law to the Supreme Court to check its compatibility with the Constitution after reconfirming two-thirds of the Wolesi Jirga members. Although it was clear from the constitution's text that the president had the right to do this before ratifying it, not after it was re-approved by the Wolesi Jirga[520].

The Supreme Court, in its opinion, argued that the Constitution had listed the officials who must receive a vote of confidence from the *Wolesi,* which include ministers, the Attorney General, the head of the Central Bank, the head of security, and the head of the Red Crescent. Likewise, according to paragraph 12 of article 64, the president and members of the Supreme Court and based on article 157, the members of the ICOIC needed to obtain a vote of confidence from the Wolesi Jirga.[521]

The Supreme Court argued that since the Constitution has specified the officials who must receive a vote of confidence, "any exception to it is considered to mean amending the Constitution, which is solely the competence of the *Loya Jirga*." [522]Therefore, according to the Supreme Court, the condition of appointing the

---

516 M. A. Salih, "Post-regime-change Afghan and Iraqi media systems: Strategic ambivalence as the technology of media governance" 16 *Media, War & Conflict* 231 (2021).

517 F. Ayub, A. Deledda and P. Gossman, "Vetting Lessons for the 2009-2010 Elections in Afghanistan" 17 (International Center for Transitional Justice, 2009).

518 Supra note 17 art. 94.

519 The media law comes to parliament for the third time, *Hasht e Subh Daily*, 04/05/2009, *available at*: https://8am.media (last visited on 13/08/2022).

520 *Supra* note 524 at 27.

521 The Afghanistan Supreme Judicial Order No.6, April 15, 2009, Official Gazette No. 986, 2009.

522 *id.*

president of National Television by the *Wolesi Jirga* was considered against the constitution[523].

Sediqullah Tawhidi, the head of the Media Watch, had a different opinion and stated that it is true that according to the constitution, ministers and some independent directorates must receive a vote of confidence from the *Wolesi Jirga*, but there is no restriction other than the specified officials should not receive a vote of confidence from the *Wolesi Jirga*[524]. On the one hand, if the articles of the constitution are considered, the officials who receive the vote of confidence from the *Wolesi Jirga* are specified in the constitution, but the constitution does not state that other than the mentioned officials, other persons should not receive a vote of confidence from the *Wolesi Jirga*.

2.2.5 Case of the Law on the Issuance of Legislative Decrees

According to the Constitution, the government could issue legislative decrees in case of urgent necessity, except for matters related to the budget and financial affairs.[525] Legislative decrees become law after the president's approval. They had to be submitted within 30 days from the date of the first session of the National Assembly, and if rejected by the National Assembly, they would be invalidated. This authority showed the president's importance and supremacy in the Afghanistan constitution[526].

Also, according to the Constitution, the National Assembly had a special duty to legislate in Afghanistan.[527] No institution, including the presidency and the judiciary, had the right to legislate. The presidency could only issue a legislative decree in a state of emergency and during the National Assembly's vacation time[528]. However, the lack of clarification of the concept of "urgent" in the constitution had facilitated the interpretation in favor of the government to abuse this legal ambiguity for its benefit and define any situation as an emergency and issue a legislative decree.

---

523 M. Shafiq, "Constitutional Justice in Afghanistan's legal system" in Persian "dadarsi asasi dar nezam hoquqi afghanstan" 3 *Contemporary Thought Quarterly* 225 (2018).

524 *Supra* note 532.

525 *Supra* note 17 art.79.

526 H. Farzanepour and P. Zangane, "Decision-making centers in the Afghan new constitution: Division of power Based on the cooperation amongst forces" 7 *Jostarha-ye-Siyasi-ye Moaser* 146 (2016).

527 *Supra* note 17 art 90.

528 A. Q. Sajadi, "Legislative challenges in the Islamic Republic of Afghanistan" in Persian "chalesh cpehei ghanon gozari dar jamehori eslami afghanstan" 4 Contemporary Thought Quarterly 305 (2018).

Amendment of the law was also one of the special duties of the National Assembly, and the president did not have the right to amend the law. However, the president started amending the law under the guise of issuing a legislative decree. These amendments were against the Constitution[529].

To prevent the government from abusing the legislative decree, the *Wolesi Jirga* prepared a draft of the law for issuing a legislative decree and sent it to the *Meshrano Jirga* for approval, which was later sent to the president for signature. However, the President vetoed the law approved by the National Assembly (*Wolsey Jirga and Meshrano Jirga*) and sent it back to the *Wolesi Jirga* [530]. The *Wolesi Jirga*, using its legal authority, approved the law with two-thirds of all members' votes and sent it to the presidency for publication in the official gazette.[531]

Instead of publishing it, the government referred this law to the Supreme Court to check its conformity with the Constitution. The government argued as follows: First, does the National Assembly have the authority to enact such a law to limit the powers of the President within the limits mentioned in Article 79 of the Constitution? Second, in paragraph (3) of the fifth article and paragraph (2) of the sixth article of the mentioned law, the issue of the non-existence of the law has been mentioned, and the issuance of a legislative decree has been included in the existence of the prohibition law, and at the same time, it has been considered invalid. The main point of the discussion here is that there may be a law in the field, but there is a need to amend it, or it may not meet the needs of the time. Considering the government's obligations to the welfare of society and its obligations towards the international community, the government must urgently fulfill these obligations[532].

Third, urgency is defined in paragraph (2) of the third law article: "It is an issue related to national interests, territorial integrity, security and stability of the country that does not exist in the context of the effective law." According to Article 79 of the Constitution, it is the authority of the government to recognize the urgent need

---

529 J. Ayazi, "Ashraf Ghani and the game of law in Afghanistan" in Persian "asharf gheni ve bazi ghanon dar afghanstan" *Mandegar Daily New Paper* 13/03/2017 *available at*: https://mandegardaily.com/?p=56353 (last visited on 25/08/2022).

530 M. K. Barati, "Examining the Role of Afghan Parliament in Promoting Good Governance: A Study" in Vijay Singh and Aastha Agnihotri (eds) *New Radical Approach in Interdisciplinary Research* 141 (Akshita Publishers and Distributors, 2020).

531 *Wolise Jirga* Resolution No. 286, Official Gazette 1285, February 2018.

532 *Supra* note 34 at 258.

because the government knows better which issues and cases are urgent and should be enforced through a decree. At the same time, issues related to national interests, defense of territorial integrity, security, and stability of the country are part of the duties of the government according to Article 75 of the Constitution[533].

The government emphasized that by approving this law, the National Assembly, in addition to ignoring the provisions of Article 79 of the Constitution, has interfered in implementing the government's duties by bypassing its supervisory duties. From the government's point of view, the National Assembly does not have the authority to impose restrictions on issuing a legislative decree, and it cannot determine the task of the government, in which case it can issue a legislative decree and when it cannot[534].

The Supreme Court expressed the following opinion: First, regarding accepted principles and legislative rules in Afghanistan, in general, issuing subsidiary laws is based on the provision of its express provision in the Constitution, which is called organic law. If, in many cases, the constitution is specified for it, but some other laws, considering the necessity of the government organs, are prosed, arranged, and carried out without specifying their basis in the Constitution, this category is called ordinary laws[535].

With this in mind, the authority to propose organic laws, except for the law contained in Article 116 of the Constitution, is jointly related to the executive and legislative powers, but the proposal of ordinary laws regarding its field is one of the exclusive powers of each of the three powers as stated in of the 2004 constitution[536].

By observing this principle, the proposal and approval of the "Law on the Issuance of Legislative Decrees by the *Wolesi Jirga*," considering Article 79 of the Constitution, is considered interference within the executive branch's jurisdiction. On the other hand, since articles (79 and 97) of the Constitution do not provide a clear ruling regarding adopting a specific law in regulating matters related to the legislative decree, based on its provision, it is considered an addition to the Constitution.[537]

---

533 *Id*., at 259.
534 *Supra* note 505 at 267.
535 The Supreme Court Judicial Order No. 71, Official Gazette no. 1285, February 2018.
536 *Supra* note 17 art.95 & 97.
537 *Supra* note 548.

Second, according to the Constitution, the government's proposal for a law is submitted to the *Wolesi Jirga* when the first National Assembly session is held[538]. The legislation of the government (as a law), which is indeed (a holiday of the *Wolesi Jirga*) and (an urgent necessity) has been specified, and the approval of the president has imposed an executive condition on it[539].

Third, the constitution is based on the principle that according to the issue of separation of powers, the proposal of the law, according to article 97 of the constitution, is made by the government or the members of the national assembly, and the proposal of the law in the area of judicial affairs according to the constitution the government can do it on behalf of the Supreme Court[540].

The Supreme Court has reasoned that the reason why the Afghan legislator has defined the authority of the proposed law in general as the scope of work of the three branches of the government in Articles 97 and 95 of the Constitution is that another branch does not limit the legal powers of one branch. According to Article 94 of the Constitution, the law is passed by the National Assembly (*Wolsi Jirga and Mashrano Jirga*), which has been approved by the President unless otherwise specified in the Constitution. Among other things (unless specified otherwise in this constitution), it is clear that the constitution provides for the approval of exceptional laws, which are among the provisions of the constitution[541]. In the mentioned article, the authority is given to the government in a special case, which can arrange legislative decrees except for financial and budget matters, and then in the case of the National Assembly's vacation and urgent necessity, and the legislative decrees become law after the approval of the president. The Supreme Court stated that it is inferred from this ruling that the cases of allocation (financial affairs and budget) and (vacation of National Assembly and urgent necessity) are foreseen in the explicit text of the mentioned article, and any other restriction such as "approval of the law for the issuance of legislative decrees" is addition and change of the text of the Constitution[542].

538 *Supra* note 17 art. 97.
539 *Supra* note 114 at 99.
540 *Supra* note 17 art 95.
541 *Id*., at art. 79.
542 *Supra* note 548.

Fourth, concerning the urgent need established in Article 79 of the Constitution, it should be noted that the goal is the need that the government feels in its work area and issues a legislative decree to resolve it. This action of the government will make things regulated and legal. In this sense, any government action and qualification must be regulated by law. The fact that the government deems it necessary to arrange a legislative decree based on Article 79 in the urgent necessity actually indicates the legalization of actions in the government's work area. Given that legislative decrees must be ratified within thirty days from the date of the first meeting of the National Assembly, and if the National Assembly rejects the said decree is rejected by the National Assembly, it will be invalidated[543].

As a result, the Supreme Court declared the "Legislative Decree Law" to be invalid.

2.3 Appraisal of the Supreme Court Performance Concerning Constitutional Review

The 2001 Bonn Agreement laid the foundation for the new political system, based on which the 2004 Constitution and other laws were approved[544]. As mentioned, the constitution introduced the judiciary as an independent power of the Afghan government. The law guaranteed the judiciary jurisdiction.[545] The Constitution guaranteed the individual and institutional independence of the judiciary[546]. However, the judges of lower courts in Afghanistan depended on the senior court judges and the Supreme Court, which was a significant challenge to their independence in their decisions. During the twenty years of the republic, the executive branch continuously intervened directly in judicial affairs. In addition, the indirect influence of executive power had an undeniable impact on the financial and administrative needs and the appointment of judges of the judiciary. Despite the recognition of the budgetary and financial jurisdiction of the judiciary in the Constitution, it was treated like the budgetary unit of the government[547].

The main problem in the constitutional law system of Afghanistan was the constitutional ambiguity regarding constitutional review. This ambiguity caused conflict among the three branches of the government. This legal ambiguity provided

543 *Id.*
544 *Supra note* 184 at 15.
545 *Supra* note 17 art. 122.
546 *Supra* note 475 at 93.
547 *Supra* note 170 at 17.

the opportunity for abuses. The government had sometimes influenced the Supreme Court's opinions in constitutional cases[548]. In Article 121 of the 2004 Constitution, Afghanistan's constitutional legislator created problems with providing the authority to review the constitutionality of law to the Supreme Court. On the other hand, the part of the authority to review the constitutionality of laws was given to the ICOIC. Also, the constitution did not clarify the authority to interpret the Constitution[549].

Citing the intention and will of the legislator does not seem justified, especially considering the difference between the American and European approaches to the constitutional review model because according to the Supreme Court's reference to the development process of the draft in this field, it is well clear that the legislator intended to define the European model of constitutional review, based on which, due to the nature of organic claims, a special authority should be created. But apparently, due to the pressure of the Americans, the drafters of the constitution took refuge in the American model without considering the consequences of changing the system[550].

It may be true that nobody except the court can issue a binding order (special judicial order), but considering the types of interpretation of the law (legal, judicial, personal), each of which is valid in its place, it is necessary to interpret the law and issue an order. It is not judicial. Does the French Constitutional Council issue a judicial order in dealing with organic lawsuits? Is the decision of the French Constitutional Council not binding? The answer to both questions could certainly be negative. In addition, the judicial decision resulting from interpretation and even judicial interpretation was limited to the case under consideration and could not be expanded and extended to all cases, even similar cases[551].

The precision in the law's wording clearly shows that the opinion of the Supreme Court was wrong and against literary rules. The arrangement of the words and phrases of this article is such that from its appearance, only the review and interpretation of ordinary laws can be understood to determine whether they are according to the Constitution or not. Therefore, the interpretation of the Constitution is a secondary matter that follows the interpretation of the ordinary law. In other words, to verify the

548 *Id*., at 15.
549 *Supra* note 484 at 3.
550 N. Faiez, "Judicial oversight of administrative decisions in Afghanistan" 3 *Administrative and Environmental Law* Review 133 (2022).
551 *Supra* note 32 at 281.

conformity and non-conformity of the ordinary law with the Constitution, the Supreme Court must interpret the ordinary law in the first step, and in addition, it is necessary to interpret the Constitution in some cases.

After that, assuming the Supreme Court has the authority to interpret the Constitution, this authority arbitral upon the request of the government or the court. This statement means that until the request for interpretation was made, the Supreme Court could not interpret the Constitution or even ordinary law directly and with its judgment[552].

The same problems were in the case of Article 157 of the Constitution. According to this article, "The Independent Commission for Monitoring the Implementation of the Constitution is formed under the provisions of the law..." As it can be seen, this article indicates the authority of the commission to monitor the implementation of the Constitution. Therefore, the commission's interpretative authority was not clear, and it implies it implicitly[553]. That is, since the responsibility of this commission was to monitor the implementation and enforcement of the Constitution, it was necessary to interpret it in some cases to verify its compliance and non-compliance. As a result, both the competence of the Supreme Court and the competence of the ICOIC in interpreting the Constitution are vague and unclear, and this issue caused confusion, as a result, there was an opportunity to abuse the law for the benefit of politics[554].

3. Role of the Independent Commission in the Implementation of the Constitution of Afghanistan (2008-2021)

The Constitution of 2004 delegated the review of the compliance of laws with the Constitution and their interpretation based on the request of the government and the courts to be the jurisdiction of the Supreme Court. In addition, in approving the Constitution, the *Loya Jirga* members, without due diligence, added Article 157 to the Constitution without amending Article 121 due to the differences that existed regarding the review mechanism of the Constitution. However, after the approval of

552 S. Pasarlay, "Constitutional interpretation and constitutional review in Afghanistan: is there still a crisis?" International Constitutional Law Journal web blog *available at*: https://www.iconnectblog.com/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/ (last visited on 08/12/2023).

553 *Supra* note 105 at 670.

554 S. Pasarlay, "The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan the 2004 Constitution of Afghanistan" 27 Washington International Law Journal 695 (2018).

the 2004 Constitution, a law should have been approved to define the limits of the powers of the Supreme Court and the ICOIC concerning constitutional review, but this law was not approved. This negligence and delay created doubts about the Supreme Court's and ICOIC's jurisdiction[555].

The vagueness of Article 121 of the Constitution regarding its interpretation and the lack of clarification of the ICOIC's duties in Article 157 caused a difference of opinion between the government and the National Assembly[556]. Although the ICOIC's creation was foreseen in the constitution, the government did not create it until 2009. Finally, after the repeated demands of the National Assembly, the government introduced five ICOIC members to the *Wolesi Jirga* to obtain a vote of confidence, and thus the commission was established.[557]

Until 2007, there was no serious conflict between the government and the National Assembly about the authority to interpret the Constitution. The competition increased when the government accepted Wolesi Jirga's no-confidence vote on the minister of returnee affairs but asked for an opinion from the Supreme Court regarding the vote of confidence on the foreign minister, Dr. Rangin Sapenta[558]. The National Assembly considered the ICOIC the only institution interpreting the Constitution. However, the executive and judicial powers considered the Supreme Court the only institution designated by the Constitution to interpret the Constitution and all types of judicial review. The conflict between the government and the parliament caused much tension, and a suitable solution was not foreseen until the republic's fall[559].

3.1 The ICOIC and the Constitution of Afghanistan 2004

The 2004 Constitution forms the basis for the ICOICs: "*An independent commission to oversee the implementation of the constitution is formed by the provisions of the law. The members of this commission are appointed by the president with the approval of the Wolesi Jirga*."[560] The Constitution only states the formation of the

555 *Supra* note 21 at 28.
556 *Supra* note 22 at 2.
557 *Supra* note 432.
558 *Supra* note 60 at 5.
559 *Supra* note 484.
560 *Supra* note 17 art. 157.

ICOIC and its members' appointment method, but it does not specify the task of the ICOIC[561].

The ambiguity of Article 157 and the vagueness of the interpretation authority in Article 121 caused the conflict between the National Assembly and the government. As stated in the fourth chapter, this controversy forced the *Wolesi Jirga* to prepare a draft law for ICOIC. The draft of the ICOIC Act gave the ICOIC clear authority to interpret the Constitution[562]. Finally, after many discussions between the National Assembly and the government, the ICOIC was established in June 2009. The ICOIC officially started its work on July 24, 2010, due to a dispute about the law of the ICOIC[563].

While the *Wolesi Jirga* approved the ICOIC law in 2009 with two-thirds of votes, the referral of the law by former president Hamid Karzai to the Supreme Court and the issuance of Judicial Order No. 5 by the Supreme Court caused an apparent "legal void" in the ICOIC take. The law published in the official gazette after the issuance of the Supreme Court ruling did not include some of the provisions of the ICOIC's law approved by the *Wolesi Jirga*. The law posted on the ICOIC's website, simultaneously with the provisions of the Supreme Court's ruling, had several significant differences[564]. While the ICOIC considered this body the authority to interpret the constitution and the decision authority to revoke the members' membership based on articles 6 and 7 of the ICOIC's law, according to the law published in the official gazette, these functions were illegal.[565]

On the other hand, even though the Supreme Court had found some clauses and articles of the ICOIC law to be against the constitution, in the text of the judicial order, it presented ideas and views based on which it considered the dismissal of the members of the ICOIC to be the same as the executive authorities and left the right to dismiss the members to President. Entrusting the power of dismissal of commission

---

561 A. S. Mubariz, M. Z. Popalzai and N. Momad, Nasrullah, "Overseeing Mechanisms of the Implementation of Constitution: A Comparative Study" 6 *Research Review International Journal of Multidisciplinary* 92 (2021).

562 "Formation of a commission to monitor the implementation of the Constitution; Good move, but too late" *Hasht-e-subh Daily* 24/03/2010 *available at*: https://8am.media (last visited on 26/08/2023).

563 *Supra* note 487.

564 *Id.*

565 Interview with M. A. Rasoli, member of the 2004 Constitution Drafting and Review Commissions and Senior Advisor to the Ministry of Justice during the Republic period, 24/ 06/2023.

members to the president greatly impacted the commission's independence, which we will discuss in the next section. This judicial order, which conflicted with Article 157 of the Constitution and Article 2 of the ICOIC Law, violated the ICOIC's independence and considered it a part of the executive branch. According to the Constitution and ICOIC law, it was an independent body within the framework of the "government" and the only commission elected by the president's nomination and the *Wolesi Jirga's* vote[566].

In Article 121 of the 2004 Constitution, only the government and courts have the authority to refer laws to the Supreme Court to check their compliance with the Constitution. Citizens are not given the right to complain about violating their rights. However, The ICOIC Law went one step further and transferred the authority to request a legal opinion to Afghanistan's Independent Human Rights Commission [567]

According to Article 4 of the ICOICs law, published in the official gazette No.986, the ICOIC had seven members, both men and women, appointed by the president for 4 years after obtaining a vote of confidence from the *Wolesi Jirga*. The law does not specify how many of the ICOIC's members should be women. Only one woman was a member in the two rounds when the ICOIC members were elected. Mrs. Mahbubeh Haquqmal was a member of the ICOIC in the first round[568], and Ms. Ghazal Haris was a member of the ICOIC in the second round[569].

According to paragraph (2) of article 4, the ICOIC, besides the chairman, had a deputy and a secretary elected for one year and had the right to be candidates again. ICOIC had a chairman, deputy, secretary, members, legal advisors, departments, and an executive directorate.[570]

To carry out its duties, the ICOIC had various departments viz, (i) the Department for studying the laws in force and finding their contradictions with the constitution; (ii)

---

566 *Id.*

567 *Supra* note 177 art.8.

568 ICOIC, *A Collection of Legal Interpretations, Commentaries and Consultations 2010-2014* in Persian "majmue i az tafasir, nazarat ve moshavareh cpehei hoquqi 1389-1393" 1 (Independent Commission for Overseeing the Implementation of the Constitution, Kabul, 2014).

569 ICOIC, *A Collection of Legal Interpretations, Commentaries and Consultations 2010-2019* in Persian "majmue i az tafasir, nazarat ve moshavareh cpehei hoquqi 1389-1389" (Independent Commission for Overseeing the Implementation of the Constitution, Kabul, 2020).

570 The Independent Commission for Overseeing the Implementation of the Constitution Code of Conduct, 2010, art.5.

The department for monitoring the performance of government departments and institutions; (iii) Department of Interpretation of the Constitution and legal advice; (iv) Law Development Department; (v) Department of Research and Awareness of the Constitution; (vi) Department of Monitoring the Performance of non-governmental Institutions;[571]

The ICOIC law considered Afghan citizenship, legal or jurisprudential education at the master's level, five years of experience, good reputation, 35 years of age, not being convicted of a crime, and deprivation of civil rights, and Non-membership in political parties while in office to be a member of this commission.[572] In terms of the fact that the age of 35 was considered for membership in this law, it was a good move because it made the conditions favorable for young people to be members of the commission. But the experience of 5 years seems insufficient for someone who has to comment on important issues related to the Constitution[573].

The ICOIC law functions includes (i)Interpret the provisions of the Constitution based on the request of the President, the National Assembly, the Supreme Court, and the government; (ii) Supervision of implementing the constitution's provisions by the president, government, national assembly, judiciary, departments, institutions, and governmental and non-governmental organizations; (iii) Providing legal advice on constitutional issues to the President and the National Assembly; (iv) Study the laws in force, finding contradictions with the constitution, and presenting them to the president and the national assembly to take measures to resolve them; (v) Presenting a specific proposal to the President and the National Assembly in the context of taking measures to develop the affairs of the legislators in cases stipulated by the Constitution; (vi) Submitting a report to the president in case of a violation of the constitution's provisions; (vii) Approving relevant regulations and procedures.[574]

As explained in the fourth chapter of this thesis, the Supreme Court declared clauses (1) and (4) of Article 8 contrary to the Constitution. The provision of the dual institution of constitutional review in the Constitution was controversial. Afghanistan

571 *Id*., at art. 12.
572 *Supra* note 177 art.5.
573 *Supra* note 494.
574 *Supra* note 177 at art.8.

did not have enough experience in this field, and a series of political factors prevented the right decision from being taken in the Constitutional *Loya Jirga*[575].

The ICOIC chairman's duties included (i) Organizing and presiding over commission meetings and calling for an extraordinary meeting; (ii) Voting on issues and proposals that require voting and announcing the results; (iii) Representing the ICOIC in front of other organizations and institutions; Supervision of the commission's professional and administrative affairs; (iv) Implementation of the commission's budget.[576] The 2004 Constitution makers did not specify ECOAC's powers, which caused it to clash with the Supreme Court[577].

Finally, the commission generally operated in three areas; all three roles involved legal advice and advisory opinions to the government's political institutions. First, the commission interpreted the constitution and presented its interpretation ideas to the National Assembly, the President, the government, and the Supreme Court[578]. Even though the Supreme Court had declared the provisions of the ICOIC's law related to the interpretation of the constitution contrary to the constitution, the National Assembly continued to request the ICOIC to provide interpretative ideas.

3.2 ICOIC & the Method and Procedure of Constitutional Review

According to the ICOIC law, the quorum for meetings was completed if five members were present, and decisions were made based on the votes of the majority of the present members. In case of a tie, the opinion of the party that the chairman of the meeting voted for was recognized as the majority.[579] This was a privilege for the chairman of the meeting. In addition, the ICOIC held a regular meeting once a week. Special meetings were held based on the request of the president, the National Assembly, the decision of the head of the commission, or the request of three members of ICOIC[580].

---

575 S. Pasarlay, "Fatal Non-Evolution: Afghanistan's 2004 Constitution and the Collapse of Political Order" *Verfassungsblog on matters constitutional law*, 09/09/2021 *available at*: https://verfassungsblog.de/fatal-non-evolution/ (last visited on 05/09/2023).

576 *Supra* note 583 art. 5.

577 K. Habibi, "Institution of protection of the constitution" in Persian "nehad seyanat az qanoon asasi" 3 *The Journal of Constitution* 77 (2018).

578 Z. Hassan Zadeh, *Afghanistan's legal culture from 1750 to the twenty-first century* 331 (Birkbeck Institutional Research Online University of London, 2021).

579 *Supra* note 177 art. 10.

580 *Supra* note 583 art. 11.

The goal of overseeing the Constitution was to ensure that the decisions and actions of any authority and body did not contradict the Constitution.[581] This duty of the ICOIC contradicts Article 121 of the Constitution, which delivered the Supreme Court the authority to review the compliance of laws and other legal documents[582].

Likewise, there was another conflict in the duties of ICOIC with the Supreme Court. One of its duties was to Study the applicable laws and regulations, bills, and procedures to find their contradictions with the Constitution and take the necessary measures to eliminate them[583].

The procedure for the ICOIC work was such that the government, the National Assembly, and, in some rare cases, the Supreme Court asked for an opinion. The ICOIC answered the questions or issues raised by the government and the National Council or provided interpretations. The case or question was discussed in the ICOIC meetings, which were led by the chairman and, in his absence, by the vice chairman. The opinions of the commission were advisory. The ICOIC law stated that its interpretive opinions should be published in the official gazette to have an executive aspect. However, the Supreme Court considered this issue against the Constitution, and it was removed from the text of the law and only mentioned in the footnote with the opinion of the Supreme Court[584].

As a result, the competencies considered by the law to be relevant to the ICOIC remained general and vague. Although the 2004 constitution did not provide more details, the ICOIC was a victim of political conflicts between the three powers.

3.3 ICOIC's Performance and Decisions

Political crises in Afghanistan are primarily rooted in the gap in the Afghan judicial and political system[585]. The system was inactive because constitutional protection institutions were not given enough attention during the last hundred years. Particularly after the approval of the 2004 Constitution, there was no agreement on which institution should resolve constitutional crises and conflicts. Disagreement between the institutions and lack of clarity of the law made ICOIC unable to perform its duties

581 *Id*., at art.2.
582 *Supra* note 483.
583 *Supra* note 583 art. 6.
584 *Supra* note 57 at 34.
585 A. Wardak, "A Decade and a Half of Rebuilding Afghanistan's Justice System: An Overview" 7 (Leiden University, Netherlands, 2016).

effectively. During its fifteen-year life, it has provided more than a dozen commentaries and recommendations[586].

3.4 ICOIC and the Constitutional Review in Afghanistan

The following are some examples of the ICOIC's decisions and opinions:

3.4.1 Opinion of ICOIC on the Special Election Court

Afghanistan's September 2010 parliamentary elections, like the 2009 presidential elections, faced many challenges and disputes. In the meantime, widespread fraud by candidates happened in different regions, but in the end, with the management of the Independent Election Commission, nearly 1.33 million fraudulent votes were declared invalid, 24 of the winning candidates were declared losers, and new people were declared winners instead[587]. Meanwhile, the election results in thirty-three provinces of the country were finalized. However, the results of the elections in Ghazni province were not finalized due to problems that were announced later. The winning candidates in this region (*Pashtuns* and *Hazaras*) were only *Hazaras*[588].

This approach created reactions among the political factions inside and outside the government. In this regard, aside from President Karzai's implicit reference to the inappropriateness of the results, he also faced protests from protesting candidates, sometimes with continuous and endless objections. In the next important step, which was the basis for a new challenge, the Attorney General of Afghanistan challenged the final results of the parliamentary elections announced by the Independent Election Commission and stated that it does not consider the final results of the elections to be acceptable due to the violation of the law[589].

On the other hand, the Election Commission and the Election Complaints Commission, by issuing the certificates of the announced winners of the elections and referring to the Constitution of Afghanistan, called this decision of the Attorney General illegal and added that this institution itself does not have the legal authority to

---

586 Interview with Ghizal Harris, a former member of ICOIC and professor of constitutional law at Afghan American University.

587 Democracy International, "Election Observation Mission to Afghanistan: Parliamentary Elections" 40 (2010).

588 F. Ramanzani Bonish, "Special Election Court and Afghanistan" *International Center for Peace Studies* 17/01/2011 *available at*: https://shorturl.at/oJ3uW (last visited on 09/08/2022).

589 T. Sharan, "The dynamics of informal political networks and statehood in post-2001 Afghanistan: a case study of the 2010–2011 Special Election Court crisis" 32 *Central Asian Survey* 337 (2013).

invalidate the election results and therefore According to the election law, no other institution except the election commissions can invalidate the election results. Opponents of canceling the results argued that the election law only gave the Election Commission and the Election Complaints Commission the right to decide on the legitimacy of the election, its annulment, or its correctness. The General Prosecutor's Office can only intervene in criminal aspects. Apart from that, the law has not given any institution the right to interfere in election affairs[590].

These election disputes, along with the continuation of the positions of supporters and opponents of the announced election results, caused. However, the President of Afghanistan initially tried not to enter directly into this campaign, but with the increase in the scope of tension between the two groups in this Process, intervened. Finally, with the suggestion of the Supreme Court of Afghanistan, the president, through a decree, established a special election court to handle the legal disputes of protesting candidates and solve this crisis. He appointed one judge as the president and 4 others as its members[591].

Several people considered the President's action to establish a special election court contrary to the provisions of the Constitution, and some supported it[592]. Through letter 1305, dated January 1, 2011, the Presidency requested to review whether the President's decree complies with the Constitution. In the meeting of January 2, 2011, ICOIC examined the compliance of the President's order regarding the establishment of a special election court and expressed the following opinion: First, the term "special courts" is not used in the presidential decree in the 2004 constitution and the applicable laws related to the judiciary[593]. If the purpose of the term mentioned above above-mentioned term was to create special courts, such as special children's or commercial courts, such courts are not called "special" in the law on the organization

590 S. A. Q. Sajadi, "13 years of interaction and confrontation between President Karzai and the three powers" in Persian "13 sal taamel ve taqabel raeis jamehor karzi ba seh ghooh" *BBC Persian* 29/09/2014 *available at*: https://www.bbc.com/persian/afghanistan/2014/09/140912_k05_karzai_legacy_three_branch_forces_sajadi (last visited on 22/01/2022).

591 H.J. Thomas, "he Illusion of Afghanistan's Electoral Representative Democracy: The Cases of Afghan Presidential and National Legislative Elections" 29 Small Wars & Insurgencies 15 (2018).

592 M. N. Haikal, *Elections: ups and downs* 107 (Shabir Publications, Kabul, 2016).

593 *Supra* note 581 at 34.

and jurisdiction of Afghan courts but are referred to as children's courts and commercial preliminary courts[594].

Second, if the term "dedicated courts" was intended to refer to specific courts, then the 2004 Constitution provides such courts in a limited form. The 2004 Constitution states: "The judiciary is composed of the Supreme Court, the Courts of Appeal, and the Primary Courts, whose organization and jurisdiction are regulated by law."[595] In the same way, the 2004 Constitution clearly states that no law can, under any circumstances, delegate a case or area from the jurisdiction of the Judiciary to another authority as stated in the Constitution.[596] This ruling does not prevent the establishment of special courts listed in Articles 69, 78, and 127 of the Constitution and military courts in related cases[597].

Considering these provisions, ICOIC argued that establishing special courts outside the constitution, under the name of a special election court or any other name given to it, is against the constitution. Creating such a court is a kind of amendment to the Constitution. According to Article 111, the Constitution amendment jurisdiction is among *Loya Jirga's* exclusive jurisdictions. The ICOIC concluded that the proposal of the Supreme Court and the ruling of the President regarding the formation of a special election court were unconstitutional and proposed this solution in the field of election disputes: The dispute in elections has become an acute and inciting issue and has put government bodies against each other[598]

Therefore, to solve the election issue, the ICOIC stated that it should refer to the special law of the judiciary. if Article 46 of the Law on the Formation and Jurisdiction of Judiciary Courts states that it is named under the title of dealing with special cases, it states as follows: handling commercial, public law, and public security cases within the jurisdiction of the Court of Appeals according to the case in the court The commercial primary and related courts are held in the primary court of the province center. Issues related to elections are related to public law, and violations related to

---

594 *Id*., at 35.

595 *Supra* note 17 art. 116.

596 *Id*., art.122.

597 M. Van Bijlert, "Electoral Reform, or rather: Who will control Afghanistan's next election?" *Afghanistan Analysts Network* 17/02/ 2015 *available at*: https://www.afghanistan-analysts.org/en/reports/political-landscape/electoral-reform-or-rather-who-will-control-afghanistans-next-election/ (last visited on 22/03/2022).

598 *Supra* note 581 at 37.

elections can also be dealt with through public law courts. If crimes related to public security have occurred during the election process, these crimes are under the jurisdiction of public security courts, which must be dealt with through this court[599].

3.4.2 Opinion of ICOIC's on Quorum of the National Assembly

The Minister of State for Parliamentary Affairs shared the request of the *Wolesi Jirga* with the ICOIC, in which they asked for the interpretation of Article 106 of the 2004 Constitution.[600] ICOIC reviewed this issue in its meeting and expressed the following opinion: The Constitution states that the presence of the majority of the votes of the members decides the quorum of the National Assembly.[601] In the provisions of the constitution, it is clearly stated that the mentioned ruling regarding the formality of the quorum of assemblies and its decisions is a general rule, and even if the voting is extended to the second round, it will be subject to it.

The meaning of the majority of the present members is clear, and according to that, the decision of each of the two National Assembly houses (*Wolsi Jirga* and *Mashrano Jirga*) is considered if half plus one of the votes of the present members are in favor of a plan or a candidate. If the voting is taken to the second round in some cases, according to the explicit ruling of Article 106, it is covered[602].

This case indicates that the ICOIC has interpreted the article of the constitution. The Supreme Court was completely against this issue and considered the interpretation of the Constitution as one of the competencies of the Supreme Court. The ambiguity of the laws in this field caused the ICOIC's opinions not to have the necessary decisiveness. The opinion that was requested from the Supreme Court has interpreted this article differently: the Supreme Court of Afghanistan stated that Article 106 provides for the review of election results based on simple majority and not on absolute majority.

