

# Summary of Papers on Constitutional Courts and Judicial Review

Aziz Huq, Postgraduate Fellow, Columbia Law School  
For the Center on International Cooperation, New York University

## I. Definition of judicial review

Judicial review is a court's power to review, and possibly nullify, laws and governmental acts that violate the constitution and higher norms. It is a way to assure that governmental actors respect the constitution and do not use powers granted to them by the constitution to seize illegitimate power. Judicial review is generally the final word by a governmental institution on a law's validity.

## II. Should Afghan courts have judicial review power?

Some argue against judicial review in Afghanistan on the following grounds:

- Courts with judicial review authority can nullify the preferences of democratically elected legislatures. There is a risk in concentrating power in courts' hands, especially when it is not clear that Afghan judges are sufficiently professional, and when some judges have been willing to impose their ideology regardless of provisions of the constitution, statutory law, or popular beliefs.
- Courts' authority rests largely on public support. In its early days, however, an Afghan constitutional court is unlikely to have much public support, so other government institutions may reject or ignore its rulings, undermining its long-term credibility. Thus, judicial review might either be irrelevant or undermine democracy.

Against these risks others argue that one must balance the protection of human rights and impartial resolution of jurisdictional and other intra-governmental questions that judicial review can provide.

One can find a compromise between these two positions by carefully limiting the institutions that can undertake judicial review (section III) and limiting the scope of judicial review (section IV).

## III. Structure and composition of court with judicial review power

The power of judicial review can be given to all courts or to a single tribunal known as a constitutional court. The first option requires that the entire judiciary be well educated, professional, and well versed in constitutional issues. It is therefore not suitable for contemporary Afghanistan.

A special court can be a chamber of the Supreme Court or a separate constitutional court. One point of view argues that, given the shortage of trained judges in Afghanistan, one should not seclude the best judges in a specialized body. Instead, a special chamber within the Supreme Court including five to fifteen judges should carry out judicial review.

Others argue that specialized constitutional courts, composed of individuals known for their probity and their support for the rule of law and democratic principles, have helped stabilize many new democracies. In making this decision one might want to take into consideration the character of the current Supreme Court of Afghanistan.

Whatever court has judicial review power should be independent of other governmental actors. Its members should have fixed salaries, immunity from prosecution, and authority to control court budgets and staffing. Judges should not be members of political parties.

Appointments to the court could be made by the executive alone; by the executive based on recommendations by the legislature or the judiciary; or by the agreement of the executive and the legislature, preferably requiring a significant super-majority for approval (two thirds or three quarters). Judges should serve lengthy non-renewable terms (perhaps between nine and twelve years). The possibility of a second term can undermine a judge's independence in the first term. Life terms create problems of superannuation and stagnation. Appointees should be lawyers of repute, including legal scholars.

#### **IV. Timing and scope of judicial review**

A court can exercise judicial review either immediately after a law is passed, at the request of a group of legislators, or once the law has gone into effect, also at the request of someone affected by the law. The first system is flawed because some laws show their unconstitutional aspect only when they are implemented.

Some nations require that another actor, like a lower court, refer cases to the court. Without this "filter," a constitutional court may be overwhelmed by thousands of complaints. But a filter may screen out valid cases in a society where people have long suffered for lack of means to seek redress of grievances. The court could retain for itself the power to select which cases to hear and employ clerks to help identify such cases. Certain independent statutory bodies (see summary paper on government structure) such as the ombudsman, human rights commission, or electoral commission, if they exist, should have the power to bring cases to the court.

In judicial review, a court should be able to decide disputes within the government, including disputes within or between different branches (legislative and executive) or levels (central and provincial) of government, and also whether individual rights protected by the constitution have been violated. This court could also deal with

electoral disputes, impeachment, and declarations of states of emergency. But since its legitimacy is likely to be fragile, other specialized bodies might better handle these disputes.

The constitutions of states where Islam is the official religion usually cite Islam as a source of legislation or of principles that law must not contradict. Should conformity to Islam be justiciable? Islamic nations like Pakistan and Egypt have encountered great difficulties with courts that can strike down statutes as incompatible with shari'a. In 1992 in Pakistan, courts thereby invalidated a large part of the statutory law. This power denies the community the right to express ijma' (consensus) and risks empowering one particular group of Muslims to define Islam. Furthermore, since shari'a is not codified, judicial review for conformity with shari'a can mean many different things. A law could be found invalid if: (a) it deals with matters on which detailed furu' already exists; (b) it deals with matters on which it would be possible to develop a rule through ijtihad; or (c) it contradicts maqasid al-shari'a or qawa'id al-fiqh. Because of this uncertainty, allowing courts to decide whether laws are compatible with shari'a gives those courts vast discretionary power and creates excessive uncertainty. This undermines the legislature and allows the courts to favor political factions and ideologies.

Under previous Afghan constitution, courts did not possess the power to determine the compatibility of laws with shari'a. Under Article 7 of the 1964 Constitution, the King was "the protector of the basic principles of the sacred religion of Islam," in part through his power to sign or reject bills passed by parliament. Nor is there a need for such a judicial power. More of Afghanistan's statutory law follows fiqh than any other country, except perhaps Yemen.

If Afghans judge it desirable to create judicial review for certain purposes, the constitution can limit its application to certain articles in the constitution. In Malaysia, where shari'a is also part of the legal system, judicial review is limited to those articles dealing with individual rights and the delimitation of the powers of the branches and levels of government. The power to determine whether a law is in conformity with Islam could be explicitly granted to the legislature alone, which will be made up almost completely of Muslims, or to the lawmaking process, including both legislature and executive.

Some argue that the court should issue only one opinion, without dissents, because this forces the court to deliberate more and reach consensus. This view holds that unanimity will be important to establishing the legitimacy of this new institution. Others hold that tolerating dissent will contribute to the effectiveness of the court and promote transparency and democratization.