

Overseeing Mechanisms of the Implementation of Constitution: A Comparative Study

¹Mubariz Abdul Saboor, ^{*2}Popalzai Mohammad Zahoor, & ³Momand Nasrullah

¹Assistant Professor, Afghanistan Science Academy, Kabul, Afghanistan

²Head of the Legal Consultations, IARCSC, Kabul, Afghanistan.

³Ph.D Scholar, Peshawar University, Pakistan

ABSTRACT

Overseeing the implementation of constitution is a vital and fundamental issue in constitutional laws of the states. The authorized body for overseeing the implementation of constitution must be independent and must have the ability to implement its decisions. Overseeing the implementation of Constitution focuses on interpretation, compatibility and application of general provisions of other laws in accordance with Constitution. There are two types of mechanisms for overseeing the implementation of constitution in the world, Political based overseeing and Judicial based overseeing. Judicial based overseeing has two models; American model of Judicial Overseeing, and European model judicial overseeing. According to the Afghan legal System, there are three bodies that oversee the implementation of constitution; The President, the Supreme Court, and the Independent Commission for Overseeing the Implementation of the Constitution. It is worth noting that Afghanistan has not adopted any of the accepted mechanisms in the world, and it has emerged a new and combined mechanism.

Keywords: *Overseeing, Mechanism, Implementation, Constitution, Model.*

Article Publication

Published Online: 15-May-2021

*Author's Correspondence

Mohammad Zahoor Popalzai

 Head of the Legal Consultations, IARCSC, Kabul, Afghanistan

 [popalzaizahoor\[at\]gmail.com](mailto:popalzaizahoor[at]gmail.com)

© 2021 The Authors. Published by *Research Review Journals*

This is an  open access article under the

CC BY-NC-ND license 

(<https://creativecommons.org/licenses/by-nc-nd/4.0/>)

1. Introduction

The issue of overseeing the implementation of constitution was raised with the development of constitutional laws in the second half of twentieth century, and some special foundations were established in this regard. All the states have addressed this issue in their legal systems. Two basic theories have been presented for the overseeing of the implementation of constitution; the first one belongs to French politician Emmanuelle Sieyes, who argues that; the task of overseeing the implementation of Constitution should be entrusted to a political foundation that does not belong to any one power, in order to not violate the independence of the foundation, and to announce and implement its decision independently without the influence of any force. The second theory is the Judicial overseeing theory, and based on Judicial Oversight, the judiciary and courts should have the power to oversee the implementation of constitution. There are two models of judicial oversight; the first one is American model; in America model all ordinary courts have the power to oversee the implementation of Constitution. The second one is European model, which was developed by the Austrian lawyer, Hans KELSEN, and based on European model a special court should be established for the overseeing the implementation of the constitution. In Afghanistan's legal system; from the very first constitution (Nezamnama) in 1303 AH till the Constitution of Dr. Najibullah's Reign in 1366 AH, there was no specific foundation that has been given the authority to oversee the implementation of constitution. However, a foundation was established in 1366 AH called the constitutional council, and this foundation had the responsibility to oversee the implementation of Constitution. According to the provisions of present constitution three authorities (bodies) have the power to oversee the implementation of the constitution; The president, the supreme court, and the Independent

Commission for Overseeing the Implementation of the Constitution.

2. Importance of the Research

Constitution is the highest national legal document in a state, and it is also called the mother of all laws. The States that do not have constitutions, have flawed legal systems. Moreover, the states that have constitutions, but these constitutions are not enforced, in fact it is being thought that they have no constitution. Nowadays, the implementation of Constitution is an important issue in all countries that is why certain institutions have been set up to oversee the implementation of Constitution. As the implementation of constitution is an important issue, the study and research of the institutions that oversee the implementation of constitution is more important.

Constitutional problems are hotly debated in Afghanistan, while lack of specificity of the institution to oversee and interpret the constitution is most debatable issue. The controversy among the lawyers has made this issue even more controversial. In order to resolve this contentious issue and reach to a clear conclusion, we need to explore this issue and do a detailed research.