3.4.3 Opinion of ICOIC on National Assembly's Oversight of the Independent Administrative Reforms Commission

In 2011, the Independent Commission for Administrative Reforms (ICAR) asked ICOIC whether the National Assembly had the authority to summon and question the

599 S.R. Aarten, "The impact of Afghanistan's electoral system on national stability" 11 (Applied Political Science of South Asia, Heidelberg, 2013).
600 The Minister of State for Parliamentary Affairs, Letter No. 1754, 2011.
601 *Supra* note 17 art. 106.
602 *Supra* note 581 at 71.

officials of ICAR or not[603]. After studying the issue comprehensively, the ICOIC has presented this opinion with the consensus of its members:

First, according to the 2004 Constitution, national sovereignty in Afghanistan belongs to the nation, which exercises it directly or through its representatives.[604] The representatives transfer the sovereignty of the nation through the vote of confidence to the ministers and the heads of the organizations that receive the vote of confidence of the *Wolesi Jirga* (thereafter *WJ*). Also, the correct application of this sovereignty requires having the authority to supervise and review the actions of executive branch bodies through questioning and forming a special commission under the Constitution.[605]

Second, the legislature principle of control of the executive branch has been accepted according to paragraph (1) of Article 91, Articles 92, 93 and 103 of the Constitution. In addition, it is one of the results of the principle of democracy and separation of powers. Third, according to the principle of analogy of priority, the ruling in the law is extended to non-documented cases if the reason for the ruling is more substantial and more severe in these cases. Also, based on the legal analogy, the ruling in law is extended to similar subjects and issues because similar cases follow the same ruling[606].

Moreover, according to these two rules, it is common sense that commissions and bodies that have an executive role and similar conditions to ministries, in terms of being accountable to the National Assembly within the scope of questioning and studying their actions through the formation of commissions Especially, they fall under the jurisdiction of the ministries. Fourth, the parliamentary traditions and procedures of the National Assembly of Afghanistan and the parliamentary procedures in many countries of the world are based on the fact that the officials of the executive bodies are not explicit in their constitutions. They are summoned and questioned in the parliament. According to the evidence explained in this theory's first

603 The Independent Commission for Administrative Reforms letter no. 5954, 2011.
604 *Supra* note 17 art.4.
605 *Id*., art. 89.
606 *Supra* note 581 at 79.

to third articles, it cannot be claimed that this parliamentary procedure is against the Constitution[607].

Finally, ICOIC argued that generalizing the provisions of the constitution provisions regarding the impeachment and vote of no-confidence to ministers and other cases has no binding basis in the Constitution[608]. The ICOIC concluded that the officials of the departments whose impeachment is not specified in the constitution could not be impeached by the *WJ*. Such a perception of the ICOIC would have opened the hands of the government, especially the president, to independent institutions under his supervision and free from parliamentary oversight. This would have violated the law and weakened the rule of law[609].

3.4.4 Opinion of ICOIC on the Constitutionality of the Draft Criminal Procedure Code

After preparing the draft of the criminal procedure code, the Afghan government sent it to the ICOIC to review its compliance with the constitution before sending it to the National Assembly.[610]

First, the second paragraph of article 4 of this draft stipulates that the judicial recording officer is a person who, according to the provisions of the law, has the authority to collect the evidence and the interrogation within the limits of the provisions of this law. The police are responsible for the general directorate of national security, responsible for the inspection of ministries, responsible for the anti-corruption department, and judicial recording officers[611].

Also, articles 89 and 82 of this draft consider the discovery of the crime and arrest of the suspect to be the joint duty of the police and the national security officer. The problem with the mentioned articles in terms of the constitution is that gathering evidence and interrogation is considered an example of participation in crime detection, and crime detection is the duty of the police, according to article 134 of the constitution. For the legislation to comply with the constitution both in terms of text and form, it should specify that institutions such as the General Directorate of National Security, the Anti-corruption Office, and the Inspectorate of Offices only

607 *Id*., at 80.
608 *Supra* note 17 art. 91 (1) and art.92 (1).
609 *Supra* note 581 at 81.
610 Ministry of State for Parliamentary Affairs, letter No. 3001, 21 May 2012.
611 *Supra* note 582 at 124.

collect the required documents and that provide it to the police and follow up the matter through the police. However, summoning, questioning, detaining, and identifying a person as a suspect is one of the duties of the police, or the legislator has developed the concept of police in the relevant laws and made it include all the organs and institutions that, according to the law, are responsible for the detection of crimes as judicial officers[612]

Regarding the concealment of the witness's identity, paragraph (1) of Article 53 of this draft makes it clear that the prosecutor and the court can order to conceal the identity of the witness. Concealing the witness's identity of the witness is against the principle of questioning the witness, which is recognized in other articles of this draft (Articles 218 and 220) and may cause a violation of the rights of the suspect and the accused. Therefore, in this case, the legislator should combine the necessity of concealing the identity of the witnesses in the case of organized crimes and the right to question the witnesses. For example, one of the ways to combine the need to conceal the witnesses and the right to question them can be that the law obliges the courts not to make the testimony of such witnesses the basis of the verdict without other evidence[613]

In addition, articles 112-118 of this draft are such that they are such that they include correspondence between the lawyer and the client, and this is a clear violation of the fourth paragraph of the constitution. It should be stated in the law, like the constitution, that "the privacy of conversations, correspondence and communications between the accused and his lawyer is immune from any kind of invasion."[614].

Furthermore, Article 244 of this draft is about depriving those sentenced to long and permanent imprisonment of their property as a secondary punishment, which is itself a severe punishment and is against the immunity of people's property from assault, which is recorded in Article 40 of the Constitution, unless Confinement of persons

612 *Id*., at 125.

613 J. Jupp, "Strengthening protection and support for victims of terrorism in criminal" 45 *Studies in Conflict & Terrorism* 144 (2019).

614 *Supra* note 582 at 125.

sentenced to imprisonment, in the case of confiscation of property, has already been reflected in the judgment of the competent court[615].

This case was brought here to show that the ICOIC had acted unconstitutionally. According to the Constitution[616], the Supreme Court was responsible for reviewing the compliance of laws with the constitution, but the government ignored the provisions of the law and sent it to the ICOIC. The ICOIC should not have reviewed the matter and asked the government to refer it to the Supreme Court.

3.4.5 Opinion of ICOIC on International Treaties

The Ministry of Finance[617] argued that some articles of the Customs Law[618] conflict with the Military Technical Agreement. However, the representatives of the forces stationed in Afghanistan, citing Article 7 of the 2004 Constitution, insist that the agreement's provisions are higher than the provisions of the Customs Law. The Ministry of Finance wanted ICOIC's opinion in this regard[619].

It should be noted that Article 7 of the 2004 Constitution states that the government observes the United Nations Charter, interstate treaties, international covenants that Afghanistan has joined, and the Universal Declaration of Human Rights[620]. ICOIC argued that they review this request because according to the second paragraph of article 8 of its law, which states that "supervision of compliance and application of the provisions of the Constitution by the president, government, national assembly, judiciary, departments, institutions, and governmental and non-governmental organizations is one of ICOIC's duties[621].

After further study and consideration of the agreement, ICOIC expressed its opinion in its meeting that the bilateral agreements between the Afghan government and other governments, according to paragraph 5 of Article 90 of the Constitution, acquire the status of law when the National Assembly approves it. The National Assembly can reject or accept any agreement. If the National Assembly does not approve the

615 M. Panahi and T. Safi, "Revision of judicial rulings in Afghanistan's criminal procedural law" in Persian "tajdid nazar dar ahkam ghazayi ghanon ejraat jazayi" 1 *Bi-quarterly Findings of Law* 79 (2021).
616 *Supra* note 17 art. 121
617 Afghanistan Ministry of Finance, letter no. 2- 65 4721, 2011.
618 Afghanistan Customs Law, Official Gazette no. 847, 2005.
619 J. Voetelink, "The Status of Foreign Forces in Afghanistan post-2014" 1 *Netherlands Military Law Review* 7 (2015).
620 *Supra* note 460 at 918.
621 *Supra* note 582 at 131.

agreement, the commitment of the Afghan government to the other government is not considered complete and final. The commission added that since the National Assembly has not approved the agreement the customs law is preferred over the agreement. However, the Afghan government must take the necessary actions to obtain the approval or rejection of the National Assembly within the limits of international law and order stipulated in the agreement[622].

3.4.6 Opinion ICOIC's on Ethnic Identity Inclusion in Citizenship IDs

Disagreement over whether the identity of Afghanistan citizens is "Afghan" or not has been going on for years. During the republic period, this issue increased the controversy surrounding the approval of the civil registration law. Opponents said the identity could not be extended to non-Pashtuns, but its supporters argued that by naming the country as "Afghanistan" and passing legal articles on this matter, the basis for its acceptance as a "national identity" has been prepared[623].

Until 2001, citizens' ethnic identities were included in their identity cards. However, in the post-Taliban era, based on the order of the former president in 2002, "nationality" was defined as the affiliation of people to the "nation" of Afghanistan. According to this order, it was forbidden to mention the ethnic groups of the citizens in front of the word "nationality" in their birth certificates. It was stipulated that instead of the names of the ethnic groups, the word "Afghan" should be inserted to express the national and not the ethnic identity of the citizens[624].

Following this long road, legislators in the *Wolesi Jirga*, after two years of heated arguments, agreed in the spring of 2013 that the electronic birth certificate should not include "nationality" and "ethnicity."[625].

In this process, the *Wolesi Jirga* demanded the interpretation of the ICOIC regarding articles 2, 6, 16, and 20 of the constitution regarding the inclusion of ethnic identity in

---

622 M. Abdolahi and F. A. Ahmadi, "Acceptance and Implementation of International Treaties in Afghanistan Legal System" 27 Journal of Legal Research 51 (2024).

623 B. Mobasher, "Identity cards and identity conflicts: a cross-national analysis of national ID cards and the lessons for Afghanistan" 2 *Indian Law Review* 159 (2018).

624 S. G. Simonsen, "Ethicizing Afghanistan: inclusion and exclusion in post-Bonn institution building" 25 *Third World Quarterly* 721 (2004).

625 J. Bjelica, "The E-Tazkera Rift: Yet another political crisis looming?" 3 *Afghanistan Analysts Network* 28 /02/ 2018, *available at*: http://www.afghanistan-analysts.org/wp-content/uploads/wp-post-to-pdf-cache/1/the-e-tazkera-rift-yet-another-political-crisis-looming.pdf (last visited on 23/01/2023).

the citizenship notice. The *Wolesi Jirga* raised whether including ethnic identity in the citizenship ID card is against the Constitution. If it is not contrary to the constitution, is it necessary to include it in the citizenship ID card according to the mentioned articles?[626].

After studying the issue, the ICOIC unanimously presented this interpretation theory: First, the ethnic identity in the birth certificate is not against the constitution. Second, according to articles 4, 6, 16 and 20, the constitution recognizes ethnic identity and considers the Afghan nation to be made up of ethnic groups living in this land, but it does not clearly indicate the need to include the identity in the birth certificate. Third, if the identity of the relatives is not included, the government of the Islamic Republic of Afghanistan should be mentioned in the title of the citizenship certificate. And finally, the ethnic identity and mother tongue in the chip of the citizenship certificate and giving the form containing the mentioned specifications to the person as an official document in addition to the birth certificate can fulfill the demands of the country's ethnic groups in the inclusion of their ethnic identity because the chip in which the ethnic identity of the person is included is part of the birth certificate. Therefore, in order to satisfy the above-mentioned request and create more transparency, the National Assembly must specify in the law that the aforementioned information should be included in the chip, and in addition to the ID card, the form containing the information contained in the chip should be given to the person as an official document[627].

The *Meshrano Jirga* rejected this resolution, but the joint committee of both houses approved the *Wolesi Jirga's* resolution.

According to the law, the resolution of the parliament, which the joint committee of both parliaments approved, did not need to be signed by the president, but former president Karzai refused to send the resolution to the Ministry of Justice for publication in the official gazette and as a result, until the end of his term as president and it was never implemented.[628]

Less than a year after this law was approved, Ashraf Ghani, elected president, communicated it to the Ministry of Justice on his first day of work as one of his

626 *Supra* note 582 at 186.
627 *Id*., at 187.
628 Afghanistan Population Registration Law, Official Gazette No. 1154, 16 November 2014.

election promises, but he refused to implement it. This law was practically suspended for about two years. In March 2016, President Ghani issued a legislative decree and ordered that by changing the civil registration law, three rows with the titles "religion", "ethnicity," and "nationality" should be added in the new birth certificates to include the word "Afghan" in the new birth certificates. This decree was sent to the National Assembly to become a law[629].

Following heated debates, the *Wolesi Jirga* rejected the president's decree on 8 November 2016, and the *Meshrano Jirga* following the positive vote. On 27 October 2017, the 16-member joint committee of both houses was allowed to make a final decision. With the votes of eight members of the Senate and four members of the House of Representatives, this committee approved the former president's decree to make the official identity of citizens "Afghan."[630]

3.4.7 Opinion of ICOIC on Accountability of the Attorney General to the National Assembly

The *Meshrano Jirga* requested a legal Opinion from the ICOIC regarding the accountability of executive institutions to the National Assembly, especially to the *Meshrano Jirga*. The *Meshrano Jirga* letter stated that Article 75 of the Constitution is about the executive branch's control by the legislature, and Article 133 of the Constitution is about the duties of the government towards the National Assembly. The Official Gazette No. 986, 2009question raised is whether the *Meshrano Jirga* has the authority to question the actions of government departments, specifically the Attorney General's Office, which is one of the government departments or not.[631]

In response to the question of the *Meshrano Jirga*, the ICOIC described: First, regarding the supervision and accountability of the members of the government, which is subject to the ministers, although Article 93 of the 2004 Constitution has given the possibility to ask questions of the ministers to the commissions of the National Assembly. Article 103 of the Constitution stipulates that every National

---

629 A. Arvin, “Identity debate in Afghanistan; Will 'Afghan' become a national identity?” BBC Persian 03/01/2028 *available at:* https://www.bbc.com/persian/afghanistan-42541683 (last visited on 08/03/2023).

630 Afghanistan Population Registration Law amendment, Official Gazette No. 1259, 13 May 2017.

631 Afghanistan *Meshrano Jirga* (Senate) Letter no. 1372/1089, 16 November 16, 2016.

Assembly can demand the presence of ministers in its meeting, and it is completely clear[632].

On the other hand, the Constitution considers the government to be composed of ministers who perform their duties under the President[633], and also, the Constitution considers the Attorney General to be part of the executive branch.[634] However, the National Assembly does not have the authority to impeach the Attorney General because the Constitution delegates the power of impeachment and no-confidence vote of ministers only to the Wolesi Jirga.[635] The generalization of the above ruling or the analogy based on these two explicit rulings of the constitution from the ministers to other officials of the executive branch that are not under the ministries has no basis in the constitution. Because the impeachment and vote of no confidence is a severe sentence and cause a strong increase in the power and competence of the legislature in front of the government; Other executive branch officials are excluded from it[636].

Second, the Constitution states that the Attorney General's Office is part of the executive branch and is independent in its actions.[637] The Constitution explicitly emphasizes the independence of the Attorney General's Office in its operations. Subdividing this department's operations is against the spirit of the Constitution and the principle of the department's independence. The independence of the Attorney General's Office should be ensured[638].

On the other hand; even though the General Prosecutor's Office is part of the executive branch, its working nature is closer to the judicial branch. According to the Constitution, the investigation of crimes and the filing of lawsuits against the accused in court are done by the Attorney General per the provisions of the law.[639] To ensure justice and prevent influence in the proceedings of the General Prosecutor's Office, it is required that the proceedings of this office are completely immune from the

632 *Supra* note 582 at 250.
633 *Supra* note 17 art. 71.
634 *Id*., art. 134 (1).
635 *Id*., art. 92.
636 A. Sethi, "Afghanistan" in *2020 Global Review of Constitutional Law* 9 (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020).
637 *Supra* note 17 art. 134 (2).
638 *Supra* note 582 at 251.
639 *Supra* note 17 art. 134 (1).

interference of legal and real persons and that they perform their proceedings with complete independence[640].

Also, based on Article 102 of the Constitution, the authority to prosecute a member of the National Assembly who has committed a crime is entrusted to the officer in charge, according to Article 134 of the Constitution. This authority of the Attorney General's Office conflicts with the principle of supervision and questioning of the National Assembly. Therefore, the questioning and questioning referred to in Article 93 of the Constitution does not include prosecution proceedings[641].

As a result, referring to the provisions of the above-mentioned articles, it is concluded that: the interrogation and supervision of the *Meshrano Jirga* by the public attorney's office has no legal basis in the Constitution. However, the working relations of the National Assembly with the public attorney office were regulated in good faith and maintaining the independence of its business affairs, keeping in mind the Law of the public attorney office[642] and the law on the regulation of administrative relations of officials of the three powers of the government[643].

3.4.8 Opinion of ICOIC on limits of the government's competence and interference in the private sector

In an official letter in 2019, *Wolesi Jirga* requested the ICOIC regarding the limits of the competencies and interference of the government in the private sector and the limits of the competencies of higher education institutions in providing educational services. At the same time, he raised the question of whether the activities of the private sector are regulated by law or regulation, and he demanded the interpretation of Article 10 of the Constitution and other articles related to the private sector[644].

The ICOIC discussed this question in its meeting and presented this interpretation theory with the consensus of its members: According the 2004 constitution, the government encouraged, supported and guaranteed private investments and enterprises based on the market economy system, in accordance with the provisions of

640 A. M. Mirzai, "Judicial security in Afghanistan" in Persian " aminiat qazai dar afghanstan" 3 *Contemporary Thought Quarterly* 39 (2018).

641 *Supra* note 552 at 252.

642 Law on the Structure and Jurisdiction of the Attorney General's Office, Official Gazette no. 1117, 2013 art 11(12).

643 Law on Regulation of Administrative relation of the Government three Powers, Official Gazette no. art.6.

644 *Supra* note 582 at 120.

the law.[645] First, the economic system intended by the constitution is the "market economic system" and not the "state economic system" because the features mentioned for the economic system in the law are consistent with the market economy system. According to the explicit provision of this article, the government should take measures to encourage, support, and protect the private sector[646].

Second, the implementation of the open economy system should be subject to laws, and the laws should be such that, on the one hand, they allow the government to control and supervise and, on the other hand, they facilitate the investment environment for domestic and foreign entrepreneurs[647] . Therefore, a law under the title "Private Investments Law" based on the constitution was approved in 2005.[648]

In the same way, the Constitution also states that matters related to domestic and foreign trade are regulated by law in accordance with the requirements of the country's economy and the interests of the people.[649] According to the provision of this article, everyone has the right to establish institutions in various fields and engage in economic activities according to the provisions of the law. From the provision the Constitution, it is deduced that for the purpose of regulating economic and commercial activities, certain laws must be enacted, and in the arrangement and formulation of these laws, the economic requirements of the country, the interests of the people, and the encouragement and support of investors should also be considered[650].

In addition, the constitution has provided the basis for the presence and activity of the private sector in the field of education and higher education. In this context, Afghan nationals can establish higher, general, specialized, and literacy institutions with the government's permission. According to the provisions of the law, the government can also allow the establishment of public and private higher education institutions for foreign persons.[651]

---

645 *Supra* note 17 art. 10.
646 *Supra* note 582 at 282.
647 *Id*.
648 Afghanistan Private Investment Law, Official Gazette No. 869, 2005.
649 *Supra* note 17 art.11.
650 *Supra* note 582 at 283.
651 *Supra* note 17 art. 46 (2).

This article has allowed investment in the field of education and higher education, for both nationals and foreigners, and it is on this basis that a large number of private schools and private educational institutions have been established by Afghan and foreign nationals and engaged in scientific activities. Literary, cultural and artistic initiatives were taken. The establishment of educational and educational institutions is subject to the law and the government can supervise and control the activities of these institutions through legislation. This monitoring and control should not cause problems for these institutions[652].

In addition, according to the Constitution, the government plans and implements the curriculum of the academic unit.[653] It is inferred from the provision of the article that the educational curriculum in institutions of higher education and education must be designed and implemented by the government, and it is necessary for the government to observe the following points in designing and implementing the curriculum: First, prevent the multiplicity of educational syllabi and implement a single syllabi in all educational institutions. Second, in planning and implementing the educational curriculum, the rules of Islam and national culture must be observed. Third, the government should consider scientific principles in planning and implementing the educational curriculum[654].

It is concluded that, according to Articles 10, 11, 46, and 47 of the constitution, citizens had the right to invest in and work in higher education, which the Constitution considered one of their rights. Based on this, the government had been obliged to support and encourage, on the other hand, the government had the authority to monitor the activities, curriculum, and compliance with the applicable laws by these institutions.

3.5 An Appraisal of ICOIC

The ambiguity of the Constitution 2004 regarding the constitutional review caused neither the Supreme Court nor the ICOIC to properly exercise their duty in protecting the Constitution and citizens' rights. As the cases above show, the views of ICOIC were sometimes influenced by the parliament and sometimes influenced by the

652 M. Mohaqaq, “Supporting the private sector in Afghan laws” in Persian “ hamayat az sektor khsusi dar qavanin afghanstan” *Hasht-e-subh Media* 07/07/ 2020, *available at*: https://8am.media/fa/protection-of-the-private-sector-in-afghan-law/ (last visited 21/09/2023).

653 *Supra* note 17 art. 45.

654 E. Farhat, H. Azizi et. al., “Education in Afghanistan since 2001: Evolutions and Rollbacks” 7 (Rumi Organization for Research, 2023).

government's pressure. There are few cases where the ICOIC has given an independent and professional opinion.[655]

The government did not pay attention to this institution and did not pay attention to the part of appointing its members. For example, two years had passed since the legal tenure of the members, but the government did not act on the appointment of new members. The quorum of this commission was not complete for holding meetings. Based on the principles of ICOIC's internal duties, the quorum of ICOIC meetings was completed if five of its members were present. This was while ICOIC was continuing its activity with four members for a long time. Mohammad Qasim Hashemzai worked as the chairman and Abdullah Shafaei, Abu Bakr Mutaqi and Mohammad Arif Hafez worked as members of the ICOIC. Two members of ICOIC left the commission due to the completion of their working period (Prof. Latuf Rahman Saeed and Prof. Ghazal Haris). But the mentioned four people continued their duty in a state of ambiguity. Although they requested the presidency to appoint new members, the government did not act in this regard[656].

Afghanistan's Freedom House has published a report stating that the country's constitution was widely violated within a few years after the adoption of this law. This report, which was published under the title "Constitutional Law, Violations and Gaps", has discussed extensive discussions about examples of violations of the Constitution, lawbreakers and structural problems that led to violations of the country's Constitution. According to the report of Afghanistan Freedom House Institution, the most violation of the constitution was committed by the executive branch. In the same way, the legislature violated the constitution by interfering in the election affairs and passing by-laws[657].

In several cases, the judiciary has violated the country's constitution. Freedom House's findings show that the main reasons are a lack of understanding of the constitution

---

655 *Supra* note 34 at 290.

656 A. A. Hussiani, "Ghani's disruption has paralyzed the Independent Commission for Overseeing the Implementation of the Constitution" in Persian "karshkni gheni kamision mosteghal nezart bar tatbiq ghanon asasi ra falaj kardeh est" Hasht-e-subh Media, 28/06/2021 *available at*: https://8am.media/fa/the-rich-sabotage-has-crippled-the-independent-commission-for-monitoring-the-implementation-of-the-constitution/ (last visited on 23/01/2023).

657 A. A. Bahrami, "Safeguarding the Constitution!" *The Daily Afghanistan Ma* 11/05/ 2011, *available at*: http://outlookafghanistan.net/topics.php?post_id=15227 (last visited on 09/08/2023.).

and by-laws, anomalies in the constitution, ambiguity in some basic legal articles, abuse of power and competences, power seeking, a culture of lawlessness, the existence of powerful people, and financial and administrative corruption. These are violations of the law[658].

These widespread violations of the constitution show that the Supreme Court and the ICOIC were not successful in performing their duties. The interviewees also expressed the reason for this: the constitution's ambiguity in constitutional justice. At the same time, the existence of two institutions and the weakness of the law caused neither the Supreme Court nor the Commission to function successfully.

4 Chapter Summary

The Constitutional review was introduced by the Supreme Court in light of the Constitution of Afghanistan 2004. First, the structure, duties, and powers of the court were discussed. Article 121 of the Constitution, which entrusted the Supreme Court with the authority to study the conformity of laws, legislative decrees, and international treaties with the Constitution and the interpretation of these documents, was also discussed.

After explaining the competencies and institutional independence of the Supreme Court in the 2004 Constitution, some cases related to the competence of the Supreme Court in the field of monitoring compliance with laws were studied. The first case was related to the interpretive opinion of the court regarding the process of the vote of no confidence of the Wolesi Jirga to the former foreign minister. In this case, it can be seen that although the Supreme Court gave its interpretation based on the constitution and internal regulations of the *Wolesi Jirga*, it was not accepted by the *Wolesi Jirga*. Correspondingly, this case demonstrates that due to the instabilities in Afghanistan and the lack of the rule of law and democracy, the government institutions did not trust each other. Institutional relations were not legal relations. At the same time, this indicated the ambiguity of the Constitution in the context of the final authority for resolving constitutional disputes.

658 R. Ahmadi and Ch. A. Hikmat, “The Factors of the Fall of the Republic Government and Political Crisis in Afghanistan: A Survey of Public Attitudes” 2 Journal of Contemporary Philosophical and Anthropological Studies 20 (2024).

In the same way, some other cases, for example, the dispute between the Parliament and the Supreme Court on the commission law, the opinion on the law on diplomatic and consular employees, the study of the compatibility of the media law with the constitution, and the Law on the Issuance of Legislative Decrees show that in some cases, the opinions of the Supreme Court have been influenced by the government. Instead of legal opinions, the Supreme Court has presented a political and biased opinion.

Thus, this chapter analyzes the functioning of the Supreme Court in the field of jurisdiction granted by Article 121 and concludes that the ambiguity in Article 121 and other articles of the Constitution, the absence of the tradition of legalism, the weakness of the rule of law, the lack of familiarity of Afghan judges with constitutional review the Constitution caused that the Supreme Court could not play a major role in this field. Its ideas and interpretations were influenced by the government. Further, in chapter five "Role of Independent Commission in Implementation of the Constitution of Afghanistan" role of Independent Commission in Implementation of the Constitution of Afghanistan has been discussed in detail.

This chapter also explained the role of ICOIC implementation of the Constitution of Afghanistan. This chapter first studied the legal basis of the commission, the reason for its creation, and its structure and weaknesses. Then, for a better understanding of its implementation, some examples of the cases on which the ICOIC had given an advisory or interpretive opinion were reviewed.

During the 13 years since the establishment of ICOIC, the president, the judiciary, the *Wolise Jirga*, *Meshrano Jirga*, the government, the Independent Human Rights Commission, the Administrative Reforms Commission, and other government institutions have discussed many issues and issues arising from the provisions of the Constitution, to provide an interpretive theory or an advisory was referred to the ICOIC. In addition, ICOIC had presented more than hundreds of interpretive theories in response to the referrals received. Based on this, some, especially the Afghanistan Parliament, claimed that the ICOIC has the authority to interpret the constitution.

In fact, the ambiguity of the constitution and the abuse of power caused the government institutions to face each other. According to the cases studied in this chapter, the commission can be seen to have sometimes exceeded its jurisdiction,

which is to supervise the implementation of the constitution, and to have violated the jurisdiction of the Supreme Court "to examine the conformity of laws, decrees and legislative documents with the constitution" has reviewed the legislation with the constitution. With a historical overview and familiarity with two important institutions and a gap in the constitutional law system of Afghanistan, chapter six explains the review of the laws under the Taliban De Facto Regime 2021-2024.

Chapter 5

Review of the Laws under the Taliban De Facto Regime (2021 -2024)

1. Introduction

After the fall of the Taliban Islamic Emirate in 2001, a republican system was established in Afghanistan, and this system was supposed to last until August 15, 2021. However, various factors such as corruption, monopoly of power, and neglect of the government in the fight against the Taliban caused the republican system to fall[659]. Another important factor in the fall of the republic was the issue of the Afghan government staying away from the process of the peace talks between the United States and the Taliban. The US government started negotiations with the Taliban in 2015[660]. However, the Afghan government was only informed about the results of these negotiations. The Afghan government could not even resist the US-Taliban agreement to release 5,000 prisoners of this group and was forced to release them[661].

In 2020, the United States signed the Doha Agreement with the Taliban, which caused the Islamic Republic of Afghanistan to slowly weaken and fall. The Taliban called the peace agreement with the US a kind of failure of the West and found an additional incentive to fight with the Afghan government. The Taliban called the peace agreement with the US a type of failure of the West and found an additional incentive to fight with the Afghan government. While the US implemented all the provisions of the peace agreement and forced the Afghan government to implement its provisions, it never put the slightest pressure on the Taliban to enforce the provisions of the agreement. As a result, when the NATO support for the Afghan security forces, especially the air support, was almost zero, the Taliban, with more motivation, continued their attacks on the big cities of Afghanistan until they captured Kabul on August 15[662].

---

659 A. Yaqubi and S. M. Hussainy, "Institutional deficit and its Effect on Afghan Political Order: Narrative of Decay within the Government" 8 *Journal of Social and Political Sciences* 19 (2025).

660 S. Y. Ibrahimi, "False negotiations and fall of Afghanistan to the Taliban" 77 *International Journal* IJ 169 (2022).

661 Ch. J. Sullivan, "White Flags: On the Return of the Afghan Taliban and the Fate of Afghanistan" 52 *Asian Affairs* 275 (2021).

662 W. Maley and A. S. Jamal, "Diplomacy of Disaster: The Afghanistan 'Peace Process' and the Taliban Occupation of Kabul" 17 *The Hague Journal of Diplomacy* 33 (2022).

With the fall Republic, the Taliban called their government *the Islamic Emirate*, canceled the 2004 Constitution and other laws, and created their own order[663].

In chapter, the laws and decrees issued by the de facto Taliban government from 2021 to 2024 have been studied to see whether there is a specific method of reviewing laws in the absence of any constitution in the country. The chapter also evaluated the validity of law, decrees and regulations to see how far they have been consistent with Islamic law and human rights standards. There may be different views about the subject and result of the present study. I consciously accept this diversity of views. In this chapter, an attempt has been made to present a documented and coherent analysis of the content of these laws, without claiming to have a monopoly on interpretation or to negate alternative views.

The chapter, first studies the structural and legal changes then the Islamic review of laws under the Taliban de facto government, and finally the impact of the changes on the rule of law and human rights.

2. Legal and Institutional Developments during the Taliban Regime

With the return of the Taliban to power in 2021, Afghanistan's judicial system collapsed. Due to the establishment of the "*Islamic Emirate*," the Taliban canceled the previous laws, dismissed the judges, prosecutors, and professional employees of the Ministry of Justice, and selected the people they wanted, who were mostly graduates of religious schools (*Madrasa*)[664]. By canceling the previous laws, especially the laws governing judicial proceedings, there are now no effective legal mechanisms to determine the limits of judicial institutions' powers and authorities[665].

The Taliban still do not have a constitution currently[666]. Although they announced several times that they were working on a draft, the result of their work is not known until now[667]. An unofficial draft of the constitution was made available to the media during the Doha peace talks in 2020, referring to the structure of forces and the

663 M. Y. A. Kadir and S. Nurhaliza, "State Responsibility of Afghanistan under Taliban Regime" 30 *Journal Media Hukum* 3 (2023).
664 United States Department of State, "Afghanistan 2022 Human Rights Report" 10 (2022).
665 *Supra* note 24 at 4.
666 *Supra* note 23 at 12.
667 G. Singh, "Identifying the Legitimacy of the Taliban Government and the Resurrection of Peace in Afghanistan" 10 *Groningen Journal of International Law* 105 (2024).

method of monitoring the constitution intended by the Taliban, which can be understood to some extent[668].

In addition, the Ministry of Justice of the Taliban announced at the beginning of their return to power that they would implement the 1964 constitution as a temporary constitution, only those articles that are not against *Sharia*. But in practice, it has not been referred to in any issue[669].

Moreover, in another move, the Taliban changed the name of the Attorney General's Office to the "Supreme Directorate of Supervision and Follow-up of Decrees and Orders" (hereafter SDSFDO) With the name change, the duties of this institution also changed. This institution must monitor the implementation of the Taliban leader's orders and decrees[670].

2.1 Structure of the Taliban De facto Government

Before discussing the main topic of this chapter, it is necessary to discuss briefly the structure of the Taliban and their government. Understanding the structure of the Taliban helps to understand the rules of their de facto government accurately.

Around the years 1993 to 1994 and during the civil wars in Afghanistan, religious students in schools supported by Saudi Arabia in Pakistan, led by Mullah Muhammad Omar, created the Taliban group[671]. This group called itself *Tehreek-e-Islami Talaba* (Taliban Islamic Movement), and with the slogan of "Implementing Islamic Sharia" and confronting Mujahideen groups in Afghanistan, it penetrated Afghanistan from the southern border and quickly captured various cities and provinces[672].

In 1996, they captured Kabul. After the fall of Kabul, Burhanuddin Rabbani, the head of the Mujahideen government at the time, moved to *Mazar-i-Sharif*, which also fell

668 H. Rahimi, "Remaking of Afghanistan: How the Taliban are Changing Afghanistan's Laws and Legal Institutions" *National University of Singapore* 26 July 2022 *available at*: https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanistans-laws-and-legal-institutions/ (last visit 20/02/ 2023).

669 Supra note 154 at 4.

670 S. Abasi, "Afghanistan's Judicial System Takes Another Hit as the Taliban Abolishes the Attorney General's Office" *Feminist Majority Foundation* 26/07/2023 *available at:* https://feminist.org/news/afghanistans-judicial-system-takes-another-hit-as-the-taliban-abolishes-the-attorney-generals-office/ (last visited on 24/09/2023).

671 A. Termeer, "Rebel Legal Order, Governance and Legitimacy: Examining the Islamic State and the Taliban Insurgency" *Studies in Conflict & Terrorism* 12 (2023).

672 A. Q. Ayati, "Investigation of the organizational structure and organization of the Taliban group" in Persian "barasi sakhtar sazmani va tashkilat goroi Taliban" 5 *Andisha Mahser* 190 (2019).

shortly after[673]. The Taliban named their government the *Islamic Emirate* and continued their rule until 2001[674]. However, they regained power in August 2021. By carefully examining the Taliban's situation, it is clear that this group has two defined parts within its structure as follows:

The first part is the hierarchical structure of the Taliban's official government, known as the "*Islamic Emirate*." Within the Islamic Emirate, the "Quetta Council" led by *Hebatullah Akhundzadeh* is considered the senior body. The main ministers of the *Emirate*, including the prime minister and the ministers of defense, interior, finance, justice, and information, take orders from *Akhundzadeh*, who is currently the senior leader of the government[675].

Below him and the "Quetta Council" are ministerial positions that have little apparent authority, including: Office of the Prime Minister: the chief executive of all ministries. Interior Minister: who deals with security issues and internal politics. Minister of Defense: Oversees military issues. Minister of Finance: who is responsible for budget issues. Minister of Justice: who manages the courts and related systems. Minister of Information: who is officially responsible for media and public information but, in practice, plays the role of the government's propaganda arm. In the de facto government of the Taliban, the courts carry out their duties under the leadership of the Supreme Court[676].

