CONSTITUTIONAL COURTS:

OPPORTUNITIES AND PITFALLS

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Constitutional courts can perform important functions in the consolidation and maintenance of democratic government. They provide a site for the enforcement of human rights and for the delineation of the powers of governmental bodies. By adjudicating constitutional questions and enforcing constitutional provisions, constitutional courts make the constitution a living document that shapes and directs the exercise of political power, rather than merely a collection of fine phrases that symbolize aspirations. Constitutional courts can contribute, in other words, to making a new regime not merely a democracy but a state governed by law and respectful of its citizens.

Not all constitutional courts manage to attain this valuable goal. Some become powerless structures, unable to gain public respect, compel compliance with their decisions, or restrain the appetites of politicians. Others become, essentially, intrusive political actors, dictating in detail what legislatures and executives must or must not do, blocking the popular will, and arrogating power to themselves. In the end, such a course compromises the political neutrality of the courts, makes the constitutional court itself a political issue, and threatens the rule of law.

Much depends on the ability of constitutional designers and those leaders who execute their design to establish a constitutional court that has adequate powers and a proper relationship to the other branches of government and to the citizenry. Careless drafting can easily undo good intentions. A great many states

around the world have become what Fareed Zakaria has called "illiberal democracies,"[1] elected governments that routinely ignore constitutional limits on their power and deprive citizens of their rights and liberties. Properly designed constitutional courts can help prevent such outcomes.

Two Models of Constitutional Adjudication

A constitutional court can be an important feature of constitutional government, but it is not always indispensable. Britain developed a constitutional regime without judicial review of the constitutionality of either legislation or governmental action.. Parliamentary supremacy did not produce an illiberal regime. Switzerland has had relatively little judicial review and still has no separate constitutional court. Yet there are few more vibrantly liberal democratic countries in the world. Judicial review originated in the United States of America as a way of enforcing the constitutionally mandated separation of powers between branches of government, division of authority between the federal government and the states, and the individual liberties guaranteed in the Bill of Rights. Some federal systems require judicial review to guard the boundaries between the center and the component units, but they do not necessarily require judicial review beyond that function. Nevertheless, the institution of judicial review has grown in several of these countries and elsewhere since the end of World War II, largely to enforce guarantees of human rights.

Some states, such as Japan, India, Canada, and Australia, have followed the American model of incorporating judicial review in the ordinary judicial hierarchy, with a single Supreme Court at the apex. Others, such as Germany, the states of Eastern Europe since 1989, South Africa, and most recently

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[1]Fareed Zakaria, "The Rise of Illiberal Democracy," 76 *Foreign Affairs*, no. 6, 22-43 (November-December 1997).

Indonesia, have followed the original Austrian model, devised after World War I, by creating a separate constitutional court in which the power to review legislative and governmental action resides.

There are pros and cons to each model. The American model weaves constitutional doctrine into the fabric of litigation and may have the advantage of uniformly presenting constitutional issues in the factual context in which they arise, rather than adjudicating them abstractly. The Austrian model allows for early, high-level consideration of constitutional questions and avoids the delay and uncertainty that attend the American treatment of such matters.

In the remainder of this memorandum, I shall deal only with the model of a constitutional-court separate from the regular judiciary. I set out to describe the variation in constitutions establishing constitutional courts and to evaluate the consequences of some of those variations. There are great differences in the way such courts perform, and some of these differences are attributable to their design. Many constitutional courts make invaluable contributions to the establishment and maintenance of democratic institutions. Some, however, have a record of becoming embroiled in political struggles or making it difficult for government to accomplish its goals. The performance of some constitutional courts, which is perfectly appropriate in their home country, might be utterly inappropriate if transplanted to another new democracy. In Afghanistan, it ought to be possible to design a constitutional court that supports, rather than impedes, the transition to and consolidation of a stable democratic regime. In the final section, I attempt to identify some special problems with which Afghan decision makers might be concerned.

The Range of Constitutional Court Models

There is no single, incontrovertibly best way to structure a constitutional court. Constitutional courts vary among themselves along the following dimensions, among others:

- The range of their jurisdiction and powers

- The parties who have access to those courts
- The mode of appointment of judges to them
- The tenure of those judges
- The effect of judicial declarations of unconstitutionality
- The ease or difficulty of reversing constitutional-court decisions

It would be very time consuming to describe all the variations, so I shall proceed by illustration.

Whereas some constitutional courts merely adjudicate the constitutionality of legislation, others are empowered to decide a variety of additional questions, some of them politically quite sensitive. In addition to their core function of deciding constitutional questions, a number of constitutional courts in central and eastern Europe have jurisdiction in cases pertaining to elections, referenda, the impeachment of the president, and the lawfulness of political parties.

