Option Paper on a Constitutional Court for Afghanistan

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Why have a Constitutional Court?

To take advantage of the latest developments in constitutional law, particularly the elaboration of constitutional courts in the political transitions of the 1990s, it is important for Afghanistan to have a constitutional court in its new constitution. It would be an essential institution for guarding the constitution, consolidating the rule of law and strengthening democratic processes in Afghanistan.

Constitutional courts perform a symbolically valuable educational function in a new constitutional regime because their decisions provide a public account of what the new constitution means. They also in practice ensure that laws and decisions of state officials are consistent with a new constitution. Because constitutional courts generally have no predecessor institutions, they come untainted by any association with past regimes, and can perform important legitimating functions for new democratic institutions among the general public. Citizens see these courts as the place that recognizes their voice in politics. Having a central location which regularly gets complaints from the citizenry is absolutely crucial in establishing democratic institutions more generally. Where political parties either don't exist or incompletely represent the views of the population, it is only through individual complaints that the central government can see what is really happening in the country. And the Constitutional Court is often best suited to receive these complaints.

Constitutional courts also assist in the thorny problem of dealing with a pre-existing judiciary and state bureaucracy whose staff operated under another regime and whose personnel may not be entirely qualified for being officials in the new constitutional order. It is often not possible (or even desirable) in fragile new democracies to have a complete house-cleaning of the old personnel. There are often not enough other qualified people to refill all of those positions and removing the prior elite class of state officials can legitimize the politics of revenge, which can rip a new state apart. Adding a Constitutional Court over and above the preexisting state structures provides a mechanism through which everyone in the old order becomes accountable to a new boss. Survival skills of lower officials in warlord regimes (or other antidemocratic systems) often include opportunism to please those in power, so changing the moral and legal tone of those who have to be pleased can create beneficial results quickly. A constitutional court can be a relatively inexpensive and effective way to give old officials a new way to be accountable in the new regime.

To accomplish these goals, the Constitutional Court must have complete independence. It should not part of the regular judiciary, and may not be subordinated to any other state

institution. If there is concern that it may have too much power, a countervailing power can be brought to bear to constrain it. The more power a constitutional court has to declare laws invalid under the constitution, the easier it should be for the constitution to be amended by the elected branches.

Competencies of a Constitutional Court

If there is to be a constitutional court, what shall be its competencies?

1. Concrete norm control/concrete review: In this form of review, the Constitutional Court procedure is initiated by judges in the regular judiciary who certify a question to the Constitutional Court when they believe that they are being called upon to apply an unconstitutional law. Ordinary judges can make this request either on their own initiative or upon request of the parties to the case. The concrete case being heard in an ordinary court is then suspended until a decision of the Constitutional Court is made determining whether the law in question should or should not be applied. If the Constitutional Court decides that the legal norm in question is unconstitutional, then the norm is nullified and the ordinary court may not apply it. On the basis of the ruling of the constitutional court, the ordinary court then decides the concrete case before it. This provides one concrete avenue of legal education for the judges of ordinary courts as well as an important mechanism for increasing constitutional coherence of the legal system.

There are important advantages to including this form of review in a new constitutional order. Since only the Constitutional Court can declare a law invalid, ordinary courts are otherwise bound to apply any positive law they find and they cannot take this power for themselves because it explicitly lodged elsewhere. Ordinary courts have to take direction from the constitutional court about which legal norms shall be considered constitutionally valid and how they are to be constitutionally applied. But the effects are not just constraining: ordinary courts are given the *responsibility* to recognize potentially unconstitutional statute legal norms so that they are actually empowered to participate in this system of developing constitutional coherence through making constitutional referrals. In complex political transitions, it generally takes awhile before the ordinary courts learn how to do this and, at the start, the ordinary judges are often quite reluctant to share any of their powers in this way.

In our view, this power to certify a question to the Constitutional Court should be limited to the judges and not extended to the litigants themselves. If one or more of the litigants believe that the law that would be applied in their case is unconstitutional and the judge refuses to so certify, the litigants should wait until the case is decided and then appeal an adverse ruling to the Constitutional Court on the grounds that a constitutional norm was violated, using the mechanism of a constitutional complaint.