Moreover, the de facto Taliban government abolished the Ministry of Women's Affairs and instead established a ministry called “the Ministry of Propagation of Virtue, prevention of Vice and Hearing Complaints.”[677] As can be seen from the name of this ministry, in addition to taking charge of what is good and forbidding, this ministry is also responsible for attracting and receiving complaints. Since its establishment, the Ministry of Propagation of Virtue, prevention of Vice and Hearing Complaints has issued orders from time to time, which not only interfere in the

673 Z. Fasihi, “Comparative study of Taliban and Hizb ut-Tahrir” in Persian " barasi tatbiqi Taliban wa hizb ut-tahrir" 5 *Andisha Mohasir* 269 (2019).

674 *Supra* note 151 at 947.

675 V. Felbab-Brown, “Afghanistan in 2023: Taliban internal power struggles and militancy” *Brookings* 03/02/2023 *available at*: https://www.brookings.edu/articles/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/ (last visited on 21/08/2023).

676 V. Morisco, “From Rebel Governance to Institutionalization? Prospects for the Taliban and Afghanistan” 7 (Österreichisches Institut für Internationale Politik, 2023).

677 H. Barr, “For Afghan Women, the Frightening Return of ‘Vice and Virtue’” *Human Rights Watch* 29/08/2021 *available at*: https://www.hrw.org/news/2021/09/29/afghan-women-frightening-return-vice-and-virtue (visited on 25/09/2023).

private lives of citizens and restrict basic freedoms, including freedom of speech and media but also interfere in the work of other ministries, including the Ministries of Defense, Interior, information and culture, Hajj and endowments, public health, prosecution and justice department, municipality and almost all other institutions are also official[678].

In addition, while the Taliban is a specific group with specific institutions and powers, another part that defines the structure of the Taliban is the subgroups that operate under the banner of this group. This group is a wider movement under which different and separate groups can operate.

The second group is "Janah Dadallah," led by "Mahmoud Dadallah." Mahmoud is the eldest son of Mullah Mansour Dadullah, the former top military commander of the Taliban in southern Afghanistan. Mahmoud Dadullah's dissatisfaction with the senior leadership of the Taliban is rooted in the death of his uncle Mullah Dadullah Akhund, the leader of the Taliban forces in the south, who was to some extent a rival of Mullah Omar and also one of the most violent Taliban forces[679]. In 2007, Tensions between the Taliban loyal to the Mullah and the "Quetta Council" erupted after Mullah Dadullah was assassinated in a NATO special forces operation. Then, a compromise was made, according to which Mansour Dadullah, Makhund's younger brother, was able to replace Makhund as a commander in southern Afghanistan[680].

In the current situation, the official structure of the Taliban government is such that the leader of the Taliban is at the head of the Taliban emirate under the title of "Amir al-Momineen." The chief executive and his deputy are also at the head of the government. In addition, the government consists of different ministries. People affiliated with the Taliban are at the head of all ministries[681].

Since this structure of the Taliban government is not the main topic, the researcher refrains from explaining it further.

---

678 UNAMA, "Human Rights Situation in Afghanistan" 2 (United Nations Assistance Mission in Afghanistan, 2023).

679 B. Roggio, "Powerful Jihadist Faction Reconciles with the Taliban" *FFD's Long War Journal* 15/08/2016 *available at*: https://www.longwarjournal.org/archives/2016/08/powerful-jihadist-faction-reconciles-with-the-taliban.php (last visited 20/06/2023).

680 A. B. Khalil, "Local Conflicts and Foreign Fighters: The 'Afghan Arabs' Phenomena During Afghan Conflict (1978–2021)" 78 *India Quarterly: A Journal of International Affairs* (2022).

681 S. Shekhawat, "Taliban 2.0: Stronger or Moving Towards Fragmentation?" 6 (Observer Research Foundation, 2023).

3. Review of Laws under the Taliban De facto Regime

The Taliban does not have a valid constitution that can be used to discuss the compatibility of laws with the constitution. The Islamic Emirate of the Taliban has not dealt with urgent national issues like a civilized government. No constitution has been enacted, and other laws are in a state of suspension. The government is governed by decrees and laws approved by the Taliban leaders and some Taliban ministers issue vague orders. Almost all governments have laws that specify the rights and obligations of citizens and the government and determine the duties of the government for the administration of the country[682].

The constitutional order of the Taliban is not clear. The main focus of this research will be on reviewing and monitoring laws in the de facto government of the Taliban. To properly understand the legal system of the Taliban government and to review the laws, the researcher refers to the cited sources and the actions they have taken so far[683].

First, a council has been appointed in the Ministry of Justice to study the conformity of laws with Islamic *Shari'a*. However, there is not enough information about the work of this council, and I can't access it. It should be added that On October 25, 2022, through a decree, the leader of the Taliban stated the draft, verify, scrutiny, approve, ratify, enforce, and publish the new legal documents the following steps: The draft should be prepared by the relevant department. The relevant department should create and appoint a committee of religious scholars, experts, and professional staff to prepare the draft. If the legislative document is related to several departments, their representatives must also participate. Those articles of the law that have a religious source should be included in the footnote.[684]

After the draft laws are prepared, they will be sent to the Ministry of Justice. The Department of Legislation of the Ministry of Justice reviews it.[685] It should be noted that the majority of its members are religious scholars related to the Taliban group.

---

682 *Supra* note 154 at 6.

683 W. Maley, "Taliban rule and anti-constitutionalism" Australian Institute of International Affairs 23/08/2023 *available at*: https://www.internationalaffairs.org.au/australianoutlook/taliban-rule-and-anti-constitutionalism/ (last visited 28/09/2023).

684 Taliban leader's decree regarding the process of legislative documents No. 9, the official gazette No. 1432, 25 October 2022, art. 1.

685 *Id*., art.2.

In other words, a committee reviews legislative documents of the first period of the Taliban Emirate before 2001 and the laws that were adopted between 2001-2021, to ensure that the provisions and cases of these documents conflict with *Sharia*. Islamic and Hanafi jurisprudence should not be investigated. This process has continued until now, and some of the laws whose differences have been examined are included in the Emirate's Case Law and Transaction Guidance Law[686].

Later, this draft will be sent to the Ministry of Justice for Shariah verification, approval, and detailed evaluation. Religious scholars and professional members of the Ministry of Justice should check the draft. After checking the draft, it will be sent to another independent review committee of scholars for finalization. After the review commission's evaluation, the legislative document will be sent to the Taliban leader for approval, and after his approval, it will be published in the official gazette and become effective. The same independent review commission also evaluates the previous rules.[687]

Secondly, the Taliban Supreme Court also has the authority to give opinions on some issues. Thirdly, the Prosecutor General's Office has been renamed and supervises the implementation of the orders of the Taliban leader. In the rest of this chapter, for a better understanding of law review in the Taliban government, the researcher first looks at the Taliban Supreme Court and its activities in law review. Later, it deals with the attorney general office, which is responsible for monitoring the implementation of the orders of the Taliban leader[688].

3.1. The Taliban Supreme Court and Review of Laws

In 2018, the Taliban created a bill for the courts of the regions under their control, which is still in force. This bill considers the judiciary as the basic organ of the Islamic system. The goal of the Islamic Emirate is to implement the divine law and ensure justice, which is implemented through the judiciary. This bill defines the Judiciary of the Islamic Emirate as follows: "The Judiciary of the Islamic Emirate consists of the supreme administration of the courts (supreme Court) under the leadership of the supreme administration of the courts the *Tamiz* Courts, appeal

686 Interviews with a few former Prosecutors living in Afghanistan (due to security reasons their names are not mentioned.)

687 *Ibid*

688 *Ibid*.

courts, arbitration courts, primary courts, special military courts, and accountability "*Eatisahb*" courts."[689].

The Taliban do not have the same court in all the provinces of Afghanistan. Taliban judges are alien to the knowledge of modern law, especially the principles of fair trial. In addition, there is no specific mechanism for appointing judges. The most important condition for the employment of judges is to provide a certificate of education from a religious school and to have a history of being a member of the Taliban group[690].

The lack of codified law damages the structure of the Taliban courts, which has made it difficult to achieve justice and has brought a kind of legal anarchy. The law, as a written text that facilitates social order and achieving justice and is enforceable on the other hand, does not exist in the Taliban's judicial system[691]. Although they traditionally use religious sources, on the one hand, these sources are old and have been written for several centuries, and on the other hand, there are wide jurisprudential differences between them. Therefore, the absence of a codified law has given more autonomy to Taliban judges to announce the final verdict of a case according to their taste, religious orientation, and subjective worldview. A ruling that justice and fairness are not seen in most cases and people cannot complain[692].

The proceedings of Taliban courts regarding criminal and legal cases differ from one court to another. It means that there are no single procedures in Taliban courts. During the rule of the Taliban, women have been deprived of the right to access justice because the customary and traditional laws of the past prevail in the courts. Currently, both the family court and the violence court do not have proceedings and are closed to the victims[693].

Since there is no constitution, then the supervision of the constitution is not an issue in the de facto Taliban system. There is only one type of Islamic supervision going on.

---

689 A. Sethi, S. Chatterjee et al., "Afghanistan at 2022 Global Review of Constitutional law" Richard Albert, David Landau et. al. (eds) 16 (EUT Edizioni Università di Trieste, 2023).

690 *Supra* note 23 at 9.

691 A. Dawi, "Taliban Undertake Speedy Overhaul of Afghanistan's Justice System" Voice of America South & Central Asia 28/09/2023 *available at*: https://www.voanews.com/a/taliban-undertake-speedy-overhaul-afghanistan-justice-system/7289101.html (last visited on 29/ 10/2023).

692 *Supra* note 680 at 104.

693 M. Jafari, "Half-finished cases and women's lack of access to justice" in Persian "prondegnpehei nimegtamam ve adam dastersi zanan bah adolt" *Etilaatroz* 07/11/2022 *available at*: https://shorturl.at/4ZkX1 (last visited on 08/04/2023).

As during the first period of their rule, 1996-2001, the leader of the Taliban had ordered that all past laws should be reviewed by the Supreme Court and the articles against Islamic Sharia rules, especially Hanafi jurisprudence, should be removed from it.[694] But in the second round, as mentioned, a committee that includes a member of the Supreme Court reviews the legal documents in the Ministry of Justice[695].

The interpretations of the Taliban from religious sources are against the accepted principles of international human rights and the citizenship rights of the Afghan people[696]. The Supreme Court under the Taliban administration has ordered "retribution" for 175 defendants and ordered the stoning of 37 others. This court also sentenced four defendants to be placed under the wall and sentenced 103 people to punishment for what this group describes as "enforcing Sharia limits". Based on a newsletter published by the Taliban, the Supreme Court of the Taliban ordered 79 defendants to pay "*diya* or blood money" and sentenced 1,562 defendants to imprisonment[697].

3.2. High Directorate for Monitoring and Follow-up of Decrees and Orders

Before delving into the duties of the Directorate of Supervision and Follow-up of Orders and Orders (HDSFDO), it is essential to discuss the changes this institution underwent after 2021. Before the Taliban assumed power on August 15, 2021, the HDSFDO functioned as the Attorney General's Office. However, following a decree from the Taliban leader, the name of the Attorney General's Office was changed to the "High Directorate of Supervision and Follow-up of Orders and Orders".[698]

The first section examines the position and duties of the Attorney General's Office before 2021, followed by an exploration of the changes implemented in this institution and its current powers and functions in the present circumstances.

---

694 The Taliban leader decree regarding the review of the past laws of the country by religious scholars of the Supreme Court, no. 18, Official Gazette No.788, 1999.

695 *Supra* note 699.

696 D. Grasse, R. Sexton et. al., “Courting Civilians During Conflict: Evidence from Taliban Judges in Afghanistan” 78 *International Organization* 145 (2024).

697 United Nations Human Rights Office of High Commissioner, *Afghanistan: UN experts appalled by Taliban announcement on capital punishment*, (2023) *available at*: https://www.ohchr.org/en/press-releases/2023/05/afghanistan-un-experts-appalled-taliban-announcement-capital-punishment (last visited on 28/07/2023).

698 The Taliban leader decree regarding the change of Attorney, no. 35, General Office to High Directorate of Supervision and Follow-up of Decree and Orders, Official Gazette No. 1434, 11 July 2023.

The attorney general office (*Saranwali*), which has been known as criminal proof lawyer, criminal clerk, public prosecutor, and *Saranwali* since the independence of Afghanistan in 1919, has existed as the main law enforcement office in the structure of the country's justice system with a history of a century[699]. In the 1964 Constitution, the Office of the Attorney General Office was established as an official government office, and it was written as follows: "The investigation of crimes by the Attorney General office, which is part of the executive branch of the government, is carried out under the provisions of this law."[700] The subsequent constitutions of Afghanistan recognized the Office of the Attorney General as an independent institution for prosecuting crimes[701].

The Attorney General's Office was one of the key institutions in Afghanistan's judicial system, playing a significant role in combating crimes, with its most important duty being the fight against crimes and criminals. In most countries around the world, the sole institution representing society in the fight against crimes and criminals, and the institution where members of society engage in such activities, is referred to as the " attorney office."[702] In Afghanistan it was called "*Saranwali*", when a crime occurred in society, the *Saranwali* was the only institution responsible for conducting preliminary investigations and pursuing suspects. After a court verdict was reached, the execution of that verdict also fell under the jurisdiction of the *Saranwali*. The *Saranwali*, as the executors were tasked with enforcing the verdict of the court against the perpetrators[703].

In Afghanistan, the responsibility for combating crime and criminals was entrusted to the *Saranwali*; it continued to be responsible for investigating and pursuing suspects and played a significant role in ensuring justice during legal proceedings. The 2004

699 N. Estanikzai, "The position of *Saranwali* in the laws of Afghanistan" in Persian "jayegah sarnavali dar ghavanin asasi afghanstan" *Hasht-e-subh Media* 29/03/2023 *available at*: https://8am.media/fa/the-position-of-sarnavali-in-the-constitution-of-afghanistan/ (last visited on 26/ 06/2023).

700 *Supra* note 12 art. 103.

701 Collections of Afghanistan Constitutions 1923- 2004 *available at*: https://andisha.org/fa/show_pdf/1341 (last visited on 20/2/2023).

702 M. A. Ahrar, Public Prosecutor and Defense Attorney in a Criminal Case" in Persian "saranwal va wakil modafeh dar dawai jazai" 16 (Saeed Publication, Kabul 2007).

703 A. J. Hussaini, "Position of the prosecutor in Afghanistan Criminal Justice System" in Persian "jayegah sarnaval dar nezam adolt jazayi afghanstan" 2 *Biannual Journal of Penal and Criminological Findings* 92 (2021).

Constitution explicitly states: “The discovery of crimes by the police, the investigation of crimes, and the prosecution of suspects in court are carried out by *Saranwali* under the provisions of the law. The *Saranwali* is part of the executive branch and operates independently in its procedures.”[704]

It should be said, however, that the Attorney General's office has been somehow present in the constitutions of Afghanistan. The extent of the authority of this office throughout its history depends on the systems and laws[705]. However, in none of the constitutions and other laws, the attorney general office has not had the task of purely monitoring the orders of the head of state. Rather, the duty of this institution has been to fight crimes, postpone criminal lawsuits and file lawsuits against the accused, and enforce the law. In the other part, I study the changes made in this institution and its role.

In Afghanistan, with the resurgence of the Taliban, the criminal justice system has become turbulent, and fair trials in most cases have been replaced by tribal courts and private justice. Many concepts of human rights have lost color in the criminal justice system and are not mentioned in the decisions of judicial and judicial executives[706]. Defense lawyers have lost their competence in front of the Taliban’s muftis, investigators, and judges. The de facto Taliban regime has changed the attorney general office into the office that supervises the implementation of the orders of the leader of this group and entrusted the authority and duties of this office to other organizations, contrary to the standards of human rights and the principles of justice[707].

According to the 3 interviewees, the officials of the Taliban argue that there was no office called the attorney office in Islam, and for this purpose, they think there is no need for this legal organization to exist in the Taliban *Emirate*. They added the Taliban officials claimed the attorney general office was corrupt thus the Taliban changed this organization[708]. On the other hand, two other interviewees argue that the

---

704 *Supra* note 17 art.134.

705 M.A. Ahrar, *Prosecutor* in Persian „Saranwal" 19 (Saeed Publication, Kabul, 2011).

706 R. Joya, “Proceedings without a prosecutor under Taliban rule” in Persian " Dadrasi Beadoan Dadsotan dar Hakimyet Taliban" Hasht-e-subh media 30/09/2023 *available at*: https://8am.media/fa/proceedings-without-a-prosecutor-under-taliban-rule/ (last visited on 20/11/2023).

707 *Supra* note 25 at 8.

708 *Supra* note 699.

Taliban asserted doubting anything or any action goes against Islamic beliefs. The attorney's task involved a sense of doubt. Therefore, the Taliban altered the framework of the Attorney General's Office[709].

However, some interviewees believe that the prosecution of Taliban regime officials by the General Attorney's Office on charges of committing crimes against humanity, terrorist crimes, and crimes against internal and external security during the republic period has caused the Taliban to hold a grudge against this administration[710].

The Taliban's argument on this matter is unjustified. The existence or lack thereof of an institution within Islamic governance does not serve as a valid reason to deem it unnecessary today. As human societies have progressed, so too have legal institutions and organizations. Some have become obsolete, while others have evolved and split into multiple entities. The attorney's office is an example of an institution that has emerged and developed from within the criminal justice system. Suggesting the elimination of fundamental administration due to corruption is a simplistic draconian view; It is similar to causing the death of a patient instead of providing medical care to them[711].

The HDSFDO law, which the Taliban leader approved, states the authority and role of this institution.[712] Article 2 of the HDSFDO Law states the objectives of enacting this law as observing and implementing decrees, orders, and legislative documents, preventing their violation, ensuring social security, protecting individual and public religious rights, and regulating the duties and authorities of the HDSFDO. The first paragraph of paragraph 1 of Article 3 of the HDSFDO Law defines law as a set of rules formulated within the framework of Sharia to regulate the internal affairs and activities of a ministry or agency and approved by the leader of the Taliban[713].

The researcher argues that Article 2 differs from the name HDSFDO. From the name of this institution, it appears that it should only oversee the implementation of the decrees and orders of the Taliban leader. However, the term "legislative documents" here also includes other laws and regulations. Although in the current situation, in the

709 *Id.*
710 *Ibid.*
711 *Supra* note 699.
712 Law on the Duties and Authorities of the High Directorate of Supervision and Follow-up of Decrees and Orders, official gazette no.1434, art. 1 & 2.
713 *Id.*, art.3 (1).

absence of a parliament, all laws are approved through the decree of the Taliban leader, the changes introduced have limited the authorities of this institution. Nonetheless, the Taliban leader seeks to have direct oversight over the operations of the HDSFDO through this means. indeed, Article 2 reflects a form of draconian governance structure under the Taliban regime, where changes are not based on necessity and objective facts. In this way, the Taliban leader limits the institutional independence and freedoms of the citizens.

According to the HDSFDO law, this institution is authorized to oversee the implementation of the leader's decrees and orders across various sectors. The law preventing individuals and officials from defying or failing to fully comply with the Taliban leader's decrees, orders, and other enforceable documents is one of its duties. The HDSFDO is authorized to seek explanations from officials and "Emirate authorities" in all governmental and private sectors connected to Taliban institutions and to take precautionary measures to prevent the loss of documents, evidence, and proof of crimes[714].

Also, the law empowered the HDSFDO to oversee the "legality" of the investigative bodies. In short, the HDSFDO has the authority to supervise all institutions and review the executions of civil and military departments and the private sector related to the Taliban regime[715].

One of the interviewees described that “under the 2004 Constitution and the existing laws regarding the Attorney General's Office, this institution was a vital part of the justice system, ensuring legal order and justice. Nevertheless, the Taliban leader's orders have changed how the Attorney General's Office functions. Even though given significant authority, the primary responsibilities and perhaps the essential beliefs of HDSFDO have been altered. This likely indicates a transition from a structured, somewhat secular legal system to one that aligns with the Taliban's interpretation of Islamic law, which could impact legal processes, justice administration, and the rule of law in Afghanistan.”[716]

The statement made by the interviewees indicates a noteworthy change in the function and role of the *Saranwali* which was a crucial part of the legal system. During Taliban

714 *Id*., art. 5.
715 Id., art.7.
716 *Supra* note 699.

rule, the institution changed its focus from overseeing and prosecuting judicial matters to supervising and enforcing the Taliban's decrees and orders. This transition represents a shift towards a more politically motivated role, focusing on individual or a group of mullahs (Islamic scholars council close to the Taliban leader) monitoring rather than impartial legal governance, towards a strict function. This declines the institution's ability to operate independently and effectively in the legal system, as it is now more closely tied to the Taliban leadership's interests and views.

3.3 Ministry of Propagation of Virtue, Prevention of Vice and Hearing Complaints (*vazart emr balmaruf ve nehi az manker va sameh shiakayat*)

In addition to HDSFDO, another ministry "Ministry of Propagation of Virtue, Prevention of Vice and Hearing Complaints" (hereafter MPVPVHC) was created instead of the Ministry of Women's Affairs when the Taliban came to power[717]. This ministry has the role of super ministry in the cabinet of the de facto government[718].

In the religion of Islam, all obligatory and desirable issues are called "*Maruf*" and all forbidden and prohibited issues are called "*Mankar*", forcing the members of society to do obligatory and desirable things, commanding the good and stopping them from doing forbidden and disgusting things, is a prohibition of vice. Verse 104 of *Surah Al-Imran* says the following about enjoining good and forbidding evil: "And a group of you should invite people to goodness and make them do decent work and prevent them from doing ugliness, and they are the saviors."[719].

The basic document cited for the establishment of the MPVPVHC in the first weeks after the capture of Kabul was this verse. The de facto government of the Taliban canceled the Ministry of Women's Affairs and allocated its building to the MPVPVHC, which is meaningful from a symbolic point of view. Its symbolic

---

717 F. Yousaf and M. Jabarkhail, "US withdrawal and the Taliban regime in Afghanistan: Future Policy Directions" 3 (Swiss Peace, 2021).

718 Etilaatroz, "An overview of the activities of the Ministry of Prosperity and Prohibition of Evil; Violation of citizens' freedom and conflict with women's clothing issues" in Persian "moroori bar faalit vazart emr bah maruf ve nehi az manker; naqz azadi sheharvandan ve dargiri ba mosail pushesh zanan" *Etilaatroz* 14/05/2022 *available at*: https://www.etilaatroz.com/142342/an-overview-of-the-activities-of-the-ministry-of-enjoining-the-good-and-forbidding-evil-violation-of-citizens-freedom-and-conflict-over-womens-issues/ (last visited on 28/09/2023).

719 M. Cook, *Commanding Right and Forbidding Wrong in Islam Thought* 13 (Cambridge University Press, 2000).

meaning was that it was the most important denial of the existence of the Ministry of Women, and with this work, a serious fight was made with one of the denials[720].

This ministry has three main tasks: "Establishing virtues, eliminating vice, and listening to people's complaints." This section focuses on the third duty of the MPVPVHC, which involves addressing complaints from the public.

A law has been approved after legal complaints were heard. The purpose of this law is to provide justice and handle people's complaints against *Emirati* officials and employees.[721] This law states that all *Emirate* departments, including courts, are obliged to provide comprehensive information, take other necessary actions, and inform the ministry about handling complaints, according to the request of the MPVPVHC.[722]

In the ministry's framework, a directorate has been created under the name "Department of Complaints Analysis and Investigation." The purpose of creating this department was to lead and manage the process of analyzing, reviewing, and verifying complaints received from the center and provinces to investigate and finalize them before making further decisions[723].

The ministry's orders interfere with the private lives of the country's citizens and restrict basic freedoms, including freedom of speech[724]. The ministry has tried to link their extreme view to Islam[725]. The ministry compares Islamic laws with human rights and considers them as "ignorant" laws: they state that "the Holy Quran was revealed 1400 years ago, but the human rights laws that define the rights of women are a

720 M. Zavali, "How does the Ministry of Good and Prohibition become a Super Ministry?" in Persian "chegoneh vazart emr bah maruf ve nehi az manker «abeŕozart» mishod?" Hasht-e-subh Media, 15/03/2022 *available at*: https://8am.media/fa/how-does-the-ministry-of-enjoining-the-good-and-forbidding-the-evil-become-abzarzart/ (last visited on 15/08/2023).

721 Complaint Hearing Law, Official Gazette No. 1444, 5 May 2023, Art.2

722 Complaint Hearing Law, Art. 5

723 MPVPVHC, "Objectives and duties of the Department of Complaints Analysis and Investigation" in Persian "chegoneh vazart emr bah maruf ve nehi az manker «abeŕozart» mishod?" *Ministry of Propagation of Virtue, Prevention of Vice and Hearing Complaints* 2023 *available at*: https://mopvpe.gov.af/index.php/dr/%D9%88%D8%B8%D8%A7%DB%8C%D9%81-%D8%B1%DB%8C%D8%A7%D8%B3%D8%AA-%D9%87%D8%A7-1 (last visited on

724 International Crisis Group, "Taliban Restrictions on Women's Rights Deepen Afghanistan's Crisis" *ICG Report No. 329*, 11 (2023).

725 UNAMA, "De Facto Authorities' Moral Oversight in Afghanistan: Impacts on Human Rights" 6 (2024).

hundred years old." The handling of complaints in this ministry is not professional. Mullahs who have no education in this field act[726].

In summary, it should be said that with the return of the Taliban to power, the structures and institutions based on the 2004 constitution collapsed. The 2004 Constitution and other laws, which included the basic rights and freedoms of the citizens, were declared abolished, and in this way, the legal guarantees of protection of the human rights of the Afghan people were completely destroyed. Consequently, due to the lack of legal mechanisms for the protection of human rights, the lack of activity of the Afghanistan Independent Human Rights Commission and other human rights institutions in the country, and on the other hand because of the absence of the active and effective presence of the international community, the human rights situation in Afghanistan has worsened[727].

4. The Taliban Regime and Rule of Law

As stated, following the collapse of the republican system on August 15, 2021, the Attorney office faced more severe crises than any other institution. In a way, all the efforts, achievements, and struggles of the employees of this institution over the past twenty years were wiped out[728]. Its leadership was transferred to non-professionals, the legal order established within this institution was disrupted, important and key departments such as the deputy office for the prevention of violence against women were suspended, and the doors of prisons and detention centers were reopened to criminals[729]. The chain of summary trials considered the most prominent and dangerous form of injustice and gross violation of legal and human rights standards in a country, began, and simultaneous authority over the police, prosecutors, and judges was entrusted to every "gunman."[730]

With this Taliban action, the process of depriving the judiciary of independence and impartiality, which had already begun with the complete takeover of authority by the

---

726 *Supra* note 699.

727 RAWADARI "Third Anniversary of Taliban Rule in Afghanistan: Continued and widespread human rights violations" *RAWADARI 14/08/2024 available at*: https://rawadari.org/140820241853.htm/ (last visited on 24/09/2024).

728 UN News, *Afghanistan: Collapse of the legal system is 'human rights catastrophe'* 20/01/2023 *available at*: https://news.un.org/en/story/2023/01/1132662 (last visited 04/01/2024).

729 *Supra* note 681.

730 US Department of States, "Country Reports on Human Rights Practices" (2023).

courts, has now been completed. Currently, the attorney general office has become a political tool in the hands of the Taliban. This action has another consequence as well. By creating a new institution for monitoring compliance with decrees and directives, the groundwork has been laid for institutionalizing personal decrees in the country's political, economic, and social life. From now on, this newly established institution will serve as an iron whip against political opponents and critics. Such individuals, under the pretext of disobedience and deviation from directives and laws, are punished, reprimanded, intimidated, and penalized using the powers granted to this institution[731].

In addition to all of this, the dissolution of the attorney general office and the transfer of its duties and powers to the police have other detrimental consequences for the people. First and foremost, this action deprives people of access to justice in criminal cases. For example, if the authority to investigate crimes is entrusted to officials of crime investigation agencies such as the police, national security (intelligence), or other investigative agencies because the personnel in this field are mostly graduates of police academies or intelligence educational institutions and their professional knowledge is limited to crime detection techniques and tactics, they are ultimately only capable of collecting tangible evidence of the crime. However, mere collection of evidence is never sufficient for obtaining the facts relevant to the case (distinguishing between innocent and guilty) and making a fair decision on the matter, as the process of proving the crime requires in-depth and comprehensive analysis, examination, and evaluation of all collected evidence and reasons[732].

At the same time, compliance with the procedures carried out to gather evidence with the provisions of the laws in force, which has a decisive role in providing justice, should also be taken care of and monitored. Carrying out these tasks and operations is far higher than the capabilities and professional and specialized knowledge of crime detection agencies. In the context of our jurisdiction, the execution of such duties is

---

731 A. Kawa, “Removal of the Attorney General: The Taliban's judicial system lacks the stage of investigation and litigation” in Persian “Elimination of the Attorney General's Office; Prosecutors: The Taliban's judicial system lacks an investigation and litigation stage” Hasht-e-Subh Media, 25/03/2023 *available at*: https://8am.media/fa/removal-of-the-attorney-general/ (last visited on 09/06/2023).

732 Roshangar, “The consequences and negative consequences of the dissolution of the Prosecutor General's Office” in Persian “” Hasht-e-Subh Media , 20/08/2023 *available a*t https://8am.media/fa/the-consequences-and-negative-consequences-of-the-liquidation-of-levi-sarnevali/ (last visited on 02/ 09/2023).

reserved for adept and formally trained legal professionals, commonly denoted as *Saranwali* or public prosecutors[733].

In addition, the investigation results are considered valid when an independent institution with legal powers has conducted them. This is even though since the establishment of *Saranwali* until now, the investigation of crimes has been one of the legal powers of this department, whose independence was guaranteed by law. Therefore, assigning the task of investigating crimes to crime detection agencies by a decree is against the accepted legal order in the Afghan system[734].

Changes made above the rule of law will not be effective. From this point of view, the position and role of the general judicial and judicial organs is considered important in ensuring the rule of law, but the role of the Attorney General in Afghanistan has always been key. *Saranwali*, who plays the role of the public prosecutor in a criminal case, had an active presence and specific legal duties in all stages of this case. In addition to performing the basic duties, he used legal tools to apply the provisions of the Criminal Procedures Law in the proceedings. And he acted and took care of other parts[735].

The contents discussed in this chapter lead to the conclusion that the de facto government of the Taliban lacks an official and written constitution. Therefore, constitutional review, as is common in other countries, is not an issue in Afghanistan at the moment. The Taliban dissolved the ICOIC. Simultaneously, the Taliban appointed their *Mullahs* and *Muftis* in the courts and the absolute majority of former judges were dismissed. However, in the Taliban government, there is a type of Islamic review of laws, decrees, regulations, and orders. First of all, the Supreme Court of the Taliban through the division of *Dar-uL-efta* gives an opinion on the Islamic nature or contradiction of the practices, regulations, and laws. Secondly, as mentioned, the committee has been appointed in the Ministry of Justice to review the previous laws make the necessary amendments, and send them to the Taliban leader for approval. In addition, the HDSFDO has the authority to supervise the implementation of orders and decrees of the Taliban leader and other laws in various departments. In the same

733 Zakia Adeli, "The Consequences of Taliban Policies on Human Rights in Afghanistan August 2021–August 2023" 27 *Asia Pacific Issues* 2 (2024).

734 *Supra* note 744.

735 I. Nassery, "Afghanistan: Afghan legal system under the Taliban" 6 (2024).

way, the MPVPVHC has the authority to handle people's complaints and supervise the implementation of Islamic laws by the people[736].

In the same way, next to the Taliban leader, there is a council of Taliban religious scholars who advise the leader on important issues, but their views are consultative and the Taliban leader himself has the authority to make the final decision. Therefore, it is concluded that there is no specific mechanism for constitutional review in the de facto government of the Taliban, but the Taliban have a widespread and inconsistent form of monitoring the laws, decrees, regulations, and the functioning of the Emirate institutions and even the actions of the people. The purpose of this review and monitoring is to ensure that the functioning of Emirati institutions, the compliance of laws and regulations, and the people's behavior are in accordance with Talabani Islam. The researcher calls this type of review and monitoring a special type of *Talibani Review* or *Islamic Review*.

5. Chapter Summary

This chapter reviewed the review of laws after the republic fell in August 2021 under the de facto Taliban regime. The Taliban abolished the constitution and other laws. The Supreme Court was dissolved, and the judges of the former government were removed. The Taliban appointed members of their group to the Supreme Court and other courts. Most of them do not have higher and legal education and have graduated from religious schools, and even some do not have sufficient literacy. For this reason, a mufti was appointed in every court along with the judge to advise the judges about cases from the Islamic point of view. It should be added that because the Taliban government does not have a constitution and other basic laws, the issue of reviewing the laws that are discussed in other countries does not exist in Afghanistan at the moment.

In the Supreme Court, the chairmanship of Dar al-Afta is responsible for providing opinions on requests submitted by governmental and non-governmental departments. In addition, this chapter discussed a committee in the Ministry of Justice to review laws. A member of the Supreme Court in the law review committee in the Ministry of Justice reviews the conformity of laws with Islamic rulings.

---

[736] H. Rahimi, " How the Taliban are Institutionalizing the Propagation of Virtue and Enjoinment of Vice in Afghanistan" 7 *Afghanistan* 100 (2024).

In addition, the chapter studied in this chapter that the Taliban also changed the Prosecutor General's Office and made it an institution that oversees the implementation of their leader's orders. The Attorney General's Office played an important role in the Afghan legal system in fighting crimes. However, in the Taliban government, the supervision department has the duty to monitor the implementation of the orders of the Taliban leader in various departments.

In this chapter, it has also been seen that the Taliban dissolved the Independent Defense Lawyers Association and made it a part of the Ministry of Justice. Women were banned from serving as defense attorneys. The nationalization of the legal profession will also negatively affect the rule of law in Afghanistan.

In the same way, the Ministry of Women's Affairs was dissolved, and instead, the Ministry of Prohibition of Good and Prohibition of Evil was established. This institution has the duty to monitor the implementation of Islamic laws and handle people's complaints. At the same time, these ministries also deal with religious issues and command and forbid the people.

Finally, this chapter stated that the review of the law in the Taliban system, in the sense of its conformity with Islamic rules, should be consistent with the Talibani interpretation, which can be referred to as the Taliban review or the Islamic review based on the Taliban interpretation. In Chapter seven “Constitutional Review Model for Afghanistan: An Empirical Study” discuses and suggest the suitable Constitutional Review Model for Afghanistan with the help of empirical study.

There may be different viewpoints on the topics discussed. I fully acknowledge and respect the diverse viewpoints of researchers. There may be different interpretations of the Taliban legal documents. The study offers a well-reasoned, evidence-based, and coherent analysis grounded in legal sources and scholarly discourse. The purpose has not been to dismiss or overshadow alternative interpretations, but to contribute constructively to the broader conversation on law review by presenting one informed approach among many.