Insofar as the constitutionality of legislation is concerned, some constitutional courts are empowered to decide such questions only after legislation is enacted, while others may decide them only before it is enacted, and a few may decide them either before or after. Presidents, prime ministers, provincial governments, and certain groups of legislators may initiate such review in some countries. Where parliamentary minorities possess such power, they are accorded an opportunity to challenge the constitutionality of legislation after they have failed to defeat it in parliament. As this suggests, constitutional challenges, especially before legislation comes into force, may place constitutional courts in the middle of parliamentary struggles and may provide a means to obstruct democratic outcomes. In Spain, after the parliamentary opposition repeatedly abused its ability to challenge legislation in the Constitutional Court, thereby impeding the government's reform program, the legislature abolished the procedure for the Court to review legislation before it enters into force, leaving it with power to

adjudicate only after passage.[2] Similarly, the Russian Constitutional Court, established in 1991, was quickly embroiled in the power struggle between Boris Yeltsin and the Russian parliament, and it found itself with fewer powers and less respect after 1995.[3] Whether constitutional adjudication occurs before or after passage of legislation, judicial review initiated by political authorities is more apt to insert a constitutional court in politics than is judicial review that is initiated by litigants or by courts when the constitutional question is crucial to the determination of individual cases.

The South African provisions seem to avoid some of these dangers by limiting the jurisdiction of the Constitutional Court to cases appealed by litigants, referred to the Court by the Supreme Court, or brought in exceptional circumstances where direct access to the court is in the interest of justice.[4] The South African Constitutional Court is clearly conceived as an adjudicator in concrete disputes. It has maintained high levels of public respect and support.

The original Austrian model allows ordinary courts and administrative courts to request the Constitutional Court to examine the constitutionality of statutes. Individual citizens may also lodge

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[2]See Sarah Wright Shreive, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," 26 *Law & Pol'y in Int'l Bus*. 1201, 1219 (1995).

[3]Herbert Hausmaninger, "Judicial Referral of Constitutional Questions in Austria, Germany, and Russia," 12 *Tulane Eur. & Civil L. Forum* 25 (1997).

[4]There is also an unutilized provision for referral of dispute between organs of the state when the constitutionality of executive action is challenged. See generally Pius N. Langa, "The Role of the Constitutional Court in the Enforcement and Protection of Human Rights in South Africa," 41 *St. Louis U. L.J.* 1259 (1997).

complaints alleging that governmental acts violate their constitutional rights. In Germany, individual complaints comprise something approaching 98 percent of all filings with the Constitutional Court. The remainder consists of referrals of constitutional questions to the Court by other courts that cannot decide particular cases until constitutional questions relevant to those cases are resolved.

In general, a decision of a constitutional court holding a statute to be unconstitutional nullifies the statute, in whole or in material part.[5] Some constitutional courts write their decisions in such a way as to be quite specific about what may be required to rectify the constitutional defect in the law. In central and eastern Europe, legislators often follow the decisions of the courts word for word in amending statutes that have been held unconstitutional. The Italian Constitutional Court has the power itself to change the language of a statute to make it conform to the constitution. Where legislators are displeased by a decision of a constitutional court, they may, of course, amend the constitution. In some cases (notably, Poland), they may pass the same statute again, provided the legislative majority meets the same threshold (usually two-thirds) as is required to amend the constitution. Elsewhere, the formal amendment process must be followed.

Some constitutional courts have gone much further than others in dictating to the legislature and executive. The Hungarian Constitutional Court has been unusually aggressive. In Hungary, if there is any unconstitutional interpretation of a statute, the whole statute is declared unconstitutional. The Hungarian Court does not confine itself to sanctioning what must not be done; it lays down affirmative obligations on the other branches. It has required parliament to pass new rules regarding its own

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[5]This is not the case in the United States, where a statute may be held to be unconstitutional merely as construed and applied, thereby leaving open the possibility that other applications of the statute may be consistent with the constitution. Even statutes held unconstitutional on their face in the United States may remain on the books, since there is no legal obligation on the legislature to repeal them.

procedures, even in the absence of a constitutional provision pertaining to them. It has also intervened in parliamentary affairs by ordering parliament to provide representation on legislative committees to a small minority party. And the Hungarian court has held that, by failing to pass certain legislation, parliament was acting "unconstitutionally by omission."[6] Between 1990 and 1995, the Court did so on some 260 occasions, defining what the new law should look like and what the deadline for passage was. The Hungarian Constitutional Court has pronounced on the powers of the other branches of government in great detail, intruding even into budgetary matters. It accords little deference to parliament and leaves "little room for politics."[7] Hungary, it is said, is not a parliamentary democracy, but a judicial one.

