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Present: Lamer C.J. and L’Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

Reference by governor in council

THE COURT --

I. Introduction

1. This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. . . In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2. The [first] question[] posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read[s] as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? . . .

3. Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court’s reference jurisdiction.

II. The Preliminary Objections to the Court’s Reference Jurisdiction

4. The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. . . .

8. . . . Section 53 . . . imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if . . . a “general court of appeal” may properly undertake other legal functions, such as the rendering of advisory opinions. . . .

12. The amicus curiae submits that

[TRANSLATION] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. . . .

13. However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual “cases” or “controversies” . . . . This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the “case or controversy” limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

14. In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an “abstract or objective question” is sufficient. . . . The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. . . . There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.
15. Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court’s receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.

III. Reference Questions
A. Question 1
Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction
32. As we confirmed in Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at p. 806, “The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable.” The “Constitution of Canada” certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also “embraces unwritten, as well as written rules”. Finally, the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

48. We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles
(a) Nature of the Principles
49. What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single
principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other. . . .

(b) Federalism
55. It is undisputed that Canada is a federal state. . . .
58. The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was “not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.” . . .

The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself. . . .

(c) Democracy
61. Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.
62. The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in OPSEU v. Ontario, supra, at p. 57, confirmed that “the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels”. As is apparent from an earlier line of decisions emanating from this Court, . . . the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.
63. Democracy is commonly understood as
being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. “[T]he Canadian tradition”, the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is “one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation”. Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64. Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65. In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are “at the core of the system of representative government”: New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to “Every citizen of Canada” by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters. In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66. It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less “legitimate” than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a
province and a federal level.

67. The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.

68. Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69. The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70. The principles of constitutionalism and the rule of law lie at the root of our system of government. . . . At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

72. The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action comply with the law, including the Constitution. . . .

73. An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74. First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions
when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75. The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit “the people” in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76. Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77. In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an “enhanced majority” to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78. It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79. The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. . . . In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. . . .

80. However, we highlight that even though
those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. . . .

81. The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Although Canada’s record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution. . . .

(4) The Operation of the Constitutional Principles in the Secession Context

83. Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession “under the Constitution of Canada”. This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84. The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85. The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the *Manitoba Language Rights Reference, supra*, at p. 745, “[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government”. The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we
have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

86. The “unilateral” nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is “unilateral”. We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede “unilaterally” is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87. Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89. What is the content of this obligation to negotiate? . . .

95. Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party’s assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law
cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96. No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97. In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated. . . .

101. If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it
would be for the democratically elected leadership of the various participants to resolve their differences. . . .

IV. Summary of Conclusions

149. The Reference requires us to consider whether Quebec has a right to unilateral secession. . . . [s]ecession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework. . . .

151. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. . . . [Yet the] continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebeckers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations. . . .

153. The task of the Court has been to clarify the legal framework within which political decisions are to be taken “under the Constitution”, not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes “a clear majority on a clear question” in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role. . . .
SHORT TITLE
1. This Act may be cited as the *Supreme Court Act*.

THE COURT
3. The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

SPECIAL JURISDICTION

References by Governor in Council

53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(a) the interpretation of the *Constitution Acts*;
(b) the constitutionality or interpretation of any federal or provincial legislation;
(c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.
CHIEF JUSTICE BURGER delivered the opinion of the Court.

Chadha is an East Indian who was born in Kenya and holds a British passport. He was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported for having “remained in the United States for a longer time than permitted.” A deportation hearing was held before an Immigration Judge on January 11, 1974. Chadha conceded that he was deportable for overstaying his visa and the hearing was adjourned to enable him to file an application for suspension of deportation under § 244(a)(1) of the Act, 8 U. S. C. § 1254(a)(1). [Pursuant to that provision,] the Immigration Judge ordered that Chadha’s deportation be suspended. The Immigration Judge found that Chadha met the requirements of § 244(a)(1): he had resided continuously in the United States for over seven years, was of good moral character, and would suffer “extreme hardship” if deported.

Pursuant to § 244(c)(1) of the Act, 8 U. S. C. § 1254(c)(1), the Immigration Judge suspended Chadha’s deportation and a report of the suspension was transmitted to Congress.

Once the Attorney General’s recommendation for suspension of Chadha’s deportation was conveyed to Congress, Congress had the power under § 244(c)(2) of the Act, 8 U. S. C. § 1254(c)(2), to veto the Attorney General’s determination that Chadha should not be deported.

On December 12, 1975, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution opposing “the granting of permanent residence in the United States to [six] aliens,” including Chadha.

The resolution was passed without debate or recorded vote. Since the House action was pursuant to § 244(c)(2), the resolution was not treated as an Art. I legislative act; it was not submitted to the Senate or presented to the President for his action.

After the House veto of the Attorney General’s decision to allow Chadha to remain in the United States, the Immigration Judge reopened the deportation proceedings to implement the House order deporting Chadha. Chadha moved to terminate the proceedings on the ground that § 244(c)(2) is unconstitutional. The Immigration Judge held that he had no authority to rule on the constitutional validity of § 244(c)(2). On November 8, 1976, Chadha was ordered deported pursuant to the House action.

Chadha appealed the deportation order to the Board of Immigration Appeals, again contending that § 244(c)(2) is unconstitutional. The Board held that it had “no power to declare unconstitutional an act of Congress” and Chadha’s appeal was dismissed.

Pursuant to § 106(a) of the Act, 8 U. S. C. § 1105a(a), Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit.

[T]he Court of Appeals held that the House was without constitutional authority to order Chadha’s deportation.

We granted certiorari and we now affirm.

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the
courts; if a challenged action does not violate the Constitution, it must be sustained. . .

By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies. . .

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions are critical to the resolution of these cases, we set them out verbatim. Article I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Art. I, § 1. (Emphasis added.)

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States . . . .” Art. I, § 7, cl. 2. (Emphasis added.)

“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.” Art. I, § 7, cl. 3. (Emphasis added.)

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. . . .

When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.

Beginning with this presumption, we must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. See infra, at 955, and nn. 20, 21. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon “whether they contain matter which is properly to be regarded as legislative in its character and effect.”

Examination of the action taken here by one House pursuant to § 244(c)(2) reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, § 8, cl. 4, to “establish an uniform Rule of Naturalization,” the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be canceled under § 244. The one-House veto operated in these cases to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress has acted and its action has
altered Chadha’s status.

The legislative character of the one-House veto in these cases is confirmed by the character of the congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation.

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General’s decision on Chadha’s deportation -- that is, Congress’ decision to deport Chadha -- no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Finally, we see that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action. There are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President’s veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;

(c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. The bicameral requirement, the Presentment
Clauses, the President’s veto, and Congress’ power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President.

The veto authorized by § 244(c)(2) doubtless has been in many respects a convenient shortcut; the “sharing” with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

JUSTICE POWELL, concurring in the judgment.

The Court’s decision, based on the Presentment Clauses, Art. I, § 7, cls. 2 and 3, apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930’s. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies. One reasonably may disagree with Congress’ assessment of the veto’s utility, but the respect due its judgment as a coordinate branch of Government cautions that our holding should be no more extensive than necessary to decide these cases. In my view, the cases may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur only in the judgment.

On its face, the House’s action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches.

The impropriety of the House’s
assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid -- the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to “the tyranny of a shifting majority.”

Chief Justice Marshall observed: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” *Fletcher v. Peck*, 6 Cranch 87, 136 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

JUSTICE WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a “legislative veto.” For this reason, the Court’s decision is of surpassing importance. And it is for this reason that the Court would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy.

I

The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression. The Reorganization Acts established the chief model for the legislative veto. When President Hoover requested authority to reorganize the Government in 1929, he coupled his request that the “Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive” with a proposal for legislative review. He proposed that the
Executive “should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration.” Public Papers of the Presidents, Herbert Hoover, 1929, p. 432 (1974). Congress followed President Hoover’s suggestion and authorized reorganization subject to legislative review. Act of June 30, 1932, § 407, 47 Stat. 414. Although the reorganization authority reenacted in 1933 did not contain a legislative veto provision, the provision returned during the Roosevelt administration and has since been renewed numerous times. Over the years, the provision was used extensively. Presidents submitted 115 Reorganization Plans to Congress of which 23 were disapproved by Congress pursuant to legislative veto provisions. See App. A to Brief for United States Senate on Reargument.

Shortly after adoption of the Reorganization Act of 1939, 53 Stat. 561, Congress and the President applied the legislative veto procedure to resolve the delegation problem for national security and foreign affairs. . .

Even [a] brief review suffices to demonstrate that the legislative veto is more than “efficient, convenient, and useful.” It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress’ control over lawmaking. . .

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches -- the concerns of Madison and Hamilton. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation’s lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority. . .

. . . The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution. We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government’s responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure its role as the Nation’s lawmaker. But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. . .

This is the perspective from which we should approach the novel constitutional questions presented by the legislative veto. In my view, neither Art. I of the Constitution nor the doctrine of separation of powers is violated by this mechanism by which our elected Representatives preserve their voice in the governance of the Nation.
III

The requirement of bicameral approval, implicit in Art. I, § 1, and the requirement that all bills and resolutions that require the concurrence of both Houses be presented to the President, Art. I, § 7, cl. 2 and 3 . . . [do not] answer the constitutional question before us. The power to exercise a legislative veto is not the power to write new law without bicameral approval or Presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the Presidential veto confer such power upon the President. Accordingly, the Court properly recognizes that it “must nevertheless establish that the challenged action under § 244(c)(2) is of the kind to which the procedural requirements of Art. I, § 7, apply” . . .

The terms of the Presentment Clauses suggest only that bills and their equivalent are subject to the requirements of bicameral passage and presentment to the President. . . .

Although the Clause does not specify the actions for which the concurrence of both Houses is “necessary,” the proceedings at the Philadelphia Convention suggest its purpose was to prevent Congress from circumventing the presentation requirement in the making of new legislation. . . .

When the Convention did turn its attention to the scope of Congress’ lawmaking power, the Framers were expansive. The Necessary and Proper Clause, Art. I, § 8, cl. 18, vests Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the enumerated powers of § 8] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” It is long settled that Congress may “exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,” and “avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.” *McCulloch v. Maryland*, 4 Wheat. 316, 415-416, 420 (1819).

The Court heeded this counsel in approving the modern administrative state. The Court’s holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups. . . .

This Court’s decisions sanctioning such delegations make clear that Art. I does not require all action with the effect of legislation to be passed as a law. . . .

If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President’s signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with the Art. I requirements.

Nor are there strict limits on the agents that may receive such delegations of legislative authority so that it might be said that the Legislature can delegate authority to others but not to itself. While most authority to issue rules and regulations is given to the Executive Branch and the independent regulatory agencies, statutory delegations to private persons have also passed this Court’s scrutiny. In *Currin v. Wallace*, 306 U.S. 1
(1939), the statute provided that restrictions upon the production or marketing of agricultural commodities was to become effective only upon the favorable vote by a prescribed majority of the affected farmers. United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577 (1939), upheld an Act which gave producers of specified commodities the right to veto marketing orders issued by the Secretary of Agriculture. Assuming Currin and Rock Royal Cooperative remain sound law, the Court’s decision today suggests that Congress may place a “veto” power over suspensions of deportation in private hands or in the hands of an independent agency, but is forbidden to reserve such authority for itself. Perhaps this odd result could be justified on other constitutional grounds, such as the separation of powers, but certainly it cannot be defended as consistent with the Court’s view of the Art. I presentment and bicameralism commands.

The Court also takes no account of perhaps the most relevant consideration: However resolutions of disapproval under § 244(c)(2) are formally characterized, in reality, a departure from the status quo occurs only upon the concurrence of opinion among the House, Senate, and President. Reservations of legislative authority to be exercised by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Art. I provides.

... § 244(c)(2) did not alter the division of actual authority between Congress and the Executive. At all times, whether through private bills, or through affirmative concurrent resolutions, or through the present one-House veto, a permanent change in a deportable alien’s status could be accomplished only with the agreement of the Attorney General, the House, and the Senate.

I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question. But the legislative veto device here -- and in many other settings -- is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress.

I regret that I am in disagreement with my colleagues on the fundamental questions that these cases present. But even more I regret the destructive scope of the Court’s holding. It reflects a profoundly different conception of the Constitution than that held by the courts which sanctioned the modern administrative state. Today’s decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history. I fear it will now be more difficult to “[insure] that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people,” Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). I must dissent.
Kenya Timeline

- Evidence of some of the earliest human settlements has been found in Kenya, suggesting that it was the cradle of humanity from which descendents moved out to populate the world.
- **600** - Arabs begin settling coastal areas, over the centuries developing trading stations which facilitated contact with the Arab world, Persia and India.
- 16th century - Portuguese try to establish foothold on Kenyan coast but are driven off by Swahili states and Omani Arabs by late 17th century.
- **1830s** - Omani Arabs consolidate control of coast.
- **1895** - Formation of British East African Protectorate.
- **Early 1900s** - White settlers move into highlands, railway built from Mombasa to Lake Victoria.
- **1920** - East African Protectorate becomes crown colony of Kenya - administered by a British governor.
- **1944** - Kenyan African Union (KAU) formed to campaign for African independence. First African appointment to legislative council.
- **1947** - Jomo Kenyatta becomes KAU leader.
- **1953** - Kenyatta charged with management of Mau Mau and jailed. KAU banned.
- **1956** - Mau Mau rebellion put down after thousands killed - mainly Africans.
- **1959** - Kenyatta released from jail but under house arrest.
- **1961** - Kenyatta freed and assumes presidency of Kanu.
- **1963** - Kenya gains independence, with Kenyatta as prime minister.
- **1966** - Odinga, a Luo, leaves Kanu after ideological split, forms rival Kenya People’s Union (KPU).
- **1969** - Assassination of government minister Tom Mboya sparks ethnic unrest. KPU banned and Odinga arrested. Kanu only party to contest elections.
- **1974** - Kenyatta re-elected.
- **1978** - Kenyatta dies in office, succeeded by Vice-President Daniel arap Moi.
- **1982 June** - Kenya officially declared a one-party state by National Assembly.
- **1982 August** - Army suppresses air force coup attempt. Private Hezekiah Ochuka rules for about six hours.
- **1989** - Political prisoners freed.
- **1990** - Death of the foreign minister, Robert Ouko, in suspicious circumstances leads to increased dissent against government.
- **1991 August** - Forum for the Restoration of Democracy (Ford) formed by six opposition
leaders, including Oginga Odinga. Party outlawed and members arrested. Creditors suspend aid to Kenya amid fierce international condemnation.

- **1991 December** - Special conference of Kanu agrees to introduce a multi-party political system.
- **1992** - Approximately 2,000 people killed in tribal conflict in the west of the country.
- **1992 August** - Ford splits into two factions - Ford-Asili (led by ex-government minister Kenneth Matiba) and Ford-Kenya (led by Odinga).
- **1997** - Demonstrations calling for democratic reform. World Bank withholds disbursement of $5bn in structural adjustment credit.
- **1997 December** - Moi wins further term in widely-criticised elections. His main opponents are former vice-president Mwai Kibaki and Raila Odinga, son of Oginga Odinga.
- Embassy bomb
- **1999** - Moi appoints Richard Leakey to head government drive against corruption.
- **2001 April** - Leakey appears in court to face charges of abuse of power and perverting the course of justice.
- **2001** - Ethnic tensions culminate in several violent clashes. In December thousands flee and several people are killed in rent battles involving Nubian and Luo communities in Nairobi’s Kibera slum district.
- **2002 December** - Elections. Mwai Kibaki wins a landslide victory, ending Daniel arap Moi’s 24-year rule and Kanu’s four decades in power.
- **2003 November** - International Monetary Fund (IMF) resumes lending after three-year gap, citing anti-corruption measures.
- **2003 December** - Government decides to grant former president Daniel arap Moi immunity from prosecution on corruption charges.
- **2004 March-July** - Long-awaited draft of new constitution completed. Document requires parliament’s approval and proposes curbing president’s powers and creating post of prime minister. But deadline for enactment is missed.
- **2004 July-August** - Food crisis, caused by crop failures and drought, dubbed “national disaster” by President Kibaki. UN launches aid appeal for vulnerable rural Kenyans.
- **2005 January** - Clashes over land and water rights leave more than 40 people dead.
- **2005 February** - Corruption takes centre stage when it is claimed that graft has cost Kenya $1bn under Kibaki. Leading anti-graft official John Githongo resigns. International donors voice unease.
- **2005 July** - Parliament approves a draft constitution after days of violent protests in Nairobi over aspects of the draft which demonstrators say give too much power to the president’s hands.
- **2005 November-December** - Voters reject a proposed new constitution in what is seen as a protest against President Kibaki. The president replaces his cabinet; some nominees reject
their appointments.
- **2006 January** - Government says four million people in the north need food aid because of a drought which the president calls a “national disaster”.
- **2006 January-February** - Government ministers are linked to a corruption scandal involving contracts for a phantom company, Anglo Leasing. One of them, Finance Minister David Mwiraria, resigns and says allegations against him are false.
- **2006 March** - Armed police, acting on government orders, raid the offices and presses of the Standard group, one of Kenya’s leading media companies.
- **2006 March** - Armed police, acting on government orders, raid the offices and presses of the Standard group, one of Kenya’s leading media companies.
- **2007 December** - Disputed presidential elections lead to violence in which more than 1,500 die. The government and opposition come to a power-sharing agreement in February and a cabinet is agreed in April.
- **2008 October** - Report into post-election clashes calls for international tribunal to try those implicated in violence. Many political leaders are reluctant to implement the commission of inquiry’s recommendations, with some arguing that prosecutions could trigger further clashes between communities.
- **2008 December** - Kenya Anti-Corruption Commission (KACC) accuses seven current and former MPs of taking illegal allowances worth $250,000.
- **2009 August** - Visiting US Secretary of State Hillary Clinton criticises Kenya for failing to investigate the deadly violence after the 2007 election. Kenya says that at least 10 million people, or one third of the population, are in need of food aid. The government mobilises the military to distribute food, water and medicines to areas hit hardest by drought.
- **2009 October** - The government says it will co-operate with the International Criminal Court (ICC) to try key suspects in post-election violence.
- **2010 January** - The US suspends $7m of funding for free primary schools in Kenya until fraud allegations are investigated.
- **2010 February** - President Kibaki overturns a decision by Prime Minister Odinga to suspend the country’s agriculture and education ministers over alleged corruption. The row threatens the coalition government.
- **2010 July** - Kenya joins its neighbours in forming a new East African Common Market, intended to integrate the region’s economy.
- **2010 August** - New constitution designed to limit the powers of the president and devolve power to the regions approved in referendum. Controversy over release of national census figures that include tribal affiliations.
The present day Kenya is home to well over forty-two different ethnic groups. The largest of the groups are the Kikuyu (21%), who occupy the central part of Kenya, followed by the Luhya (14%) and the Luo (13.5%) of western Kenya. There are also the Kambas (11%), Kalenjins (11%), Merus (5%), Embus, and other smaller groups. Before colonialism, each of these groups existed in different autonomous entities each identifying with distinct territory (homeland). The homelands had cultural and economic significance. The common characteristic amongst these groups was that life was simple and cultures and religion were built around food, shelter, and the quest for security.

Despite the fact that the ethnic groups existed as political units, the relationship between them was not necessarily in conflict. This by no means suggests that these groups were totally egalitarian or that their members enjoyed a homogenous culture with unambiguous identity. In Kenya, the relationship between groups was influenced by the interdependence in the realm of trade and material well being.

B. The Colonial Rule

Through conquest, deliberate annexation of territory and lopsided treaties, the British coalesced the ethnic groups and the minority settler population into a Nation State. The British direct rule was established on June 15, 1895, by the declaration of a protectorate status over the present day Kenya. The protection status conferred on the British the power to exercise control over the indigenous groups and also acquire their land. The process of acquiring territory through conquests benefited a great deal from the British tactics of playing one African group against another and rewarding their supporters with loot, mainly cattle, taken from the conquered groups. The African “allies” also earned political increment in British victories and sustained domination over internal opposition.

Coextensive with the exercise of state power was the institutionalization of racial segregation. By and large, the ideological underpinnings that informed the edifice of colonial administration were explicated by the perception of the African as a “happy, thriftless, excitable person, lacking in self-control, discipline, and foresight. “This, no doubt, provided a moral justification for the systematic and deliberate divestiture of land from the ethnic groups and exacerbated exploitation. European occupation was perceived as something good for the African because he was inferior.

It is thus not surprising that in 1915 the colonial government passed the Crown Lands Ordinance that divested the ownership of all land from the Natives and invested it in the Crown. In effect it abolished the rights of Africans to land in the colony and made them tenants at will of the Crown. Generally speaking, the purpose of this legislation was two-fold. First, it ensured that all the fertile land, both suitable for agriculture and ranching, were made available for white settlers. The divestiture was so effective that by 1914 there were well over one thousand white farmers occupying about four million acres of land. Secondly, it created a situation where the natives would be landless and thus form a pool from which cheap labor could be drawn. A systematic movement of Africans from their ancestral land and subsequent settlement into designated areas, notoriously called the “native reserves” was undertaken. The natives were thus confined into designated tribal reserves with clearly marked boundaries.

Not only were ethnic boundaries in the reserves clearly demarcated and their inhabitants technically confined within their territories, but the general life of the African was strictly controlled.
employment in the metropolitan areas. The young men who moved to the white farms took residency there and became squatters.

The squatter phenomenon greatly influenced colonial policies and to a large extent defined the nature of the relationship between races during this time. As the number of squatters increased and their agricultural output became significant, the colonial government introduced legislation to keep them in check. The 1918 Resident Native Squatter Ordinance primarily set the obligations and restrictions on squatter activity. It gave the settlers tremendous power of supervision by introducing government controlled labor contracts. These contracts ensured that the African could reside in the white highlands in no other status other than that of a squatter, “liable to eviction at the expiration of the respective labor contracts.”

Inter-ethnic relationships could not be explained only in terms of the class differences. The ethnic groups were treated differently depending on the attitude of the colonial administrators based upon what was considered to be their propensity. For example, the Luo were perceived as prudent civil servants, the Kamba as generally “flexible and cooperative,” while the Kikuyu as shrewd tradesmen.

One consequence of such stereotyping was the creation of ethnic hierarchy and the sharpening of consciousness toward ethnic identity. Perhaps this explains why the Kikuyu, more than any other ethnic community, were more readily integrated into the emergent capitalist economy. And because of the proximity to the white highlands, a significant portion of their population committed to the European way of life and, thus, achieved the greatest social mobility. It is thus not surprising that the Kikuyu were the first to agitate against the colonial state.

To the colonialists, the ability to cope with dissent depended on “fragmented local containment of African political and economic sources and their representation in state institutions according to their ethnic categories.”

“The policy worked in so far as it decentralized dissent. The ethnic groups were never able to ferment a national uprising against the very unpopular land policies.

C. The “Ethnic” Factor in the Independence Movements

... From the beginning, African political activity in Kenya was besieged by ethnic parochialism, a factor that not even independence and all its plausible rhetoric of “Umoja na Nguvu” (unity is strength) has been able to dislodge. Thirdly, there was a total lack of a shared discourse or conceptual language of rights and obligations between the African politicians.

The onset of the Mau Mau revolt in 1950 considerably changed the political landscape. The oathing ceremonies that the young Kikuyu fighters underwent reinforced their sense of ethnic identity. But that said, the revolt also revealed the difference between the elitist members of the Kikuyu community who perceived themselves as above ethnic politics and the lower rank and file whose motivation to fight off the European rested on his seared economic condition. The elitist group (also the political party leaders) detested Mau Mau methods. The declaration of the state of emergency on October 20, 1952, which resulted in large scale arrests and detention of many Mau Mau activists, and the subsequent reprisal by the colonial authorities may have limited the spread of the Mau Mau to other ethnic groups in Kenya. However, its aftermath revealed that the colonial establishment and the settler ideology that it professed could no longer withstand the political challenge from majority Africans.

The 1957 elections, conducted under the Lyttelton constitutional arrangements, formed a watershed in Kenya’s political history. For the first time, African members of the legislative council were elected through popular vote. This reinvigorated claims by African politicians of more African involvement in the political life of the country. The claims were backed by boycotts and refusal to cooperate in the workings of a government that did not
respect the majority opinion. However, it was not until 1960 when Kenyan National African Union (KANU) (currently the ruling political party in Kenya) was formed that party politicking emerged as a strong force in the movement toward independence. The reason for this lies in the broad ethnic support that the party got from its inception. African Nationalism was propagated instead of Kikuyu or Luo nationalism, the narrow focus to which little appeal could be attached. [However,] . . . Geertz notes:

. . . KANU was supported by the Luo, a significant population living in the western part of the country. The other ethnic groups were suspicious of the Luo and Kikuyu domination and thus formed Kenya African Democratic Union (KADU) to function alongside KANU. The difference between the two parties reflected their ethnic composition. KADU’s main fear was that KANU could use its demographic superiority to grab all the land left behind by the European settlers. They thus advocated for “decentralization of power so that power is shared between many,” a regional system of government. KANU on the other hand supported the creation of a strong central government.

The contestation between the two parties is important to this discourse as it illustrates how resource competition engraved ethnic affirmations just before independence. The Kikuyu aspirations favored the centrality of land ownership and dismissed any historical claims. “Land is so important to the economy of Kenya that it must ultimately be under control of the central government,” one Kikuyu elite argued. According to him, digging back in “history in order to find which tribes originally occupied this land or that, would only lead to unrest. What mattered more was the economy of the situation.” At that time, KADU leaders Daniel Arap Moi, Wafuwa Wabuge, and Ole Tipis refuted this position on the grounds of unfairness. They argued that independence should confer benefit to all. After independence, the political parties, despite their differences, formed a coalition government. But, the polarity of views, especially as regards issues of land and minority interests, remained unsolved. . . .
"Thurgood Freezes as Kenyans Feud," announced the Cleveland Call and Post in a January 30, 1960 headline. The famous American civil rights lawyer Thurgood Marshall was in London in 1960, and was embroiled in a controversy. He had come at the invitation of Tom Mboya, a young nationalist leader from Kenya. Marshall traveled first to Kenya, and then to London to serve as an advisor to nationalists during negotiations on a new constitution for Kenya, at the time a British colony. But as the Call and Post reported it, “Marshall sat in a London hotel room . . . ‘too cold by American standards’ . . . sipping ‘warm beer’ and fretting for action,” as the British government and the nationalists faced an impasse over constitutional advisors. . . .

The story may seem paradoxical, for Marshall, a champion of the rights of African Americans in his role as chief NAACP Legal Defense Fund (LDF) litigator, would support a Bill of Rights that protected the rights of white landholders in Kenya. Whites were a numerical minority in Kenya, yet they had long held a monopoly on the finest agricultural land in the colony. Once it became clear in 1960 that indigenous Africans would soon become the dominant political power, a central question was the property rights of minorities in an independent Kenya. Marshall sought to entrench minority safeguards by including strong property rights protection in his draft Bill of Rights. In doing so, Marshall accorded formal legal rights to a group that he described as worse than the Ku Klux Klan.

Was Marshall’s support for the rights of whites who had been the beneficiaries of a historic injustice--the longstanding racially discriminatory distribution of land in the colony of Kenya--an indication that his commitment was to formal equality, regardless of material conditions? Was he simply oblivious to the impact of an American-style conception of equality in a postcolonial society, in keeping with the coming critique of law and development, that American ideas of law reform are often ill-fitting in foreign lands? . . .

Thurgood Marshall’s story intersects with another narrative: the story of Kenya’s first constitution as an independent nation. . . . The constitution writing that happened in Africa in the early 1960s occurred in this particularly precarious context for nation-building. The difficulties in constitutionalism in sub-Saharan Africa are legion, leading to the widespread belief that the region has “constitutions without constitutionalism.” . . . Because Kenya became a corrupt and authoritarian regime by the 1980s, perhaps constitutionalism in the country has “failed,” and there is nothing to learn from this “failure.” But in the records from Kenya, an interesting picture emerges. Against a backdrop of violence, in the early 1960s, groups that had been killing each other--African nationalists, white farmers, the colonial government--fought with each other over the things they held most dear, land and political power, not with weapons of violence but with constitutional clauses. As violence erupted in the Congo, South Africa, and elsewhere in the early 1960s, in Kenya the result of constitutional bargaining was peaceful regime change. Constitutional politics aided that important achievement in Kenya, even if constitutionalism could not shield the country from the national and international political forces that would unravel Kenya’s first attempt at democracy. If we look at constitutional moments in a different way, we can see constitutionalism at work in Kenya. . . .

These two narratives--Thurgood Marshall’s and Kenya’s--come together in a context that seems both foreign and familiar. Americans have been framing constitutions for other countries in the many years since the United States Constitution was written. . . .

Ultimately, this rich and unusual story gives us a window not only into the constitutional thought of someone who would soon write
American constitutional law, but also gives us a window into constitutional politics. Constitution writing often happens against a backdrop of violence. In that environment, constitution writing can be a peace process. Whether constitutionalism has worked or failed in Africa and other regions cannot be determined simply by looking for later signs of American-style constitutions and judicial review. In Kenya, for a short period of time, constitutional politics provided a structured and nonviolent forum for political warfare.

* * *

African Americans had long been interested in Africa. . . . By the time Thurgood Marshall went to Kenya, Americans had long conceptualized the world as divided into “developed” and “underdeveloped” spaces. . . . Technical expertise would bring about “development,” and soon American lawyers lent a hand in bringing law to bear to aid “underdeveloped” nations.

Marshall had no meaningful background in Kenya law, politics, and culture before his trip, but within an understanding of the world framed by a development continuum, he had something that an “underdeveloped” area like Kenya needed: expertise in a “developed” legal system.

Tom Mboya would be Marshall’s initial tie with nationalists in Kenya. Mboya was a young, dynamic emerging leader in Kenya in the 1950s. A labor activist, Mboya became active in the International Confederation of Free Trade Unions. Through this work, Mboya developed ties with labor activists around the world, including Walter Reuter of the United Auto Workers Union, and A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, an important African American labor union. In 1959, Mboya returned to the United States to lecture and generate support for the rights of Africans in Kenya. On a number of occasions he appeared with Thurgood Marshall.

It was after Mboya’s 1959 trip that he invited Marshall to serve as advisor at the upcoming conference on the Constitution of Kenya. . . . Julius Kiano later recalled that Marshall “readily agreed to come to Nairobi and then to come with us to London to be . . . our . . . main constitutional advisor. And one of his major contributions was to insist that, ‘You’ve got to have a Bill of Rights in that constitution.’ And so that was wonderful assistance that we got from him.”

Early 1960 was an unsettling time in the Colony of Kenya. When the year began, Jomo Kenyatta, who would become the first President of Kenya, was in detention. Jailed in 1952 on suspicion that he was a leader in the violent Mau Mau rebellion against British Colonial rule, Kenyatta was thought to be so dangerous that he was detained even though he had completed his sentence. Kenya politics were constrained in other ways. Although a seven year state of emergency, the Colonial government’s response to the Mau Mau, had ended, new security legislation was in place which gave the Colonial Governor “reserve powers with which to control all public gatherings for political purposes, provide for the continuance of control over African villages and require the registration of political parties.” A “Detained and Restricted Persons Bill” would “enable the Government to continue to restrain and hold persons for security reasons without trial.”

. . . Kenya differed from many emerging African nations in that it had a sizeable white settler population. To encourage immigration to the colony, the British government had reserved to white settlers the richest agricultural land in Kenya, the “White Highlands.” Africans were not allowed to own land in these areas.

Kenya would not experience an easy path to liberation. Large white-owned farms had depended on African labor. This labor was induced through a brutal colonial regime. In the 1950s, a resistance movement, known as the Mau Mau rebellion, waged guerilla war on the colonial government, white farmers, and African collaborators. Sensational accounts of violence flooded the newsreels, while Britain responded by detaining and torturing thousands of Africans.
and by bombing their forest hideaways. The colonial government seemed to have reasserted control over the colony in early 1960, but many in Kenya remained wary. Even before Colonial Secretary Ian Macleod announced that African majority representation in politics, and eventually independence, were coming to Kenya, whites reacted against upcoming constitutional talks and the very idea of African political control.

Many thought that no safeguards would be strong enough to protect the interests of white settlers in an African-run government. . . . An unidentified writer, in a letter to the Colonial Secretary and others, said, “Dear Sirs, After ten meetings 2500 of us have decided that if you give the African equal voting power as the Europeans in this country we will blow up everything in Kenya. Then the African can start from the beginning the same as we did.” . . .

In these difficult circumstances, Thurgood Marshall embarked on his first trip to Africa. He traveled to Kenya in January 1960, and met with Kenyan nationalists. As he remembered it, “[T]he restrictions were almost unbelievable. Africans could not hold a meeting in a building. So as a result, the only meetings they had were outside.” Some nationalist leaders, including Jomo Kenyatta, “were under detention orders.”

Marshall seems not to have prejudged the Kenya context prior to meeting with the nationalists in Kenya. When asked by a reporter upon his arrival whether he supported universal suffrage for Kenya, Marshall demurred and said, “I have got to have a look around.” . . .

Marshall soon left Kenya for London and the Lancaster House Conference on the Kenya Constitution. He would be the only person present who was not British or Kenyan. Marshall’s role, as the Cleveland Call and Post reported it, was “to write a tricky constitution that will give the Africans in Kenya complete political power on the basis of a democratically elected government by universal franchise, while protecting the rights of the white minorities which is outnumbered about 100 to one.”

The Kenya Constitutional Conference would get off to a rocky start, with a dispute over advisors. Four delegations were present at Lancaster House in London. As Marshall described them, his delegation “was made up of all native African men born in Kenya.” A second one, representing the New Kenya Group, was mixed. “It had Africans, it had white British, it had Indians, all mixed together.” A third delegation was Asian Indians, a major minority group in Kenya. The fourth delegation representing the United Party, was all white, and as Marshall described it, “[T]he best way I can explain them is that if you compared them to the Ku Klux Klan in its heyday in this country, the Ku Klux Klan would look like a Sunday School picnic. These were real rabid, awful.” . . .

The politics of the conference quickly became complicated. The Africans announced that they sought two advisors at the meeting, Thurgood Marshall and Peter Mbu Koinange. The nationalists were in an awkward position without Kenyatta present. They had taken the position that they should not collaborate with the colonial government, but instead insist on Kenyatta’s release as a condition of any sort of collaboration. Their very presence at Lancaster House without Kenyatta therefore raised questions among some Kenyans at home. Koinange, a nationalist in exile, could provide the group with needed legitimacy, since he shared with Kenyatta having been associated by the British with the Mau Mau and therefore cast outside what the British considered to be an acceptable political community. There was as well an element of personal rivalry. Mboya’s rival, Oginga Odinga, thought that involving Marshall “gave United States’ circles a foot in the door of the conference,” and he was “not happy about it.” This was just one of Mboya’s unilateral moves related to the Lancaster House conference, and his tendency to go it alone generated tension and resentment within the group.

The British government barred Koinange from the meeting, calling him “one of the only two men outside Kenya regarded by the Government of Kenya as responsible for the
unhappy events that led to the Emergency in Kenya.” This decision led the African Elected Members to boycott the conference. As an American newspaper put it, the Africans had given in to “the whites on [the Africans’] insistence that Jomo Kenyetta [sic], convicted and exiled on a charge of leading the Mau Mau terrorists in 1952, as one of their delegation.” Thurgood Marshall explained that, having compromised on Kenyatta, the Africans thought they needed Koinange as an African “elder statesman.” If the Africans gave in to objections to Koinange’s role, Marshall told the paper, “the people back home will accuse them of selling out and any agreement they make at the conference will be regarded with suspicion.”

Because of these developments, the Lancaster House Conference began without the Africans present, and without Thurgood Marshall.

Ultimately, the controversy over Koinange led the British to embrace Marshall. Macleod called him “a very distinguished lawyer and one whom we will be very glad to see at our Conference.” Koinange, in contrast, was regarded by the British as tainted by Mau Mau ties, and hence unacceptable.

[British Colonial Secretary Ian] Macleod set out the central problem underlying the constitutional talks: the issue of political enfranchisement of the majority without the sacrifice of minority rights. This dynamic created problems that “have to be solved before Kenya can come to independence.”

[Ultimately.] Macleod brokered a compromise. Each delegation would be entitled to one adviser in attendance at the sessions in Lancaster House. Other advisers, including Koinange, could be present in the building, but could not attend sessions. Because of this deal, the African delegation’s sole advisor to be present at the sessions would be Thurgood Marshall. Macleod was now pleased with Marshall’s presence, for without him as an alternative advisor to Koinange, the elements making this compromise possible would be missing.

The meetings at Lancaster House were not pleasant. As Marshall put it, “[e]verybody was at everybody’s throat.” There was a rough consensus, however, on what mattered most: the central issue of voting rights and representation in the legislature. British support for majority African voting rights meant that progress on that issue came sooner than participants had expected. With majority representation possible for Africans, another matter became central: safeguards, or a bill of rights, to protect the interests of the powerful who were soon to become an electoral minority.

For the African Elected Members, Ronald Ngala emphasized the importance of moving to democratic self governance soon. Delay, he suggested “would be disastrous.” Minority rights should be protected, but not through reserved seats for racial groups in the legislature, as was the case in 1960. Instead, “the best form of safeguard for all races in Kenya was a Bill of Rights enforced by an independent judiciary.” He announced that Marshall, “an expert on minorities and civil rights, had been retained by the African Constituency Elected Members and was drafting a proposed Bill of Civil Rights.” The Africans repeatedly emphasized that a bill of rights, rather than reserved seats in the legislature, was the ideal way to protect minority rights.

For their part, members of the all-white United Party stressed not voting rights, but broader education, and argued that full enfranchisement of Africans would have to wait for some time until more Africans had been educated.

Days of opening statements were accompanied by nights of behind-the-scenes negotiations.

An agreement leading to majority rule in Kenya put Marshall’s work front and center, for Marshall’s contribution to the conference was a draft Schedule of Rights. On February 2, 1960, Marshall submitted a memorandum on a draft Bill of Rights to the Committee on Safeguards at the Lancaster House Conference.
Marshall explained his objectives at a Committee on Safeguards meeting later that month. He said that “the intention of his paper . . . was to protect the rights of every individual in Kenya, rather than the rights of any particular minority groups.” The proposed Bill of Rights began with a preamble: “All persons are equal before the law and are entitled without any discrimination [sic] or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law.” Marshall thought that the preamble would “help the Courts when interpreting the particular provisions of the Bill by setting out general principles on which it would be based.”

Section I protected the rights of “Freedom of Religion, Speech, Press and Association.” Section II on “Personal Security” protected rights to life and liberty, rights against slavery, and the right to equal protection of the law. Section III guaranteed rights to “Education, Health and Welfare,” Section IV protected the “Right to Work,” and Section V protected voting rights. Sections I, II and V paralleled in many ways the U.S. Constitution, but Sections III and IV differed, at least from the U.S. text. Section III on “Education, Health and Welfare,” and Section IV on the “Right to Work,” protected affirmative rights to education, to employment, and to what now would be called a “living wage.” Section IV provided that “[e]veryone who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.” The right to work also protected the right “to form and to join trade unions.” Marshall said that his draft drew upon provisions from the U.S. Constitution, the Malayan Bill of Rights, and the Constitution of Nigeria. The language of the right to work clause does not parallel provisions of these constitutions, however, and instead tracks the language of the Universal Declaration of Human Rights.