Chapter 6

Constitutional Review Model for Afghanistan: An Empirical Study

1. Introduction

In the previous chapters, the history of constitutional review mechanisms was reviewed in the past constitutions of Afghanistan. Afghanistan's constitutional law history shows that constitutional review has not been institutionalized[737]. In the same way, the third chapter showed that constitutional review has evolved gradually in democratic countries[738]. Especially after World War II, this process has accelerated, and the majority of countries in the world have adopted constitutional review mechanisms[739].

Each country has chosen a constitutional review mechanism based on political, social, and cultural conditions[740]. America has a decentralized judicial system[741], most European countries have adopted a centralized "Constitutional Court" system, and France and some other countries have adopted a "Constitutional Council," which is relatively political nature in their constitutions[742].

Despite the changes in the political system after 2001, Afghanistan could not choose an effective constitutional review mechanism in the constitution that was approved in 2004[743]. Disagreements in approving the 2004 Constitution caused a dual judicial and political constitutional review mechanism in the Constitution, which caused many problems in practice[744]. After the republic's fall in 2021, Afghanistan currently lacks a constitution[745]. The existence of a constitution is a must for any country[746].

With the understanding of this issue, in this chapter, using the empirical method, the appropriate constitutional review model for Afghanistan has been studied. This chapter assesses the appropriate mechanism of constitutional review for the future

737 *Supra* note 179 at 97.
738 *Supra* note 7 at 4.
739 Supra note 282 at 417.
740 *Supra* note 207 at 51.
741 *Supra* note 274 at
742 T. Ginsburg and M. Versteeg, "Models of Constitutional Review" in Lee Epstein (ed) *The Oxford Handbook of Comparative Judicial Behaviour* 45 (Oxford University Press, 2024).
743 *Supra* note 13.
744 *Supra* note 57.
745 F. L. Ramaioli, "A Constitutional Emirate? Legal Developments in Taliban Afghanistan" 17 *JCL* 11 (2022).
746 R. Dixon, "The New Responsive Constitutionalism" 87 *Modern Law Review* 799 (2024).

constitution of Afghanistan from the point of view of constitutional law scholars, those who played a role in the drafting process of the 2004 constitution, members of the Supreme Court, judges, law professors, ICOIC members, parliament members, lawyers, and civil society activists are studied through 30 interviews. Also, through 284 questionnaires, the opinions of professors, students of the Faculty of Law and Faculty of Sharia, judges, jurists, defense lawyers, and civil society activists have been studied.

This chapter's primary goal is to present an appropriate constitutional review model based on the opinions of constitutional law experts.

2. Significance of the Constitutional Review Mechanism for Afghanistan

The legal system of every country consists of institutions and norms that have interacted with each other in the era of this system, and all of them align with its goal. The purpose of every legal system is to justify the institution of protection of the constitution because the constitution is the fundamental law of every country, and it governs other laws from a legal-political point of view[747]. The principle of constitutional rule in the hierarchy of laws requires that the laws at the lower levels do not violate the norms and laws of the upper hand and do not disturb the boundaries set by the Constitution. Otherwise, on the one hand, it may focus on the government itself, and on the other hand, it might focus on the acquired rights of individuals and social freedoms[748].

Hence, it can be said that if the constitutional review mechanism is not the most important part of the knowledge of constitutional law, it has a fundamental role in maintaining the hierarchy of norms in the legal system of any country and the protection of its constitution. Today, the protection of the constitution and the constitutional review mechanism of monitoring play a fundamental role in the evolution of rights and their progress. As in many countries, the votes and opinions expressed by the institutions that protect the constitution reflect the evolving realities

747 S. Slorach, J. Embley et. al., *Legal Systems and Skills* 6 (Oxford University Press, 2023).
748 *Supra* note 228 at 905.

of society, and in many cases, these opinions are the driving force behind legislatures and centers of power's consideration of these developments[749].

Looking at the constitutional review mechanism in countries, I attempted to study the importance of the constitutional review mechanism in Afghanistan from the perspective of constitutional law experts. In the interviews, the question was raised: What is your opinion regarding the need for a constitutional review mechanism for Afghanistan? The majority of the interviewees emphasized the existence of the constitutional review mechanism in Afghanistan. They mentioned that the absence of an effective constitutional review mechanism was the gap in Afghanistan's legal system in the past. They added that the ambiguity in the 2004 Constitution aroused the problems. However, most of them emphasized that the constitutional review mechanism should match the objective realities of Afghan society. Perhaps a constitutional review mechanism has good efficiency in society but does not have the necessary efficiency in Afghanistan or elsewhere.

Mirwaise Ayobi[750] , no country, especially developing countries, can exist without a mechanism to protect the constitution. There is no other way to protect the Constitution and citizens' rights than through a constitutional review mechanism. Adopting an effective constitutional review mechanism is essential to protecting the fundamental rights of citizens and the balance of government power in Afghanistan's future political system.

In addition, Justice Willem Verrijdt[751] mentioned that, in his opinion, every country needs a constitutional review mechanism. All State organs must be held accountable by a judge, and that is even the case for a democratically elected legislator. The majority within Parliament is often the same as the government, so its role in controlling the government is limited. It will often just vote on the proposals drafted by the government. Therefore, constitutional control of the legislator's work is an extended judicial control of the executive's work. Justice Verrijdt supports the

749 Kovacs and Toth, "Constitutional Review as a Democratic Instrument" 48 *Review of Central and East European Law* 477 (2023).

750 Interview with former assistant professor of constitutional law and administrative law at Herat University. He got his Ph.D. in Judicial review of the Executive performance in Afghanistan from Speyer University, Germany, 25/ 08/2022.

751 Interview with a member of the Constitutional Court of Belgium, 15/09/2022.

existence of a judicial body to protect the Constitution. He considers the existence of a constitutional court necessary for every country.

Abdullah Shafaei[752] said that, as much as a country needs a constitution and a modern system and government by universally accepted criteria, it is necessary to have a constitutional review mechanism. A constitution states the structure and competencies of the governing bodies and the rights of the citizens, and also it guarantees and protects them. The constitution will have the necessary efficiency if there is a powerful system and institution to monitor the implementation of the constitution and protect it. The experience of governance and human thought has shown that the best mechanism for monitoring the constitution is to conduct constitutional review proceedings. Undoubtedly, there was no place for constitutional review in the past constitutions of Afghanistan. This huge gap in the failure of Afghanistan's past constitutions is quite noticeable. In general, constitutional review have had successful results in many developed countries. Considering their experience will save us from making many mistakes. Trying the necessary methods confuses us and puts us on a rough path where we do not know the results.

Furthermore, Professor Dr. Rainer Grote[753] said he thinks having a constitutional review mechanism makes a lot of sense. He added if you don't have one, then in the last instance it is left to the political branches to decide to determine themselves whether the Constitution has been respected by those who are in power while exercising power, that is to say, by themselves or not so the idea of having a constitutional review mechanism is that you have an independent an independent institution which determines in cases of doubt or in cases of controversy whether the constitution has been respected or has not been respected and if you think it is meaningful and it is even necessary that the rules fixed by the constitution are also respected and implemented in practice and then he thinks there are good convincing reasons for having an independent institution which exercise the power of constitutional review and determine in a binding manner in the case of doubt or Controversy whether indeed the constitution has been respected or not and in case it comes to the conclusion that the constitution has not been respected. The failure to

752 Interview with a former member of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) and a Professor at Ibni-Sina University, on 20/09/2022.

753 Interview with Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law and Lecturer of Constitutional Law, Comparative Law, European Law at the University of Heidelberg, on 27/09/2022.

respect the constitution in that particular case, I think constitutional review in a country aspiring to the constitution that enshrines separation of powers is not autocratic; it makes much sense to have a constitutional review mechanism.

Mohammad Qadamsha[754] described that it is necessary to have a mechanism called constitutional review in the country for proper coexistence between society members and public order. Until the people's citizenship and fundamental rights are secured, the government can be responsible to the people for its activities. Life in America has had an impact on my opinion. But from the perspective of research and his life experience in Afghanistan,

He added that society must have a mechanism so that people can have a relationship with the government and the citizens, and based on that, they can reach their rights. From an academic point of view, it is still seen that different societies have such mechanisms, but these needs are influenced by the religious, cultural, social, and historical issues of the countries'. Afghanistan has had a different experience. There has always been a need for a constitutional review mechanism. Those at the top of governance and regulation of government-citizen relations have made these issues political. And considering the structure that was influenced by their political interests and based on the short-term political interests of politicians, not based on the sense of intention of the government-citizen relationship.

Moreover, Shamshad Pasarlay[755] explained that this is one of the questions that has been discussed for a long time in the literature: whether judicial review is required. The general trend in the scholarship is that it is required. The judicial review might work under certain circumstances to protect rights, and some scholars like Alex Stone St. and Samuel Issacharoff discussed that the judicial review or constitutional review and the institutions that perform constitutional review are essential for democratization. They can steer or bleed the transition to democracy because these are impartial institutions that conduct some fundamental tasks in society. That is why a country needs a judicial review. There are different theories about why judicial review is needed, or other countries adopt judicial review. It should be mentioned that

754 Interview with Assistant Prof. of International Sustainable Development at Seattle Pacific University, he got his Ph.D. from the University of Washington. He was assistant Prof. at Balkh University Afghanistan, on 12/10/2022.

755 Interview with Assistant Instructional Professor at the University of Chicago. He got his Ph.D. in comparative constitutionalism from the University of Washington, on 23/10/2022.

some countries do not have a constitutional review mechanism. He thinks the Netherlands is one of those countries that does not have a constitutional review mechanism. It's a systematic system of judicial review, so yeah, it's needed. It can do good things if you have judicial review, but it's unnecessary. It's not an indispensable institution for rights protection.

Furthermore, he added that a judicial review does not mean that rights will not be protected, but some scholars recently discussed that courts are not needed for fundamental rights. Courts really cannot protect the rights. What is needed in other constituencies that can rally behind certain rights, for example, in the US, if it's the right to abortion, these abortion rights groups kind of advocate for that. The right to carry guns is the National Rifle Association, so these scholars discuss that these constituencies outside the judiciary are needed to protect rights for judicial review in constitutional courts into other functions that might benefit countries at a very critical time. To give you a short answer, NO! Judicial review is unnecessary for better protection of rights; it can protect rights, but it does not mean that rights are not protected if you don't have a judicial review or constitutional court.

In addition, this question was asked in the questionnaire to the professors, students of law and Shariah faculties, judges, defense lawyers, and civil rights activists. They gave the following answer to this question:

Diagram 6.1: The Importance of the Constitutional Review in the Legal System of Afghanistan

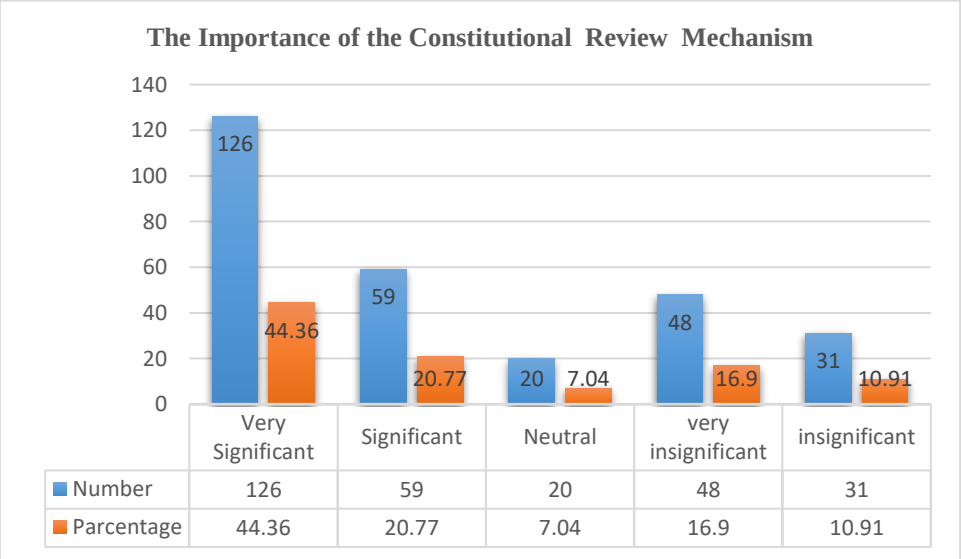


Diagram 6.1 shows that among the 284 research participants, 126 (44.36%) considered the existence of a constitutional review mechanism very significant for

Afghanistan's legal system in the future. While 59 people (20.77%) described it as significant, 20 people (7.04%) said they had no opinion, 48 people (16.9%) said it was very insignificant, and 31 people (10.91%) said it was insignificant. From the opinions of the research participants, it is concluded that about 65 percent of them consider the existence of a constitutional review mechanism required for the future constitution of Afghanistan.

As a result, most of the interviewees (29 people) and 65 percent of questionnaire participants had a positive opinion on the existence of a constitutional review mechanism in Afghanistan. To avoid prolonging the discussion, I did not include the opinions of all 30 interviewees. Because their ideas were very similar.Their opinions will be mentioned in other cases. However, it should be noted that some judges and prosecutors did not want their names to be mentioned. They live in Afghanistan, so they asked to be named only as interviewees.

In addition, the questionnaire participants were asked how important it is to research the constitutional review mechanism in Afghanistan. Participants of the questionnaire regarding the research on an appropriate model of constitutional review for Afghanistan answered as follows:

Diagram 6.2: Importance of Research on Proposing a Constitutional Review Mechanism

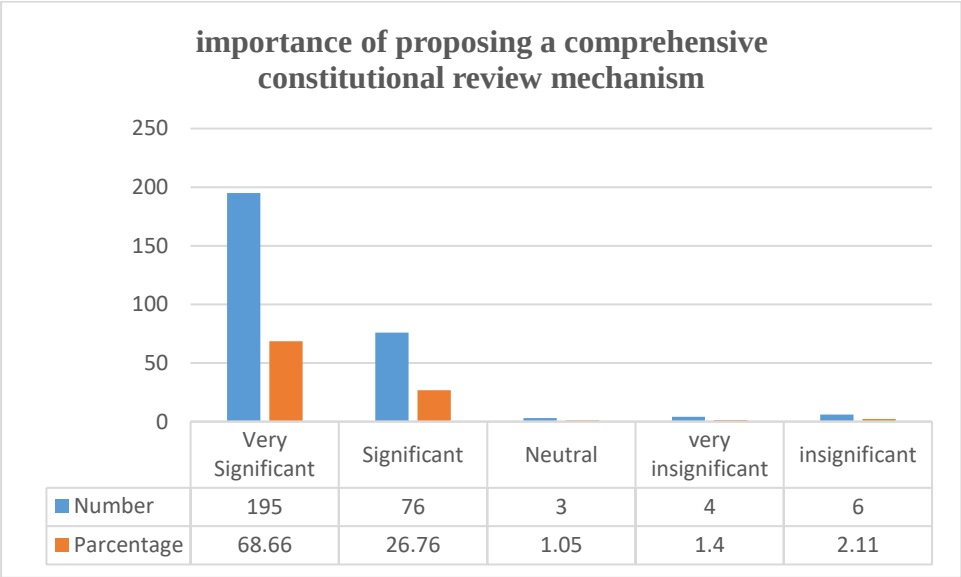


Diagram 6.2 shows that 195 (68.66%) of research participants stated that it is extremely important to research this matter. 76 people (26.76%) said that it is

important, only three people (1.05%) said that they are neutral, four people (1.4%) said that it is very insignificant, and six people (2.11%) said that it is insignificant. Consequently, 95.52 percent of the participants considered it important to research the appropriate constitutional review model for Afghanistan.

3. Impact of Past Political Systems on the Constitutional Review Mechanism

Najman Masoodi[756] described the nature of political systems in developing countries or the third world, which directly impact the use of the constitution. Freedom-loving and democratic systems emphasize the protection and supervision of the Constitution; if political systems in their inner existence try to support society and institutions, they are supported by the need to use and implement the Constitution directly. Dr. Muttaqi[757] explained that the type of political system greatly influences. There is a relationship between the institution of constitutional protection and the government, but the constitutional protection institution should not be affected by it. It is related to the three powers, but they should not influence it.

Ghazal Haris[758] said countries that have stronger legal systems or more stable political systems those countries tend to be much better with their constitutional review mechanism. It is difficult to talk about the political system and how that impacts the constitutional review because if we're talking about presidential versus parliamentary system when we're talking about civil versus common law system there are so many examples around the world for example Germany, such as an example of a parliamentary system with constitutional court and India with parliamentary system, but the supreme court has the power of judicial review. if you're talking of presidential systems in the US, it's working extremely well as compared to Afghanistan. I mean the US with a presidential system; the supreme courts have the power of judicial review. I think that the nature of the political system if it is democratic and legitimate and based on the rule of law does not impact a lot on constitutional review mechanisms. For me what's important is how strong a legal framework can be created for a constitutional review mechanism. Once a very strong

---

756 Interview with Professor of Constitutional Law at Ashna University in Kabul. PhD. in Public Law from Iran, on 16/11/2022.

757 He was a member of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), on 27/11/2022.

758 Interview with Prof. Haris a former member of ICOIC and a Professor of Constitutional law at the American University of Afghanistan, on 08/01/2023.

constitutional review mechanism is created, how will it be implemented? For example, if this power is given to the Supreme Court, the significant question is how the Supreme Court will implement it. In Afghanistan, this power was vested to the Supreme Court But unfortunately, the Supreme Court did not really have that strength, also didn't have that interest in making this mechanism strong, if we are giving this power to a constitutional court, it is important to understand how that constitutional court is going to function? There are some constitutional courts, like one of Germany, that are extremely strong, independent, and powerful, and have seen an example around the world of being the best for the strongest constitutional court but then you also have other countries like in the astern Europe Like Hungary, for example, where the constitutional court has been very vulnerable to the political demand and to the political changes in the country, so I think as it is important to have a very small legal framework supporting constitutional review, which of course should be a constitutional mandate there should be the political will to allow the creation of that system and once the power is given to an institution it very much depends on that particular institution, on how they make these mechanisms Efficient and effective method.

In contrast, Dr. Pasarlay thinks that the form of government might not affect the judicial review. He added that some work suggests that parliamentary systems are more prone to adopting a constitutional court to review and exercise this function because the argument is that it has a competitive nature of politics in a parliamentary system. Political parties come and go from power. They cycle back and forth in power. Thus, when one group loses political power, they tend to create constitutional courts and give them some power, or the power of judicial review. When they are out of politics, and if they lose in elections, they will have the court as a kind of check on who will be there to align in some kind of contain or to limit the power of the new electoral winners. But it's not general. Some parliamentary systems have the Supreme Court, which is a centralized or diffuse system of judicial review, where there is no constitutional court but a Supreme Court will perform judicial review.

In addition, Dr. Pasarlay's short answer was that there is no relation between the form of the government and the form of judicial review. You will have centralized and decentralized judicial review in both presidential or parliamentary systems or some other forms of mixed make mixed political system. You will have abstract and

concrete judicial review in all. Types of political systems like presidential, parliamentary, or a mixed system and the same will be confirmed with strong or weak from judicial review. Consequently, they're available in all types of systems. He thinks the form of government is not a factor that whether you are a presidential system you're prone to adopting a certain type of judicial review if you are a parliamentary system you will adopt a different type of judicial review or the institution that performance is not relevant. I think it's not relevant. In short answer will be that I don't think it affects the farm or the nature of judicial review.

However, I do not agree with this opinion of Dr. Pasarlay because research has shown that the form and nature of the political system have an effect on the political and legal institutions in a country. Institutions implementing the supervision of the constitution cannot be excluded from other institutions. For example, Aylin Aydin-Cakir tried in his research to study the effect of constitutional review mechanisms on reducing violations of the constitution by governments and the impact of government on constitutional review mechanisms. After reviewing the research literature, he concluded that the political system has an impact on the decisions of the constitutional review authorities, but these institutions can moderate it with their performance. (Aydin-Cakir, 2019, pp. 1118-1119) Accordingly, I conclude that there is a connection between the nature of the system and the constitutional oversight authorities, but these institutions can moderate it with their performance. It could be concluded that there is a connection between the nature of the system and the constitutional oversight authorities.

Dr. Pierre-Emmanuel Pignarre[759] begins by discussing the structure of federal and unitary states. He describes that constitutional review holds immense significance in federal systems as it not only safeguards the fundamental rights of citizens, akin to Germany's model but also empowers judicial bodies. For instance, the German Constitutional Court plays a pivotal role in overseeing the allocation of authority between the central and state levels. In federal systems, one of the primary roles of constitutional review, particularly exemplified by bodies like the Federal Constitutional Court, is to ensure adherence to the division of powers outlined in the federal constitution. This includes safeguarding the rights of federal entities.

[759] Interview with Dr. Pignarre he is a professor at Université Paris Panthéon-Assa & former senior research fellow at Max Planck Foundation for International Peace and the Rule of Law, Afghanistan Project, 18/01/2023.

Constitutional review is crucial in preserving the equilibrium between the federal and national levels, a topic he explored in his PhD, particularly concerning the European Court of Justice and its quasi-federal role in adjudicating member-state issues. Conversely, in Unitarian states like France, constitutional review doesn't revolve around power distribution since such concerns don't exist.

Professor Pignarre further highlighted that in France, the primary issue within the scope of constitutional review relates to the allocation of powers between the central government and local entities. However, this allocation isn't overseen by the Constitutional Council. Therefore, while power distribution is vital in federal states, it holds less importance in Unitarian states. Regarding the nature of governance, he pointed out the complexity in drawing parallels, noting that in the UK, parliamentary sovereignty prevents judicial bodies from challenging laws, unlike in Germany where the constitutional court can nullify laws passed by parliament. He emphasized that the nature of the regime doesn't directly dictate the mechanism of constitutional review; rather, it's influenced more by tradition and cultural factors. For example, the absence of judicial review in the UK stems from its unwritten constitution and the principle of parliamentary supremacy, while in Germany, the Federal Constitutional Court serves as the ultimate guardian of the constitution, reflecting a distrust in pure parliamentary sovereignty.

Dr. Luisa Netto[760] believes that a sincere commitment to upholding human dignity necessitates recognizing that the state and its powers should serve as means to facilitate individual development, rather than ends in themselves. Therefore, it is imperative to acknowledge and respect the diverse historical, cultural, and religious backgrounds of societies. The political system of a country is deeply intertwined with its history, and any constitutional review mechanism must be mindful of and compatible with this historical context to effectively preserve and leverage tradition.

She added Drawing from my experiences residing in the Netherlands and engaging in teaching and research in constitutional law and comparative constitutional law, I have observed that different political systems manifest distinct institutional arrangements. For instance, attempting to vest the responsibility of scrutinizing the constitutionality of laws in the parliament, as in Brazil, would be incongruent with the Dutch tradition.

760 Interview with Assistant Professor at the University of Leiden, Netherlands on 28/01/2023.

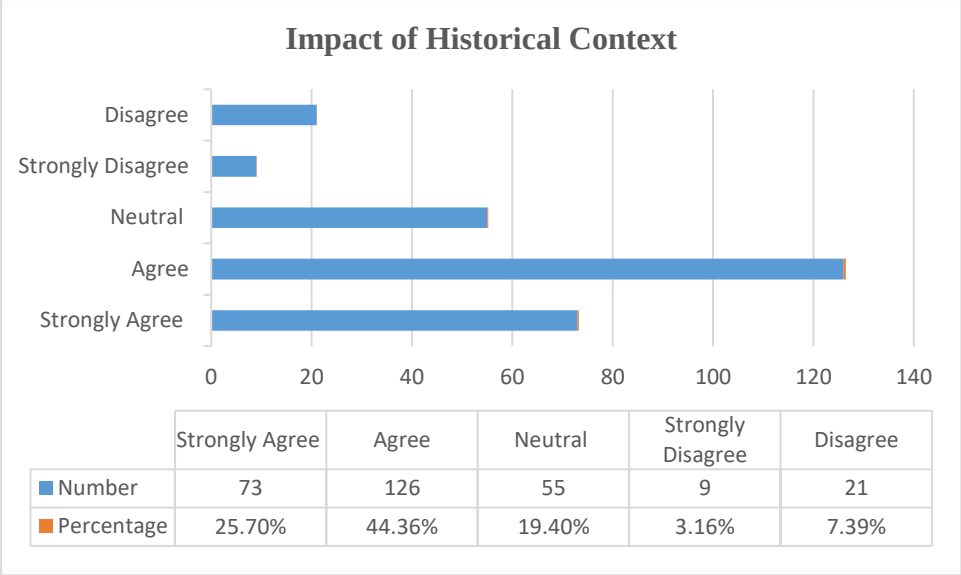
In the Netherlands and the United Kingdom, historical development has entrenched the notion of parliamentary sovereignty, shaping the parliament's role as not merely a legislative body but also a guardian of the rule of law in contemporary society.

Moreover, she added it is crucial to consider how power is structured within a society, the prevailing traditions, and the relationships between different branches of the state. These factors significantly influence the design of constitutional review mechanisms. While constitutional design offers avenues for introducing new values and actions, it is essential to balance tradition with adaptability to address evolving societal challenges. The legitimacy of any constitutional review system is paramount; without sufficient legitimacy, the decisions rendered by constitutional courts or parliaments risk lacking public support. When evaluating existing constitutional review systems, it is imperative to conduct a critical assessment of their functionality and the sources of legitimacy. This assessment should encompass considerations such as whether the decisions are effectively implemented and whether the system adequately safeguards against undue majoritarian influences. Furthermore, in the context of constitutional review or constituent processes, while traditions should inform deliberations, they should not be regarded as immutable; rather, they should be subject to scrutiny and, if necessary, revision to ensure alignment with contemporary societal needs and values.

From the opinions of the interviewees, who are experts in constitutional law, it can be concluded that the nature of the political system and especially those who hold power, as well as the federal or the centralization of the form of government, are related to the constitutional review mechanism.

The participants of the questionnaires were asked to what extent they think the historical context of Afghanistan affects the implementation of constitutional review in the country. They expressed their opinion in this regard:

Diagram 6.3: The impact of Afghanistan's historical context on Constitutional Review



	Strongly Agree	Agree	Neutral	Strongly Disagree	Disagree
Number	73	126	55	9	21
Percentage	25.70%	44.36%	19.40%	3.16%	7.39%

Diagram 6.3 shows that the respondents to the questionnaire confirmed the negative impact of the political systems and the country's history on the body that protects the constitution with a majority. As can be seen in the diagram, 73 people (25.70%) completely agree, and 126 people (44.36%) agree. In this case, we can say that about seventy percent have approved of the history and political system. The history of Afghanistan has witnessed non-democratic and autocratic systems. The rulers have not paid much attention to the role of the people and the rule of law. The construction of institutions for the implementation of the Constitution and the institutions protecting the Constitution in Afghanistan has not developed well. The impact of the political system on the constitutional monitoring body has been negative. Afghanistan's judicial system is also another factor that the supervision of the constitution cannot develop well. Although a relatively democratic system was established in the country after 2001, various factors prevented this.

4. Performance of Afghanistan's Constitutional Review Mechanism from 2004-2021

Judge Nargis Haftzadeh[761] emphasized that Articles 121 and 157 of the 2004 Constitution required thorough elucidation of the constitutional review processes, which unfortunately did not occur. She identified these articles as pivotal but inadequately clarified elements contributing to weaknesses in the interpretation and oversight procedures. Specifically, the lack of clarity about the functions, and powers

[761] Interview with Former Judge of Appeal Court in Balkh Province on 02/02/ 2023.

of the ICOIC and the Supreme Court regarding the jurisdiction for constitutional interpretation has led to a situation where every institution vies for greater authority, seeking to augment its competencies. The word interpretation is mentioned only once in the Constitution, which is mentioned in Article 121, which states the powers of the Supreme Court. Otherwise, the ICOIC position was not clear in 2004. Although the constitution is comprehensive, it does not specify what the major powers of the constitution were silent about ICOIC's functions and ICOIC was not successful. The Supreme Court could not be successful in monitoring the constitution and acting independently. Both institutions were not successful. We saw that the Supreme Court interpreted the Constitution several times according to the government's discretion.

Judge Haftzadeh added the 2004 constitution ambiguity in regards to constitutional review particularly constitutional interpretation Therefore, there was a need for a specific article for interpreting the Constitution, which clearly stated in which way and by which institution the interpretation should be made. To sum it up, the Supreme Court and the ICOIC could not perform successfully. It should be said that in the case of drafting a new constitution or revising the 2004 constitution, along with other gaps in the constitution, the issue of constitutional supervision has been addressed and a specific institution has been considered considering the conditions of Afghanistan and the constitution guarantees the institutional independence of this organization.

Amirzoi[762] stated that the Constitution's ambiguity caused the Supreme Court, the Parliament, and the executive branch to face each other. The lack of clarification in the interpretation of the constitution caused a conflict between the government and the parliament. This conflict caused the Supreme Court and the ICOIC to proceed with related matters independently. The Supreme Court was under the influence of the government and did not perform independently. In addition, the vote of confidence from the parliament made them dependent on the parliament and impacted their independence. The experiences of the past twenty years show that the ICOIC and the Supreme Court have not been successful in this field and have yet to act impartially.

[762] Interview with Former Judge in Afghanistan Supreme Court and Professor at Kabul University on 08/02/2023.

Dr. Abdullah Shafaei[763] described the performance of Afghanistan's constitutional protection institutions were weak. This weak performance had many reasons, but the main reason was the fragmentation of the authority to monitor the constitution between two institutions. The continuous conflict caused by Articles 121 and 157 of the Constitution made the protection of the Constitution ineffective and ineffective in the last 20 years. The second factor in Afghanistan's constitutional monitoring body's failure was the politicization of the Supreme Court and the Commission for Monitoring the Implementation of the Constitution. The president, especially Ashraf Ghani, infiltrated the judiciary, politicized it, and used it to advance his policies. Although the commission was not spared from this political work and influence, considering its position and weak legal base, the commission became less of a tool of the president. The third factor in the failure of the supervisory institutions was the low capacity and ability of the members of the Supreme Council of the Judiciary and the Independent Constitutional Monitoring Commission. Many of these high-level members had education in Islamic sciences and needed sufficient and deep knowledge and education about the constitution and constitutional review. Therefore, they needed help to analyze and write legal texts. The fourth factor was the factional and party affiliation of the Supreme Council and commission members. Most of the commission and the supreme council members were nominated and selected based on merit and legal knowledge. This selection method caused each member to think about protecting the interests of individuals and political movements before thinking about the country's supreme interests and the system's expediency. Otherwise, the same factions would not support him for his future career, and he would probably be isolated within the organization.

Dr. Adeili[764]Although the Afghanistan government had democratic characteristics and the constitution foresaw democratic principles, its nature was authoritarian. Therefore, in authoritarian systems, the institutions created are mostly for maintaining the system's dominance. A very good example is ICOIC. Although the constitution stated this institution to monitor the implementation of the constitution, in practice, it was a means to achieve the government's goals. "This institution had a democratic and

763 Interview with former Member of ICOIC and Professor of Law Faculty at Ibn Sina University on 16/02/2023.

764 Zakia Adeli was the Deputy Minister of the Justice Ministry of the Islamic Republic of Afghanistan and a Professor at Kabul University (2018-2021) on 04/08/2023.

sophisticated cover, but in reality, it was a tool, and it acted as what the government wanted." The ICOIC was political in nature and did not take any practical action to monitor the Constitution. For example, they found some violations, especially cases of violation of the constitution by the president, but the ICOIC did not publish them.

Moreover, she mentioned the Supreme Court was not successful either. The ability and efficiency of the institutions can be understood from their selection and qualifications. The Supreme Court and the ICOIC members were appointed by the president; consequently, the president had a great role. In addition, the constitution was silent on the powers of the ICOIC. So this caused the Supreme Court and the ICOIC to be successful. Although the ICOIC was called an independent institution, in practice, it was a political institution under the supervision of the government and especially the president.

In general, if we analyze the opinions of 30 scholars and experts about the function of the Supreme Court and the ICOIC, the following result is obtained:

Diagram 6.4: Experts View on the Performance of Supreme Court and ICOIC

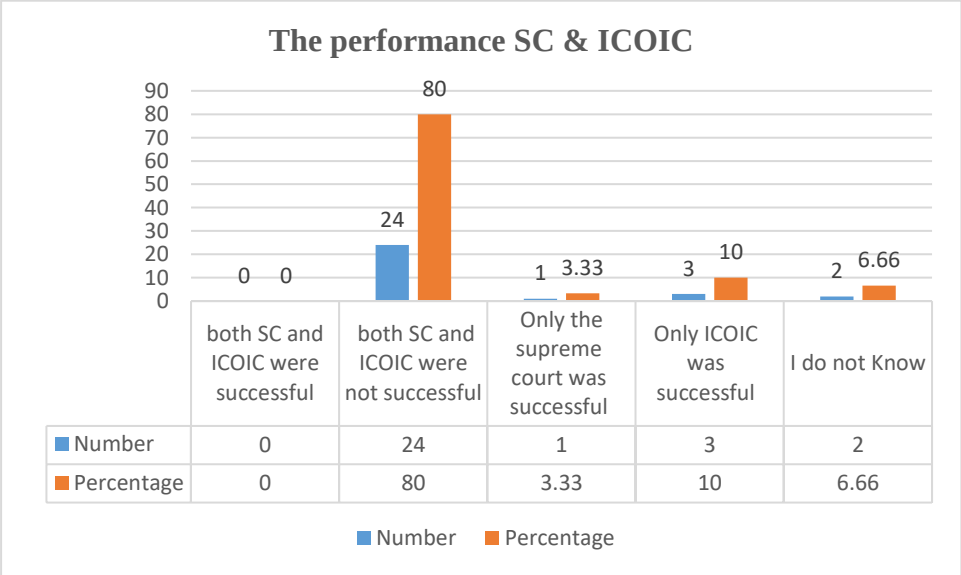
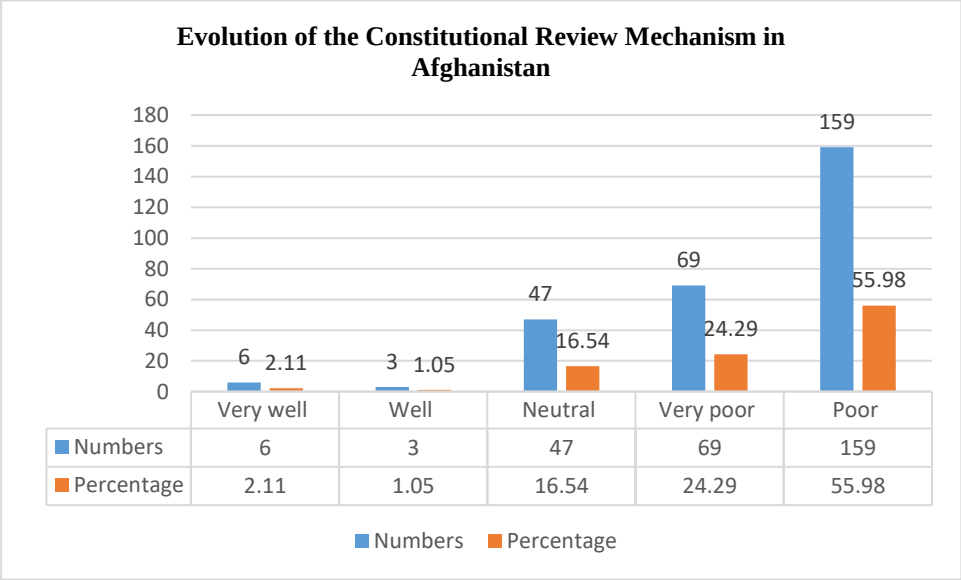


Diagram 2.4 shows that 24 people (80%) of the experts stated that both the Supreme Court and the Commission were unsuccessful. Most of them stated that these institutions were unsuccessful because the Constitution had the authority to interpret the Constitution, the judges lacked familiarity with the supervision of the Constitution, and the government and parliament abused this gap. Institutions for protecting the 2004 constitution were a new and unsuccessful experience. The main

reason for this failure was political intervention in these institutions' formation stages. The two almost parallel institutions were given the authority to protect the Constitution. This action has no logical justification. Out of the respondents, only three individuals (10%) regarded the ICOIC as successful, while one person (3.33%) deemed the Supreme Court successful. Notably, these four individuals did not provide detailed explanations for their assessments, and it's worth mentioning that they are not affiliated with either the ICOIC or the judiciary as judges or members. Additionally, two foreign experts (6.66%) expressed a lack of sufficient information about the operations of both the Supreme Court and the ICOIC, specifically regarding their roles in constitutional oversight.

