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MPs approve members of Constitution commission amidst legislative-executive standoff on interpretation powers

The Wolesi Jirga on June 9 approved five of seven members of the Independent Commission for Oversight of Implementation of the Constitution (ICOIC). The Afghan Constitution stipulates establishment of the ICOIC, but does not specify the scope of its authority¹. MPs have pushed the body as an alternative to the Supreme Court – which, many argue, lacks comprehensive Constitutional interpretation powers and too frequently sides with the president, particularly on balance-of-power issues – for interpreting the Constitution.

In August 2008, the Assembly passed a draft of the ICOIC Law with amendments outlining the scope of the commission’s authority, including that of Constitutional interpretation at the request of any of the three branches of government. In defending the move, MPs cite several government actions and Supreme Court decisions as demonstrating pro-government bias at the Constitution’s expense. The MPs note, for example, the Court’s overturning of their 2007 vote of no confidence on former Foreign Minister Spanta over his handling of Iran’s expulsion of Afghan refugees.

The MPs also point out Assembly drafts of legislation stalemated between Parliament and the government which would allow for Wolesi Jirga review and approval of the heads of major ‘independent’ government institutions, including the Independent Election Commission (IEC Structure Law) and Radio and Television Afghanistan (Media Law)². Over the past few years, the Assembly has sought clarification of the relevant articles of the Constitution by the as then un-established ICOIC. The eventual aim was a favorable ruling that Assembly approval of the officials complies with and is mandated by – if not the word, then the spirit of

¹ Article 157 of the Afghan Constitution: “The Independent Commission for Supervision of the Implementation of the Constitution shall be established in accordance with the provision of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People.”

² The Wolesi Jirga approved by two-thirds a draft authorizing its review and approval of the RTA head, but the government published the draft with a Supreme Court note stating that Assembly approval of the figure violates Article 64 of the Constitution, which does not explicitly list the RTA head as subject to Assembly review.

– the Constitution. Similarly, prior to finalizing their draft of the Government Structure Law, MPs sought similar interpretation from the ICOIC on Assembly approval of the heads of the Independent Directorate of Local Governance (IDLG) and other agencies not listed explicitly in Article 64 of the Constitution as subject to Assembly review.

After the Assembly’s approval of the ICOIC bill, the president’s office subsequently rejected the Assembly draft citing conflict with Article 121 of the Constitution³, which, it argues, grants broad Constitutional interpretation authority to the Supreme Court. MPs, however, overrode the president’s veto with a two-thirds vote, which meant the Wolesi draft was enforceable law. The president then referred the law to the Supreme Court to determine its Constitutionality. The Court, not surprisingly, cited Article 121 in deciding against interpretation powers for the ICOIC. Subsequently, the article in question was removed and the modified draft published in the Official Gazette as law – without further consideration by the Assembly.

The MPs were not happy. “It’s well known fact that in a disagreement between two sides, the sides involved can’t be witnesses. The same applies to Supreme Court; they are part of this disagreement, their interpretation will be void,” MP Qazi Nazir Ahmad Hanifi (Herat) said in rejecting the Supreme Court’s ruling.

“If [the Court] finds a law contrary to the Constitution, they should send their reasoning to the National Assembly and the Assembly can decide what to do with it,” argued Sayed Hussain Alemi Balkhi (Kabul). “The Supreme Court can’t amend laws, it is unlawful.”

A Constitutional gap

Kabir Ranjbar (Kabul), chairman of the Central Audit and Oversight of Implementation of the Law Committee and a member of the commission responsible for drafting the Constitution, argues that Article 121 does not grant blanket Constitutional interpretation authority to the Supreme Court, but that such authority remains unaddressed in the Constitution. Article 121 specifically addresses the Supreme Court’s authority to ensure the consistency of legislation, decrees and treaties with the Constitution, which requires a level of Constitutional interpretation, but does not grant explicit authority to interpret broader issues, such as the Constitutionality of certain government actions.⁴

Many MPs argue that breaking balance-of-power deadlocks, as described above, would only be possible by resolving this Constitutional gap by granting the ICOIC Constitutional interpretation powers equivalent to that of a constitutional court.

³ Article 121: “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.”

⁴ “USIP Briefing: Resolving the Crisis over Constitutional Interpretation in Afghanistan.” John Dempsey and J. Alexander Their. United States Institute of Peace, March 2009. <http://www.usip.org/resources/resolving-crisis-over-constitutional-interpretation-afghanistan>

While Ranjbar agrees with the need for an independent body to interpret the Constitution, the MP believes the commission is not it. First, “The WJ has no power to assign the authority of interpretation to this commission, and, secondly, the nominees are not well qualified. They will dance to any tune President Karzai plays.” But Ranjbar also believes that the Supreme Court’s ruling to withhold all interpretation powers from the body while granting itself wide interpretation discretion (through amendments to the Organization and Jurisdiction of Courts draft law, which remains under consideration in the Assembly) is a clear violation of the Constitution.

The solution, he argues, is to reestablish a body included in early drafts of the Constitution. “There needs to be a Constitutional Court, some sort of High Council, similar to that in France, which can interpret the Constitution,” he said. But that, he argues, should wait until the Constitution is amended.

Others suggest, however, that the issue can be resolved in a variety of ways through synchronization of the Organization and Jurisdiction of Courts Law and ICOIC Law, rather than Constitutional amendments undertaken by a Loya Jirga.⁵

The ICOIC nominee questioning and vote

On June 9, the legislators set aside their ongoing boycott of Assembly duties – over what they see as the government’s disregard for the Constitution – to question the government’s nominees to the ICOIC. Though the government’s published ICOIC draft eliminates interpretation powers for the ICOIC, the MPs pressed the nominees to explain their positions on the body’s powers. “Your Excellency the speaker, I suggest we ask the nominees about who has the power to interpret the Constitution. Then we will know if they are capable of this hugely important job,” suggested Mohammad Dawood Sultanzoi (Ghazni). “The idea is to examine the level of their independence and expertise.”

When faced with evasive answers by a few nominees, H.E. Speaker Yunus Qanooni (Kabul) said, “One single answer is what we are looking for, not even two sentences. Does the authority to interpret the Constitution lie with the Supreme Court or the Commission?”

Particularly frustrated by lack of clarity from Gulrahman Qazi, in spite of repeated attempts, Qanooni asked the nominees to leave the chamber so that voting could begin. Not long after, Qazi requested to return to address the house a second time. The MPs readmitted the entire team. Mr. Qazi clarified that interpretation powers rest with the commission, as stipulated in the Wolesi draft of the ICOIC Law. “When you have given this right to us, we will make use of it, for as long as you support us,” he said. The other four nominees concurred in succession.

⁵ Ibid.

The MPs subsequently approved all five nominees. They are:

- Mr. Gulrahman Qazi, lecturer in the law faculty of Kabul University.
- Mrs. Mahbooba Huquqmal, chairperson of the Meshrano Jirga legislative and justice committee
- Mr. Sayed Omar Muneeb, lecturer in theology, Kabul University
- Amin Ahmadi, senior researcher and member of the Constitutional Loya Jirga
- Abdul Qader Adalatkwa, deputy justice minister

A sixth nominee, Mr. Samargul Ashraf, withdrew prior to appearing in the WJ. Two seats remain open.

Given the debated status of the published ICOIC law, which grants no powers of interpretation to the ICOIC, and the parallel 'commitment' of its members to their interpretation powers, questions remain as to potential internal conflicts as well as those between the ICOIC and Supreme Court.