3. Objectives of the Research:

This research is designed to achieve the following objectives:

- To recognize the nature of overseeing the implementation of constitution.
- To analyze the mechanisms of overseeing the implementation of constitution.
- To know the institutions that oversee the implementation of constitution in Afghanistan.
- To compare the overseeing mechanisms of implementation of constitution in Afghanistan and World

4. Research Questions

1. What mechanisms are used for overseeing the implementation of constitution?
2. Which institutions can oversee the implementation of the constitution?

5. Research Methodology

This research is carried out based on descriptive and Analytical method.

6. Introduction to Overseeing the Implementation of Constitution

All countries with written constitutions have accepted the supremacy of constitution over ordinary laws. During the French Revolution, Sieyes, a well-known politician, said: "Constitution is both compulsory and fully enforceable, or it is nothing at all." (1) Sieyes aimed that the constitution is made to be fully implemented and if the constitution is violated, then the constitution will lose its prestige.

Overseeing the implementation of constitution consists three parts: First, all provisions of the constitution should be implemented and the implementation of these provisions should be overseen. Second, overseeing the compliance of ordinary laws with the constitution, it means that unconstitutional laws should not be initiated and passed if the provisions of an ordinary law are in conflict with the constitution, it suspends implementation of the constitution and the provisions of constitution remain unenforceable. Third, to fully implement the constitution, the Overseeing Institutions of the implementation of constitution should interpret the provisions of Constitution that remain unapplied due to the complexity or ambiguity.

To oversee the implementation of Constitution, a separate subject entitled, Constitutional Procedure, has been created in the world today, and Nizamuddin Abdullah in his book, Introduction to Afghanistan Law defines this subject as: Constitutional Procedure is set of rules that help the institutions that oversee the implementation of the Constitution in resolving the disputes between government agencies, examine the compliance of ordinary laws with Constitution, and interpret the constitution. (2)

7. The Overseeing Mechanisms of Implementation of Constitution in the World

There are two types of mechanisms for overseeing the implementation of constitution in the world; formal overseeing, and informal overseeing. In informal overseeing, all citizens of a state can oversee the implementation of constitution, while formal overseeing is divided into two types; political institutions based overseeing, and judicial institutions based overseeing. The mentioned overseeing mechanisms are discussed below.

A: Informal Overseeing:

In this Overseeing, the implementation of constitution is overseen through the citizens of a state): The issue of public overseeing of the implementation of constitution was raised with the initiation of written constitutions around the world. The public were given the right to seek the implementation of constitution, and to revolt against the rulers who violated constitution by not giving the citizens' rights enshrined in constitution. Moreover, public had the right to oppose, when legislature enacted unconstitutional laws. (3)

John Locke, in his book Civil Government, published in 1690 said: "the people are allowed to revolt against the ruling system, if their constitutional rights are violated. (4)

The 2nd article of Declaration of Human and Civil Rights of 26 August 1789 during the French revolution stated that: "French citizens have the right to resist against the government's pressure and oppression. (5)

Moreover, it was stated in the mentioned declaration that if anyone violate sovereignty of the people, he will be killed by the free human beings.

Besides this, it is stated in the 20th article of German constitution: "All Germans have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible."(6)

The 120th article of Greece Constitution also guarantees the revolt and resistance rights for the people against a cruel government. (7)

It is concluded based on the mentioned details that citizens of a state have the right to oversee the implementation of constitution informally; and the citizens of a state can oversee the implementation of constitution by founding political parties, civil societies, and pressure groups and so on. If the government violate the constitution, the people can raise their voice against the government. (8)

B – Formal Overseeing:

In formal overseeing, the government officials oversee implementation of the constitution; and formal overseeing is divided into two type:

- 1- **Political Institutions Based Oversight (Political Oversight):** Today we face with power-based control of the power in the world, it means that lawyers are working hard on how to balance the power in a state's legal system. How can they uphold the values of Constitution on the one hand, and prevent its violation on the other hand? That is why the theory of separation of powers has emerged. Based on the constitution, one branch does not interfere in the affairs of the other branch, but one branch can control and monitor the other branch, nevertheless no branch can be superior to another. According to this theory, the French politician Emmanuel Sieyes proposed the idea for the first time in 1799 that the right to oversee the implementation of the constitution should be given to a non-partisan body. If this right is given to any power, it will increase its superiority over the other powers. When a power has been given the right to oversee the implementation of constitution, it will not be able to evaluate and monitor its actions that are in violation with constitution. (9) that is why Sieyes proposed that a body should emerged that does not belong to any power, and he called that body "Board of Overseeing the Implementation of Constitution". His theory was rejected on that time, because it was considered that this foundation would pose a threat to the three powers, and it will limit parliamentary powers and prevent innovations. However, this theory was accepted in the 1946th French Constitution, and a body called the "Constitutional Committee" was assigned to oversee the implementation of constitution. The powers of this committee were very limited at that time, however the 1958th French Constitution established a body with full powers called Constitutional Council, which still has the right to oversee the implementation of constitution in France. (10) The council is made up of nine (9) members whose members are elected for a period of nine years as bellow: Three members are selected by the President, three by the National Assembly and three others by the Senate. Moreover, all former French presidents are members of the council as long as they live. Head of the council is selected by the president. All laws must be submitted to the council after the signing of the president, and the council will examine the compliance of the laws with the constitution. The decisions of this council are final and nobody has the right to review them. According to the 61st article of French constitution, the council should examine the compliance of an ordinary law with the constitution within a month, and announce its decision. It is worth mentioning that if the government wants to examine the compliance of a law urgently, this period can be reduced to eight days. Such body is called a political body, because it does not have full jurisdiction over the judiciary, meaning that the right to oversee the implementation of the constitution is not vested in the court or judiciary, but it is vested in such a body. Which is not part of the three forces, but it is directly part of the state. As this body is not fully depended on Judiciary, it is called political body or political mechanism. In other words, in such

mechanism the right to oversee the implementation of constitution is not assigned to the courts, it is entrusted to a body which is directly part of the state.

- 2- **Judicial Institutions Based Oversight (Judicial Oversight):** Judicial Based oversight mechanism was introduced in the United States in the early nineteenth century for the first time, and nowadays many countries follow this mechanism. (13)

Judicial oversight, which is called judicial review by English writers, refers to the power and authority on which the courts can cancel all laws, regulations and actions of the executive and legislature that are not in accordance with the Constitution. (14) There are two models of judicial oversight in the world, one is the American model and the other is the European model, we discuss both here:

- **American model of Judicial Oversight:** All judges of the courts can oversee the implementation of the constitution in this model of judicial oversight, and they have the right to refrain from enforcing, avoid or cancel the law if they found it to be in conflict with the constitution while making decisions. (15) This model was first used by the Director of Supreme court, Judge John Marshall, in the case of Marbury V. Madison (1803) in the United State. Judge Marshall ruled in the case that the 1799th Judiciary Act of the United States is unconstitutional and ordered its cancellation. (16). Following this decision, this mechanism became commonplace in the United States legal system, and the courts have the power to oversee the implementation of Constitution till now. (17) Denmark, Norway and Sweden also use a mechanism close to the American model to oversee the implementation of the constitution. (18)
- **European Model of Judicial Oversight:** In this model of judicial oversight the right to oversee the implementation of the constitution is delegated to a special court, it means that in this model ordinary courts and ordinary judges cannot oversee the implementation of the constitution or Cancel ordinary laws in case of conflict with constitution; rather, it must be done through a special court. Hence, the European model of judicial oversight differs from the American model; in American model, ordinary courts and judges can oversee the implementation of the constitution and cancel laws in the case of a conflict, while in European model special court can do so. (19) As this mechanism was first proposed by the Austrian Jurist Hans KELSEN, it is also called the KELSEN `s mechanism. (20) KELSEN believed that the issue of overseeing the implementation of constitution is very important, and ordinary courts and judges cannot deal with it, so competent and specialist judges should be appointed to deal with it. (21)