Those who participated in the questionnaires expressed the following opinion regarding the evolution of the constitutional review mechanism in Afghanistan from 1923 to 1921:

Diagram 6.5: The Evolution of the Constitutional Review Mechanism in Afghanistan from 1923 to 1921



Out of the total participants, 159 individuals (55.98%) asserted that the progression of constitutional review institutions in Afghanistan was notably feeble and sluggish. An additional 69 respondents (24.29%) echoed this sentiment, describing the development as weak. Conversely, only a marginal fraction, comprising 6 people (2.11%), deemed the progress as very good, with another 3 individuals (1.05%)

characterizing it as good. Notably, 47 participants (16.54%) refrained from expressing their opinions on the matter.

The findings of the research underscore a widespread sentiment among approximately 80 percent of the participants, indicating dissatisfaction with the monitoring of fundamental rights in Afghanistan. Furthermore, insights gleaned from interviews corroborate this concern, emphasizing the significance of addressing this issue in the context of constitutional review.

5. An Appropriate Constitutional Review Model for the Future Constitution of Afghanistan: Discussion

As recent historical events in different countries, especially European countries, testify, paying attention only to the special task of constitutional review in an era when the concepts of human rights are growing significantly cannot meet the needs of current societies. (Faridzadeh & Kabgani, 2019, p. 324) In other words, liberal constitutionalism is growing and evolving, and such competence, which can mostly be examined in institutionalist and normative constitutionalism, cannot bring a sense of public satisfaction to societies. On the other hand, today, constitutional justice is a sufficient method to guarantee people's fundamental rights and freedoms. Before World War II, the experiences of different European countries, especially Germany and Italy, showed this reality. Accordingly, after the war, most countries paid special attention to the competence of the constitutional review institutions in supporting fundamental freedoms. (Sweet, The politics of constitutional review in France and Europe, 2007, p. 89) In the same way, today, the protection of fundamental rights has become the main basis for the legitimacy of constitutional review. What makes countries different concerning fundamental rights is the relativity and limits of restrictions on fundamental rights and freedoms, and more importantly, the method of determining these limits is related to the fact that the determination of such limits and boundaries after the legislature is within the competence of institutions for the protection of the constitution. (Krajewski, 2023, p. 160)

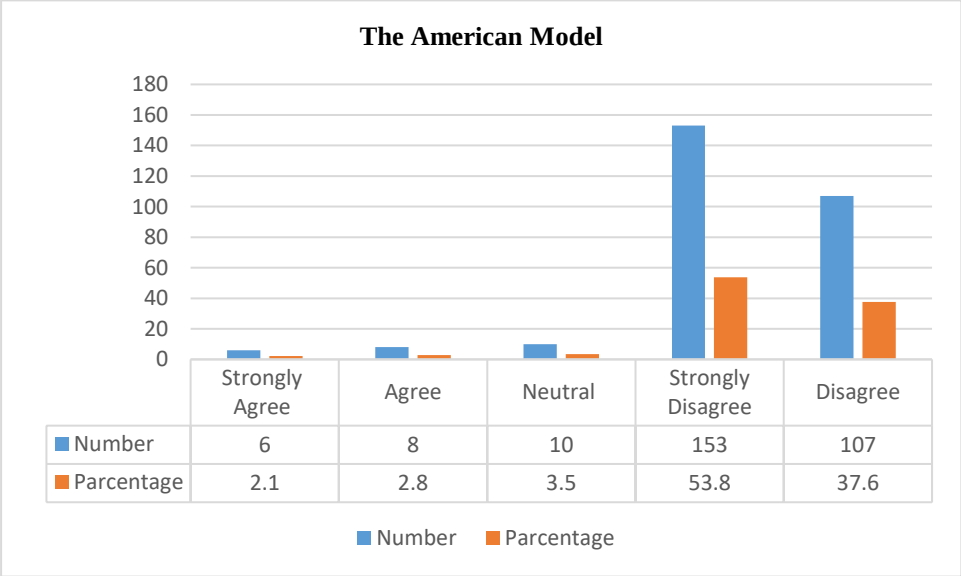
Keeping in mind the things that have been said, the existence of a mechanism to protect the constitution in any country, especially developing countries like Afghanistan, is necessary to protect the rights of citizens. As it was discussed in the third chapter, countries have considered different models to protect citizens'

constitutional and fundamental rights. I shared the question with the interviewees and those who answered the questionnaire: which method of protecting the constitution would be effective for Afghanistan? The collected data shows these results.

5.1. The American Model (Decentralized Model)

The research participants were asked how effective the decentralized or American model of constitutional protection would be. To what extent do they agree or disagree with this system for the future of Afghanistan?

Diagram 6.6: Participants' opinions about the effectiveness of the American Model



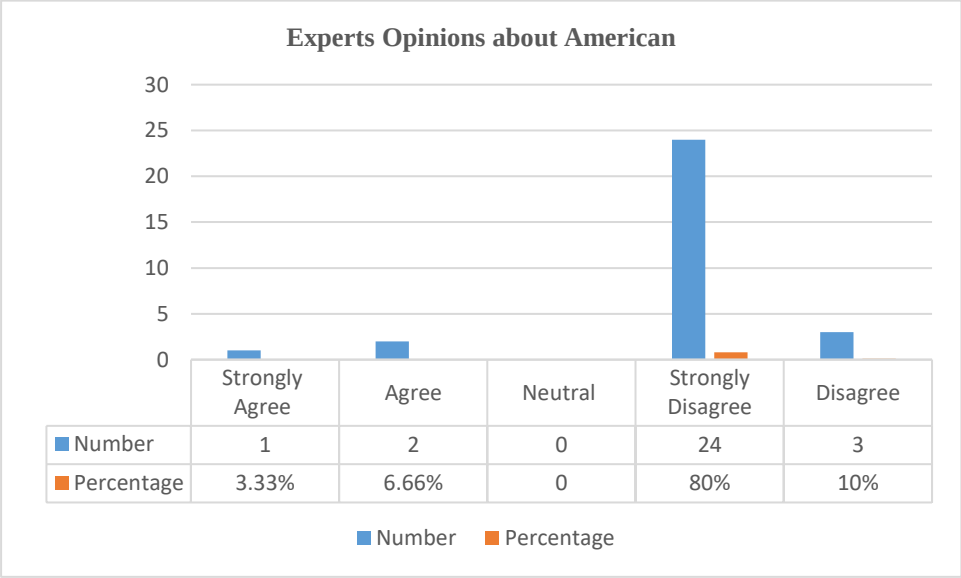
A mere 6 individuals (2.1%) expressed strong agreement with the decentralized model, with an additional 8 people (2.8%) indicating agreement and 10 individuals (3.5%) maintaining a neutral stance. In contrast, a significant majority of 153 respondents (53.8%) vehemently opposed the American model, while another 107 individuals (37.6%) registered their disapproval. The research findings indicate a striking consensus, with approximately 90% of participants rejecting the decentralized constitutional monitoring system.

These perspectives hold particular significance given the composition of the research participants, the majority of whom were professors and students from the Faculty of Law and Sharia Law. This demographic is inherently vested in legal scholarship and

education, thus lending weight to their opinions on matters concerning constitutional review and monitoring mechanisms.

30 experts were also interviewed about the effectiveness of the decentralized system. Their response shows that 24 people strongly disagreed with this model, and 3 disagreed; only 2 strongly agreed, and 1 agreed. Diagram 2.6 shows the opinions of experts in this regard.

Diagram 6.7: Experts' opinions about the effectiveness of the American Model



Experts highlighted several reasons why the decentralized system, particularly the American model, would not function effectively in Afghanistan. Firstly, they emphasized that any constitutional review institution must possess functions that align with the constitutional framework, which they believed the decentralized system may not adequately fulfill. Moreover, Afghanistan's tumultuous history, marked by prolonged conflicts, political strife, and civil unrest, has deeply entrenched systemic challenges within the judiciary.

Over the years, the judiciary in Afghanistan has been marred by political interventions and manipulation by both internal and external actors. This has severely compromised its independence and integrity, rendering it unable to function effectively. The continuous wars and widespread corruption have further exacerbated the instability within the country, leading to the near collapse of judicial institutions. Many courts remain inactive, and those that are operational struggle with a severe shortage of qualified personnel.

The experiences of the past two decades have underscored the government's influence over the Supreme Court, preventing it from acting autonomously. Given the current state of affairs, experts expressed skepticism that significant improvements could be achieved in the judiciary in the future. With the recent collapse of the republic and the dissolution of the judiciary, they argued that the decentralized model would face even greater challenges and would likely fail to function optimally.

5.2. The European Model (Centralized Model)

As stated in the previous chapters, the European or centralized model of constitutional review has two main methods: first, the judicial method (Constitutional Court), for instance, Germany and Belgium, Azerbaijan, Austria, and Indonesia. Second, the political method (Constitutional Council), like France, Chad, Mauritania, Iran, and Morocco. Also, some countries have a mixed method. The research participant was asked which of the models could be more effective for Afghanistan. The opinions of both groups of participants are discussed below.

5.2.1. Effectiveness of Constitutional Court for the Future of Afghanistan

Constitutional courts in many countries have been very effective in protecting the constitution and protecting the rights of citizens, and it is often suggested in the legislative process that this institution can be effective in protecting the constitution and the rights of citizens. But the trajectory of Afghanistan's constitution shows a distinct anomaly. A comprehensive examination of Afghanistan's constitutional law history spanning the past century reveals a notable absence of a constitutional court within its institutional framework. Prior iterations of Afghan constitutions have either entirely omitted provisions about constitutional review or have explored alternative methods, none of which have proven successful in practice.

Both groups of research participants, consisting of experts and questionnaire respondents, were solicited for their perspectives on the potential effectiveness of implementing a Constitutional Court within Afghanistan's future constitutional law system. Their opinions on this matter were as follows:

The experts generally had a positive view regarding the Constitutional Court. However, they mentioned that we cannot directly replicate the Constitutional Courts of other countries, especially those in advanced democratic systems, for Afghanistan.

Considering the context of Afghanistan in the future constitution, an institution safeguarding the constitutional law (Constitutional Court or any other name) is important. But, more importantly, ensuring organizational independence, legitimacy of the members' selection process, and clarity of its duties in the constitution are crucial.

Shoaib Timory[765] delineated that the previous model that existed in Afghanistan demonstrated the inefficiency of the mechanism through the Supreme Court, which the government demanded, but the courts did not interpret any cases and enforce them according to the constitution. Afghan judges were not prepared for such tasks and lacked the expertise and knowledge. Therefore, the European model was considered more suitable for Afghanistan. He prefers the European model with a Constitutional Court "or any name Afghans give it" approach for safeguarding the constitution for Afghanistan's future. He thoughts that in the political method of "the Constitutional Council" politicians are involved; for example, in France, former presidents are members of commissions. Therefore, if the court decides on political matters, it becomes clear that it is a political court, and later the independence of the judiciary and the Supreme Court will be questioned. Whereas if a Constitutional Council is established, its sole task is to interpret the Constitution. Therefore, in countries like Afghanistan, the presence of a Constitutional court can be more successful. There is no need to consider the model of a specific country, but the German constitution has been successful because it established a Constitutional Court with clearly defined powers and other considerations. Currently, in Afghanistan, we first need to approve the constitution and then protect it. The constitution should be citizen-centric. However, if the constitution is tailored to protect the interests of the ruling elite and serves a dictatorial regime, it will be ineffective.

Justice Luc Lavrysen[766] discribed in an interview that the Constitutional Court is a good choice for most countries. For example, its efficiency has been very good in Belgium. It has played an effective role in the protection of the constitution, consolidation of democracy and protection of citizen's rights. But to what extent a

765 Interview with Timory, he was the former Deputy Permanent Representative of Afghanistan to the UN in Geneva and a Law lecturer at the American University of Afghanistan, 09/11/2022.

766 Interview with President of the Belgian Constitutional Court and professor of Law school at Ghent University on 23/ 03/2023.

constitutional court was effective for Afghanistan, I cannot give an exact answer because I have little information about the conditions and realities of the Afghan society. According to my opinion, each country should consider a method for protecting the constitution according to its political, legal, and cultural conditions. The main goal of protecting the constitution, the balance of power and the protection of citizen's rights is to provide them in the best way.

Dr. Pasarlay presented the following argument in this regard: the discussion about constitutional review highlights the complexity and importance of the questions surrounding the judicial review models, particularly in the context of transitioning democracies like Afghanistan. There is a global trend favoring the adoption of the European model of constitutional court over the US model, with an increasing recognition of the significance of judicial review in safeguarding rights and promoting democratic principles. However, it is acknowledged that both models can be effective if implemented appropriately, and there is no inherent superiority of one over the other.

In addition, he emphasized that the effectiveness of judicial review depends on various factors, including institutional independence, clarity of powers, and protection against political capture. While constitutional courts have been viewed as essential for democracy in the past, recent developments suggest that they can also be vulnerable to manipulation by political actors, as seen in examples like Brazil and India. Therefore, simply establishing a Constitutional Court in Afghanistan may not guarantee effective judicial review, and additional measures are necessary to ensure its success.

He concluded that in considering potential models for Afghanistan, the centralized model of judicial review is suggested as preferable, wherein a single institution, whether a Supreme Court or a constitutional court, is entrusted with the responsibility. This centralized approach is seen as necessary given the challenges faced by ordinary courts in performing such functions effectively. However, it is crucial to learn from past experiences and tailor the model to suit Afghanistan's specific context, ensuring institutional integrity and independence to maximize its effectiveness in safeguarding the constitution and citizens' rights.

Professor Noorullah Mohseni[767] stated in the interview that we had in this regard that the experience of Afghanistan shows that the Supreme Court and other courts have not been effective in protecting the constitution and solving important issues related to the constitution, and in the near future, especially with the changes that It will not occur in Afghanistan after August 2021. The existence of the institution of protection of the constitution, taking into account the experiences of different countries and its non-existence and the problems that existed in this field during the republic, is certain in the future constitution of the country. But the nature of this institution must have a judicial nature. be completely independent from other forces. For example, we can refer to the experiences of Indonesia in this field. But in my opinion, with my understanding of the Afghan society, we should choose the word council for this institution. Because people don't have good memories of courts like political parties. Because the courts in Afghanistan have mostly acted under the influence of the government and have not had the necessary independence. The European model of the French Constitutional Council with a judicial nature like Germany, Turkey, Belgium, and Italy can be effective.

Professor Dr M. Hashim Kamali[768] During the interview, he emphasized the existence of a constitutional protection institution. He recalled that by understanding its importance, they had considered a Supreme Constitutional Court in the initial draft of the 2004 Constitution, but it was removed due to considerations that arose later during the ratification of the Constitution. Dr. Kamali added that the existence of a mechanism to protect the constitution is necessary in every country. Afghanistan has been politically unstable, due to the continuation of political stability, in addition to other measures, the existence of a constitutional protection mechanism is essential. But this institution must have a judicial nature and its independence is very important. It does not matter whether it is called the Supreme Constitutional Court or the Supreme Constitutional Council. Like European countries, it must be centralized. However, the necessary guarantees in the constitution should be taken into account in terms of the institutional and individual independence of this organization. Efforts

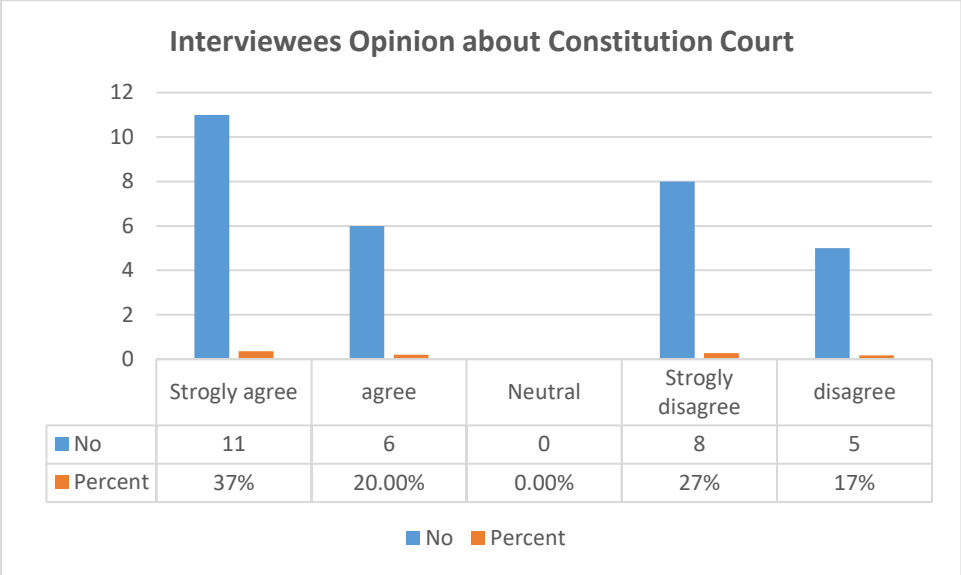
767 Interview with Professor Mohsini, he was dean school of law at Balkh University and former chief of the public attorney general office in Herat Province on 22/09/2023.

768 Interview with Afghan Islamic scholar and former Professor of Law at the International Islamic University of Malaysia. He was also, a member of the constitutional reviewing commissions in 2003 on 25/05/2023.

should be made for Afghan politicians to gradually institutionalize the tradition of respecting the decisions of this institution.

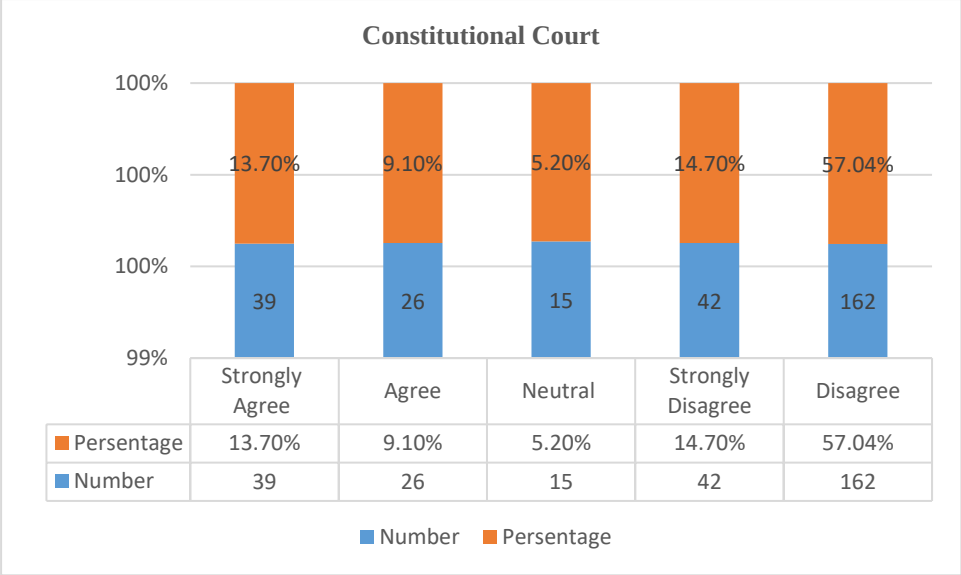
The experts offered the subsequent opinion on the Constitutional Court:

Diagram 6.8: Experts' opinions about the effectiveness of the Constitutional Court



As evidenced by the viewpoints of experts, 8 individuals (27%) are in strong favor of establishing a constitutional court for Afghanistan's future, 2 individuals (6.60%) agree, 7 individuals (23%) strongly oppose it, 13 individuals (43.3%) disagree, and none expressed neutrality on the matter. Despite the opposition from 66% of respondents, it is evident that approximately 33% endorse the establishment of a Constitutional Court as a favorable model for safeguarding the Constitution and protecting citizens' rights in Afghanistan.

Diagram 6.9: Questionnaires participants Opinions regarding the effectiveness of the Constitutional Court



In diagram 6.9, depicting responses from 284 questionnaire participants, it is evident that 39 individuals (13.7%) strongly advocated for, while 26 individuals (9.10%) expressed support for, the establishment of a Constitutional Court in the future constitution. A further 15 participants (5.2%) remained neutral, while 42 individuals (14.70%) were strongly opposed and 162 individuals (57.04%) were against this proposed model.

The primary rationale behind the 71% dissent toward this model stems from the historical ineffectiveness of Afghanistan's judicial system. Particularly over the past two decades, the Supreme Court exhibited a reliance on governmental influence. Although proponents argue that the envisioned Constitutional Court would operate independently from conventional courts, the majority of dissenters object primarily due to its designation as a court. They contend that an institution tasked with safeguarding the constitution should possess judicial functionalities and responsibilities, rather than merely bearing the title of a court.

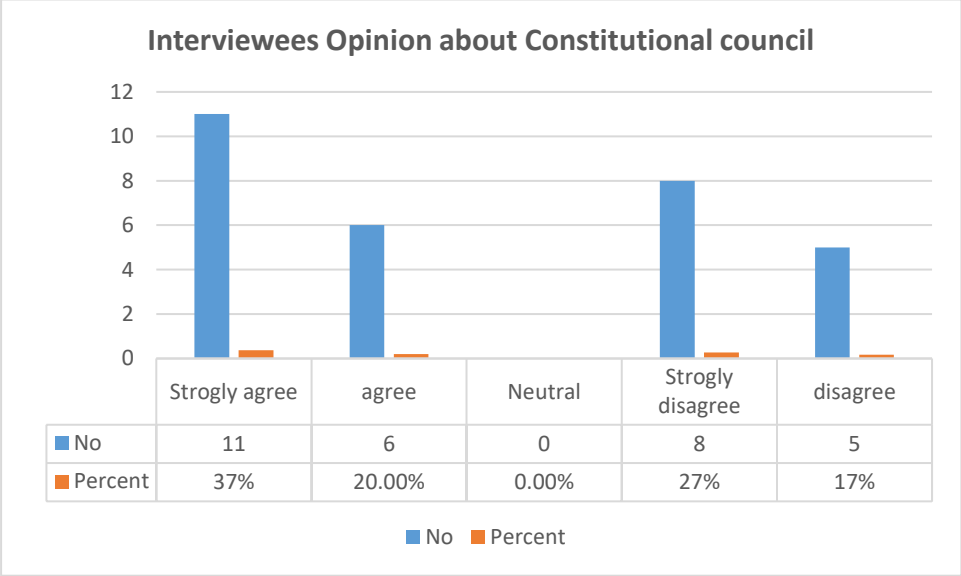
5.2.2. Constitutional Council

The Soviet Union withdrew from Afghanistan in 1988. Former Afghan president Dr Najeeb made reforms, one of which was adopting a constitutional council. Another key reform was the transformation of the People's Democratic Party into the Watan Party and the initiation of the amendment process for a Constitution in 1990. (Qaderi, 2020) The parliamentary system, initially introduced in the 1964 constitution as a parliamentary monarchy, was later regarded as the parliamentary system of the

republic. As previously stated, one of the notable features of this constitution was the establishment of Afghanistan's inaugural constitutional council, marking a significant milestone in its political history. [769]

Analysis of Afghanistan's Constitutional Council during this era reveals that despite its deficiencies and challenges, the institution represented a constructive stride towards ensuring the alignment of ordinary legislation with the Constitution. During interviews, experts were asked about the efficacy of the Constitutional Council model in the future Afghanistan Constitution, the diagram below illustrates the distribution of expert opinions on this matter:

Diagram 6.10: Experts Opinions Regarding Effectiveness of Constitutional Council



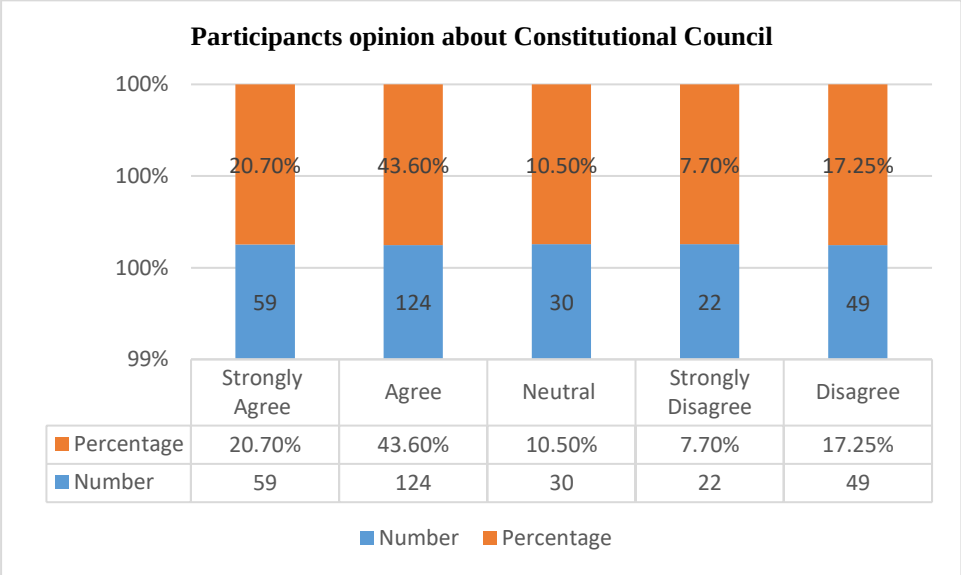
[769] *Supra* note 16 art 122.

Among the experts interviewed, 11 individuals (37%) strongly supported establishing an independent constitutional council, asserting its positive impact on Afghanistan. They emphasized the importance of ensuring the Council's independence through constitutional guarantees and mechanisms to safeguard against governmental and institutional interference. Additionally, 6 people (20%) agreed with this proposition, while 8 individuals (27%) were strongly opposed and 5 individuals (17%) were against the idea of a Constitutional Council.

Prof. Sikander Sepehr[770] highlighted the necessity of having a constitutional safeguarding system in every country, particularly Afghanistan. However, he emphasized that the design of this constitutional review mechanism should be determined by the Afghan people themselves, regardless of its specific name, whether it be the Constitutional Council or the Constitutional Court. The crucial aspect lies in enshrining in the constitution provisions that guarantee the independence, functions, and selection process of its members.

The participants of the questionnaire gave the following answer to the question of how effective the Constitutional Council can be for the future of Afghanistan:

Diagram 6.11: Research Participants' Opinions Regarding Constitutional Council



[770] Interview with Professor, he is a professor of the School of Law at Balkh University and he was Head of the Constitution Commission Secretariat in Balkh Province on 24/09/ 2022.

The results of the participants' answers show that the majority of them supported this model of constitutional supervision (Constitutional Council). As can be seen, 59 people (20.70%) strongly support, 124 people (43.60%) support, 30 people (10.50%) are neutral, 22 people (7.70%) strongly oppose and 49 people (17.25%) oppose the establishment of the council.

As can be seen from the results of the opinions of the research participants, 59 people (20.70%) strongly supported the Constitutional Council and 124 people (43.60%) supported it. 30 people (10.50%) were neutral, 22 people (7.77%) strongly opposed and 49 people (17.25%) were against the establishment of the Constitutional Council.

Dr. Mobasher[771] in his interview with me about adopting a constitutional review mechanism described that he thinks there are a few principles that all constitution-making or amendment processes have to take into consideration. But at the same time, every country has its sociopolitical context that has to be taken into consideration when drafting or amending a constitution in these countries. The history of Afghanistan also tells us a lot about how well we can draft and amend a constitution. The basic principles I would consider would be, first of all, before you draft or amend a constitution, you have to establish a pact between diverse groups, between different political groups, on how they proceed in terms of drafting this constitution and ratifying this constitution. In other words, even the constitution itself, when you make it, it has to follow some set of principles.

The second one is the political and moral legitimacy of the constitution, which is basically that a constitution and the mechanisms it creates have to be popular. In other words, there has to be some form of referendum on the most important provisions of the constitution. The public has to be consulted. In addition, Dr. Mobasher believes that the future constitutional review mechanism should be included in the constitution with the consultation and opinion of the people (particularly referendum) so that the legitimacy of this institution is well guaranteed just as the constitution has legitimacy. In addition, he thinks that the first three members should be elected by the parliament and then these three members should choose the other members. I agree with the first

[771] Interview with Dr. Bashir Mobasher is a postdoctoral fellow at the American University (DC), an adjunct at the American University of Afghanistan, and an affiliate with EBS Universität. He is the President of the Afghanistan Law and Political Science Association on 28/06/2023.

part of his point of view, but the method of selecting members as he says can cause problems for the independence of this institution.

Finally, Dr. Mobasher emphasized more on the country of France and the method of electing the members of the Constitutional Council of this country and said that it can be a good example, but it should be formed according to the opinion of the people of Afghanistan and the conditions of our country. Adaptation should not be indiscriminate.

During the interview, Dr. M. Yasin Mutawakkel[772] supported the French model as a suitable model for Afghanistan. He stated that Afghanistan has the experience of the Constitutional Council like France during the period of noble rule. Although the Constitutional Council of Afghanistan was different from the Constitutional Council in many ways. In the future, we can also consider a constitutional protection institution, which is very important, in the constitution. I am not in favor of the new constitution and I think that the 2004 constitution should be revised. However, people should be involved in the revision process. People's opinions can play a role in strengthening the rule of law and the stability of the constitution. The institution or law that people see themselves involved in its formation will be more accepted and people will protect it.

Moreover, Dr. Matawakkel emphasized the independence and competencies of the Constitutional Council. In addition, this expression of the name of the council is more acceptable to the people than to the commission and the court. Because *Shuras* (council) and *Jirgas* are accepted by the people as traditional institutions in Afghanistan. But the constitutional protection institution "Constitutional Council" should not have a traditional aspect like the Loya Jirga. This institution must have elected members independent of government institutions.

As shown in the diagram above, a large number of experts supported the Constitutional Council. To avoid the length of the discussion, I will skip mentioning all the theories. In addition, some of the topics were similar, that is, mostly on the independence of this institution that the constitution guarantees the competencies of

[772] Interview with Judge Mutawakkel, He was a judge in Afghanistan Supreme Court, on 15/07/2022.

this institution, and that this institution has the final authority in matters related to the constitution, elections, and political parties.

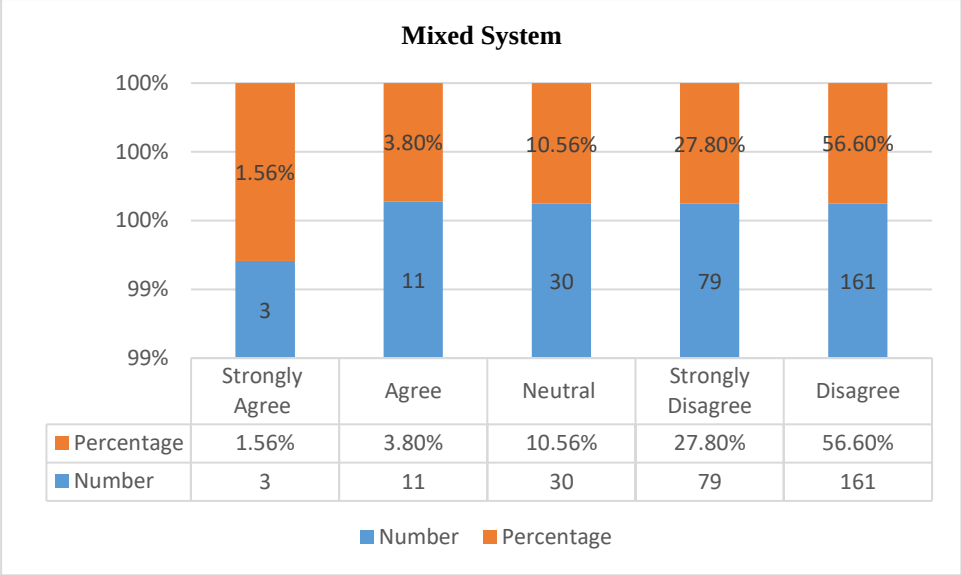
I also agree with the opinions of the majority that it is necessary to form an institution to protect the constitution for the future system of Afghanistan. It should be called the Constitutional Council. But its nature, competences and independence should be like the constitutional court of some countries. The point of the Law of Attention is that only the institution of protection of the Constitution cannot be the solution to all problems. During the revision of the constitution, some other mechanisms should also be changed, for example, the issue of separation of powers, the form of the system and the authority of the president. Since these topics are not related to the present research, I will not discuss them further.

5.3.Mixed Constitutional Review Model (European and American)

A limited number of countries worldwide have adopted a mixed basic surveillance model. Various factors have caused countries to envisage a mixed model in their constitution. The 2004 Constitution of Afghanistan is considered a mixed model. Article 121 gave part of the authority to supervise the Constitution to the Supreme Court, and Article 157 gave the ICOIC the authority to oversee the implementation of the Constitution. The ICOIC was a political institution and it was a kind of mixture of political and judicial methods.

To what extent the mixed model will be effective for Afghanistan, the research participants answered this question as follows:

Diagram 6.12: Research Participants' Opinions Regarding Mixed Constitutional Council



As can be seen in diagram 2.12, the mixed model of constitutional supervision does not have many fans. 3 people (1.56%) strongly support it, 11 people (3.80%) support it, 30 people (10.56%) are neutral, 79 people (27.80%) are strongly against and 161 people are against this model.

30 experts and professors did not support the mixed monitoring of the constitution in their interviews. They said that this model may be effective for some countries, but the knowledge and information they have about the Afghan society, the combination of political and judicial institutions, or entrusting the task of monitoring can face many problems in practice.

Dr. Hanif stated in his interview that a mixed model of judicial review would not be successful in Afghanistan. He added that Afghanistan's experience over the past twenty years has shown that delegating jurisdiction to two institutions will be practical in many problems.[773]

Likewise, Dr. Saeed[774] described that the mixed model of constitutional review, which combines judicial and political oversight, has weaknesses that can lead to challenges in the administration of justice and legal stability. First, the possibility of interference between different oversight bodies, such as constitutional courts and parliament, may

773 Interview with Dr. Hanif. He is a Professor at Alberoni University and he was an employee of ICOIC. On 23/02/2022.

774 Interview with Dr. L. Saeed Prof. of Sharia law at Kabul University and former member of ICOIC. On 11/ 06/2022.

lead to conflicting interpretations of laws and reduce the effectiveness of the legal system.

