Constitution Transformation Network
MELBOURNE FORUM for Constitution-Building

INTERNATIONAL IDEA INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE

"DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD"

2021 Melbourne Forum on Constitution Building in Asia and the Pacific

Session 1: International approval of new constitutions – Afghanistan as a case study

Dr. Shamshad Pasarlay

Since enacting its first written constitution in 1923, Afghanistan's rulers have adopted ten different constitutions. The first constitution of Afghanistan was ratified, in large part, to declare that the country had been freed from British control over her foreign policy.[1] Thereafter, governments that came to power through victory in a civil war or military coups have used constitutions to signal to Afghans and to the world that a new regime has taken control of the country. Notably, in the second half of the 20th century, the 'external face' of Afghan constitutions became particularly important because the authoring regimes, most of which took power through extra-constitutional routes, yearned for international recognition and humanitarian assistance. Some of these constitutions thus went so far as to grant normative supremacy to a number of core international human rights treaties without any reservation or declaration.

Drafting of the 2004 Constitution and the international response

By the time of the drafting of the 2004 Constitution, the international community, led by the United States, had become enormously involved in Afghanistan. They had toppled a repressive Taliban regime and had carved out, with Afghan representatives, a path for a democratic government in the 2001 Bonn Agreement.[2] The drafting of the 2004 Constitution thus occurred with considerable international support and oversight. In fact, foreign actors (states and international organizations) that provided technical and financial assistance to Afghanistan's post-Taliban reconstruction held lengthy negotiations with the framers of the Constitution and the leaders of the Transitional Government, and they 'made [it] clear to [the Afghan] leaders what the international community's red lines were, and the final result reflected negotiations among many Afghan and international parties.'[3] In reality, a constitution that would be viewed favourably at the international level was a necessary condition for the Western powers' willingness to invest in Afghanistan's reconstruction and offer security for the fragile new state.

Importantly, the desire for a positive viewing of the new constitution internationally was not advanced by foreign actors alone. A majority of Afghans also wanted to adopt a constitution that would be regarded positively on the world stage. This was because Afghanistan under the Taliban

[1] In 1880, after the second Anglo-Afghan war, the Afghan ruler who came to power with British consent entered into an Agreement under which Afghanistan's foreign relations were controlled by the British Empire stationed in the Indian sub-continent. The British control over Afghanistan's foreign affairs continued until 1919 when Afghan became a complete independent state.

[2] Alexander Thier, 'The Making of a Constitution in Afghanistan' (2007) 51 New York Law School Law Review 558.

[3] Barnett R. Rubin, 'Crafting a Constitution for Afghanistan' (2004) 15 Journal of Democracy 5, 14.

had become an isolated 'pariah state' where basic rights and freedoms were severely restricted and political dissent brutally repressed. Hence, the framers used the constitutional process and its outcomes to convey to the world that Afghanistan was back as a friendly member of the international community – a nation that respected international human rights and freedoms.

However, such a view of the new constitution was not universally shared inside Afghanistan. Some framers, particularly those associated with the Islamist factions, viewed international involvement with suspicion and were reluctant to draft a constitution that gave international human rights values normative supremacy. This concern emanated from the international actors' push to change a fundamental provision in the draft constitution, namely Article 3. Initially, draft Article 3 stated that all state laws and *international treaties* Afghanistan had ratified 'should not contradict the basics of Islam.' Foreign actors, however, used their influence to force the framers and the Transitional Government of President Hamid Karzai to change this provision because it crossed what they deemed to be a 'red line' – the international community would not finance Afghanistan's reconstruction if the new constitution did not commit to protecting liberal rights. This message was conveyed privately, but directly, to the Islamist leaders and other parties involved in the drafting process. Ultimately, the framers changed this provision; the revised Article 3 read that state laws should not contradict the basics of Islam while Article 7 required the state to 'observe' international human rights treaties to which Afghan has become a party.[4]

The pursuit to draw a positive international reaction in response to the new constitution affected both the process and substance of the Constitution. On the process front, the Transitional Government and the framers conducted an impressive public consultation program. In 2003, the drafters of the Constitution travelled to almost all provinces and held numerous meetings with community leaders and youth representatives. They also consulted Afghan refugees in Pakistan and Iran. Additionally, the framers distributed some 500,000 questionnaires, a fair number of which were returned along with numerous memoranda and recommendations. Although not all of views of the public were seriously considered, this remarkable public consultation program was entwined in the drafting process to 'decorate' the constitutional process so that the document could be viewed approvingly overseas.