Austria, Germany, France, Italy and Spain follow similar mechanism. Moreover, this mechanism was adopted in Eastern Europe after the fall of communist regimes. Besides this, there are also constitutional courts in Russia, Ukraine, Azerbaijan and Armenia that follow the European model. In addition, African countries, such as Lebanon, Egypt, Tunisia, Algeria, Morocco, Mauritania, Kuwait, Iraq, Cameroon and Senegal follow the same mechanism. (22) The history of Constitutional Court is not so long; the first constitutional court being established in Czechoslovakia on February 9 and in Austria in October of 1920. (23)

Finally, it can be said that the best mechanism to oversee the implementation of constitution is the judiciary based European model (A special court must be set up to oversee the implementation of the constitution). The reasons are as follows:

- 1- The interpreting, overseeing the implementation, and studying the compliance of constitution with other laws, has legal and judicial nature. Based on this characteristic, the power to oversee the implementation of constitution should be entrusted to a body that know the nature and spirit of the constitution with a legal and judicial structure and nature. If this task is given to a political body, it will not be able to legally and judicially oversee properly the implementation of the constitution.
- 2- Overseeing the implementation of constitution requires a body that has full authority and is free from the influence of government policies, and this aim can be achieved only by setting up a special court to oversee the implementation of the constitution. If this task is given to a political body, it will not be able to stay away from government policies, and be safe from their influence.
- 3- Overseeing the implementation of Constitution through a political body may violate the fundamental rights of the citizens, because it is not a judicial body and the citizens cannot appeal to a political body if their rights are violated due to its nature. While in judicial based oversight the citizens can sue a complaint and a lawsuit to judicial body, if the fundamental rights of citizens are violated during overseeing the implementation of constitution.
- 4- Judicial oversight is also preferred in terms of credibility and prestige. The Constitution is a high national legal document and enjoys much high level of credibility. So, the body that oversees the implementation of this high national document should be credible and have high prestige as well. It is worth mentioning that the credibility and prestige of judicial body is higher than a political body and a governmental political council. (24)

Existence of a special court in the European model of judicial oversight has made the model prior. If we prefer the American model, then ordinary courts could have the right to oversee the implementation of the constitution. If the right to oversee the implementation of constitution is entrusted to the judiciary branch of the state, the judiciary will not remain free and independent anymore. As we have already discussed, to issue its decisions impartially and without the influence of any power, the body that oversees the implementation of constitutions should be fully independent.

8. Overseeing Mechanism of Implementation of the Constitution in Afghanistan

If we have a look to the provisions of 1382nd A.H Afghan Constitution, it is clear that this constitution does not follow any of the international mechanisms to oversee the implementation of constitution. Nonetheless, this constitution has emerged a new and combined mechanism to oversee the implementation of constitution, which is the combination of international mechanisms. Based on the provisions of constitution, three bodies have assigned to oversee the implementation of the constitution in Afghanistan.

First: The President: According to the first part of 64th article overseeing the implementation of Constitution is on the duties of the president. The article states: “The President shall have the following authorities and duties: 1- Supervise the implementation of the Constitution; ...” (25)

Moreover, according to 63rd article of constitution while the president taking the oath, he says that he shall respect and supervise the implementation of the constitution. (26)

Based on the mentioned articles of constitution, it clears that the President is the first entity who has been entrusted the responsibility to oversee the implementation of the Constitution.