The most independent and judicious constitutional courts are composed of judges who have high legal qualifications and are appointed for long, non-renewable terms. Members of the Italian Constitutional Court are elected for a fixed, non-renewable term of 9 years. One-third of the judges are elected from the highest ordinary and administrative courts and the Council of State; one-third are elected by parliament; and one-third are nominated by the president. But the choices of the parliament and president are limited: they must select from among judges, professors, and lawyers who have had at least 25 years' experience in practice. The underlying notion is that every judge of the Constitutional Court must be learned in the law. The obvious message is that constitutional adjudication is serious legal business, not to be confused with the political functions of government.

The appointment requirements elsewhere in Europe may be somewhat less strict, but they are generally similar. In France, members of the Constitutional Council have 9-year unrenewable terms. In

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[6]Kim Lane Scheppele, "The New Hungarian Constitutional Court," 8 *East European Constitutional Review*, no. 1, 81 (Fall 1999).

[7]*Ibid*.

Germany, judges of the Constitutional Court serve for 12 years, and they may not be renewed. In central and eastern Europe, terms range from 7 to 10 years and are generally non-renewable, with the notable exception of Hungary, which allows a single renewal of a 9-year term.

In general, the appointment process is shared among parliament, the executive, and, in some cases, the judiciary, and constitutional-court judges who are selected are either legal scholars or senior judges of the ordinary courts. In Hungary and Poland, on the other hand, judges of the constitutional courts are appointed exclusively by parliament, a practice that has been criticized for its tendency to create "a 'risk of excessive politicisation' of the appointment process."[8] The Hungarian selection process involves screening by a parliamentary committee in which each party has a vote, before election by a two-thirds vote in parliament. Unsurprisingly, Hungarian judges are essentially selected not as individuals but in groups, as a result of agreements among political parties.[9] This is a process conducive to politicizing the Court.

Designing a Constitutional Court

Not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights. The Hungarian Constitutional Court's judicial activism is undoubtedly in part a product of the judicial selection process and the Court's very broad jurisdiction, but it is also said to be the result of a long Hungarian tradition of the supremacy of customary law over

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[8]Wojciech Sadurski, "Postcommunist Constitutional Courts in Search of Political Legitimacy," EUI Working Papers, Law No. 2001/11 (European University Institute, 2001), p. 4, quoting Leszek Garlicki, a judge of the Polish constitutional court.

[9]See the remarks of Kim Lane Scheppele in 12 *Am. U. J. Int'l L. & Pol'y* 95, 99 (1997).

codified law.[10] The widespread disregard of decisions of the Russian Constitutional Court was due not only to difficulties in fitting the Court into the Russian legal system but to the centrifugal and separatist forces prevailing in the country.[11] Those who design constitutional courts need to shape their contours carefully, taking account of traditions and current obstacles likely to affect the reception accorded their decisions.

There is good reason to create a Constitutional Court that performs undeniably judicial functions and gradually gains respect by virtue of its fidelity to the constitution and the law, rather than attempting to intrude into politics. In shaping the jurisdiction of the court, it might be wise to entrust it with adjudicative powers only after legislation is enacted and signed, so that it may not become a partisan in disputes between legislative factions or between the executive and legislature. Jurisdiction on the basis of individual complaints or referrals from other courts that certify the adjudication of constitutionality as essential to the decision of a pending case may be preferable to wide-ranging power to decide routinely on the constitutionality of every law that is passed. Likewise, jurisdiction to declare laws in conflict with specific provisions of the constitution (such as a bill of rights or the enumerated powers of the central government) may avoid problems that can arise from a broad power to decide whether laws or government actions conform to the constitution in general. Functions extraneous to constitutional adjudication, such as the conduct or certification of elections, might better be left to independent

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[10]Radoslav Procháza, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002), pp. 50, 57.

[11]Alexei Trochev, "Implementing Russian Constitutional Court Decisions," 11 *East European Constitutional Review*, nos. 1-2, 95-103 (Winter-Spring 2002).

commissions specializing in those functions. Overall, the South African model seems especially worthy of consideration.