The need for international approval also influenced the substance of the new constitution in two major areas: on the issue of basic rights and their relationship with Islam and on the structure of the executive branch. With respect to the former, the framers made both Islam and liberal rights the founding pillars of the new state, an awkward but necessary compromise. With regard to the latter, foreign actors lobbied for a presidential executive – one in which a strong president would be the sole decision-maker atop the executive branch and would have the right to enter into security and strategic agreements with foreign countries. Without such a powerful president at the apex of the central government, Western powers were not ready to assist and fund the reconstruction of Afghanistan's post-war political order. Foreign actors thus played a key role in defeating a proposal under which a more collegial executive branch would have been shaped – one in which a prime minister shared executive power with a president.

[4] Shamshad Pasarlay, 'Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory' (DPhil dissertation, University of Washington 2016), 186.

International reaction to the 2004 Constitution

Despite the 2004 Constitution's commitments to Islam, international response to the adoption of the Constitution was overwhelmingly favourable. It was admired in Western media as 'a tolerant, democratic' constitution. Politicians in the West 'welcomed the constitution as a "turning point" that would help return the rule of law to a land still dominated by warlords.'[5] President George W. Bush remarked in a statement that the 'new constitution marks a historic step forward.' Similarly, foreign diplomats and international experts/advisors who had closely followed the constitutional process and participated in its signing ceremony 'praised [the document] for being coherent and even forward looking for the region.'[6] Lakhdar Brahimi, UN Special Representative for Afghanistan, stated that the ratification of the Constitution represented a 'proud' moment for Afghanistan and that the document was 'a new source of hope.'[7] Afghans and their international allies did have a reason to celebrate; the ratification of a relatively democratic constitution is, indeed, a milestone anywhere. However, the long-term workability and performance of the Afghan Constitution required that political and judicial actors to honour its terms.

The functioning of the 2004 Constitution and institutional behavior

Constitutional outcomes, which were shaped by a desire to draw a favourable international reaction, had mixed consequences. For example, the juxtaposition of Islam, democracy and liberal rights in the supreme law of the land gave Afghans an opportunity to debate these foundational (and explosive) issues through formal legal and political processes, instead of going to war in the pursuit of their preferred values. Although no settlement was reached throughout the lifespan of the 2004 Constitution (2004-2021), Afghans experienced the fruits of a constructive dialogue with respect to the question of the relationship between Islam and liberal values. This may be considered a positive outcome, particularly because debates and disagreements over the exact role and meaning of these (apparently contradictory) values had caused the collapse of constitutional processes and the downfall of the Afghan state in the past.

By contrast, the adoption of the presidential system at the behest of the international community turned out to be counterproductive. In a deeply divided society like Afghanistan, the winner-take-all presidential system designed in the Constitution heightened the stakes of electoral politics in such a way that made political instability inevitable. In this system, political contestation created a 'win or lose it all' form of electoral dynamic. In this zero-sum game, electoral losers suffered so much that they preferred to destabilize politics rather than stand as losers and wait for their turn to cycle into power. As a result, nearly every presidential election begot fatal political crises that were only resolved through extra-constitutional political deal makings. The spoils that presidential contenders would gain from these political pacts motivated them, though grudgingly and temporarily, to abide by the rules of peaceful political discourse. Nevertheless, such types of deal making created political gridlock and lessened public trust in the government and ultimately undermined governmental legitimacy. In fact, by the time the post-Taliban political order collapsed in August 2021, the presidential system had effectively become dysfunctional.