Second: The Supreme Court: According to 121st article of Constitution the supreme court of Afghanistan has the power to study the compliance of other laws with constitution and interpret the constitution; the article stipulates: “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.” (27)

Third: The Independent Commission for Overseeing the Implementation of the Constitution: According to 157th article of Constitution the Independent Commission for Overseeing the Implementation of the constitution has the power to Oversee the implementation of the constitution; the article states: “The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the ratification of the Lower House (Wolesi Jirga).” (28)

The commission emerged based on the mentioned article. After the emergence of the commission, the question arose that whether the commission has the power to interpret and oversee the implementation of the constitution? The question was answered by the 1387th law of independent commission for overseeing the implementation of constitution. The 1st, 2nd and 4th parts of Article 8th of the mentioned law includes provisions about interpretation and overseeing the implementation of constitution: The Commission shall have the following powers to better oversee the implementation of the provisions of the Constitution:

- 1- Interpretation of the provisions of constitution at the request of the president, Supreme Court and Government.
- 2- Overseeing the implementation and observance of the Constitution by the President, National Assembly, judiciary, the government and other governmental and non-governmental administrative units, institutions and organizations;
- 3- Reviewing enforced laws to find the contradictions to the Constitution, and submit these contradictions to the President and National Assembly for measures to eliminate them. (29)

According to the law of the Independent Commission for Overseeing the Implementation of the Constitution, it seems that this commission has the power to oversee the implementation of the Constitution, because all the tasks listed in Article 8 are intended to better oversee the implementation of the Constitution. (30)

9. A Controversial Discussion

The issue of interpretation of constitution and the power to study the compliance of other laws with constitution is an argumentative subject, which has always been the topic of the writings and discussions of the Lawyers. As we have said earlier, the power to oversee the implementation of the Constitution in Afghanistan have been entrusted to three bodies, but due to the conflict between Articles 121 and 157 of the Constitution, a controversial discussion has arisen over the power to oversee the implementation

of the Constitution between the last two bodies (the Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution), which will be briefly discussed here:

The commission was set up six years after the enforcement of the constitution in accordance with Article 157th of the constitution. The first draft of the law of commission was sent to the National Assembly for ratification after it was approved by the Council of Ministers in 1387 A.H. The National Assembly passed the law and sent it to the President (Hamid Karzai) for signature after making some amendments. The president rejected the commission's law and returned the law back to the Lower house (Wolesi Jirga), because some of its provisions were unconstitutional. The Lower House (Wolesi Jirga) exercising its legal authority in accordance with Paragraph 2 of Article 2 of the Constitution passed the law of Independent Commission for Overseeing the Implementation of the Constitution by a two-thirds majority in 10/06/1387 A.H. The bill, which had become law in accordance with the provisions of constitution, instead of being enforced and published in the official gazette, remained vague for several months. (31)

President (Hamid Karzai) issued Decree No. (5861) on the law of this commission on 09/04/1388 AH, the script of the decree was as follows:” The law of Independent Commission for Overseeing the Implementation of Constitution was passed by a two-thirds majority vote of all members of the Lower House (Wolesi Jirga) in 10/06/1387 AH in resolution No. (100). as some of the provisions of this law are in conflict with the provisions of the Constitution. So, the issue was referred to the Supreme Court to examine its compliance with the Constitution in accordance with Article 121 of the Constitution. (32)

Supreme Court issued Judicial Order (Decree) No (5) on 25/01/1389 AH in this regard, which stated: “The provision of the first paragraph of Eighth article of the Law of Independent Commission for Overseeing the Implementation of the Constitution is in conflict with the provision of 121st article constitution due to the following reasons:

First Reason: If we refer to the archive of Constitutional Commission, the article 121 of the constitution was not exist in the chapter of Judiciary. Because before that date there was another chapter in the draft constitution called the High Divan of Constitution, this chapter was the eighth chapter in the draft constitution. The 146th article of that chapter stated: “The High Divan of Constitution has the following powers:

- 1- Examining the compliance of the Constitution with other laws, legislative decrees, international treaties and conventions.
- 2- Interpretation of the Constitution with ordinary laws and legislative decrees.