2. Constitutional complaints: Most constitutional courts have jurisdiction over "constitutional complaints." Anyone whose rights have been adversely affected by a decision of a state official can appeal to the constitutional court to have the action of government annulled. (For example, if the election commission rules against a candidate in ways that violate his or her free speech rights, then the candidate could petition the Constitutional Court.) In these cases,

the challenge can take two forms: a) the petition can claim the law under which the state official acted in the particular case is unconstitutional in general or b) the petition can challenge the actions of a state official as unconstitutional in the way that an otherwise constitutional law is applied. In both cases, this jurisdiction is a crucial mechanism not only for ensuring that unconstitutional laws that are voided, but also for keeping state officials in line. Without this jurisdiction, the Constitutional Court can only reach the facial validity of laws without getting into the problems that may arise in the unconstitutional application of otherwise constitutional laws. Both facial validity and constitutional application need to be controlled in a new constitutional order. Allowing individuals to complain directly against adverse decisions, including rights-violating decisions by judges, provides a channel through which the entire state apparatus can be effectively monitored and corrected.

In designing an effective constitutional complaint mechanism, one needs to ask: When may it be used? Here, the main options are 1) requiring that an individual exhaust all possible remedies before going to the Constitutional Court (appealing lower court decisions, following administrative procedures for complaining against an action of a state official) or 2) allowing an individual to go straight to the Constitutional Court when the first adverse decision is made. There are arguments for both positions. Requiring exhaustion of remedies may allow courts or state bureaucracies to discipline themselves. It also removes a heavy burden on the Constitutional Court. But if the shortage of both training and constitutional consciousness goes all the way up the chain of command, the second alternative would allow the Constitutional Court to hear complaints as soon as an individual's rights have been violated by a decision of a state official. This second alternative has as the chief objection the fact that the caseload at the Constitutional Court will be heavy.

If a constitutional court is to be genuinely accessible to a population that has substantial rates of illiteracy, especially among women, the appeals process should not be complex. One possible remedy might include sending staff members from the Constitutional Court out around the country on a regular basis to take oral complaints and convert them into written appeals for presentation at the Court. (The model here would be the way old common law courts moved from place to place to do their jobs, or the way that early American judges "rode circuit.") Another might involve encouraging human rights and humanitarian NGOs who work in the country to take on constitutional appeals as one of their activities. This might also be a role for the Ombudsman or the Human Rights Commission, to help take oral complaints for submission to the court.

3. Abstract norm control/abstract review: Under abstract review, the Constitutional Court reviews a law without having a concrete case before it. Instead, the Constitutional Court reviews the challenged law for its facial compatibility with the constitution and may declare incompatible laws to be void. But the court should *not* have the power to initiate such review on its own. Only those parties explicitly authorized by the Constitution or the Constitutional Court Act may bring challenges to any already-effective law, and we would suggest that the court itself not be among those parties.

Virtually all constitutional courts possess something like this form of review; the main variation lies in the set of parties that are able to mobilize the court for this purpose. The most

conservative form of this review limits requests for review to those who have some official state position. So, for example, the President, the Prime Minister, the Chief Justice of the Supreme Court, the Ombudsman, the Human Rights Commission, the head of either chamber of the Parliament and a substantial fraction of MPs may ask the constitutional court for a ruling on the constitutionality of a statute. The more radical forms of this sort of review (e.g. in Hungary) extend the right to petition to anyone regardless of their relationship to the new law. The vast majority of jurisdictions with constitutional courts limit requests to a small handful of state officials. But in the context of Afghanistan, the power might be usefully be broadened to include not only ordinary citizens, but also NGOs and human rights organizations which might be better able to spot the human rights consequence of currently effective law.

Broadening the ability of ordinary citizens to participate in government by giving them a right of complaint at the Constitutional Court may be just the way to provide a democratic constraint on those who attain positions in the new government, particularly those who may not be fully committed to the new Constitution. In addition, citizens who are empowered by being able request declarations of unconstitutionality will feel that they have an important voice in government above and beyond their role in elections. Being able to appeal to the Constitutional Court allows *individual* citizens (not just those arranged into voting blocs, political parties or other pressure groups) to have a direct role in government. If one of the effects of the civil war has been to decimate civil society and to make it more difficult for like-minded citizens to organize to defend their political interests, it may be crucial to have institutions in the new constitutional order in which citizens can go as lone complainants. In places like Hungary (with its *actio popularis)* and Spain (with the *amparo)*, where there is such broad access, citizens have felt part of the democratic landscape more quickly.