The key section of the Bill of Rights was Section VI, on “Property Rights.” Here Marshall recommended that provisions of the Nigerian Constitution be adapted to conditions in Kenya, and his memo simply incorporated the Nigerian text. He relied on the Nigerian constitution for clauses protecting property rights, because these were “the best he had met.” This section provided, in part:

(1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force --

(a) requires the payment of adequate compensation therefor;
(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the Courts;
(c) gives to any party to proceedings in the Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

A “taking” could only be for public purposes, and this section of the Bill of Rights incorporated that idea through a reference to previously existing statutes. This proposal would ultimately be modified to include a right to take a dispute over a taking of property directly to the highest court in Kenya. Allowing the government to take property seemed to leave open the option of land reform, while the requirement of compensation was principally aimed to protect white minority settlers from government abuse.

The fairly straightforward language of this takings clause masked a deep underlying division at the Kenya Constitutional Conference, a fissure that ran through independence politics in the Colony. The most valuable land in Kenya had originally been tribal land, and now was exclusively in the hands of white settlers. These
farmers produced Kenya’s agricultural exports, and so were the principal tie with global markets. The settler community believed that the land belonged to them, and that their property rights must be protected. Many nationalists believed that a key objective of a postcolonial government must be land reform and resettlement. Land reform would redress a historical injustice of displacement of African peoples from their lands under colonialism. For the British, contemplating a continuing relationship with Kenya as part of the Commonwealth, and hoping to protect British citizens who had settled in Kenya, any resettlement scheme must not interfere with settler property rights, and so must be based on just compensation.

An argument broke out in committee: what “public purposes” could the government take land for? Some white settlers wanted this spelled out very clearly. But to do that would seem to require the Africans to develop a policy on land reform on the spot—something they had not contemplated, and were not in a position to do.

This issue would drive a wedge between groups at the conference, threatening the consensus Colonial Secretary Macleod had hoped for.

Ultimately the Committee considered the following language:

PROPERTY RIGHTS
Suggested Formula for Report

[p. 1] In regard to rights in property, the Conference considered that the Bill of Rights should include provision to the effect:

(i) that private rights in property of all kinds should be respected and should not be compulsorily acquired or extinguished without full and fair compensation;

(ii) that any question or dispute as to the property to be acquired or the compensation to be paid therefor should be open to judicial determination by the Courts at the instance of the person from whom the property is to be acquired, and that such

judicial determination should be subject to the normal avenues of judicial appeal in civil cases; and

(iii) that compulsory acquisition of property of any kind should be confined to circumstances in which such acquisition is required for the fulfilment of contractual or other legal obligations attaching to the owner of the property or circumstances in which such acquisition is justified in the general public interest.

[p. 2] The Conference did not however consider that compulsory acquisition of private rights in property would be “justified in the general public interest” if the purpose of the acquisition would be to make the property available to another person or persons for his or their private advantage unless the property is after acquisition to be so applied as to be of service to the public outweighing the resultant hardship to the dispossessed owner.

The Conference considered that the provisions in this regard in the Nigerian constitution would provide a convenient model for adaptation and modification to these requirements.

The nationalists indicated that they could agree to the first page of this language, but not to page two. . . Marshall insisted that “he is prepared to stake his reputation that the words on the second page add nothing to those on the first.”

Before work on the Kenyan Constitution was complete, a call from home brought Marshall back from Kenya. Marshall was in London on February 1, 1960, a historic day in the U.S. civil rights movement. That day, four African American freshmen at North Carolina Agricultural and Technical College held a sit-in at the segregated lunch counter at Woolworth’s in Greensboro, North Carolina. The simple protest soon expanded into a widespread sit-in movement. . . Thurgood Marshall returned to New York. . .

After Marshall departed, meetings continued in London on the question of safeguards. According to the U.S. Embassy in London, the
“subject [is] not all plain sailing.” . . . As Mboya saw it, some representatives at the conference “want the bill to contain safeguards on land which would exclude any future Government from expropriating land with or without compensation.” Mboya said, “We are not prepared to discuss this question. The bill already safeguards land and property owners within the due process of law.” . . .

In late February the conference ended, but with the major question of land and safeguards unresolved. . . . [But the] ideas in Marshall’s draft would be put to further use. In 1962, the principal nationalist party in Kenya, KANU, included Marshall’s Bill of Rights in their constitutional demands. . . .

Perhaps influenced by an economic crisis in the colony that . . . was precipitated by the move toward independence at the 1960 Lancaster House Conference, upon his release in 1961, Kenyatta would emphasize that property rights would be protected by the future African government, and that “[w]e will encourage investors in various projects to come to Kenya and carry on their business peacefully, in order to bring prosperity to this country.” In light of these developments, land and the compensation clauses, a focus of the 1960 meeting, were not a major issue in later constitutional negotiations, which would turn instead on regional versus national government, tribal politics, and federalism. The final 1963 independence constitution would contain very detailed clauses regarding confiscation of land for public purposes, along the lines that Marshall had supported in 1960. . . .

* * *

At the 1960 conference on the Kenya Constitution, the issue of greatest concern to Marshall—property rights and their impact on minority rights—was so volatile that it interfered with the Colonial Secretary’s efforts to bring the Conference to a successful conclusion. In the controversy among delegates, Marshall’s ideas played a key role. It is possible that his position on constitutional questions may have placed him in tension with some of the nationalists he was there to support, nevertheless, having Marshall as an advisor was of great political value for the nationalists. When pressed as to whether extending political power to them would abrogate the rights of the white minority, the nationalists could point to the fact that their constitutional advisor had devoted his career to the protection of minority rights. . . .

Marshall developed a deep affection for Jomo Kenyatta after his release in 1961. . . . [He] was an honored guest of Prime Minister Jomo Kenyatta at Kenya’s independence ceremonies in December 1963. After traveling to Kenya in 1978 to attend Kenyatta’s funeral, as Kenya was slipping into a dark period under President Daniel Arap Moi, Marshall nevertheless remarked that he was “happy to find that the Schedule of Rights that I drew for the Kenyan Government was working very well.” Within an American conception of constitutionalism, this comment may seem strange, for Marshall’s Bill of Rights and the constitution as a whole seemed powerless to constrain the Kenyatta and Moi governments from abusing the people of Kenya. . . .

Marshall remained proud of his work on the Kenya Constitution. It was better than the original U.S. Constitution had been, he thought. In the U.S. Constitution, the Bill of Rights was a set of amendments. In the Kenya Constitution, the Bill of Rights was there in the original.

As he described it, the Bill of Rights “gave the white citizen living in Kenya absolute protection, the strongest, I maintained, of any constitution in the world, spelled out in detail.” And in spite of the vast historical and material differences in the minority experience in Kenya and the United States, he would often emphasize a point he made in an oral history interview: “That, to my mind, is really working toward democracy, when you can give to the white man in Africa what you couldn’t give the black man in Mississippi. It’s good.” It may seem a puzzling irony that for this champion of African American rights, a focus in Kenya was protection of the rights of privileged white people. What was he doing? How did he think
about it?

If this was “working toward democracy,” as Marshall put it, it was a rather perverse form of democracy, playing out within the halls of the colonial power in Lancaster House. When the Kenya Independence Constitution was completed in 1963, the final act of ratification was not a vote of the people, but the signature of the Queen of England. These and other antidemocratic features of late-colonial politics make it easy to dismiss the entire story of constitutional politics in Kenya and other parts of Africa in the 1960s, at least if we focus only on conventional, contemporary measures of democratic politics. No wonder, among comparative constitutional scholars, sub-Saharan Africa is so often left out of the conversation.

If African constitutionalism was meaningless, why did it look so different from the perspective of the participants at the time? For groups in Kenya, constitutional debates seemed to be the only path away from nearly certain violence. . . . During the endless hours of negotiations in Kenya and in London, as armed conflict erupted in other parts of the continent, adversaries in Kenya reached instead for constitutional clauses. . . . Thurgood Marshall’s part in this, in 1960, was to play a role in a process that kept these adversaries at the table. In light of the bloody alternative, that, in itself, was an accomplishment. . . .

When Marshall wrote a Bill of Rights for Kenya, he built into it many robust, forward-looking rights, beyond those that the United States has ever seen in the area of economic rights, and more expansive than the rights in the final Kenya independence constitution would be. But on the question of equality and property—the paradox of entrenching rights gained through historic injustice—was he placing form over substance? . . . Perhaps in Kenya, “minority rights” was an abstract moniker that obscured the necessary trade-offs on the critical issue of land reform. . . .

But perhaps Marshall was also saying something about a substantive conception of democracy. One reading might be that in protecting the rights of whites, Marshall was embracing formal equality, and was abstracting his conception of equality from the material conditions on the ground in Kenya. Readers may find this idea incredulous. . . .

If it was a formal equality that he embraced, it could not have been based on a lack of awareness of its implications, an abstraction that might distance him from the moral consequences of the trade-offs of his theory. . . . The question to ask instead is why knowingly entrenching such rights was so important to him. “That, to my mind, is really working toward democracy,” he said, “when you can give to the white man in Africa what you couldn’t give the black man in Mississippi. It’s good.” . . .

Perhaps Marshall is showing us another way to think about it: that there is justice in the process. If constitutional negotiations were not successful, he warned before the Lancaster House conference, it could result in a “new uprising in Kenya that nobody can control—any more than they could control Mau Mau.” It was writing a constitution itself that kept these adversaries out of the trenches and kept the weapons of violence, at least for a time, out of their hands. Perhaps for Marshall, giving whites in Africa what he hadn’t been able to give blacks in Mississippi—writing a Bill of Rights with the full knowledge that it entrenched a historic injustice—kept democratic politics in motion. What resulted was not a fully formed, ideal democratic constitution, but was a path left open, a way to continue working toward democracy.

The 1962 Lancaster Conference and the subsequent meetings in Nairobi that resulted in the adoption of the Constitution were bedeviled by claims for recognition of minority interests. It was thus not a surprise that the 1963 self-government constitution recognized some form of Federalism-Majimbo, to provide opportunity for minority groups to participate in governance. The Constitution provided for the division of the country into seven regions, each with a regional assembly vested with legislative as well as executive powers. Specifically, regional executive powers were to be exercised by a committee of the Assembly known as the Finance and Establishment Committee, but the Assembly was at liberty to delegate specific duties to other committees.

The relationship between the centre and the regions was not clearly spelled out. While the regions had powers to legislate on matters of agriculture, archives, auction sales, primary and secondary education, housing, medical, and others, the centre could also do the same. Secondly, the centre had the powers to intervene in matters within the competence of the Regional Assembly. For example, under section 106(2) of the Constitution, the central government could “give directions to the regional assembly as appeared to it necessary or expedient” so as to ensure the compliance of the regional assembly. This section provided that:

The executive authority of a Region shall be so exercised as . . . (a) not to impede or prejudice the exercise of the executive authority of the Government of Kenya; and (b) to ensure compliance with any provision made by or under any Act of Parliament applying to that Region.

According to Ghai and McAuslan, the regions had very little autonomy if any. Their authority was precarious and could be impeded by the central government at any time. Secondly, the Majimbo provisions were rigid and complicated to the extent that they would have constrained economic planning and development. This was so because the country did not have any “conventions for co-operation” between government and other institutions. In the end, the authors observe that:

It is important to remember that the regional...
After gaining its independence in 1963, Kenya adopted a parliamentary system of government based on the Westminster model. In theory, the executive (consisting of a prime minister and a cabinet) was accountable to the legislature. In addition, the prime minister and the cabinet were supposed to implement public policy through a meritocratic, impartial, and politically neutral public (or civil) service. The Constitution of Kenya of 1963 (hereinafter, the Independence Constitution) made elaborate provisions to ensure the autonomy and neutrality of the public service. For example, it established an autonomous Public Service Commission (PSC) and put it in charge of recruitment, promotion, discipline, and dismissal. The Independence Constitution also imposed restrictions that ensured that members of the PSC would neither be political figures nor public officers, as such figures might be indebted for their appointment to a political leadership position. Members of the PSC also were given security of tenure.

However, Kenya quickly shifted to a presidential system of government following a series of constitutional amendments enacted in the 1960s, which consolidated power in the presidency by weakening the multiparty system, and gave the President control over critical governmental agencies such as the Public Service.

Until the promulgation of the new constitution in 2010, the executive consisted of the President, vice president, prime minister, two deputy prime ministers, and ministers of government. Together these officers made up the cabinet, whose function was “to aid and advise the president in the government of Kenya.” Further, the Independence Constitution (as amended) provided that the cabinet was “collectively responsible to the National Assembly for all things done by or under the authority of the president or the vice-president or any other minister in the execution of his office.” This provision of the constitution could be interpreted to mean that the President could only instruct the Public Service to implement policy decisions that had been made collectively and pursuant to deliberations of the cabinet.

In practice, however, the exercise of executive power was not constrained by the doctrine of collective responsibility precisely because this provision did not impose an obligation on the President to seek the aid and advice of the cabinet. For all intents and purposes, the President was an “executive with unshared responsibility for policy” and was perfectly entitled to bypass the authority of the cabinet. Indeed, collective responsibility did not imply collective power for decision making and merely obligated ministers to support and defend government policies, irrespective of whether they participated in their formulation. These provisions of the now-repealed Independence Constitution largely explain why successive presidents were accused of governing with so-called “kitchen cabinets.” Indeed, the President often ignored the cabinet entirely or made important decisions affecting the portfolios of ministers without involving or informing them.

The primary objective of the constitutional amendments of the 1960s was to ensure presidential control of the Public Service. One amendment empowered the President to appoint members of the PSC without reference to anyone. A subsequent amendment enhanced the President’s control of the Public Service by giving him the power to constitute and abolish offices in the Public Service, to make appointments to any such office, and to terminate any such appointment. The aggregate effect of these amendments made the Public Service totally subservient to the President.

Perhaps the most blatant illustration of the abuse of power by the Public Service is the behavior of the head of Public Service and secretary to the cabinet in relation to the 2007
general elections. The Commission of Inquiry into Post-Election Violence established that the National Security Intelligence Service prepared a survey at the direction of the head of Public Service on “the relative positions of the 3 presidential candidates in the polls.” Alarmingingly, the commission found that “correspondence about the survey appeared to be arranged outside the [national security intelligence] framework.” Additionally, the Commission established that “on a number of occasions the decision making and behaviour of senior police officers was influenced by factors outside the formal operating arrangements, chain of command and in direct conflict with mandated duties.” For example, the Commission found that the head of Public Service ordered the Administration Police to train a large number of its officers before polling day so that they could act as agents for the Party of National Unity (under whose banner President Kibaki was seeking reelection) during election polling. The Commission reports that the “training was conducted by a senior academic, and high ranking government officials including the hierarchy of the Administration Police.”

The Commission also found that the role of these officers “was to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed.” When the Commission sought an explanation from the head of the Public Service, he responded that the “deployment was approved by the Government and was commissioned for security reasons” and that the “reason for sending those people under plainclothes is that the area was very unfriendly.”

Another significant loophole in the institutional framework was that public servants were required to implement the instructions of the minister before registering any objections. These regulations even obliged public servants to implement verbal instructions of ministers, although they could then ask for written confirmation of these instructions.

The practical absence of security of tenure in the Public Service also means that public servants often have no choice but to do the bidding of their seniors, government ministers, and the President. Because they have the power to dismiss or suspend public servants, the President and his ministers are able to intimidate public servants.

In addition, public servants are often intimidated into silence.

B. Organization, Exercise, and Accountability of Legislative Power

At the time of independence, the legislature had two chambers, a House of Representatives and a Senate. The bicameral legislature was part of a federalist system, created by political parties representing minority ethnic groups that thought such a structure would protect their interests. However, the federal system was not sustained. Once the Kenya African National Union (KANU) party, which represented the interests of the majority ethnic groups, assumed power, it undermined and then abolished the federal system and bicameral legislature. On the one hand, the KANU government withheld funds from the regional governments, which soon lost their viability. Such machinations frustrated the Kenya African Democratic Union (KADU), the opposition party representing minority interests, which then decided to disband and join the ruling party in 1964. Kenya thus became a de facto one-party state. On the other hand, the bicameral legislature was terminated by a constitutional amendment in 1966 that merged the two chambers into a National Assembly. Today, the National Assembly consists of 210 elected members, twelve nominated members, and two ex officio members, namely the speaker of the assembly and the attorney general.
The independence of the legislature was further undermined by a series of constitutional amendments, the effect of which was to consolidate power in the presidency. Some of these amendments gave the President the power to suspend the proceedings of or dissolve the legislature. The legislature therefore had no control of its calendar, and the President could simply terminate its proceedings whenever he felt that the legislature was going off course. Additionally, the absence of political party competition enabled the President to control the appointment of the presiding officer, or speaker, of the legislature.

Therefore, the legislature became a mere appendage of the executive that was administered through the office of the President. For example, the bureaucracy of the legislature was part of the public service. Hence the public service recruited personnel for the legislature’s bureaucracy and regulated its terms and conditions of service. The committee system of this legislature was also rudimentary and it therefore had little capacity to hold the executive accountable. Nor did it have sufficient funds, as the Ministry of Finance ensured that it was starved of funds when determining its budget. In addition, legislators were poorly paid and depended on executive patronage for their political survival. For example, those who were deemed loyal were appointed as ministers, assistant ministers, or chairmen of public corporations. Further, the President often gave legislators cash handouts to enable them to meet the demands of their constituents. Due to these constraints, the legislature played only a minimal role in policy making and legislation, even if it provided a useful forum for the ventilation of issues of national concern.

C. Organization, Exercise, and Accountability of Judicial Power

Unlike the legislature, which has gained considerable autonomy from the executive, the judiciary remains vulnerable to manipulation. At the same time, the Chief Justice, who is the head of the judiciary, enjoys immense power. The powers of the President and the Chief Justice have been exercised in ways that undermine the institutional autonomy of the judiciary and the decisional independence of judicial officers, respectively. As a result, judicial officers are not only insecure in their positions, but may also become enablers of corruption, as the decision of the High Court in Republic v. Judicial Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti (Saitoti) demonstrates.

The constitutional amendments of the 1960s, which sought to enhance the powers of the President, weakened the judiciary. On the basis that an impartial and independent judiciary would be required if the rule of law were to thrive in Kenya, section 184 of the Independence Constitution established a Judicial Service Commission (JSC) to regulate matters such as judicial appointments and disciplinary actions. The membership of the JSC is comprised of the Chief Justice (as chairman), two judges nominated by the governor-general (acting in consultation with the Chief Justice), and two members of the PSC nominated by the governor-general acting in consultation with the chairman of the PSC. Under section 172 of this constitution, the Chief Justice is appointed by the governor-general, acting in accordance with the advice of the prime minister, while other judges were appointed by the governor-general acting in accordance with the advice of the JSC. Judges could only be removed from office for inability to perform functions or misbehavior, a determination made by an impartial tribunal appointed by the governor-general with the possibility of appeal to the Judicial Committee of the Privy Council in England, whose decision the governor-general would act upon. The JSC was also given the power to appoint other judicial officers, such as magistrates.

Following the constitutional amendments, the power to appoint the Chief Justice was transferred to the President, who was no longer required to consult with anyone. In addition, while the President was now required to consult the JSC in appointing judges, little if any consultation occurred in practice.
The system for appointing judges was open to abuse because it established no standards or criteria for vetting candidates. A task force established to examine the question of judicial reform noted that “[t]he process through which candidates for appointment are currently identified and vetted by the JSC is neither transparent, nor based on any publicly known or measurable criteria” and is certainly not competitive.

With respect to the removal of judges, section 62 of the Independence Constitution provided that the Chief Justice and other judges could be dismissed by the President—for inability to perform the functions of their office or for misbehavior—if an impartial tribunal recommended their removal. Unfortunately, it failed to establish due process mechanisms to ensure that the process of removal—including the exercise of the power to recommend the establishment of a tribunal—was transparent, impartial, and fair. In these circumstances, the threat of removal then operated as the proverbial sword of Damocles, in the sense that judicial officers never knew when it might strike.

In addition, it should be noted that the Chief Justice wielded immense power that could threaten the decisional independence of judges. For a long time, the judiciary was treated as a branch of the Public Service. This status changed in the early 1990s when the judiciary was unlinked from the Public Service and placed under the charge of the Chief Justice, thereby enhancing his power. As the head of the judiciary, the Chief Justice possessed wide-ranging but unregulated powers, including determining which judges heard what cases and where litigants could file their cases, supervising and disciplining judicial officers, allocating office space and housing, transporting judicial officers, transferring judicial officers from one geographic station to another, and initiating the process of removing judges. Because the exercise of these powers was not circumscribed, they could be abused to the detriment of judicial independence and accountability. Thus, judges confronted with these powers may have been inclined to do the bidding of the Chief Justice.

Thus in the case of the judiciary, the failure to regulate the powers of appointment of the President and the Chief Justice, and the administrative powers of the latter, may have aided corruption and undermined the legitimacy of the judiciary.

B. The Moi Era and the Politics of Ethnic Mobilization

From the day [Daniel Arap] Moi took leadership [in 1978],\(^1\) his ability to maneuver the ethnic equation to his benefit has not been in doubt. When he came to power, he proclaimed that he would follow the footsteps of his predecessor, Kenyatta, so as to gain support from the Kikuyu. Having come to power amidst international economic changes that reduced real income levels of Kenyans, the Moi clique did not have an economic base upon which to anchor the ethnic political domination. Almost immediately he embarked on the systematic replacement of Kikuyu in high positions, by members of his Kalenjin tribe. Like his predecessor, Moi did not tolerate any form of dissent to his authoritarian rule. . . .

C. The Return of Multi-Party Politics

At the beginning of the [1990s], the regime came under very severe opposition from the local NGO community, religious groups, and professionals. These groups agitated for the reintroduction of multi-party politics. The government insisted that Kenyans were not ready for multi-partyism because it was divisive and a plot to reinstate the Kikuyu hegemony since “all President Moi’s critics were Kikuyu.” Pressure mounted from internal as well as external forces. The international donor agencies exacerbated strain on the Moi regime to accommodate opposition groups. At the same, time the opposition politicians backed by a powerful civil society movement, the Law Society of Kenya (LSK) and church groups threatened mass action and complete disruption of public activity unless reform was undertaken. . . . As it became evident that the narrow one party political arena could not withstand the pressure, Moi hurriedly changed the Constitution to allow for multi-partyism in 1991.

It is the political developments after the amendment of the constitution that illustrates how ethnic equation became vulnerable to Moi’s manipulative tactics. Though preceded by political euphoria in the form of street demonstrations and civil society agitation, the change took the political groups by surprise. The ethnic groups unfavored by the Moi regime hurriedly and disjointedly formed political parties. . . .

It is important to note that prior to this development, the Moi regime had used all means possible to suppress people’s freedoms. The entire civil society and opposition groups could only think “negatively” of what they opposed. They were thus never oriented toward the devolution of concrete political agenda, other than ethnic allegiance, in support of which they could rally. . . .

D. Ethnic Cleansing: A Political Tactic?

What the post-independence history of Kenya has shown is that when a repressive and autocratic incumbency in a multi-ethnic state is threatened by reforms, it falls back to its ethnic sympathizers for political support. . . . Moi had no option but to fall back to his Kalenjin group for support. . . .

Attacks on non- Kalenjin residents in Rift Valley began in 1991 after declaration by Kalenjin politicians that people from other ethnic groups were not welcome there. The killings were done by chopping heads, limbs and genitals in a ritualistic fashion. The women were raped, their breasts cut and bellies opened up to determine if they were pregnant. The brutality with which these atrocities were conducted seems to suggest that a clear message of terror was being passed to the non- Kalenjin communities. The victims were supposed anticipate the horrific consequences that would befall them if Moi was removed from power. . . .

Thus, when the elections were held on December 1992, Moi won with a majority of seats. The outcome of the 1992 elections affirmed the primacy of ethnicity in Kenya’s politics. . . .

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\(^1\) Moi was a co-founder of KADU, largely composed of members of the Kalenjin tribe. When Kenya became independent, Kenya’s first president Jomo Kenyatta engineered a merger of KANU and KADU, on the theory that multi-party politics would be too dangerous in the context of divided ethnicities. In practice Kenya was a one-party state. Moi joined the cabinet, and became vice-president in in 1967. When Kenyatta died in 1978, Moi succeeded to the presidency.]
I. KENYA’S CONSTITUTION-WRITING PROCESS

Agitation for constitutional reform in Kenya began in 1990-1991 and was accompanied by calls for multiparty elections, presidential term limits, and expanded political freedom under the highly repressive Moi regime. The primary impetus for reform came from elites in Kenya’s civil society, including religious and human rights groups, which mobilized opposition political parties and their supporters and which helped create a popular movement. In 1991 Moi acceded to international and domestic pressure and permitted a constitutional amendment reforming the presidential election process and reinstating a multiparty political structure. These reforms, however, failed to bring opposition leaders the gains they had anticipated, in part due to continued structural disadvantages in the political system.

By 1994, democratic agitation in Kenya had become linked with the call for a new constitution: “Constitution-making became the sole vehicle through which democratization, promotion and protection of human rights and social justice were robustly agitated.” This agitation led to additional moderate constitutional reforms in 1997 and to the enactment of the Constitution of Kenya Review Act (“Review Act”), which was amended in 2001 to provide for a comprehensive review of the constitution and the option to draft a new document.

B. The Review Act

The Review Act outlined a three-step constitutional review process for Kenya: (1) public consultation and initial drafting by a small review commission, (2) revisions to the draft by a national convention, and (3) ratification by Parliament. Strikingly, the Act seemed consistent with many of the preconditions that scholars have argued are necessary for successful constitution-writing: it included several measures to ensure that the document was “home-grown” and would create “a sense of ownership,” and it included checks to ensure that “the government [w]ould neither control nor unduly influence” the process. In particular, the Act emphasized consultation with ordinary Kenyans and extensive deliberation among drafters, and it attempted to sidestep interference in the process by the President or by Parliament.

First, the Act created a Review Commission that was empowered to “collect and collate the views of the people of Kenya” on proposals to amend or rewrite the constitution, and to draft a bill to alter the constitution for presentation to Parliament. The Act required the Commission to visit every constituency in Kenya to collect citizens’ views and to disseminate the draft constitution widely among the public.

Next, the Act required the Commission to convene a National Constitutional Conference for “discussion, debate, amendment and adoption” of the Commission report and draft constitution. This National Conference consisted of 629 delegates, including the commissioners as nonvoting members, every MP, and representatives from each district and political party in Kenya, as well as from religious, professional, and other civil organizations. The Act mandated that the National Conference agree to the draft constitution by “consensus” and required a two-thirds majority for amendments. Contentious amendments, which were neither supported by two-thirds of delegates nor opposed by a third of delegates or more, could be submitted to a national referendum. Finally, under the Act, the Commission had to submit the revised draft to Parliament, which could accept or reject the proposed constitution, without amendment, in
an up-or-down vote.

C. The Constitutional Review Process

1. The 2002 Elections and the Review Process

Kenya’s review process began in late 2001 and the Review Commission completed the Act’s first stage of information-gathering, public education, and initial drafting by mid-2002. The Commission planned to start the second stage of the process, the National Conference, in October 2002, and to have the entire process completed before December 2002 so that a new constitution could be in place before Kenya’s presidential and parliamentary elections. However, the process’s interaction with Kenya’s December 2002 elections fundamentally altered its terms.

President Moi dealt the first blow to the review process by dissolving Parliament in October 2002 and ending the terms of Kenya’s MPs (a power he had as President under the existing constitution). This eliminated any possibility that the review process would be completed before the December elections . . . Moi, a fierce opponent of constitutional reform, had ensured that the 2002 elections would take place under the old constitution.

The second blow to the review process came from the National Rainbow Coalition (NARC), the opposition coalition to the ruling Kenya African National Union (KANU) during the 2002 elections. In previous multiparty elections, opposition to KANU had fragmented. NARC thus chose to solidify its alliance by drafting a “Memorandum of Understanding” that promised key leaders new positions created by the as-yet-unratified draft constitution. In particular, opposition leader Raila Odinga, whose support was particularly critical for NARC’s electoral survival, agreed to join NARC and to throw his weight behind coalition leader Mwai Kibaki rather than to vie independently for the presidency, in exchange for a promise that he would become Prime Minister when the new constitution creating this position was ratified. NARC announced this agreement publicly, and it was widely discussed in the media. At the same time, Kibaki promised to have a new constitution in place within a hundred days of assuming power.

The Memorandum of Understanding succeeded in keeping NARC unified before the elections and thereby facilitated Kenya’s peaceful democratic transition from KANU rule. Bucking expectations, NARC won control of Parliament from KANU in a free and fair election, and Kibaki defeated Moi’s chosen successor to win the presidency.

Despite its role in Kenya’s political transition, however, the Memorandum of Understanding also helped make the subsequent Constitutional Conference highly divisive and acrimonious, prompting ex post alterations to the constitutional review process by Parliament and leading to a number of competing drafts. The Memorandum of Understanding had allowed Kibaki to ride the coattails of the idea of the new constitution without facing divisive debates about its content. When constitutional negotiations recommenced after the election, however, such debates quickly emerged.

2. The Constitutional Conference at Bomas

Almost immediately after his election in late December 2002, Kibaki pushed back his promise of a new constitution to June 2003. The second stage of the Review Act, the Constitutional Conference, began in late April 2003. The Conference took place at the Bomas of Kenya theater facility and was widely referred to simply as “Bomas.” Talks quickly became acrimonious, and the Conference ultimately required three rounds of negotiations ending in March 2004. The Bomas process did produce a draft constitution, but it also led to lawsuits, the withdrawal of the Kibaki government from negotiations, parliamentary bills to alter both the Act and the existing constitution, and alternative drafts. Despite almost a year of negotiations, the Bomas draft was never enacted by Parliament or presented to the public for a referendum.

Three major issues dominated Bomas: (1)
the structure of the executive (whether there should be a Prime Minister in addition to the President, and if so, what powers the position should enjoy); (2) devolution (whether Kenya should have a federal system with significant lawmaking powers at the local level); and (3) Khadis courts (whether Kenya should codify separate civil courts for Muslims). However, the issue of executive power was by far the most publicized issue and the most divisive among delegates.

During the Bomas negotiations, Odinga led a coalition that called for a powerful executive Prime Minister, while President Kibaki’s supporters strongly opposed an executive Prime Minister, arguing that executive power should be concentrated and that checks and balances through other branches could be used to balance the President’s power. The Bomas debate made explicit reference to the coalition’s pre-election agreement and identified Odinga as the would-be Prime Minister.

...[W]hen a final draft was] brought to a full vote, Bomas delegates ... voted for a constitution with a strong Prime Minister (as well as devolution of political powers). President Kibaki’s allies proceeded to walk out of Bomas, and the following day the Kibaki government announced its withdrawal altogether from the National Conference.

The remaining members of the Conference continued their work without the government or its representatives and subsequently passed a draft constitution—which included a strong Prime Minister—to be submitted to Parliament under the Review Act.

3. Revisions to the Draft

With the Bomas Conference completed, parliamentary proponents and opponents of the draft constitution entered bitter negotiations over how to move forward. Complicating matters, just as Bomas was completing its work, Kenya’s High Court issued a ruling that any new constitution ultimately needed to be ratified through a national referendum. Parliament amended the Review Act in response to the High Court’s ruling, adding a provision for a referendum subsequent to Parliament’s ratification of the draft constitution. However, Kibaki’s supporters further demanded that Parliament amend the Act to enable itself to alter the Bomas draft before presenting it to the public, instead of having to accept or reject the draft in an up-or-down vote. . . .

With new power to make amendments, MPs participated in a series of retreats to rework the Bomas draft in light of the ruling government’s concerns, particularly over the scope of executive power. Odinga’s followers and the opposition party boycotted these retreats, accusing the government of “mutilating” the Bomas draft. However, the retreats went on, and the drafters finalized a revised constitution in July 2005, promising a referendum for November. The new draft mandated, among other changes, a Prime Minister who was appointed by and reported to the President. Odinga’s followers and KANU opposed the new draft, arguing that it failed to reflect the will of the people regarding essential reforms and that it ignored the “views expressed through the [Commission] and . . . Bomas . . . for a Parliamentary system of government and a devolved participatory form of local government.”

4. The Referendum

The lead-up to the referendum was marked by a moderate level of violence, including riots in Western Kenya, an area dominated by Odinga’s Luo ethnic group. The Kibaki government also openly made promises of patronage and resources in return for electoral support—offering pay raises to civil servants and distributing land titles and food relief in exchange for support. Kibaki also threatened to fire cabinet members and civil servants who did not support the draft constitution, and he used a televised address to encourage passage of the constitution, without providing the opposition with a similar opportunity to address the country. Odinga and other opposition politicians, for their part, stoked ethnic tensions and at times misrepresented the content of the
Despite concerns that violence would escalate in anticipation of the polls, the days immediately preceding the elections were calm. But in what was perhaps more a contest along ethnic lines and a referendum on Kibaki’s leadership than a vote on the draft’s content, approximately 57% of voters rejected the proposed constitution. After over ten years of public agitation, Kenya’s efforts to write a new constitution had failed.

II. LESSONS LEARNED

A. Lesson 1: The Benefits and Costs of a Participatory Review Process

... Many commentators have ... urged best practice guidelines that support participation in generalized terms, urging countries to develop a process that “constructively engages the majority of the population” and that empowers ordinary people “to make effective contributions,” without specifying why or how to structure that participation. ...

However, those who argue that highly participatory constitutional review processes are prerequisites to legitimacy face some embarrassing counterexamples. Perhaps most notably, Japan’s constitution has enjoyed long-term legitimacy despite the fact that it was written by approximately two dozen Americans during Japan’s postwar occupation, with relatively minor revisions made by Japanese government officials and virtually no public consultation. Likewise, while there is some empirical evidence that participation can deter conflict, the correlation is far from perfect. More seriously, highly participatory processes have also had delegitimizing effects in some countries. For example, Chad’s participatory constitutional conference in 1996 increased Francophone-Arab tensions, due in part to the slowness of deliberations. Similarly, Nicaragua’s 1987 constitutional review process led to fairness concerns regarding the methods of canvassing local opinion. ...

Perhaps most importantly, Kenya’s history made consultation important to legitimacy in a way that it may not be in countries where constitutionalism is not associated with a popular democratic reform movement. Kenya’s existing constitution is strongly associated with colonialism and political oppression under the Kenyatta and Moi governments, and the reform movement emphasized the need for “a home-made and home-grown constitution.” Kenya’s constitutional reform movement was itself an outgrowth of a broader democratization movement, and the rhetoric of participation thus played an essential part in the debate over the draft constitution. ...

While Kenya’s participatory procedures were important in legitimizing the process and consolidating democracy, they also generated severe costs in terms of expense, time, and the opportunity cost of other legislative initiatives. Outreach, education, and negotiation among delegates took time; the review process dominated Kenya’s attention and the legislative calendar for over three years. ...

Kenya’s review process also ... was ... quite divisive. It was accompanied by moderate violence and led to ethnic pandering and polarization. ...

The lesson, then, is mixed. Broad participation lent legitimacy to Kenya’s review process and helped strengthen Kenya’s democratic institutions. However, participation was not an unconditional good: it was expensive, time-consuming, and brought with it risks of violence and corruption. On balance, Kenya’s highly participatory process was likely “worth” the cost. ...

B. Lesson 2: The Risk of Capture

Kenya’s experience also powerfully illustrates how elites can revise a constitutional review process ex post, depending on whether the drafting has been to their advantage. ...

Kenya’s constitutional reformers knew that Parliament and the President would not necessarily be committed to the success of the review process, and the Review Act consciously minimized their role: “When Kenyans spoke of a people-driven constitution, it meant they did
not trust Parliament to give them a document that captures their interests, needs and aspirations.” However, when the carefully designed checks on the ruling party’s influence ran against its interests, the party simply changed the rules. Thus, Parliament and Kibaki altered the review process mid-stream in the face of proposed reforms that the government saw as potentially weakening its power. The Bomas draft was never voted upon by Parliament or by the public; rather, Parliament put forward its own draft for the national referendum that deleted or altered those aspects of the Bomas draft that it opposed. . . .

C. Lesson 3: The Need for a Veil of Ignorance

Turning to more broadly applicable lessons, Kenya’s experience also illustrates that there is a severe risk of self-dealing when it is clear how individual parties will benefit from the new constitution, and it highlights the importance of designing processes to promote a “veil of ignorance.” . . .

Most vividly, NARC’s Memorandum of Understanding, which promised Odinga the future Prime Minister seat, played a prominent role in constitutional negotiations. The establishment of the Prime Minister position was debated explicitly in the context of support for or opposition to Odinga, rather than on its merits. . . .

More generally, Kenya’s MPs and ruling government eventually balked at the Bomas draft in part because they knew that it would weaken their own powers, not the powers of uncertain future parties. It is likely not coincidental that Kibaki’s supporters were the strongest proponents of a powerful President in the new constitution. . . .

Kenya’s lack of a veil of ignorance thus encouraged self-dealing among elites rather than support for good institutions. It also made compromise difficult, as participants pursued personal interest rather than the common good. . . .

. . . Kenya’s experience . . . highlights the value of creating procedural designs that try to approximate a veil of ignorance to the extent possible. For example, rules limiting drafters’ eligibility for future public office could help, as would attempts to time drafting around periods of political uncertainty, such as near the end of an election cycle.

D. Lesson 4: Mitigating Ethnic Tensions

Kenya’s experience also highlights a general risk in multiethnic societies that constitutional review could lead to violence or ethnic pandering, undermining the legitimacy of the final product. . . .

. . . In the Kenyan context, ethnic divisions are sharp, and political conflict has engendered ethnic violence in the past. While Kenya’s constitution-drafting process did not lead to large-scale ethnic clashes, the process did increase ethnic tensions throughout the negotiations. . . .

E. Lesson 5: The Need for a Process That Produces a Coherent Design

Another general lesson from Kenya’s experience is that process choices, such as the number of participants and the structure of the drafting process, can affect the coherence of the final product. Kenya’s constitution-writing process, with its multiple drafting stages and myriad participants, did not lend itself to creating a set of institutions carefully designed to protect clearly articulated values. . . .

The end result did lack coherence, with many of the draft constitution’s elements in tension with each other. For example, . . . the draft provisions on executive power, which created a weak Prime Minister and maintained a strong President, blurred the lines of executive authority while failing to check the power of the President in any meaningful way. The initial constitutional review process was motivated in large part by a desire to curb excessive presidential power. While the proper scope of presidential power was highly contested during the review process, the draft constitution’s compromise was no compromise at all. The draft created a Prime Minister with no power independent of the President. While the draft
assumed that the Prime Minister would represent the majority or coalition party in Parliament, it also permitted the President to appoint a Prime Minister of his choice if Parliament rejected two of his nominees. Furthermore, even if the Prime Minister were supported by the majority in Parliament, he or she would be appointed by the President, be accountable to the President, act “under the general direction of the President,” and be removable by the President. Thus, the draft created the appearance, but not the reality, of diffuse executive power, confusing lines of authority without bringing any concomitant reduction in presidential power.

F. Lesson 6: The Dynamism of Political Environments

Kenya’s experience also shows that the political environment in a country can sometimes change quickly and dramatically, altering the power dynamics among elites and shifting support for and opposition to meaningful constitutional review. A final lesson, then, is that a review process should aim to create generally applicable incentives, rather than to mitigate the influence of a particular person, party, or interest group.

III. DESIGNING CONSTITUTIONAL REVIEW PROCEDURES

This Part therefore uses Kenya as an example of how reformers might begin thinking about the application of Part II’s lessons in a particular country context. It does not provide a forward-looking proposal for Kenya--Kenya’s process is currently too far along to justify restarting from scratch. Rather, this Part applies the six general lessons outlined in Part II to the specific political context in Kenya and offers detailed recommendations for how Kenya’s process could have been more effectively designed.