As we discussed earlier, at the drafting stage of constitution the 121st article of Judiciary chapter was not existed. Later, the chapter of High Divan of Constitution was eliminated from the constitution and the 146th, 147th and 148th articles of that chapter merged to each other, and article 121st emerged. On the last day of Loya Jirga (14th of Jaddi), alongside the amendment or elimination of article 121st, the Independent Commission for Overseeing the Implementation of Constitution was added in article 157th of the constitutional draft. It can be concluded from this historical analysis that the main authority to interpret the constitution and to study its compliance with other laws was entrusted to the High Divan of Constitution, which was predicted in the provisions of (146 to 149) articles of constitution. Later, the context and provisions of these articles (146-149) merged as the 121st article of the current constitution. It turned out that the purpose of the legislators was to give the Supreme Court the power to interpret the constitution and to examine its compliance with other laws. That is why they had placed the High Divan of Constitution in the context of 121st article. (33)

Second Reason: the word (those)¹ has been used in Article 7th of the constitution, which includes all previous laws, legislative decrees, international treaties, international conventions and the constitution.

Third Reason: Interpretation of the Constitution, laws and decrees requires the issuance of a judicial order (Decree), which no body has the power to issue such order that has binding aspect, than the court.

Fourth Reason: Pursuant to the article 157th of the Constitution, as its name implies the (Independent Commission for overseeing the Implementation of the Constitution) has the power to oversee, not to interpret. If the commission is given the power to interpret, the article 157th of the constitution must be amended, and the word (interpret) should be added to the name of commission. It is worth noting that the power to amend the constitution rests with the Loya Jirga, not parliament. (34)

According to the above reasons, the Supreme Court ruled that the Independent Commission for overseeing the Implementation of Constitution does not have the power to interpret the Constitution or to study the compliance of constitution with other laws. Nevertheless, interpretation and examine the compatibility of constitution with other laws is the sole prerogative of the Supreme Court based on the article 157th of the Constitution. Accordingly, the law of the Commission for overseeing the Implementation of the Constitution amended, and it took away the above two powers from this commission. The law was published in the official gazette and is in force today. (35)

¹ 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.

Following the above amendments, the law of Independent Commission for Overseeing the Implementation of Constitution states the powers of this commission in its amended Article 8 as follows:” In order to better oversee the implementation of the provisions of the Constitution the commission shall have the Following duties and authorities:

- 1- Overseeing the implementation and observance of the Constitution by the President, National Assembly, judiciary, the government and other governmental and non-governmental administrative units, institutions and organizations;
- 2- Providing legal advice to the President and Parliament regarding issues arising from the Constitution.
- 3- Providing specific recommendations to the President and National Assembly, in order to take necessary measures for development of legislative affairs, in the areas stipulated by the Constitution
- 4- Presenting report to the President, in case of observing violations and infringements of provisions of the Constitution.
- 5- Endorsement of relevant rules and procedures. (36)

Shortly, there are three institutions for overseeing the implementation of the Constitution based on the 1382nd A.H constitution of Afghanistan: The President, The Supreme Court, and the Independent Commission for Overseeing the Implementation of the Constitution.

We believe that Supreme Court is the strongest and most authoritative body, because it can directly prosecute those who violate the Constitution, and as well as revoke laws that are in conflict with the Constitution at any time. While, the other two bodies or institutions (The President and Commission) cannot directly prosecute the violators of the constitution or cancel the laws, they are required to refer violators of the constitution, and laws that are in conflict with the constitution to the Supreme Court.

As we have discussed the mechanisms of overseeing the implementation of the Constitution in Afghanistan and in the world. Now, if we compare these two mechanisms, we can get the following results:

There are two types of mechanisms in the world to oversee the implementation of the constitution; the informal oversight, and the formal oversight. Formal oversight is divided into two types; Political institution-based oversight (Political mechanism) and judicial institutions-based oversight (judicial mechanism). There are independent commissions for overseeing the implementation of constitution in the countries that follow political mechanism, while there are courts and judges for overseeing the implementation of constitution in the countries that follow the judicial mechanism. The following countries in the world follow the political mechanism:

- 1- France: The Constitutional Council
- 2- Al-Jazeera: The Constitutional Council
- 3- Iran: Constitutional Guardian Council
- 4- Soviet Union: High Council of Directors of the Soviet Union
- 5- China: The Permanent Congress Committee of the People
- 6- Tunis: The Constitutional Council.