---

[5] 'Afghanistan Adopts a New Constitution' *NBC News* (January 26, 2004), available at https://www.nbcnews.com/id/wbna4064960.

[6] Carlotta Gall, 'Afghanistan Council Gives Approval to Constitution, The New York Times' (January 5, 2004), available at https://www.nytimes.com/2004/01/05/world/afghan-council-gives-approval-to-constitution.html.

[7] Ibid.

Despite such a major flaw, the Constitution survived for nearly eighteen years and transformed many people's understanding of constitutional possibility. Its liberal and democratic features, adopted in large part to please the international community, helped prompt a constructive discourse in the country over liberal rights and freedoms, shaped a vibrant and forward-looking civil society and inspired a vocal, lively media. A majority of the Afghan citizenry and political elites alike shared a belief that the Constitution warranted respect and fidelity,[8] precisely because it guaranteed basic rights and freedoms. Similarly, constitutional outcomes that were realized in light of the need to attract international approval forced courts and other political actors to adopt behaviours that did not upend those outcomes. For example, the Afghan Supreme Court adopted an ambivalent approach with regard to the question of the relationship between Islamic law and liberal rights. While some lower courts would punish those who committed blasphemy or apostasy with severe penalties, the Supreme Court would drop such cases citing procedural irregularities or 'mental fitness of the accused to sand trail.'[9] The Court simply did not want to trounce a formula that had attracted and maintained a positive international response.

A favourable viewing of the Constitution at the world stage was an important factor in the shaping of its process and outcome. However, this desire went too far and caused a serious unforced error, namely the exclusion of the Taliban from the political process – something that the UN Special Envoy to Afghanistan called the 'original sin' of the constitutional process.[10] In the immediate aftermath of the Taliban defeat, some of the group's prominent leaders wanted to partake in the political process; Western powers, however, were not inclined to engage them because the Taliban were considered too weak to wreck a political order if excluded, and their ideological commitments were in deep tension with the values that the West wanted to advance in the new Afghanistan. The Taliban's exclusion over time created a serious ownership and legitimacy problem, so much so that some of the same powers that excluded the Taliban from the constitutional process in 2002 re-engaged them in 2018 to include them in the political process. The Taliban, however, rejected the 2004 Constitution, claiming that the document had been ratified under the threat of the world's super power's warplanes.[11] Upon overthrowing the Government established by the 2004 Constitution, the Taliban abrogated the document and are on path to replace it with an entirely different constitutional order.

Relationship between international (treaty) law and national law: The Afghan context

Under the Constitution and laws of Afghanistan, international treaties were entered into as follows: Article 64(17) of the Constitution awarded to the president the right to sign and grant letters of credentials to conclude international treaties; the National Assembly would then ratify them. Beyond these provisions, the Constitution articulated no mechanisms or procedures by which international law (treaties) would be incorporated and absorbed into domestic law. In 2016, the Afghan Parliament adopted a law on international treaties that provided some further details about

[8] Heart of Asia Society, 'Survey: What are the Afghan People's Preferences in the Peace Talks?' (Kabul, 2020), available at https://heartofasiasociety.org/research/survey-what-are-the-afghan-peoples-preferences-in-the-peace-talks/

[9] Michael Schoiswohl, 'The New Afghanistan Constitution and International law: A Love-Hate Affair' (2006) 4 International Journal of Constitutional Law 664, 675.

[10] Mary Sack and Cyrus Samii 'An Interview with Lakhdar Brahimi' (2004) 58 Journal of International Affairs 239, 244.

[11] Sean Kane, 'Talking with the Taliban: Should the Afghan Constitution Be a Point of Negotiation' (2015) United States Institute of Peace, Special Report 356, at 2.

the procedures through which international treaties and conventions would be ratified, but the mechanisms for effectively incorporating international law into domestic law still remained unclear.

