



UNITED STATES INSTITUTE OF PEACE

An independent institution established by Congress to strengthen the nation's capacity
to promote peaceful resolution to international conflicts

COMPARATIVE CONSTITUTIONAL REVIEW

Tom Ginsburg
University of Chicago Law School

Constitutional review is the power to examine statutes and government actions for conformity with the constitution. From its origins in the American experience, the institution has spread around the globe to become part of the standard institutional architecture of democracy. Some systems (such as those of the United States or Pakistan) give the function of constitutional review to any ordinary court at a certain level; some give it to a Supreme Court but not to lower courts; some countries in the French constitutional tradition have designated “constitutional councils” with more limited review authority. The largest trend in the past two decades has been to create special bodies called constitutional courts to carry out the function of constitutional review. This is the German model, adopted widely in new democracies including Indonesia.

Motives for adopting a constitutional review body vary, and courts that have the power of interpretation of the constitution do many other jobs as well. They may hear cases related to presidential impeachment; they may supervise elections; they may have special jurisdiction for settling disputes between political branches; they may rule on the constitutionality of political parties. Many of these functions are very political, and can place the court into very public controversies.

Even for the core function of deciding whether law is in conformity with the constitution, systems of constitutional review vary widely on a number of key questions of institutional design, including who can bring a claim, what the claim can be based on, when claims can be brought, and what the effect of such decisions is. These institutional details may be set out in the constitution itself, in statutes on the organization of the courts, and in subsequent interpretations by the court itself. This memo covers these issues, and concludes with some comparative commentary on the Afghan situation.

1. Standing: Who can bring a claim?

Constitutional review systems differ widely on the question of who is allowed to bring a claim, a concept known as “standing.” One can array access to the court on a spectrum from very limited access to very wide access. One model, associated first with Austria in the 1920s, allowed only state and federal governments to bring cases, so the constitutional court served mainly as a referee to protect federalism. The original design of the French Constitutional Council in 1958 only allowed designated politicians, namely the President, Prime Minister, leader of the Senate and leader of the National Assembly to challenge laws. 1974 Constitutional

amendments in France extended the right of petition to any group of 20% of parliamentary deputies, allowing minority parties to challenge governmental action on constitutional grounds.

Some constitutions treat constitutional review as essentially legal in character, and so the key question is whether one can bring a lawsuit. This is the United States model. Anyone who satisfies general “standing” requirements for litigation can raise a constitutional issue in court. Such requirements typically include a concrete injury—one must have suffered actual or imminent harm from the application of the law in order to challenge it in court (see section 2 below for more on this).

One variant is that in India, where the Constitution guarantees direct access to the Supreme Court on questions of fundamental rights. This was done in part to ensure that lower courts did not hinder rights protection by failing to exercise active review. It makes the Indian system a bit more open than the US to rights litigation because those who claim their rights have been injured can go immediately to the highest court, rather than having to potentially lose at the lower level and pay the costs of appeal. The Indian Supreme Court has been a very active body.

The most open systems of constitutional litigation allow a direct petition to the constitutional court. This is exemplified by the Indonesian Constitutional Court, where not only political bodies but individuals may enjoy direct access through constitutional petitions. In addition, ordinary judges can refer constitutional questions to the Supreme Court as well. In Italy, there is no direct petition to the Constitutional Court but litigants can ask ordinary courts to refer questions to it.

The figure below describes these features for some of the major systems of judicial review, again keeping in mind that hybrids are possible between these types.