In addition to 'repressive norm control' (review of already-effective laws), there is often also 'preventive norm control' (review of laws before they enter into force). In systems that have preventive norm control, the number pf those who can petition the Constitutional Court is strictly limited. In our view, power to petition should be given only to the President between passage and promulgation—that is, before a law goes into force. We propose no general review of all statutes by the Constitutional Court, as is typical in France or Iran. Why? If there is presumptive legitimacy to the democratic process and state officials swear to uphold the Constitution, then the default position should be that legislation is normally constitutional unless explicitly challenged for a reason.

4. The Constitutional Court should have the power to remedy "constitutional omissions." These occur when the constitution specifies that the specific legal mechanisms for bringing a provision of the Constitution into effect shall be provided by law – and then the law is never passed. In our view, anyone adversely affected by the *absence* of a law that is constitutionally required (e.g. absence of political parties law, absence of a statute specifying a selection mechanism for local councils) should be able to appeal to the Constitutional Court for a declaration of a constitutional omission. The power could even be given to every citizen.

5. One power that is rarely given to constitutional courts but that might be usefully considered in Afghanistan is the power to petition where a constitutionally valid (or perhaps even constitutionally compelled) law exists but is not enforced. For example, consider a case where

there is a law requiring the registration of political parties but in practice no state official ever registers them. If those who would be affected by the enforcement of the paper-only law had the right to petition the Constitutional Court to compel enforcement of the statute, this could bring the law in practice as much into compliance with constitutional mandates as law on paper.

6. Constitutional courts are typically given the power to resolve conflicts between the center and the regions. In constitutional systems without federalism, where the regions have no independent lawmaking authority, institutions at the center would have the right to petition the Court against the regions if regional leaders were acting in ways inconsistent with the Constitution. (E.g. if a warlord issued a decree without the constitutional authority to do so, the President or a Minister could petition the constitutional court to have the decree nullified). Through this mechanism, some of Afghanistan's acute political conflicts could be resolved while strengthening the rule of law and the constitutional framework for political decision-making.

There may be occasions even in a unitary government, however, where there is tolerable local variation in interpretations of national laws by provincial authorities for locally relevant reasons (e.g. ethnic differences in local dispute resolution practices), or where there is some permissible form of local or municipal self-government (e.g., local *shura*s with some self-governing power supervising cultural activities). The Constitutional Court could then have jurisdiction to determine levels of "permissible" variation under the Constitution on the basis either of petitions from the institutions at the center claiming that local authorities exceeded their authority or on the basis of petitions from institutions in the regions, claiming that they have more leeway under the Constitution for individualized interpretations of the laws. Local councils, for example, might bring petitions against provincial or central authorities to ensure that locally specific collective rights guaranteed in the constitution to language and religious instruction are realized.

7. The Constitutional Court should also have the power to resolve conflicts among state organs at the national level. In separation of powers cases, any affected state actor (e.g. Parliament or President) can petition the Court for a ruling on what the Constitution requires of them and others in a dispute (e.g. the Parliament might ask whether an executive decree was properly within the powers of the President, or required parliamentary approval under the Constitution).

8. If the Constitution contains provisions for referenda, the Constitutional Court may review referenda before they are put to the public to determine their constitutionality. This power might be made automatic so that all proposed referenda are so reviewed.

9. Through the review of treaties for their compliance with the Constitution, the Constitutional Court may strengthen the role of international law in the constitutional order in several ways:

A. Successful constitutional review could be the final step through which international law becomes part of domestic law.

B. The constitutional court, through a specific provision in the constitution, be

encouraged to interpret the constitution in light of international law norms so that they become incorporated in the court's growing sense of constitutionalism itself.

Competencies NOT Recommended

There are some competencies of constitutional courts that we believe would be a mistake to include in the constitutional jurisdiction of Afghanistan.

1. Constitutional review of political parties, election results, and all supervisions of the political process should be given to an Election Commission. If constitutionally significant irregularities arise, (for example, is registration is denied to a political party), then there is concrete review or challenge to the law itself in the usual manner and the Constitutional Court would become involved at that point.

2. Trials of public officials are best left to separate administrative courts under a High Administrative Court (*divān-i Āli)*.

3. Advisory opinions requested by state officials on the constitution implications of particular policies should not be given by the Constitutional Court. If the implications involve potential human rights violations, preliminary recommendations can be made by the Human Rights Commission or Ombudsman.