Although the Constitution and laws of Afghanistan distinguished between international 'treaties,' 'inter-state agreements,' 'conventions' and 'contracts,' these distinctions had no bearing on the ratification procedures of these documents. All types of international legal documents were entered into in a similar manner: signed by the President, or his accredited representative, and ratified by both houses of the Parliament. Nevertheless, Afghanistan's law on international treaties made some consequential distinctions with respect to the subject matter of treaties. Under that law, treaties and conventions concluded in the following areas required the ratification of both houses of the Parliament: war and peace, border issues, foreign relations, refraining from use of force and aggression, establishing international organizations, treaties that required the amendment of national law, treaties on fundamental rights, treaties on international loans, taxation and tariffs, mutual legal assistance agreements and expatriation of criminals, international conventions and protocols, security agreements, economic agreements, and other treaties the substance of which required parliamentary approval. For other 'simple' treaties, the Ministry of Foreign Affairs could enter into them, and they did not require the Parliament's approval, though they needed to be ratified through the endorsement of the Council of Ministers.

Notably, the procedures enshrined in Afghanistan's laws were not only inadequate but also deeply flawed. Both the Constitution and the law of international treaties did not clarify when an international treaty or a convention that Afghanistan becomes party to should take the form of binding legislation. Additionally, the law of treaties formulated general 'reservation' rules that basically obfuscated the extent of the state's intent to be bound by an international treaty or convention and blurred the limits of the state's obligations under them. For example, the law required that the Government is obliged to make reservations to those provisions of international treaties and conventions that were repugnant to the Constitution or the dictates of the Islamic *sharia*. Such general and unclear reservation rules are not only problematic under international law, but also created serious problems when it came to transparency and accountability in fulfilling the state's obligations under international treaties.

Status of international law in domestic law

The Afghan legal system follows the 'dualist' approach to international law, meaning that international law and national law are of different sources, and international law becomes applicable only after it is actively made part of domestic law. Therefore, international treaties in Afghanistan, like many dualist legal orders around the world, do not automatically become part of the domestic legal system upon ratification. Instead, international treaties need to be effectively absorbed into national law through implementing legislation; otherwise they have no legal effect and state institutions have no obligation to apply them directly.

In the Afghan context, it is important and relevant to differentiate between different sources of international law because the Constitution and laws of Afghanistan referred only to international treaties and described the procedures through which they could be ratified. The country's laws did not make any mention of customary international law, general principles or other sources of international law; they articulated no rules about whether and how these forms of international law were to be incorporated into the legal order.

Importantly, the 2004 Constitution made several references to international law (treaties) and highlighted the country's responsibilities under it. For example, the Constitution's Preamble stated that the country's basic law had been ratified in adherence to the UN Charter and the Universal Declaration of Human Rights. Similarly, Article 7 stated that the state was obliged to 'observe' the UN Charter, international treaties and international conventions that Afghanistan has become a party to as well as the Universal Declaration of Human Rights. A cursory reading of these constitutional provisions may suggest that Afghanistan's Constitution had elevated international treaty law as the normatively supreme law of the land. A closer look, however, suggests that the Constitution paid only 'lip service' to international treaty laws.[12] In reality, international law (treaties) was lower in rank and hierarchy not only to the Constitution and Islamic law but also to ordinary state legislation.

Article 3 of the Constitution provided that 'no law should be repugnant to the beliefs and the tenets of the scared religion of Islam.' Article 121 then stated that the Supreme Court should review the consistency of laws and *international treaties* with the Constitution, including Article 3; the Supreme Court was granted the right to invalidate laws and treaty provisions that contradicted the Constitution or the laws of Islam.[13] These constitutional rules established the primacy of the Constitution and Islamic law over international treaties (law). Afghanistan's law of international treaties moved a step further and required that before acceding to an international treaty or negotiating a new one, the Government should review the consistency of the treaty with the Constitution and the laws of Islam, and if there were contradictions, the Government was obliged to make reservations setting aside those provisions of the treaty that did not comply with the Constitution or laws of Islam. Additionally, the law of international treaties required that the Ministry of Foreign Affairs should submit the draft of a new treaty the Government wished to enter into to the Ministry of Justice to ensure that it complied with Islam and the laws of Afghanistan. Together, all of these provisions meant that not only the Constitution and Islamic law, but also ordinary state laws, enjoyed normative supremacy over international law in Afghanistan.