A. A Limited Number of Drafters with Broad Consultation Duties

Kenya’s Review Act essentially tried to ensure that the constitutional drafters represented every aspect of Kenyan society, and it sought broad public input both directly and through national delegates. While this highly participatory model made the process more “democratic” and helped promote legitimacy, the use of hundreds of delegates and two sets of constitution-drafting bodies (both a Review Commission and a National Conference) was both cumbersome and costly: it undermined coherence in the final document, ratcheted up expenses, weakened lines of accountability, and led to clashes among delegates who essentially replicated national political lines.

A small set of drafters would provide a variety of benefits. In addition to keeping down costs and promoting coherence, a small drafting team would promote accountability because the decision-makers would be clearly identifiable and likely to become significant public figures. Furthermore, the desire to have a “representative” commission does not itself justify using a large drafting committee. Even with hundreds of delegates, it is not possible for a committee to truly represent every aspect of a society.

One way to ensure that the commission actually took public input into account would be to require that it actively seek input, record suggestions, and give reasons for why particular suggestions were accepted or rejected. The commissioners should also be required to seek input from the President and MPs, as well as the leaders of Kenya’s political parties.

Because open-ended sessions are likely to lead to highly generalized conversations, the commissioners might want to frame the discussion in terms of some of the options the commission is considering, with reference to other nations’ constitutions. For example, a commissioner might explain that the commission is considering creating a new Prime Minister position and might point out that France has a strong executive Prime Minister, while Tanzania has a weak Prime Minister, and Ghana does not have a Prime Minister at all.

B. Including Nonnationals as Delegates and Excluding National Politicians
One relatively straightforward procedure for promoting a veil of ignorance and discouraging self-interested behavior among drafters is to prohibit drafters from seeking political office within five years after the new constitution’s ratification. This option substantially dampens the opportunities for drafters to personally gain from particular institutional choices, although they would still have opportunities to promote a political party or ethnic group, among other interests. One large concern, however, is the opportunity for ex post revisions to such a rule. As Kenya’s experience illustrates, carefully negotiated rules can be quickly abandoned, and individuals have a strong incentive to maintain options for political power.

... The most serious risk in using nonnationals as drafters is that they will not be familiar with local culture and politics and will therefore impose inappropriate political institutions based on their own experiences. Furthermore, because outside drafters will not live under the constitution they are drafting, they may not fully internalize the costs of their decisions, making it more likely that ideological and other commitments will trump political necessities.

However, several countries with outside drafters who were attentive to local conditions have been successful; postwar Japan and Germany are two such examples. In Japan, the U.S. drafters were familiar with Japan’s existing constitution, and they created institutions, such as a parliamentary system, that were alien to the U.S. political system but more consistent with Japan’s existing institutions. Thus, countries may benefit from outside drafters who are able to evaluate local conditions and institutional needs without the bias of opportunities for personal gain.

Using a mix of national and nonnational drafters would bring many of the benefits of outside drafters with fewer costs. On the one hand, having a majority of national drafters would ensure that the process was seen as “home-grown,” would bring important expertise about unique national needs and challenges, and would avoid troubling accusations of neocolonialism. On the other hand, outside drafters might offer a useful counterbalance to the influence of national drafters; they would be less likely to be politically connected to local interest groups and less likely to be self-interested or bought off, for the simple reason that they could not hold national political office and would be unlikely to be members of national ethnic groups or parties.

Employing nonnationals would also allow for outside expertise in constitution-writing, which is an important consideration for a developing country like Kenya with a small professional class.

To be effective, these outsiders should ideally be known and respected within the country drafting the constitution, and at least some of them should be from the same general region, although not from a neighboring state. For example, South African judges and political leaders who participated in South Africa’s constitutional review process in the 1990s would likely have been respected and viewed as neutral in Kenya. Today, Kofi Annan would be another good candidate, as would, perhaps, Bill Clinton.

Kenya’s experience also suggests that no current MPs or other national politicians (including members of the opposition) should be permitted to serve as constitutional drafters--their interests are too closely intertwined with the institutional choices being made.

C. Adopting the New Constitution After the General Election

The statute or regulation enacting the review process should also require that the new constitution only come into force after a general election. This is a simple way to further promote a veil of ignorance during the drafting process because politicians and other interest groups will not know exactly how they will benefit from the new provisions. For example, in Kenya, Odinga would not have known whether he would become Prime Minister if he had had to wait until the next round of elections for the
would need other checks on the government’s ability to select drafters. For example, religious leaders might be a good option in a country like Kenya where churches have traditionally called for checks on abusive government power and where religious leaders enjoy a great deal of respect and moral legitimacy. This would of course be unacceptable under the United States’ model of separation of church and state, but in countries with different traditions it may both be legitimizing and offer a valuable check on government power.

E. The Value of a Referendum

Finally, Kenya’s experience shows both the value and the risk of a referendum. First, given that the public will not necessarily support any document put forward, even if it is eager for a new constitution, a referendum can offer a final check on elite capture by ensuring that the document is palatable to a majority of citizens. Kenya’s referendum also helped consolidate democratic institutions and promote the rule of law, even though it left Kenyans without a new constitution. Referenda do, however, have their own risks. In addition to their expense, in transitional democracies like Kenya they create the danger of corruption and violence, particularly along ethnic lines. The following process might help bring the benefits of a referendum while mitigating concerns.

In an ethnically divided country like Kenya, the referendum should not operate by a simply majority vote; rather, there should be regional requirements as a way to reduce the risk of ethnic tensions. In this way, the document would have to appeal not only to a majority of voters but also to a relatively wide swath of the country. Because Kenya’s ethnic groups are regionally based, region is a good proxy for ethnicity, in addition to being more administratively manageable. In countries where region and ethnicity are not correlated, it may be necessary to include more direct group voting. It may also be important to account for the presence or absence of a federalist tradition.

How . . . [did] legislators exercise[] their powers [after the return of multi-party politics in the 1990s?] In the recent past, the legislature has arguably been unduly influenced by special interest groups in exercising its lawmaking power, as the enactment of the Tobacco Control Act of 2007 illustrates. Furthermore, the legislature has not only enacted unconstitutional laws (such as the Constituency Development Fund Act), but has also failed to amend laws that have been declared unconstitutional (such as the Kenya Roads Board Act). These examples demonstrate that the legislature is not only prone to the undue influence of special interest groups, but may also be abusing its collective power.

While it is to be expected that different interest groups will legitimately lobby the legislature to enact favorable policies and laws, there should be mechanisms to ensure that interest groups seeking specific legislative outcomes do not subvert the public interest. Such mechanisms include those that regulate lobbying, conflicts of interest, misconduct, and even corruption in the legislature. In Kenya, an attempt has been made to establish such mechanisms, as exemplified by the National Assembly (Powers and Privileges) Act. The primary purpose of the Act is to codify the convention of parliamentary privilege, which guarantees legislators the independence and freedom of speech necessary to effectively perform their duties of “honest, unbiased and impartial examination and inquiry and criticism.” . . .

In general, the conduct of legislators outside the debating chamber or the precincts of the legislature is not regulated. In particular, the absence of proper regulation has meant that legislators can serve on committees “even though their membership would entail a conflict of interest—either because they face allegations of corruption, are allegedly allied to corruption cartels, or have commercial interests that are overseen by these committees.” . . . Since the late 1990s, the Kenyan government has attempted to regulate the sale, marketing, and consumption of tobacco products, with the aim of implementing the World Health Organization’s Framework Convention on Tobacco Control. However, tobacco companies saw these attempts as a threat to the profitability of their businesses and therefore lobbied against the enactment of any adverse legislation. A bill introduced in the legislature in 1999 did not make any progress until 2004, thanks in large part to the resistance of the tobacco lobby. When the bill was reintroduced in the legislature in 2004, the tobacco lobby organized a retreat for more than forty legislators at which it prevailed upon them to make certain desired changes to the bill. Reports revealed that the legislators were each flown to the beach resort that served as the venue for this meeting, accommodated, and entertained at the expense of the tobacco lobby. While the tobacco lobby was perfectly entitled to seek favorable legislation, this retreat arguably undermined the ability of the legislators to act free of undue influence. In addition, the retreat privileged the interests of the tobacco lobby at the expense of other groups in society who do not have equivalent resources to entertain legislators. Further, it undermined public confidence in the legislature.

The Kenyan public perceives the legislature as one of the most corrupt public institutions. Indeed, there is a growing perception that legislators do not serve the public interest and are only motivated by selfish interests. There are even allegations that legislators have taken bribes from wealthy politicians to influence the deliberations and decisions of the legislature. Therefore, it does not seem that salary increases have necessarily enhanced the independence of legislators. Additionally, the legislature has been the recipient of capacity-building initiatives (including enhancing legislators’ understanding of technical issues) that have led to lobbying. For example, the legislature has established an informal forum, labeled the Parliamentary Initiatives Network, to facilitate its interactions with various nongovernmental organizations that support the work of the legislature. Unfortunately, the criteria for membership of, or the rules of engagement in, this forum are not clear; the result is that it may be perceived as an instrument for special interest groups to promote their agenda in the legislature.
[After the referendum failed, further unsuccessful efforts were made to draft a new constitution. In the meantime, President Kibaki ran for reelection in 2007. His main opponent was Raila Odinga, of the Orange Democratic Movement (ODM). Initial results showed Odinga winning; “late returns” gave Kibaki a decisive victory, but one widely regarded as engineered by Kibaki with the complicity of Kenya’s electoral commission. Ethnic violence broke out, with many deaths, and hundreds of thousands of Kenyans being displaced in what looked like ethnic cleansing. About a month after this article was published, a group of African mediators, led by former UN Secretary General Kofi Annan, helped the parties come to an agreement that made Odinga Prime Minister while recognizing Kibaki’s victory. Cabinet positions were divided between the two parties.]

Kenyans were coyly cynical about their political establishment long before the violence following the presidential election last weekend.

One wisecrack doing the rounds since last year goes “there is more chance of a Luo becoming president of America than president of this country” - a reference to Barack Obama, whose father comes from the same ethnic Luo region in western Kenya as Raila Odinga, the challenger to the incumbent president, Mwai Kibaki, who is from the Kikuyu tribe.

While Kenya is often portrayed as a business-oriented tourist haven in a troubled region, more than 350 people have been killed in the past week since Kenya’s electoral commission announced that Kibaki somehow pulled back a million vote deficit to win the election.

Street violence, church massacres and foiled demonstrations followed, suggesting that Kenya risks political meltdown along ethnic-tribal lines.

After a US diplomatic intervention, Kibaki said yesterday that he is ready to form a government of national unity to end the crisis that followed his disputed election. The president also said he may accept opposition demands for a fresh election, but only by court order. However, on the streets the fighting continues.

While Kenya’s tribal divisions are a proximate cause, they are not the underlying source of the violence. Secondly, Kenya’s stability has always been tenuous, and the battle lines have been drawn at least since Kibaki was soundly defeated by Odinga’s Orange Democratic Movement (ODM) in a 2005 referendum on Kenya’s constitution.

Underlying the post-election violence is endemic political corruption and flawed governance by Kenya’s political elites. On acceding to power in the 2002 election, Kibaki’s National Alliance Rainbow Coalition (NARC) was dismantled, and Kibaki concentrated power - and access to wealth and patronage - in his ‘Mount Kenya Mafia’.

This cabal is drawn down from the foothills of Africa’s second highest mountain, which rises in the Kikuyu-dominated region north of the capital, Nairobi. Odinga was a key member of Kibaki’s 2002 team, but was dropped in the post-election shake-up, leaving the two men as bitter personal rivals.

Kibaki’s successes in government - consistent 6 per cent annual economic growth after years of stagnation, the introduction of universal free primary education, revitalising tourism - all paled in voters’ minds compared with the prospect of another opaque, Kikuyu-dominated government, this time on the back of an almost-certainly rigged election.

Many media reports in the past week painted too rosy a picture of Kenya’s historical stability or relative prosperity vis-a-vis neighbouring states.

To compare: Sudan has seen war for all except 11 years since independence in 1956, with more than two million dead.

Somalia remains a failed state, too lawless for most aid agencies to work in. The Congo endured the most destructive war since World War II - measured in absolute human losses - with five million dead between 1998 and 2007.

Northern Uganda was, until last year, ravaged by a millenarian cult known as the Lord’s Resistance Army, best known for abducting children as soldiers and sex slaves, and cutting
off the tongues, lips and ears of villagers who resisted.

Kenya has not imploded to such an extent, but election-time clashes in 1992 and 1997 killed 2,000 people. A similar number died after a failed 1982 coup attempt. Nairobi - nicknamed Nairobibery - is a dangerous city, with high car-jacking rates and violent armed break-ins.

Kenya’s northern and eastern borderlands with Ethiopia and Somalia are remote bandit territory, with cheap small arms giving herders, nomads and smugglers the means to hijack and rob at will. Road travel is undertaken with extreme caution and rarely without armed escort.

Despite $16 billion in foreign aid since independence, and the recent economic growth, more than half of Kenyans live in poverty. In 2006, more than three million Kenyans in arid northern and eastern areas were threatened by a severe drought and ensuing food shortage, and ethnic groups in these regions are as poor and marginalised as any in Africa.

All too often in Africa, politics gets played as a zero-sum game. The state is viewed as a cash cow to be captured and retained at all costs - as played out in numerous civil wars in recent years. The phenomenon of power-grabs by particular ethnic groups is not new and, when combined with institutional graft and cronyism, it has made for an explosive dynamic. Kenya has not bucked that trend.

The ODM election sloganeering went ‘Now it’s our turn to eat’. Luo, Luhya and Kalenjin ethnic groups saw the elections as a means to take their turn on the podium, ‘to eat’ from the lavish table at the expense of deposed rivals, perpetuating the dynamic that saw party and candidate votes coalesce on ethnic lines.

Rewards must be doled out to one’s colleagues and allies, whether this transpires after an election win or triumph in a violent civil war. As with Kenya last week, even in an ostensibly viable democracy, this dynamic can result in violence and conflict.

Unlike nearby states such as Uganda and Ethiopia, official aid is not a major factor in Kenya’s economy. Instead, it is buttressed by lucrative tourism revenues, and the tax collection system works relatively well.

However, there has not been sufficient pressure on Nairobi to curb corruption, and many remain content with the facade of stability - now shown to be hollow - in a regional hub for Barclays, British American Tobacco, Diageo and Unilever.

Nairobi also provides a regional base camp for the field operations of UN agencies and NGOs in Sudan, Somalia, Uganda and the Congo. With Chinese investment growing, and much Kenyan banking now done in Dubai, western influence is limited, although Kenya remains a key US ally, dating to at least the 1998 embassy bombings in Nairobi and Dar-es-Salaam.

Other than a highly unlikely military intervention, perhaps the most effective western gambit would be to stifle tourism, making leaders establish a mental link between corrupt government and empty hotels.

Interestingly, a blanket warning by the British Foreign and Commonwealth Office advising against travel to Kenya was followed hours later by conciliatory noises from both Kibaki and Odinga.

Since Kibaki indicated some willingness to talk late last week, some form of interim national unity government may be sorted out, perhaps paving the way for either a decisive recount or a rerun of the presidential election.

However, allegations of genocide and ethnic cleansing by both sides last week could threaten to become a self-fulfilling prophecy.

With mob footsoldiers attuned to the words of their political leaders, language can spur more attacks and create an uncontrollable situation, irrespective of what political dialogue can be arranged in the coming days.
On 4 August 2010, Kenyans voted overwhelmingly in a national referendum to adopt a new constitution. The culmination of a process that began two-and-a-half years earlier when UN secretary-general Kofi Annan brokered a resolution to the violent conflict that followed the disputed December 2007 general election, the passage of the constitution marked a watershed for the East African country of 39 million people. By reducing the power of the executive, devolving authority to subnational units, and formally guaranteeing a host of social and economic rights to women, minorities, and marginalized communities, the constitution has the potential to transform Kenyan politics—not least by diminishing the role that ethnicity plays in the country’s affairs.

The referendum drew about 70 percent of the country’s twelve-million registered voters. Thanks to the support of most of the Kenyan political elite—including President Mwai Kibaki and Prime Minister Raila Odinga, the bitter rivals from the 2007 presidential race—the constitution passed with 68 percent of the vote. In marked contrast to the violence and disorder that broke out the last time that Kenyans went to the polls, the referendum took place in an atmosphere of remarkable calm. In Rift Valley Province, where postelection violence had been particularly severe (and where opposition to the proposed constitution ran the highest), the outcome was accepted without major incident. The “No” coalition, led most visibly by higher-education minister and ethnic-Kalenjin politician William Ruto, conceded defeat and encouraged opponents of the new constitution to accept the results. On August 27, three weeks after the official announcement of the referendum outcome, President Kibaki officially signed the new constitution into law, marking the beginning of the transition to a new constitutional order for Kenya.

Set against the backdrop of both the bloody postelection strife that cost roughly a thousand lives between late December 2007 and February 2008 and the decades-long effort to bring about constitutional reform in the country, the peaceful promulgation of the new—and decidedly liberal and forward-looking—constitution marks a defining moment in Kenya’s democratic development. Set more broadly against the backdrop of Africa’s history of unfettered executive authority and weakly protected civil liberties, Kenya’s success also represents part of a larger trend toward the increasing institutionalization of political power in the region.

The third phase of Kenya’s constitutional-reform process began with the negotiations that ended the postelection violence early in 2008. The February power-sharing agreement between Kibaki and Odinga featured a plank (Agenda Item 4) that singled out constitutional reform as crucial to hopes of averting more violence. A follow-up law created a Committee of Experts (CoE)—comprising mostly Kenyan legal scholars but including several non-Kenyans with constitution-drafting experience—whose job would be to write a “harmonized” constitution pulling together elements of the CKRC, Bomas, and Wako drafts. The CoE was also charged with identifying unresolved “contentious issues” and making recommendations on different proposals for how to deal with them. The harmonized draft and discussion of the contentious issues would then be submitted to parliament, where a Parliamentary Select Committee (PSC) would convene to reach consensus on the contentious issues, make appropriate changes to the proposed draft, and send it back to the CoE, which could then choose whether to accept or reject these changes.

The PSC’s membership was split between the Party of National Unity (PNU)—Kibaki’s alliance that contested the 2007 elections—and the ODM. Heading into the January 2010 PSC retreat at Naivasha in the Rift Valley, it appeared that the political disputes which had undermined previous attempts at constitutional
reform were likely to resurface. The PNU, much like the NAK before it, was intent on instituting a centralized presidential system with only limited devolution. The ODM, on the other hand, much like its LDP and KANU predecessors, was solidly in favor of a dual executive with a strong prime minister and extensive devolution. This time, however, the key players proved more willing to compromise.

In contrast to the position that they had taken earlier, a number of ODM members on the PSC supported a PNU proposal to adopt a strong presidency instead of the dual executive specified in the harmonized draft. The revised PSC draft ended up omitting the premiership altogether. The reasons for this shift are several. First, the ODM may have hoped to use its acceptance of a presidential system as a bargaining chip in the negotiations over devolution, a goal that at least some of its members valued more highly than any particular way of structuring the executive. Second, several prominent ODM members harbored presidential ambitions and may have had mixed feelings about constraining the powers of a post that they hoped one day to fill. Third, tensions within the ODM coalition may have undermined its ability to maintain a united front on the issue. In particular, the relationship between Ruto and Odinga had become strained, with Ruto moving closer to his old KANU ally, Deputy Prime Minister Uhuru Kenyatta. Odinga’s own backtracking might be explained by his recognition that objecting to the elimination of the prime minister would risk derailing a process that the public strongly wanted to see completed, thereby jeopardizing his frontrunner status for 2012. Moreover, Odinga had learned in 2007 that he could win an honest presidential election, so he was likely disinclined to dilute presidential power.

At Naivasha, as in the past, the structure of devolved government proved another contentious topic. The ODM had hoped to establish a three-tiered system featuring 74 counties grouped into fourteen regions, as outlined in the Bomas draft. The PNU, by contrast, opposed a system with so many regional governments, worrying that it would foster ethnic enclaves—and presumably threaten Kikuyu and other non-Kalenjin groups living in the Rift Valley. As discussed above, the ODM seems to have agreed to the presidential system in the hopes of strengthening its position on devolution. Why, then, did it acquiesce in a two-tier system outlined in the Revised Harmonized Draft—a position much closer to the PNU’s vision than to its own?

The answer seems to lie in a mix of the political and the practical. On the political side, the PSC simply could not form a consensus within its own ranks on the structure of a three-tier system, with strong disagreements surfacing about the exact number of devolved units and their boundaries. On the practical side, the three-tiered system seemed too costly to operate and the 74 counties all too small to be viable even in the barest administrative sense—much less able to act as counterweights to the power of the central government. Also, the timeline imposed by the power-sharing agreement forced the committee to move forward before consensus could be reached. The PSC thus agreed to the least controversial position: a two-tier system with 47 county governments whose boundaries would be congruent to the country’s pre-1992 districts.

After reviewing the PSC revisions, the CoE submitted the proposed constitution to parliament for approval. After a month-long debate during which various members proposed a total of 150 amendments—none of which passed—parliament approved the proposed constitution on 1 April 2010, setting the stage for the referendum on August 4.

Although the political disputes that characterized the drafting process revolved around the structure of the executive branch and the nature of devolution, the most heated issues during the referendum campaign involved two very different topics: the claim by the draft’s opponents that the proposed constitution favored abortion, and the constitution’s recognition of the Kadhis’ courts, which govern personal issues such as marriage, divorce, and inheritance
for Muslims. The first charge was puzzling, since the PSC had deliberately inserted a clause that read “The life of a person begins at conception” in order to address religious groups’ concerns that the new constitution not become a vehicle for legalizing abortion. The second spoke to fears that, by specifically acknowledging the role of the Kadhis’ courts, the constitution was unfairly recognizing one religion over others. Both issues rallied the Christian establishment against the draft and may have accounted for a significant share of “No” votes recorded against the constitution.

A third important issue was the constitution’s establishment of a National Land Commission with the power to investigate historical injustices surrounding land ownership. Several prominent politicians—including former president Daniel arap Moi—were thought to have opposed the constitution out of fears that the creation of the land commission would put at risk thousands of hectares of public land that they had acquired over the years under questionable circumstances.

Kibaki and Odinga were united in their support of the draft constitution, and frequently appeared together to stump for it. Matters within their respective coalitions, however, were more contentious. The ODM split openly. Along with the religious opposition, the most prominent foes of the draft were Ruto and other former KANU politicians who had joined forces with Odinga and the ODM during the 2005 referendum campaign and the 2007 elections. Ruto, who has stated his intention to run for president in 2012 despite being named by the International Criminal Court (ICC) for his alleged role in the 2007 postelection violence, clearly saw the referendum campaign as an opportunity to show how well he could mobilize his Kalenjin support base.

For its part, the PNU publicly supported the document. Yet some observers believed that several prominent PNU leaders not only Deputy Prime Minister Kenyatta, another 2012 presidential hopeful named by the ICC for his alleged role in the 2007 strife, but also Vice-President Kalonzo Musyoka—were “watermelons” who may have looked green (the color of the “Yes” campaign) on the outside but were actually red (the color of the “No” campaign) on the inside. The “watermelons” were formally in the “Yes” camp but made only weak efforts for it and—or so some charged—even secretly funneled money to the “No” campaign.

In merciful contrast to previous electoral exercises in Kenya, the referendum campaign was peaceful and lacking in overt ethnic mobilizations. The Interim Independent Electoral Commission, which oversaw the voting, did a much better job than it had in 2007 in securing, transporting, and counting the votes. Yet both sides did display questionable campaign tactics. In particular, the “Yes” campaign improperly harnessed state resources in support of the proposed constitution. Odinga declared the passage of the proposed constitution a government project. Kibaki dispatched civil servants to their home areas to campaign for the “Yes” side. On several occasions during the campaign, Kibaki (illegally) promised the creation of new administrative districts—and in one case even a new university—in exchange for a strong local “Yes” vote.

The “Yes” campaign had hoped to receive at least two-thirds of the vote in order to highlight the breadth of support for the new constitution and bolster its international legitimacy. The hope was fulfilled when 68 percent voted “Yes.” As the Map above makes clear, support for the new constitution was strong in most of the country’s provinces. Opposition sentiment largely came from the populous Rift Valley, home to prominent “No” campaigners Ruto and Moi. Of the 2.7 million “No” votes cast nationwide, about 37 percent came from the Rift Valley. Of these, fully 78 percent came from the predominantly KANU constituencies that Ruto’s and Moi’s supporters had carried for the ODM back in 2007.

Regional patterns aside, what motivated
individual voters’ decisions in the referendum? To answer this question, we conducted a pair of surveys: one in late July and the first few days of August 2010 (just before the August 4 referendum), and one afterward in October and November. The “after” survey featured an open-ended question asking respondents why they had voted as they did. Among self-described “Yes” voters, the most frequent response (about 20 percent) mentioned a simple desire for change. Other frequently cited reasons included support for the system of devolved government (just under 20 percent), the hope that the constitution would reduce corruption (11 percent), and support for the creation of the land tribunal (10 percent). Respondents also mentioned their expectation that the new constitution would help to curtail tribalism, promote human rights, and end politicians’ impunity. Thirteen percent of “Yes” voters were unable to give a single reason for their vote (though two very honest respondents confessed that they had voted as a politician had told them to!). “No” voters were driven by entirely different considerations. Whereas only a handful of “Yes” voters mentioned religion or abortion, almost 30 percent of “No” voters cited religion as a factor motivating their voting decision, while 25 percent mentioned abortion; 23 percent of “No” voters mentioned land issues; and 10 percent were unable to provide a reason.

[Under the new constitution,] executive power is further constrained by the devolution of authority to the counties. Under the new constitution, at least 15 percent of the national government’s revenues must go to the 47 county governments, which will have a range of duties in areas such as the provision of primary health care, the implementation of agricultural policy, and the management of county-level transportation issues. Each county is to have its own directly elected governor and lawmaking assembly. Decisions about resource allocations to the counties will be made in the new Senate—composed of representatives drawn from the counties—rather than in ministries controlled by the executive, further reducing presidential discretion in the allocation of resources.

Although controlling corruption is less about the content of formal rules than about their enforcement, the new constitution holds promise of improving matters in this area as well. The constitution establishes an independent ethics and anticorruption commission and includes provisions to shield the commission from inappropriate political interference. The constitution also calls for an independent auditor-general and a controller of the budget. Each of these critical institutions of horizontal accountability will include a chairperson and members appointed by the president and approved by the National Assembly. In addition, constitutional provisions for reforming and bolstering the independence of the judiciary may strengthen this notoriously corrupt institution.

In order to address the issue of socioeconomic inequality, the constitution recognizes an extensive set of rights, including such “second-generation” rights as healthcare, food, education, and housing. These provisions are, however, largely aspirational and are less likely to have an impact than other constitutional requirements that are more feasibly enforced. For example, the new constitution tackles gender inequalities by improving marriage, inheritance, and land-ownership rights for women, and by mandating certain minimal levels of female representation in national and county assemblies. It also explicitly extends special economic and social rights to other vulnerable groups including seniors, young people, persons with disabilities, and members of certain traditionally marginalized ethnic, religious, or cultural communities. The devolution of power to the counties will make a tangible difference as well by providing for greater equality in the allocation of resources across localities.

The problem of politicized ethnicity presents a special challenge in Kenya. One response contained in the constitution is, effectively, to declare that tribal distinctions do not (or should not) matter. Thus, the Bill of Rights enshrines freedom from discrimination, including
discrimination practiced on the basis of ethnic or social origin; Article 44 protects linguistic rights; Article 49 makes hate speech and incitement to violence illegal; Article 91 requires that political parties have a “national character,” stipulating that they cannot be founded on any religious, linguistic, racial, ethnic, gender, or regional basis; Article 130 requires that the national executive reflect Kenya’s regional and ethnic diversity; Article 131 gives the president special responsibility for promoting respect for regional and ethnic diversity; and Article 232 requires that the composition of the civil service be representative of such diversity. More important, however, are the provisions meant to give politicians incentives to appeal across ethnic and regional lines. Key elements in this regard include the requirements that the winning presidential candidate garner at least half the votes in a quarter of the 47 counties, and that each candidate name a running mate for the office of deputy-president.

Devolved government is also supposed to improve interethnic relations by diluting the all-or-nothing atmosphere that surrounds presidential elections. If an ethnic group fails to win the presidency, it may still look forward to controlling its county assembly and electing one of its own as county executive, for instance. And with resources going out to the counties by fixed formula rather than presidential discretion, the question of which group controls the presidency becomes somewhat less pressing.
III. Will the New Constitution Enhance Government Accountability?

... The new constitution adopts a presidential system of government. Article 130 establishes an executive cabinet consisting of a President, deputy president, and cabinet secretaries. Article 148 provides that the deputy president shall be nominated by the President-elect and declared as such by the Independent Electoral and Boundaries Commission. The cabinet secretaries, who shall not be legislators, are appointed by the President and subject to the approval of the National Assembly, one of the two houses that make up the legislature. The President also appoints principal secretaries (formerly permanent secretaries), again subject to the approval of the National Assembly. The new constitution does not specify the qualifications that cabinet secretaries or principal secretaries must satisfy, with the result that these powers of appointment are not fettered unduly, save that Article 152 caps the number of cabinet secretaries at twenty-two. Accordingly, it curtails a power that previous presidents have used as a resource to dispense political patronage and subvert the democratic process by, for example, depleting the ranks of the opposition. ... 

The role that the cabinet will play in the exercise of executive authority is unclear. Article 131 only provides that the President will exercise executive authority “with the assistance of the Deputy President and Cabinet Secretaries,” without clarifying the forms that this assistance will take, or whether the President will be obligated to seek their assistance. Furthermore, it is unresolved whether the President can bypass the cabinet altogether or make decisions affecting the portfolios of cabinet secretaries without involving or informing them. In this regard, it therefore seems that there is no marked departure from the previous constitution to the extent that the President retains exclusive and unfettered responsibility for the exercise of executive authority. If there is to be a departure from the status quo, the President should be obligated to consult and involve the cabinet in decision making.

Nevertheless, the new constitution makes the cabinet accountable to the legislature. Thus Article 153 requires cabinet secretaries to appear before committees of the legislature whenever they are summoned and to provide the legislature with “full and regular” reports concerning matters under their control. In addition, this article facilitates accountability by requiring that decisions of the cabinet be in writing. ...

In a bid to protect public officers from intimidation and to give them security of tenure, Article 236 provides that public officers will not be victimized or discriminated against for carrying out their duties in accordance with the law, or “dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.” Therefore, public officers will no longer hold office “during the pleasure of the President,” as section 25 of the old constitution proclaimed. Accordingly, the new constitution fills a significant loophole in the framework governing the Public Service, namely that public officers were not empowered to resist the illegal instructions of their seniors, ministers, or the President, with the result that they are often accomplices in grand corruption schemes. As examined earlier, public officers looking out for the public interest can easily be intimidated into implementing illegal instructions, which are invariably verbal. Articles 135 and 153 of the new constitution remedy this problem by providing that the decisions of the cabinet and the President must be in writing. This will empower public officers to require the production of written instructions before taking any action. It will be necessary to align public service regulations, such as the Government Financial Regulations, with these provisions of the new constitution. ... 

The new constitution also introduces strict rules on conflicts of interest, which will assist in preventing the abuse of power which so often leads to corruption. Article 75 imposes a duty on
state officers to “behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties.” Article 79 also requires that Parliament enact a law to establish an “independent ethics and anti-corruption commission.” This body’s main function will be to ensure compliance with, and enforce, constitutional provisions on leadership and integrity, including conflicts of interest.

Article 93 of the new constitution establishes a Parliament with two houses, namely a National Assembly and a Senate. The National Assembly will have primary responsibility for legislation and oversight of the executive at the national level. On the other hand, the Senate is a mechanism for devolution.

Article 117 of the new constitution provides for the powers, privileges, and immunities of the legislature, including “freedom of speech and debate in Parliament.” However, it makes no attempt to circumscribe the exercise of these powers. Nevertheless, Article 118 imposes a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees, while Article 119 gives every person the right to petition Parliament “to consider any matter within its authority.” Article 104 also gives the electorate the right to recall the legislator representing their constituency. Although these provisions may constitute useful mechanisms for regulating the collective powers of the legislature, they will need to be accompanied by mechanisms that regulate lobbying, conflicts of interest, misconduct, and abuse of power in Parliament. The absence of such mechanisms has made legislators vulnerable to capture by special interests, which jeopardizes the ability of the legislature to safeguard the public good.

Finally, in the case of the judiciary, the failure to regulate the President and Chief Justice’s powers of appointment and dismissal and the administrative powers of the latter, often aid corruption and undermine the legitimacy of the judiciary. How, then, does the new constitution enhance the independence and accountability of the judiciary? First, it disperses judicial authority. Although the Chief Justice is still the head of the judiciary, the new constitution establishes three superior courts (in addition to various subordinate courts): the Supreme Court, the Court of Appeal, and the High Court. It further provides that the Chief Justice will preside over the Supreme Court, while the Court of Appeal and the High Court will be presided over by a judge elected by the judges of these courts from among themselves pursuant to Article 164.

Second, Article 166 of the new constitution gives the judiciary autonomy from the executive. It provides that the President will now appoint the Chief Justice and judges of the superior courts subject to the recommendations of the Judicial Service Commission (JSC) and the approval of the National Assembly.

Third, Article 168 of the new constitution circumscribes the power to dismiss judges. Unlike before, the process of removal of the Chief Justice and judges will now be initiated by the JSC. Acting on its own motion, or on the petition of “any person,” this Commission is required to hold a hearing regarding the affected judge and to send the petition to the President only when there are legitimate grounds for removal.

Another notable feature of the new constitution is that it rids the judiciary of regime actors and provides a framework for the removal of “unsuitable” judges. First, it provides that the Chief Justice shall vacate office within six months after it takes effect. Secondly, within one year of the constitution taking effect, Parliament must enact a law establishing mechanisms and procedures for vetting the suitability of all judges and magistrates, ensuring they continue to serve in accordance with the values and principles established in Articles 10 and 159. While these vetting provisions are commendable, care should be taken to ensure that they do not facilitate witch hunting.
The comparativist project traditionally has been concerned with the abstraction and classification of local legal systems. This project, particularly its North American variant, aimed to explore intercultural differences and to understand and map legal traditions in a horizontal movement. Current streams of comparative constitutional law appear to have rejected comparativism’s traditional concern with empathizing and understanding differing local law. Instead, the object is to participate actively in the construction of a constitutionalism that makes liberal legal rights the common constitutional inheritance of humankind. Though transcending the local, these projects are instantiated largely through local agents (such as the judiciary and the bar), the traditional locus of legal understanding for the comparativist.

Roberto MacLean argues that a previously anarchic legal world is generating a body of uniform laws, evolving ultimately toward a unified global legal community. For MacLean, local national judicial systems in the South are an obstruction to the achievement of the universal ideal of an independent and impartial judiciary, an administration of justice free of corruption, and a democratic culture in which legal security for both majority and minority is fully enjoyed. His project is to identify the mechanisms—such as judicial independence and judicial training—that will help to institutionalize a global legal culture. This project moves beyond comparison to find “common denominators” and “minimum standards” required for a fully functioning national judicial system. The agency for this global movement are local bars and judiciaries schooled in the values of legal cosmopolitanism. MacLean, however, looks to international arbitration and other mechanisms for alternative dispute resolution to take a leadership role in instructing local judiciaries. They can be the “conscience” of judicial understanding and the “guardians” of justice and equity, of “freedom, exchange, development, [and] distribution of wealth.”

Lorraine Weinrib considers the post-World War II model of rights, such as that found in the constitutional systems of Canada, Israel, and South Africa, as sharing in a single transnational project, that of advancing the gradual convergence of national constitutional systems around the principle of rights protection and promotion. In such a world, comparative constitutional analysis becomes central to this ongoing collective enterprise of liberal rights and equality protection. Weinrib acknowledges that hers is not a project that embraces new international institutions. The local is less problematic for her, as it is a stepping stone to the Kantian ideal of a gradual convergence of national constitutional systems.

For both MacLean and Weinrib, the constitutional world is converging on one model: a variant of liberal constitutionalism with an emphasis on judicial review. Both authors unhesitatingly situate comparative lawyers as critical to this project of making material a global regime of constitutional law. Theirs is no mere objective description of the world or cataloguing of indigenous legal difference, but a vital project in which comparativists and the institutions with which they are associated are the key agents in shaping judicial minds and global public opinion.

What is missing from these accounts is the element of political economy. Might it be no mere coincidence that we are undertaking new work in comparative constitutional law at the very time there is a narrowing of options available to structure constitutional regimes? In a world where the market rules, where structural adjustment programs mandate legal reform that privilege economic interests, states increasingly are under pressure to adopt constitutional regimes that replicate the model upon which economic success more likely will be secured.

From this perspective, the objective of constitutional convergence is not only to
enhance civic life, but also to lock in those gains made in the post-1989 international economic environment—the general tendency toward open markets and limited government—by constraining, through the force of constitutional and constitution-like limitations, the capacity of government to intervene in the market.” Constitutional law, according to this view, aspires to generate one large free trade zone.

Regional and transnational legal regimes, such as the North American Free Trade Agreement and the Uruguay Round General Agreement on Tariffs and Trade (GATT) World Trade Organization, facilitate the concretization of economic globalization within national legal regimes. This is accomplished not only by policing trade and investment disputes from without, but also by internalizing the values of liberalized trade within. In this way, international trade rules and domestic constitutionalism complement each other, argues Ernst-Ulrich Petersmann. International trade law “is an expression of, and gives precision to, the liberal constitutional obligations of governments towards their own citizens.” Regional and international economic rules and institutions act as external constraints, or “conditioning frameworks,” on the range of political possibilities available to secure domestic social change.

The reform of domestic legal regimes remains, however, a critical objective if the neoliberal gains of the post-1989 world are to remain locked in. Enhancing economic performance and liberalized trade through legal reform has been a singular goal of the World Bank’s “good governance” project. According to the Bank’s 1997 report, “markets rest on a foundation of institutions” and, without rudimentary legal protections for property rights, markets cannot develop. The Bank maintains that states must establish the critical supports for property rights in order for markets to develop—prohibitions against theft, protection from arbitrary government action, and a reasonable and fair judiciary. It is the second support that is most revealing of the Bank’s intentions. By “arbitrary government action,” the Bank means not merely outright corruption, but a range of activity including, “unpredictable” rule-making or “ad hoc regulations and taxes.” “Capricious” and “arbitrary” state action, the misuse of state power, gives rise to issues of “credibility” and what the Bank terms the “lawlessness syndrome.”

The Bank emphasizes that stability and predictability in legal rules and institutions are the hallmarks of a successful developing market. Constitutionalizing rules that facilitate market transactions signals to foreign investors that a state is serious about participating fully in the processes of global capitalism. Increasing the number of checking points on domestic political processes—slowing down politics and restraining “constant legislative changes”—is the stated objective of the Bank’s good governance strategy. By subordinating political to economic processes, the Bank makes clear that democratic politics are less important than securing the conditions for the entry of foreign direct investment.

Here lies one point of contradiction in the contemporary discourse of globalization. The speeding up of time and the narrowing of distances—together with the evolution of legal processes seemingly outside of the state system has not resulted in the removal of the state. The state is necessary to secure the conditions in which private property will be safeguarded and returns on investment assured. In emphasizing movement, the discourse of globalization obscures this element of fixity. It is at this point that constitutional regimes institutionalize some of the processes associated with economic globalization. It is also here that comparative constitutional law, by its silence, elides its complicity.
Stephen J. Schnably, The OAS and Constitutionalism: Lessons from Recent West African Experience

The Organization of American States (OAS) has long been committed to two fundamental principles not easily reconciled. The OAS Charter requires member states to adopt “representative democracy.” Building on earlier resolutions, the General Assembly declared in the Inter-American Democratic Charter of 2001 that “[t]he peoples of the Americas have a right to democracy.” Yet the Inter-American Democratic Charter also requires “due respect for the principle of non-intervention.” Similarly, the OAS Charter gives each member state the “right to choose, without external interference, its political . . . system and to organize itself in the way best suited to it.”

