A CONSTITUTIONAL COURT FOR AFGHANISTAN

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I PRELIMINARY COMMENTS

Some caveats and observations:

1. Please forgive my exceeding your space limits but it is impossible to discuss the elements of a new institution without exploring many interconnected matters.

2. I know little about Afghanistan, either its law or its history. In response to Mr. Maruf=s suggestion, I have looked at the Egyptian, Algerian and Turkish Constitutions.

3. My observations reflect conversations with Messrs. Maruf and Sherzoy of the Afghan Constitutional Commission (Feb. 5, 2003).

4. In response to the January 30, 2003 email from Said Arjomand to Barnett Rubin:

a.. Impeachment. I don=t believe that the Constitutional Court is the best tribunal in which to charge, prosecute, try, and if necessary, sentence the President and other high government officials for such matters as corruption and similar crimes. Although many states do impose what seems to be a similar duty on a constitutional court, it is often limited to treason or violations of the Constitution after a super-majority vote by the legislature. E.g., Bulgaria (Art), Czech Republic, Art. 66.

To start with, the members of a constitutional court, as described below, are likely to be scholars and distinguished public figures, including some high court judges. Corruption trials can take a very long time and may involve complex fact questions that are difficult to resolve. A court that focuses on constitutional issues, which are essentially legal issues, and often after a regular court has determined the material facts, has neither the time nor, with respect to many members, the competence to determine the facts and apply the law. Its work is primarily with legal norms B constitutional provisions, statutes, regulations and decrees. It may, in some cases to be discussed below, also consider whether a constitutional norm was unconstitutionally applied to the facts but that is usually where there is no dispute as to the facts.

A basic theme of this memo is that judicial review can be a powerful institution but it is quite fragile, particularly in a society unfamiliar with it. The fragility is partly because of its delicate role: it determines winners and losers in disputes between the citizen and the government and among powerful political, religious and ethnic forces. These disputes often

involve hotly disputed matters that seem vital to the disputants such as national security, turf, religion and ethnicity, and if the court is to do its job of maintaining the rule of law, democratic processes and human rights, it will have to say No to at least some of these powerful forces much of the time. Since the court has neither the power of the sword nor of the purse, it depends on public support and for this, particularly in the early years, it must tread carefully, and not expend whatever capital it has on matters best handled by other institutions. For this and other reasons noted above, I prefer the Polish and Algerian models which involve a special tribunal (Polish Const. Arts. 198-201); Algerian Const. Art 158.) to try the President and other high officials.

b. I don't see why promoting "national reconciliation, and maintenance of the integrity of Afghanistan" is especially the constitutional court's business, so much so that it should appear in the constitutional provisions for that court. Those objectives are the business of all branches of government and properly appear not in a section on the constitutional court but in what are called in some constitutions "Fundamental Principles" and often in the Preamble as well. The special role of a constitutional court is to promote the rule of law, democratic principles and processes, and human rights. Obviously, this can only be done, as the email suggests, by appointing the right people, which will be discussed further below.

II. ISSUES TO BE RESOLVED
A. Size and Selection

1. Selection

The first question to be decided is the number of judges. Assuming that Afghanistan does not have a great many lawyers who are familiar with constitutional issues, it will probably be difficult to put together a large court of qualified people. Nor is there any need for a large court, especially in the early years when there probably will be few cases. It would therefore be well for the constitution to provide for a maximum such as nine, but with implicit or explicit authorization to the legislature to establish a court of fewer judges. At this point, five judges may be enough. The United States Supreme Court size fluctuated over 75 years from five to ten before it finally settled on nine.

There are many types of selection ranging from the American version of nomination by the President and confirmation by the Senate - which is a workable procedure - to dividing the selection among the different branches. Bulgaria divides the selection with four for the President, four for the parliament, and four for the judiciary; Hungary leaves it to the parliament by a two-thirds vote after selection by a committee on which all parties represented in the parliament have a voice; Turkey allows the President to appoint one or more members from each of several different tribunals (military, civil, the Council of State, etc.) with each tribunal submitting a group of candidates. I believe the best system involves selection by different political entities (legislature, judiciary, executive, provincial) in order to obtain a court that is generally representative of the population.

I do not believe that a constitutional court gains by adding non-lawyers. This may be in part because of my occupational parochialism, but I think it also gives the wrong impression.

The strength of a court, whether constitutional or other, is in the belief that its decisions are objective and governed by legal principles. Of course, this is only partly true because at the constitutional level, a significant element of discretion as well as personal and other values enter into the picture. But even if the belief that objective legal factors determine a decision is something of a myth, it is essential to public acceptance of the court. Putting non-lawyers on the court, particularly if they are prominent political figures, detracts from that appearance of objectivity.

