

Options for a Constitutional Court in Afghanistan

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The following paper is intended to provide informative elements that should help with discussing options for a Constitutional Court. The author, although very familiar with the experience of constitutional adjudication in different European and not European countries, doesn't know the legal tradition of the Islamic societies. He apologizes therefore and asks the readers consider this paper as an attempt to present, in a schematic and hopefully clear way, a set of alternatives in drafting such an institution like the Constitutional Court outside their specific cultural context. The author is ready to add further details and clarifications if needed, and to collaborate with specialists of Islamic legal culture and tradition.

Assuming that the establishment of a Constitutional Court is preferable to the absence of it ¹ the first alternative is the following:

Should constitutional adjudication be attributed:

- A) to the Judiciary as such, or
- B) to a single body specialized in that function?

I'll come soon to a substantive consideration of what is "constitutional adjudication" about. For now I think that it is important to say that the option B) has been adopted in most of the countries that introduced a democratic constitution after the breakdown of an authoritarian (both fascist and communist) regime. The reason is pretty evident. The option A) (the American system of "judicial review") presupposes a democratic minded large group of ordinary judges entrusted with the important function of controlling the constitutionality of statute laws and other acts of public authorities. This condition is normally absent in a country with no democratic past, where the establishment of a professional and independent judiciary is an important task that cannot be realized immediately. So it is perfectly understandable that post-fascist constitutions (like Germany in 1949, Italy in 1948, Spain in 1978) and post-communist constitutions (after 1989 in Central and Eastern Europe) chose the option B: a specialized body made up by a small number of people with an adamant democratic pedigree.

I'll come back to the modalities of appointments of the members of that specialized Court. It is important to realize that in any event there will be also in the option B) some connections between the Constitutional Court and the judiciary as such, so that the establishment of an independent judicial power remains a crucial element for any successful democratic constitutional order.

¹ What is the case only in the oldest democracies in the world like UK and Nederland and in tyrannical regimes.

Before considering more specific options, it seems important to clarify what is, according to the historical experience, “constitutional adjudication”, meaning what is its function, scope and limits.

The intuitive answer that constitutional adjudication consists of checking the constitutionality of laws passed by the parliament and of other executive and judicial acts is far from being satisfactory. By that I mean that the importance and the challenge of the function lies in the fact that constitutional adjudication goes largely beyond the simple “logic” control of the hierarchy of norms (where the constitution is superior to the statute law, and so on). *De facto*, a Constitutional Court, using the language of constitutional control can be active in three different important political-constitutional areas:

1. protection of constitutional right of individuals and insulated minorities
2. moderation of the political power of elected officials
3. conflict resolution of disputes between the central government and political sub-units (provinces, regions, etc.) and between the branches of the central government itself.

More in general, a Constitutional Court may have jurisdiction on other areas and types of conflicts; for instance, it may be the Court of electoral disputes, a criminal court for high the political officials, or also have competence of adjudicating the constitutionality of political parties. I will consider these other functions later; but the three listed above seem to be the three major ones on the basis of the historical experience.

Now considering them, it is evident that this quasi-judicial body has potentially a very significant political power that can be used both for the best and the worst in stabilizing a democratic order. This is a reason why special attention has to be given to the constitutional provisions organizing such a Court.

I’m going to start from the function 2. “moderating political power of elected officials”, since it involves some crucial aspects of any liberal-democratic constitutional order. Constitutional democracy is not the same thing that simple majority rule. The elected majority has certainly the power to govern the country for a while, until the next elections, but it should neither oppress individuals or minorities nor modify the basic agreement represented by the constitution. In that sense the Constitutional Court is first of all the guardian of the constitutional agreement; an agreement or compromise that the Court has to defend, to promote, to interpret and sometimes recreate. Since no constitutional text can foresee all the possible cases and events, constitutional interpretation is often a creative enterprise that has to be realized in the respect of the spirit more than simply of the letter of the constitutional agreement. Different groups and minorities can be at the origin of the constitutional pact. Each one should be allowed to ask the Constitutional Court to adjudicate a law or an act of the government that seems to infringe upon its rights as constituent part of the constitution. This implies that political, ethnical, linguistic and religious minorities should be empowered with the right to refer statutes and other acts of public authorities to the Court for constitutional adjudication.

There are here two options. The referral can be sent to the Court (a) *ex ante*, before the enforcement of the statute, in the period of time between its approval by the Parliament and its promulgation, or (b) *ex post*, once the statute is concretely enforced.