Figure 1: Accessibility of Constitutional Adjudication

	ACCESS MECHANISM	EXAMPLES
more open	Special bodies + any court + direct petition	Hungary; Germany; Mongolia
↑	Any litigant	United States, India
↓	Special bodies + any court	Taiwan, Poland before 1997
	Special bodies + Legislative Minorities	France 1974-2008, Bulgaria, Rumania
less open	Special bodies only	Austria 1920-29, France before 1974

2. What kind of claims can be brought?

Another distinction is whether a constitutional interpretation body can hear constitutional questions only in the context of concrete legal cases, or whether it can consider constitutional issues in the abstract. Concrete review requires review in a particular case where the law has already been applied or is about to be applied. Abstract review determines the constitutionality

of a statute or government practice without any reference to a specific case. For example, suppose that a country has a constitution with a right to free speech, and the government passes a media law that says that licenses will only be given to publications with pro-government views. If the law is implemented and the government moves to remove the license of a newspaper owner, that owner would have a concrete claim against the government, and the court would be engaging in concrete review. Abstract review, on the other hand, might occur if the law was never actually implemented, but a citizen simply thought the law was unconstitutional and filed a direct petition with the court. Abstract review also occurs when political institutions ask the court to provide an authoritative interpretation of the constitutional text outside a real dispute.

The U.S. and Japanese Supreme Courts may only hear concrete cases. The German and Spanish Constitutional Courts may practice both abstract and concrete review. Certain other courts may only hear abstract claims, and must rely on the ordinary courts to apply their decisions in concrete cases. In these systems, certain political institutions may challenge legislation as an abstract matter, while citizens who allege that their constitutional rights have been violated can approach the court for relief, either through a court or direct constitutional petition. This allowed, for example, the German Constitutional Court to rule that it would be unconstitutional for the military to shoot down a hijacked plane. The case came to the court as an abstract matter, before any such situation had arisen. In the United States, such a case would only arise *after* the military had shot down a plane, and the victims' relatives were bringing a lawsuit alleging violation of constitutional rights.

3. Review of Legislation and Review of Administrative Action

An issue arises in some countries with a designated constitutional court as to what type of actions can be challenged. For example, in South Korea, the 1987 Constitution set up a constitutional court that was empowered to make decisions on constitutionality, but left the Supreme Court responsible for determining the constitutionality of administrative regulations and government actions. This led to conflicts between the two courts, in which the Constitutional Court seems to have had the last word, but it was a messy fight.

A similar institutional design in Indonesia also led to conflicts, but there was no clear winner. Indonesia created a constitutional court in 2003 because an earlier parliamentary attempt to impeach President Wahid had led to total gridlock in the political system. The Constitutional Court can review legislation and the Supreme Court hears challenges to administrative action. Under the rules, the Constitutional Court must inform the Supreme Court when it is reviewing a law, and the Supreme Court is required to suspend cases involving review of regulations under the law in question. But it is not actually required to abide by the decision of the constitutional court! Thus, one can have cases in which legislation is ruled unconstitutional, but the sub-regulations are still enforced by the Supreme Court.

France features a separate administrative court, the *Conseil d'Etat*, staffed by bureaucrats and responsible for ensuring the legality (including the constitutionality) of administrative regulations and government action. In addition, the ordinary supreme court (*Cour de Cassation*) interprets the constitution in the context of ordinary litigation. This system of three top courts (constitutional, administrative, and "cassation") has functioned decently, but probably only because, as described below, for many years the constitutional council had no jurisdiction over

actual cases or laws once passed. This meant that there was a clear division of labor among the adjudicative bodies.

When two or more institutions have concrete review power, trying to separate review of administrative action from review of legislation is difficult. Suppose there is a law that allows the Ministry of Finance to pass tax rules, and the Ministry does so in way that a citizen believes is unconstitutional. The citizen might have to file claims in two different courts: one claim challenging the application of the tax rules and another claim challenging the statute that empowered the Ministry to issue the rules. In real life, these questions can be closely related and it may create problems to have two different interpretive bodies if they come to different decisions.

4. Timing: When can claims be brought?

A related issue concerns the *timing* of review. In the French system before July 2008, review could only take place before promulgation of legislation. This meant that the law could be modified by the legislature to conform with the decision of the Council and so never needed to be formally struck after promulgation. This form of review made the Council more akin to a third house of the legislature than a court.