2. Term of Office

Duration. In my conversation with Mr. Maruf, he indicated that the commission was thinking of a term of three to four years; he mentioned nothing about renewability.

Three-four years is too short - it should be between nine and twelve years and should be nonrenewable. The longer term is necessary for the members of the court to learn and to be comfortable with issues with which they are probably unfamiliar. Moreover it provides a necessary stability so that the political nature of the appointment process does not produce frequent and rapid changes in the jurisprudence of the court.

It is also important to remember that constitutional law is not a matter of logical deduction or even application of established law to the facts. It is a creative endeavor that is constantly confronted with extremely difficult and delicate situations that are either unpredictable, have not been predicted, or were papered over to avoid a break-up of the constitutional process. To learn to do this takes a good deal of time. It has been estimated that in the United States Supreme Court, most justices do not find their voice or how to view a problem until after they have served for four to five years.

Reappointment. Independence can be severely undermined by the possibility of reappointment. In most places, being a constitutional court judge - or indeed any high court judge - is a much valued position.[1] Obviously many of these judges will seek reappointment and if - as is usually the case - that is determined by the political branches, there will inevitably be an incentive for judges to bow to the wishes of powerful political figures, particularly as the time for reappointment approaches. For this reason most countries with constitutional courts have made the terms nonrenewable.

Staggered terms. Another element in enhancing the stability of the Court=s decision-making is a staggering of the terms of the judges, so that the judges aren=t all replaced with an entirely new cohort of judges, perhaps with radically different views. Retirement, death, incapacity, or resignation will produce some gradual changes, but those happen infrequently. A

[1]In civil law countries this does not apply to lower court judges but only to judges of the highest courts, because judges of the lowest courts are generally civil servants.

full replacement of most of the judges can result in a loss of both continuity and collective memory, impairing the efficiency of the court. Also, major shifts in the electorate=s attitudes can often produce unpredictable and large-scale changes in political dominance. If such a shift produces a near-total replacement of the judges and a major switch in the court=s decisions, as is not unlikely, this will undermine legal stability and certainty, on which people rely. It can also affect the society=s faith in the court=s independence and impartiality, and with that, the court=s status and legitimacy.

3. Independence and Impartiality

Independence. Obviously, the key to a successful judicial enterprise that can contribute to constitutional democracy committed to the rule of law and protective of human rights (and each of these is a separate element, all of which are necessary to a truly modern liberal state) are independence and objectivity. By and large the experience of the new courts in Europe, including East Europe and elsewhere, is that somehow or other, despite the lack of a tradition of judicial review, judges have remained remarkably independent. In many cases they have been among the few bulwarks against efforts to return the society to authoritarianism of the left or the right; Bulgaria and Slovakia in Europe are among the best examples but there are others. This holds true even for judges who would be expected to be quite malleable by the government in power; Romania is an exception. In my book, The Struggle for Constitutional Justice in Post-Communist Europe, I speculate about the reasons for this independence and suggest that it is because most of the judges in Europe have been law professors, with very high social status. Many have read widely and have had opportunities to travel outside their region, even under the communist regimes. This may also be true of some Afghan scholars, particularly those who went into exile. This of course points to selecting academics to maximize the likelihood of such independence. At the very least, the members of the court must be men of great stature in the profession, on which they can fall back when under fire from powerful political elements for their decisions. And it must be stressed that such fire is inevitable, given the nature of the task given to constitutional courts.

In addition to picking the right people, it is equally important to minimize the pressures on the court. For this reason it is appropriate to include boilerplate provisions in the constitution about the need for judicial independence and a prohibition on any effort to influence the court=s decision-making except through the proper channels. Indeed in Turkey, members of the parliament may not comment on a case while it is being considered and before the decision. (Art. 138) In some countries, the constitution calls for criminal penalties for anyone who tries to tamper with the judicial process. These latter provisions can be put in an organic act and need not be in the constitution so long as they are in provisions that are not easily changed.

Overt pressures are not, however, the only method of putting undue influence on a court. In many countries, such as Russia, the government controls a wide range of privileges such as housing, cars, drivers, and other matters which directly affect the quality of life for members of the court. Also in many countries, the Ministry of Justice, an executive organ, controls the budget and the staffing of the courts. These all provide opportunities for exerting improper pressure, and there have been many such instances in Eastern Europe during the past 10 years

when courts or judges have displeased the governments in power. For this reason there should be a constitutional provision that the that the salary and privileges of office may not be reduced, that the court controls its own staffing and administration, and that its budget is submitted directly to the parliament.

The most blatant form of pressure is either to remove judges or, at the worst, to prosecute them. All constitutions therefore have specific provisions for removal of a constitutional court judge, which usually involve the concurrence of the other judges. All constitutions also provide immunity from prosecution for the judges unless certain conditions are met. A good example of the latter is Article 196 of the Polish Constitution; a typical example of the criteria for the termination of a judge=s term is Article 148 of the Bulgarian Constitution.