The option (a) that characterizes the French model of “saisine parlementaire” offers the possibility of reviewing the law before its promulgation but presents a double inconvenient. On one side, parliamentary minorities or whatever political actors empowered with the right of referral may abuse this right in order to slow down or even obstruct the legislative action. On the other side, many statutes show their abusive character only when they start to be concretely enforced; so that the exclusive control *ex ante* will make impossible to correct bad effects of the legislation once the statute has been promulgated and entered the legal system.

So the *ex post* option seems wiser, in order to avoid the two drawbacks considered above. It has to be noticed that in this context it is important to specify the type of actors empowered with this type of referral. It is evident that only the political minorities represented in the parliament (perhaps 1/5 of the legislators) and groups or minorities recognized by the constitution can enjoy such a right.

One has to consider immediately that in this role the Constitutional Court shall play a very important and difficult function of equilibrium between different political and constitutional conflicting interests. Only showing the greatest impartiality and moderation the Court can establish its authority and reputation. For such a body, lacking democratic elective legitimacy, the authority doesn't come straightforward from the existence of constitutional articles. The constitutional provisions are simply a tiny basis on which the Court has to build up its authority and reputation through its own work of adjudication. The narrow pathway existing between naïve boldness and excessive deference vis-à-vis the political majority is the road that any Constitutional Court has to go through in the first years of its work, if it wants to establish that impartial and solid reputation. Only human wisdom and luck can guarantee that the Court will help the stabilization of democracy. But the challenge has been overcome in some countries; so, making use of great moderation, there is no reason to give up this hope.

The 3. function (conflict resolution of disputes between the central government and political sub-units - provinces, regions, etc. - and between the branches of the central government) is in a sense similar to the previous one. It again promotes the moderation inside the constitutional system, but has in a sense a preeminent role since it is just inevitable in a federal state (which may be the case of Afghanistan) and, in any event, in a system based on a true separation of powers. On this last point, one should consider that the separation of powers excludes inside the central government anything like a sovereign instance. Quarrels among coordinated branches (legislative, executive, judiciary) are always possible and somehow inevitable. Now these possible conflicts need a judge. And the Constitutional Court has direct jurisdiction on this type of conflicts. Here again adjudication cannot be conceived of as the mechanic application of the constitution. In many cases conflict may appear that the constitution was not able to foresee. The constitution, in other terms, will be often silent. So the Court has to find out the solution, the one that seems, at the same time, the most coherent one with the spirit and the letter of the constitution and the less arbitrary to the parties of the conflict. Again a task that is both difficult and one that can establish the respect for and the authority of the Court.

As to the first and most intuitive function of a Constitutional Court (protection of constitutional right of citizens) the paramount question is the choice between the two following options:

1. should the citizens as such (according the German model) be entitled to send to the Court constitutional complaints; or 2. should it exist an institutional filter selecting the cases to refer to the Court?

1. implies normally that the citizen whose constitutional rights are infringed upon by any public authority first exhaust the ordinary judicial remedies. Which has the inconvenient that normally a rapid protection is ruled out (so normally in Germany).

2. on the other hand, introduces an institutional actor between the citizen and the court with the exclusive competence to open the door of the Constitutional Court. In the Italian system this institutional actor is the ordinary judge, who has the possibility of accepting (or rejecting) a constitutional complaint from a part in the trial, sending immediately the case to the Constitutional Court (that will rule about the constitutionality of the statute and send back the case to the ordinary court for the concrete adjudication).

These two important options need to be considered in more details.

In the first case, the citizen can complain not only on a law applied to him or her that seems to be unconstitutional, but also against an act of the administration or any other public official, included a judge (something excluded in the Italian model). With other words, exhausted any other judicial remedy any citizen has the possibility to send a letter to the Constitutional Court to ask it for protection of his or her constitutional rights, supposedly infringed upon by a public authority.

Notice that a normal consequence of this option is that the Court is invaded by thousands individual complaints each year with the consequence that it has to work in panels to face the huge caseload, reducing considerably the time for discussions and deliberations en banc.

In the second case, the judiciary represents a filter (so reducing the number of complaints), but this choice gives to ordinary judges the exorbitant power of the monopoly of opening the door of the Constitutional Court or of keeping it close. A risky choice to make in a society, where it may not be entirely wise to trust the democratic consciousness of ordinary judges.