Moreover, he added this model also, can also lead to excessive politicization of constitutional oversight, as political institutions may be influenced by partisan interests and undermine judicial independence. On the other hand, the lack of clear criteria for determining the final authority in constitutional interpretation can lead to legal uncertainty and increased conflicts between government institutions. Afghanistan's experience over the past twenty years has shown that the ambiguity of the 2004 Constitution regarding the interpretation of the Constitution, with the existence of two institutions, has created many problems in practice.

Finally, Prof. Dr. J. C. Salas[775] explained that Afghanistan ought not choose a mixed constitutional review model, because this model is not compatible with the legal structure and political conditions of the country. In systems with stable democratic institutions, a mixed model that combines centralized and decentralized constitutional review may be effective, but in Afghanistan, which faces legal instability, weak judicial institutions, and political influence over the executive branch, this model could lead to jurisdictional conflicts, interference in decision-making, and reduced public confidence in the constitutional review process.

Furthermore, he added, with parallel and sometimes conflicting structures in the Afghan legal system, implementing this model could fuel further divisions between judicial and political institutions, thereby undermining the rule of law. Therefore, choosing a transparent, centralized model that is compatible with the Afghan legal structure, such as centralized review by a constitutional court or by any name but with a judicial nature would be a more appropriate option.

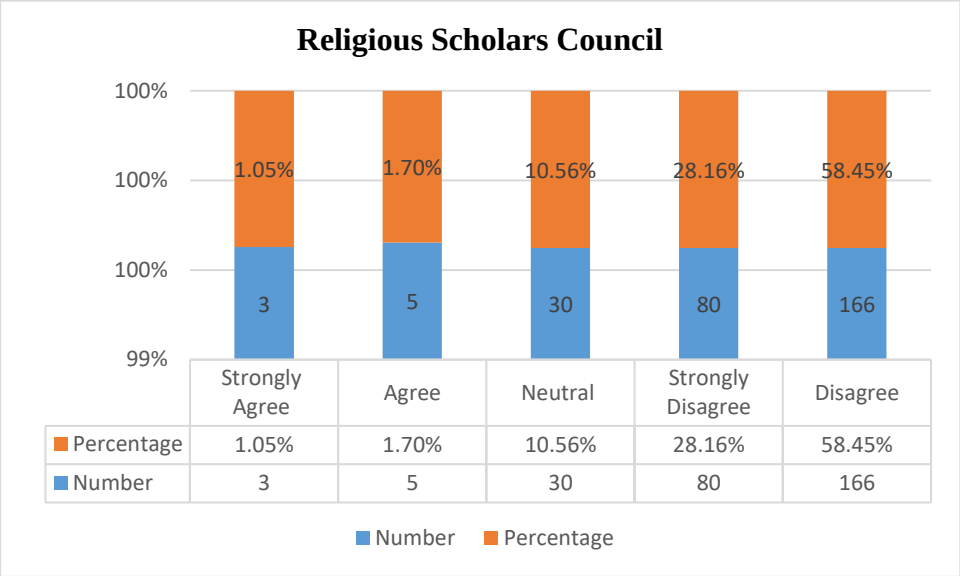
5.4.Religious Scholars Council

The Council of Religious Scholars as a constitutional monitoring mechanism does not exist in the category. I brought this up because Afghanistan is an Islamic country and in Islamic countries religious scholars play an important role in social, political and legal issues. It should be noted that the role of religious scholars varies from country to country. Afghanistan is a traditional country. In two neighboring countries, Iran

[775] Interview with Dr. Salas, he is professor of global trends in constitutionalism at Utrecht University in the Netherlands, on 02/ 04/2022.

and Pakistan, religious scholars play an important role in the process of legislation and approval of laws. I wanted to get the opinion of experts and research participants on this matter. The results of the questionnaire are as follows:

Diagram 6.13: Research Participants' Opinions about Religious Scholars Council



The questionnaire results show that most participants are against the formation of the Council of Religious Scholars to monitor the Constitution. 80 people (28,16%) strongly disagree, 166 participants (58,45%) disagree and this is although 30 people were neutral, only 5 people (1,7 %) agreed and 3 People (1,05%) strongly agreed. Consequently, it is understood that the intellectual community of Afghanistan is against the active role of religious scholars in important political and legal issues, especially the monitoring of the constitution.

The participating experts in the interviews were also against entrusting the authority of constitutional review to religious scholars. Most of them argued as follows: Religious scholars in Afghanistan play an important role in society, but constitutional review requires legal and political expertise the religious scholars cannot review the constitutionality of laws based on the accepted principles of human rights and political principles and based on legal and international principles thus that all citizens, regardless of religion, have equal rights. The direct involvement of religious scholars in the constitutional review process can lead to strict religious interpretations and restrictions on human rights and citizens' rights and freedoms. Therefore, legal and legal expertise should be the focus on constitutional review based on legal and

international standards and human rights values to ensure justice and equality for all citizens.

Moreover, they stated that this does not mean that religious scholars are fully included in the constitutional monitoring mechanism. For example, the future Constitutional Council of Afghanistan can have two or three moderate religious scholars from both Sunni and Shia religions. Their presence can increase the validity of the decisions of the Council or the Constitutional Court. In addition, the nature of these decisions can be better considering the traditional and religious society of Afghanistan.

I also agree with the majority of research participants and experts in this field. Instead of the direct involvement of religious scholars in monitoring the constitution, their advisory role can be used in specific frameworks. In such a way that religious scholars, as cultural and ethical advisors, present their opinions and suggestions along with other legal and social experts. These opinions can be discussed in the meetings of the Constitutional Council, but the final decision must be based on legal principles and national interests by the members of the Council. Finally, the participation of religious scholars in the constitutional review process should be designed in such a way that it supports the rights of all sections of the society, regardless of religious beliefs, and strengthens national unity.

6. Chapter Summary

As a result, this chapter reflects the opinion of research participants and interviewees regarding the appropriate model of constitutional supervision in the future constitution of Afghanistan. The summary of the agree and strongly agree opinions of questionnaire participants can be shown in this table.

Constitutional Review Model	Numbers	Percentage
American Model	14	5.11%
Constitutional court	65	22.09
Constitutional Council	183	64.69
Mixed Model	14	5.11%
Council of Religious Scholars	8	3%

As can be seen in the table, 65.69% of the participants agreed with the name of the Constitutional Council. The interviewees also agreed with the name of the

Constitutional Council, but the majority of them emphasized that this institution should not have a political nature. A constitutional council specific to Afghanistan's conditions and context should be established, and it should have a legal nature like the German, Belgian, and Indonesian constitutional courts.

In the same way, the experts emphasize the need for a constitutional review mechanism for every country, especially developing countries. Constitutional review protects the Constitution and citizens' rights. Adopting an effective constitutional review mechanism is essential for protecting the fundamental rights of citizens and the balance of government power in Afghanistan's future Afghan constitution and governments.

Interviewees	Numbers	Percentage
American Model	3	10%
Constitutional court	10	33.3%
Constitutional Council	17	56.6 %
Mixed Model	0	0 %
Council of Religious Scholars	0	0%

All government organs must be held accountable by a constitutional review mechanism, and that is even the case for a democratically elected legislator. In a parliamentary system, the majority within Parliament is often the same as the government. Consequently, parliament's role in controlling the government will be limited. It will often just vote on the proposals drafted by the government. Therefore, constitutional control of the legislator's work is an extended judicial control of the executive's work. From this, we conclude that for developing and post-conflict countries like Afghanistan, which do not have a strong government, the existence of a constitutional protection mechanism is important.

Another important issue that can be learned from this chapter is that the mere existence of a constitutional review mechanism is not enough. This institution must be independent of any kind of intervention. Its members must be clearly selected and have institutional and individual independence. The most important point is that the tradition of obeying and promoting respect for the decisions of this institution should be institutionalized in Afghanistan.

There was no place for constitutional review in Afghanistan's past constitutions, and this huge gap is quite obvious. Overall, constitutional review has had successful results in many developed and developing countries. Considering their experience will save us from making many mistakes. Trying the necessary methods confuses us and puts us on a rough path where we do not know the results.

This chapter discussed the literature's long discussion of the question: Is constitutional review required? The general trend is that it is required. However, some scholars think that without the existence of a constitutional review mechanism, it is possible to protect the stability of the constitution and citizens' rights. They give examples from the Netherlands and England. But it should be known that the political, social, cultural and economic conditions of any country have an effect on their social and political relations. In societies like England and the Netherlands, democracy has been gradually institutionalized over time. Both the people and the government adhere to democratic principles and the law. But in a country like Afghanistan, where democracy and the rule of law are not institutionalized, the existence of an institution to protect the constitution and citizens' fundamental rights is a definite and necessary thing for the institutionalization of democracy and the rule of law. As a result, most of the interviewees and questionnaire participants had a positive opinion on the existence of a constitutional review mechanism in Afghanistan.

Another important lesson from this chapter is that rulers should respect this institution's decisions and credit the people with them. This is possible if people participate in political and social processes. The ruling political system should be formed as a result of the people's votes and answerable to the representatives of the nation or the elected parliament. The participating experts stated in the interviews that the form and nature of the political system affect the effectiveness of the constitutional review mechanism.

At the end of the chapter, it was learned that the constitutional rights mechanism should be established according to the cultural, social, and political realities of society. Although the majority emphasized the name "Constitutional Council," the name is not important. The majority of experts emphasized the independence and judicial nature of this institution.

Chapter 7

Suggestions and Conclusion

The study results show that from 1923 to 2024 lack of an effective mechanism of constitutional review has been one of the major shortcomings of the Afghan constitutional law system. After the fall of the first Taliban regime in 2001 and the approval of the new constitution in 2004, it was thought that, among other issues, decent steps would be taken in constitutional review. The special conditions of Afghanistan at that time and the difference of opinion between Afghan politicians and interested countries (the United States and European countries) caused a clear mechanism not to be adopted in the 2004 constitution.

On the other hand, the Independent Commission for Overseeing the Implementation of the constitution, which was formed based on Article 157 of the 2004 constitution to monitor the implementation of the provisions of the constitution, was opposed to the explicit text of Article 121 and represents the powers of the judiciary in its incomplete form. Applying some of these powers at different times led to serious difficulties. The confrontation between the ICOIC and the Supreme Court and the government's support of the Supreme Court and the parliament of the ICOIC had caused certain situations to arise in Afghanistan. The gap in the law caused the constitution to be violated in various cases and the people’s fundamental rights to be destroyed.

Also, political differences and imbalances between powers had weakened the ability of regulatory institutions to play their role. The mechanism of checks and balances under the 2004 Constitution did not effectively balance and control government powers. For this reason, it is necessary to establish precise constitutional review mechanisms. The study showed that examining different constitutional review models can help solve these problems. However, this requires careful examination of these models and their compatibility with Afghanistan’s cultural, social, and political context. This thesis's main objective was to study constitutional review from a comparative perspective to suggest an appropriate constitutional review mechanism for Afghanistan's future constitution.

Furthermore, this research aimed to examine the historical context of constitutional review in Afghanistan, including the pre-Taliban period and the current situation, and

to understand the evolution of the legal framework for constitutional review in Afghanistan from 1923 to 2024. The different models of constitutional review were also evaluated, along with their strengths and weaknesses.

The study showed that the history of constitutional law in different countries shows; that to balance the government's powers and protect the rights of citizens, different countries have adopted different models of constitutional review to prevent contradictions between laws and the constitution. The constitutional review is divided into two general categories: the decentralized or American model (judicial method) and the centralized or European model (with judicial and political methods). It was studied some countries have adopted a mixed method, and some countries, like the Netherlands, do not have a specific mechanism for constitutional review. Nonetheless, the majority of scholars emphasize the existence of the constitutional protection mechanism for all countries, especially post-conflict and multi-ethnic countries, because it can play an effective role in promoting human rights and consolidating the rule of law and democracy.

Every country, regardless of its form of government, objective realities, and some political, cultural, and social factors, has adopted a method of constitutional review. The research results show that each method's effectiveness varies from place to place. Some countries of old and new democracies have had successes in this field, which experiences can be referred to, but a model cannot be fully adapted and prescribed for another country. Every country, considering its context, should adopt a constitutional review mechanism to balance the powers, monitor the government's performance, and review the compliance of laws with the constitution. The existence of such a mechanism is necessary for every country.

Also, the study showed that in Afghanistan both institutions (the Supreme Court and the ICOIC) that had the duty of protecting the constitution were not successful. In the fourth chapter, the research data showed that the Supreme Court's lack of independence, the Afghan courts' lack of experience, and the government's intervention had facilitated abuse and caused the violation of the constitution and the confrontation of government power against each other.

The cases studied in this thesis showed that the institutions interfered in each other's affairs and even acted beyond their legal authority in most cases. Instead of solving

the conflict related to constitutional issues and ruling institutions, the Supreme Court and the ICOIC presented interpretations and political views and favored one side. The functioning of these two institutions in protecting the Constitution did not solve the problems but also caused more problems. However, in Afghanistan, the Supreme Court and the ICOIC have caused problems by not playing an accommodating role.

Moreover, this research showed that the judiciary's organizational and individual independence has been weak. Individual judicial independence has been weaker than organizational judicial independence, primarily due to the president's excessive authority and other factors. Although the constitution guarantees the independence of the judiciary, this independence is relative because the president had a stronger position than the judiciary. The president's excessive authority affects the institutional and individual independence of the judiciary.

This research showed that considering the problems in the last twenty years and the second Taliban government (15 August 2021 to the present), a specific and clear constitutional review mechanism is necessary for the future constitution of the Afghan government. The Taliban abolished the 2004 constitution and other laws. The Supreme Court was dissolved, and the judges of the former government were removed. The Taliban appointed members of their group to the Supreme Court and other courts. Most of them do not have higher and legal education and have graduated from religious schools, and even some do not have sufficient literacy. For this reason, a mufti was appointed in every court along with the judge to advise the judges about cases from the Islamic point of view. In addition, the Taliban government does not have a constitution and other basic laws, the issue of reviewing the laws that are discussed in other countries does not exist in Afghanistan at the moment. The Taliban have created a committee in the Ministry of Justice that studies the conformity of laws with Islamic principles. The Taliban review the compatibility of the past laws with their own interpretation of Islamic principles, which can be called the law review of Taliban or *Talibani Islami* review.

Further, the results of 30 interviews with experts, members of the *Wolesi Jirga*, the Supreme Court, the ICOIC, and foreign experts, and 284 questionnaires show that a constitutional review mechanism is necessary according to Afghanistan's conditions. 183 people (64.69%) of the research participants favored the independent and

centralized model (European model) of the constitutional review mechanism (Constitutional Council). In their interviews, most experts emphasized the existence of a centralized model of constitutional protection in the country's future constitution. They described that the constitutional review mechanism is one of the important issues to consider during the constitutional making or amendment process, especially when revising the 2004 constitution or adopting a new one.

Consequently, the research results showed that experts do not consider its name important. It can be the Constitutional Court or the Constitutional Council, but this institution must be independent and judicial. Nevertheless, some emphasized that although this institution should have a judicial nature if it had the council title "Shura," it would be more accepted by the people of Afghanistan. *Shura and Jirga* are traditional institutions in Afghanistan that have been used for hundreds of years to solve people's problems, and people believe in them. Therefore, it is concluded that the research hypothesis regarding adopting a constitutional review mechanism for Afghanistan is confirmed. The only issue was the name constitutional review mechanism, which the participants considered a council instead of a court. But this council should have the same powers as the constitutional court in other countries.

This research hypothesized that the adoption of a constitutional court in the future constitution of Afghanistan could ensure the rule of law, and democracy and protect the constitution and citizen rights. However, the research results showed that the majority of the 30 experts and practitioners interviewed and 284 members of the Afghan legal community who responded to the questionnaires support a Constitutional Council with a judicial nature.

Thus, this study successfully achieved all its stated objectives and provided comprehensive answers to the research questions. Through rigorous analysis, the findings indicate that the proposed hypothesis is not fully supported. However, the results suggest valuable insights that support modifications to the initial hypothesis. These modifications will refine the research framework and contribute to a more precise understanding of the subject matter. Future research may build upon these findings to explore alternative perspectives and validate the revised hypothesis.

Finally, the research results show that due care should be taken in selecting the members of the Constitutional Review Mechanism (Constitutional Council), and this

council should reflect the majority of people living in Afghanistan. Emphasis was placed on the membership of women in the council and the legal guarantee of its independence. As a result, if the constitutional review mechanism is institutionalized in Afghanistan's constitutional system, it can impact the strengthening of the rule of law, the stability of the constitution, and the political system, and the rights of the citizens will be protected.

Also, the research showed that an Independent Constitutional Review Mechanism with special conditions in its members' appointment procedures can effectively protect the Constitution and citizens' rights and fulfill the goals of constitutional review has been proved and all the objectives have been attained in the study while suggesting Constitutional Council for strengthening of the rule of law and protecting the rights of the citizens in the country.

Consequently, the research data confirmed the existence of an efficient constitutional review mechanism for Afghanistan's future constitution. The majority of interviewees emphasized the judicial nature of the constitutional protection mechanism. Some suggestions based upon the study may bring better results for protecting the interest of Afghanistan which are as follows:

Recommendations

- **Need for an active role of politicians in the process of adopting a Constitutional Review Mechanism**

The results of this research and hundreds of other researches show that the existence of a mechanism to protect the constitution is important in a country. Therefore, serious attention should be paid to creating such an institution in approving or revising the Constitution of Afghanistan. However, their goal should not be to create a constitutional protection mechanism to reach their goals and support their views through this institution. The purpose of establishing the Constitutional Council or the Constitutional Court should be resulted to the establishment of a consensus democratic framework, constitutional stability, applicability of the Rule of law, ensuring the protection of human rights to citizens, separation of power between legislative, executive, and judiciary, and finally dispute resolution mechanism for resolving constitutional disputes among legislative, executive, and judiciary.

- **Need for active involvement of people in Constitution-making process**

The legislators of the constitution's "drafting and revision commissions and finally the *Loya Jirga* or the Constituent Assembly" should consider the constitutional review mechanism an important issue and pay attention to it in a knowledgeable and scientific manner while approving or revising the Afghanistan constitution. Deciding on issues related to the constitution should be logical and rational. Legislators should not make decisions based on personal, regional, party, and ethnic interests. National interests, the rule of law, public participation, and social justice should be the basis of their decisions.

Based on the research results, it is suggested that the European or centralized model will be efficient in Afghanistan. This institution, with a judicial nature, should be considered in the Afghan Constitution under the title of "Independent Constitutional Council."

The model may comprise 11 members, including a chairperson (4 moderate religious scholars, 4 secular Lawyers, 1 Economist, 1 Sociologist, and 1 Policy expert). The chairperson will be selected by the members' absolute majority. Adequate representation of all ethnic groups in the Council. Out of 11 members, 4 seats will be reserved for women. The Constitutional Council Review Model as a Constitutional body will help establish the rule of law, democratic principles, and Human Rights in Afghanistan.

Decisions should be made with the advice of civil society institutions, scientists, and lawyers. The people should be aware of the decision and educated about the related issues in approving the constitution.

- **Need for promotion of human rights**

The government should organize educational programs for the general public regarding fundamental rights to raise awareness about the Constitution and its protection. Promoting awareness about citizens' rights and the Constitution strengthens the institutions protecting it and increases people's trust in them.

- **Need for strengthening the educational and research capacity of the institution for the protection of the Constitution**

The government should provide training courses and research resources for the constitutional protection institution's members and employees to improve their legal

knowledge and awareness of the country's principles and laws and human rights. Continuously updating the information and knowledge of the members of the constitutional protection body can help improve the quality of their decisions and enable them to deal with sensitive cases in the best possible way.

- **Need for assistance from the international community**

The international community should impartially cooperate with the people of Afghanistan in this process. Past experiences show that the imposition of institutions and views in the practical flow can cause problems. The international community should provide financial and technical resources for legal processes, including legal advice and training for authorities and civil society. They should also share experiences and best practices from countries that have succeeded in adopting or revising the constitutional review mechanism. Also, it should monitor the process independently and evaluate legal processes to guarantee transparency and justice in cooperation.

Scope for further study

This research work is an initial step, more extensive work may be done. Especially in the process of working on the Constitution of Afghanistan, lawyers and researchers should act actively in this field with comprehensive academic studies and clarifying public minds and scientific advice to legislators. Paying attention and research to the protection mechanism of the constitution is very important in a country like Afghanistan. An effective mechanism for protecting the constitution can be effective in consolidating the process of democracy, the rule of law, and protecting the rights of citizens. Therefore, with deep and comprehensive research, the dark aspects of the issue may be clarified so that decision-makers can act in the light of scientific research.

References

A. Legal documents

1. A Collection of Legal Interpretations, Commentaries and Consultations 2010-2014 in Persian "majmue i az tafasir, nazarat ve moshavareh cpehei hoquqi 1389-1393" (Independent Commission for Overseeing the Implementation of the Constitution, Kabul, 2014).
2. A Collection of Legal Interpretations, Commentaries and Consultations 2010-2019 in Persian "majmue i az tafasir, nazarat ve moshavareh cpehei hoquqi 1389-1389" (Independent Commission for Overseeing the Implementation of the Constitution, Kabul, 2020).
3. Afghanistan's Constitutions Collections (Benyad Andisha, Kabul, 2019).
4. Afghanistan's Constitutional Council Law, Official Gazette No.682, 10 January 1989.
5. Afghanistan's Statute of the Basic Structures of the Government, 5 February 1924.
6. Afghanistan's Customs Law, Official Gazette no. 847, 2005.
7. Afghanistan's Independent Commission for Administrative Reforms letter no. 5954, 2011.
8. Afghanistan's Independent Commission for Overseeing the Implementation of the Constitution Code of Conduct, 2010.
9. Afghanistan's Judiciary Structure and Jurisdiction Law, official gazette no. 1109, 2013.
10. Afghanistan's Law on Diplomatic and Consular Employees, official gazette No.1105, 2013.
11. Afghanistan's Law on Regulation of Administrative relation of the Government three Powers, Official Gazette no. ?
12. Afghanistan's Law on the Establishment, Duties, and Competencies of the Afghanistan Independent Human Rights Commission, official gazette no. 855, 2005.
13. Afghanistan's Law on the Major Principles of Formation and Duties of Ministries and Departments of the Islamic Emirate, Official Gazette No. 797, 2001.

14. Afghanistan's Law on the Structure and Jurisdiction of the Attorney General's Office, Official Gazette no. 1117, 2013.
15. Afghanistan's Law on the Structure and Jurisdictions of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), Official Gazette No.986, 6 July 2009.
16. Afghanistan's Meshrano Jirga (Senate) Letter no. 1372/1089, 16 November 16, 2016.
17. Afghanistan's Ministry of Finance, letter no. 2- 65 4721, 2011.
18. Afghanistan's Ministry of Foreign Affairs Letter No. 498, March 20, 2013.
19. Afghanistan's Ministry of State for Parliamentary Affairs, letter No. 3001, 21 May 2012.
20. Afghanistan's Minister of State for Parliamentary Affairs, Letter No. 1754, 2011.
21. Afghanistan's Population Registration Law, Official Gazette No. 1154, 16 November 2014.
22. Afghanistan's Population Registration Law amendment, Official Gazette No. 1259, 13 May 2017.
23. Afghanistan's Private Investment Law, Official Gazette No. 869, 2005.
24. Afghanistan's Regulations on the internal duties of the Wolesi Jirga, 2013.
25. Afghanistan's Supreme Court Judicial Order No. 5, Official Gazette, No.986, 2009.
26. Afghanistan's Supreme Court Judicial Order No.6, April 15, 2009, Official Gazette No. 986, 2009.
27. Afghanistan's Supreme Court Judicial Order No. 71, Official Gazette no. 1285, February 2018.
28. Afghanistan's Supreme Court Resolution No. 20, Official gazette no. 1114, 2013.
29. Afghanistan's Supreme Court, Judicial Decision No. 5, 14 April 2009, Official Gazette No. 986, 2009.
30. Afghanistan's Wolesi Jirga Resolution No. 286, Official Gazette 1285, February 2018.
31. Basic Law for the Federal Republic of Germany, 1949.
32. "Collection of opinions, approvals, and laws of the Constitutional Council From 1988 to 1991" in Persian "Majmohai Nazaryat, Tasawib and Qawanin Shorai

Qanoon Asasi az 1367 ta 1370" (Afghanistan Independent Commission of Overseeing of the Implementation of Constitution, Kabul, 2019).

33. The Basic Regulations of the Supreme Government of Afghanistan "Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan", 9 April 1923.
34. The Belgian Constitution, 2007.
35. The Constitution of Afghanistan "Qanoon-e-Asasi-e-Afghanistan" Official Gazette No. 12, 1964.
36. The Constitution of Afghanistan Republic "Qanoon-e-Asasi-e-Jamhori-e-Afghanistan" Official Gazette No. 660, 30 November 1987.
37. The Constitution of Afghanistan Republic "Qanoon-e-Asasi-e-Jamhori-e-Afghanistan" Official Gazette No. 728, 6 November 1990.
38. The Constitution of France 1958.
39. The Constitution of India 1949.
40. The Constitution of Japan (1946).
41. The Constitution of Argentina (1853).
42. The Constitution of Italy (1947).
43. The Constitution of Turkey (1982).
44. The Constitution of Austria (1920).
45. The Constitution of Indonesia (1945).
46. The Constitution of Portugal (1976).
47. The Spain Constitution (1974).
48. The Constitution of Mexico (1917).
49. The Constitution of the Republic of Indonesia, 1945.
50. The Constitution of the Republic of Korea, 1987.
51. The Constitution of the Democratic Republic of Afghanistan "Qanoon-e-Asasi-e-Jamhori-Democratic-e-Afghanistan" Official Gazette No. 450, 21 April 1980.
52. The Constitution of the Islamic Republic of Afghanistan "Qanoon-e-Asasi-e-Jamhori-e-Ialami-e-Afghanistan" Official Gazette No.818, 2004.
53. The Constitution of the Republic of Afghanistan "Qanoon-e-Asasi-e-Daulat-e-Jamhori Afghanistan" Official Gazette No. 360, 1976.
54. The Law of the Constitutional Council of Islamic Emirate, Official Gazette No.797, 2 May 2001.
55. The Taliban Complaint Hearing Law, Official Gazette No. 1444, 5 May 2023.

56. The Taliban Law on the Duties and Authorities of the High Directorate of Supervision and Follow-up of Decrees and Orders, official gazette no.1434 (2023).
57. The Taliban Leader's Decree No. 70, Official Gazette No. 788 on March 6, 1997.
58. The Taliban leader decree regarding the change of Attorney General Office, no. 35, General Office to High Directorate of Supervision and Follow-up of Decree and Orders, Official Gazette No. 1434, 11 July 2023.
59. The Taliban leader's decree regarding the process of legislative documents No. 9, the official gazette No. 1432, 25 October 2022.
60. The Taliban leader's decree regarding the review of the past laws of the country by religious scholars of the Supreme Court, no. 18, Official Gazette No.788, 1999.
61. The United Nations International Covenant on Civil and Political Rights, 1966.
62. The Basic Principles of the Supreme Government of Afghanistan "Osol-e-Asasi-e-Daulat-e-Aliyah-e-Afghanistan" 1930.
63. Universal Declaration of Human Rights, 1948.

B. Books

64. A. A. Gurgi Arzanderyani, *In Pursuit of Constitutional Law* in Persian *"Dar Takapoi Hoqooq Asasi"* 34 (Jangal Publication, Tehran, 2015).
65. A. de Tocqueville, *Democracy in America* (The Pennsylvania State University, 2003).
66. A. Harel and A. Shinar, "The Real Case of Judicial Review" in *Comparative Judicial Review*, E. F. Delaney and R. Dixon (eds) 15 (Edward Elgar Publishing Limited, 2018).
67. A. Lanni, *Judicial Review and the Athenian 'Constitution'* (Harvard Law School, 2010).
68. A. Orakhelashvili, *Domesticating Kelsen* (Edward Elgar Publication, 2019).
69. A.R. Brewer-Carías, *Judicial Review in Comparative Law* 24 (Cambridge University Press, 2023).
70. A.S. Amin, *Judicial Independence in Afghanistan: A Study of the Legal System in Light of International Standards, Islamic Principles, and the Afghan Legal Tradition* (Berlin Science Publishing House, Berlin, 2020).

71. B. Mobasher, M. Qadam Sha, and S. Pasarlay, *The Constitution and Laws of the Taliban 1994-2001* 19 (Stockholm: International Institute for Democracy and Electoral Assistance, 2022).
72. C. Behrendt, "The Belgian Constitutional Court" in A. Von Bogdandy, P. Huber, and C. Grabenwarter (eds) *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, 2020).
73. C. B. Lombardi and S. Pasarlay, "Constitution-Making for Divided Societies: Afghanistan" in *Constitutionalism in Context*, David S. Law (ed) 91 (Cambridge University Press, 2022).
74. C. Boisen, "Pufendorf's Enduring Legacy for International Law" in Peter Schröder (ed), *Pufendorf's International Political and Legal Thought, The History and Theory of International Law* 252 (Oxford Academic, 2024).
75. C. Chwaszcza, "Kelsen on Democracy in Light of Contemporary Theories of Human Rights" in *Kelsenian Legal Science and the Nature of Law*, P. Langford, I. Bryan, and J. McGarry (eds) 195 (Springer International Publishing, 2017).
76. C. Saunders, "Courts with Constitutional Jurisdiction" in Roger Masterman and Robert Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* 419 (Cambridge University Press, 2019).
77. Constitutional Courts in Asia: A Comparative Perspective, Albert H. Y. Chen and Andrew Harding (eds). (Cambridge University Press, 2018).
78. C. Schonberger, "Karlsruhe: Notes on a Court" in Matthias Jestaedt, Oliver Lepsius et.al. (eds) *The German Federal Constitutional Court: The Court Without Limits* (Exford University Press, 2020).
79. D. Baranger, "French Constitutional Law" in Roger Masterman and Robert Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press, 2019).
80. D. E. Edlin, *Judges, and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan, 2008).
81. D. Fontana, "Docket Control and the Success of Constitutional Courts" in *Comparative Constitutional Law* (Edward Elgar, 2011).
82. D. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* 13 (Oxford University Press, 2017).

83. E. S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (Routledge Taylor & Francis Group, London, 2014).
84. F.M. Alam, *Afghanistan National Grand Jirgas: Loya Jirgas* in Persian *"Jirga hai Mili Bozirg Afghanstan: Loya Jirga"* (Lahore, 1989).
85. G. Buquicchio and S. R. Durr, "Constitutional Courts—the Living Heart of the Separation of Powers/The Role of the Venice Commission in Promoting Constitutional Justice" in Luis López Guerra and Guido Raimondi (eds) *Human Rights in a Global World: Essays in Honour of Judge Luis López Guerra* (Wolf Legal Publishers, Oisterwijk, 2018).
86. H. K. Rezaei, "Constitutional Justice in the Islamic Republic of Afghanistan" in Seyed Mohammad Mehdi Ghamami (ed), *Comparative Constitutional Justice: The Study of the Foundations, Structures, and Competencies of the Institution of Constitutional Justice* (Guardian Council Research Institute, 2014).
87. H. Mehraban, "History of Parliament in Afghanistan" in Persian *"Tarikh-i-Shora dar Afghanistan"* (Kabul: Afghanistan Senate Publication, 1989).
88. J. Auburn and J. Moffett et. al., *Judicial Review: Principles and Procedure* 20 (Oxford University Press, 2013).
89. J. Bell, *Judiciaries within Europe: A Comparative Review* 2 (Cambridge University Press, 2006).
90. J. Ferejohn and P. Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice" in W. Sadurski (ed.), *Constitutional Justice, East and West* 22 (Kluwer Law International, London, 2002).
91. J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).
92. J. Mouchette, "The French Constitutional Council as a Law-Maker: From Dialogue with the Legislator to the Rewriting of the Law" in Monika Florczak-Wator (ed), *Judicial Law-Making in European Constitutional Courts* (Routledge, 2020).
93. J. M. Mate, "Public Interest Litigation and the Transformation of the Supreme Court of India" in D. Kapiszewski, G. Silverstein, and R. A. Kagan (eds) *Constitutional Courts: Judicial Roles in Global Perspective* 268 (Cambridge University Press, 2013).
94. J. T. Ojanen, "Constitutional Amendment in Finland" in Xenophon Contiades (ed) *Engineering Constitutional Change* 98 (Routledge, 2012).

95. G.D.A.Ribeiro, "Judicial Review of Legislation in Portugal: Genealogy and Critique" in F. Biagi, J. O. Frosini and J. Mazzone (eds) *Comparative Constitutional History* (2020).
96. L. Dupree, *Afghanistan* (Princeton University Press, New Jersey, 1980).
97. L. Langer, *Judicial Review in State Supreme Courts: A Comparative Study* 6 (State University of New York Press, 2002).
98. L. Rubinelli, *Constituent Power: A History* 141 (Cambridge University Press, 2020).
99. L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 1st ed, 2007).
100. M. A. Ahrar, *Public Prosecutor and Defense Attorney in a Criminal Case* in Persian *"Saranwal va Wakil Modafeh dar Dawai Jazai"* (Saeed Publication, Kabul, 2007).
101. M. Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill Company, 1971).
102. M. Craig, *Judicial Review and Bureaucratic Impact* 57 (University of Chicago Press, 2019).
103. M. F. Risnes, *Judicial Review in the Nordic Countries: Norway, Sweden, Denmark, Finland, and Iceland* (Cambridge University Press, 2018).
104. M. Loughlin, *The Idea of Public Law* 45 (Oxford University Press, 2003).
105. M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008).
106. M. Tushnet and M. Khosla, "Judicial Review in South Asia" in *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 87 (Cambridge University Press, 2021).
107. M. Verkuil, *Judicial Review and the Separation of Powers* 11 (Oxford University Press, 1987).
108. M. Wojciechowski, *The Role of Constitutional Courts in Protecting Democracy: A Global Perspective* (Cambridge University Press, 2023).
109. M.J. Perry, *The Constitution in the Courts: Law or Politics?* 26 (Oxford University Press, 1994).
110. N. Dorsen, M. Rosenfeld, A. Sajo, and S. Baer, *Comparative Constitutionalism: Cases and Materials* (West Academic, 3rd ed, 2016).

111. N. Lupo and G. Piccirilli, *Legislative Due Process in Europe* (Cambridge University Press, 2017).
112. N. Lupo and L. Scaffardi, *Comparative Trends in Public Law* 39 (Eleven International Publishing, 2019).
113. O. Doyle, *The Nature of Constitutional Rights* (Cambridge University Press, 2017).
114. P. Carrozza, "Judicial Review and the Protection of Fundamental Rights in Europe" in *Comparative Constitutional Law* (Edward Elgar, 2011).
115. P. Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016).
116. P. Daly, *Judicial Deference and the Rule of Law* 33 (Cambridge University Press, 2021).
117. P. Galligan, *Comparative Federalism* (Oxford University Press, 2006).
118. P. Hamburger, *Law and Judicial Duty* 65 (Harvard University Press, 2008).
119. P. Pasquino, *Constitutional Adjudication: The French Model* 23 (Oxford University Press, 2011).
120. R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019).
121. R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).
122. R. Jackson and D. Tushnet, *Comparative Constitutional Law* 4th ed. (West Academic Publishing, 2021).
123. R. L. Maddex, *Constitutions of the World* (CQ Press, 3rd ed, 2008).
124. R. Rawlings, *Judicial Review and the Rule of Law* 31 (Oxford University Press, 2013).
125. R. Schütze, *Global Constitutionalism: Global Governance without Global Government* (Cambridge University Press, 2018).
126. R. Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot, Berlin, 1928).
127. R. Thoma, *Verfassungsrecht und Verfassungswirklichkeit* (Springer, 1932).
128. R. van Ginkel, *Judicial Review in the Netherlands: An Overview of Dutch Constitutional Law* 27 (Boom Juridische Uitgevers, 2017).
129. S. Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press, 2007).
130. S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015).