In responding to classic military coups against elected governments since 1991, the OAS has resolved the tension between democracy and non-intervention in favor of the former. For example, the OAS condemned a coup in Haiti in 1991 and a military-supported ouster of Ecuador’s President in 2000. Its response has been varied in more ambiguous situations. The OAS condemned the autogolpes in Peru in 1992 and Guatemala in 1993, in which civilian presidents suspended the constitution and other branches of government, but it reacted passively to Peruvian President Alberto Fujimori’s subsequent success in building on the autogolpe to bring into force a new constitution that greatly increased his powers. It condemned the attempted removal of Venezuelan President Hugo Chavez in 2002, in which he was asserted to have


5. OAS Charter, supra note 1, art. 3(e).


7. See Schnably, Constitutionalism, supra note 5, at 171-75.
resigned, but it remained silent in 2004, when former Haitian President Jean-Bertrand Aristide asserted that he had not resigned but had been forced out by armed militias and U.S. duplicity.

Judging when intense political struggle between branches of government crosses the line into a coup or unconstitutional rupture can be exceedingly difficult, as can be determining when the military has coerced apparently voluntary resignations. One way to deal with ambiguous threats, which are likely to recur, might be to define democracy more concretely. The Inter-American Democratic Charter defines democracy to encompass not only free elections and human rights but also "the rule of law" together with "the separation of powers and independence of the branches of government." Addressing the OAS in January 2005, former U.S. President Jimmy Carter listed eight factors he said could help determine when representative democracy has been disrupted, such as "[v]iolation of the integrity of central institutions, including constitutional checks and balances providing for the separation of powers." The Declaration of Florida, adopted by the OAS General Assembly in June 2005, presents "full respect for human rights and fundamental freedoms, the rule of law, [and] the separation of powers and independence of the judiciary" as inextricably bound up with "democratic institutions."

Any sustained effort to create a regional or transnational constitutional law would, however, deeply implicate the OAS and member states in constitutional design and interpretation. What does "separation of powers" mean in parliamentary systems? Does judicial independence require judicial review? Do term limits make presidents too independent? Does constitutional amendment by popular plebiscite give voice to the will of the people or undermine the rule of law by subjecting basic structures to the passions of the moment?

Answering these questions concretely on a regional basis would involve a far greater turn away from non-intervention than the OAS has undertaken to date. Most recently, the OAS General Assembly declined to adopt a proposal, reportedly offered by the U.S., to create a permanent body to monitor democracy in member states. The monitoring body would

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9. Democratic Charter, supra note 2, art. 1(3).


have been empowered to hear from labor unions and civic groups who thought the government was not governing democratically.\textsuperscript{12} The OAS General Assembly did, however, instruct the Secretary General to develop proposals for mechanisms to “address[] situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power.”\textsuperscript{13}

The reluctance to accept the initial U.S. proposal cannot be dismissed as a simple desire by member states to escape scrutiny. Paradoxically, if the OAS were to try to define democracy in detail, the very effort would violate the right to democracy. Democracy requires a high degree of internal domestic choice in the form of government. The commitment to non-intervention is in part an expression of the right to democracy.

Perhaps, then, states should be free to adopt any plausibly democratic constitutional structure, but having done so should be required to respect that structure, including rules governing change. The OAS’s emphasis on responding to interruptions of constitutional government might be explained as an attempt to ensure constitutional fidelity. In 1991, it promised to respond immediately to “any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government” of an OAS member.\textsuperscript{14} The Protocol of Washington, which amended the OAS Charter, provides for suspension of a state “whose democratically constituted government has been overthrown by force.”\textsuperscript{15} The Inter-American Democratic Charter commits the OAS to

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\item \textsuperscript{12} See Joel Brinkley, \textit{U.S. Proposal in the O.A.S. Draws Fire as an Attack on Venezuela}, N.Y. TIMES, May 22, 2005, \S\ 1, at 10; Joel Brinkley, \textit{Latin States Shun U.S. Plan To Watch Over Democracy}, N.Y. TIMES, June 9, 2005, at A8. The initial U.S. proposal was not made public. A subsequent U.S. proposal without the monitoring body asserted that “governments that do not [govern democratically] should be held accountable,” and would have directed the Secretary General to “propose[] specific measures to strengthen the effectiveness and application of the Inter-American Democratic Charter.” It also would have directed the Permanent Council to “develop a process to assess, as appropriate, situations that may affect the development of a Member State’s democratic political institutional process or the legitimate exercise of power; and to make concrete recommendations, using the Inter-American Democratic Charter as its guide and with input from civil society, on how the Permanent Council should address threats to democracy in a timely fashion, anticipating crises that might undermine democracy.” Draft Declaration of Florida – Delivering the Benefits of Democracy, paras. 7, 17, and 18, \textit{reprinted in Miami Herald}, June 5, 2005, \textit{available at http://www.miami.com/mld/miamiherald/11822010.htm}.
\item \textsuperscript{13} The final version of the Declaration of Florida adopted by the General Assembly eliminated the language in the earlier draft about holding governments accountable, made the instructions to the Secretary General and Permanent Council more general, and added a reference to nonintervention. Declaration of Florida, \textit{supra} note 11, pmbl. para., 18, and paras. 3, 5.
\item \textsuperscript{14} Representative Democracy, para. 1, OEA/Ser.P, OAS Doc. AG/RES. 1080 (XXI-O/91) (June 5, 1991).
\item \textsuperscript{15} Texts Approved by the General Assembly at its Sixteenth Special Session in Connection with the Amendments to the Charter of the Organization, OEA/Ser.P, OAS Doc. AG/doc.11 (XVI-E/92) (1992) (Article 8 bis) (Article 9 of the amended Charter).
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respond to “an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.” The Declaration of Florida envisions the possibility of an OAS mechanism to “address situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power.”

Other organizations have similar commitments. MERCOSUR, a free trade association among several South American nations, agreed in 1996 to respond to any “interruption in the democratic order” of its members or associates. The Organization of African Unity formally bound itself in 2000 to protect democracy against “unconstitutional changes of government.” The Economic Community of West African States (ECOWAS) agreed in 2001 to respond to situations where “democracy is abruptly brought to an end by any means” in member states.

Emphasis on constitutional fidelity does less to resolve the paradox than one might hope, for the practice of responding to coups or other interruptions in democratic government requires surprisingly intrusive and contestable interpretations of other countries’ constitutions. A recent example from the West African Republic of Togo vividly illustrates this problem – and suggests that it may be common to any regional effort to protect constitutional democracy.

Gnassingbé Eyadéma, Togo’s President since 1967, died on February 5, 2005. Within hours the military declared his son Fauré Gnassingbé the new President. Article 65 of Togo’s Constitution, however, provided that if the President died the Speaker of the legislature – the President of the National Assembly – was to exercise the functions of the presidency for sixty days, at which time an election would be held. In Paris when the President died, the Speaker subsequently asserted from Benin that he

17. Declaration of Florida, supra note 10, para. 3.
20. See ECOWAS Good Governance, supra note 9, art. 45; see also Declaration of Political Principles of the Economic Community of West African States, 14th Sess. of the Authority of Heads of States and Government, Abuja, ECOWAS Doc. A/DCL. 1/7/91 (July 4-6, 1991).

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was the true constitutional successor.\(^{23}\)

ECOWAS called Fauré Gnassingbé’s accession a “violation of the [Togolese] Constitution.”\(^{24}\) The African Union (AU) deemed it “a blatant and unacceptable violation of the Togolese Constitution.”\(^{25}\) The U.N. Secretary General said the transfer of power had “not been done in full respect of the provisions of the Constitution.”\(^{26}\) The U.S. State Department called it “an unconstitutional move.”\(^{27}\) France, Togo’s former colonial ruler, took the same position.\(^{28}\)

Was the accession of Gnassingbé Eyadéma’s son constitutional? At first the government rested its defense of his accession on a sweeping claim of inherent power in a national emergency. The military asserted that the speaker’s absence from the country at the moment the president died created a power vacuum that called for swift action to ensure stability and security. The military undercut its argument, however, by announcing the suspension of the constitution and closing the country’s borders, preventing the Speaker’s return.\(^{29}\)

The government soon presented a constitutional case less easily dismissed. On February 6, the Togolese legislature elected Fauré Eyadéma its new speaker. By unanimous vote it also exercised its power under Article 144 to amend the constitution with the concurrence of at


\(^{24}\) Press Release, ECOWAS Salutes the Memory of President Eyadema, Condemns the Violation of the Constitution and Calls for a Return to Constitutional Order (Feb. 5, 2005); Communiqué, ECOWAS, On the Situation in Togo, Cotonou (Feb. 11, 2005).


\(^{28}\) France Insists on Respect for Togo’s Constitution, PANAFRICAN NEWS AGENCY (PANA) DAILY NEWSWIRE, Feb. 7, 2005. See also Francophonie Threatens Togo with Suspension, PANA DAILY NEWSWIRE, Feb. 8, 2005 (criticism from Francophonie Parliamentary Assembly regarding the violation of the Togolese constitution).

least four-fifths of the members, changing Article 65 to allow the son to serve out the remainder of his father’s term. Fauré Gnassingbé was sworn in the next day. These after-the-fact changes were not entirely unlike Peru’s retroactive regularization of the autogolpe through the promulgation of a new constitution by a relatively powerless constituent assembly in 1992 and 1993.

ECOWAS condemned the “illegal amendment” of the constitution, calling it nothing more than pure and simple “manipulations of the Constitution by the National Assembly” – a “cover-up” for a “coup d’etat.” It proceeded to impose sanctions. The AU “firmly condemn[ed] the revision of the Togolese Constitution made by the de facto authorities, in violation of the relevant provisions of the Togolese Constitution,” and suspended Togo’s participation in the AU.

To assert that constitutional amendments are unconstitutional is to venture into interpretive territory more often explored by scholars than by regional political bodies. To be sure, there was ample ground in Article 144 to question the amendments’ validity. Article 144 provides that


31. Press Release, ECOWAS Holds Extraordinary Meeting on the Situation in Togo (Feb. 8, 2005). “In violation of the Togolese Constitution, following its illegal amendment, Faure Gnassingbé, son of the late president, was designated to succeed his father.” Id.

32. Final Communiqué, ECOWAS, Extraordinary Summit of the Heads of State and Government, Niamey (Feb. 9, 2005), para. 5.

33. Id. para. 6; see also Communiqué Issued by the Current Chairman ECOWAS (Mamadou Tandja, President of the Republic of Niger and Chairman of the Authority of Heads of State and Government of ECOWAS) (Feb. 18, 2005).


amendments may not be adopted when the presidency is vacant. 36 (It also prohibits amendments that would revise the “Republican form of the State.”) 37 The presidency may well have been vacant on February 6, when the legislature adopted the amendments. The military’s initial recognition of Gnassingbé Eyadéma’s son as President was questionable, to say the least, and his election as Speaker would not clearly have made him President as opposed to simply entitling him to exercise presidential powers pending elections.

As U.S. constitutional scholars have pondered whether Article V’s own amendment procedures could be employed to eliminate its prohibition against depriving a U.S. state of equal suffrage in the Senate without its consent, 38 so too did the Togolese legislature recognize that a constitutional limitation on the amendment power might itself be amended out of existence. Thus at the same time it elected Gnassingbé Eyadéma’s son as Speaker and amended Article 65, the Togolese legislature also amended Article 144 to remove the prohibition of constitutional amendments when the presidency was vacant. 39

ECOWAS and the AU were unmoved, and their steadfastness pressured Togo to back down. On February 21, the National Assembly amended the constitution yet again to provide for elections within sixty days, essentially reversing the previous amendments. 40 Four days later Fauré Gnassingbé resigned, paving the way for a new Speaker and Interim President, Abass Bonfoh. 41

There is much to be said for a judgment that something other than the spirit of democracy infused Togo’s hasty constitutional revisions. What is striking, however, is that the condemnations were expressed so strongly in constitutional terms, given the potential complexity of the legal argument. Similar complexities arose in the conduct of the presidential election that followed, and in each case ECOWAS and other international actors showed little hesitancy in interpreting the Constitution.

36. Togo Const., supra note 21, art. 144.
37. Id.
39. Loi No. 2005-002, supra note 30 (removing reference to vacancy of the presidency); see BBC AFRIQUE.COM, Togo, supra note 29; see also Vacance du Pouvoir, supra note 29.
One issue related to the timing of the election. On February 28, 2005, shortly after Fauré Gnassingbé had resigned, ECOWAS met with the government and opposition parties and announced that “transparent, free and fair elections” for President would need to be held “within 60 days as required by the Constitution of Togo.”\(^42\) Sixty days after Gnassingbé Eyadéma died would have been April 6, 2005, but ECOWAS declared two days later that “the 60 days Interim period prescribed by the Constitution of Togo in article 65 shall be deemed to have started on the February 26, 2005, with the coming into office of Mr. Abass Bonfoh as Interim President.”\(^43\) In dating the vacancy in relation to the resignation of Fauré Gnassingbé, rather than in relation to the death of his father, Gnassingbé Eyadéma, ECOWAS might appear to have contradicted its view that Fauré Gnassingbé had never legitimately occupied the office in the first place. On the other hand, opposition parties claimed that holding an election quickly after years of dictatorship would give them insufficient time to organize,\(^44\) and the slightly later date did provide somewhat more time to prepare for the election.

A second issue related to eligibility. Long-time opposition leader Gilchrist Olympio, son of Togo’s first president (who had been assassinated in 1963), had been in exile in France since 1992, when government forces nearly assassinated him.\(^45\) In 2002, Parliament – dominated then as in February 2005 by the ruling party – amended the Constitution to prohibit the candidacy of anyone who “does not reside in the national territory for at least twelve (12) months.”\(^46\) Olympio was thereby eliminated as a candidate in the 2003 presidential election. Nearly two years later, Fauré Gnassingbé – whom ECOWAS had just thwarted from what it deemed an attempted coup d’etat – qualified as a candidate in the April 2005 election, while Olympio was again barred from running. (With Olympio’s endorsement the opposition nominated instead Emmanuel Bob-Akitani, widely viewed as a stand-in for Olympio.)\(^47\)

On April 26, 2005, Togo’s electoral commission reported Fauré Gnassingbé the winner with sixty percent of the vote, with Bob-Akitani


\(^43\) Press Release, ECOWAS Calls for Commencement of Progress Towards Holding Presidential Elections (Mar. 2, 2005); see also Togolese Political [Leaders] Sign Agreement on Upcoming Presidential Polls, BBC, Mar. 30, 2005 (text of agreement signed government, opposition parties, and ECOWAS concerning April 24 election).


\(^45\) See U.S. DEP’T OF STATE, supra note 26.

\(^46\) Id.

The positions ECOWAS took on Togo’s Constitution in overseeing the election raise interesting questions. If the amendments that would have validated Faure Gnassingbé’s assumption of the presidency in February 2005 amounted to no more than invalid manipulations of the constitution, should the same be said for the ruling party’s adoption of the residency requirement in 2002, apparently to exclude an exiled opposition leader from running for office? What legitimate leeway might there be in interpreting and applying a constitutional mandate for a quick election to fill a vacancy in a country that had not held a free or fair elections for decades?

More generally, how should such questions be approached? In dealing with the exclusion of former Guatemalan Dictator Rios Montt from running for President, the Inter-American Commission on Human Rights once suggested that there was a “customary constitutional rule with a strong tradition in Central America” excluding coup d’etat participants from running for President. Would ECOWAS have been justified in finding or asserting a similar rule of transnational constitutional law in West Africa, perhaps using it as a basis for interpreting Article 58 of the Togolese Constitution (stating that the President is to be “the guarantor of ... the institutions of the Republic”) to exclude a former coup participant from running? Using regional customary law would have been an assertive though not entirely implausible approach to interpreting the Constitution.

Alternatively, one could understand ECOWAS’s approach in terms of constitutional fidelity. Perhaps it reflected a judgment that adherence to a constitutional text in a fairly literal manner, with little regard for its origins and context, is the best route over the long run to a creating a strong constitutional underpinning to democracy. The prospect of credible pressure by international bodies to adhere to the terms of the text might lend attractiveness to this vision of constitutional fidelity. Granted, the immediate outcome – installation of the late President’s son after an election widely regarded as tainted by fraud and enforced by systematic violence – gives little sign of any advance towards democracy. But that outcome does not in itself settle the longer-run question of constitutionalism and democracy.

Contrast the vigor of the constitutional interpretation displayed in the West African regional response to Togo’s succession crisis, notwithstanding fundamental ambiguities in both interpretation and...
method, with the regional response in the Americas to one of Ecuador’s frequent constitutional upheavals some years earlier. In 1997, the Ecuadorian Congress removed the widely unpopular President Abdalá Bucaram. Instead of impeaching him under Article 82(g) of the Constitution, Congress removed him under Article 100 for “mental incapacity.” With a show of institutional assertiveness echoing Fujimori’s actions in Peru in 1992, the Ecuadorian Congress also removed the Attorney General, the Comptroller, and members of the Constitutional Court. Bucaram may have earned (indeed courted) the nickname “El Loco,” but there was little question that Congress simply made a strategic and contestable choice to use the simpler of the two routes to remove him. Refusing to accept the legality of his removal, Bucaram called Congress’ action an “attempted coup.” Neither the OAS nor any member states took an official position on the constitutionality of Bucaram’s removal or the competing claims of succession put forth by the Vice-President and the Head of Congress. One U.S. official was quoted as saying that “the law is ambiguous . . . It’s not for us to tell the Ecuadorian people how they should interpret their Constitution.”

The Inter-American Democratic Charter was adopted four years later in 2001. In April 2005, Ecuador’s Congress removed yet another president (one of four from 1997 to date), finding pursuant to Article 167(6) of the Ecuadorian Constitution that he had abandoned his post – a conclusion he disputed until the military announced it would no longer recognize him. Even as the OAS General Assembly met in June 2005 amidst calls for more vigorous enforcement of the Charter’s endorsement of the separation of powers, independence of the judiciary, and the rule of law, Bolivia experienced a crisis of succession. Its President and both the first and second in line to succeed him resigned in the face of widespread protests.

Claims by the U.S. government and some non-governmental organizations that crises like these should meet with a more active OAS response in light of the adoption of the Charter appear to assume that the modesty displayed in the regional response to Ecuador’s constitutional crisis in 1997 should now be discarded. As the more assertive approach

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57. This is not to say that prior to the Charter, member states never took the occasion to pronounce on the proper interpretation of other countries’ constitutions. The U.S., for example, took a very firm stance on a contestable point of interpretation of Haiti’s Constitution when it returned Aristide to power in 1994, requiring him to accept that his first term would end in
to constitutional interpretation displayed in the regional response to Togo’s crisis makes clear, however, the blend of complexity and impact so distinctive to constitutional controversies cuts both ways. Governments’ interpretations of their own constitutions are typically marked by a heavy dose of domestic self-interest; the events in Togo in February 2005 may show that some regional constraint on the process could be desirable. But those events, and the questions ECOWAS faced in overseeing the elections, also show how deeply international or regional organizations can be drawn into reasonably contestable issues of constitutional interpretation. And however marked by self-interest a government’s interpretation of its own constitution may be, it would be unwise to assume that states’ interpretations of other countries’ constitutions will be free of their own foreign policy self-interest. The U.S. government’s initial position (quickly withdrawn) that Chavez’s apparent departure in the events of April 2002 represented the constitutionally valid resignation of an autocrat who needed to learn to “respect constitutional processes” was surely not unrelated to its hostility to his political positions and rhetoric.58 It is equally hard to imagine that the U.S. initiative in the June 2005 OAS meeting was entirely unrelated to its consistent hostility to Chavez, even though the proposal cannot be dismissed simply as another diplomatic maneuver against a government not in favor with the U.S. If states and regional bodies become more deeply involved in interpreting other countries’ constitutions, there is a danger that they will have a new and substantially more intrusive means of pursuing their own foreign policy aims.

In short, whether it takes the form of transnational constitutional law or an emphasis on constitutional fidelity, a practice of regional interpretation of constitutions presents dangers as well benefits. A keen appreciation of both is an essential guide to any further development of the OAS’s new involvement in constitutionalism.

1996, five years after he had been sworn in, even though a military coup had prevented him from serving most of his term. Schnably, Constitutionalism, supra note 6, at 190-91. However, it seems plausible that the Charter’s references to constitutional concepts like the separation of powers, together with recent calls for the OAS to hold governments accountable for governing democratically, will produce more such occasions.

Bringing the Courts Back Under the Constitution: NEWT 2012 Position Paper Supporting Item No. 9 of the 21st Century Contract with America (Draft 10/7/11), pp. 13-16

**Diminished American Sovereignty Owing to the Growing Practice of Using Foreign Opinion as the Basis for U.S. Constitutional Interpretation**

There is a new and growing pattern among the Left-liberal establishment to view foreign opinion and international organizations as more reliable and more legitimate than American institutions.

In July 2004, about a dozen House members wrote a letter to United Nations Secretary General Kofi Annan asking him to certify the 2004 presidential election. When an amendment was offered to block any federal official involving the U.N. in the American elections, the Democrats voted 160 to 33 in favor of allowing the U.N. to be called into an American election. The Republicans voted 210 to 0 against allowing the United Nations to interfere.

The fact that a five-to-one margin of Democrats could vote in favor of United Nations involvement in an American presidential election is an astonishing indicator of the degree to which international institutions have acquired greater legitimacy among the Left-liberal establishment.

This same trend toward the reliance of foreign opinion and foreign institutions is also developing in the Supreme Court.

Former Justice O’Connor, in 1997, argued, “Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.” Later, in 2002, she further asserted:

“‘There is much to learn from...distinguished jurists [in other places] who have given thought to the same difficult issues we face here.’”

Justice Ruth Bader Ginsberg, in 2003, stated:

[O]ur “island” or “lone ranger” mentality is beginning to change. Our Justices...are becoming more open to comparative and international law perspectives. Last term may prove a milestone in that regard. *New York Times* reporter Linda Greenhouse observed on July 1 in her annual roundup of the Court’s decisions: The Court has displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the Court’s role in keeping the United States in step with them.

(Ginsburg, Ruth Bader. “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjucation.” Sherman J. Bellwood Lecture delivered on September 18, 2003 at the University of Idaho)

In other words, Justice Ginsberg is promising that as elites in other countries impose elite values on their people, the Supreme Court has the power and the duty to translate their new Left-liberal values on the American people. No more worrying about the legislative and executive branches.

No more messy process of debating with the American people. No more old-fashioned defense of American traditions and American constitutional precedent.
Justice Ginsberg quotes approvingly Justice Kennedy’s opinion making same-sex relationships a constitutional right in part out of “respect for the Opinions of [Human]kind.” The Court emphasized: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries....In support, the Court cited the leading 1981 European Court of Human Rights decision...and the follow-on European Human Rights Court decisions.” And most recently in February of 2006, Justice Ginsburg gave a speech in South Africa, on “The Value of a Comparative Perspective in Constitutional Adjudication” in which she was quite explicit about her view of using foreign law:

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions....is in line with the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view.

U.S. jurists honor the Framers’ intent “to create a more perfect Union,” I believe, if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18thcentury understandings. (Ginsburg, Ruth Bader. “A decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Constitutional Court of South Africa, February 7, 2006)

For Justice Ginsburg, the U.S. Constitution does not belong to the United States but to “a global 21st Century”, whatever that means. Later in her speech, Justice Ginsburg gave an idea of her meaning when she cited approvingly the judgment of the Court in Roper v. Simmons. In this case, a Missouri jury of his peers judged that 17 year-old Christopher Simmons acted as an adult, with premeditation, when he broke into a woman’s home, covered her head in a towel, wrapped her up in duct tape, bound her hands and legs with electrical wire, and then dumped her over the side of a bridge and left her to drown to death. For his actions, the Missouri jury gave Simmons the death penalty.

The Supreme Court said no and that henceforth no Missouri jury would have the right, and no jury in any U.S. state shall ever again have the right, to determine whether justice calls for the death penalty to apply in cases like this. The Court decided that in the global 21st century it would henceforth be a violation of the Constitution for Americans to make such judgments, even though Americans had exercised this right for the previous two hundred plus years.

What changed? The Court in Roper argued that the Constitution’s 8th Amendment prohibition on cruel and unusual punishment is subject to interpretation in light of the “the evolving standards of decency that mark the progress of a maturing society”. Justice Ginsburg called the decision in Roper as “perhaps the fullest expressions to date on the propriety and utility of looking to ‘the opinions of [human]kind.’” She went on to note that the Court “declared it fitting to acknowledge ‘the overwhelming weight of international opinion against the juvenile death penalty.’” She cited Justice Kennedy who wrote that the opinion of the world community provided “respected and significant confirmation of our own conclusions.” Kennedy also wrote that “It does not lessen our fidelity to the Constitution [to recognize] the express affirmation of certain fundamental rights by other nations and peoples.” Justice Scalia dissents strongly from this view, writing that Constitutional entitlements cannot come from foreign governments: “Much
less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.” Scalia asserts that “this Court...should not impose foreign moods, fads, or fashions on Americans.” In his dissent in Roper, Justice Scalia blasted the majority’s reliance on foreign opinion, rejecting that “the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners.” (543 U.S. 551 (2005) (Scalia, dissenting)) In a 2002 case, Atkins v. Virginia, Chief Justice Rehnquist also dissented: “I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination...we have...explicitly rejected the idea that the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.” (536 U.S. 304, 325 (2002) (Rehnquist, dissenting)) Despite these dissents, the majority on the Court is continuing to look outside America for guidance in interpreting American law.

In her own actions, Justice Ginsberg noted that in the Michigan affirmative action cases, “I looked to two United Nations Conventions: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified; and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, which, sadly, the United States has not yet ratified....The Court’s decision in the Law School case, I observed, accords with the international understanding of the office of affirmative action.” Note that Justice Ginsberg is proudly stating her use of a United Nations Convention that the United States Senate has not yet ratified.

Thus a mechanism has been locked into place by which five appointed lawyers can redefine the meaning of the U.S. Constitution and the policies implemented under that Constitution either by inventing rationales out of thin air or by citing whatever norms contained in foreign precedent they think helpful to buttress their own claims. This is not a judiciary in the classic sense, but a proto dictatorship of the elite pretending to still function as a Supreme Court.
Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

Embodied in the cruel and unusual punishments ban is the “precept . . . that punishment for crime should be graduated and proportioned to [the] offense.” The Court’s cases implementing the proportionality standard fall within two general classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant’s crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. In a second subset, cases turning on the offender’s characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, Roper v. Simmons, or whose intellectual functioning is in a low range, Atkins v. Virginia. In cases involving categorical rules, the Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. Roper. Next, looking to “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach.

Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional. Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 123 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 46 are imprisoned in just 10 States, it appears that only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization. Given
that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, e.g., Atkins and Enmund v. Florida, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate.

The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider Roper’s holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. nonhomicide crimes “may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’” Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is “the second most severe penalty permitted by law,” and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—is adequate to justify life without parole for juvenile nonhomicide offenders. Because age “18 is the point where society draws the line for many purposes between childhood and adulthood,” it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.

A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability. Second, a case-by-case approach requiring that the particular offender’s age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles’ impulsiveness, difficulty thinking in terms of long-term benefits, and reluctance to trust adults. A
categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform.

[The following is from the actual opinions:

Justice Kennedy delivered the opinion of the Court. . . . There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “‘[t]he climate of international opinion concerning the acceptability of a particular punishment’ “ is also “‘not irrelevant.’ The Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.

Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. A recent study concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. See M. Leighton & C. de la Vega, Sentencing Our Children to Die in Prison: Global Law and Practice 4 (2007). An updated version of the study concluded that Israel’s “laws allow for parole review of juvenile offenders serving life terms,” but expressed reservations about how that parole review is implemented. De la Vega & Leighton, Sentencing Our Children to Die in Prison: Global Law and Practice, 42 U.S. F. L. Rev. 983, 1002-1003 (2008). But even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide or attempted homicide. See Amnesty International, Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States 106, n. 322 (2005); Memorandum and Attachment from Ruth Levush, Law Library of Congress, to Supreme Court Library (Feb. 16, 2010) (available in Clerk of Court’s case file).

Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his amici emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of “life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.” Brief for Petitioner 66; Brief for Amnesty International et al. as Amici Curiae 15-17. As we concluded in Roper with respect to the juvenile death penalty, “the United States now stands alone in a world that has turned its face against” life without parole for juvenile nonhomicide offenders. 543 U.S., at 577.

The State’s amici stress that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus. See Brief for Solidarity Center for Law and Justice et al. as Amici Curiae 14-16; Brief for Sixteen Members of United States House of Representatives as Amici Curiae 40-43. These arguments miss the mark. The question before us is not whether international law prohibits
the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.” *Roper*.

The debate between petitioner’s and respondent’s *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import. See Brief for Amnesty International 10-23; Brief for Sixteen Members of United States House of Representatives 4-40. The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.

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The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. The judgment of the First District Court of Appeal of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

**Chief Justice Roberts, concurring in the judgment.** I agree with the Court that Terrance Graham’s sentence of life without parole violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.” Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court’s precedents, in particular (1) our cases requiring “narrow proportionality” review of noncapital sentences and (2) our conclusion in *Roper v. Simmons*, that juvenile offenders are generally less culpable than adults who commit the same crimes.

These cases expressly allow courts addressing allegations that a noncapital sentence violates the Eighth Amendment to consider the particular defendant and particular crime at issue. The standards for relief under these precedents are rigorous, and should be. But here Graham’s juvenile status--together with the nature of his criminal conduct and the extraordinarily severe punishment imposed--lead me to conclude that his sentence of life without parole is unconstitutional. . . .

**Justice Thomas, with whom Justice Scalia joins, and with whom Justice Alito joins as to Parts I and III, dissenting.** The Court holds today that it is “grossly disproportionate” and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide. Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.
The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the “moral” question of whether this sentence can ever be “proportionate” when applied to the category of offenders at issue here.

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority. In the end, however, objective factors such as legislation and the frequency of a penalty’s use are merely ornaments in the Court’s analysis, window dressing that accompanies its judicial fiat. By the Court’s own decree, “[c]ommunity consensus . . . is not itself determinative.” Only the independent moral judgment of this Court is sufficient to decide the question.

I respectfully dissent.

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59 I confine to a footnote the Court’s discussion of foreign laws and sentencing practices because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court’s discernment of any longstanding tradition in this Nation. Here, two points suffice. First, despite the Court’s attempt to count the actual number of juvenile nonhomicide offenders serving life-without-parole sentences in other nations (a task even more challenging than counting them within our borders), the laws of other countries permit juvenile life-without-parole sentences, see Child Rights Information, Network, C. de la Vega, M. Montesano, & A. Solter, Human Rights Advocates, Statement on Juvenile Sentencing to Human Rights Council, 10th Sess. (Nov. 3, 2009) (“Eleven countries have laws with the potential to permit the sentencing of child offenders to life without the possibility of release”, online at http://www.crin.org/resources/infoDetail.asp?ID=19806) (as visited May 14, 2010, and available in Clerk of Court’s case file). Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.
Jim Kelly, *U.S. Supreme Court Clarifies Limits on Its Use of International Law*, Global Governance Watch, May 19, 2010

It is unfortunate that, in the recently decided case of Graham v. Florida, the Supreme Court of the United States refers to international opinion against the sentencing of juveniles to life without parole as support for the Court’s decision. Nevertheless, it is important to note that, in the Court’s majority opinion, Justice Anthony Kennedy clarifies and significantly restricts the Court’s use of international opinion, at least in cases where the Court is involved in interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment. The Court explained that the judgments of other nations and the international community are not dispositive and are used only for support for the Court’s own independent conclusion on the matter. No doubt, this evolution in the Court’s approach disappoints those transnational progressives who had petitioned the Court to use international laws and practices to guide the Court’s Eighth Amendment analysis, rather than to merely support a decision of the Court based exclusively on domestic laws and practices.

In the *Roper* decision, written by Justice Kennedy, the Court went on to explain that, though the rejection of the juvenile death penalty by almost every nation in the world did not control the Court’s interpretation of the Eighth Amendment, since 1958, “the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’” (emphasis added). The Court then went on to examine the practices of nations and international covenants that rejected the sentencing of juvenile offenders to death. After this analysis, the Court decided that: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

Thus, in *Roper*, during the course of interpreting the Eighth Amendment, the members of the majority had looked to international practices and authorities for confirmation of their own conclusions, which, collectively, formed the basis for the Court’s opinion. This was a much more robust use of international law than would have been the case had the members of the majority interpreted the Eighth Amendment based on U.S. domestic death sentencing laws and practices, reached a conclusion as to the constitutionality of sentencing juvenile offenders to death, and then cited international practices and authorities as support for the Court’s own independent conclusion.

During the years following the *Roper* decision, many individuals, including lawyers, politicians, commentators, and ordinary citizens, harshly criticized the fact that the members of the majority had relied on international practices and authorities to interpret a provision of the United States Constitution.

In its decision, the Court ruled that juveniles who commit crimes in which no one is killed may not be sentenced to life in prison without the possibility of parole. Five justices, in an opinion written by Justice Kennedy, agreed that the Eighth Amendment’s ban on cruel and unusual punishment forbids such sentences as a categorical matter. After reaching that conclusion, the Court cited “the overwhelming weight of international opinion” against life without parole for non-homicide offenses committed by juveniles as support for its “independent conclusion” on that question.

Thus, the Court made it clear that, in principle, the members of the majority did not consider international opinion as evidence to
be used during the course of interpreting the dictates of the Eighth Amendment. In the Court’s words:

The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it. . . .

As it relates to the use of international law, there are three important outcomes from the Court’s decision in *Graham*.

First, the Court has made it clear that, contrary to the somewhat muddled and more substantive reliance on international law in *Roper*, in interpreting the Eighth Amendment, Justices are only permitted to consider domestic laws and practices and may only look to international laws and practices to support the Court’s own independent conclusion.

Second, the Court completely rejected the argument made by transnational progressives in an amicus curiae brief filed by Amnesty International and others that “the consistency and uniformity of international law and opinion against the challenged sentence should weigh heavily in this Court’s determination that the juvenile life sentence without parole is inconsistent with the Eighth Amendment’s prohibition of cruel and unusual punishments.”

Third, by reducing the role of international law to that of after-the-fact support for an independent decision of the Court based solely on domestic law and practices, the Court appeared to adopt the argument contained in an amicus curiae brief filed by conservative groups that, in *deciding* the case, the Court not consider “the non-binding provisions of international human rights treaties or an insufficiently definite international norm regarding the sentencing of juveniles to life without parole.”

Though, at first blush, some will criticize the Court for referring to international law at all in deciding *Graham v. Florida*, a closer examination of the decision reveals that the Court has taken a significant step toward minimizing the role of international law and policies in the interpretation of the U.S. Constitution. In light of globalization, the Court’s past foray into the citation of international law and the regular exposure of U.S. Supreme Court Justices to the liberal arguments of transnational progressives, Western European jurists and academics, and non-governmental organizations, conservatives can take solace in the Court’s more carefully calibrated and circumspect approach to the use of international law. Though liberal Justices on the Court who are influenced by international opinion may engage in an analysis of domestic laws and practices in a manner that guarantees an outcome consistent with international laws and practices, the Court’s professed prohibition against the use of international law as an interpretative tool will help expose any such disingenuous practices.

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court held that the Second Amendment protects an individual right to keep and bear arms. Because the case concerned a District of Columbia regulation, the Court did not reach the question whether the Second Amendment applies to the states through the Fourteenth Amendment. In *McDonald*, the Court ruled that it did.

Among other things, Justice Alito noted in the plurality opinion:

“Municipal respondents submit that the Due Process Clause protects only those rights “‘recognized by all temperate and civilized governments, from a deep and universal sense of [their] justice.’” According to municipal respondents, if it is possible to imagine any civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States. Brief for Municipal Respondents 9. Therefore, the municipal respondents continue, because such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership, it must follow that no right to possess such weapons is protected by the Fourteenth Amendment.

“This line of argument is, of course, inconsistent with the long-established standard we apply in incorporation cases. And the present-day implications of municipal respondents’ argument are stunning. For example, many of the rights that our Bill of Rights provides for persons accused of criminal offenses are virtually unique to this country. If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of any civilized country, it would follow that the United States is the only civilized Nation in the world. . . .

“Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents’ argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” Brief for State of Texas et al. as *Amici Curiae* 23.

In dissent, Justice Stevens argued that the Second Amendment should not be applied to the states, on the ground that only those liberties that are fundamental should be “incorporated.” He argued that “firearms have a fundamentally ambivalent relationship to liberty” because they can be used to harm others, that owning firearms is not critical to autonomy, equality, or dignity, and that the Second Amendment was more of a federalism provision aimed at protecting states’ militias. He also argued.

“Third, the experience of other advanced democracies, including those that share our British heritage, undercuts the notion that an expansive right to keep and bear arms is intrinsic to ordered liberty. Many of these countries place restrictions on the possession, use, and carriage of firearms far more onerous than the restrictions found in this Nation. See Municipal Respondents’ Brief 21-23 (discussing laws of
England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand). That the United States is an international outlier in the permissiveness of its approach to guns does not suggest that our laws are bad laws. It does suggest that this Court may not need to assume responsibility for making our laws still more permissive.

“Admittedly, these other countries differ from ours in many relevant respects, including their problems with violent crime and the traditional role that firearms have played in their societies. But they are not so different from the United States that we ought to dismiss their experience entirely. The fact that our oldest allies have almost uniformly found it appropriate to regulate firearms extensively tends to weaken petitioners’ submission that the right to possess a gun of one’s choosing is fundamental to a life of liberty. While the “American perspective” must always be our focus (plurality opinion), it is silly—indeed, arrogant—to think we have nothing to learn about liberty from the billions of people beyond our borders.

Concurring, Justice Scalia responded:

“No determination of what rights the Constitution of the United States covers would be complete, of course, without a survey of what other countries do. When it comes to guns, Justice Stevens explains, our Nation is already an outlier among “advanced democracies”; not even our “oldest allies” protect as robust a right as we do, and we should not widen the gap. Never mind that he explains neither which countries qualify as “advanced democracies” nor why others are irrelevant. For there is an even clearer indication that this criterion lets judges pick which rights States must respect and those they can ignore: As the plurality shows, and this follow-the-foreign-crowd requirement would foreclose rights that we have held (and Justice Stevens accepts) are incorporated, but that other “advanced” nations do not recognize—from the exclusionary rule to the Establishment Clause. A judge applying Justice Stevens’ approach must either throw all of those rights overboard or, as cases Justice Stevens approves have done in considering unenumerated rights, simply ignore foreign law when it undermines the desired conclusion, see, e.g., Casey, 505 U.S. 833 (1992) (making no mention of foreign law).”
Introduction†
Starting in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts. This Insight will summarize the trend in adopting legislation hostile to international law and foreign laws and briefly discuss its causes and consequences.

State Bills and Proposed Constitutional Amendments
In February 2010, a Republican Iowa State Representative introduced a bill to prohibit state judges from using “judicial precedent, case law, penumbras, or international law as a basis for rulings.” The same month, a Utah Republican state representative introduced House Bill 296, prohibiting enforcement of any foreign law, or any decision rendered by a foreign legal or governmental authority, if it would violate a person’s state or federal constitutional rights.†

Similarly, the bill would nullify or rewrite private contracts with a choice of foreign law clause, the enforcement of which would violate a constitutional right.