It is very difficult for me in general and specially in this case to give any specific advice concerning the best option. Nonetheless it seems to me that the Afghani population has been exposed since so many years to so numerous and exorbitant abuses and to any sort of violence that it would be harsh to deny them the right that German citizens have granted by the their constitution: the right of complaining against abuses of their constitutional rights. For sure, it is pointless and counterproductive to promise legal help and create at the same time the impossibility of helping people. But it seems to me that with the assistance of a substantial number of young clerks the Afghani Constitutional Court should be able to cope with this demand of justice that is a primary need of the Afghani citizens, and hopefully a means to spread through the citizenry “constitutional patriotism”

It is time now to turn to another important aspect: *the mechanism to appoint the members of the Constitutional Court.*

We know broadly speaking three systems:

- I. monocratic,
- II. majoritarian,
- III. supermajoritarian

The first one attributes to the head of the state the undivided power to appoint the justices according to his/her own judgment and preferences. The majoritarian mechanism exists where the choice of the members of the Constitutional Court is in the hands of the political majority governing the country. The third model, aiming at the impartial character of the Court, wants to take away the control of the Court from the political majority, let alone the individual will of a single political actor. The requirement of a supermajority (2/3 for example) of the Parliament has the effect to send to the Court justices who have the confidence of the majority and at least of part of the opposition. Extreme ideological candidates are so excluded; an important condition to establish a Court able to exercise its power with wisdom and moderation.

Internal deliberation in the decision making of the Court is of the greatest importance. Experience seems to show that the absence of “dissenting opinions” promotes internal deliberation and compromise. Majority rule, inevitable as a last resort for the decision, should be avoided as much as possible and replaced by the attempt to find a unanimous position that takes into account the different opinions developed during the deliberation. The publication of dissenting opinions can moreover undermine, at the very beginning of the Court activity, its reputation showing in public internal splitting that may be detrimental to the reputation of the Court as neutral instance able to say what is right.

The organization of the Court procedures is an important aspect. The role of the President (who may be chosen by the Justices or by the Parliament) is crucial at least in setting the agenda and in attributing different cases to single justices for the preliminary report preceding the ruling of the Court.

As to the number of justices it should be such to allow a real collective discussion (a number between 9 and 15 is normally the standard in the existing similar institutions).

The duration of the mandate, with few exceptions, is not for life. A single, non-renewable term of 9-12 years, without the possibility of reappointment, may be preferred, to guarantee independence and turn over of the justices.

It may be interesting to say a few words concerning the technique itself of constitutional interpretation (in the western legal systems). The public decision of the Court takes inevitably the form of a syllogism: a statute is partially or entirely rejected since it contradicts a superior principle spelled out in the constitution. This structure of the argument represents a constraint and plays an important role in showing the non-arbitrary character of the Court’s decision. On the other hand, it is clear that in many cases the constitutional norm is unclear and needs to be interpreted by the Court in order to constitute the standard allowing the decision on the constitutionality of the statute law. This is certainly part of the Court’s office and duty. It has to be fulfilled with respect of the essential tenets of the constitutional compromise. It should be noticed that very often

decisions of existing Constitutional Courts do not take the binary form of rejection or approval of a referred law. Often the decision can take the form of an interpretation of the law, which makes it compatible with the spirit of the constitution. These types of decisions are important also for a different reason. It cannot be underestimate that the main function of the Constitutional Court at the beginning of its action is to establish its institutional legitimacy and its social and political recognition. Whenever is possible to decrease the amount of injustice without conflicting openly with democratically legitimated political actors, the Court has to choose that way. Inevitably there will be contrasts between the Court and political actors in the first years and later. Maximizing justice minimizing the open conflicts is the recipe for establish the authority of the guardian of the constitution. Now, coming back to the interpretative questions, it may be useful in many cases to avoid to reject explicitly a statute law passed by the Parliament, if it is possible to suggest an interpretation of the same law that makes it compatible with constitutional values. In general, very often, the job of the Court will be to “rewrite” the statute laws (as already noticed) once their concrete enforcement will show unforeseen consequences. These last can clash with constitutional values and principles. So the law has to be “rewritten” taking into account the experienced unexpected consequences.

Sometimes Constitutional Courts cumulate other functions next the three we considered above. Among others: the adjudication of electoral conflicts, outlawing political parties that violate constitutional provisions, prosecution of the President, minister and members of the Parliament.

The last one is quite problematic, at least for the following reason. Prosecution and adjudication of politicians are often dramatic experiences; moreover, they may be extremely time-consuming. The negative consequence may be the paralysis of the regular court activity for a long period of time. One wonder if there is not the possibility to establish a High Court for political crimes distinct from the Constitutional Court. One has to be aware that a single body cannot fulfill an exorbitant number of difficult function, all of them politically very sensitive.

On the other hand, a function that may be attributed to the Constitutional Court is the declaration of emergency powers, conjunctly to its suspension. It is not possible here to consider into details this complex constitutional issue. I even do not know if the Constitutional Commission is working on constitutional provisions regulating the emergency powers. Nonetheless it seems to me that, in some connection with the head of the state, the Constitutional Court may play a role in declaring the emergency, trying to avoid that this one will be declared in the interest of the government and not in the interest of the country. But this is a different and complex topic, and I do not need to say more, for now.

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