The following countries follow the judicial mechanism to oversee the implementation of constitution:

- 1- Egypt: Constitutional High Court
- 2- Germany: Constitutional High Court
- 3- Italy: Constitutional Court.
- 4- Turkey: Constitutional Court
- 5- Uzbekistan: Constitutional Court
- 6- Tajikistan: Constitutional Court
- 7- Kazakhstan: Constitutional Court
- 8- Bulgaria: Constitutional Court
- 9- Romania: Constitutional Court
- 10- South Africa: Constitutional Court

Consequently, if we compare the world’s mechanisms with the legal system of Afghanistan, it is being cleared that the informal overseeing mechanism, in which all the citizens of a state can oversee the implementation of the constitution, is applicable in Afghanistan. Afghan constitution give its citizens the right to oversee the constitution and, if they have a complaint regarding the implementation of the constitution, they can share it with the courts, or the Independent Commission for overseeing the Implementation of the Constitution. Afghanistan is alike to the world in informal oversight mechanism, while it is much varied to the world in formal oversight mechanism. As we have discussed that the formal oversight mechanism is divided into two types; political based mechanism and judicial based mechanism, the countries of the world either recognize the political based mechanism or judicial based mechanism in their constitutions. However, Afghanistan has not fully accepted either of these two mechanisms. As it is mentioned earlier three foundations have been identified to oversee the implementation of the constitution in Afghanistan: The

President, The Supreme Court, and the Independent Commission for overseeing the Implementation of the Constitution. The president and Independent Commission oversee the implementation of constitution based on the political mechanism, while the Supreme Court oversees the implementation of constitution based on the judicial mechanism. Briefly, Afghanistan has added a new mechanism to formal oversight and is a mixed mechanism that practices both the political mechanism and the judicial mechanism. That is why we argue that Afghanistan is different from other countries in the world in this respect.

10. Conclusion

There are two mechanisms to oversee the implementation of the constitution. First type is informal oversight, in which the citizens of a state have the responsibility to oversee the implementation of the constitution, and they should appeal to the courts and indicate the violated provisions of the constitution. The second type is formal oversight, which is carried out by official authorities and it is divided into two types; political institutions based oversight, and judicial institutions based oversight. There are two models of judicial oversight in the world: first one is the American model, in which all ordinary judges and courts can oversee the implementation of the constitution, and the second one is European model, in which a special court is set up to oversee the implementation of the constitution in judicial oversight. Though, based on these two main reasons we can say that judicial oversight is better than political oversight:

- 1- Overseeing the implementation of the Constitution is inherently legal and judicial in nature, and should be addressed by a body with a judicial or legal structure and nature.
- 2- Overseeing the implementation of the Constitution through a political body may violate the fundamental rights of individuals. Because individuals cannot appeal to a political body in the case of violation of their rights like the judicial body. However, if the fundamental rights of individuals are violated at any time during the Judiciary overseeing of the constitution, they can file a complaint and claim to the same judiciary body.

If we have a look at the provisions 1382nd AH Constitution of Islamic Republic of Afghanistan, it has not accepted any of international mechanisms for overseeing the implementation of the Constitution. Nonetheless, it has emerged a new and combined mechanism which is based on international mechanisms. According to the provisions of the Constitution, the duty of overseeing the implementation of Constitution has been assigned to three institutions in Afghanistan: The President, the Supreme Court, and the Independent Commission for Overseeing the Implementation of the Constitution. We believe that Supreme Court is the strongest and most authorized body that oversees the implementation of constitution, and the reasons of this idea have been mentioned earlier.

11. Suggestions

This research proposes the following Suggestions:

- 1- The 1382nd AH Afghan constitution should be amended, and the European model of judicial oversight must be considered in order to oversee the implementation of the constitution.
- 2- If the amended constitution does not consider the European model of judicial oversight, then it is necessary to eliminate the conflict between Articles 121st and 157th of the Constitution, and a single authority (body) should be clearly defined to interpret and oversee the implementation of constitution.
- 3- The research showed that the European model of judicial oversight is better and more accurate than other constitutional oversight mechanism, and the world should use and recognize this mechanism in their constitutions.