131. S. Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press, 2006).
132. S. Moeckli, D. H. Ziegler, and A. Clapham, *International Human Rights Law* (Oxford University Press, 3rd ed, 2017).
133. S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002).
134. S. Shapiro and A. Stone Sweet, *On Law and Policy in the European Court of Justice* (Oxford University Press, 2002).
135. T. Ginsburg and A. Versteeg, "Why Do Countries Adopt Constitutional Review?" in *Comparative Constitutional Law* (Edward Elgar, 2011).
136. T. Ginsburg and R. Dixon, *Comparative Constitutional Law in Asia* (Edward Elgar, 2014).
137. T. Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, 2003).
138. T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003).
139. W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005).
140. Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).

C. ***Articles***

141. A. B. Ardestani and P. R. Mirlotfi, "Role of Political Socialization in Forming Talibanism in Afghanistan" in Persian "naqsh jameh paziri siasi da shekl giri talbanism dar Afghanstan" 4 *Scientific-Research Quarterly Journal of Political Science and International Relations* (2011).
142. A. F. G. Stanikzai- Shinwari and T. Hemat, "Introduction to Ghazi Amanullah Khan's Administrative and Economic Reforms" 1 *American Journal of Social Development and Entrepreneurship* (2022).
143. A. Imran and D. Xiaochuan, "The Hidden Hands Soviet-Afghan War 1979-89, U.S Policy, and External Actors" 6 *American International Journal of Contemporary Research* (2016).
144. A. Molaee and M. R. Dolaty, "A Comparative Study of the Constitutional Review in Afghanistan and the US Legal Systems" in Persian "Barresi moqaaiseyi Dadarsi

asasi Dar nezam hoqooqi afghastan ve eyalatmathadeh amrika ” 5 *Comparative Law Biquarterly* (2021).

145. A. Misra, “The Taliban, radical Islam and Afghanistan” 23 *Third World Quarterly* (2002).

146. A. R. Hearavi, “Methods of protecting the constitution” in Persian “Shiawa hai Siayanat Az Qanoon Asasi”. *Constitutional Journal* (2018).

147. A. Rofii, “Islam, Islamic Law and Constitution Making: International and Domestic Engagement in the Constitution-Making Process in Afghanistan” 19 *Mazahib* (2020).

148. A. Shafaee, “Constitutional Council; Unfinished experience” in Persian “Shorai Qanoon Asasi Tajrobai Natamam” 3 *Constitution Magazine* (2019).

149. A. Tarzi, “Islam and Constitutionalism in Afghanistan” 5 *Journal of Persianate Studies* (2012).

150. A. B. Khalil, “Local Conflicts and Foreign Fighters: The ‘Afghan Arabs’ Phenomena During Afghan Conflict (1978–2021)” 78 *India Quarterly: A Journal of International Affairs* (2022).

151. A. J. Hussaini, “Position of the prosecutor in Afghanistan Criminal Justice System” in Persian “jayegah sarnaval dar nezam adolt jazayi afghanstan” 2 *Biannual Journal of Penal and Criminological Findings* (2021).

152. A. Q. Ayati, “Investigation of the organizational structure and organization of the Taliban group” in Persian "barasi sakhtar sazmani va tashkilat goroi Taliban" 5 *Andisha Mahser* (2019).

153. A. A. Gorji and M. Khademi, “A Comparative Study of the Scope of Supervision of the Constitutional Guardian Institution over Ordinary Laws in the Legal Systems of Iran and India” in Persian “motaleh tatbighi gostereh nezart nehad nageiban qanoon asasi bar qawanin adi dar nezam hoqoqi iran ve ind” 8 *Comparative Law Review* (2018).

154. A. J. Bellia and B. R. Clark, “The Constitutional Law of Interpretation” 98 *Notre Dame Law Review* (2022).

155. A. Khordad, “Judicial independence in Afghanistan: Domestic and international view on judicial independence” in Persian *esteghalal ghazayi dar afghanstan: didegah dakhli ve bin olmollli dar moord esteghalal ghazayi* 7 *Justice* (2020).

156. A. M. Mirzai, “Judicial security in Afghanistan” in Persian *aminiat qazai dar afghanstan* 3 *Contemporary Thought Quarterly* (2018).
157. A. S. Mubariz, M. Z. Popalzai, and N. Momad, Nasrullah, “Overseeing Mechanisms of the Implementation of Constitution: A Comparative Study” 6 *Research Review International Journal of Multidisciplinary* (2021).
158. A. Shafaee, “Centralism in the 2004 Constitution of Afghanistan” 6 *Nuovi Autoritarismi e Democrazie: Diritto, Istituzion, Societa* (2024).
159. A. Termeer, “Rebel Legal Order, Governance and Legitimacy: Examining the Islamic State and the Taliban Insurgency” *Studies in Conflict & Terrorism* (2023).
160. A. Yaqubi and S. M. Hussainy, “Institutional deficit and its Effect on Afghan Political Order: Narrative of Decay within the Government” 8 *Journal of Social and Political Sciences* (2025).
161. A. B. Rubin, “Judicial Review in the United States” 40 *Judicial Review in the United States* (1979).
162. A. Harel, “Rights-Based Judicial Review: A Democratic” 22 *Law and Philosophy* 248 (2003).
163. A. Harel and A. Shinar, “Two concepts of constitutional legitimacy” 12 *Global Constitutionalism* (2023).
164. A. S. Sweet, “The Politics of Constitutional Review in France and Europe” 5 *International Journal of Constitutional Law* (2007).
165. A. S. Sweet, “Why Europe Rejected American Judicial Review and Why it May Not Matter” 101 *Michigan Law Review* (2003).
166. A. C. De Poorter, “Constitutional Review in the Netherlands: A Joint Responsibility” 9 *Utrecht Law Review* (2013).
167. A. W. Karimi, “The necessity of the National Assembly” in Persian *zarvarat mojals shoraye moli* 4 *Contemporary Thought Quarterly* (2018).
168. A. De Lauri, “Law in Afghanistan: A critique of post-2001 reconstruction” 6 *Journal of Critical Globalization Studies* (2013).
169. A. S. Zahid, “Rebuilding the Afghan Constitution: From Theory to Practice” 3 *International Legal Studies* (2024).
170. A. M. Garro, “ Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions” 45 *Duquesne Law Review* (2007).

171. A. Mashhadi, “Principles and Criteria of Administrative Judicial Review in Switzerland Law” in Persian “konterl edari edari dar hoquq savis” 42 *Law Quarterly* (2012).
172. B. Sinani, “Global Patterns of Constitutional Judicial Review Systems: Two Major Models of Constitutional Judicial Review in the World” 14 *Review of Comparative and International Law* (2024).
173. B. Khan, “Judicial Accountability in Afghanistan: Reform Proposals and Challenges” 11 *Legal Studies Journal* (2024).
174. B. Shah, “Loya Jirga and The Present Day Afghanistan” 20 *Strategic Studies* (2000).
175. B. Mobasher, “Identity cards and identity conflicts: a cross-national analysis of national ID cards and the lessons for Afghanistan” 2 *Indian Law Review* (2018).
176. B. Opeskin, “Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges” 35 *Oxford Journal of Legal Studies* (2015).
177. B. Peeters, “European Law Restrictions on the Temporal Effect of National Judicial Decisions: The Case of the Belgian Constitutional Court” 29 *EC Tax Review* (2020).
178. B. Bossuyt and W. Verrijdt, “The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment” 7 *European Constitutional Law Review* (2011).
179. B. Neuborne, “The Supreme Court of India” 1 *International Journal of Constitutional Law* (2003).
180. B. Sharma, “The rights of minorities under the constitution of India: An analysis” 4 *International Journal of Law* (2018).
181. C-D. D. Hyun, “A War that Never Ends: Internal Conflicts, External Interventions, and the Civil Wars in Afghanistan” 8 *Armstrong Undergraduate Journal of History* (2018).
182. C. F. Ridout, “Authority Patterns and the Afghan Coup of 1973” 29 *Middle East Journal* (1975).
183. C. Eric, “The judicial review of legislation in the United Kingdom: a public choice analysis” 37 *European Journal of Law and Economics* (2014).

184. C. F. Zurn, “Deliberative Democracy and Constitutional Review” 21 *Law and Philosophy* (2002).
185. C. Wang, “Rule of law in Afghanistan: Enabling a constitutional framework for local accountability” 55 *Harvard International Law Journal* (2014).
186. C. Bezemek, “A Kelsenian model of constitutional adjudication: The Austrian Constitutional Court” 67 *ZOR* (2012).
187. D. Landau and R. Dixon, “Abusive Judicial Review: Courts Against Democracy”, 53 *Davis Law Review* (2020).
188. D. A. Strauss, “Does the Constitution Mean What it Says?” 129 *Harvard Law Review* (2015).
189. D. E. Edlin, “From Ambiguity to Legality: The Future of English Judicial Review” 52 *The American Journal of Comparative Law* (2004).
190. D. E. Engdahl, “John Marshall's Jeffersonian Concept of Judicial Review” 42 Duke Law Journal (1992).
191. D. Lustig and J.H.H. Weiler, “Judicial review in the contemporary world: Retrospective and prospective” 16 *International Journal of Constitutional Law* (2018).
192. D. Arhur, “Technocracy and Distrust: Revisiting the Rationale for Constitutional Review” 13 *International Journal of Constitutional Law* (2015).
193. D. Kommers, “An Introduction to the Federal Constitutional Court” 2 Notre Dame Law Journal (2002).
194. D. Misri and R. Abeyratne, “Separation of Powers and the Potential for Constitutional Dialogue in India” 5 *Journal of International and Comparative Law* (2018).
195. D. Paris, “Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review” 24 *Maastricht Journal of European and Comparative Law* (2017).
196. D. Rupp, “Federal Constitutional Court in Germany: Scope of Its Jurisdiction and Procedure” 44 Notre Dame Law Review (1969).
197. D. F. Batchelor, “Renewal and Reform for a Post-Karzai Afghanistan: A Critical Appraisal of the 2004 Constitution” 5 *ICR Journal* (2014).
198. D. Grasse, R. Sexton et al., “Courting Civilians During Conflict: Evidence from Taliban Judges in Afghanistan” 78 *International Organization* (2024).

199. D. Lustig and J.H.H. Weiler, “Judicial review in the contemporary world: Retrospective and prospective” 16 *International Journal of Constitutional Law* 321 (2018).
200. E. M. Ahmadi, “Foundations of legislation in Afghanistan” in Persian *Mabani Qanoon Guzari dar Afghanistan* 118 *Marefat* (2007).
201. F. D. A. Gustavo, “Comparative Constitutional Law: Judicial Review” 3 *Journal of Constitutional Law* (2001).
202. F. Halliday and Z. Tanin, “The Communist Regime in Afghanistan 1978-1992: Institutions and Conflicts” 50 *Europe-Asia Studies* (2007).
203. F. R. Carugati - Calvert and B.R. Weingast, “Constitutional Litigation in Ancient Athens: Judicial Review by the People Themselves” 39 *Journal of Law, Economics, & Organization* (2023).
204. F. Tamburini, “The Ghost of the Constitutional Review in Tunisia: Authoritarianism, Transition to Democracy and Rule of Law” 57 *The Journal of Asian and African Studies* (2021).
205. F. Fabbrini, “Kelsen in Paris: France’s Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation” 9 *German Law Journal* (2008).
206. F. R. Carugati-Calvert and B. R. Weingast, “Judicial Review by the People Themselves: Democracy and the Rule of Law in Ancient Athens” 39 Journal of Law, Economics, & Organization (2023).
207. F. K. Habibi, “Power Sharing and Constitutional Stability in Afghanistan” 7 *Asian Political Review* (2023).
208. F. L. Ramaioli, “A Constitutional Emirate? Legal Developments in Taliban Afghanistan” 17 *JCL* (2022).
209. F. Musella and L. Rullo, “The Italian Constitutional Court under stress. How to respond to political inefficiency” 25 *European Politics and Society* (2023).
210. G. Dietze, “Judicial Review in Europe” 55 Michigan Law Review (1957).
211. G. Romeo, “The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition” 21 *German Law Journal* (2020).
212. G. S. Wood, “The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less” 56 *Washington and Lee Law Review* (1999).

213. G. Halmai, “Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective” 13 *Wake Forest Law Review* (2016).
214. G. L. Neuman, “Anti-Ashwander: Constitutional Litigation as a First Resort in France” 43 *International Law and Politics* (2010).
215. G. P. C. Magalhaes and N. Garoupa, “Judicial Performance and Trust in Legal Systems: Findings from a Decade of Surveys in over 20 European Countries” *Social Science Quarterly* (2020).
216. G. Hashimi, “Defending the Principle of Legality in Afghanistan: Toward a Unified Interpretation of Article 130 to the Afghan Constitution” 18 *Oregon Review of International Law* (2016).
217. H. Ghafari and M. Khademi, “Judicial Independence of Supreme Court of India” in Persian “Esteqlal qazai dadgai qanoon asasi ind” 48 Public Law Quarterly (2018).
218. H. Schwartz, “The New East European Constitutional Courts the New East European Constitution” 13 Michigan Journal of International Law (1992).
219. H. Farzanepour and P. Zangane, “Decision-making centers in the Afghan new constitution: Division of power Based on the cooperation amongst forces” 7 *Jostarha-ye-Siyasi-ye Moaser* (2016).
220. H. Moazenzadegan, S. M. Hoseini, and A. Arsin, “A Qualitative Assessment of Judicial Independence in the Islamic Republic of Afghanistan” in Persian *sanjesh kifi esteghalal ghazayi dar jamehori eslami afghanstan* 25 *The Quarterly Journal of Public Law Research* (2023).
221. H. Rahimi, “How the Taliban are Institutionalizing the Propagation of Virtue and Enjoinment of Vice in Afghanistan” 7 *Afghanistan* (2024).
222. H. J. Etchichury, “Argentina: Social Rights, Thorny County: Judicial Review of Economic Policies Sponsored by the IFIs” 22 *American University International Law Review* 102 (2006).
223. J. E. Fleming, “The Natural Right-Based Justification for Judicial Review”, 69 *Fordham Law Review* (2001).
224. J. C. A. De Poorter, “Constitutional Review in the Netherlands: A Joint Responsibility” 9 Utrecht Law Review (2013).
225. J. L. Marshfield, “America's Other Separation of Powers Traditions” 73 Duke Law Journal (2023).

226. Jain, “Judicial Review: A Comparative Analysis of India, USA & UK” 1 International Journal of Law Management and Humanities (2018).
227. J. Hamdard and K. Khan, “Imperatives of Judicial Review in India” 6 Indian Journal of Law and Legal Research (2024).
228. J. Komarek, “National constitutional courts in the European constitutional democracy” 12 International Journal of Constitutional Law (2014).
229. J. Limbach, “The Role of the Federal Constitutional Court the Role of the Federal Constitutional Court” 53 SMU Law Review (2000).
230. J. McGarry, “The principle of parliamentary sovereignty” 32 Legal Studies (2012).
231. J. Jupp, “Strengthening protection and support for victims of terrorism in criminal” 45 *Studies in Conflict & Terrorism* (2019).
232. J. Voetelink, “The Status of Foreign Forces in Afghanistan post-2014” 1 *Netherlands Military Law Review* (2015).
233. J. Reich, “Switzerland- 2021 Review of Constitutional law: realm, limits, and legitimizing capacity of direct democracy” in R. Albert, D. Landau and P Fraraguna (eds) *2021 Global Review of Constitutional Law* (2021).
234. K. Kalra and P. Choudhary, “Judicial Review and Fundamental Rights: Key features of Constitutionalism” 6 International Journal of Law and Social Sciences (2020).
235. K. Khan and J. Hamdard, “Imperatives of Judicial Review in India” 6 Indian Journal of Law and Legal Research (2024).
236. K. Rosenn, “Judicial Review: Old and New” 81 The Yale Law Journal (1972).
237. K. Habibi, “Institution of protection of the constitution” in Persian *nehad seyanat az qanoon asasi* 3 *The Journal of Constitution* (2018).
238. Kovacs and Toth, “Constitutional Review as a Democratic Instrument” 48 *Review of Central and East European Law* (2023).
239. K. Rosenn, “Judicial Review: Old and New” 81 The Yale Law Journal (1972).
240. K.Wherhan, “Poplar Constitutionalism, Ancient and Modern” 46 UC Davis Law Review (2012).
241. K. S. Rosenn, “Judicial Review in Latin America” 35 *OHIO State Law Journal* (1990).

242. L. Beckman, “Popular sovereignty facing the deep state. The rule of recognition and the powers of the people” 24 Critical Review of International Social and Political Philosophy (2021).
243. I. Imbert, “Endorsing Migration Policies in Constitutional Terms: The Case of the French Constitutional Council” 14 European Journal of Legal Studies (2022).
244. L. Garlicki, “Constitutional courts versus supreme courts” 5 International Journal of Constitutional Law (2007).
245. L. Beckman, “Popular sovereignty facing the deep state. The rule of recognition and the powers of the people” 24 Critical Review of International Social and Political Philosophy (2021).
246. L. Armytage, “Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War” 67 *Heidelberg Journal of International Law* (2007).
247. L. E. Nagle, “Evolution of the Colombian Judiciary and the Constitutional Court” 6 *Indian International & Comparative Law Review* (1995).
248. L. Imbert, “Endorsing Migration Policies in Constitutional Terms: The Case of the France Constitutional Council” 14 *European Journal of Legal Studies* (2022).
249. M. A. C. Andreescu, “Supremacy of the Constitution Theoretical and Practical Considerations” 25 *LESIJ - LEX ET SCIENTIA International Journal* (2018).
250. M. Andreescu and C. Andreescu, “Constitution and Constitutionalism Contemporary Issue” 17 *Lex ET Scientia International Journal* (2017).
251. M. B. E. Samimi and M. J. Nazari, “The three big wars between Afghanistan and England” 2 Sprin Journal of Arts, Humanities and Social Sciences 24 (2023).
252. M. Cappelletti, “Constitutional Review in Comparative Perspective” 58 California Law Review (1970).
253. M. I. Samsudin, “A Comparison of Judicial Review in Indonesian Constitutional Court and French Constitutional Council” 5 Indonesian Comparative Law Review (2022).
254. M. Langford, “Why Judicial Review?” 1 Oslo Law Review (2015).
255. M. N. Sharani, “War, Functionalism and State in Afghanistan” 104 American Anthropologist (2002).

256. M. P. Fashkhami and B. Abasi, “The position of the High Dispute Resolution Board and the regulation of power relations” in Persian “jaiga hait haly hal ekhtelaf wa tanzim rawoabet qowai sia gana dar dadrasis asasi” 4 Quarterly Journal of Public Law Knowledge (2019).
257. M. T. Nasiri, “The Impact of Religion and Culture on the Supremacy of the Constitution in Afghanistan” 12 *ICR Journal* (2021).
258. M. Tushnet, “New Forms of Judicial Review and Persistence of Rights -and Democracy-Based Worries” 38 *Wake Forest Law Review* (2003).
259. M. T. Nasiri, “The Impact of Religion and Culture on the Supremacy of the Constitution in Afghanistan” 12 *ICR Journal* (2021).
260. M. Cappelletti, “Constitutional Review in Comparative Perspective” 58 *California Law Review* (1970).
261. M. Bolton, “Three theories of separation: Kelsen, Schmitt and Pashukanis and the historical development of the legal form” 50 *Philosophy and Social Criticism* (2024).
262. M. C. M. De La Torre, “Overcoming Judicial Supremacy through Constitutional Amendment: Some Critical Reflections” 34 *Ratio Juris* (2021).
263. M. Loughlin, “The Contemporary Crisis of Constitutional Democracy” 39 *Oxford Journal of Legal Studies* (2019).
264. M. Rosenfeld, “Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court” 4 *International Journal of Constitutional Law* (2006).
265. M. S. Bilder, “The Corporate Origins of Judicial Review” 116 *The Yale Law Journal* (2006).
266. M. Vacura, “Three Concepts of Natural Law” 33 *Philosophy and Society* (2022).
267. M. Bossuyt and W. Verrijdt, “The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment” 7 *European Constitutional Law Review* (2011).
268. M. Borowski, “The Beginnings of Germany’s Federal Constitutional Court” 16 *Ratio Juris* (2003).
269. M. C. Ponthore and H. Fabrice, “The French Council Constitutional: An evolving Form of Constitutional Justice” 3 *The French Conseil Constitutionnel* (2008).

270. M. De La Torre, “Overcoming Judicial Supremacy through Constitutional Amendment: Some Critical Reflections” 34 *Ratio Juris* (2021).
271. M. Makireddy, “Case Analysis of Kesavananda Bharati v. State of Kerala” 3 *International Journal of Legal Science and Innovation* (2021).
272. M. P. Singh and S. Deva, “The Constitution of India: Symbol of Unity Under Diversity” 53 *Jahrbuch des Öffentlichen Rechts der Gegenwart* (2005).
273. M. Rosenfeld, “Constitutional adjudication in Europe and the United States: Paradoxes and contrasts” 2 *International Journal of Constitutional Law* (2004).
274. M. S. Bilder, “The Corporate Origins of Judicial Review” 116 *The Yale Law Journal* (2006).
275. M. S. Sweet, “The Politics of Constitutional Review in France and Europe” 5 *International Journal of Constitutional Law* (2007).
276. M. Abdolahi and F. A. Ahmadi, “Acceptance and Implementation of International Treaties in Afghanistan Legal System” 27 *Journal of Legal Research* 51 (2024).
277. M. Arizad, “Comparative Study of the Constitutional Review Mechanism in the legal system of the Islamic Republic of Afghanistan and Iran” 9 *Social Science Studies Quarterly* (2023).
278. M. Christensen, “Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies” 4 *The Berkeley Journal of Middle Eastern & Islamic Law* (2011).
279. M. Lau, “The Independence of Judges Under Islamic Law, International Law, and the New Afghan Constitution” 64 *Heidelberg Journal of International Law* (2004).
280. M. M. Mirzaei, “Judicial independence in Afghanistan's legal system” in Persian *esteghalal ghazayi dar nezam hoquqi afghanstan* 3 *Law and Policy Studies Bi-quarterly Journal of Religion and Social Sciences* (2023).
281. M. Stubbs, “A Brief History of the Judicial Review of Legislation under the Australian Constitution” 40 *Federal Law Review* (2019).
282. M. Y. A. Kadir and S. Nurhaliza, “State Responsibility of Afghanistan under Taliban Regime” 30 *Journal Media Hukum* (2023).

283. M. Shafiq, “Constitutional Justice in Afghanistan's legal system” in Persian *dadarsi asasi dar nezam hoquqi afghanstan* 3 *Contemporary Thought Quarterly* (2018).
284. M. Stubbs, “A Brief History of the Judicial Review of Legislation Under the Australian Constitution” 40 *Federal Law Review* (2019).
285. M. Y. Fathi, “The Role of Constitutional Courts in Post-War Democracies: Case Study of Afghanistan” 14 *Global Governance Review* (2023).
286. N. Zahedi, R. Qasemian and R. Dehghani, “The role of the Taliban in the power structure of Afghanistan and its impact on the future of Iran-Afghanistan relations” in Persian “naqsh talban dar sakhtat ghodrat afghanstan ve tasir an bar ravabet ayandeh iran va afghanstan” 15 *Scientific Quarterly Journal of International Relations Studies* (2022).
287. N. Bowie and D. Renan, “The Separation-Of-Powers Counterrevolution” 131 *The Yale Law Journal* (2022).
288. N. Faiez, “Judicial oversight of administrative decisions in Afghanistan” 3 *Administrative and Environmental Law Review* (2022).
289. N. Nggilu, M. Riyldi et al., “Judicial Review of Constitutional Amendments: Comparison Between India, Germany, Colombia, and Relevancy with Indonesia” 8 *Lex Scientia Law Review* (2024).
290. N. Kawagishi, “The birth of judicial review in Japan” 5 *International Journal of Constitutional Law* (2007).
291. O. Pfersmann, “Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective” 6 *European Constitutional Law Review* (2010).
292. P. Khirullah, “A Survey on Constitutional Justice in the World” in Persian “jastary bar andyshh̊ dadarsi asasi dar jacpehan” 6 *Study of Comparative Law* (2015).
293. P. M. Faiz, “A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court” 2 *Constitutional Review* (2016).
294. P. J. S. Stieglitz and K. Van der Straeten, “Social contract theory in light of evolutionary social science” 3 *Evolutionary Human Science* (2021).

295. P. Lindseth, “Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England” 55 *University of Toronto Law Journal* (2005).
296. P. E. Quint, “Leading a Constitutional Court: Perspectives from the Federal Republic of Germany” 154 *University of Pennsylvania Law Review* (2006).
297. P. Kumar, “Doctrine of Basic Structure of Indian Constitution” 5 *Journal of Global Research and Analysis* (2016).
298. P. Singh and G.K. Sharma, “Judicial Review in India: A study” 6 *Legal Express: An International Journal of Law* (2020).
299. Q. Fatima, “The Rise and Fall of Taliban Regime (1994-2001) in Afghanistan: The Internal Dynamics” 19 *IOSR Journal of Humanities and Social Science* (2014).
300. Q. Hashimy, “The Constitutional Failures in Afghanistan: A Narrative of Agonising Constitutional Death” 56 *The Indian Journal of Politics* (2022).
301. Q. A. Sadaqat, “Supreme Court and protection of the constitution” in Persian *sterah mahkama wa seyanat az Qanoon-i-asasasi* 1 *Afghanistan Legal Studies Journal* (2006).
302. R. Reuveny and A. Prakash, “The Afghanistan war and the breakdown of the Soviet Union” 25 *Review of International Studies* (1999).
303. R. Dworkin, “Equality, Democracy, and Constitution: We the People in Court” 27 Alberta Law Review 328 (1990).
304. R. Abeyratne and D. Misri, “Separation of Powers and the Potential for Constitutional Dialogue in India” 5 *Journal of International and Comparative Law* (2018).
305. R. Grote, “Constitutional Courts in the Federal States: the case of Germany” *Fédéralisme Régionalisme* (2017).
306. R. Raman, “A Comparative Study of Judicial Review in India and the United States and the United Kingdom” 3 *Law Mantra a Quarterly Online Journal* (2016).
307. R. F. Utter and D. C. Lundsgaard, “Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective” 54 *OHIO State Law Journal* (1993).

308. R. Espinosa, “Constitutional Judicial Behavior: Exploring the Determinants of the Decisions of the French Constitutional Council” 13 *Review of Law and Economics* (2017).
309. R. Ahmadi and Ch. A. Hikmat, “The Factors of the Fall of the Republic Government and Political Crisis in Afghanistan: A Survey of Public Attitudes” 2 *Journal of Contemporary Philosophical and Anthropological Studies* (2024).
310. R. Dixon, “The New Responsive Constitutionalism” 87 *Modern Law Review* (2024).
311. S. B. Prakash and J. C. Yoo, “The Origins of Judicial Review”, 70 *The University of Chicago Law Review* (2003).
312. S. Gardbaum, “Separation of Powers and the Growth of Judicial Review in Established Democracies” 62 *The American Journal of Comparative Law* (2014).
313. S. Pasarlay, “Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan”, 26 *Michigan State International Law Review* (2018).
314. S. Pasarlay, “The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan” 27 *Washington International Law Journal* (2018).
315. S. Q. Hashimy, “Afghanistan’s Constitutional Journey: Hazards of Adopting Foreign Models” 58 *The Indian Journal of Politics* (2024).
316. S. Timory, “Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency” 42 *Loyola Los Angeles International and Comparative Law Review* (2019).
317. S. Y. Ibrahimi, “The Taliban's Islamic Emirate of Afghanistan (1996-2001): 'war-Making and State-Making' as an Insurgency Strategy” 28 *Small Wars & Insurgencies* (2017).
318. S. D. O’connor, “Reflections on Preclusion of Judicial Review in England and the United States” 27 *William & Mary Law Review* (1986).
319. S. Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review” 9 Law and Philosophy 339 (1990).

320. S. Gardbaum, “Separation of Powers and the Growth of Judicial Review in Established Democracies” 62 *The American Journal of Comparative Law* (2014).
321. S. Lalisan, Classifying Systems of Constitutional Review: A context-specific analysis” 5 *Indiana Journal of Constitutional Desing* (2020).
322. S. Lesinson, “Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program” 123 The *Yale Law Journal* (2014).
323. S. Deva, “Public Interest Litigation in India: A Critical Review” 28 *Civil Justice Quarterly* (2009).
324. S. Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review” 9 *Law and Philosophy* (1990).
325. S. Lesinson, “Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program” 123 *The Yale Law Journal* (2014).
326. S. Lalisan, “Classifying Systems of Constitutional Review: A context-specific analysis” 5 Indiana Journal of Constitutional Design (2020).
327. S. Wright, “The French Conseil Constitutionnel and Constitutional Reform” 1 *European Public Law* (1995).
328. S. G. Simonsen, “Ethicizing Afghanistan: Inclusion and Exclusion in Post-Bonn Institution Building” 25 *Third World Quarterly* (2004).
329. S. Pasarlay, “The Limits of Constitutional Deferral: Lessons from the History of the 2004 Constitution of Afghanistan” 27 *Washington International Law Journal* (2018).
330. S. Qazi Zada, “Legislative, institutional and policy reforms to combat violence against women in Afghanistan” 59 *Indian Journal of International Law* 207 (2021).
331. S. Y. Ibrahimi, “False negotiations and fall of Afghanistan to the Taliban” 77 *International Journal IJ* (2022).
332. S. G. Calabresi, “The Global Rise of Judicial Review Since 1945” 69 *Catholic University Law Review* (2021).
333. S. Isra and P. M. Faiz, “The Indonesian Constitutional Court: An Overview” 12 *Brill’s Asian Law Series* (2024).
334. T. Ginsburg and M. Versteeg, “Why Do Countries Adopt Constitutional Review?” 30 *The Journal of Law, Economics, and Organization* 589 (2014).

335. T. Ginsburg and M. Versteeg, “Why Do Countries Adopt Constitutional Review?” 30 The Journal of Law, Economics, and Organization 589 (2014).
336. T. Ehs, “Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review” 72 *Heidelberg Journal of International Law* (2013).
337. T. Ginsburg, Z. Elkins et al., “Does the Process of Constitution-making Matter?” 5 Annual Review of Law and Social Science (2009).
338. T. Öhlinger, “The Genesis of the Austrian Model of Constitutional Review of Legislation” 16 *Rajio Juris* (2003).
339. T. Ginsburg, Z. Elkins et. al., “Does the Process of Constitution-making Matter?” 5 *Annual Review of Law and Social Science* (2009).
340. T. Sharan, “The dynamics of informal political networks and statehood in post-2001 Afghanistan: a case study of the 2010–2011 Special Election Court crisis” 32 *Central Asian Survey* (2013).
341. V. F. Comella, “The European model of constitutional review of legislation: Toward decentralization?” 2 *International Journal of Constitutional Law* (2004).
342. V. M. Hakimi, “The Judiciary and the Rule of Law in Afghanistan” 105 *Judicature* (2021).
343. W. M. Treanor, “Judicial Review before Marbury” 58 *Sandford Law Review* (2005).
344. W. Maley and A. S. Jamal, “Diplomacy of Disaster: The Afghanistan ‘Peace Process’ and the Taliban Occupation of Kabul” 17 *The Hague Journal of Diplomacy* (2022).
345. W. Sadurski, “Judicial Review and the Protection of Constitutional Rights”, 22 *Oxford Journal of Legal Studies* (2002).
346. X. D. Jackson, “The Crisis of Constitutional Legitimacy in Afghanistan: 2001-2021” *Journal of Political Studies* (2022).
347. Y. R. Singh, “Afghanistan’s Constitutional Design: Evolution and Controversies” *International Journal of Constitutional Law* (2023).
348. Y. Hazama, “From activism to resilience: the Turkish constitutional court in comparative perspective” 24 *Turkish Studies* (2023).
349. Y. Roznai, “Introduction: Constitutional Courts in a 100-Year Perspective and a Proposal for a Hybrid Model of Judicial Review” 14 *The Vienna Journal on International Constitutional Law* (2020).

350. Z. A. Barak, “Comparative Constitutional Review in South Asia” 29 *Asian Constitutional Review* (2021).
351. Z Adeli, “The Consequences of Taliban Policies on Human Rights in Afghanistan August 2021–August 2023” 27 *Asia Pacific Issues* (2024).
352. Z. P. Ahdout, “Enforcement Law Making and Judicial Review” 135 *Harvard Law Review* (2022).
353. Z. Tavadze, “A Priori Model of Constitutionality Review in Georgia: Systemic Aspects and Potential Shortcomings” 14 *European Scientific Journal* (2018).
354. Z. Fasihi, “Comparative study of Taliban and Hizb ut-Tahrir” in Persian "barasi tatbiqi Taliban wa hizb ut-tahrir" 5 *Andisha Mohasir* (2019).
355. Z. Lutfi, “Government of Mohammad Daud Khan in Afghanistan 1973-1978 And Iran's policy towards him in this historical period” in Persian “Hokomat Mohamad Daud khan dar Afghanstan wa Siyasat Aeran dar Qeabal ho dar ein doora tarikhi” 5 *Quarterly Bulletin of Greater Khorasan* (2014).

D. Reports (Research Reports)

356. A. Athayi, “Report on Citizenship Law: Afghanistan” 13 (Global Citizenship Observatory Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School, 2017).
357. A. Giustozzi, “Afghanistan: Transition without end: An analytical Narrative on State-Making” 26 (Crisis States Research Centre, 2008).
358. A. Harding, “The Fundamentals of Constitutional Courts” (International Institute for Democracy and Electoral Assistance, 2017).
359. A. Mav, “Constitutional Courts: Models of Operation as Regards Federal systems” (European Commission for Democracy Through Law, 1997).
360. A. Sethi, “Afghanistan” in 2020 Global Review of Constitutional Law (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020).
361. A. Sethi, S. Chatterjee et al., “Afghanistan” in 2022 Global Review of Constitutional law Richard Albert, David Landau et. al. (eds) 16 (EUT Edizioni Università di Trieste, 2023).
362. A. Their, “Constitutional Decision Rules, Who Decides?”, 2 (United States Institute of Peace, 2020).