Impartiality. Obviously a judge should also be free from any personal ties that may affect his judgment. For this reason almost all constitutions provide that the judge of a constitutional court may not be a member of any political party, may not engage in any other occupation or activity other than lecturing at a university or doing legal research or writing.

B. The Work of the Constitutional Court

As stressed above, a constitutional court has a delicate but vital function. To do that it must hear a sufficient number of cases of importance to make an impact, but must not be overloaded with unimportant cases or cases that the court is not truly equipped to deal with. There are three central factors to consider in ensuring that the court has sufficient important work to make an impact but not too much to handle: (1) the kinds of judicial pronouncements it can make; (2) the subject matter of these pronouncements; and (3) who has access to the court to generate one of these. Finally, there are the questions of the timing of constitutional court review and finality.

1. Types of Rulings

Appellate courts are usually limited to deciding ordinary lawsuits by deciding in whole or in part for one of two opposing sides. Constitutional courts, however, usually issue opinions on *questions,* and leave resolution of the specific cases raising those questions to other courts, though not always - acting as an appellate court, the South African and Spanish courts often make the final decision in the case and issue the necessary orders, disobedience of which is deemed contempt of the constitutional court. I see no great advantage in favor of either the South African or the other model. However, if the ordinary courts lack public confidence, it would be preferable to follow the South African-Spanish model, especially since experience elsewhere shows that the ordinary courts, including the Supreme Court, are likely to be hostile to the constitutional court.

Constitutional questions can arise not just in conventional litigation but as requests for opinions, interpretations, or on the court=s own initiative. Several constitutional courts are required to provide constitutional interpretations upon demand by the president or other high legislative or executive official. That task should ordinarily not be imposed on a tribunal, for it calls for abstract review in its most extreme form, especially if there is no serious underlying

controversy about a specific matter. Abstract interpretation, divorced from any factual settings can result in ill-considered judgment. Moreover, if an interpretation is issued, and the constitutional provision is applied later to an actual situation, what if the prior interpretation is then seen to have been unwise, unfair, or productive of unexpected consequences? Will the court be willing to reverse itself about a provision that it has once interpreted? And if the request is related to a specific dispute over a legislative or other matter, the court runs the risk of being caught up in the partisan politics of the legislative process; moreover, involvement in the legislative process undermines separation of powers principles.

Despite my reservations, I must admit that in some countries, constitutional courts do provide such interpretations and the practice can play a useful role by forestalling some bad legislation or actions. I can=t provide an overall assessment of whether the practice is good or bad, because that kind of information is just not available. So my preference remains - interpretations should not be provided before there is a live dispute involving some concrete legislation unless an advance interpretation is truly necessary. This can be the case with respect to pending treaties or where there is uncertainty about which branch of the government has jurisdiction over an important matter. Where ordinary legislation or executive activity is concerned, I think the court should be allowed to wait.

I see almost not justification for allowing the court to take cases on its initiative. That would truly be injecting itself into controversy which it should not do. It should wait until questions are presented to it by disputants.

2. Limiting Subject Matter Jurisdiction

There is a tendency to load the constitutional court with difficult tasks because it is supposed to be one of the very few non-partisan institutions in government. The constitutional court is a specialized tribunal, however, with a particularly important and often delicate role. It should not have to deal with issues that do not raise constitutional questions and can be dealt with by other courts. For example, there is no reason why a constitutional court should resolve electoral decisions raising no constitutional issues. The courts have no particular competence in these controversies, which plunge the tribunal into partisan politics. Bipartisan and impartial electoral commissions can do the job just as well, with the ordinary courts resolving nonconstitutional legal questions.

It is especially unwise to require the constitutional court to verify the results of a presidential election in a presidential system. Would its decision be obeyed if it finds the election invalid? It is not in a position, well after the fact, to do a good job, especially since it has no special competence for this task, for it is the general courts that have the capacity to find the facts and to interpret the relevant laws.

Nor is there normally any need for a constitutional tribunal to deal with the competencies of state or local governmental units that exist only by virtue of a statute or executive order and are not constitutionally established.

In short, the constitutional court should not have to deal with any nonconstitutional question except perhaps for the impeachment of the president, as discussed above.

To avoid overload, a constitutional court should also limit itself to determining the constitutional validity of the legal norm at issue or to cases involving widespread application of a norm, such as a racially or gender discriminatory application of an otherwise valid law. A case that involves only an allegedly unconstitutional application of a valid norm to an individual should be left to the ordinary courts, unless, as noted, the application in question is widespread or raises important issues. In that case, the court should have discretion about taking the case, as discussed below.