Judicial Review and the Shari`a

The Constitutional Court can consider the constitutionality of law and administrative acts in the lights of the principles of Islam, rule of law, constitutional and human rights and democracy as the supreme values of the Constitution. It is our view that articles of the new constitution corresponding to old Articles 7[1], 64,[2] 69 and 102[3] of the 1964 Constitution[4] already specify the hierarchy of norms and define as a result the parameters for constitutional judicial review with regard to the principles of Islam and the Shari`a. There is, however, no need for the explicit mention of the role of the Shari`a in the provisions of the new Constitution on the Constitutional Court.

The Islamic science of jurisprudence (*fiqh*) has never been the basis for the foundation of the political order and government. Neither Imam Abu Hanifa nor any of the other founders of the Islamic schools of law (*madhahib*) ever claimed it was, but rather developed jurisprudence as a science which could be used to answer questions about social life and the political order in the

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[1] Making the king the protector of national independence and Islam and the guardian of the Constitution and national unity.

[2] Declaring that the laws should not be contrary to the principles of Islam and the values of this constitution--hopefully with the addition/specification of the rule of law, democracy and human rights.

[3] Both on Shari`a as the secondary source if law where positive laws are lacking.

[4] The recognition of the 1964 Constitution under the Bonn agreement is, however, for a republic, not a monarchy.

light of the this- and other-worldly goals of the Islamic religion. Expressions such as "Islamic ideology" and "political *fiqh*" as the foundational science for constitutional law derive from a fundamentally erroneous hypothesis which is contrary both to democracy and to ethical principles of Islam. They are recent innovations in imitation of totalitarian fascist and communist constitutional models. The confusion of the derivative norms (*furu`*) of the Shari`a with its goals (*maqāsid al-shari`a*) was another major error that followed from this totalitarian hypothesis. This error results in a fundamental misunderstanding of the place of the *furu`* in the hierarchy of legal norms.

The derivative norms of the Shari`a correspond not to constitutional principles but rather to ordinary laws. Various laws currently in force in Afghanistan already incorporate a very substantial number of derivative norms of the Shari`a according to Hanafi jurisprudence. The constitutional court therefore should not declare any ordinary laws null and void simply on account of their variance from the derivative norms of the Shari`a because the latter have always been subject to interpretation in the light of the supreme goals of the Shari`a (*maqāsid al-shari`a)* and the principles of Islam, including public interest (*maslahat*), man's vice-gerency *(khilāfat*) of God, and Islamic ethics. It follows from these considerations that the judges of the ordinary courts cannot refer cases to the constitutional court for "concrete review" on grounds of lack of conformity with the Shari`a. Nor can any "constitutional complaint" or petition for "abstract review" be made on grounds of repugnancy of laws to or contradiction of administrative acts with the Shari`a.

The discussions of the relationship between the Shari`a and constitutionalism in comparative constitutional law in the last decades has been too ideological, and has not paid any attention to the history and institutions of public law in the Muslim world before the era of modernization. Contrary to current misconceptions, there was an appeals system in the Islamic tradition, and the *Mazālim* court of the ruler served as its highest court. The ruler (the Sultan or the Shah) was responsible for the protection of Islam and the maintenance of order, and delegated his authority to hear cases of injustice to the Kadi of the *Mazālim*. The *Mazālim* was thus a court of appeal against overtaxation and misrule by the ruler and against the miscarriage of justice by the Kadis—items that correspond to the judicial review of unconstitutional acts under a modern constitution. It is reasonable to say that with the transfer of the ruler's authority to the President and Parliament as elected representatives of the nation, the Constitutional Court should inherit his authority to hear "constitutional complaints" against misrule and injustice.

Constitutionality of Customary Procedures and Norms

"Reviewable law" generally includes: Positive legal enactments – statutes, executive orders and decrees, parliamentary resolutions with force of law, administrative regulations at both the national, regional and local levels. International treaties with domestic force of law are also generally included as well. The status of court decisions in civil law systems is more difficult. Technically such decisions have no independent force of law; practically, they may have a major effect. To the extent that court decisions (or rules of interpretation announced by the Supreme Court) have something like the force of law, they should also be reviewable for constitutional compliance. One way to reach unwritten norms that have the force of law is to give the constitutional court the power to review "living law" as is done in Italy.