More commonly, claims are brought *after* the law is passed. Systems differ on when and how the cases can be brought. Typically there is some requirement of injury, leading to interesting questions when the injury is only a potential one, and has not yet occurred. Courts vary in the legal tests they employ to sort out issues like this—a typical requirement is that the potential injury be about to occur or “imminent”.

In the United States, the courts will not hear a case when there is no longer a basis for the dispute. Suppose for example someone challenges a government decision to take their property. Before the court hears the case, however, the government returns the property to the person. The courts might say that the case is “moot” because there is no reason for the court to act. (Alternatively, if the issue is capable of being repeated, the courts might allow it.)

In systems with a designated constitutional court, an issue arises as to how to treat constitutional questions that come up in the context of ordinary lawsuits. This is an issue because ordinary courts cannot interpret the constitution. A common solution developed in Germany and Italy is to allow the courts to pause the litigation temporarily while they send the constitutional question to the constitutional court. The constitutional court will then answer the question, instructing the other court to apply the rule.

5. Effect: what is the impact of a decision of unconstitutionality?

Systems of judicial review also vary in the effect of their pronouncement on legislation in concrete cases. American courts, as a technical matter, do not actually void laws that they find to be unconstitutional. Rather, since subsequent similar cases must follow the rule in previous cases, the voided law remains on the books, if dormant for all practical purposes because no court will ever enforce it. In systems with a designated constitutional court, in contrast, the court usually has the power to declare the laws unconstitutional and immediately void. The decision means the law cannot be applied.

In some countries with a tradition of parliamentary sovereignty, courts are not allowed to declare laws unconstitutional. Instead they make a recommendation to the legislature, which is the only body that can repeal or amend law. In June 2011, Indonesia's government proposed a law that would institute such a system there. This would reduce the power of the court.

Courts in Latin America make use of a device called *amparo*, wherein a successful constitutional complainant will be free from the application of the offending law or government act, but the law will continue to apply to others. An unconstitutional act that affects 1000 different people might require 1000 suits, requiring a lot of expense and time. This device is desirable from the perspective of politicians who do not want much judicial constraint, a fair characterization of many governments in Latin America during the 20th century. The *amparo* may work well to deal with government actions that provide substantial burdens on small numbers of citizens, such as measures affecting property rights. But the device is less effective in protecting people from unconstitutional actions that affect larger populations or those less able to mobilize for legal action.

One variation that seeks to have the benefits of *amparo* without the costs is the Mexican system, in which the Supreme Court can declare a law or practice unconstitutional after five *amparo* challenges are upheld. Similarly, the Brazilian Senate (Art. 52X of constitution) can choose to accept a decision rendered in a specific case as generally binding, allowing it to convert a finding of unconstitutionality in one case into a general rule.

Sometimes the constitutional court may wish to limit the act in question, interpreting it to be constitutional if applied in a particular way. The German Constitutional Court has two choices in rendering a finding of unconstitutionality. It can find legislation null and void (*nichtig*) or incompatible (*unvereinbar*) with the Basic Law. In the latter case, the Court declares the law to be unconstitutional but not void, and usually sets a deadline for the legislature to modify the legislation, during which period it might still be applied. Sometimes these decisions admonish the legislature to modify the legislation within particular guidelines. The court becomes deeply involved in "suggesting" to the legislature language that ultimately finds its way into the statute. For example, in its 1975 decision voiding a statute that allowed abortion, the German Constitutional Court engaged in extensive suggestions for rewriting of the statute. In other cases, the Court will sustain a challenged statute but warn the legislature that it is likely to void it in the future, or suggest conditions for the constitutional application of the statute. In addition, constitutional courts may strike only part of a law, and not the entire law. Usually, courts want to make sure that the law still makes sense as a whole without the challenged language. If it does not, the courts may strike the whole law and force the legislature to come up with a new comprehensive scheme.