Practical and theoretical challenges in enforcing international law in the Afghan context

The enforcement, or lack thereof, of international law in the domestic legal context in Afghanistan created serious theoretical and practical challenges. For one thing, international treaties Afghanistan ratified were published in the Official Gazette, and they should have therefore *ex proprio vigore* become binding legislation; however, these treaties had no legal effect in the country. Put differently, ratified international treaties which were published in the Official Gazette became part of domestic law, yet legal and judicial actors in Afghanistan did not abide by them simply because they were not incorporated in domestic law through specific implementing legislation. The Afghan experience reveals how dualist states may evade their international legal obligation by refusing to adopt implementing legislation to give effect to international treaties in their domestic legal orders. Under dualism, a state may be bound by a treaty but will still have sufficient room not to apply it in their domestic legal system.

On the practical front, Afghan courts over the past two decades have refused to apply international treaties in cases under their consideration simply because courts did not consider them binding legal

[12] Schoiswohl, note 9, at 668.
[13] Ibid. at 668-70

norms. Particularly, courts in Afghanistan have argued that international treaties to which Afghanistan became a party could not be placed in the hierarchy of laws mentioned in Article 130 of the Constitution. That Article reads as follows:

> *In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case [at bar], the courts shall, in pursuance of Hanafi [school of Islamic] jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.*

Citing this provision, Afghan judges have argued that international treaties were not included in this hierarchy, and 'applying international law on the cases has no basis in the [C]onstitution and statutory laws.'[14] Afghan courts have also gone further and punished several acts (such as blasphemy, the selling of prohibited meat and women leaving their houses due to domestic violence) which are not clearly criminalized in the country's official laws, but are prohibited under the *Hanafi* jurisprudence. Nearly all decisions of Afghan courts in these areas are in glaring violation of the international treaties Afghanistan had ratified.

In the wake of these judicial decisions, Afghanistan's political elites, civil society and international rule of law organizations began to address the problems of incorporating international treaties into domestic law so that they could be applicable in the courts. However, the question of the consistency of some international treaties (particularly human rights treaties) with the basics of Islam created serious obstacles in this respect. For example, in 2010 the Afghan Government prepared a draft law that would incorporate the *Convention on the Elimination of All forms of Discrimination Against Women* into domestic law. However, the Parliament refused to consider the law at all because several members of the Parliament argued that the proposed law violated Islamic dictates. Instead of asking the Supreme Court to review the consistency of the said law with Islam, President Karzai chose to enact the law through a legislative decree. Courts, however, refused to apply the decree unless it was ratified by the Parliament – a ratification that never came.

The debate over the method of the incorporation of international (treaty) law into domestic law was ongoing and was a work-in-progress when the Taliban took control of Afghanistan and put an end to it.

Biography: *Shamshad Pasarlay is a former Assistant Professor of Constitutional Law at Herat University in Afghanistan. He holds a bachelor's degree from Kabul University School of Islamic Law and an LL.M. and Ph.D. in comparative law from the University of Washington School of Law. He has worked in the Law Library of Congress and the United Nations Headquarters in New York. Shamshad Pasarlay's research interests involve comparative constitutional law and Afghanistan's constitutional history. His scholarship on judicial politics, religion and constitution making and constitution-making/design in deeply divided societies has appeared in numerous journals, including the International Journal of Constitutional Law, Asian Journal of Comparative Law, Australian Journal of Asian Law and Washington International Law Journal. He participated in the Melbourne Forum in 2018 and 2019.*

[14] Ghizaal Haress, 'Judicial Review in Afghanistan: A Flawed Practice' (2017) Afghanistan Research and Evaluation United, Issue Paper, 30.