Utah H.B. 296 was not adopted, but it proved unexpectedly influential in other states. Soon after its introduction, the debate over the role of international law and foreign laws intensified dramatically. In March 2010, a spark spread the debate through state legislatures like a wildfire. The unlikely incendiaries were an obscure state court decision in a domestic violence case involving a Moroccan couple living in New Jersey and an “honor killing” by an Iraqi father in Arizona.62

† Aaron Fellmeth, an ASIL member, is a professor of law at Arizona State University College of Law. The author thanks Beth DiFelice and Heather Horrocks for research assistance.

61 The Bill reads, in relevant part:
(2) It is the public policy of this state that a court, arbitrator, administrative agency, or other adjudicative, mediation, or enforcement authority may not enforce a law enacted or a decision rendered by any legislative, judicial, or other governmental authority of a foreign nation or power if the law enacted or the decision rendered violated or would violate a right of the party against whom enforcement is sought guaranteed by the constitution of this state or the United States including due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state. (3) If any contractual provision or agreement provides for the choice of a foreign law or legal code or system to govern its interpretation or the resolution of any dispute between the parties, and if the enforcement or interpretation of the contract or agreement would result in a violation of a right guaranteed by the constitution of this state or of the United States including due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the constitution of this state, it is the public policy of this state that the agreement or contractual provision is considered modified or amended to the extent necessary to preserve the constitutional rights of the parties under the laws of this state or the United States. Any agreement or contractual provision incapable of being modified or amended in order the [sic] preserve these constitutional rights of the parties is null and void.
62 In the New Jersey case, in late 2008 and early 2009, the husband allegedly raped his wife repeatedly. When she sought a restraining order to protect herself from future attacks, a New Jersey superior court judge found the order unnecessary, in part based on the theory that the defendant’s belief in Islamic precepts, giving husbands an absolute right to coerce sex from their wives,
The resulting New Jersey bill expanded on the Utah bill by requiring courts to refuse enforcement of a contractual forum selection clause designating a foreign forum if enforcement would foreseeably “result in a violation of any rights guaranteed by” the New Jersey or the federal constitution. The same provision would have forbidden New Jersey courts to grant a “claim” of forum non conveniens if such grant “would likely lead to the violation of any right guaranteed by” the New Jersey or the federal constitution. Unlike the Utah bill, however, the New Jersey bill exempted from its provisions agreements to which a corporation or other legal person is a party.

The New Jersey bill was not adopted either, but within a few months, legislators in seventeen more states introduced bills, more or less similar to the Utah or New Jersey efforts. Many bills, such as those introduced in Alaska, Arkansas, Florida, Indiana, Louisiana, and Iowa, substantially mimic the New Jersey bill (although seven do not exclude contracts involving business organizations). Some of these bills define “foreign” laws, legal codes, and systems specifically to include decisions of “international organizations and tribunals.” An Idaho nonbinding concurrent resolution was passed in April 2010, stating that on “domestic” (presumably meaning non-foreign) issues, “no court should consider or use as precedent any foreign or international law, regulation or court decision.” Several bills and resolutions specify that foreign law includes “religious law” or “Sharia law.” A recent Iowa bill, for example, defines “foreign law” to include religious law, international or foreign judicial decisions, and international organization decisions or informal guidance.

A few bills propose much more extreme changes to state law. In February 2011, two Arizona representatives and four senators (all Republicans) introduced a bill that threatens impeachment for any judge whose decisions “use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority” or “use, implement, refer to or incorporate any case law or statute from another country or a foreign body or jurisdiction that is outside of the United States and its territories in any decision, finding or opinion” as either “controlling or influential authority” or

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63 A.B. 3496, § 3.b, 214th Leg. (N.J. 2010).
64 Id. § 4. As worded, this provision seems to allow a business firm to seek enforcement of a foreign law or forum selection clause in New Jersey courts in violation of an individual’s constitutional rights, while precluding another individual from doing the same.
67 S.B. 1294 (Flor. 2011); H.B. 1273 (Flor. 2011).
68 H.B. 1078 (Ind. 2011); S.B. 520 (Ind. 2011).
69 S.B. 460 (La. 2010); H.B. 785 (La. 2010), adopted as Act No. 886 (effective Aug. 15, 2010).
70 H.F. 489 (Iowa 2011).
71 S.B. 51 (Ga. 2011); H.B. 45 (Ga. 2011); H.B. 2087 (Kan. 2011); S.B. 308 (Mo. 2011); H.B. 708 (Mo. 2011); H.B. 768 (Mo. 2011); Legis. Bill 647 (Neb. 2011); H. 3490 (S.C. 2011); S. 444 (S.C. 2011); S.B. 201 (S.D. 2011); H.B. 911 (Tex. 2011); H.B. 3027 (Tex. 2011).
72 See e.g., S.B. 97 (Ark.).
74 See e.g., H.F. 575 (Iowa 2011); H.B. 301 (Miss. 2011).
75 H.F. 575 (Iowa 2011).
“precedent or the foundation for any legal theory.” The bill would also void any decision relating to a private agreement that relies on foreign or “religious sectarian law.” The term “foreign body” is specifically defined to include the United Nations and its agencies, the European Union, an “international judiciary,” various other intergovernmental organizations, and the Socialist International. “Foreign Law” is defined as “any statute or body of case law developed in a country, jurisdiction or Foreign Body outside of the United States, whether or not the United States is a member of that body, unless properly ratified as a Treaty pursuant to the United States Constitution.”

Like the federal Constitution Restoration Act bills introduced in Congress in 2004-2005, the Arizona bill carves out specific exemptions for statutes or case law inherited from Great Britain or based on an “Anglo-American legal tradition.”

Most of these bills have either died in committee or stand little chance of adoption, but they express misunderstanding and distrust of international law and foreign laws. Some bills, however, may actually be adopted in some states. Louisiana has, in fact, adopted its bill, and the Indiana Senate recently passed a bill similar to New Jersey’s A3496 by a roll-call vote of fifty to zero. The bill was referred to the Indiana House of Representatives on February 17 and awaits further legislative action.

In addition to these bills, similar state constitutional amendments were proposed in late 2010 and early 2011 in Alabama, Arizona, Arkansas, Indiana, Iowa, Missouri, Oklahoma, and Wyoming. Although a few proposed amendments, such as Indiana’s, mainly reproduce the New Jersey bill, most specifically preclude courts from considering or applying international law, foreign laws, or “legal precepts of other nations or cultures.” The Oklahoma “Save Our State” resolution (H.J.R. 1056) is typical:

The Courts when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.

that no Oklahoma court had ever cited Sharia, but he characterized the law as a “preemptive strike.”


H.J.R. No. 1056, at 2 (Okla.).

See John R. Crook, Contemporary Practice of the United States Relating to International Law, 105 Am. J. Int’l L. 123 (2011). The measure’s sponsor is reported to have admitted that no Oklahoma court had ever cited Sharia, but he characterized the law as a “preemptive strike.”
State courts are also forbidden to consider international law, foreign laws, and Sharia law in the joint resolutions proposed in Alabama, Arizona, Missouri, and Wyoming.

The Oklahoma Constitutional Amendment and Awad v. Ziriax

Some of the proposed state constitutional amendments have proved popular. The Missouri joint resolution has 105 co-sponsors in the House of Representatives. The Oklahoma amendment was actually approved by a comfortable margin. On May 25, 2010, the Oklahoma House of Representatives adopted joint resolution 1056 to amend the state constitution. The resolution, presented to Oklahoma voters as State Question 755, was approved by 70% of the voters.84

The amendment was not immediately certified to the state supreme court because a resident of Oklahoma challenged it, inter alia, as contrary to the Establishment Clause of the U.S. Constitution. The Establishment Clause generally prohibits arbitrary government discrimination against any religion. 85 The federal district court for the Western District of Oklahoma, which interpreted the reference to “Sharia law” to apply to religious beliefs rather than a system of law, found that the plaintiff had made a “strong showing of a substantial likelihood of success” in proving that the amendment unconstitutionally stigmatized Muslims. 86 For now, the Oklahoma State Board of Elections is pursuing an appeal in the U.S. Court of Appeals for the Tenth Circuit.87

Measures Prohibiting Consideration of International Law

Under Article VI of the U.S. Constitution, treaties to which the United States is a party are the “supreme Law of the Land.” Any state law or constitutional provision barring courts from enforcing international treaty law would likely run afoul of the Supremacy Clause. Those state bills and joint resolutions prohibiting courts from considering or enforcing international law would be void.

The U.S. Constitution does not explicitly incorporate customary international law into federal law. However, the Supreme Court declared in The Paquete Habana (1900) that customary international law “is part of our law.” 88 More recently, in the context of suits against foreign citizens for serious human rights violations, the Court reaffirmed that at least some customary international law rules, if sufficiently well defined and widely accepted, are enforceable in U.S. courts as federal law. 89 To the extent that the state bills and

87 The Paquete Habana, 175 U.S. 677, 700 (1900).
88 See Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Although Justices Scalia, Rehnquist, and Thomas concurred in part and in the judgment, all three have been among those members of the Court most harshly critical of the reliance on international and foreign laws in Supreme Court opinions. Their opinions may have provided support or inspiration for the legislatives measures discussed in this Insight. See, e.g., Lawrence v. Texas, 539 U.S. 558, 586, 589 (2003) (Scalia, J., dissenting) (referring to discussions of foreign views on a question of constitutional rights as “dangerous”); Roper v. Simmons, 534 U.S. 551, 607 (2005) (Scalia, J., dissenting) (denigrating the Court’s use and reference to foreign laws in its opinion).
89 However, even relatively restrained bills, such as Louisiana Act No. 886, could be read to prohibit a contractual waiver of state or federal constitutional rights in an agreement governed by foreign law. For example, an agreement under foreign law not to reveal trade secrets, national security information, or data protected by the EU Data Privacy Directive could be interpreted as void for violating a contracting party’s right of...
constitutions would forbid courts to enforce the “narrow class” of customary international law directly enforceable under Supreme Court precedent, they too would violate the Constitution.

Measures Prohibiting Consideration of Foreign Law

Whether excluding foreign law from state courts would violate the federal Constitution is a more complex question. Those bills subordinating foreign laws to fundamental state and federal constitutional rights, such as the adopted Louisiana Act No. 886, would have minimal effects in most states if reasonably interpreted. However, bills and proposed state constitutional amendments forbidding judges to look to precepts of and to enforce foreign laws could conflict with a broad range of federal laws and policies. They would also require state courts to abandon the practice of citing to foundational English cases and would preclude enforcement in state courts of federal laws that require recognition or enforcement of foreign judicial or arbitral decisions.

Several of the bills and proposed constitutional amendments, such as bills introduced in Arizona and Texas, and the Oklahoma Save Our State Resolution, could be interpreted to deny state government officials and courts the power to recognize foreign juristic persons, as well as marriages or child adoptions originating on foreign soil. Most would also nullify state laws that rely on recognition of foreign laws and court judgments.

Some bills, including the New Jersey, Florida, and Iowa bills, would require conflicts of law to be decided in favor of the forum state, or the case dismissed, whenever the law suit or arbitration would threaten a person’s state or federal constitutional rights. Others would do the same regardless of whether a constitutional right is threatened.

Finally, the Arizona bill would nullify the choice of a foreign law or foreign forum in an agreement between private parties, and nearly all of the bills and proposed constitutional amendments would do the same when the choice of law or forum is perceived to threaten state or federal constitutional rights. Unless interpreted very narrowly, such limitations could not only foil the reasonable expectations of the parties in many cases, but defeat their clearly expressed intentions. It is unclear what desirable policies these provisions would serve.

free speech. For this reason, some (but not all) bills specifically provide that waivers of such rights are enforceable.

90 For reasons that are unclear, some bills allow citation to English precedents, which would nonetheless preclude reference to Scottish cases.

91 Even nonbinding guidance by intergovernmental and nongovernmental organizations incorporated by the parties as essential terms in a contract would arguably be rendered unenforceable by some of the bills and proposed amendments. The International Chamber of Commerce’s widely used Uniform Customs and Practices for Documentary Credits or its Incoterms could be rendered inoperable in contracts with a citizen of an affected state.
Hungary’s centre-right Fidesz party celebrated a historic election victory yesterday and pledged to drive a hard bargain in talks to renegotiate an international loan that saved the economy from collapse.

In Sunday’s second round of voting, Fidesz became the first party since communism collapsed in 1989 to secure more than two-thirds of seats in Hungary’s parliament, a mandate that allows it to change the constitution and major laws without having to make deals with other parties.

Fidesz leader and prime minister-designate Viktor Orban (46) called his victory a peaceful revolution, with which Hungarians had ousted the regime of oligarchs who misused their power, and the people have established a new regime, the regime of national unity.

Fidesz won 263 seats in parliament, far ahead of the 59 seats secured by the Socialists, who are in disarray after eight years in power. The ultra-nationalist Jobbik party entered parliament for the first time with 47 seats and the new liberal and green party, Politics Can Be Different, won 16 seats at its first attempt. One independent MP also won a seat.

The Socialists were laid low by a series of scandals, the economic crisis that struck Hungary in 2008, and the unpopular cutbacks demanded by European Union and International Monetary Fund in return for a EUR 20 billion emergency loan that averted financial meltdown.

Mr Orban says he wants lower taxes to stimulate growth and will try to persuade the EU and IMF to allow Hungary a higher budget deficit in return for a comprehensive plan on reducing its debt.

“Our job is that Hungarians have an economic plan for which we can win the support of those who otherwise have undertaken Hungary’s financing. We are seeking a partnership . . . We must draw up a multi-year plan in which we cut Hungarian state debt to a manageable level,” Mr Orban said.

He added that he hoped to reach a new agreement with creditors this year but stressed that we will not accept diktats but present our own views and then try to win over market financiers, financial bodies of the EU and the World Bank and representatives of the IMF.

“In my view, neither the IMF nor the EU’s financial bodies are our bosses. We are not subordinate to them,” Mr Orban added.

The Fidesz leader has pledged to cut bureaucracy and corruption and make the economy more efficient, but analysts say international markets are wary of his reputation for profligacy and unfulfilled promises earned during his time as premier from 1998-2002.

“If implemented, changes like the reform of the municipal system or a profound tax and labour market reform would shift the nature of the fiscal adjustment from expenditure freezes . . . towards structural changes that would support long-term fiscal sustainability,” said investment bank Goldman Sachs.

A failure to implement the promised reforms would quickly erode the confidence in the new government and the course of the economic policy.
Cillian O’Donoghue, Fidesz looks to alter Constitution, The Prague Post, Nov. 3, 2010

The ruling Fidesz party says it wants to “revamp” the Constitution after the Hungarian Constitutional Court struck down a law allowing a 98 percent tax on any severance packages for public sector workers that total more than 2 million forints ($10,000) Oct. 26.

Later the same day, the party’s parliamentary leader, Janos Lazar, initiated an unprecedented effort to strip the top legal authority of a number of powers by resubmitting the exact same bill in its entirety, while introducing legislation for a constitutional amendment that would remove court authority on any budget-related issues. “If the people cannot decide on an issue, then the Constitutional Court does not have the right either,” Lazar said.

He added that a change in the Constitution would be a stop-gap measure before a new Constitution is written. The proposed constitutional amendment would take away the Constitutional Court’s powers to rule on budget and tax laws. Significantly, the move would also prevent the court from intervening in Fidesz’s proposed pension reforms. Fidesz holds more than two-thirds of the seats in Parliament, the threshold required to amend the Constitution.

Prime Minister Viktor Orban and the Christian Democratic People’s Party (KDNP), a subgroup of Fidesz . . ., have come out in support of Lazar’s proposals. Opposition political leaders have responded with outrage, with multiple parties condemning the Fidesz proposal.

Taxes on severance payments have large-scale public support and will put an end to the enormous public sector payouts that have been the source of controversy in recent months.

“We are not objecting to the severance tax but to the methods used to introduce it,” Attila Mesterhazy, leader of the opposition Socialists (MSZP) said. . . . [T]he leader of the left-wing Politics Can Be Different Party (LMP) Andras Schiffer . . . compare[d] Fidesz’s moves to change the Constitution to a hard-line Central Asian dictatorship, saying they “must be the envy of Nursultan Nazarbayev in Kazakhstan.”

Of much greater surprise has been the reaction of the right-wing media. On Oct. 27, the daily Magyar Nemzet, largely seen as loyal to Fidesz, . . . refer[ed] to the proposed constitutional amendments as “an attack on democracy.”

While the amount to be gained by the state from the 98 percent tax is considered negligible - by the government’s estimates, it would generate just 1 billion forints in 2010 - the move to amend the Constitution is seen to pre-empt any attempt by the Constitutional Court to strike down government plans to sharply increase taxes on energy, telecommunications and the financial sector, all of which include holdings by foreign investors. There are also fears the court could rule as unconstitutional the government’s decision to seize employee contributions to private pension funds.

Estimates are that these additional tax hikes would generate $2.2 billion for the state budget, and they are seen as vital for the government to reach its declared deficit reduction goals of 3.8 percent of GDP in 2010 and 2.8 percent in 2011. With Hungary taking the rotating European Union presidency from January, there is added pressure to balance the books.

According to a report by the Political Capital Policy and Consulting Institute, “The loss of revenues would spell disaster for the budget. From Fidesz’s perspective, the narrowing of the Constitutional Court was the only hope for maintaining fiscal balance.”

The current controversy over the severance pay tax is “good camouflage,” political scientist Igor Breitner told The Prague Post. “It covers their real intention, which is to take away the court’s powers to decide on matters with much greater financial significance.” . . .
Hungary Prime Minister Viktor Orban, poised to take over presidency of the European Union, is fighting back against criticism from Germany and other countries over a new Hungarian law that some fear could be used to curb press freedom.

The law, which was passed last week by the Parliament in Budapest and comes into force on Jan. 1, empowers the newly created National Media and Communications Authority to impose heavy fines for coverage that it considers unbalanced or offensive to human dignity or common morals.

Dunja Mijatovic of the Organization of Security and Cooperation in Europe, which monitors press and human rights freedoms throughout the region, said he was concerned that the legislation, “if misused, can silence critical media and public debate in the country.”

The German Chancellor Angela Merkel spoke out strongly against the new law. “As a country that is about to take over the president of the E.U., Hungary will have a particular responsibility for the image of the whole union in the world,” said a spokesman for Mrs. Merkel.

Luxembourg Foreign Minister Jean Asselbron questioned whether Hungary was ready to represent the E.U. “The plans clearly violate and the spirit of E.U. treaties,” he said. “It raises the question of whether such a country is worthy of leading the E.U.”

But Mr. Orban hit back against his critics. “We are not even thinking in our wildest dreams about making amendments to the law,” he said in an interview with the Hungarian private television channel Hir TV. “I am not inclined to react with wobbly knees to debates in parliament or Western reactions. There is not a single passage in the law that does not correspond to the media law in E.U. countries.”

National television channels could face fines up to 200 million forints ($950,000) for violating the law, and daily newspapers and Internet news portals face fines up to 25 million forints ($119,000). Fines for weekly or monthly publications could total 10 million forints ($48,000).

Mr. Orban’s conservative Fidesz Party was swept into power last April after a surge of resentment against the former socialists. He can change several laws and the constitution because his party holds a two-thirds majority in the parliament.

Gyorgy Konrad, one of Hungary’s leading writers and a dissident during the communist era, criticized Mr. Orban for eroding Hungary’s democracy.

Referring to the rise of Hitler’s National Socialists, Mr. Konrad said in an interview with the Berliner Zeitung that “the law reminds me very much of 1933 when the NSDAP came to power with an electoral majority under seemingly democratic conditions.”

“Even if Hungary is a small country in comparison with Germany, and if a reign of terror is unlikely, there is no calling this a democracy any more,” he said.

Hungary assumes the six-month-long presidency of the E.U., the third former communist-bloc country to do so, following Slovenia and the Cezch Republic. Hungary joined the 27-member union in 2004.

Even though the role as E.U. presidency does not give the country great power because policies are set mostly in Brussels, the post gives a country a chance to show off its culture and traditions as well as lobby for certain foreign policy interests.
Judy Dempsey, *Hungary approves a new Constitution; Socialists and liberals boycott vote in dispute over checks and balances*, The International Herald Tribune, April 19, 2011

... Hungary’s Parliament approved a new Constitution on Monday ...

One of the most disputed provisions curbs the powers of the constitutional court on budget and tax matters and allows the president to dissolve Parliament if a budget is not approved.

The center-right party Fidesz, which swept into power last year with a two-thirds majority, was the only party that voted for the Constitution in the 262-to-44 vote. The decision by the main opposition Socialists and liberal parties to boycott the vote reflected the controversy not just over the contents of the Constitution, but also the way it was drafted and the political polarization that has continued ever since the Soviet Union collapsed in 1990 and its satellites moved toward democracy.

But Janos Lazar, leader of Fidesz’s parliamentary faction, told Parliament before the vote that the Constitution represented something fundamental: a break with Hungary’s communist past.

The Constitution served to repay “those Hungarians who changed the regime and the political players who took part in shaping political life,” he said. “We are trying to settle that debt.”

As soon as he was elected last year, Prime Minister Viktor Orban, who was once a leading dissident, said he would move quickly to write and pass a new Constitution that he claimed would complete Hungary’s transition to a full-fledged democracy.

The opposition parties, however, withdrew from a commission that was established last year to draft a written Constitution, the first in Hungary’s turbulent history.

“They withdrew for political reasons,” Foreign Minister Janos Martonyi said in an interview Friday in Berlin. “We wanted them to participate. We kept asking them to come back. It was a big mistake that they did not rejoin the commission.”

The opposition claimed it would not have been listened to even had it remained in the commission. Mr. Martonyi denied such allegations and mentioned that the Greens party had been involved but had also dropped out. Nevertheless, he said the Greens’ concerns about sustainable development were reflected in the Constitution, he said.

Mr. Martonyi went on a diplomatic offensive last week to explain why the Constitution would complete Hungary’s transition from a communist state to a democratic society.

Even so, the contents of the Constitution, which will go into effect in January, did not satisfy the Venice Commission, the E.U.’s constitutional law advisory body. Last week, it questioned the transparency of the process in addition to the powers Parliament will have to curb the constitutional court’s judges, especially over budgetary and other financial matters.

The constitutional court’s restrictions with regard to financial issues will be lifted only once the public debt sinks below 50 percent of gross domestic product.

Laszlo Solyom, a former president as well as a former head of the constitutional court, criticized the curbs on the court and the way the Constitution was drawn up. “The drafting process had lost its dignity by descending to the level of common parliamentary wrangling,” he said in excerpts of an article to be published in the Thursday edition of the weekly Heti Valasz. Still, he said, “Hungary will stay among the European democracies even under the new Constitution.”
In an effort to gain legitimacy, the Fidesz party sent 8 million questionnaires to Hungarian households asking what the constitution should contain. Nearly 950,000 citizens replied; however, with only one month to read such a large number of applications, the move was passed off as little more than a PR stunt by political analysts.

“The questionnaire was not academically sound and could not substitute for a referendum,” political scientist Andras Bozoki told The Prague Post.

However, Fidesz rejected any calls for a referendum and instead referred to the April 2010 elections as a “revolution at the voting booths,” giving the government a mandate to proceed with an overhaul of the legal foundations of the country.

Socially, the document takes on a conservative tone and has been criticized for alienating homosexuals, single parents and atheists while also adopting a pro-life stance on abortion.

Marriage is referred to as “that as between a man and a woman,” although same-sex couples are entitled to registered partnerships. Extra voting rights are given to parents with three or more children.

The document says, “The life of a fetus will be protected from conception,” raising fears that protections could be placed against abortion; however, the government says the present liberal regulations on abortion won’t change.

A statement released by the Hungarian Civil Liberties Union said the new constitution “reflects a Christian conservative set of values, discriminating against those who do not share such ideas.”

Meanwhile, new restrictions curtailing the powers of the Constitutional Court in economic matters were created, prohibiting judges from ruling on issues related to the national budget until state debt is reduced below 50 percent of GDP. Currently at 80 percent, Hungary has one of the highest debt-to-GDP ratios in the European Union. The commitment to reduce the size of the budget deficit is generally seen as a necessity within the country, and this commitment has won praise among the economic and business community.

Under the new constitution, the head of state now has the power to dissolve Parliament unless a budget is passed by March 31. If Hungary decides to join the eurozone, it will require approval by two-thirds of MPs.

Also under new rules, all Constitutional Court judges must now retire at age 62. Judges have called the provision a political attack on the independence of the courts, as Hungary’s top courts will lose many of its most experienced officials, while other government officials do not have such age restrictions.
Nicholas Kulish, *Overhauling Hungary, bit by bit; As Fidesz Party leverages its majority, opponents see a slow-motion coup*, International Herald Tribune, Dec. 23, 2011

In less than two years as a member of the Hungarian Parliament, Timea Szabo said, she has looked on helplessly as the governing Fidesz Party used its two-thirds majority to tighten its grip on the media and the courts, redraw parliamentary districts in its favor and pack the constitutional court with supporters. On Jan. 1, a new Constitution written and ratified by Fidesz takes hold.

“They are preparing the funeral for the Hungarian Republic,” Ms. Szabo said. Opposition parties, including her small, green Politics Can Be Different party, known by its Hungarian abbreviation L.M.P., have called for a demonstration Friday against the encroaching “demolition of democracy” of Prime Minister Viktor Orban.

Democracy in Hungary is dying not with a single giant blow but with many small cuts, critics say, through legal processes in Parliament that add up to a slow-motion coup. In this view, there is a drift toward authoritarian government aided by popular disaffection with political gridlock and a public focused mainly on economic hardship.

To growing criticism from the European Union and the United States, Fidesz has used its majority to pass an unprecedented flurry of legislation before the new Constitution takes effect, a push that critics say will dramatically consolidate power with Mr. Orban, a political veteran who got his start opposing Communist rule as it waned in the late 1980s.

Fidesz Party loyalists are being put in charge of powerful institutions like the public prosecutor’s office and the national budget authority. Judges are being forced out with a drop in the mandatory retirement age to 62 from 70, even as the procedure for Fidesz to nominate replacements has been eased.

On Tuesday, the Hungarian media council withdrew the frequency from the independent radio station Klubradio, an opposition voice in an increasingly cowed and self-censoring media landscape.

“What you have is the systematic destruction of checks and balances in the government,” said Peter Hack, a law professor at the Eotvos Lorand University in Budapest who, in Parliament for the pro-business Free Democrats, worked on judicial matters. “The present situation is really a building where the foundations are weakened.”

Mr. Orban and his backers counter that they are only keeping promises to sweep away an order they say was tainted with compromises to ensure a smooth transition from Communism but left a legacy of gridlock.

Government supporters note that the opposition claims on one hand that Fidesz is cementing its hold on power and, on the other, asserts that the real danger lies in the far-right party Jobbik taking control of a government shorn of checks and balances.

The constitutional court this week struck down portions of the controversial media law, as well as changes to the criminal code and a law governing churches, but the high court’s purview will be limited by the new Constitution, one of several steps reining in the power and independence of the judiciary.

Meanwhile, representatives of the International Monetary Fund and European Commission walked out on negotiations last week over assistance for the heavily indebted country after the government introduced proposals to significantly restrict the independence of the Hungarian National Bank.

As legislative and constitutional change gained speed this year, outsiders including the U.S. secretary of state, Hillary Rodham Clinton, and the E.U. justice commissioner,
Viviane Reding, expressed concerns about the erosion of independent institutions. But the situation in Hungary has remained largely under the radar in Europe as leaders have been almost entirely preoccupied with the sovereign debt crisis threatening the survival of the euro.

Ms. Szabo, 35, has the doggedness and intensity of someone who worked for two years in Afghanistan and Pakistan on human rights issues. She said that exhaustion following legislative sessions that stretched well past midnight wore on her less than being a member of Parliament reduced to barely more than a spectator.

With Mr. Orban’s center-right Fidesz passing laws more or less at will, she and other opposition lawmakers sometimes had only a few hours’ warning of debates on complex laws. Her party boycotted entirely the debate Tuesday on the central bank legislation.

“We more and more feel that by sitting there in Parliament, we’re legitimizing what’s happening without really being able to do anything about it,” Ms. Szabo said. The new Constitution, she noted, fittingly changed the name of the country, removing the word Republic and leaving it officially just Hungary.

Zoltan Kovacs, a government spokesman, said that opposition parties and analysts sympathetic to them were painting legal changes in a dire light simply because they disagreed.

The level of antagonism in Hungarian politics rose significantly starting in September 2006, when radio stations played a leaked recording of Ferenc Gyurcsany, the Socialist prime minister, who acknowledged lying to the public about the real state of the country’s economy before elections that year.

Long before austerity became Europe’s watchword, the Hungarian government was cutting government jobs and raising taxes and fees in 2007 to try to control its growing budget deficits. Steel barriers surrounded the Parliament building to protect it from tens of thousands of demonstrators.

Dissatisfaction over cutbacks and Mr. Gyurcsany’s speech helped the vertiginous rise of the nationalist, anti-Semitic Jobbik party. From a fringe party with a paramilitary wing, Jobbik eventually won nearly 17 percent of the vote in the 2010 election.

But the main beneficiary of voter outrage toward the Socialists was Fidesz, which won 53 percent of the vote.

Analysts say the depths of the changes will become apparent only over time. In this view, no individual measure substantially undermines Hungarian democracy. But the sum of changes to electoral districts and election laws, a weakened constitutional court packed with additional political nominees, a broader judiciary under closer political control and a tight leash on public and private news media tilt the balance in Fidesz’s favor.

Mr. Hack, the law professor, said that Mr. Orban does not represent the greatest danger to Hungary’s democracy. It is Jobbik, he said, which would benefit from the rising anti-establishment mood and displeasure with Fidesz over further, deeper slashing of public spending in a deepening budget crisis. “A lot of people are not saying that Orban is doing too much but that he is doing too little,” Mr. Hack said.

The centralization of power would look very different, even to Fidesz, with someone else in charge. “In the short term it seems reasonable to take out the brakes from a car, it appears to go faster,” Mr. Hack said. “The problem is when the first curve appears and you need them.”
Hungary’s government on Tuesday made a robust defence of a new constitution that critics both inside and outside the country have called an assault on democracy.

The comments came after a demonstration by up to 30,000 protesters on Monday night outside Budapest’s opera house where a reception was taking place to celebrate the constitution coming into force on January 1. Earlier, former communist-era dissidents had accused the government of Viktor Orban of “destroying the democratic rule of law”.

Financial markets, meanwhile, continued to put pressure on the country, whose debt has been downgraded to junk by two rating agencies in recent weeks. Hungary on Tuesday sold three-month Treasury bills at their highest yield since 2009 in the first debt auction since the country passed controversial laws that could jeopardise financial assistance it is seeking from the European Union and the International Monetary Fund.

Mr Szijjarto likened the furore over the constitution to criticisms a year ago of a new media law, which he claimed had proved groundless.

“Critics said freedom of the press will die,” he said. “If you come to Hungary and open up any newspaper, or watch TV news, you can read what rude things they say about us.”

The prime minister’s spokesman rejected opponents’ claims that redrawn constituency boundaries in a new electoral law could entrench his Fidesz party in power. Mr Szijjarto disputed analyses suggesting that under the new boundaries, Fidesz would have won elections in 2002 and 2006 that it lost under the old system, saying it was impossible to predict voter behaviour.

“I think voter patterns are independent of boundaries,” he said.

Critics have also warned that judicial reforms give the government undue influence over the courts, in particular the appointment of Tunde Hando, an Orban family friend, as head of a new National Justice Office. The office has powers both to appoint judges and to allocate cases to courts of its choosing.

Mr Szijjarto said Ms Hando had been a judge “for decades without one single complaint”. “She is a very respected expert,” he said. The reform was designed to speed up court cases in Hungary’s sclerotic and inefficient judicial system.

“People seem to think that [Ms Hando] can dictate the verdict in advance,” he said. “I do not think the independence of the judicial system is at risk.”

Hungary’s new constitution and several associated “cardinal” laws passed just before the new year have caused mounting international concern. Hilary Clinton, US secretary of state, wrote to Mr Orban last week expressing worries over democracy in Hungary.

But Peter Szijjarto, Mr Orban’s spokesman, told the Financial Times that many criticisms of the new constitution were exaggerated or incorrect. “If anyone says the current Hungarian government wants to bring Hungary to a dictatorship, what can I say? No it does not,” he said, “because it is a democratic government.”

He insisted the new constitution was designed to replace a flawed basic law that, unlike in Hungary’s neighbours, had remained in place in modified form since the fall of communism in eastern Europe two decades ago.

Reawakening a debate on what the European Union should do when one of its members threatens its democratic principles, the bloc’s executive arm opened legal proceedings on Tuesday against Hungary, which critics contend is sliding toward authoritarianism.

It had been more than 10 years since the union faced a similar dilemma, when an Austrian coalition government included a far-right party. Austria was forced into semi-isolation when the bloc’s other countries severed political ties.

The government of Hungary, by contrast, is being taken to task on technicalities rather than the wider claims that it is undermining democracy, centralizing power and destroying pluralism.

On Tuesday, the European Commission, the union’s executive arm, said it was starting proceedings over Hungarian measures that threaten the independence of the country’s central bank and its data-protection authority, and over rules on the retirement age of judges. Ultimately, Hungary can be forced to change rules that breach European law or, if it refuses, can be taken to the European Court of Justice.

But the dispute has ignited a broader debate. While the union insists that countries meet democratic standards to join, there are few sanctions once a nation is a member. After talks on Monday, Belgium and the Netherlands suggested that European ministers could discuss the situation next week.

Belgium’s foreign minister, Didier Reynders, said the bloc should monitor countries’ adherence to political and economic standards. “Why is it possible for economic criteria but not for political criteria?” he asked Tuesday in Brussels. “It is a question of political will.”

The issue came into focus after 10 once-Communist countries joined the bloc in 2004 and 2007, despite worries about whether all had completed their transition to Western-style democracy. In the past decade, Poles and Slovaks have elected populist governments, though neither clashed as openly with the European authorities as has Hungary’s leader, Viktor Orban.

Criticized a year ago over the introduction of a law to regulate the media, he hit back at those who likened his style of government to that of the Russian prime minister, Vladimir V. Putin. “From 1998 to 2002, the Western press said I was reminiscent of Hitler and Il Duce,” Mr. Orban said at the time. “Now they compare me with Putin and the Belarussian president. I will leave up to you to decide if it is progress or not.”

One of the architects of Hungary’s overthrow of Communism, Mr. Orban won his first term as prime minister in 1998, riding a wave of nationalism while cultivating his image as a churchgoing father of five. He returned to the post in April 2010 after his Fidesz Party won a landslide victory. . . .

Mr. Orban, in fact, retreated when the European Commission objected to the media law. But similar tensions have arisen over a revamping of Hungary’s Communist-era Constitution. Mr. Orban has been able to redraft it because he has an unusually large parliamentary majority. Critics say he has used his powers to install those loyal to Fidesz to public positions carrying long periods of service. . . .

Hungary’s prime minister promised Friday to abandon plans to merge the nation’s central bank and its financial markets regulator, seeking to defuse criticism from the European Union and the International Monetary Fund over the country’s increasing centralization of power.

The prime minister, Viktor Orban, made the pledge in an address to the Hungarian Parliament. Speaking in an interview on Kossuth Radio, Mr. Orban said the bank and the regulator “have been operating separately and they will do fine separately in the future.”

The rollback came two days after Mr. Orban offered an undetailed pledge to change parts of new Hungarian laws that critics say are pushing the country toward authoritarianism. Officials in Brussels welcomed the announcement, but said they expected to see further details.

Mr. Orban has been criticized for pushing through measures that threaten the independence of the news media and the judiciary, as well as the central bank. Fears that he is seeking to put his supporters in key positions and erode pluralism in Hungary have highlighted worries that the European Union lacks tools if one of its members appears to be breaching democratic principles.

Because of its large parliamentary majority, Mr. Orban’s Fidesz Party can amend the Constitution without the support of the opposition. But Mr. Orban has a relatively weak hand to play over the issue of the national central bank, since his government is requesting financial aid from the European Union and the International Monetary Fund. Both have insisted on changes before they begin negotiations.

“We have to come to an agreement on the interpretation and understanding of the central bank independence,” Tamas Fellegi, Hungary’s minister in charge for aid negotiations, said after a meeting in Brussels with the European commissioner for economic and monetary affairs, Olli Rehn. “We have to implement measures that will satisfy the I.M.F and E.U.”

For his part, Mr. Rehn “reiterated that before we can start formal negotiations on this E.U.-I.M.F. financing program, certain preconditions must be met,” said the commissioner’s spokesman, Amadeu Altafaj-Tardio. “In particular, he stressed that Hungary must take concrete steps to ensure full independence of its central bank,” Mr. Altafaj-Tardio said.

Hungary does not appear to have compromised on a requirement that central bankers take an oath on the Hungarian Constitution. Mr. Fellegi said that requirement was not new.

On Tuesday, Mr. Orban will hold talks in Brussels with the European Commission president, Jose Manuel Barroso, and will be expected to outline the specific changes he intends to make, said a European Union official who spoke on the condition of anonymity because he was not authorized to speak publicly.

Earlier this week the European Commission, the union’s executive arm, threatened legal action against Hungary over new laws on the central bank, the retirement age of judges and the country’s data protection authority that it said violated European Union rules.

Mr. Fellegi did not reveal how much Hungary would request in “precautionary” assistance, saying this would be a part of the negotiations rather than a precondition. “It is very clearly in the interests of the E.U. and Hungary to have these negotiations start as quickly as possible,” he said.
...[T]he gravity of European political developments isn’t widely understood... [D]emands for ever-harder austerity, with no offsetting effort to foster growth, have done double damage. They have failed as economic policy, worsening unemployment without restoring confidence; a Europe-wide recession now looks likely even if the immediate threat of financial crisis is contained. And they have created immense anger... 

Right-wing populists are on the rise from Austria, where the Freedom Party (whose leader used to have neo-Nazi connections) runs neck-and-neck in the polls with established parties, to Finland, where the anti-immigrant True Finns party had a strong electoral showing last April. And these are rich countries whose economies have held up fairly well. Matters look even more ominous in the poorer nations of Central and Eastern Europe.

Last month the European Bank for Reconstruction and Development documented a sharp drop in public support for democracy in the “new E.U.” countries, the nations that joined the European Union after the fall of the Berlin Wall. Not surprisingly, the loss of faith in democracy has been greatest in the countries that suffered the deepest economic slumps. . . .

One of Hungary’s major parties, Jobbik, is a nightmare out of the 1930s: it’s anti-Roma (Gypsy), it’s anti-Semitic, and it even had a paramilitary arm. But the immediate threat comes from Fidesz, the governing center-right party.

Fidesz won an overwhelming Parliamentary majority last year, at least partly for economic reasons; Hungary isn’t on the euro, but it suffered severely because of large-scale borrowing in foreign currencies and also, to be frank, thanks to mismanagement and corruption on the part of the then-governing left-liberal parties. Now Fidesz, which rammed through a new Constitution last spring on a party-line vote, seems bent on establishing a permanent hold on power.

The details are complex. Kim Lane Scheppele, who is the director of Princeton’s Law and Public Affairs program -- and has been following the Hungarian situation closely -- tells me that Fidesz is relying on overlapping measures to suppress opposition. A proposed election law creates gerrymandered districts designed to make it almost impossible for other parties to form a government; judicial independence has been compromised, and the courts packed with party loyalists; state-run media have been converted into party organs, and there’s a crackdown on independent media; and a proposed constitutional addendum would effectively criminalize the leading leftist party.

Taken together, all this amounts to the re-establishment of authoritarian rule, under a paper-thin veneer of democracy, in the heart of Europe. And it’s a sample of what may happen much more widely if this depression continues.