In some systems with a legacy of parliamentary control of constitutionality, the decision of the constitutional court as to unconstitutionality is not binding, but rather is advisory to the legislature. The legislature retains some power to reject or accept the court's finding, either by majority or supermajority vote. A version of this model existed in Poland during the life of its first Constitutional Tribunal 1988-97, and remains intact in Mongolia, where the legislature can reject an initial finding by a panel of the constitutional court. Afterwards, the Court can rehear the case with its full membership and uphold its initial decision with a 2/3 vote.

Finally, a major innovation of the Canadian constitution allows provincial legislatures to pass legislation, even if it violates the national constitution and has been struck by the Supreme Court. Such legislation requires the provincial legislature to make an explicit declaration that it is passing the law, notwithstanding its unconstitutionality. Such laws last for only five years, but

can be renewed. The logic is to allow provinces to enact popular but unconstitutional policies; in practice, however, such declarations have only been used by one province (Quebec) and are now very rare.

6. Constitutional Review in Afghanistan

Afghanistan finds itself, as any new democracy, with many constitutional issues to be decided. Many of these concern the structure of government and the relative powers of the president, parliament and cabinet. This is a normal situation, as highly political issues tend to turn into constitutional disputes in any country.

What is unusual, however, is that the mechanism for resolving these disputes is unclear. This results from the interpretation of last-minute changes introduced during the constitutional drafting process, in which the constitutional court initially included in Article 146 was removed and its powers only partially assigned to the Supreme Court. Article 121 says that the government or courts can request the Supreme Court to review laws and treaties for compatibility with the constitution. It does not, however, explicitly give it the general power to “interpret” the constitution outside of this context. Thus if there were a dispute over the what body is assigned a constitutional power, there would be no mechanism for resolving it.

In addition, Article 157 describes a Commission for Supervision of the Implementation of the Constitution, (ICSIC), whose members are to be nominated by the president and approved by parliament. Its constitutional powers are vague.

The system functioned without controversy from 2004-2007, with the Supreme Court acting as if it had a general power of interpretation. The ICSIC was not formed during this period. In 2007, the Wolesi Jirga sought a vote of no confidence in Foreign Minister Spanta using Article 92 of the Constitution, in connection with comments he made on Afghan refugees. While the initial vote failed, a second vote succeeded, and parliament held that Spanta had been recalled, though Article 92 is not explicit about the consequences of a vote of confidence. President Karzai disagreed that parliament had the power to recall Spanta, and asked the Supreme Court to hold the act of the Wolesi Jirga unconstitutional. The Supreme Court responded that the vote was unfounded and violated procedure.

Parliament did not recognize this decision, and when presented with legislation to create the ICSIC, gave it the power to interpret of the Constitution at the request of the President, Assembly, government and Supreme Court, and to review old laws for conformity with the constitution. It passed the statute over President Karzai’s veto. In 2008, however, the Supreme Court, however, exercising its power to review laws for conformity with the constitution at the request of the president, held these provisions to be unconstitutional usurpations of the Supreme Court’s power.

The governing statute does give the ICSIC several uncontested powers, including providing constitutional advice to government actors, which makes it look something like the Conseil d’Etat in France. It also gives it the authority to “supervise the observance and application of the Constitution” by government and non-government actors, including the judiciary. This last provision makes it look like an appellate body of some kind, to which one might imagine that Supreme Court cases might be appealed if they do not interpret the constitution in the same way as the ICSIC. Even if the provision refers to lower judges only, it means that the ICSIC might be able to say that lower court rulings that misapplied the constitution were not binding. This would mean that lower courts had two supervisory organs.

All this puts Afghanistan in the difficult position of having multiple bodies claiming some power of constitutional interpretation. The Supreme Court says that the ICSIC does not have the power, which of course is itself a statement that interprets the constitution. The ICSIC contests this position because of the lack explicit assignment of interpretive power to the Supreme Court. No doubt both bodies will need to interpret the constitution to achieve their missions: to “supervise implementation”, the ICSIC will have to develop an understanding of what the constitution requires; meanwhile, the Supreme Court will have to interpret the constitution to assess whether laws are in conformity with it.