The qualifications of the judges who sit on the Constitutional Court should be considered carefully. Such judges should be learned in the law (and the relevant constitutional provision might well say this explicitly), as evidenced by prior judicial experience or scholarly accomplishment. It might be preferable to have a smaller court of undeniably able and independent judges than a larger court that includes politically ambitious judges. The appointment of judges on the most successful European constitutional courts is a function generally shared among the executive, the legislature, and the judiciary. If one body nominates judges, another might then have the power to confirm them, so that no branch may pack the Court with its politically favored nominees. To preserve the independence of the Court, the terms of judges are usually long and nonrenewable.

It is thus not difficult to choose provisions conducive to creating a court that supports constitutional government and human rights without preventing the legislature and executive from performing their important tasks. There are, however, a few specific issues that Afghan decision makers might consider as they go about creating a Constitutional Court.

Most obviously, Afghanistan is a country that needs to get things done—many things and many of them in a hurry: building infrastructure, reconstructing an education system, creating an army, reviving the legal system, and so on. The power to declare governmental action unconstitutional is the power to block things, to prevent them from getting done. That power, therefore, needs to be exercised with restraint and with due respect to the political branches of government. This makes it important to specify the jurisdiction of the Constitutional Court carefully. This is a delicate drafting job. In other countries, courts that adjudicate constitutional issues have spent much time laying down legal doctrine about when courts should *not* adjudicate constitutional issues, lest they overstep their legitimate powers and act undemocratically. This is a task that requires wisdom, training, and discretion. The appointment process

needs to be crafted with a view to finding and attracting judges possessing such qualities, because the democratic accountability of constitutional courts in transitional societies is usually indirect at best: they are not subject to the electoral process. Judges must, therefore, possess qualities of self-restraint.

To the extent that constitutional adjudication becomes politicized, control of the Constitutional Court can itself become a political issue, just as the control of government or of a particular ministry may be a political issue. When this happens and the Court is seen as just another political actor, rather than a neutral servant of constitutional norms, the moral weight of its decisions is likely to decline precipitously, and it will then be unable to perform its high function of helping to assure that Afghanistan is not just a democracy but a constitutional democracy that respects the rights of its citizens.

A special problem concerns the fit of the constitution and its enforcement with Shariah. From time to time, Afghanistan has borrowed foreign legal concepts and provisions from European (non-Muslim) sources into the body of its statutory law. Afghanistan may ultimately wish to insure that Shariah principles pervade every aspect of its civil law. Whether, how, and when it does this are matters for Afghan political leaders, informed by the public, to decide. But the process by which this is done needs to be orderly. Abrupt invalidation of existing rules of law that do not conform precisely to Shariah principles can disrupt the economy and unsettle societal expectations at a time when economic recovery and social stability are especially crucial. The country needs a body of reliable legal doctrine so that the legal system can function while decisions about the future legal regime are made in a deliberate fashion. It would, therefore, be a great tragedy if the new Afghan Constitution contained a clause that authorized the Constitutional Court to declare particular statutes or rules of law to be in conflict with the Constitution because they are "contradictory (munaqiz) to Islam." A great legal vacuum and great uncertainty would ensue from such decisions, with negative consequences for the administration of justice.

This does not mean that Islamic principles cannot be infused into Afghanistan's legal system—on the contrary, they can be[12]—but in Afghanistan's conditions this is not something that should be done by judicial decree. And it should be emphasized that all Islamic countries borrow from non-Islamic sources in crafting their legal institutions.

There is, therefore, a strong case for not empowering the Constitutional Court to hold laws or government action unconstitutional because they are contradictory to Islam. These matters might better be left to political leaders, acting on the advice of Islamic legal scholars and lawyers, who are able to embark on a careful program of reform.

Likewise, the focus on constitutional adjudication may well have the unfortunate, inadvertent effect of encouraging the neglect of the legal system overall. The rule of law in Afghanistan will depend as much on ordinary law and the predictability and regularity of its application as it does on constitutional law. In law, as in life, what is routine is often more important than what is exceptional. Attention to constitutional adjudication should not be allowed to preempt attention to reviving the legal system, to getting courts functioning again, to setting up institutions of legal education and sending law students overseas for training as well—in other words, to creating a fair, honest, and worthy system of justice. It would be a pity if the Constitutional Court siphoned off the best legal talent in Afghanistan, merely because the Constitutional Court became a particularly glamorous institution.

In short, a carefully designed and properly limited Constitutional Court can be of inestimable benefit to the creation of the rule of law in Afghanistan. Equally, a poorly designed Constitutional Court, with unspecified powers, can become an object of political struggle, an impediment to democracy, and a

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[12]See Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change," 42 *Am. J. Comp. L.* 233 & 543 (1994).

negative influence on the development of the legal system. It is worth taking great pains to get this job done correctly.