It’s not clear what can be done about Hungary’s authoritarian slide. The U.S. State Department, to its credit, has been very much on the case, but this is essentially a European matter. The European Union missed the chance to head off the power grab at the start - - in part because the new Constitution was rammed through while Hungary held the Union’s rotating presidency. It will be much harder to reverse the slide now. Yet Europe’s leaders had better try, or risk losing everything they stand for.

And they also need to rethink their failing economic policies. If they don’t, there will be more backsliding on democracy -- and the breakup of the euro may be the least of their worries.

... Under the new constitutional order, the judiciary has taken the largest hit. The Constitutional Court, which once had the responsibility to review nearly all laws for constitutionality, has been killed off in three ways. First, the government expanded the number of judges on the bench and filled the new positions with their own political allies (think: Roosevelt’s court-packing plan). Then, the government restricted the jurisdiction of the court so that it can no longer review any law that has an impact on the budget, like laws pertaining to taxes and austerity programs, unless the law infringes particular listed rights. Finally, the government changed the rules of access to the court so that it will no longer be easily able to review laws in the abstract for their compliance with the constitution. Moreover, individuals can no longer challenge the constitutionality of laws without first going through a lengthy process in the ordinary courts. The old Constitutional Court, which has served as the major check on governmental power in a unicameral parliamentary system, is now functionally dead.

The ordinary judiciary has suffered a similar fate. The government lowered the retirement age for judges from 70 to 62, giving judges only a few months to adjust to their new futures. More than 200 judges will be forced to retire from the bench starting on January 1, including most of the court presidents who assign cases and manage the daily workings of courts. The new law on the judiciary requires that the Supreme Court president have at least five years of Hungarian judicial experience. The current president of the Supreme Court is disqualified because his 17 years of experience as a judge on the European Court of Human Rights do not count. Therefore, he must leave office on January 1 also.

The law on the judiciary also creates a new National Judicial Office with a single person at the helm who has the power to replace the retiring judges and to name future judges. This person also has the power to move any sitting judge to a different court. A new constitutional amendment – to the new constitution! – will permit both the public prosecutor and the head of this new National Judicial Office to choose which judge will hear each case.

The independence of the judiciary is over when a government puts its own judges onto the bench, moves them around at will, and then selects which ones get particular cases to decide.

The Vice President of the European Commission for Justice, Fundamental Rights and Citizenship, Viviane Reding, issued a strongly worded request for information about the new law last week and demanded immediate replies from the Hungarian government. She also strongly urged the government “to ensure... that no measure is implemented until doubts about its compliance with EU law are removed.” The government responded by saying all of these changes are improvements and it seems to be going ahead with implementing the new constitutional framework despite the strong caution from Brussels.

In the new constitutional system, the legal supervision of elections has also been changed. Before the last election, the norm was for the five-member Election Commission to be politically diverse and for the government of the day to consult the opposition before nominating candidates. But the rules were changed last year so that each new national election is now accompanied by a new choice of election commissioners. As a result, the existing commissioners were removed from their offices without allowing them to finish their terms and now the Election Commission consists of five members of the governing party.
The new election law specifies the precise boundaries of the new electoral districts that will send representatives to the parliament. But the new districts are drawn in such a way that no other party on the political horizon besides Fidesz is likely to win elections. A respected Hungarian think tank ran the numbers from the last three elections using the new district boundaries. Fidesz would have won all three elections, including the two they actually lost.

Virtually every independent political institution has taken a hit. The human rights, data protection and minority affairs ombudsmen have been collapsed into one lesser post. The public prosecutor, the state audit office and, most recently, the Central Bank are all slated for more overtly political management in the new legal order.

And all of this has happened while the press operates under day-to-day intimidation. A draconian set of media laws created a new media board – staffed only by Fidesz party loyalists with a chair who is appointed by the Prime Minister to a nine-year term. This board can review all public and private media for their compliance with a nebulous standard of political “balance” and has the power to bankrupt any news organization with large fines. It is not surprising that the media have become self-censoring. This new media regime has been severely criticized by the European Commissioner for Communications, among others.

The new constitution also accepts conservative Christian social doctrine as state policy, in a country where only 21% of the population attends any religious services at all. The fetus is protected from the moment of conception. Marriage is only legal if between a man and a woman. The constitution “recognize(s) the role of Christianity in preserving nationhood” and holds that “the family and the nation constitute the principal framework of our coexistence.” While these religious beliefs are hard-wired into the constitution, a new law on the status of religion cut the number of state-recognized churches to only fourteen, deregistering 348 other churches.

In a democracy, the population can “throw the bums out” and replace the government with a different one that can change the policies that do not have public support. But that will be nearly impossible under this constitution. In addition to compromising institutions that are necessary for a free and fair election – like a free press and a neutral election apparatus – the new constitution embeds Fidesz control even if another political party defies the odds and wins an election.

The new constitution makes huge swaths of public policy changeable only by a two-thirds vote of any subsequent parliament. From here on, all tax and fiscal policy must be decided by a two-thirds supermajority. Even the precise boundaries of electoral districts cannot be changed by simple majority vote, but only by a two-third supermajority. If a new government gets a mere majority, policies instituted during the Fidesz government cannot be changed.

That’s not all. The long arm of the current Fidesz government can grab and shake any foreseeable future government through the officials they are now putting into place. The new constitutional order extends the terms of office for the public prosecutor (9 years), the head of the state audit office (12 years), the head of the national judicial office (9 years), the head of the media board (9 years), the head of the budget council (6 years) and more. Each of these positions has been filled with Fidesz party loyalists who will be able to conduct public investigations, intimidate the media, press criminal charges and continue to pack the courts long after the government’s current term is over. Moreover, unless there is a two-thirds vote to replace these new office holders, they can stay in office until such a two-thirds vote can be achieved, which could
extend these long terms of office even further. How do all of these pieces work together? One example will illustrate. The constitution creates a national budget council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the budget council have been chosen by this government for terms of 6 or 12 years and can only be replaced if two-thirds of the parliament can agree on new candidates when their terms are over. Another part of the constitution requires the parliament to pass a budget by March 31 of each year. If the parliament fails to do so, the president of the country can dissolve the parliament and call new elections. When these pieces are put together, the constraints on any future government are clear. A new government will pass a budget – but that budget can be vetoed by Fidesz loyalists so that the budget deadline is missed, and then the president (also named by Fidesz) will call new elections. And this can be repeated until an acceptable government is voted back into power.

The only parties that might replace Fidesz in the current Hungarian landscape are the Socialist Party or, in a real nightmare scenario, the far-right Jobbik. Under laws that preceded Fidesz’s election last year, political parties that are anti-constitutional may be banned. Some have suggested that Fidesz could eliminate Jobbik in this way. In fact, Europe probably would not mind if Jobbik were excluded from public life because other European countries can ban extremist parties also. But what about Fidesz’s primary competition – the Socialists?

According to a proposed constitutional amendment, the crimes of the former communist party will be listed in the constitution and the statute of limitations for prosecuting crimes committed during the communist period will be lifted. The former communist party is branded a criminal organization and the current opposition Socialist Party is designated as their legal successor. It is still unclear, legally speaking, what this amendment means. But it is probably not good for the major opposition party.

The Fidesz government has accomplished this constitutional revolution by legal means after a democratic election. But though Fidesz was democratically elected and has accomplished this program through constitutional change, Hungary is not a constitutional democracy. Instead Hungary is, as Paul Krugman said, sliding into authoritarianism.

On New Year’s Day, the new Hungarian constitution became law. The Hungarian parliament has been preparing for this event by passing a blizzard of “cardinal” – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. In the last two weeks alone, the parliament has enacted so many new laws that it has been almost impossible to keep up.

And to top it off, there was also a huge new omnibus constitutional amendment – an amendment to the new constitution even before it went into effect. By one commentator’s count, the Fidesz government has enacted 359 new laws since it came to power 18 months ago.

All of the laws connected to the new constitutional structure kicked into action yesterday if they hadn’t already taken effect. As a result, with the new year, Hungarians began living in a new constitutional order. In this new order, all of the escape hatches that would permit reentry into a constitutional democracy have been bolted shut. If constitutions are supposed to guarantee checks on political power and ensure the rights of citizens, this is an unconstitutional constitution.

The new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary.

Ignoring stern warnings from European Commission President José Barroso, the Fidesz government just pushed through two cardinal laws on financial matters. The new law on the central bank (the Magyar Nemzeti Bank or MNB) gives the prime minister the right to appoint all vice-presidents of the bank, when previously the president of the central bank initiated the nominations process himself. No longer. He must now work with the vice-presidents that the government provides for him without having any input into the process of selecting them. Because the law creates a new third vice-president for the bank, Prime Minister Viktor Orbán can name one of these vice-presidents immediately. The new law also expands the number of members on the monetary council. The monetary council, which – as the name suggests – sets monetary policy and interest rates, will grow to nine members, of which fully six already were or soon will be put into office by the Fidesz government.

The central bank law was changed in small ways at the last minute to respond to the EU warnings that Hungary must maintain the independence of the bank. As a result, under the new law, the current embattled MNB president, András Simor, keeps his job at the head of a stand-alone bank. But appearances are deceiving.

On the same day it passed this law, the parliament passed a constitutional amendment that also affects the status of the central bank. According to the amendment, the parliament may merge the central bank with the existing Financial Supervisory Authority (the bank regulator) to create a new agency (unnamed in the law), within which the central bank would be just one division. The government would then be able to name the head of this new agency who would effectively become the boss of the president of the central bank, reducing the bank president to a mere vice-president in the new agency.

The constitutional amendment doesn’t actually complete the merger – it just lays the constitutional groundwork for this change in the status of the bank. So the government can honestly claim it has not done anything that harms the MNB – at least not yet. But the legal authorization is there, waiting for parliament to flip the switch and make the central bank a subdivision of the Agency that Cannot be Named.
The new Economic Stability Law – also a target of EU criticism – creates a permanent flat tax, requiring all personal wage income to be taxed at the same rate, starting in January 2013. While the law does not specify the rate of taxation, the very flatness of the tax sets limits on how much the rich can be made to pay. As one observant commentator has noted, Prime Minister Orbán has been very dependent on a group of wealthy Hungarians to support his media operations and his political party. The personal income flat tax will protect their wealth from future progressive taxation.

The flat tax will be extended to corporate profits in 2015, when a new provision kicks in to require equal taxes to be levied on a corporation’s “achieved results.” Given these constraints on the shape of new taxes, Hungary is unlikely to be able to balance its books for the foreseeable future. This is why the EU strongly urged Hungary not to enact this law. But the Fidesz government went ahead and did so anyway.

Why is the Hungarian government doing this? For some years now, the Hungarian government has been in financial trouble. It borrows in foreign currencies, and the debts balloon each time the forint (the national currency) falls. Between June and December, the Hungarian forint fell 13% against the euro and 18% against the Swiss franc (in which much of Hungary’s private debt is denominated). Under the previous Socialist government, national debt expanded, causing Hungary at the start of 2008 to turn to the IMF for emergency support.

When the Fidesz government came to power in 2010, swept into office at widespread public disgust with the Socialist party, the economy was stable but fragile. As economic conditions worsened with Fidesz’s new policies, however, the government insisted it did not need to go hat-in-hand to the international financial institutions for assistance. Instead, it started to plug the budget holes using unconventional one-off solutions. After effectively nationalizing private pension funds, imposing extraordinarily steep taxes on targeted foreign-owned businesses, and requiring banks to accept repayment of private loans at a substantial loss, the Fidesz government has been considering further unconventional economic measures which the MNB has attempted to block.

In mid-December, the Fidesz government approached the IMF to discuss a new loan. But the IMF walked out of the negotiations when the government refused to budge on the Economic Stability Law and the law on the central bank.

The markets have seen the economic distress signals for some time. After both Moody’s and S&P downgraded Hungarian debt to junk status over the last two months, the rates on long-term Hungarian debt have skyrocketed to unsustainable levels. Just last week, the Hungarian government abandoned sale of its three-year bonds because it got no offers it could accept, and the price of ten-year bonds rose to 9.7%.

Source: http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/
European Parliament Resolution of 5 July 2011 on the Revised Hungarian Constitution

The European Parliament,

- having regard to Articles 2, 3, 4, 6 and 7 of the Treaty on European Union (TEU), Articles 49, 56, 114, 167 and 258 of the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR), which deal with respect for and the promotion and protection of fundamental rights,
- having regard to the Basic Law of Hungary, adopted on 18 April 2011 by the National Assembly of the Hungarian Republic that will enter into force on 1 January 2012 (hereinafter referred to as ‘the new Constitution’),
- having regard to Opinions Nos CDL(2011)016, CDL(2011)001 of the European Commission for Democracy through Law (Venice Commission) on the new Hungarian constitution and the three legal questions arising out of the process of drafting the new Hungarian constitution,
- having regard to motion for resolution No 12490 on serious setbacks in the fields of the rule of law and human rights in Hungary tabled on 25 January 2011 in the Parliamentary Assembly of the Council of Europe,
- having regard to the ruling No 30141/04 of the European Court of Human Rights (Schalk and Kopf vs. Austria), and particularly its obiter dicta,
- having regard to the Oral Questions tabled in the European Parliament on the new Hungarian Constitution and to the Council and Commission statements on the revised Hungarian constitution and following the debate held on 8 June 2011,
- having regard to Rules 115(5) and 110(4) of its Rules of Procedure,

A. whereas the European Union is founded on the values of democracy and the rule of law, as stipulated in Article 2 TEU, on unequivocal respect for fundamental rights and freedoms, as enshrined in the Charter of Fundamental Rights of the European Union and in the ECHR, and on the recognition of the legal value of said rights, freedoms and principles, which is further demonstrated by the EU’s forthcoming accession to the ECHR,

B. whereas Hungary has signed the ECHR, the International Covenant on Civil and Political Rights and other international legal instruments obliging it to respect and implement principles concerning the separation of powers, the implementation of institutional checks and balances and the promotion of democracy and human rights,

C. whereas, while the drafting and the adoption of a new constitution falls within the remit of Member States’ competences, Member States, current and acceding, and the EU have a duty to ensure that the contents and processes are in conformity with EU values, the Charter of Fundamental Rights and the ECHR, and that the letter and spirit of adopted constitutions do not contradict these values and instruments; whereas this is clearly demonstrated by the fact that a number of current EU Member States had to review and amend their constitutions to ensure accession to the EU or adapt their constitutions to subsequent EU treaty requirements, notably at the request of the Commission,

D. whereas the constitution-making process lacked transparency and the drafting and adoption of the new Constitution was conducted in an exceptionally short time frame that did not allow sufficient time for a thorough and substantial public debate on the draft text; and whereas a successful and legitimate constitution should be based on the largest consensus possible,
E. whereas the Constitution has been widely criticised by national, European and international NGOs and organisations, the Venice Commission and representatives of Member States' governments, and was adopted exclusively with the votes of the MPs from the governing parties, so that no political or social consensus was achieved,

F. whereas the European Parliament shares the concerns voiced by the Venice Commission, particularly regarding the transparency, openness and inclusiveness of and the time frame for the adoption process, and regarding the weakening of the system of checks and balances, in particular the provisions concerning the Constitutional Court and the courts and judges that may put the independence of the Hungarian judiciary at risk,

G. whereas the new Constitution fails to explicitly lay down a number of principles which Hungary, stemming from its legally binding international obligations, is obliged to respect and promote, such as the ban on the death penalty and life imprisonment without parole, the prohibition on discrimination on the grounds of sexual orientation and the suspension or restriction of fundamental rights by means of special legal orders,

H. whereas the new Constitution, through the values it enshrines and its unclear wording when defining basic notions such as ‘family’ and the right to life from the moment of conception, creates the risk of discrimination against certain groups in society, namely ethnic, religious and sexual minorities, single-parent families, people living in civil partnerships and women,

I. whereas the unclear wording of the preamble, particularly the parts concerning the Hungarian state's obligations towards ethnic Hungarians living abroad, may create a legal basis for actions that neighbouring countries would consider as interference in their internal affairs, which may lead to tensions in the region,

J. whereas the new Constitution stipulates that its preamble has legal force, which may have legal and political implications and may lead to legal uncertainty,

K. whereas the incorporation of the Charter of Fundamental Rights of the European Union into the new Constitution may give rise to overlaps in competences between Hungarian and international courts, as pointed out in the opinion issued by the Venice Commission,

L. whereas the new Constitution provides for the extensive use of cardinal laws, whose adoption is also subject to a two-thirds majority, which will cover a wide range of issues relating to Hungary's institutional system, the exercise of fundamental rights and important arrangements in society; whereas in practice this makes their adoption part of the new Hungarian constitutional process,

M. whereas, under the new Constitution, a number of issues, such as specific aspects of family law and the tax and pension systems, which normally fall within the sphere of competence of the government or are covered by the regular decision-making powers of the legislature, will also have to be regulated by cardinal laws, which means that future elections will have less significance and more scope will be created for a government with a two-thirds majority to cement its political preferences; whereas the process of enacting specific and detailed rules by means of cardinal laws can thus put the principle of democracy at risk,

N. whereas, as underlined by the Venice Commission, cultural, religious, socio-economic and financial policies should not be set in stone by means of cardinal laws,
O. whereas a non-parliamentary body, the Budget Council, with its limited democratic legitimacy, will have the power to veto the adoption of the general budget, in which case the Head of State can dissolve the National Assembly, severely restricting the scope for action of the democratically elected legislature,

P. whereas the effective system of four parliamentary commissioners will be downgraded to one consisting of a general ombudsman and two deputies, which may not provide the same level of protection of rights and whose powers will not include those of the former Commissioner for Personal Data and Freedom of Information; whereas the latter's powers will be transferred to an authority whose *modus operandi* is not specified,

Q. whereas in parallel with the adoption of the new Constitution, the Hungarian Government and the governing parties made many new appointments to key positions, such as Attorney-General, President of the State Audit Office and President of the Budget Council; whereas more recently the Hungarian Parliament elected the judges who will sit on the new Hungarian Constitutional Court, as required by the new Constitution; whereas the nomination procedure and the election were not based on political consensus,

R. whereas the new Constitution lays down very general rules governing the judicial system, and leaves it unclear as to whether the Supreme Court, under its new name, will continue with its current president,

S. whereas the Parliamentary Assembly of the Council of Europe has decided to prepare a report on the new Hungarian Constitution, based on the opinion of the Venice Commission,

T. whereas the drafting and adoption of a new constitution was not mentioned in the electoral manifesto of the governing parties,

U. whereas the Secretary-General of the United Nations, Ban Ki-moon, has stated that he would ‘appreciate it if the Hungarian Government were to seek advice and recommendations from within the country and from the Council of Europe or the United Nations’ and takes the view that Hungary, as an EU Member State, should ask the European institutions to give advice and review the new Constitution,

I. Calls on the Hungarian authorities to address the issues and concerns raised by the Venice Commission and to implement its recommendations, either by amending the new Constitution or through future cardinal and ordinary laws, notably to:

(a) actively seek consensus, to ensure greater transparency and to foster genuine political and social inclusion and a broad public debate in connection with the forthcoming drafting and adoption of the cardinal laws laid down in the new Constitution;

(b) adopt only the basic and clearly defined scope of cardinal laws regulating the tax and pension systems, family policies and cultural, religious and socio-economic policies, allowing future governments and democratically elected legislatures to take autonomous decisions on these policies; revise the current mandate of the Budget Council;

(c) guarantee equal protection of the rights of every citizen, no matter which religious, sexual, ethnic or other societal group they belong to, in accordance with Article 21 of the Charter of Fundamental Rights, in the Constitution and its preamble;
(d) explicitly guarantee in the Constitution, including its preamble, that Hungary will respect the territorial integrity of other countries when seeking the support of ethnic Hungarians living abroad;

(e) reaffirm the independence of the judiciary by restoring the right of the Constitutional Court to review budget-related legislation without exception, as required by ECHR-based law, by revising the provision on the lower mandatory retirement age for judges and by guaranteeing explicitly the independent management of the judicial system;

(f) explicitly protect in the new Constitution all fundamental civil and social rights in line with Hungary's international obligations, ban the death penalty, life imprisonment without parole and discrimination on the basis of sexual orientation, provide sufficient guarantees concerning the protection of fundamental rights, and make it clear that fundamental rights are acquired at birth and are unconditional;

(g) ensure that the reorganisation of the system of parliamentary commissioners will not serve to water down the existing guarantees concerning the protection and promotion of rights in the areas of the protection of national minorities, the protection of personal data and the transparency of publicly relevant information, as well as the independence of the respective bodies responsible for these areas;

(h) make sure that the incorporation of the Charter of Fundamental Rights into the new Constitution does not cause problems of interpretation and overlapping competences between domestic courts, the new Hungarian Constitutional Court and the European Court of Justice;

2. Calls on the Commission to conduct a thorough review and analysis of the new Constitution and of the cardinal laws to be adopted in the future in order to check that they are consistent with the acquis communautaire, and in particular the Charter of Fundamental Rights of the European Union, and with the letter and spirit of the Treaties;

3. Instructs its relevant committees to follow up the matter, in cooperation with the Venice Commission and the Council of Europe, and to assess whether and how the recommendations have been implemented;

4. Instructs its President to forward this resolution to the Council, the Commission, the Council of Europe, the governments and parliaments of the Member States, the Fundamental Rights Agency, the OSCE and the UN Secretary General.


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I. Introduction

1. At its meeting of 26 March 2011 in Paris, the Monitoring Committee of the Parliamentary Assembly decided to ask the Venice Commission to provide an Opinion on the new Constitution of Hungary.

2. A working group of Rapporteurs was set up, composed of Ms Hanna Suchocka and Messrs Wolfgang Hoffmann-Riem, Christoph Grabenwarter, Kaarlo Tuori and Jan Velaers.

3. On 17-18 May 2011, the working group, accompanied by Mr Thomas Markert and Ms Artemiza Chisca of the Venice Commission Secretariat, travelled to Hungary in order to meet with representatives of the authorities, the political parties represented in the Hungarian Parliament, the Constitutional Court and the civil society. The Venice Commission wishes to thank them all for the discussions which took place on this occasion and the Hungarian authorities for the excellent organisation of the visit.

4. The present Opinion, which is based on the comments provided by the rapporteurs, was adopted by the Venice Commission at its 87th Plenary Session in Venice from 17 to 18 June 2011.

A. Background information

5. The present Constitution of the Republic of Hungary was adopted on 20 August 1949. It is the country's first and only written Constitution, and Hungary is the only former Central and East-European country that did not adopt an entirely new Constitution after the fall of Communism.

6. From 1988 on, the idea of preparing a new Constitution emerged in Hungary. The declared aim was to establish a multiparty system, parliamentary democracy and a social market economy. Due to time pressure, however, a new Constitution could not be drafted and the National Assembly adopted a comprehensive amendment to the 1949 Constitution (Act XXXI of 23 October 1989). The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force, as a temporary one, until the adoption of a new Constitution.

7. Since 1989, the Constitution has been amended several times, including, due to the two-thirds majority held by the ruling coalition, more than ten times more recently.

8. When the current Hungarian Government came to power in 2010, the preparation and adoption of a new constitution was again put on the agenda and this became a major project for the current majority. A Body of National Consultation and an Ad-Hoc Parliamentary Constitution Drafting Committee have been set up for this aim. The Ad-hoc Parliamentary Committee was set up in June 2010 and started its work on 20 July 2010. It prepared a Concept Paper, which in the end was only considered to be a working document for the constitution-making process. Meanwhile, a Draft was prepared by FIDESZ/KDNP elected representatives and introduced before the Hungarian Parliament on 14 March 2011. It was adopted by the Hungarian Parliament with the votes of the FIDESZ/KDNP coalition on 18 April 2011.

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1 See also the particular case of Latvia: On 4 May 1990 the Supreme Council of the Republic of Latvia declared Latvia independent and adopted articles 1, 2, 3 and 6 of the Constitution of 1922. The rest of the Constitution remained in abeyance until it was reviewed to fit the modern situation; the Constitution was fully reinstated by Latvia’s parliament on 6 July 1993.

2 “In order to facilitate a peaceful political transition to a state under the rule of law, realizing a multi-party system, a parliamentary democracy and a social market economy, the Parliament hereby establishes the text of the Constitution of our country - until the adoption of the new Constitution of our country – […]”, The Constitution of the Republic of Hungary [Act XX of 1949 as revised and restated by Act XXXI of 1989].
2011 and signed by the President on Hungary on 25 April 2011. As indicated by its Closing Provisions, the new Constitution shall take effect on 1 January 2012. Transitional provisions are still to be adopted.


B. Preliminary remarks

10. The Venice Commission has already provided its legal assistance to the Hungarian authorities in the context of the current constitutional process. In its Opinion CDL-AD(2011)001 adopted at its 86th Plenary Session (Venice, 25-26 March 2011), it assessed, at the request of the Hungarian authorities, three legal questions having been raised in the process of drafting the new Constitution: the possible incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights (hereafter: the EU Charter), the role and significance of the preliminary review among the competences of the Constitutional Court and the role and significance of the *actio popularis* in *ex post* constitutional review. The Commission gave its legal opinion on these three specific issues and the most suitable options that, in its view, could be implemented in the Hungarian context, in the absence, at that time, of the draft of the new Constitution. The Commission notes in this context that the recommendations contained in this Opinion have been partly taken into account (see however § 122).

11. In its Opinion adopted in March 2011, the Venice Commission, in the light of the numerous concerns raised within the civil society over the lack of transparency of the process of the adoption of the new Constitution and the inadequate consultation of the Hungarian society, has also formulated a number of general comments with regard to this process. It criticised the procedure of drafting, deliberating and adopting the new Constitution for its tight time-limits and restricted possibilities of debate of the draft by the political forces, within the media and civil society. It took note with regret that no consensus had been possible - among political forces and within society - either over the process or the content of the future constitution\(^3\). In the light of the information received with regard to the final stage of debate and adoption of the new Constitution, the above-mentioned comments are still valid.

12. The Venice Commission wishes to underline that a constitutional culture which clearly separates constitutional issues from ordinary politics and sees the constitution as a commonly accepted framework for ordinary democratic processes - with their understandable and even healthy political disagreements - is a precondition for a fully successful and legitimate constitution-making process.

13. The Commission however notes that, while no genuine dialogue has been possible between the majority and the opposition during the debate and final adoption of the new Constitution, according to the information provided to the Venice Commission during its visit in May 2011, there will be co-operation between the majority coalition and the opposition in the preparation of the implementing legislation.

C. The object of the opinion

14. It is generally welcomed by the Venice Commission that former communist countries adopt a new and modern Constitution to create a new framework for society, guaranteeing democracy, fundamental freedoms and the rule of law.

15. When the Venice Commission evaluates a new Constitution, it primarily tries to check whether its provisions are in compliance with the European Convention on Human Rights\(^3\) See CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, § 16-19.
(ECHR) and in line with the democracy and rule of law standards and fundamental values commonly shared by the member states of the Council of Europe.

16. The analysis below is based on the English translation of the adopted Constitution provided by the Hungarian Ministry of Public Administration and Justice and published on the official website of the Hungarian Government. The translation may not accurately reflect the original version in every point and, consequently, certain comments and omissions could be affected by problems of the translation.

17. The following comments are not meant to be an in depth study of the entire Constitution. They aim at providing substantial insights with regard to some selected points.

II. General remarks

18. Hungary has adopted a new Constitution which aims to meet the general features of a modern Constitution within the framework of the Council of Europe. In particular, the Venice Commission welcomes the fact that this new Constitution establishes a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles. It notes that constitutions of other European States, such as Poland, Finland, Switzerland or Austria, have been used as a source of inspiration. A particular effort has been made to follow closely the technique and the contents of the ECHR and to some extent the EU Charter.

19. A special feature of the new Constitution of Hungary is that, while drawing on the above-mentioned standards, this Constitution contains a number of particular variations of European guarantees which can partly be found in a limited number of European constitutions. Most of them are linked to national traditions and identity. These are considered to be an important factor in European Union law (Art. 6 TEU)⁴ and also accepted under the ECHR. The Venice Commission considers in this respect that, while a number of these special guarantees may be seen as part of national constitutional autonomy, other guarantees must be analysed in the light of European standards, above all the case law of the ECtHR (see comments under specific provisions of the Constitution).

20. The task might be more difficult in some cases due to sometimes unclear interrelations between its different provisions as well as to the fact that the constitutional text often relegates to cardinal (organic) laws the definition of the detailed rules applicable to the concerned matters (including fundamental rights, institutional settings, structural arrangements for the operation of the judicial power etc.).

21. More generally, while it represents a major step for the current ruling coalition and for Hungary, the adoption of the new Constitution in April 2011 appears to be, as confirmed by its text, only the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures. To be fully successful, these processes should be based on the largest consensus possible within the Hungarian society.

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⁴“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” (Art.6.3).
A. Cardinal laws

22. The Constitution provides for an extensive use of cardinal laws to regulate in detail the most important society settings. It contains over 50 references to cardinal laws, including their definition in Article T § 45. Cardinal laws should regulate inter alia issues or sectors such as: family policy (Article L), the designation of ministries and other public administration organs (Art. 17 § 4), the term of office and remit of the “Autonomous Regulatory Organs” (Art. 23, §§ 2, 4), the judiciary (Article 25 (7), the basic rules of public finances, public service provisions, pension system etc. (Art. 40), the State Audit Office (Art. 43 § 4), the Budgetary Council (Art. 44 § 4), the defence forces (Art. 45 §§ 2, 5), the police and the national security services (Art. 46 § 6), the rights of nationalities (Art. XXIX § 3) etc.

23. These cardinal laws, known in other legal systems as “organic laws”, require a qualified majority of two thirds of the members of parliament present for their adoption and amendment. Their aim is to prevent too easy introduction of changes concerning matters related to the Constitution, which nevertheless are not of such fundamental importance as to be regulated by the Constitution itself. The requirement of a supermajority also underlines the need for a broad consensus in these fields. For instance, matters such as the elections or the rules of procedure of the parliament are often laid down in cardinal acts. Such organic laws are not a specific feature of the Hungarian constitution system, as other constitutions, e. g. in Albania, Austria, Croatia, France and Montenegro, make also use of this possibility to regulate certain topics. Moreover, a comprehensive - though less broad - system of cardinal laws is already part of the current Hungarian Constitution.

24. This being said, the Venice Commission finds that a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. In its view, there are issues on which the Constitution should arguably be more specific. These include for example the judiciary. On the other hand, there are issues which should/could have been left to ordinary legislation and majoritarian politics, such as family legislation or social and taxation policy. The Venice Commission considers that parliaments should be able to act in a flexible manner in order to adapt to new framework conditions and face new challenges within society. Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order. Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the “expression of the opinion of the people in the choice of the legislator”, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and “detailed rules” on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.  

11 This also increases the risk, for the future adoption of eventually necessary reforms, of long-
lasting political conflicts and undue pressure and costs for society. The necessity of a certain quorum may however be fully justified in specific cases, such as issues forming the core of fundamental rights, judicial guarantees or the rules of procedure of the Parliament.

25. While acknowledging that States enjoy a wide margin of appreciation in establishing the scope and level of detail of the constitutional provisions and of the different levels of domestic legislation, the Venice Commission considers that the subjects of cardinal laws, as prescribed by the new Hungarian Constitution, are far too many.

26. In addition, in view of this extensive use of cardinal laws, it is important to clearly distinguish these laws from other laws and the Constitution itself. The new Hungarian Constitution makes such a distinction in one aspect: cardinal laws require a two-thirds majority of the MPs present while a two-thirds majority of all MPs shall be applied with regard to the Constitution itself. As far as the substance is concerned, a sufficient justification for using this type of law is very often missing. The Commission would like to recall that, as stated in its March Opinion, “as a rule, constitutions contain provisions regulating issues of the highest importance for the functioning of the state and the protection of the individual fundamental rights. It is thus essential that the most important related guarantees are specified in the text of the Constitution, and not left to lower level norms” (§ 52).

27. In conclusion, the Venice Commission recommends restricting the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority.

B. Rules of interpretation

28. The Commission takes note with interest of the effort made by the Hungarian constitutional legislator to provide guidance with regard to the main principles, values and sources to be used for an adequate interpretation and application of the new Constitution. This effort is however hampered by a certain lack of clarity and consistency between elements, in different constitutional provisions, which are of relevance for the interpretation of the Constitution.

29. The concept of “historical constitution”, used both in the Preamble and in Art. R, dealing specifically with the interpretation of the Constitution, brings with it a certain vagueness into constitutional interpretation. There is no clear definition what the “achievements of the historical constitution”, referred to in Art. R, are.

30. Furthermore, it is regrettable that neither Art. R above-mentioned nor Art. 28, dealing with the courts’ interpretative obligations, mentions Hungary’s international law obligations, nor does the chapter on “Freedom and Responsibility” include any reference to international human rights instruments. In the dualistic model of the relations between international and domestic law, an important means to secure respect for international human rights treaties consists of the obligation, for courts and public authorities, to interpret constitutional provisions on fundamental rights and freedoms in light of human rights treaties. It is thus particularly important to derive such an obligation from Art. Q(2), according to which “Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law”. The obligation to interpret constitutional provisions in the light of international human rights treaties binding on Hungary concerns, inter alia, Art. I (3), which states that “[a] fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right”. This would for instance mean that eventual limitations should also be in harmony with the limitation clauses in the ECHR (see also comments under Article 28 below).
III. Specific remarks

A. Preamble

31. The Commission recalls that preambles have above all a political purpose and represent political declarations meant to stress the importance of the fundamental law, its principles, values and guarantees, for the state concerned and its population. As a consequence, they should also have a significant unifying function. In the absence of European standards in this area, the specific elements that are included in the Preamble depend on the will of the constitution-making authority.

32. The Preamble of the new Constitution indeed contains numerous national, historical and cultural references, such as to King Saint Stephen, the Christian tradition and the Hungarian culture and language. It would be difficult to neglect the importance, for Hungary, of these factors and their particular role in building and preserving the Hungarian state and nationhood. One can note, as far as the religious aspect is concerned, that while stressing the major role of Christianity in the history of Hungary, the Preamble also states that “we value the various religious traditions of our country.” Such a statement is of key importance. It should be adequately taken into account in the future application and interpretation of the Constitution and should be extended to the protection of all religions, religious traditions and other convictions of conscience.

33. It should also be noted that, notwithstanding the strong emphasis put on the national element and the role of the Hungarian nation,12 there has been an effort to find a balance, in the Preamble, between the national and universal elements: “we believe that our national culture is a rich contribution to the diversity of European unity and we respect the freedom and culture of other nations, and shall strive to cooperate with every nation of the world”.

34. That being said, there are a number of statements and terms in the Preamble that might raise concern. These statements, terms and the underlying approach are all the more problematic as, according to Article R § 313 of the Constitution, the Preamble shall have a substantial influence on the interpretation of the entire Constitution and appears to be provided legal significance. Although preambles are usually seen as one of several means of interpretation of the Constitution, the reference to the Preamble in Article R § 3 may lead to problems in the Hungarian case since the Preamble’s text lacks precision, which is essential for a legal text, and contains a number of potentially controversial statements. The reference to the “historical constitution” is quite unclear, since there have been different stages in the development of different historical situations in Hungary and therefore there is no clear and no consensual understanding of the term “historical constitution”.

35. First, problems of legal nature may arise. This might be the case if the paragraph on the old 1949 Constitution is understood strictly in a technical way: “We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.” If this is meant to have legal consequences, it can only be read as leading to ex tunc nullity - otherwise it would have been sufficient to declare that the former Constitution was repealed. Ex tunc nullity of the former Constitution could lead to the result that all acts of state enacted under the former Constitution would lose their legal basis and will thus be invalid themselves. This may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which, although based on this “invalid” constitution, has played an important role in Hungary’s development towards a democratic state governed by the rule of law. Even Constitutional institutions like the Parliament would lose their legitimacy and have to be seen as legally inexistent. This would lead to a legal paradox since an illegitimate or even non-existent Parliament cannot enact a new Constitution.

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12 “We are proud that our people has over the centuries defended Europe in a series of struggles and enriched Europe’s common values with its talent and diligence.”

13 “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution.”
36. At the same time, the above-mentioned paragraph can be considered to be a political statement, statement which does not mean that all acts and laws based on the former constitution, especially since 1989, will become invalid. Rather, the expression can be regarded as drawing a clear line between the democratic system in place and the former communist regime. The 1949 Constitution was legitimized by the decision of Parliament and the amendments adopted since 1989 and the 1990 elections. This is clearly stated by the Preamble’s text: “We date the restoration of our country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed. We shall consider this date to be the beginning of our country’s new democracy and constitutional order.” Moreover, the new constitution in its Closing provisions refers to the provisions of the present Constitution as the legal basis for the adoption of the Fundamental Law.

37. The Commission has taken due note that, according to the Hungarian authorities met during its May visit to Budapest, the declaration of the invalidity of the 1949 Constitution should only be understood as a political statement. It nonetheless finds regrettable that such an important statement and an unfortunate internal contradiction has been retained in the Preamble without due regard to its potential legal and political implications. It trusts that the Constitutional Court of Hungary will provide clarity on this sensitive issue in the context of its future interpretation of the new Constitution. The adoption of transitional provisions is also an opportunity for providing legal clarity on this matter.

38. The Commission further considers that, while it is not uncommon that the Preamble to a Constitution or the chapter on the general principles includes provisions on the values underlying the Constitution, a Constitution should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society. Such values, as well as their legislative implications, should be left to the ethical debates within society and ordinary democratic procedures, respecting at the same time the country’s human rights and other international commitments.

39. It is also of particular importance that the constitutional legislator pays proper attention to the principle of friendly neighbourly relations and avoids inclusion of extra-territorial elements and formulations that may give rise to resentment among neighbouring states. In this respect, the Preamble seems to be premised on a distinction between the Hungarian nation and (other) nationalities living in Hungary. The Hungarian nation, in turn, also includes Hungarians living in other states. According to the Preamble, “we promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century”. This statement implies obvious historical references and should be read in conjunction with Art. D, establishing Hungary’s “responsibility for the fate of Hungarians living beyond its borders”. Such a wide understanding of the Hungarian nation and of Hungary’s responsibilities may hamper inter-State relations and create inter-ethnic tension (see also comments under Article D below).

40. The Preamble however continues by stating: “the nationalities living with us form part of the political community and are constituent parts of the State”. While this statement may be seen as an effort towards inclusiveness, it is also to be noted that the Preamble has been written in the name of “we the members of the Hungarian nation”, intimating that members of the “nationalities living with us” are not part of the people behind the enactment of the Constitution. The Constitution should be seen as the result of the democratic will-formation of the country’s citizens as a whole, and not only of the dominant ethnic group. Therefore, the language used could/should have been more inclusive (such as, for example “We, citizens of Hungary…”). It is, again essential, that a comprehensive approach is favoured in the context of the interpretation of the constitutional provisions.

14 “Parliament shall adopt the Fundamental Law pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949.” (Closing provisions, paragraph 2).
B. Foundation

Article D

41. The Venice Commission finds that the statement in Article D that “Hungary shall bear responsibility for the fate of Hungarians living beyond its borders” touches upon a very delicate problem of the sovereignty of states and, being a rather wide and not too precise formulation, might give reason to concerns. In particular, the Venice Commission finds unfortunate the use, in this context, of the term “responsibility”. This term may be interpreted as authorizing the Hungarian authorities to adopt decisions and take action abroad in favour of persons of Hungarian origin being citizens of other states and therefore lead to conflict of competences between Hungarian authorities and authorities of the country concerned. Such action includes inter alia support to the “establishment of their community self-governments” or “the assertion of their individual and collective rights”.