This situation creates the possibility of conflicting interpretations of the constitution. There is no clear hierarchy among the two bodies. The general risks of this situation were described above with regard to France, South Korea, and Indonesia. Afghanistan faces the further problem of having no clear mechanism for resolving the fundamental dispute about whose authority is final. It goes without saying that this is a risky situation given the other challenges facing Afghanistan today. And it also lies at the heart of many of the major political disputes in the country, including controversies over ministerial appointments, the special election tribunal, and impeachment.

A logical way to resolve this situation would be to pass a constitutional amendment to clarify the authority of the Supreme Court, and to adopt a clear division of labor between the two bodies. Here again, the lack of a clear authority has itself become the barrier to proceeding. The constitutional amendment process, laid out in Chapter Six, requires the convening of a constitutional Loya Jirga, whose membership is to include both houses of parliament, and chairmen of provincial and district councils. The Loya Jirga can convene with a quorum of 50% of its members. Given the situation of war in the country, it has been impossible to hold district level elections, meaning that there are only 385 of 789 authorized members holding office at the moment.

A natural way to interpret Chapter Six in this situation would be to say that the denominator of purposes of the quorum requirement is the number of officers actually elected. Thus a quorum would be 193 of 385, rather than 395 of 789. The ICSIC, however, has held otherwise, and so takes the position that no amendment of the constitution is possible until district elections are held. This is surely an uncompromising and impractical position, essentially saying that no amendments are possible until the war is won. It is also self-defeating: it is plausible that the various unresolved constitutional crises in Afghanistan are reducing the possibility of stabilizing the country so that it could hold district-level elections.

Let us assume that Afghans decide that they want to develop a clearer account of the division between the Supreme Court and the ICSIC. This division of labor could take a variety of forms. Three possibilities are laid out below.

- a) Ideally, there would be either a single Supreme Court with exclusive power of interpretation, or a dual system with a Supreme Court and Constitutional Court. A dual system is not ideal in a country with limited personnel and a weak tradition of constitutionalism. But if it is adopted, the relationship between the two courts must be clearly laid out. Either way, the jurisdiction of the Courts with regard to electoral disputes, interbranch conflict and other major issues should be clearly spelled out in the constitution and in relevant legislation. If the Constitutional Court system is adopted, it should include a mechanism by which ordinary judges are allowed to refer questions to the Court.

- b) Another possibility would be to divide interpretive authority among the existing institutions on the basis of whether or not the dispute was abstract or concrete. The Supreme Court would have the power to “interpret” laws in the context of concrete cases involving real legal disputes. The ICSIC would supervise the implementation of the constitution in abstract cases. Ideally, the ICSIC would exercise its function only before laws were promulgated, as in the classical French system. Once laws were passed only the Supreme Court could act.
- c) A third possibility is to divide the authority by the type of government action at issue. The Court would supervise laws, while administrative action would be characterized as “implementation.” The legislature makes laws; other bodies implement them. In implementing the laws, the government may violate the constitution, and claims related to these violations would go to the ICSIC. Thus the Commission would become a kind of supreme administrative court, to go along with its other powers that look like the Conseil d’Etat in France. Dividing jurisdiction over statutes from that over administrative action has worked in France; but it has been more problematic in Indonesia, and has taken some time to work out in Korea. Conflicts can arise because, of course, the administrative court must sometimes “interpret” the relevant law in order to make a judgment about the implementation. But with careful drafting of the statutes and judicial statesmanship, it might work.

Some of these suggestions would require a constitutional amendment, but it would also be possible to implement some of them if there were a consensus among the Afghan authorities and scholars about the relevant division of labor. Whether such a consensus can develop remains to be seen.