References

1. Niaz, Abdul Waheed, General Constitutional Law, Yousafzad Publications: Kabul, 2016, p. 5.
2. Abdullah, Nizamuddin, Fundamentals of Afghanistan's Laws, Saeed Publications: Kabul, 2013, P. 445.
3. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 111.
4. Lahiji, Bijan Abbasi, Fundamentals of General Constitutional Law, Jungle Publications: Tehran, 2014, P. 94.
5. Ibid.
6. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 112.
7. Lahiji, Bijan Abbasi, Fundamentals of General Constitutional Law, OP. CIT., P. 80.
8. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 113.
9. Lahiji, Bijan Abbasi, Fundamentals of General Constitutional Law, OP. CIT., P. 81.
10. Herawi, Abdul Rauf, Methods of Overseeing on Constitution, Journal of the Constitution, Volume III, Independent Commission for Overseeing on the Implementation of the Constitution: Kabul, 2013, P.31.
11. Ulfat, Asadullah. Knowledge of Law, Momand Publishing Society: Jalalabad, 2014, P. 150.

12. Shariat Panahi, Sayed Abul Fazl Qazi, Constitutional Law and Political Institutions, Mizan Publications: Tehran, 2004, P. 120.
13. Ibid, P. 116.
14. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 113.
15. Abdullah, Nizamuddin, Fundamentals of Afghanistan's Laws, OP. CIT., P. 446.
16. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 114.
17. Shariat Panahi, Sayed Abul Fazl Qazi, Constitutional Law and Political Institutions, OP. CIT., P. 117.
18. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 115.
19. Louie, Fauro. Constitutional Courts, translated by Ali Akbar Geraji Azandriani, Mizan Legal Foundation Publicatios: Tehran, 2009, P. 22.
20. Abdullah, Nizamuddin, Fundamentals of Afghanistan's Laws, OP. CIT., P. 447.
21. Shariat Panahi, Sayed Abul Fazl Qazi, Constitutional Law and Political Institutions, OP. CIT., P. 118.
22. Abdullah, Nizamuddin, Fundamentals of Afghanistan's Laws, OP. CIT., P. 448.
23. Louie, Fauro. Constitutional Courts, OP. CIT., P. 23.
24. Danish, sarwer. Constitutional Law of Afghanistan, Ibn Sina Publications: Kabul, 2010, P. 96.
25. Islamic Republic of Afghanistan, Collective Constitutions of Afghanistan, Constitution of the Islamic Republic of Afghanistan (2004), Ministry of Justice: Kabul, 2013, Article 64.
26. Ibid, Article 63.
27. Ibid, Article 121.
28. Ibid, Article 157.
29. Government of the Islamic Republic of Afghanistan, Resolution of the Independent Commission for Overseeing the Implementation of the Constitution, 2009, Article 8.
30. Niaz, Abdul Waheed, Introduction to the Constitutional law of the Islamic Republic of Afghanistan, Saeed Publications: Kabul, 2014, P. 562.
31. Rasuli, Mohammad Ashraf, Analysis and Criticism on the Constitution of Afghanistan, Volume II, Saeed Publications: Kabul, 2013, P. 339.
32. Ibid, P. 340.
33. Abdullah, Nizamuddin, Authority of Interpretation in The Constitution of Afghanistan, Translator: Abdul Saboor Mubariz, Islah Online Website, Date of Access: 2019/10/10, Available at:<https://www.eslahonline.net/2015/07/07/%D8%AF->
34. Government of the Islamic Republic of Afghanistan, Fifth Judicial Decree of the High Court (2), Ministry of Justice: Kabul, 2009, Available at:<http://law.acku.edu.af/ps/download/file/ps/26166/79006>
35. Niaz, Abdul Waheed, General Constitutional Law, OP. CIT., P. 105.
36. Government of the Islamic Republic of Afghanistan, Independent Commission for Overseeing on the Implementation of the Constitution Amended Law, Ministry of Justice: Kabul, Article 8.