42. The Venice Commission recalls that, while states may legitimately protect their own citizens during a stay abroad, as indicated in its Report on the Preferential Treatment of National Minorities by their Kin-State, "responsibility for minority protection lies primarily with the home-States". The Commission indeed added, in that report, that “kin-States also, lay a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong”. It however considered that respect for the existing framework of minority protection, consisting of multilateral and bilateral treaties, must be held a priority. Unilateral measures by a State with respect of kin-minorities are only legitimate “if the principles of territorial sovereignty of States, pacta sunt servanda, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected”. The Commission would also like to make reference in this respect to Article 2 of the Framework Convention for the Protection of National Minorities (thereafter: the Framework Convention), to which Hungary is a Contracting Party. It this connection, it welcomes the provisions of Article Q of the new Constitution stressing the importance of ensuring “harmony” between international law and Hungarian law and wishes to underline their importance.

43. As to the issue of “collective rights”, it should be noted that, as indicated by the Explanatory Report of the Framework Convention, while “the rights and freedoms flowing from the principles of the Framework Convention may be exercised individually or in community with others”, “no collective rights of national minorities are envisaged”. This of course does not prevent Hungary, on its territory, to provide its own minorities with collective rights. Nevertheless, it is not up to the Hungarian authorities to decide whether Hungarians leaving in other States shall enjoy collective rights or establish their own self-governments.

44. The Venice Commission trusts that future interpretation of the Constitution and subsequent legislation and policies will be based on the interpretation of the said statement as a commitment to support the Hungarians abroad and assist them, in co-operation with the States concerned, in their efforts to preserve and develop their identity, and not as a basis for extra-territorial decision-making. The Commission wishes to emphasise that, in their dialogue with the Commission’s Rapporteurs, the Hungarian authorities have formally confirmed this narrow interpretation of the said statement.

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15CDL-INF (2001) 19 Conclusions.
16“The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States”.
17“(2) Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law.
18“(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation.
19“Hungary shall bear responsibility for the fate of Hungarian living beyond its borders”. 


Article H

45. The Venice Commission finds regrettable that Art. H, which regulates the protection of Hungarian language as the official language of the country, does not include a constitutional guarantee for the protection of the languages of national minorities. It however notes that Article XXIX guarantees the right to the use of these languages by Hungary’s “nationalities” and understands this provision as implying also an obligation for the State to protect these languages and to support their preservation and development (see also the Preamble and Article Q of the Constitution).

Article L

46. Article L of the new Constitution contains a constitutional guarantee for the protection of the institution of marriage, which is defined as "the union of a man and a woman established by voluntary decision", as well as of the family “as the basis of the nation’s survival”. This definition of marriage has been criticized, as it might be interpreted as excluding the union of same sex couples.

47. The Venice Commission notes in this respect that, as the ECtHR held in its judgment of 24 June 2010, in the case of Schalk and Kopf v. Austria, “although, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage” (§ 58).

48. The Court further held, in § 105 of its judgment that “[t]he Court cannot but note there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes. (see Courten, cited above; see also M.W. v. the United Kingdom (dec.), no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom)

49. Moreover, although not explicitly addressing the institution of traditional marriage, the EU Charter states in its Article 9: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Also, Article 23 of the United Nation International Covenant on Civil and Political Rights, establishes that, “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”19 This Article further recognizes “[t]he right of men and women of marriageable age to marry and to found a family . . . .”20

50. In the absence of established European standards in this area and in the light of the above-mentioned case-law, the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator and, as such, it does not appear to prohibit unions between same sex persons (although such unions cannot enjoy protection under the institution of marriage). The Commission notes in this context that registered same-sex civil partnerships enjoy legal protection (although within certain limits) in Hungary since 2009.

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20 Id. at art. 23, cl. 2.
Article N

51. According to Art. N § 3, the Constitutional Court is obliged to respect the “principle of balanced, transparent and sustainable budget management”. This statement seems to give the budget management priority with respect to a weighing of interests in cases of infringements of fundamental rights. The Venice Commission considers that financial reasons can bear on the interpretation and application of norms, but they are not as such sufficient to overcome constitutional barriers and guarantees. They must not in any way hamper the responsibility of the Court to scrutinize an act of state and to declare it invalid, if it violates the Constitution. (see further comments under Article 24 below).

Article O

52. The provisions of Article O including an obligation for every person “to contribute to the performance of state and community tasks to the best of his or her abilities and potential” lack clarity, are too wide and may be difficult to apply. In particular, it is not clear either what kind of contribution could be imposed on “every person”, nor who will decide on this or what the significance of “every person” is. One may also raise the question whether such an obligation can be extended to non-citizens and, if this is the case, what would be the consequences.

Article R (See comments under Rules of interpretation above)

Article T

53. A list of legislative acts by which generally binding rules of conduct can be established, as well as related publication rules (Article T (3) are provided by Article T of the Constitution. The list includes Acts of Parliament, government decrees, orders by the Governor of the national Bank of Hungary, orders by the Prime Minister, ministerial decrees, orders by autonomous regulatory bodies and local ordinances. In addition “legislation shall also include orders issued by the National Defence Council and the President of the Republic during any state of national crisis or state of emergency”. Art. T (3) lays down that “no legislation shall conflict with the Fundamental Law”. At the same time, Art. 23(2) stipulates that the decrees issued by autonomous regulatory bodies may not conflict with any act, government decree, any decree of the Prime Minister, ministerial decree or with any order of the Governor of the National Bank of Hungary. In other respects, the hierarchy of the enlisted legislative acts remains open.

54. The hierarchical relations between legislative acts are somehow complicated by the provisions on “special legal orders” empowering the National Defence Council (Art. 49(4)), the President (Art. 50(3)) and the Government (Art. 51(4), 52(3) and 53(2)) to “suspend the application of particular laws and to deviate from any statutory provision”. This power is not limited by any explicit requirement of proportionality and should be adequately regulated by the relevant cardinal law.

55. Article T(4) defines “cardinal acts” as “[a]cts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament” (See related comments under General Remarks above).

C. Freedom and Responsibility (Article I to XXXI)

a) General remarks

56. The Chapter “Freedom and Responsibility”, laid down in Articles I to XXXI, regulates fundamental rights and has been partly built drawing on the structure of the EU Charter of Fundamental Rights and Freedoms.
57. The Commission recalls that the EU Charter places the individual and individual dignity at its heart. It notes at the same time the particular emphasis put by several parts of the Constitution on the citizens' responsibilities and obligations, which seems to indicate a shift of emphasis from the obligations of the state toward the individual citizens to the obligations of the citizens toward the community. In view of the vagueness of the relevant constitutional provisions, it would be advisable to specify obligations (and their legal consequences) such as:

- “Every person shall be responsible for him or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.” (Article O);
- “All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation’s common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.” (Article P).

58. The “Freedom and Responsibility” Chapter moreover seems to contain a collection of provisions of different legal nature. It covers fundamental principles and rights, so-called social rights as well as individuals’ responsibilities. Fundamental rights are not restricted to individuals but also extended to communities and “subjects of law established by an act”. In the Commission’s view, constitutions should provide a clear differentiation between principles, legal guarantees and responsibilities and present them in a systematic order.

59. The new Hungarian Constitution relegates the task to determine “the rules for fundamental rights and obligations” to “special Acts” (Art. I § 3). The Constitution gives no guidelines for “special Acts” and does not specify nor restrict their scope. Since Articles II-XXI contain many vague terms, they could be considered as providing a margin of appreciation that is too wide in determining the content of these guarantees and the limits of the obligations by special Acts. As a result of such a construction, there seems to be a risk that the constitutional provisions on freedom and responsibility might be eroded by special Acts. The Hungarian authorities are encouraged to make sure that, in the process of adoption/amendment of the relevant special acts, sufficient legal clarity and guarantees be provided for the effective enjoyment and protection of fundamental rights, in line with the applicable international standards. The Venice Commission stresses that the content of fundamental rights is a constitutional matter par excellence.

60. It is also essential to provide legal clarity, through the subsequent legislation, as far as restrictions of fundamental rights are concerned. In addition, in so far the rights guaranteed in the Constitution are also guaranteed in international and European conventions on human rights ratified by Hungary, limitation clauses specified in these international instruments should also be fully respected. For example, Article 52 § 1 of the EU-Charter, contains inter alia the requirement that in a state under the rule of law, any restriction of a human right should be “provided for by law.”

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21 “(2) Hungary shall recognise the fundamental rights which may be exercised by individuals and communities.”
22 “Special Acts” is the term used in the official translation of the Constitution received by the Venice Commission. In other translations, the term “legislative acts” is used.
23 “A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.”
24 “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”
b) Specific remarks

Article II

61. Article II of the Chapter “Freedom and Responsibility” stipulates that human dignity shall be inviolable. Furthermore, every human being shall have the right to life and human dignity, a right which can be found in any modern catalogue of fundamental human rights. As a special rule, Article II provides for the protection of embryonic and foetal life from the moment of conception.

62. This duty to protect may under certain circumstances come into conflict with Article 8 ECHR. Legislation regulating the interruption of pregnancy touches upon the sphere of private life of the woman concerned, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.

63. According to the ECtHR case law, while the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must - in case of a therapeutic abortion - also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (ECtHR judgement of 7. 2. 2006, Tysiak. / POL, no. 5410/03, § 107). Concerning Article 2 ECHR, the ECtHR is of the view that, in the absence of common standards in this field, the decision where to set the legal point from which the right to life shall begin lies in the margin of appreciation of the states, in the light of the specific circumstances and needs of their own population (ECtHR judgement of 8. 7. 2004 (GC), VO/. FRA, no. 53924/00, § 82).

64. At the same time, the preamble to the UN Convention on the Rights of the Child states “that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Article 24, § 2 of this Convention requires moreover that "[s]tates take appropriate measures: "(d) To ensure appropriate pre-natal care for mothers”.

65. However, this does not result in the recognition of an absolute right to life of the foetus. If Article 2 ECHR were held to cover the foetus, and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the unborn life of the foetus would be regarded as being of a higher value than the life of the pregnant woman (Commission decision of 13. 5. 1980, X./. UK, no. 8416/78, § 19).

66. In the light of the above, Article II of the Hungarian Constitution cannot be read as considering the life of the unborn child to be of higher value than the life of the mother and does not necessarily imply an obligation for the Hungarian State to penalise abortion. Weighing up the various, and sometimes conflicting, rights or freedoms of the mother and the unborn child is mandatory. Provided that such a balance of interests is met, the extension of the safeguards of Article II to the unborn child is in line with the requirements of the ECHR.

67. It is, at present, not clear how the Hungarian legislator will regulate abortion in the future. Concerns have been expressed that this provision might be used to justify legislative and administrative action restricting or even prohibiting abortion. For such a situation, the Venice Commission considers that the Hungarian authorities should pay particular attention to the ECtHR case law, including the recent judgment of 16 December 2010, in the case of A, B and C v. Ireland. In this judgement, the Court assessed that the Irish legislation struck “fair balance between the right of the first and second applicants to respect for their private lives and the
rights invoked on behalf of the unborn.” In its judgment, the Court had inter alia taken into account that Ireland allows abortion where there is a risk to the life of the expectant mother.

68. The Venice Commission would like to add that, in the light of Protocol 6 (“Restriction of death penalty”) and to Protocol 13 (“Complete abolition of death penalty”) to the ECHR, both ratified by Hungary, and taking into account that the will of Hungarians authorities is to give high protection to human life, it is regrettable that neither Article II nor any other Article in the Constitution mentions explicitly the complete abolition of the death penalty.

Article IV

69. By admitting life imprisonment without parole, be it only in relation to the commission of wilful and violent offences, Article IV of the new Hungarian Constitution fails to comply with the European human rights standards if it is understood as excluding the possibility to reduce, de facto and de jure, a life sentence. More specifically, it is only in line with Article 3 ECHR under certain conditions, as applied by the ECtHR in its case law. In its judgment of 12 February 2008 (Kafkaris v. Cyprus, no. 21906/04), the ECtHR summarized the case law as follows:

“97. The imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention […] At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 […] .

98. In determining whether a life sentence in a given case can be regarded as irreducible the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court’s case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. The Court has held, for instance, in a number of cases that where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, that it could not be said that the life prisoners in question had been deprived of any hope of release (see, for example, Stanford, cited above; Hill v. the United Kingdom (dec.), no. 19365/02, 18 March 2003; and Wynne, cited above). The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited (see for example, Einhorn (cited above, §§ 27 and 28). It follows that a life sentence does not become “irreducible” by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible.

101. In reaching its decision the Court has had regard to the standards prevailing amongst the member States of the Council of Europe in the field of penal policy, in particular concerning sentence review and release arrangements […] (). It has also taken into account the increasing concern regarding the treatment of persons serving long-term prison sentences, particularly life sentences, reflected in a number of Council of Europe texts (see paragraphs 68-73 above).”

70. In this regard, the Venice Commission refers to its previous comments stressing the particular significance of the interpretation of constitutional provisions on fundamental rights and freedoms in the light of human rights treaties binding on Hungary and related case-law, as it results from Article I (3) and Article Q(2) of the new Constitution (see related comments under Rules of Interpretation above).

25 “No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences.” (Article IV (2)).
Article VII

71. Article VII contains the right of freedom of thought, conscience and religion. According to its second paragraph, State and Churches shall be separate and Churches shall be autonomous. Furthermore, the State shall cooperate with the Churches for community goals.

72. Article 9 ECHR guarantees the freedom of thought, conscience and religion. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs, and to practise or not to practice a religion (ECtHR judgement of 18.2.1999 (GC), Buscarini and others v. SMR, no. 24645/94, § 34). Article 9 ECHR applies not only to individuals but also to churches and religious communities. According to the ECtHR, the State shall act neutrally and impartially when organising the exercise of different religious beliefs in order to uphold public security, religious harmony and tolerance in a democratic society. A separation between state and churches is an inevitable consequence of the rule of law, respect of human rights and the idea of democracy.

73. Mentioning the co-operation between churches and the State for community goals in Article VII does not constitute a State Church (although such systems exist in Europe), insofar as it is explicitly stipulated that churches shall be autonomous and separated from the state. The cooperation between state and churches can be seen as an additional value for the overall State policy in this field and may even strengthen the State’s role as a neutral and impartial arbitrator and organiser. Furthermore, Article 17 TFEU stipulates that the European Union shall maintain an open, transparent and regular dialogue with churches and non-confessional organisations. Also, as stated by the Venice Commission in its 2004 Guidelines for Review of Legislation Pertaining to Religion and Belief, “[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country’s history are permissible so long as they are not used as a justification for ongoing discrimination” (Chapter II.B.3). Against this background, Article VII is in line with Article 9 ECHR.

Article IX

74. The Venice Commission finds it problematic that freedom of the press is not formulated as an individual’s right, but as an obligation of the state. This freedom appears to be dependent on the will of the state and its willingness to deal with its obligation in the spirit of freedom. This construction has consequences for the substance, direction and quality of the protection, as well as for the chances for successful judicial review in cases of infringements of constitutional rights. Article IX is even more problematic since its paragraph 3 leaves the detailed rules for this freedom and its supervision to a cardinal Act - even without outlining the purposes, contents and restrictions of such a law. Once enacted, there will be no practical way for any further (simple) majority to change the act. The Commission suggests amending Article IX (and other norms on freedoms) in a way that explicitly makes clear that the constitutional guarantees contain individual rights.

Article XV

75. Article XV guarantees for all persons equal treatment before the law and states that special measures should be taken to promote effective implementation of this principle. Moreover, according to Article XV (2), “Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language,

26.1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.” (Treaty on the functioning of the European Union, Consolidated version, 30 April 2008, Article 17).
religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever”.

76. Article XV lacks any mention of the prohibition of discrimination on the ground of sexual orientation. This however appears to be common to the majority of European Constitutions. In contrast, various international instruments, including the ICCPR (articles 2 and 26), the TFEU (article 19), and the Directive 2000/78/EC (the so-called “Employment Equality Directive”), as well as, more recently, the EU Charter (article 21§1), protect against discrimination on the ground of sexual orientation.

77. The Venice Commission would like to draw the attention of the Hungarian authorities to recent case law related to the meaning of the prohibition of discrimination, namely a recent judgment of 28 September 2010 (in the case of J.M. v. the United Kingdom), in which the ECtHR held (§54):

“54. As the Court’s case-law establishes, for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations, such difference being based on one of the grounds expressly or implicitly covered by that provision. Such a difference in treatment is discriminatory if it lacks reasonable and objective justification, that is to say it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued. There is a margin of appreciation for States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide when it comes to general measures of economic or social strategy (see most recently Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, 16 March 2010). However, where the complaint is one of discrimination on grounds of sexual orientation, the margin of appreciation of Contracting States is narrow (Karner, § 41, Kozak v. Poland, no. 13102/02, § 92, 2 March 2010). The State must be able to point to particularly convincing and weighty reasons to justify such a difference in treatment (E.B., § 91).”

78. Furthermore, in its recent judgment of 24 June 2010 in the case of Schalk and Kopf v. Austria, the ECtHR itself summarised this case law (see § 8727).

79. Article XV is an open-ended provision (“or other circumstances”). For that reason, the Hungarian Constitution might create the impression that discrimination on this ground is not considered to be reprehensible. The Venice Commission however proceeds from the assumption that the Hungarian Constitutional Court will interpret the grounds for discrimination in a manner according to which Article XV prohibits also discrimination on grounds of “sexual orientation”. This is in line with the ECtHR case law, which regards “sexual orientation” as a prohibited distinctive feature under Article 14 ECHR, although the wording of Article 14 ECHR does not include this ground of discrimination.

80. It is important to note in this context that the Hungarian Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities forbids discrimination based on factors that include sexual orientation and sexual identity in the fields of employment, education, housing, health and access to goods and services.

27. The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45; Norris v. Ireland, 26 October 1988, Series A no. 142; and Modinos v. Cyprus, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. These included, inter alia, different age of consent under criminal law for homosexual relations (L. and V. v. Austria, nos. 33985/96 and 33986/96, ECHR 1999-VI), the attribution of parental rights (Salgueiro da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX), permission to adopt a child (Fretté v. France, no. 36515/97, ECHR 2002-I, and E.B. v. France, cited above) and the right to succeed to the deceased partner's tenancy (Karner, cited above)". 

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Article XXIII

81. Article XXIII (6) of the new Constitution establishes that “a person disenfranchised by a court for committing an offence shall have no suffrage”. The Venice Commission considers that the ECtHR case law relating to Article 3 of Protocol No. 1 is of particular relevance for the subsequent interpretation and application of this constitutional provision.

Article XXIX

82. The Commission notes that, while the present Constitution asserts the State’s obligation to ensure the fostering of the cultures of national and ethnic minorities, the use of their native languages, education in their native languages and the use of names in their native languages, the basic provisions of the new Constitution dealing with the protection of Hungary’s “nationalities” only make reference to the “respect” of the rights of citizens belonging to national minorities, without establishing any positive obligation on behalf of the State. The term “protect” is not used in relation to minority rights and the term “promote” is only mentioned in the Preamble in reference to “the cultures and languages of nationalities living in Hungary”. It is true however that the Preamble includes a broader commitment of the State for the protection of its nationalities. The Venice Commission expects that the Hungarian authorities will make sure that such an approach will not result, in practice, in a diminution of the level of minority protection previously guaranteed in Hungary (see also comments under The Commissioner for Fundamental Rights).

Article XXXI

83. Article XXXI stipulates the duty of every adult male Hungarian citizen living in Hungary to perform military service and the possibility for those, whose conscience does not allow such a military service, to perform an unarmed service. Furthermore, every adult Hungarian citizen living in Hungary may be ordered to perform work for national defence purposes during a state of national crisis and to engage in civil protection for the purpose of national defence and disaster management:

84. The exception for conscientious objectors may raise a specific problem. While it is true that the ECHR leaves it to the member states to decide whether to establish any obligation to perform armed services, the obligation to perform unarmed service in Article XXXI has to be interpreted using a systematic approach. Unarmed services should be performed outside the army in order to avoid potential conflicts with Article 9 ECHR (the right to freedom of thought, conscience and religion). This would resemble regulations in other European states and their handling of armed and unarmed services.

85. Article 4 ECHR prohibits slavery, servitude and forced labour. Explicit exceptions are listed in § 3 and include, inter alia, any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service, as well as any service exacted in case of an emergency or calamity threatening the life or well-being of the community (see also comments under Special legal orders below).

86. In view of Article 4 ECHR, the compulsory performance of work for national defence purposes during a state of national crisis as stipulated in Article XXXI § 4 is in line with human rights standards. The duty of Hungarians to engage in civil protection for the purpose of national defence and disaster management lies within the scope of Article 4 § 3 ECHR as well. Situations that come naturally with the necessity of national defence, or disasters, can be seen as cases of “emergency or calamity”.

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29 Article 68(2) 1949 Constitution of the Republic of Hungary, as amended.
87. In addition, Article XXXI § 5 of the Hungarian Constitution establishes that every person may be ordered to provide economic and financial services for the purpose of national defence and disaster management.

88. The provision of economic services can also be covered by the exception of Article 4 § 3, which exists for situations threatening the life or well-being of the community. In contrast, the duty to provide financial services has to be considered under Article 1 Protocol no. 1 ECHR, which provides for the right to the peaceful enjoyment of one's possessions. Public charges such as taxes can be regarded as an interference with Article 1 Protocol no. 1 ECHR. Such an interference can be justified, when a fair balance between the right to peaceful possession of property and the concerned public interest is struck. Particular attention should therefore be paid, in the practical implementation of Article XXXI § 5, to the respect of the said balance.

D. The State

89. The Venice Commission notes that the new Constitution maintains the current parliamentary system. It further notes that, in spite of the change of the country's name (from the Republic of Hungary to Hungary, Article A, “Foundation”), Hungary’s present form of government - a republic, governed by the principles of democracy, rule of law and separation of power (as confirmed by the provision of the “Foundation” chapter - is maintained. Specific sections (although unevenly elaborated) are dedicated to the state powers, the main public institutions and their interrelations. The weakening of the parliamentary majority’s powers and of the position of the Constitutional Court in the Hungarian system of checks and balances, as it results from the new Constitution, is for the Venice Commission a reason of concern.

Article 23 (Autonomous regulatory bodies)

90. Article 23 creates a power for the Parliament to establish autonomous regulatory bodies through a cardinal law. According to the Hungarian authorities, this provision has been adopted mainly to enable setting up the autonomous bodies that are required by EU legislation. Nevertheless, as its wording does not explicitly state this aim, one could see a risk that this instrument could be used (too extensively) as a way to curtail the parliament’s powers.

Article 24 (The Constitutional Court)

91. Since 1990, the Constitutional Court has played a vital role in the Hungarian system of checks and balances. Moreover, the Venice Commission is pleased to note that the Court has gained international recognition through its case law.

92. Article 24 does not regulate in detail the mandate, organisation and functioning of the Constitutional Court, leaving it the cardinal law to define more precisely the scope of its competences and related rules and procedures. In addition, further articles of the Constitution are relevant for the operation of the Constitutional Court (see related comments under Rules of Interpretation, Public Finance, etc.).

93. As far as the composition of the Court is concerned, the new Constitution increases the number of its members from 11 to 15 and prolongs their term of office from nine to twelve years. In addition, it transfers the election of its president from the Court to Parliament (by two-thirds majority) and prolongs his/her mandate to the entire duration of the mandate.

30 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

31 See in this respect ECtHR related case law, in particular ECtHR judgement of 18.12.1984, Sporrong v. Lönnroth./SWE., no. 7151/75, § 73.
94. The Venice Commission acknowledges that election of the Constitutional Court’s president by a political actor, and not by the Court itself, is a widely accepted phenomenon. It however notes that, according to the present Constitution of Hungary, the judges have elected the president from their own ranks, a system which is seen, in general, as a stronger safeguard for the independence of the Constitutional Court.

95. Regarding the duration of term of office of the Constitutional Court’s judges, which is prolonged to twelve years, the Constitutional Court Act should preferably state that it is non-renewable, to further increase the independence of the Constitutional Court Judges.\textsuperscript{32}

96. The Commission notes that further constitutional amendments to the Constitution still in force in Hungary - aiming to already introduce the above-mentioned changes to the number of judges of the Constitutional Court, their term of office and the election of the Court’s president - are currently under discussion. The envisaged changes and the initiative to introduce them through an amendment to the present Constitution immediately after the enactment of the new Constitution have raised concerns within Hungarian society and represent a reason for concern for the Venice Commission also.

97. In the Commission’s view, the above-mentioned changes in the composition and mode of election of the Constitutional Court must also be assessed in conjunction with the competences of the Court. On the one hand, the Venice Commission notes with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system. On the other hand, in the light of the 2010 curtailment of the Court’s powers\textsuperscript{33}, confirmed by the new Constitution and of the recent developments mentioned in the previous paragraphs, the Commission is concerned that a number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order (see also related comments in § 51 above).

98. The Constitution imposes specific criteria for the management of the state budget as well as strict limitations to the State debt. Nevertheless, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, it gives a special power of intervention in this domain to the new Budget Council. In line with the “veto power” of the Budget Council, the said curtailment of the powers of the Constitutional Court and which regards the budget, taxes and other financial legislation is conditional on the state debt exceeding 50% of the GDP. This will, however, be the case for the foreseeable future. This limitation of the Court’s competences also covers the State Budget “implementation”, which may expand even further the number and scope of acts that will not be subject of constitutional review. It is strongly recommended that the cardinal law regulating the competences, organisation and operation of the Constitutional Court (as required by Article 24 § 5 of the new Constitution) provide all clarifications needed in this respect (see also related comments under The Budget Council).

99. In this context, the Commission recalls its remarks in its already mentioned Opinion of March 2011, on the role and functions of the Constitutional Court:

\textit{“a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all}

\textsuperscript{32}See CDL-AD (2009) 042, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, § 14. See also CDL-INF(96) 2. Opinion 6/1995 Regulatory Concept of the Constitution of Hungary, § 15, stating: “to ensure that judges are completely independent of the bodies which elect them, it would be preferable if their term of office - provided it is sufficiently long - were not renewable”.

\textsuperscript{33}See CDL-AD(2011)001, § 9. “ As a result of a constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced. According to this amendment, the Constitutional Court may assess the constitutionality of Acts related to the central budget, central taxes, stamp duties and contribution’s, custom duties and central requirements related to local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these Acts in case of violation of the abovementioned rights.”
constitutionally guaranteed fundamental rights. Therefore, restricting the Court’s competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament “to enhance the protection of fundamental rights in Hungary” (§ 54; see also paragraphs 51-53).

100. Article 6 § 8\(^{34}\) may also be seen as a potential limitation to the authority of the Court. The Commission stresses in this respect that, to be referred to the Constitutional Court again, a law must differ substantially, in its wording, from the previously reviewed text. Otherwise, a second review is superfluous. The requirement of an expedited procedure in § 8 is also problematic. If the doubts regarding the constitutionality of a law have not been entirely dispelled through a different wording, the Court should be given sufficient time for a new deliberation. If from the Parliament’s view the adoption of the act is urgent, the Parliament can decide to adopt it without the objected provision and provide for a later amendment or amend the provision in a way that evidently takes into account all objections.

101. As indicated above, the provisions of Article N § 3 of the new Constitution, impose the Constitutional Court the obligation to respect the “principle of balanced, transparent and sustainable budget management” in the course of performing its duties. The Commission wishes to understand this obligation as a requirement applicable to the administrative management of the Constitutional Court as a public institution, and not as an interpretation principle to be enforced in the context of its constitutional review task. In addition, it considers that this principle should not be applied in a way that adversely affects the financial autonomy and the overall independence of the Court in its functioning (see remarks on Article N above).

*Articles 25 to 28 (Courts)*

102. The new Constitution only establishes a very general framework for the operation of the judiciary in Hungary, leaving it to a cardinal law to define “the detailed rules for the organisations and administration of courts, and of the legal state and remuneration of judges” (Article 25 (7)). Although Article 26 (1) clearly stipulates that individual judges shall be independent and only subordinated to the law, a clear statement that courts constitute a separate power and shall be independent is missing. This however results from the general principle of separation of powers enshrined in Article C of the “Foundation” chapter. It is recommended that a clear reference to the principle of the independence of the judicial power and concrete guarantees for the autonomous administration of the judiciary be included in the relevant cardinal law.

103. During its visit to Budapest in May 2011, the Commission was informed that a far-reaching reform of the judiciary was under preparation in Hungary. Nevertheless, there is very limited information on this important reform in the Constitution and little knowledge within Hungarian society on its details.

104. This part of the Constitution also contains rather vague and general provisions. This entails a significant degree of uncertainty with regard to the content of the planned reform and gives reason to concern as it leaves scope for any radical changes. The Hungarian authorities are strongly encouraged to ensure that any future changes in the area of the judiciary and the envisaged reform as a whole are fully in line with the requirements of the separation of powers and the rule of law, and that effective guarantees are available for the independence, impartiality and stability of judges.

\(^{34}\) “The Constitutional Court may be requested to re-examine the Act discussed and adopted by Parliament under Paragraph (6) for its conformity with the Fundamental Law under Paragraphs (2) and (4). The Constitutional Court shall decide on the repeated motion as soon as possible but no later than ten days from receipt.”

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105. Provisions concerning the system of courts are of very general nature. Article 25 (4) only states that “the judiciary shall have a multi-level organization” and their detailed regulation is relegated to a cardinal law. In the absence of transitional provisions in the new Constitution, it is difficult to understand not only what “multi-level organization” means, but also whether all existing courts will be maintained and how the future structure will affect the status of judges.

106. It is also important to note that the new Constitution does not contain any reference to the National Council of the Judiciary, the body entrusted by the present Constitution (Article 50 §1) with the administration of the courts. It is therefore not clear whether this body will continue to exist, which solutions will be found to ensure adequate management of courts until the justice reform is effectively implemented and which mechanism will be put in place by the reform. The Venice Commission calls upon the Hungarian authorities to make sure that, whatever the chosen mechanism, strong guarantees will be provided for the independent administration of courts and no room for political intervention will be left.

107. According to Article 25 (1) of the new Constitution, the “Curia” (the Hungarian historical name for the Supreme Court), will be highest justice authority of Hungary. In the absence of transitional provisions and despite the fact that the election rules for its president remain unchanged in the new Constitution35 a question arises: will this change of the judicial body’s name result in replacement of the Supreme Court’s president by a new president of the “Curia”? As to the judges, they “shall be appointed by the President of the Republic as defined by a cardinal Act.” (Article 26 (2)). This also leaves of margin of interpretation as to the need to change (or not) the composition of the supreme body.

108. As stipulated by Article 26 (2), the general retirement age will also be applied to judges. While it understands that the lowering of the judge’s retirement age (from 70 to 62) is part of the envisaged reform of the judicial system, the Commission finds this measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges. According to different sources, this provision entails that around 300 of the most experienced judges will be obliged to retire within a year. Correspondingly, around 300 vacancies will need to be filled. This may undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary. In the absence of sufficiently clear information on the reasons having led to this decision, the Commission trusts that adequate solutions will be found, in the context of the reform, to address, in line with the requirements of the rule of law, the difficulties and challenges engendered by this measure.

109. Article 27 (3), stipulating that “In cases defined by law, court secretaries may also act within the competence of sole judges subject to Art. 26(1)”, also lacks precision and creates ground for questions. Can the court secretary, who is not a judge, act as a judge? If this will be the case, this provision seems questionable from the perspective of the European standards relating to the status of judges. It is therefore essential that, in the context of the adoption of legislation to determine the specific “cases” referred to by Article 27 (3), the applicable standards are fully respected. In particular, clear mention should be made of the requirements to fulfill in order to discharge judicial duties and more general, of the conditions which should guarantee the competence, independence, and impartiality of judges and tribunals (cf Article 6 ECHR).

110. Article 28 seems to contain interpreting guidelines for courts, to be followed in the application of laws: “In applying laws, courts shall primarily interpret the text of any law in accordance with its goals and the Fundamental Law. The interpretation of the Fundamental Law and other laws shall be based on the assumption that they serve a moral and economical purpose corresponding to common sense and the public benefit.” The Commission understands that, since it is located in the section titled “Courts”, this statement only aims at

35."The President of the Curia shall be elected from among its members for nine years by Parliament on the recommendation of the President of the Republic. The election of the President of the Curia shall require a two-thirds majority of the votes of the Members of Parliament" (Article 26 (4))."
ordinary courts, excluding the Constitutional Court. In view of its rather general nature, it sees it more as a political declaration than as a constitutional interpretative directive. Nevertheless, the above-mentioned assumption should not be used, in the context of the interpretation of the Constitution, as a way to relativize, in the light of concrete moral and economic needs, the normative content of the Constitution.

Article 29 ( Prosecution Services)

111. Compared to Chapter XI of the present Constitution, Article 29 of the new one reflects an evolution in the approach of the role of the prosecutor’s office. While the present Constitution seems to establish, as a primary function of the Chief Public Prosecutor, the protection of the rights 36, the new Constitution focuses on the contribution of the Supreme Prosecutor and prosecution services to the administration of justice.

112. The Supreme Prosecutor and prosecution services shall: exercise rights in conjunction with investigations; represent public accusation in court proceedings; supervise the legitimacy of penal enforcement and exercise other responsibilities and competences defined by law (Article 29(2)). This approach is in line with the findings of the Venice Commission in its Report on European Standards as regards the Independence of the Judicial System37:

81. Further, in its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

“17. […] The general protection of human rights is not an appropriate sphere of activity for the prosecutor’s office. It should be better realised by an ombudsman than by the prosecutor’s office”38.

113. The Constitution is very laconic as regards the legal status of prosecutors. It only regulates the prosecutors’ appointment and the election of the Supreme Prosecutor, and refers to a future cardinal law for the detailed rules of the organisation and operation of prosecution services, the legal status and remuneration of the Supreme Prosecutor and prosecutors (Article 29(7)). There is no indication, in the constitutional provisions, of any particular changes that would affect the legal status of the prosecutors.

Article 30 ( The Commissioner for Human Rights)

114. According to Article 30, one single Commissioner for Fundamental Rights will replace the previous four parliamentary commissioners (specialized ombudspersons), whose general responsibility will be to “protect fundamental rights”. His or her deputies will be vested with the task to specifically to “defend the interests of future generations and the rights of nationalities living in Hungary” (Article 30.2). As it results from Article VI.3, an independent authority in charge of supervising “the exercise of the right to the protection of personal data and the access to data of public interest” will replace the commissioner for personal data and freedom of information. While the detailed rules for the Commissioner for Fundamental Rights shall be established by separate act, no information is provided with regard to the future competences and functioning of the new data protection authority, nor reference is made to any related subsequent legislation.

115. The Venice Commission acknowledges that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single ombudsperson or multiple ombudspersons may be

36 “The Chief Public Prosecutor and the Office of the Public Prosecutor of the Republic of Hungary shall ensure the protection of the rights of natural and legal persons as well as organizations without legal personality, and shall prosecute consistently any act which violates or endangers the constitutional order, security and independence of the country” (Article 51, § 1).
more appropriate at different stages of the democratic evolution of states\textsuperscript{39}. This being said, it considers it important that the above-mentioned re-organisation does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the fields of national minority protection, personal information protection and transparency of publicly relevant information. More generally, it deems important to ensure that the decrease in the number of independent institutions does not have an negative impact on the Hungarian system of check and balances and its efficiency.

\textit{Articles 31-35 (Local governments)}

116. Article 31 (1) of the new Constitution stipulates that “[l]n Hungary local governments shall be established to administer public affairs and exercise public power at a local level”. Nevertheless, no explicit mention is made of the principle of local self-government. The Venice Commission recalls that the European Charter of Local Self-Government (CEAL), which is binding for Hungary, requires compliance with a minimum number of principles that form a European foundation of local democracy, including as a starting point the principle of local self-government\textsuperscript{40}.

117. According to Article 2 of the CEAL, “the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution”. It is recommended that the cardinal law entrusted with the definition of local governments rules duly stipulate this and other important key principles laid down in the CEAL: the principle of subsidiarity, the principle of financial autonomy and that of adequacy between resources and competences, the legal protection of local self-government, the limits of the administrative supervision of local authorities. Adequate guarantees should be provided for their effective implementation.

118. With regard to local authorities’ supervision, the new Constitution enables metropolitan or county government offices to adopt, upon court decision, local ordinances in cases of failure by the local authorities to introduce such acts under their “statutory legislative obligation” (Article 32 (5)). At present, the government supervises the lawful operation of local authorities and can only react to shortcomings by means of legal action, without being allowed to introduce local acts on their behalf. In the absence of more detailed rules, this provision might be problematic from the point of view of the principle of local self-government. According to Article 8.2 of the CEAL, “[a]ny administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.” It is therefore recommended that the subsequent local self-government legislation provide clarity in this respect. In particular, a clear distinction should be established between, on the one hand, the local authorities’ own competences and those delegated by the central government and, on the other hand, between the control of the local authorities’ activities’ legality and supervision of their decision’s expediency.

119. Art. 35(5), allowing for Parliament’s dissolution of local elected bodies on the ground of a violation of the Constitution, is also a source of concern. Such an important decision seems

\textsuperscript{39} See CDL-AD(2007)020. Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, Venice, 1-2 June 2007, § 25: “On balance, however, it would seem preferable to follow the third-named alternative in Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, and to organise the functions of the specialised ombudsman within the overall institution of the national Ombudsman, by way of establishing a special department and/or appointing a deputy ombudsman for the special field. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added strength and efficiency both to the special function and the national institution. If this approach is followed, it would be appropriate to have the deputy ombudsman or head of department appointed either by the Ombudsman or by the appointing authority (Parliament/President) upon recommendation of the Ombudsman.”

\textsuperscript{40} “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population” (CEAL, Article 3 § 1).
not to require a binding court decision and the role of the Constitutional Court in this context appears to be only of an advisory nature. It is recommended that the specific rules applicable in such situations, to be established by cardinal law (Article 35(4)), take duly into account the relevant principles of the CEAL and include guarantees to enable their respect.

*Articles 36 to 45 (Public Finances)*

The competence of the Constitutional Court

120. The Chapter on the Public Finances contains provisions which aim to bring about an improvement in the State finances. Specific restriction on the Parliament and Government budget-related decisions are set out in Art. 36 § 4, Art. 36 § 5, Art. 37 § 2-3.

121. The adoption of constitutional provisions which impose to maintain the state deficit below 50 % per cent of GDP, responds to a legitimate aim. Thus, it cannot be criticized in the light of international and European standards of democracy, human rights and the rule of law, on the condition that the laws implementing the budget - by raising taxes or by cutting the expenses of the state - comply with these standards.

122. From this perspective, serious concern has to be expressed as to Article 37 (4) of the new Constitution, which openly leaves breaches of the Constitution without a sanction by stating that the Constitutional Court’s power to review is limited to the fields explicitly listed. Article 37 (4) reads as follows:

“(4) As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship […]”.

123. In its March Opinion, the Venice Commission has already expressed its regrets with regard to this serious limitation of the competences of the Constitutional Court introduced in November 2010 by constitutional amendment. In its view, such a limitation creates the impression that capping the national budget at 50 per cent of the GDP may be considered to be such an important aim that it may even be reached by unconstitutional laws (see related comments under the chapter on the Constitutional Court).

124. It is important to note in this respect that the limited competence of the Court to assess whether a tax law violates “the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship” still allows the Hungarian Court to sanction potential abuses of the tax power. In a recent judgment dated 6 May 2011, the Court had to rule on a 98% tax law with a retroactive scope of five years. In its ruling, the Court held that “[T]he retroactive taxation of a legal income, generated without infringing any laws, in a tax year which has ended, represents such a degree of public interference into an individual’s autonomy that it lacks an acceptable reason, and thus, goes against human dignity…”

125. Furthermore, as it results from the ECtHR case law\(^{41}\), tax laws fall within the ambit of Article 1 of the First Protocol of the ECHR. According to the ECtHR, a retroactive tax law imposing an excessive burden on the citizens can be considered to be a violation of Article 1 of the First Protocol of the ECHR\(^{42}\).