I am informed, however, that the ordinary courts are not reliable. That is of course very troubling but the constitutional court is no substitute for a satisfactory judicial system. There will be neither a useful constitutional court nor an adequate ordinary judiciary if the constitutional court is overloaded in an attempt to substitute for the ordinary courts.

3. Standing

Constitutional courts must deal with a substantial number of important issues for them to have any influence on the society. Without generous standing provisions, they will not get such cases. This is especially true for human rights issues. If a constitutional court is to protect human rights to any significant degree, individual citizens must be able to invoke the jurisdiction of the constitutional courts. Indeed, there is no reason why any person, natural or legal, who is adversely affected by an unconstitutional law should not be allowed to challenge that law in the constitutional court even if it pertains to something other than human rights.

Ideally, the constitutional court should get into the picture primarily by way of referral from the general courts. The latter should be required to pass on the question first in order to screen and refine the issues, as well as to become accustomed to applying constitutional doctrines and principles. The losing party should then be able to refer the constitutional issue to the constitutional court. Such a referral should be authorized whenever there is a substantial question as to the constitutionality of a law, as in Poland, Romania, Italy, Spain, and other countries.

Unhappily, few ordinary courts are sensitive to constitutional considerations. To force a person to invoke the general courts first is likely to impose delay that is futile and frustrating, especially given the current situation in Afghanistan. Also, there may be no pending case in the general courts, or the legal system may not authorize a suit by the injured party in those courts. Accordingly, and in keeping with the constitutional court's prime obligation to protect human rights, many states allow direct access to the constitutional tribunal for human rights cases, and that would seem appropriate in Afghanistan.

Permitting widespread direct access can, however, overwhelm the tribunal, as noted above in the prior section. The court should therefore have discretion to refuse to deal with an individual problem if it affects only one or a few individuals unless it deems the issue important.

Those should be left to the Ombudsman, about which more below.

Almost all constitutional courts allow high government officials, such as the President, Prime Minister, and a percentage of the legislators, both national and provincial, depending on the issue, to apply to the court. This is because one of the initial and continuing reasons for a constitutional court is to keep the governing majority within constitutional bounds, as well as to protect the minority against the majority. The legislative percentages are usually about 20-30%.

These should also be an Ombudsman and that official should have standing in his own right and on behalf of individuals whose constitutional rights have been invaded, should he consider them appropriate for constitutional court adjudication. Moreover, there should be a Freedom of Information Act in the Constitution and the Ombudsman should have the right to go to the constitutional court for enforcement of the Act.

Standing should also be extended to organizations with a clearly identifiable interest in a case, such as trade unions and human rights organizations. The South African constitution offers the best model here.[2]

4. Timing

Most constitutions authorize constitutional court review only after a law goes into effect. One advantage of this is that the court then has a sense of how the law works in practice and is not limited to the bare text. On the other hand, if sufficiently delayed, post-enactment review can destabilize existing relationships and undermine legal security. Moreover, even post-enactment review is sometimes of the bare text of the law and in those cases delay would seem unnecessary. Nevertheless, review prior to a law going into affect not only runs the risk of prematurity but increases the politicization of a the court. The review comes immediately after what could be a bitter political conflict and it is most often sought by a losing political faction, trying to win in the courts what it lost in the legislature.

Perhaps for this reason, few states have followed the model of the French constitutional

[2]The South African constitution offers a very good model not only with respect to its human rights provisions, with respect to which it is probably superior to any other constitution in existence today, and its constitutional court, but also with respect to such other matters as cooperation between the provinces and different ethnic groups and the central government. I don=t know how much of that is relevant to Afghanistan but the South African constitution is well worth consulting.

tribunal whereby the constitutional court reviews a law after passage by the National Assembly but before promulgation by the President (I am unaware of cases where constitutional court review of proposed legislation or bills takes place.) Such preventive review also injects the court into the legislative process before it is fully concluded and blurs the necessary separation of powers. An adverse decision on some or all of a law not yet enforced is, in effect a recommendation to the legislature to revise the law, often with indications of how it should be revised.

Nevertheless, the same factors which sometimes justify interpretations even when there is no legislation or specific action in question, as discussed above, applies here as well. There may be times when early review is useful and even indispensable, such as with pending treaties or highly important legislation which can be analyzed on its face and once in effect, will have serious immediate consequences. This can be true for tax laws, for example, on the basis of which business planning may take place. Here too, as with interpretations, I would leave the decision whether to review a law before it goes into effect to the discretion of the court.

5. Finality

The constitution should declare that the decisions of the constitutional court are final and must be obeyed by all.

Conclusion

It is difficult for me to know how many of these suggestions fit the Afghan context. I think most do but my unfamiliarity with that situation makes it difficult for me to have any firm views with respect to many of my suggestions. And again, I apologize for the length.

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