In the context of Afghanistan, questions about the constitutionality of customary dispute resolution processes may arise. In customary processes, it may be hard to identify just what the legal "norms" are because they are not written down. In addition, the Constitutional Court may not have the ability to adequately assess the facts from which the norms can be inferred. The procedures themselves may raise human rights questions by (for example) giving different categories of witnesses unequal weight or by requiring remedies that violate human rights (e.g. requiring marriages between feuding families). Nonetheless, if customary dispute resolution mechanisms are going to be used for a wide variety of controversies in Afghanistan, some constitutional compatibility of these mechanisms will need to be assessed, if not all at once, then at least as an aspiration over time. There are several ways to integrate customary dispute resolution into the constitutional system:

1. The most aggressive is to allow direct constitutional court review of decisions of local *shura* or elders under the provisions for constitutional complaints since such decisions could count as decisions by state officials.

2. A less aggressive alternative involves provision of alternative mechanisms for dispute resolution (e.g. trials in the civil courts) so that those who believe that their constitutionally protected rights might be violated in traditional proceedings have somewhere else to go. Customary procedures would survive, but the state could not permit them to be mandatory where at least one of the parties objected to using them.

3. Another way to deal with this issue would involve regulating the customary procedures by statute so that their primary objectionable features are eliminated. For example, a statute could ban certain forms of remedies (e.g. requiring marriages) or require that disputes between members of different ethnic groups be resolved in a more neutral forum. This statute could then be periodically reviewed by the Constitutional Court to see whether it takes into account the human rights provisions in the Constitution and the Constitutional Court might increase the human rights requirements of this statute over time. In this alternative, constitutional review would be of the statute regulating customary procedures, not of the customary procedures directly.

Design Questions:

1. Number of judges:

   A. Given the difficulty of finding local trained personnel, the number should be relatively small – 7, 9, 11.
   B. the larger the number of judges, the harder it is for the court to work together in a single panel; with two or more panels for reviewing statutes, there is a chance that incompatible decisions will be issued by the court.

2. Qualifications:

A. No ex officio members because that would compromise the independence of the Court.
B. Judges should have "modern" legal education
C. Once appointed, judges should be strongly encouraged to participate in international meetings and trainings of constitutional court judges; as a result, it would be helpful if the judges spoke some international languages.

3. Selection process (assuming 9 judges): There are several alternatives:

A. Three named by President; three by upper house, three by lower house.
B. All nominated by the President with parliamentary confirmation by simple majority in one or both houses.
C. Nomination of judges is done by a parliamentary committee composed of one member (or one vote) per region which has to approve each nominee by a simple majority, and then the parliament as a whole has to approve each candidate by either simple majority or 2/3rds vote. This would ensure regional (and then indirectly ethnic) representation of the judgeships.

4. Term of office:

A. There should be a fixed term of office, with a mandatory retirement age (say, 65 or 70).
B. There should be rotation of judges built in at the start so that their terms are up in a predictable staggered sequence. So, for example, if there are 9 judges, three of the first set should have three-year terms, three should have 6-year terms and three should have 9-year terms. Then after that, everyone would have 9 years.
C. Terms of constitutional judges should *not* be renewable (because otherwise they would not be independent of those who could renew them).

5. Incompetencies/ conflicts of interest:

A. Being a constitutional judge is incompatible with holding any other state office, save that of a writer or professor.
B. Constitutional judges may not belong to a political party or other advocacy group, except for human rights organizations.

6. Selection of Officers of the Constitutional Court.

A. The President and Vice President of the Court should be elected by the judges, not appointed into those positions by political officials.
B. The judges should have the power to hire and fire their own staff; staff (including the position of the general secretary of the court) should be accountable only to the judges of the Court and to the Constitution.

7. The proposed budget for the Court should be drafted by the judges and should be submitted directly to the Parliament. The Court budget should not be subject to direct approval either by the presidential administration or the Ministry of Justice.

8. The salaries of judges may not be reduced while they are in office. If some judicial compensation comes in the form of apartments, cars or other payments in kind, it may not be reduced in value by an action of state or taken away during the term of a judge's tenure.

9. Judges may be removed only for cause, and only first upon a vote of the other constitutional judges, followed by a vote of at least one house of the Parliament. There shall be a public proceeding at which evidence shall be presented, and the judge under review shall be given both due process and an opportunity to develop evidence in his/her favor.

10. The court shall determine its own internal rules about the following matters:
    A. whether opinions shall be signed
    B. whether dissents shall be published
    C. what order to take up cases in/ deciding own agenda
    D. when to issue judgments in specific cases
    E. whether to adopt a view that certain cases are not justiciable -- that the constitutional questions are properly left to other branches.

11. The decisions of the court shall be published and made available widely, particularly to state officials and to ordinary court judges and to institutions for legal education.