363. A. Von Bogdandy and D. Paris, “Building Judicial Authority: a comparison between the Italian Constitutional Court and the German federal constitutional court” (Max Planck Institute for Comparative Public Law and International Law, 2019).
364. A. Wardak, “A Decade and a Half of Rebuilding Afghanistan’s Justice System: An Overview” (Leiden University, Netherlands, 2016).
365. A. Y. Adili, R. Sorush, and S. A. Sadat, “The Stagnation of Afghanistan’s State Institutions: Case studies of the Supreme Court, Senate, Provincial Councils and the Constitutional Oversight Commission” (The Afghanistan Analysts Network, 2021).
366. ACSI, “Towards a Constitutional Court in Afghanistan: A Proposal” (Afghanistan Constitutional Studies Institute, 2019).
367. Administrative Review Council, “The Scope of Judicial Review” (2003).
368. C. B. Duryea, “The Roots of Collapse: Imposing Constitutional Governance” (Penn Carey Law: Legal Scholarship Repository, 2022).
369. C. B. Lombardi, and A. F. March, “Afghan Taliban View on Legitimate Islamic Governance: Certainties, Ambiguities, and Areas for Compromise” 15 (United States Institute of Peace, 2022).
370. C. W. M. Johnson, A. Their and A. Wardak, “Afghanistan’s political and constitutional development” (the UK Department for International Development, 2003).
371. Constitutional Loya Jirga Secretariat, “New Constitution of Afghanistan” in Persian “qanoon assasi nawin afghanstan” (2004).
372. Democracy International, “Election Observation Mission to Afghanistan: Parliamentary Elections” (2010).
373. E. Farhat, H. Azizi et. al., “Education in Afghanistan since 2001: Evolutions and Rollbacks” (Rumi Organization for Research, 2023).
374. F. Ayub, A. Deledda and P. Gossman, “Vetting Lessons for the 2009-2010 Elections in Afghanistan” (International Center for Transitional Justice, 2009).
375. F. Hamidi and A. Jayakody, “Separation of Powers under the Afghan Constitution: A Case Study” (Afghanistan Research and Evaluation Unit, 2015).
376. F. Yousaf and M. Jabarkhail, “US withdrawal and the Taliban regime in Afghanistan: Future Policy Directions” 3 (Swiss Peace, 2021).

377. G. Haress, Judicial Review in Afghanistan: A Flawed Practice, (Afghanistan Research and Evaluation Unit, 2017).
378. H. Kamali, “The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years” 14 (Hamida Barmaki Organization for the Rule of Law, Kabul, 2015).
379. International Crisis Group, “Taliban Restrictions on Women’s Rights Deepen Afghanistan’s Crisis” ICG Report No. 329, 11 (2023).
380. I. Nassery, “Afghanistan: Afghan legal system under the Taliban” (Bundesamt fur Fremdenwesen und Asyl, 2024).
381. J. Finnis, “Judicial Power: Past, Present and Future” (Judicial Project, 2015).
382. J. Goossens and M. Decock, “Belgium” in Luis Roberto Barroso and Richard Albert (eds) The International Review of Constitutional Reform (The Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism, 2020).
383. J. D. S. Ribeiro, “Constitutional Court as Positive Legislators” (International Academy of Comparative Law, 2010).
384. K. Bass and S. Choudhry, “Constitutional Review in New Democracies” (The Center for Constitutional Transitions, 2013).
385. L. Lavrysen, J. Theunis et. al., “2018 Global Review of Constitutional Law” (I•CONnect and the Clough Center, 2018).
386. L. Lavrysen and A. S. Vandaele, “The Legal Consequences of Constitutional Court Decisions in Belgium: Judgment in Cases of Actions for annulment. Trilateral Meeting between the Czech, Latvian, and Belgian Constitutional Courts” in The Trilateral Meeting Between the Czech, Latvian and Belgian Constitutional Courts (Constitutional Court of Belgium, 2019).
387. Lavrysen, “The Belgian Constitutional Court and the separation of powers” in 50th Anniversary of the Constitutional Judiciary in the Republic of Macedonia (Constitutional Court of the Republic of Macedonia, 2014).
388. M. H. Kamali, “Afghanistan's Constitution Ten Years On: what are the Issues?” 4 (Kabul: Afghanistan Research and Evaluation Unit, 2014).
389. M. L. Paris, “The French Constitutional Council: Another ‘Work-In-Progress’ Paris” (University College Dublin, 2017).
390. P. Craig, “Proportionality and Judicial Review: A UK Historical Perspective” (European and Comparative Perspectives, 2016).

391. P. D. Carrington, “Checks and Balances: Congress and the Federal Courts” (Duke Law School Legal Studies, 2008).
392. Rawadari, “Justice Denied: an examination of the legal and judicial system in Taliban-controlled Afghanistan” 44 (2023).
393. Resolving the crisis over Constitutional Interpretation in Afghanistan (United States Institute of Peace, 2009).
394. S. M. Ghamami, M. Mansoorian, et. Al., “Comparative Constitutional Justice: Study of the principles, structures, and competencies of the constitutional review institution” in Persian “dadarsi asasi tatbighi…” (Iran’s Constitution Guardian Council Research Institute, 2014).
395. S. Pasarlay and Z. Mallyar, “The Afghan Parliament: Constitutional Mandate versus the Practice in the Post-2001 Context” 27 (Afghanistan Research and Evaluation Unit, 2019).
396. S. R. Aarten, “The impact of Afghanistan’s electoral system on national stability” (Applied Political Science of South Asia, Heidelberg, 2013).
397. S. Shekhawat, “Taliban 2.0: Stronger or Moving Towards Fragmentation?” (Observer Research Foundation, 2023).
398. S. Timory, “Judicial Independence in Afghanistan: Legal Framework and Practical Challenges” 43-44 (Afghanistan Research and Evaluation Unit, 2021).
399. S. Worden and S.Q. Sinha, “Constitutional Interpretation and the Continuing Crisis in Afghanistan” (United States Institute of Peace, 2011).
400. T. Ginsburg, “Comparative Constitutional Review” 1 (United States Institute of Peace, 2008).
401. The Constitutional Council of France, “Discover the Constitutional Council” (2022).
402. UNAMA, “De Facto Authorities’ Moral Oversight in Afghanistan: Impacts on Human Rights” (2024).
403. UNAMA, “Human Rights Situation in Afghanistan” (United Nations Assistance Mission in Afghanistan, 2023).
404. United States Department of State, “Afghanistan 2022 Human Rights Report” 10 (2022).
405. United States Department of State, “Afghanistan 2022 Human Rights Report” (2022).

406. US Department of States, “Country Reports on Human Rights Practices” (2023).
407. US Department of States, “Country Reports on Human Rights Practices” (2023).
408. V. Morisco, “From Rebel Governance to Institutionalization? Prospects for the Taliban and Afghanistan” (Österreichisches Institut für Internationale Politik, 2023).

*E. **Electronic Sources***

409. A. Arvin, “Amani State Council; The core of the National Assembly in Afghanistan” in Persian “Shoray Dolat Amani; Hastai Majlis Shoray Mili dar Afghanstan” 17/08/2021, *available at*: https://www.bbc.com/persian/afghanistan/2010/08/100817_k02-afghan-gov-council-amanullah-khan (last visited on 15 June 2022).
410. A. Arvin, “Identity debate in Afghanistan; Will 'Afghan' become a national identity?” BBC Persian 03/01/2028 *available at:* https://www.bbc.com/persian/afghanistan-42541683 (last visited on 08/03/2023).
411. A. A. Hussiani, “Ghani's disruption has paralyzed the Independent Commission for Overseeing the Implementation of the Constitution” in Persian “karshkni gheni kamision mosteghal nezart bar tatbiq ghanon asasi ra falaj kardeh est” Hasht-e-subh Media, 28/06/2021 *available at*: https://8am.media/fa/the-rich-sabotage-has-crippled-the-independent-commission-for-monitoring-the-implementation-of-the-constitution/ (last visited on 23/01/2023).
412. A. A. Bahrami, “Safeguarding the Constitution!” *The Daily Afghanistan Ma* 11/05/ 2011, *available at*: http://outlookafghanistan.net/topics.php?post_id=15227 (last visited on 09/08/2023.).
413. A. Dawi, “Taliban Undertake Speedy Overhaul of Afghanistan's Justice System” Voice of America South & Central Asia 28/09/2023 *available at*: https://www.voanews.com/a/taliban-undertake-speedy-overhaul-afghanistan-justice-system/7289101.html (last visited on 29/ 10/2023).
414. A. Kawa, “Removal of the Attorney General: The Taliban's judicial system lacks the stage of investigation and litigation” in Persian “Elimination of the

Attorney General's Office; Prosecutors: The Taliban's judicial system lacks an investigation and litigation stage" Hasht-e-Subh Media, 25/03/2023 *available at*: https://8am.media/fa/removal-of-the-attorney-general/ (last visited on 09/06/2023).

415. A. Hamilton, "Federalist Papers: No. 78, the Judiciary Department 1788" Library of Congress *available at* https://guides.loc.gov/federalist-papers/text-71-80 (last visited on 25/05/2023).
416. A. Pushkar, "S.R. Bommai vs Union of India – The Relevance of the Judgement Against the Test of Time" SSRN *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951636 (last visited on 05/03/2025).
417. A. Y. Adili and E. Qaane, "The Constitutional Oversight Commission in a Standoff with President Ghani: Defending their independence or covering up mistakes?" Afghanistan Analysts Network, 2017 *available at:* https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-constitutional-oversight-commission-in-a-standoff-with-president-ghani-defending-their-independence-or-covering-up-mistakes/ (last visited on 17/ 08/2023).
418. BBC Persian, Afghan Supreme Court: Afghans with dual citizenship cannot become diplomats, 2013 *available at* https://www.bbc.com/persian/afghanistan/2013/04/130415_k04_afghan_diplomatic_law (last visited on 24/11/2023).
419. B. Halvarsson, "Report on Local Democracy in Belgium" Council of Europe,2008 *available at*: https://rm.coe.int/report-on-local-democracy-in-belgium-strasbourg-20-22-may-2003-/1680718ec1 (visited on 18/09/2023).
420. B. Roggio, "Powerful Jihadist Faction Reconciles with the Taliban" *FFD's Long War Journal* 15/08/2016 *available at*: https://www.longwarjournal.org/archives/2016/08/powerful-jihadist-faction-reconciles-with-the-taliban.php (last visited 20/06/2023).
421. C. Gall, "Afghan Legislators Vote Out Foreign Minister" New York Times 13 May 2007 *available at*: https://www.nytimes.com/2007/05/13/world/asia/13kabul.html (last visited 15/09/2023).

422. Council of Europe, Venice Commission official website, *available at*: https://www.venice.coe.int/webforms/courts/ (last visit 24/03/2025).
423. Etilaatroz, "An overview of the activities of the Ministry of Prosperity and Prohibition of Evil; Violation of citizens' freedom and conflict with women's clothing issues" in Persian "moroori bar faalit vazart emr bah maruf ve nehi az manker; naqz azadi sheharvandan ve dargiri ba mosail pushesh zanan" *Etilaatroz* 14/05/2022 *available at:* https://www.etilaatroz.com/142342/an-overview-of-the-activities-of-the-ministry-of-enjoining-the-good-and-forbidding-evil-violation-of-citizens-freedom-and-conflict-over-womens-issues/ (last visited on 28/09/2023).
424. F. Foschini, "Parliament sacks key ministers: Two birds with one stone?" Afghanistan Analysts Network *available at*: https://www.afghanistan-analysts.org/en/reports/political-landscape/parliament-sacks-key-ministers-two-birds-with-one-stone/ (last visited on 1/11/2023).
425. F. Ramanzani Bonish, "Special Election Court and Afghanistan" International Center for Peace Studies 17/01/2011 available at https://shorturl.at/oJ3uW (last visited on 09/08/2022).
426. "Formation of a commission to monitor the implementation of the Constitution; Good move, but too late" Hasht-e-Subh Daily 24/03/2010 available at https://8am.media (last visited on 26/08/2023).
427. F. Sakhizadah, "Supreme Court vs Constitution Commission: Which administration has the authority to interpret the constitution?" Afghanistan Center in Kabul University 03/02/2020 *available at*: https://acku.edu.af/supreme-court-vs-constitution-commission/ (last visited on 20/11/2023).
428. H. Rahimi, "Afghanistan Laws and Legal Institutions under the Taliban" Melbourne Asia Review, 6 June 2022 *available at*: https://doi.org/10.37839/MAR2652-550X10.17 (last visited on 22/ 11/2022).
429. H. Barr, "For Afghan Women, the Frightening Return of 'Vice and Virtue'" *Human Rights Watch* 29/08/2021 *available at*: https://www.hrw.org/news/2021/09/29/afghan-women-frightening-return-vice-and-virtue (visited on 25/09/2023).
430. H. Rahimi, "Remaking of Afghanistan: How the Taliban are Changing Afghanistan's Laws and Legal Institutions" *National University of Singapore*

26 July 2022 *available at*: https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanistans-laws-and-legal-institutions/ (last visit 20/02/ 2023).

431. How to Lodge a Constitutional Complaint, available in The Federal Constitutional Court, *available at:* https://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html (last visited on 28/06/2023).
432. J. Ayazi, "Ashraf Ghani and the game of law in Afghanistan" in Persian "asharf gheni ve bazi ghanon dar afghanstan" Mandegar Daily New Paper 13/03/2017 *available at*: https://mandegardaily.com/?p=56353 (last visited on 25/08/2022).
433. J. Mazák, "The European Model of Constitutional Review of Legislation" in Venice Commission, available at https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm (last visited on 22/05/ 2023).
434. J. Bjelica, "The E-Tazkera Rift: Yet another political crisis looming?" 3 *Afghanistan Analysts Network* 28 /02/ 2018, available http://www.afghanistan-analysts.org/wp-content/uploads/wp-post-to-pdf-cache/1/the-e-tazkera-rift-yet-another-political-crisis-looming.pdf (last visited on 23/01/2023).
435. M. A. Mohammadi, "Constitutional Review Mechanism in the Afghan legal system" in Persian "szijar bezar asasu dar bezam hoqoqi afghanstan" Hasht e Subh Daily, 12/07/2014 *available at*: https://8am.af/afghanistan-law-monitoring/ (last visited on 25/12/2022).
436. M. A. Rezwani, "The Tragedy of Seven and Eight Thor" in Persian "Teragedi haft wa hasht soor" Hasht e Subh Daily, 28/04/2022 *available at*: https://8am.media/fa/tragedy-seven-and-eight-of-sawr/ (last visited 05/ 06/2022).
437. M. Mateen, "Wolesi Jirga's lack of trust in Spanta and Karzai's reaction" BBC Persian 13 May 2007 *available at* https://www.bbc.com/persian/afghanistan/story/2007/05/070513_v-spanta-karza-analysis (last visited on 28/9/2023).
438. M. Van Bijlert, "Electoral Reform, or rather: Who will control Afghanistan's next election?" *Afghanistan Analysts Network* 17/02/ 2015 *available at*: https://www.afghanistan-analysts.org/en/reports/political-landscape/electoral-

reform-or-rather-who-will-control-afghanistans-next-election/ (last visited on 22/03/2022).

439. M .Mohaqaq, “Supporting the private sector in Afghan laws” in Persian “ hamayat az sektor khsusi dar qavanin afghanstan” *Hasht-e-subh Media* 07/07/ 2020, *available at*: https://8am.media/fa/protection-of-the-private-sector-in-afghan-law/ (last visited 21/09/2023).
440. M. Jafari, “Half-finished cases and women's lack of access to justice” in Persian “prondegnpehei nimegtamam ve adam dastersi zanan bah adolt” *Etilaatroz* 07/11/2022 *available at*: https://shorturl.at/4ZkX1 (last visited on 08/04/2023).
441. M. Zavali, “How does the Ministry of Good and Prohibition become a Super Ministry?” in Persian “chegoneh vazart emr bah maruf ve nehi az manker «aóbeórozart» mishod?” Hasht-e-subh Media, 15/03/2022 *available at*: https://8am.media/fa/how-does-the-ministry-of-enjoining-the-good-and-forbidding-the-evil-become-abzarzart/ (last visited on 15/08/2023).
442. MPVPVHC, “Objectives and duties of the Department of Complaints Analysis and Investigation” in Persian “chegoneh vazart emr bah maruf ve nehi az manker «aóbeórozart» mishod?” *Ministry of Propagation of Virtue, Prevention of Vice and Hearing Complaints* 2023 *available at*: https://mopvpe.gov.af/index.php/dr/%D9%88%D8%B8%D8%A7%DB%8C%D9%81-%D8%B1%DB%8C%D8%A7%D8%B3%D8%AA-%D9%87%D8%A7-1 (last visited on 12/09/2023).
443. N. Estanikzai, “The position of *Saranwali* in the laws of Afghanistan” in Persian “jayegah sarnavali dar ghavanin asasi afghanstan” *Hasht-e-subh Media* 29/03/2023 available at https://8am.media/fa/the-position-of-sarnavali-in-the-constitution-of-afghanistan/ (last visited on 26/ 06/2023).
444. P. Sharma, “Doctrine of Judicially Discoverable and Manageable Standards: Who Draws the Line in India?” SSRN 2019, *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435940 (last visited on 05/03/2025).
445. R. Levush, “The Constitutional Council and Judicial Review in France”, Library of Congress Blogs, 04/11/2020 *available at* : https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france/ (last visited on 14/08/2023).

446. RAWADARI “Third Anniversary of Taliban Rule in Afghanistan: Continued and widespread human rights violations” *RAWADARI 14/08/2024 available at* :https://rawadari.org/140820241853.htm/ (last visited on 24/09/2024).
447. Roshangar, “The consequences and negative consequences of the dissolution of the Prosecutor General's Office” in Persian “” Hasht-e-Subh Media available, 20/08/2023 *available at* https://8am.media/fa/the-consequences-and-negative-consequences-of-the-liquidation-of-levi-sarnevali/ (last visited on 02/ 09/2023).
448. R. Joya, “Proceedings without a prosecutor under Taliban rule” in Persian " Dadrasi Beadoan Dadsotan dar Hakimyet Taliban" Hasht-e-subh media 30/09/2023 *available at* https://8am.media/fa/proceedings-without-a-prosecutor-under-taliban-rule/ (last visited on 20/11/2023).
449. S. Biswakarma, “Subtle Differences Between Article 226 and Article 227 of the Constitution of India” Daslegal Advocates, *available at* https://www.daslegal.co.in/subtle-differences-between-article-226-and-article-227-of-the-constitution-of-india/ (last visited on 05/03/2025).
450. S. Brouard, “Concrete Constitutional Review in France: Institutional Setting and Effects”, ECPR, 04/07/2013 available at https://ecpr.eu/Events/Event/PaperDetails/3268 (last visited on 30/07/2023).
451. S. Pasarlay, “Constitutional interpretation and constitutional review in Afghanistan: is there still a crisis?” International Constitutional Law Journal web blog *available at*: https://www.iconnectblog.com/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/ (last visited on 08/12/2023).
452. S. Pasarlay, “Fatal Non-Evolution: Afghanistan’s 2004 Constitution and the Collapse of Political Order” Verfassungsblog on matters constitutional law, 09/09/2021 *available at*: https://verfassungsblog.de/fatal-non-evolution/ (last visited on 05/09/2023).
453. S. Pasarlay, “Islam and the Sharia in the 1993 Mujahideen — Draft Constitution of the Islamic State of Afghanistan: A Comparative Perspective” SSRN, 11/01/2016 *available at*: http://dx.doi.org/10.2139/ssrn.2714049 last visited 12/07/2022.

454. S. Z. Saeedi, "How Afghanistan's Judiciary Lost its Independence" The Diplomat 5 June 2019 *available at* https://thediplomat.com/2019/06/how-afghanistans-judiciary-lost-its-independence/ (last visited on 14/12/2023).
455. S. Abasi, "Afghanistan's Judicial System Takes Another Hit as the Taliban Abolishes the Attorney General's Office" *Feminist Majority Foundation* 26/07/2023 *available at*: https://feminist.org/news/afghanistans-judicial-system-takes-another-hit-as-the-taliban-abolishes-the-attorney-generals-office/ (last visited on 24/09/2023).
456. The Constitutional Court of Belgium, 2014, available at https://www.const-court.be/public/brbr/e/brbr-2014-001e.pdf (visited on 12/10/2023).
457. The COIC's official website, *available at*: https://icoic.gov.af/en/commissions-law (Last visited on 15 September 2021).
458. The media law comes to parliament for the third time, Hasht e Subh Daily, 04/05/2009, *available at*: https://8am.media (last visited on 13/08/2022).
459. United Nations Human Rights Office of High Commissioner, *Afghanistan: UN experts appalled by Taliban announcement on capital punishment*, (2023) available at https://www.ohchr.org/en/press-releases/2023/05/afghanistan-un-experts-appalled-taliban-announcement-capital-punishment (last visited on 28/07/2023).
460. UN News, *Afghanistan: Collapse of the legal system is 'human rights catastrophe'* 20/01/2023 *available at*: https://news.un.org/en/story/2023/01/1132662 (last visited 04/01/2024).
461. V. Felbab-Brown, "Afghanistan in 2023: Taliban internal power struggles and militancy" *Brookings* 03/02/2023 *available at*: https://www.brookings.edu/articles/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/ (last visited on 21/08/2023).
462. W. Maley, "Taliban rule and anti-constitutionalism" Australian Institute of International Affairs 23/08/2023 *available a*:*t* https://www.internationalaffairs.org.au/australianoutlook/taliban-rule-and-anti-constitutionalism/ (last visited 28/09/2023).
463. Z. Daryai, "War in the Dark; Where will the fate of the Independent Commission for Overseeing the Implementation of the Constitution lead?" Etilaatroz 01/08/2017 *available at*: https://www.etilaatroz.com (last visited on 30/ 11/ 2023).

F. Unpublished Sources

464. S. Mandal, *Judicial Review Under Indian Constitution: Its Reach and Contents*, (2017) (Unpublished Ph.D. Thesis, University of North Bengal).

465. Z. Hassan Zadeh, *Afghanistan's legal culture from 1750 to the twenty-first century* (2021) (Unpublished Ph.D. Thesis, Birkbeck Institutional Research Online University of London).

G. Interviewees

1) Interview with M. Ashraf Rasoli, a member of the 2004 Constitution Drafting and Review Commissions and Senior Advisor to the Ministry of Justice during the Republic period, on 24/ 06/2023.
2) Interview with G. Haris, she was a former member of ICOIC and professor of constitutional law at Afghan American University, on 12/04/2023.
3) Interview with Dr. M. Ayobi, he was a former assistant professor at Herat University. He got his Ph.D. in Judicial review of the Executive performance in Afghanistan from Speyer University, Germany, on 25/ 08/2022.
4) Interview with Justice Willem Verrijdta, he is member of the Constitutional Court of Belgium, on 15/09/2022.
5) Interview with A. Shafaeia, he was a former member of ICOIC and a Professor at Ibni-Sina University, on 20/09/2022.
6) Interview with Dr. R. Grote, He is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law and Lecturer of Constitutional Law, Comparative Law, European Law at the University of Heidelberg, on 27/09/2022.
7) Interview with Dr. M. Qadamsha, he is an Assistant Prof. of International Sustainable Development at Seattle Pacific University, he got his Ph.D. from the University of Washington. He was assistant Prof. at Balkh University Afghanistan, on 12/10/2022.
8) Interview with Dr. S. Pasarlay, he is an assistant instructional professor at the University of Chicago. He got his Ph.D. in comparative constitutionalism from the University of Washington, on 23/10/2022.
9) Interview with Dr. N. Masoodi, he is a professor of constitutional law at Ashna University in Kabul. He got his PhD. in Public Law from Iran, on 16/11/2022.

10) Interview with Dr. S. A. Muttaqi, he was a member of the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), on 27/11/2022.
11) Interview with Dr. P. E. Pignarre, he is a professor at Université Paris Panthéon-Assa & a former senior research fellow at Max Planck Foundation for International Peace and the Rule of Law, Afghanistan Project, on 18/01/2023.
12) Interview with Dr. L. Netto, she is an assistant professor at the University of Leiden, Netherlands. She teaches comparative constitutional law, on 28/01/2023.
13) Interview with Judge N. Haftzadeh, she was a former Judge of the Appeal Court in Balkh Province on 02/02/ 2023.
14) Interview with Dr. M. Amirzoi, a former judge in the Supreme Court of Afghanistan and Professor at Kabul University on 08/02/2023.
15) Interview with Zakia Adeli, she was the Deputy Minister of the Justice Ministry of the Islamic Republic of Afghanistan and a Professor at Kabul University (2018-2021) on 04/08/2023.
16) Interview with S.Timory, he was the former Deputy Permanent Representative of Afghanistan to the UN in Geneva and a Law lecturer at the American University of Afghanistan, on 09/11/2022.
17) Interview with Justice L. Lavrysen he is the head of the Belgian Constitutional Court and professor of Law school at Ghent University on 23/ 03/2023.
18) Interview with Professor N. Mohsini, he was a dean school of law at Balkh University and former chief of the public attorney general office in Herat Province on 22/09/2023.
19) Interview with Dr. M. H. Kamali, an Afghan Islamic scholar and former Professor of Law at the International Islamic University of Malaysia. He was also, a member of the constitutional reviewing commissions in 2003 on 25/05/2023.
20) Interview with S. Sphre, he is a professor of the School of Law at Balkh University and he was Head of the Constitution Commission Secretariat in Balkh Province on 24/09/ 2022.
21) Interview with Dr. Bashir Mobasher a postdoctoral fellow at the American University (DC), an adjunct at the American University of Afghanistan, and an

affiliate with EBS Universität. He is the President of the Afghanistan Law and Political Science Association on 28/06/2023.

22) Interview with Judge Y. Mutawakkel, he was a judge in the Supreme Court of Afghanistan, on 15/07/2022.
23) Interview with Dr. L. Saeed, he was professor of Sharia law at Kabul University and a former member of ICOIC, 11/06/2022.
24) Interview with Dr. H. Hanif former employee of ICOC and Professor of Alberoni University, 23/02/2022.
25) Interview with Dr. J. C. Salas, Professor of Constitutional Law at Diego Portales University in Chile, and Chair in global trends in constitutionalism at Utrecht University in the Netherlands, on 02/ 04/2022.
26) Interviews with four former Prosecutors living in Afghanistan (due to security reasons their names are not mentioned.)

Appendices

Annexure 1

Questionnaire for Legal Community of Afghanistan

I am a PhD student at Lovely Professional University. My research studies the mechanisms of constitutional review in Afghanistan. Constitutional protection mechanisms are essential for any country, and Afghanistan has faced problems in this field. Your opinions are very valuable to me. All the information give will not be used and shared with any person except for this research purpose. Please complete the questionnaire. Thanks for your cooperation.

1. What is your age?
   a) 18-25
   b) 26-35
   c) 36-45
   d) 46-55
   e) 56 and over

2. What is your gender?
   a) Women
   b) Man
   c) Prefer not to say

3. What is your level of education?
   a) High school graduate
   b) Bachelor's Degree
   c) Master Degree
   d) PhD. or Professional Degree
   e) Undergraduate Student
   f) Postgraduate Student (Master Student)
   g) Ph.D. Candidate

4. What is your education
   a) Government employee
   b) Private sector employee
   c) Self-employee
   d) Unemployment

e) Teaching at a University or researcher

5. In which province of Afghanistan were you born? ( )

6. Where do you live?

a) Afghanistan

b) Abroad

7. How long have you been living in Afghanistan?

a) 1-5 years

b) 6-10 years

c) 11-20 year

d) More than 20 years

8. What is your ethnicity?

a) Hazarah

b) Uzbek

c) Tajik

d) Pashtoon

e) Others (Arab, Sadat, Pashai,…)

9. To what extent do you think Afghanistan's historical context affects the implementation of constitutional review in the country?

a) Very much

b) Very

c) Neutral

d) Very less

e) Less

10. How significant do you believe the challenges facing the constitutional review process in Afghanistan are?

a) Very significant

b) Significant

c) Neutral

d) Very insignificant

e) Insignificant

11. Do you think a constitutional review mechanism is necessary for every country?

a) Strongly agree

b) Agree

c)Neutral

d) disagree

e) Strongly disagree

12. To what extent do you agree that the different models of constitutional review and their strengths and weaknesses should be evaluated?

a) Strongly agree

b) Agree

c)Neutral

d) disagree

e) Strongly disagree

13. How familiar are you with the role of the Supreme Court and the Commission for Supervision of the Implementation of the Constitution in the constitutional review process?

a) Very Familiar
b) Familiar
c) Neutral
d) Not Familiar
e) Not at all Familiar

14. To what extent do you agree that the significant challenges preventing the institutionalization of constitutional review in Afghanistan should be identified?

a) Strongly agree
b) Agree
c) Neutral
d) Disagree
e) Very disagree

15. How important do you believe it is to propose a comprehensive and effective constitutional review mechanism for Afghanistan, drawing on domestic experiences and best practices from democratic countries?

a) Important
b) Very important
c) Neutral
d) Not important
e) At all not important

16. To what extent do you agree that an independent constitutional review mechanism can ensure democratic governance and constitutional compliance in Afghanistan?

a) Agree
b) Disagree
c) Neutral
d) Disagree
e) Very disagree

17. To what extent do you think Afghanistan's past political history affects the effectiveness of the constitutional review mechanism?

a) Agree
b) Strongly agree
c) Neutral
d) Disagree
e) Very disagree

18. How confident are you in the empirical evidence collected to identify the challenges facing the constitutional review process in Afghanistan?

a) very confident (strongly agree)
b) Confident (agree)
c) Neural
d) No confident (disagree)
e) Not at all confident (very disagree)

19. How well do you believe the legal framework for constitutional review in Afghanistan has evolved from 1923 to 2023?

a) Very Well
b) Well
c) Neutral
d) Poor
e) Very Poor

20. A constitutional council like France can work well for Afghanistan.

a) Strongly agree
b) Agree
c) Neutral
d) Strongly disagree

e) Disagree

21. To what extent can the Supreme Court play a role in the current situation concerning constitutional review in Afghanistan?

f) Very Well
g) Well
h) Neutral
i) Poor
j) Very Poor

22. To what extent can a Constitutional Court play a role in the current situation concerning constitutional review in Afghanistan?

a)Very Well
b) Well
c) Neutral
d) Poor
e) Very Poor

23. To what extent can a Religious Council play a role in the current situation concerning constitutional review in Afghanistan?

a) Very Well
b) Well
c) Neutral
d) Poor
e) Very Poor

24. In your opinion, can a joint commission of jurists and religious scholars be a good institution for constitutional review in Afghanistan?

f) Strongly agree
g) Agree
h) Neutral
i) Strongly disagree
j) Disagree

Annexure 2

Interview questions with Afghan Constitutional Law Scholars and Practitioners

(Professors of Constitutional Law, Members of ICOI, member of Loya Jirga and Judges)

1. What is your opinion regarding the need for a constitutional review mechanism in for Afghanistan?
2. How does the nature and form of the political system affect the constitutional review mechanism, in your opinion?
3. How was the performance of Afghanistan's constitutional review mechanism? Please select one of the following answers:
   a) It was good (both SC and ICOIC were successful)
   b) It was not good. (both SC and ICOIC were not successful)
   c) Only the supreme court was successful in this regard.
   d) Only ICOIC was successful in this regard.
   e) I do not know
4. Could you please describe your reasons for question three? Why do you think like that?
5. What was the main weakness of Afghanistan's constitutional review mechanism after 2001, in your opinion?
6. How was the constitutional review mechanism adopted in the 2004 constitution? Please select one of the answers:
   a) It was an appropriate model for Afghanistan
   b) It was not an appropriate model for Afghanistan
   c) I do not know
7. Could you please describe your answer to question 6? What were the reasons for not adopting or adopting an appropriate constitutional review mechanism under the 2004 constitution?
8. What do you think, should be the 2004 constitution amended, or a new constitution be adopted? Please select one of the following answers:
   a) The 2004 Constitution should be amended
   b) A new constitution be adopted
   c) No need for amendment of the 2004 constitution

9. Could you please describe the reasons for your answer to question 8 ? why do you think like that?
10. what kind of constitutional review will be effective for Afghanistan?
    a) The US model
    b) The European model (constitutional court)
    c) The French model (constitutional council)
    d) Mixed model (judiciary and a commission)
    e) Religious scholars council
11. Please describe why the model you selected in question 10 is appropriate for Afghanistan.
12. In your opinion, the experiences of which countries in the constitutional review have suitable lessons for Afghanistan?
13. What lessons do you think Afghanistan learns from its experiences in the field of constitutional review?

Annexure 3

Interview Questions for International Scholars and Practitioners

(Professors of Constitutional law and Members of Constitutional Courts)

1. What is your opinion regarding the need for a constitutional review mechanism in every country?
2. How does the nature and form of the political system affect the constitutional review mechanism, in your opinion?
3. In your opinion, what are the main obstacles to institutionalizing constitutional review in a country?
4. What kind of constitutional review will be effective for a divided society and failed government like Afghanistan? And why?
5. In your opinion, the experiences of which countries in constitutional review have suitable lessons for Afghanistan? And why?
6. What lessons do you think Afghanistan learns from your country's experiences in regard of constitutional review?

7. In your opinion, has the Constitutional review mechanism of your country successfully implemented its duties, especially in protecting the rights of citizens? Please explain.
8. Considering the context of Afghanistan, can your country be a good model for Afghanistan? Why, please explain.

Annexure 4

List of Publication

1. Gender Inequalities in Access to the Right to Education: The Consequences of the Taliban's Gender-based Educational Policy on Women in Afghanistan, *The Journal of Human Rights*, Vol.17, No.2 (2023) Online ISSN:2538-6360, (Log Request Id 18350) https://www.scopus.com/sourceid/21100943308
2. Taliban Discrimination against Women: Analysis of the main factors, *Kutafin Law Review* Vol.11, No.4 (2024) Online ISSN:2713-0533, (Log Request Id 78604) https://www.scopus.com/sourceid/21101079410
3. Constitutional Interpretation in Afghanistan's Legal System from 1923 to 2021, *International Journal of Research Culture Society*, Vol.8 No. (2024) ISSN: 2456-6683 https://ijrcs.org/call-for-papers-ijrcs/
4. Electoral Dispute Resolution Mechanisms in Afghanistan after 2001, *Rostrum's Law Review*, Vol.7 No.1 (2023) ISSN: 2321-3787 https://ugccare.unipune.ac.in/Apps1/User/WebA/ViewDetails?JournalId=101001094&flag=Search

Annexure 5

List of Conferences

No	Title of Paper	Conference Title	Date	Organizer	Place
1	Electoral Dispute Resolution Mechanisms in Afghanistan After 2001	Revitalizing Social Institutions for Peace, Justice, and Environmental Protection	16 April 2022	LPU	India / Online
2	Overview of the Causes of Taliban Misogyny in Afghanistan	The Afghanistan Legal Research Network Conference	19-21 October 2022	Max Planck Foundation for International Peace and the Rule of Law	Germany
3	The impact of global constitutional changes on Afghanistan's constitutions	The Global and the Local Processes of Constitutional Change: the Netherlands, Chile, and Afghanistan	30 Nov 2022	Utrecht University	Netherlands
4	From Attorney General's Office to Amir ul-Momin's Decrees: A Draconian Transition	Conference on Law, Power, and Gender in Taliban-Ruled Afghanistan	26 August 2024	CHR. Michelsen Institute	Norway
5	The Role of Defense Lawyers in Ensuring Justice Under the Taliban Courts: An Analysis	Law, Society, and Politics in Afghanistan: prospects for Dialogue, Inclusion and Representation	11-12 October 2024	Afghanistan Law and Political Science Association	USA/ Online