\(^{41}\)See e.g. ECHR decision n° 19276/05, Allianz – Slovenska poist’ovna a.s. and others against Slovakia, 9 November 2010.

\(^{42}\)ECHR, di Belmonte v. Italy, 16 June 2010., appl. 72638/01; see also ECHR National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, judgment 23 October 1997,
126. In addition, to the extent that the words “the Acts on the State Budget and its implementation” in Article 37 (4) of the new Constitution also apply to laws cutting state expenses, the Venice Commission wishes to stress that, as indicated by the ECtHR case-law, the notion of “possessions” in Article 1 of the First Protocol covers all pecuniary rights, including welfare benefits, both of a contributory and of a non-contributory nature.

127. While the ECtHR recognised in a recent judgment that states dispose of a large margin of appreciation in this field, this margin of appreciation is however not unlimited. On the one hand, the legislator will have to strike a fair balance between the demands of the general interest of the public and the requirements of the protection of the individual’s fundamental rights, not imposing a disproportionate and excessive burden on certain private persons (Article 1, First Protocol). On the other hand, it will have to respect the principle of non-discrimination: persons in analogous or relevantly similar positions may not be treated differently without an objective and reasonable justification (Article 14 ECHR). It is therefore essential, in states having opted for a constitutional court, that this court should be entitled to assess the compliance of all laws with the human rights guaranteed in the constitution, and especially with human rights of such a particular importance: the right not to be discriminated and the right not to be unduly deprived of its possessions.

The Budget Council

128. The establishment and the competences of the Budget Council, as well as its composition and the way it is established (Article 44(4)), has a significant impact on the adoption of the State Budget and the Parliament’s related power. This is of key importance for Parliament as, in addition to legislation, the Budget is the main instrument for parliamentary majority to express and implement its political programme. Article 44(3), interpreted in conjunction with Article 36(4)-(5), seems to grant the non-parliamentary Budget Council a “veto” power over Parliament’s decision for the foreseeable future.

129. The adoption of the State budget is part of the core competence of the Parliament and usually its main exclusive privilege. Making its decision dependent on the consent of another authority - with limited democratic legitimacy, as none of the members of the Council is directly elected - is therefore problematic and might have a negative impact on the democratic legitimacy of budgetary decisions. Such decisions may be complicated further by the fact that the Council’s composition will consist of members appointed by a previous majority. Moreover, apart from the general requirements stipulated in Article 36(4)-(5) previously quoted, the Constitution does not set up any condition for the “prior consent” of the Budgetary Council. The Venice Commission trusts that the Hungarian authorities will avoid a too rigid/restrictive interpretation of the “prior consent”, and that this condition will be interpreted and implemented, as it results from Article 44 (1)-(2): as a “statutory contribution to the preparation of the State Budget Act” through “supporting Parliament’s legislative activities and examining feasibility of the State Budget” (and not as an absolute power to block the adoption of the budget). As the compliance with the provisions of the Constitution - Article 36 (4)-(5), but also Article 44 (1)-(2) - is at stake, in any case the Constitutional Court should have the last word.

Levels of regulation

130. Several provisions of the Chapter on Public Finances refer to cardinal acts. These provisions are related to issues such as: general taxation and the pension system; the organisation and operation of the National Bank National Bank and its responsibility for...
monetary policy; the organisation and operation of the State Audit Office, the operation of the Budget Council.

131. As indicated before, there are no standards or precise criteria to determine the issues which should be regulated in the Constitution itself or in special majority acts. Nevertheless, the Commission considers to be in contradiction with the majority rule, which normally applies in a democracy, that the social, fiscal and financial policies of one political majority at a specific moment in time are cemented through a two third majority in the constitution or in cardinals laws. As a result, it will be particular difficult to translated the “free expression of the opinion of the people in the choice of the legislator” (Article 3, First Protocol to the ECHR), in future elections, in changes of these policies. The way in which the cardinal laws will be drafted is thus of key importance (see related comments under Preliminary Remarks. Cardinal Laws).

Articles 45 - 46 (The Hungarian Defence Forces and the Police and National Security Services)

132. It is a Hungarian constitutional tradition that the issues of armed forces and police are regulated by the Constitution (see also chapter VIII of the present Constitution). In many countries, it is a matter of an ordinary law.

133. The Venice Commission notes that, in line with the main constitutional values referred to in the Preamble, the provisions of Article 45 clearly states the mains aims of the military defence of the country, namely Hungary’s independence, territorial integrity and state borders. It is commendable that the constitutional provisions also open the way for common defence, peacekeeping tasks arising from international agreements.

Articles 48 to 54 (Special legal orders)

134. The provisions of Articles 48-54 are provided for a situation when normal functioning of the state’s organs are seriously disturbed and it is impossible to make use of the regulations applicable to periods when such disturbances not exist. The Hungarian Constitution is not unique in regulating special legal orders in such a detailed way (see in this respect the Polish or the German Constitution).

135. The new Constitution sets out the conditions for the establishment of different types of special legal orders (the state of national crisis, the state of emergency; the state of preventive defence; unexpected attacks; the state of extreme danger) as well as specific conditions for the adoption of related extraordinary measures.

136. In order for special legal orders to be in line the European standards, certain specific conditions must indeed be fulfilled. The Constitution itself in its Article I (3) dealing with restrictions to fundamental rights states that “[A] fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right”.

137. In the light of the Venice Commission’s conclusions in its Opinion concerning the Protection of Human Rights in Emergency Situations, this Chapter of the Hungarian Constitution appears to be generally in line with the European standards.

138. Increased clarity would be needed as to the scope of the cardinal law referred to in Article 50 (3), 51 (4), 52 (3), 53 (1-2). It is not entirely clear, from the wording of these provisions, whether the cardinal law only relates to “any extraordinary measure” or also - what would be advisable - to the suspension of the application of particular laws and the deviation from any statutory law. The general wording of Article 54 (4) seems to confirm this wider interpretation: “The detailed rules for any special legal order shall be defined by a cardinal

Act.” When the relevant cardinal law is adopted or amended following to the requirements of the Constitution, this aspect should clarified and the scope of the law defined accordingly.

139. The Commission also notes that, according to Article 54 (1), “[In] a special legal order, the exercise of fundamental rights may be suspended or restricted beyond Article I (3), except for the fundamental rights set out in Articles II and III, and Article XXVIII (2)-(5)”. As Hungary is also bound by Article 15 of the ECHR and by Article 4 of the ICCPR, special legal orders will also have to comply with the provisions of these articles (see also comments under Article T above).

Closing provisions

140. As previously indicated, the reference in second paragraph of the Closing Provisions to the 1949 Constitution seems to be in contradiction with the statement, in the Preamble, by which the Hungarian 1949 Constitution is declared as invalid. The Venice Commission tends to interpret this apparent inconsistency as a confirmation of the fact that the said statement does not have legal significance. Nevertheless, it is recommended that this is specifically clarified by the Hungarian authorities. The adoption of transitional provisions (as required by the third paragraph of the Closing Provisions), of particular importance in the light of the existence, for certain provisions of the new Constitution, of possibly diverging interpretations, could be used as an excellent opportunity for providing the necessary clarifications. This should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution.

IV. Conclusions

141. The adoption of a new Constitution, aiming to consolidate Hungary as democratic state based on the principles of separation of powers, protection of fundamental rights and the rule of law, is a commendable step.

142. The Venice Commission welcomes the efforts made to establish a constitutional order in line with the common European democratic values and standards and to regulate fundamental rights and freedoms in compliance with the international instruments which are binding for Hungary, including the ECHR and the recent EU Charter. It notes that the current parliamentary system and the country’s form of government - the republic - have been maintained. The Commission is pleased to note the introduction of the individual constitutional complaint in the Hungarian system of constitutional review.

143. The Venice Commission notes that the recommendations it formulated, in March 2011, following the authorities’ request for assistance on specific legal issues raised in the constitutional process, have been partly taken into account.

144. By contrast, it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe. The Commission hopes that the adoption of implementing legislation will be a more transparent and inclusive process, with adequate opportunities for a proper debate of the numerous major issues that are still to be regulated. It calls upon to all parties involved to adopt, beyond their political background and orientations, an open and constructive approach and effectively co-operate in this process.

145. The significant number of matters relegated, for detailed regulation, to cardinal laws requiring a two-thirds majority, including issues which should be left to the ordinary political process and which are usually decided by simple majority, raises concerns. Cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law.
146. The limitation of powers of the Constitutional Court on taxation and budgetary matters and the prominent role given to the Budget Council in the adoption of the State budget, represent further sensitive issues that have raised concern in the light of their potential impact on the functioning of democracy.

147. In addition, a rather general constitutional framework is provided for key sectors, such as the judiciary and further important society settings. This is also a source of concern, as it may have an impact on the quality and level of guarantees and protection available and on the effective implementation of the standards applicable to the sectors concerned. Guarantees for the main principles pertaining to such important matters are usually enshrined in the Constitution, especially when major reforms are planned, as it is the case for the Hungarian judiciary. The provisions relating to life imprisonment without parole could raise issues of compatibility with international norms that are binding on Hungary and the related case-law.

148. With regard to the constitutional protection of fundamental rights, the Commission considers that more precise indications should be provided by the Constitution as to their content and stronger guarantees for their effective protection and enjoyment by individuals, in line with the international human rights instruments to which Hungary is a Contracting Party. The Venice Commission recalls that, as indicated in its March 2011 Opinion\(^{47}\), “[…] as a rule, constitutions contain provisions regulating issues of the highest importance for the functioning of the state and the protection of the individual fundamental rights. It is thus essential that the most important related guarantees are specified in the text of the Constitution, and not left to lower level norms”.

149. The relevance of the Preamble for the Constitution’s interpretation and some potentially problematic statements and terms contained therein have also gave reason to questions and would call for adequate clarification by the Hungarian authorities. This include the wording on the protection of the rights of Hungarians abroad contained in the Preamble and other related provisions of the new Constitution, which may be found problematic and engender concern in the framework of inter-state relations.

150. The Venice Commission trusts that adequate clarifications and responses - fully in line with the applicable standards - to the concerns mentioned before, will be provided in the context of the future interpretation and application of the new Constitution or by amending the Constitution where necessary. The preparation and adoption of cardinal and other implementing laws is an opportunity in this respect. The Venice Commission stands ready to assist the Hungarian authorities in this process upon their request.

\(^{47}\) CDL-AD(2011)001, § 52.
European Centre for Law and Justice, Memorandum on the Hungarian New Constitution of 25 April 2011, May 19, 2011

Introduction
The President of the Republic of Hungary, Pál Schmitt signed Hungary’s new constitution on 25 April 2011 after the Hungarian Parliament approved it by an overwhelming majority. The ceremony took place at the President’s Sandor Palace office in Budapest.

This new Hungarian Constitution has stirred much debate in Europe. An impartial analysis of the text suggests that Hungary’s new Supreme Law could surprise a secularist and postmodern Europe. However, the new Constitution’s content should not be considered innovative with regard to European constitutional practice.

In large part, critics of the new Constitution argue the document stems from Christian ideals and thought, as its Preamble references Christianity. It is also criticized for its choice to protect the right to life and human dignity from the moment of conception, as well as the marriage and family, and prohibits practices aimed at eugenics. Symbolically, the preamble of the Constitution starts with a deeply emblematic pledge, declaring the Hungarian people “proud that one thousand years ago [its] King, Saint Stephen, based the Hungarian State on solid foundations, and made [the] country a part of Christian Europe.” Additionally, the opposition objects to Parliament’s rapid adoption of the text, accusing the government of having been marginalized during the whole process of reform. Since 1988, the need of a new Constitution has become more pressing. Several Governments have failed to pass a new one, and the amending process has progressively intensified. Effectively, the Constitution has been amended about ten times in the last months of 2010. Thanks to the two-thirds majority held by the ruling centre-right coalition of the Hungarian Civic Union (Fidesz) and the Christian Democratic People’s Party (KDNP), recently, the National Assembly has been finally able to draft and adopt a new comprehensive fundamental text.

In any case, it is not the end of the matter. Several legal issues arising from the adoption of the new text will be addressed with organic laws (which require two-thirds majority) to implement a number of constitutional provisions. It will be the case, for example, of pension system, taxation, protection of national heritage, protection of families, electoral system, incompatibility of the MPs, National Central Bank, Constitutional Court, political parties procedures, and so on. Without considering that the same constitutional court will evidently intervene in the effective implementation of the new provisions.\(^1\)

\(^1\)The ECLJ’s analysis is based upon an English translation of the draft Constitution, Fundamental Law of Hungary, available at http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constitution.pdf. Further modifications were approved after the adoption of the final version of the text.

\(^2\)Fundamental Law of Hungary, National Avowal of Faith, supra note1, at 1 (emphasis added).

\(^3\)KATALIN KELEMEN, NUOVA COSTITUZIONE UNGHERESE ADOTTATA E PROMULGATA (Diritti Comparati) (2011)
Nevertheless, apart from the further internal adjustments, this new Constitution has raised a number of critics through Europe, focusing mainly on the national, religious and moral values underlying the text, such as the references to Christianity, as well as criticizing the new balance of power in favor of the Parliament and to the detriment of the Constitutional Court which gained a lot of influence during the post-communist transitional period.

Objectively, there are a few basic premises undergirding this new Constitution. First, it rejects communism’s atheistic vision of society, which the Hungarian citizenry has never fully embraced. It equally rejects the post-modern vision of society. Secondly, with regard to the separation of powers doctrine, the text attempts to properly redress the previous imbalance of governmental power. Both of these goals comply with democratic European standards. In sum, the new Hungarian Constitution seeks to ensure European values: peace, democracy, human rights, and the rule of law, while the new Constitution tries in the meantime to “take up with its national History and its values again. It is a Constitution of “national reshaping”.

The opposition’s objections to the constitutional process appear to be largely ideologically predetermined. Moreover, they have gone far as to distort the evaluation provided by authoritative European institutions, such as the Venice Commission. Those opposing the new Constitution have called for Europe’s rejection of the Hungarian reform, labeling it as anti-democratic and discriminatory.

Hungary’s new Constitution, to some extent, relies on Christian and traditional inspired values, and as such, Hungary can be said to have rejected the post-modern model of society. Hungary is not alone in rejecting this model, thus indicating that the post-modern model of society is no longer compulsory in Europe. Significantly, the political leaders of Germany, the United Kingdom, and France have recently asserted in nearly identical terms that “multiculturalism” has failed.

Not surprisingly, then, those who promote a post-modern society (and primarily, the coalition of multicultural and secularist advocates, as well as pro-abortion and LBGT lobbies) find Hungary’s new Constitution dangerous and unacceptable. These lobbies are trying to force Hungary to amend its new text, as they have succeeded in the past to cancel the draft Slovakian concordat. Specifically, the EU forced the Slovakian government to renounce its ratification of a treaty with the Holy See aimed at, inter alia, guarantying and protecting the conscientious freedom of medical practitioners. More recently, the same coalition failed to impose their view on the European Court concerning the removal of the crucifix from Italian public classroom walls. Hungary is one of the 21 European States which lent its support for the right to display the crucifix before the European Court. The new Hungarian Constitution, adopted by an overwhelming majority, shows that the post-modern model of society is not compulsory or irresistible.

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4 Which is the Council of Europe’s advisory body on constitutional matters.
5 Angela Merkel, speech to members of the Junge Union, Potsdam, 16 October 2010; David Cameron, speech to the Munich Security Conference, 5 February 2011; Nicolas Sarkozy, interviewed on Paroles de Français (TF1), 11 February 2011.
6 More precisely, the EU organ known today as the “Fundamental Right Agency” (FRA).
In the following sections, the main points raising criticism will be discussed, in the light of the European and International legal standards, in particular:

- **The Values in the New Hungarian Constitution (Part A)**
  - The Rejection of the National Socialist and Communist Dictatorship
  - The Nation based on ethnic origin
  - The Reaffirmation of the Underlying Christian Values of the Hungarian State and Society
  - The Cooperation between Church and State
  - The protection of the right to life and human dignity from the moment of conception
  - Protection of the family and the institution of heterosexual marriage
  - The condemnation of practices aimed at eugenics

- **The Legal Questions Arising from the New Hungarian Constitution (Part B)**
  - The Venice Commission Opinion on the New Constitution of Hungary
  - The general concerns expressed by the Venice Commission
  - The role and significance of the *actio popularis* in *ex post* constitutional review
  - The role and significance of the preliminary (*ex ante*) review among the competences of the Constitutional Court.

**PART A: THE VALUES IN THE NEW HUNGARIAN CONSTITUTION**

**I. The Rejection of the National Socialist and Communist Dictatorship:**

During a press conference on his recent visit to Hungary, the United Nations Secretary-General Ban Ki-moon recognized the remarkable transformation the country has seen over the past two decades. Hungary has moved “from communism to democracy, from the Warsaw Pact to modern Europe.”

Today Hungary is an example for the rest of the contemporary states which are in the middle of a transition to democracy, especially in the Middle East area.

Unlike other communist countries, Hungary was not completely cut off from the West under communism. Hungary maintained privileged ties with liberal democracies, particularly with West Germany. Therefore the preamble of Hungary’s new Constitution simply emphasizes the constitutional heritage of the country when it states that:

We do not recognize the suspension of our historical Constitution due to foreign occupation. We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its people under the national socialist and communist dictatorships.

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We do not recognize the legal continuity of the 1949 Communist “Constitution”, which laid the foundation for tyranny, and hence we declare it to be invalid.

...We proclaim that the self-determination of our State, lost on 19 March 1944, was restored on 2 May 1990, with the formation of our first freely-elected representative body.

Such statements cannot be considered anti-democratic. To demonstrate, Hungary’s constitutional premises parallel other state constitutions which espouse similar democratic ideals:

A. The democratic standards of European public law

The Hungarian Constitution provides democratic standards similar to those provided by constitutions of other post-communist states, such as Croatia and Poland:

The Croatian constitution recognizes the death of and freedom from communism:

\[
\text{the ‘millenary identity of the Croatian nation [...] founded on the historical right of the Croatian nation to full sovereignty, manifested [...] on the threshold of historical changes, marked by the collapse of the communist system and transformations of the European international order, the Croatian nation reaffirmed its millenary statehood by its freely expressed will at the first democratic elections (1990)’.}
\]

Article 13 of Polish constitution forbids anti-democratic government forms:

\[
\text{‘Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, [...] shall be forbidden’}
\]

More generally speaking, on a sub-constitutional level, countries of Central and Eastern Europe have adopted various forms of “lustration laws”. After the fall of various European Communist states between 1989–1991, the term came to refer to governments’ policies of “mass disqualification of those associated with the abuses under the prior regime” (for example, the Czechoslovakian law of 4 October 1991, and the Polish Law passed by the Sejm on 28 May 1992). These laws excluded participation of former communists, especially communist secret police informants, successor politicians, and even in civil service positions. The European Court of Human Rights has accepted these exclusions as a legitimate means of “transitional justice”.

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B. The European Convention on Human Rights

Under the margin of appreciation given to the various Member States in the Council of Europe, the European Court of Human Rights has permitted national authorities to close the door to their past communistic eras (even when condemning those Member States). For example, in Ždanoka v. Latvia, the Grand Chamber upheld Latvia’s decision to disqualify the applicant from holding political office in the Latvian parliament as well as other municipal positions. The applicant brought her claims under Articles 3, Protocol No. 1 (right to free elections), 10 (Freedom of expression), and 11 (Freedom of assembly and association) of the European Convention on Human Rights. Latvia had disqualified the applicant because of her political militancy in the Communist Party of Latvia during the Soviet period. In upholding Latvia’s decision, the Grand Chamber underscored Latvia’s historical context and its specific need to protect democracy from subversive political activities:

While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.¹²

C. The European and international law system

The international law system has not only accepted departures from Communist regimes, but has encouraged it. The Parliamentary Assembly of the Council of Europe (PACE) has explicitly provided measures to dismantle the heritage of former communist totalitarian systems. To quote the imperative resolution 1096 of 1996,

The dangers of a failed transition process were manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the “velvet restoration” of a totalitarian regime, if not a violent overthrow of the fledgling democracy.¹³

That is why Assembly recommended that “member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems...”

¹² Ždanoka v. Latvia [GC], no. 58278/00, § 133, ECHR 2006-IV. For a comment of this decision, see PECORARIO A., Il rovescio del giudizio della Grand Chamber, in tema di violazione dell’art. 3 primo protocollo e degli articoli 10 e 11 della convenzione, svela la complessità della transizione lettone, in “Associazione italiana costituzionalisti” (May 2006).
D. Conclusion

The new Hungarian Constitution’s mild rejection of Hungary’s communist heritage completely aligns with the constitutional and sub-constitutional provisions existing in European public law, as well as democratic standards in the international system.

II. Nation based on ethnic origin

It is necessary to add a comment on another related question that has raised concerns, summed up in the concept of “Nation based on ethnic origin”. Article D of the new text states that:

Hungary, guided by the notion of a single Hungarian nation, shall bear responsibility for the fate of Hungarians living outside its borders, shall foster the survival and development of their communities, shall support their endeavours to preserve their Hungarian identity, and shall promote their cooperation with each other and with Hungary.

This provision has been strongly criticized, mainly by the neighboring States; Hungary has been accused of political expansionism. It could concern around 500,000 people living today mainly in Slovakia and Romania, on the territories lost by Hungary at the Treaty of Trianon in 1920. This is a very sensitive issue, and still “a gaping wound”. This provision may be seen as a dangerous reopening of the “Pandora Box”, leading to new local tensions. It may be the case. It may also be an instrument for pacification like in Ireland, where the double citizenship system is rather seen as a solution than a problem. Indeed, Art. 2 of Irish Constitution is very similar, by stating that “the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural affinity and heritage”.[1] This provision is also similar to the famous Israeli Law of Return, of 5 July 1950 granting to the every member of the Jewish diaspora the right to return to Israel and to citizenship.

III. The Reaffirmation of the Underlying Christian Values of the Hungarian State and Society

One of the most criticized aspects of Hungary’s new Constitution is its reaffirmation of Christian values which undergird the Hungarian State and society. The Preamble implicitly rejects national socialist and communist dictatorships by declaring itself “proud that one thousand years ago [its] King, Saint Stephen, based the Hungarian State on solid foundations, and made [the] country a part of Christian Europe.”[4] Hungary further declares its desire to honor “the achievements of [its] historical Constitution and [honors] the Holy Crown, which embodies the constitutional continuity of the Hungary and the unity of the nation”.[15] Moreover, Hungary explicitly “acknowledges the role that Christianity has played in preserving [the] nation”.[16]

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14 Fundamental Law of Hungary, National Avowal of Faith, supra note 1, at 1 (emphasis added).
15 Id. at 2 (emphasis added).
16 Id. at 1 (emphasis added).
Again, a comparison with other European states shows that several states also highlight their Christian heritages in their respective constitutions.

A. The democratic standards of European public law

A large number of European States acknowledge foundational Christian values within their societies.

The Preamble of the Irish Supreme Law states:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ . . . Do hereby adopt, enact, and give to ourselves this Constitution. 17

Similarly, Article 13 of the Bulgaria’s constitution designates Eastern Orthodox Christianity as Bulgaria’s official religion: “Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria”. 18 Article 2 of Norway’s constitution provides similarly: “The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same”. 19 Likewise, Greece’s constitution declares that that the Eastern Orthodox Church of Christ is the prevailing religion in Greece:

The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. 20

B. The European Convention of Human Rights

In a number of cases, the European Court of Human Rights has recognized the legitimacy and importance of Christian values which underlie European States and their societies. For example, in the Otto-Preminger-Institut v. Austria, a case regarding the seizure of a film which, in the opinion of the Government, was outrageous for the Roman Catholic religion, the European Court of Human Rights granted a wide margin of appreciation to the national authorities, recognizing that “the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans”. 21 Recently in the “crucifix case”, Lautsi v. Italy, the Court reaffirmed the same principle establishing that, “by prescribing the presence of crucifixes in State-school classrooms . . .

17 Constitution of Ireland, 1 July 1937, CODICES, cit.
19 The Constitution of the Kingdom of Norway, 17 May 1814, CODICES, cit.
the regulations confer on the country’s majority religion preponderant visibility in the school environment.”

This preponderant visibility is justified “in view of the place occupied by Christianity in the history and tradition of the respondent State . . . .”

C. The European and international law system

As explained in the Guidelines for Review of Legislation Pertaining to Religion and Belief (“Guidelines”) adopted the Venice Commission in 2004, “[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country’s history are permissible so long as they are not used as a justification for ongoing discrimination”.

The aim of the Hungarian Constitution is not to create grounds for discrimination, but rather to “preserve the intellectual and spiritual unity of [the Hungarian] nation,” also recalling the role of Christianity.

The Hungarian Constitution merely follows in the footsteps of the Council of Europe, considering that the Council’s statute reaffirms Europe’s spiritual and moral heritage:

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.

Similarly, the Treaty of Lisbon, establishing the European Union, declares reliance in part on a religious heritage:

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law . . . .”

Moreover, Article 4 of the Treaty of Lisbon announces that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities . . . .”

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22 Lautsi v. Italy [GC] no. 30814/06, § 71, 18 March 2011.
23 Id. (citing Folgerø and Others v. Norway [GC], no. 15472/02, § 89, ECHR 2007 VIII).
28 Id. art. 4, ¶ 2.
D. Conclusion

Those provisions of Hungary’s new Constitution which reaffirm Christian values are not unique in Europe. These provisions are in accordance with the European Law and legal traditions. Thus, that Hungary’s national identity is marked by the Christianity presents no conflict.

IV. The Cooperation between the Church and State

Article VI of the new Hungarian Constitution affirms that,

[i]n Hungary the State and the churches shall be separated. Churches shall be independent. For the attainment of community goals, the State shall cooperate with the churches.29

This provision has also stirred much criticism from secularists. Once again, those criticisms are not objectively justified and reflect an ideological bias against the sovereign choice of the Hungarian people. To the contrary, European and International law do not require pure secularism. Moreover, the European landscape presents a colorful variety of solutions with which to achieve an appropriate relationship, as well as cooperation, between Church and State.

A. The democratic standards of European public law

A small number of States explicitly indicate secularism as a distinguishing feature of their legal system in their Constitution. For example, the First article of the French Constitution requires that, “France shall be an indivisible, secular, democratic and social Republic”.30 Similarly, article 2 of the Turkish Constitution states that “the Republic of Turkey is a democratic, secular and social State”.31

On the other hand, many states establish state churches in their constitutions. For example, article 4 of the Danish Constitution, affirms that “the Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State”,32 while in the United Kingdom, the Head of State is also the Head of the Church. Additionally, some seats of the House of Lords are reserved to the Ecclesiastics of the Anglican Church.

Another series of constitutions establishes some form of compromise. For example, Article 7 of the Italian Constitution provides that, “[t]he State and the Catholic Church are, each within its own order, independent and sovereign. . .”.33

Similarly, Article 16 of Spain’s constitution states that “there shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and

29 Fundamental Law of Hungary, supra note 1, art. 6, cl. 2.
32 The Constitutional Act of Denmark, 5 June 1953, CODICES, cit.
shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions”.  

The European continent, thus, exhibits a wide variety of governmental models, some secular and some sectarian in nature. The European Court of Human Rights has always afforded great respect to these relationships.

**B. The European Convention of Human Rights**

In *Folgerø and Others v. Norway*, the Grand Chamber of the Court decided whether Norway violated Convention principles by providing instruction in the Christian faith to primary school students. In its analysis of the applicants’ claims brought under Article 1 of Protocol No. 1, the Grand Chamber held that Christianity could occupy a prominent position in school curriculum:

> [T]he fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court’s opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (see, mutatis mutandis, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR (1983). In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State’s margin of appreciation in planning and setting the curriculum.

Thus, Member States may freely emphasize one religion over others due to the place that one religion holds in the State’s “national history and tradition”.

Additionally, for secular Member’s States, the Grand Chamber of the Court acknowledged the importance of this specific tradition in its 2003 decision, *Refah Partisi v. Turkey*. In this case, the Grand Chamber decided that Turkey acted legitimately and proportionately when it dissolved the political party, *Refah Partisi*, particularly in light of the importance of secularism to Turkey’s constitutional framework. In sum, the Grand Chamber agreed with the Turkish constitutional Court’s finding that Turkey’s

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34 Constitution of Spain, 31 October 1978, CODICES, cit.
35 *Folgerø and Others v. Norway* [GC], no. 15472/02, § 89, ECHR 2007 VIII.
36 *Id.* § 89.
38 *Id.* §§ 67, 135
39 The Court concluded that Turkey’s interference was necessary in a democratic society because it met a “pressing social need” and was “proportionate to the aims pursued.” *Id.* at § 135. The interference met a pressing social need because the danger of Refah seizing power was tangible and immediate, because Refah could have implemented its anti-democratic regime if it seized power in the next election. *Id.* at § 110. Also, the interference was proportionate to the aims pursued since the economic penalties alleged by Refah were speculative and the penalty of the individual members refraining from political activity was merely temporary. *Id.* at § 134.
40 The Court noted that the margin of appreciation for Turkey is limited in regard to dissolution of political parties since Article 11 is to be construed strictly in its application to political parties. *Id.* at § 100. However, the Court found that Turkey was within its margin of appreciation when it dissolved Refah. *Id.* at § 110.
41 *Id.* § 40.
Constitution forbade political parties from actively seeking to end democracy. In analyzing why Refah’s goals conflicted with a democratic society, the Court stated that “there can be no democracy without pluralism.”\(^41\) Refah’s desire to implement an Islamic regime directly conflicted with a democratic society. As the Grand Chamber noted, “freedom of thought, conscience, and religion is one of the foundations of a “democratic society” within the meaning of the Convention.”\(^42\) In so doing, the Grand Chamber recognized Turkey’s right to self-determination, even where secularism is the prevailing governmental system. As the Turkey’s Constitutional Court explained in its prior decision, “‘Secularism, which is also the instrument of the transition to democracy, is the philosophical essence of life in Turkey.’”\(^43\) Thus, the Court upheld the Constitutional Court’s decision: “Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah’s policy of establishing sharia was incompatible with democracy . . . .”\(^44\)

In short, the Court’s decision in Refah Partisi indicates that, under the Convention, there is a required balancing between freedom of political speech and freedom of association. Political parties are permitted to suggest changes to the fundamental democratic system of a state as long as they use democratic means to implement those changes and as long as the change itself is compatible with fundamental democratic principles. The “necessary in a democratic society” element requires this balancing. If a political party crosses the line of posing a threat to democracy, then the Convention cannot be used as a protection for those anti-democratic activities and ideals. Therefore, the Court rejected Refah’s desire to claim freedoms protected by a document enacted through democratic means and committed to the protection of democracy when Refah’s obvious goal was to stifle democracy.

Finally, in Sahin v. Turkey, when analyzing whether Turkey’s regulation of the Islamic headscarf at a public university was “necessary in a democratic society” under Article 9, the Grand Chamber explained the impossibility of discerning a uniform conception of religion in society throughout Europe, and, thus, why member states must be given a wide margin of appreciation in these matters:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. . . . It is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . and the meaning or impact of the public expression of a religious belief will differ according to time and context. . . . Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. . . . Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to

\(^{41}\) *Id.* at § 89.
\(^{42}\) *Id.* at § 90.
\(^{43}\) *Id.* § 40 (quoting the Constitutional Court of Turkey).
\(^{44}\) *Id.* § 125.
a point to the State concerned, as it will depend on the specific domestic context. . . .

C. The European and international law system

European and international law also recognize and encourage the above-mentioned variety in the regulation of the relations between Church and State. For example, the Treaty of Lisbon (in Article 17 of the Treaty on the Functioning of the European Union) states that, “[t]he Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.” Recognizing their identity and their specific contribution, the Union undertook to maintain an open, transparent and regular dialogue with churches and religious associations, highlighting the essential role that they play in a pluralistic society for the common good.

D. Conclusion

Accordingly, the new Hungarian constitutional text is fully compatible with European practices on Church and State relationships. Moreover, this new Constitution takes steps which surpass the examples cited herein to protect individual rights: First, it explicitly provides for a separation between Church and State. Second, the document neither refers to nor designates a specific religion or denomination as many Member States in the Council of Europe do. Rather, the new Constitution only refers to churches generally.

Should the idea that the “State shall cooperate with the churches,” be considered a crime? This governmental paradigm reflects a balanced, and inclusive approach toward religion, and simultaneously excludes any anti-religious bias.

V. The protection of the right to life and human dignity from the moment of conception

The new constitution is not only based upon democratic principles generally as set forth in its National Avowal of Faith, but under Freedoms and Responsibilities, Article II grants to individuals specific protections which espouse values and which respect human life. For example, Article II protects a foetus’ right to life, which begins at conception:

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45 Sahin v. Turkey [GC], no. 44774/98, § 109 ECHR 2005-XI (internal citation omitted) (emphasis added).
47 For example, sixteen of the forty-seven Member States of the Council of Europe are confessional states or specifically mention a relationship with a specific religion in their constitutions or founding documents: Andorra (Catholic); Armenia (Armenian Apostolic Church); Bulgaria (Eastern Orthodox Christianity); Cyprus (Greek Orthodox Church); Denmark (Evangelical Lutheran Church); Georgia (Apostle Autocephalous Orthodox Church of Georgia); Greece (Eastern Orthodox Church of Christ); Iceland (Evangelical Lutheran Church); Italy (Catholic Church); Liechtenstein (Roman Catholic Church); Malta (Roman Catholic Apostolic Religion); Norway (Evangelical Lutheran Religion); Poland (Roman Catholic Church); Spain (Catholic Church); Macedonia (Macedonian Orthodox Church); United Kingdom (church of England and Church of Scotland).
Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception. 48

Article II’s explicit protection for human life and dignity has created an inexplicable scandal among some “post-modern” advocates. However, a comparison to other European states’ similar protections demonstrates that Hungary’s democratic choice is fully legitimate.

A. The democratic standards of European public law

Hungary is not alone in providing strong protection for human life and dignity. As many are aware, Catholic countries have specially undertaken a respectful approach toward human life. Thus, article 40 of Ireland’s constitution states that, “

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. 49

Similarly, Article 38 of Poland’s constitution binds the Republic to “ensure the legal protection of the life of every human being”. 50

B. The European Convention of Human Rights

The European Convention of Human Rights (“Convention”) declares protection for human life. Article 2 of the Convention states that, “[e]veryone’s right to life shall be protected by law.” 51 The European Court has never ruled that the unborn shall not—in principle—benefit from this protection, which derives from the general responsibility of the States to defend the lives of their people. To the contrary, in the Vo v. France, for example, the Grand Chamber of the Court ruled that States have the authority to determine when the right to life begins. 52 Human Rights treaties provide a floor of protection, not a ceiling. Therefore, the States can regulate their legal system to enhance the internal level of protection of fundamental rights; and simultaneously, they cannot give less protection than the Convention provides. In a recent decision, A. B. C. v. Ireland, the Grand Chamber of the Court decided there is no fundamental right to abortion stemming from the European Convention under Article 8. 53 In that case, the Court acknowledged the “right to life of the unborn” 54 as a legitimate concern to be taken into account. Even considering the broad European consensus on abortion, the Court held that Ireland “struck a fair balance between the conflicting rights and interests” at stake; as

48 Fundamental Law of Hungary, supra note 1, art. II,
49 Constitution of Ireland, 1 July 1937, CODICES, cit.
52 Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII.
53 A, B and C. v. Ireland [GC], no. 25579/05, §§ 214, 233, 16 December 2010 (selected for publication)
54 Id. § 233.
to the first two applicants, although Ireland prohibited abortion for health and well-being reasons, it permitted women to travel outside the state to obtain an abortion for those reasons. In its analysis, the Court did not waiver on granting Ireland a broad margin of appreciation, considering “the acute sensitivity of the moral and ethical issues raised by the question of abortion,” and “the profound moral views of the Irish people as to the nature of life.”

**D. The European and international law system**

The protection of life and human dignity enshrined in the Hungarian constitution is also completely in line with international law. Suffice it to recall the United Nation Convention on the Rights of the Child ("Rights of the Child Convention"). This Convention dates back to 1989 and it “is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social right”.

The Preamble to the United Nations Convention on the Rights of the Child explicitly recognizes that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...” Further, Article 6 affirms that “States Parties recognize that every child has the inherent right to life,” and that they “shall ensure to the maximum extent possible the survival and development of the child.”

**E. Conclusion**

Hungary unequivocally based its new constitution on the principle of human dignity. Hungary chose the most solid foundations for its governmental institution. Those who attack the new provisions of this constitution which protect human life from conception are, in reality, using human rights as a weapon against human dignity. Use of human rights in this manner directly conflicts with the logic of European and international law and values.

**VI. Protection of the family and the institution of heterosexual marriage**

Article K of the new Fundamental Law of Hungary, in relevant part, preserves marriage:

1. Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent; Hungary shall also protect the institution of the family, which it recognises as the basis for survival of the nation.

2. Hungary shall promote the commitment to have and raise children.

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55 Id. § 237.
56 Id. at 233 (emphasis added).
57 Id. 241 (emphasis added).
60 Id. at art. 6.
61 Fundamental Law of Hungary, *supra* note 1, art. K.
A. The democratic standards of European public law

Forty-one of the forty-seven Member States of the Council of Europe limit marriage to the conjugal union of a man and a woman. Among them, there are some States which constitutionally define marriage as a union between one man and one woman. For example, Poland’s constitution provides in its Article 18 that, “marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” Likewise, the Ukrainian constitution establishes that, “[m]arriage is based on the free consent of a woman and a man”. Latvia’s constitution also provides that “the State shall protect and support marriage—a union between a man and a woman, the family, the rights of parents and rights of the child.” Considering such examples, the provisions in Hungary’s new constitution are a far cry from revolutionary.

B. The European Convention of Human Rights

Article 12 of the European Convention on Human Rights, guarantees only to “men and women of marriageable age” the right to marry and to found a family. Recently, in Schalk and Kopf v. Austria, the Court held that the European convention does not impose an obligation on Member States to afford the right to marry to same-sex couples. The Court further affirmed that the Austrian government had not discriminated against the couple when it prohibited two men from contracting a marriage. As the Court explained, “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.” Moreover, the Court “reiterate[d] that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.” Notably, the Court disagreed that there was any European consensus on this issue, with only six of the forty-seven member states allowing same sex marriage.

C. The European and international law system

Article 23 of the United Nation International Covenant on Civil and Political Rights, establishes that, “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” This Article further recognizes “[t]he right of men and women of marriageable age to marry and to found a family . . . .” Additionally, the European Union leaves such matters within its member states’ discretion. Article 9 of the Charter of Fundamental Rights of the European Union,

64 Constitution of the Republic of Latvia, 15 February 1922, CODICES, cit.
65 ECHR, supra note 51, § 12.
66 Schalk and Kopf v. Austria, no. 30141/04, § 63, 24 June 2010 (selected for publication).
67 Id. § 62.
68 Id.
69 Id. § 58.
71 Id. at art. 23, cl. 2.
although not explicitly addressing the institution of traditional marriage, simply establishes that “[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

D. Conclusion

While some radical pro-LGBT lobbies may not appreciate the new Hungarian constitution, it is the sovereign and legitimate choice of the Hungarian people. This choice, which includes protecting life from conception, is especially justified by the serious demographic problem that Hungary suffers regarding an exceedingly low fertility rate– around 1.3 children per woman.

VII. Prohibition of practices aimed at eugenics

Article III of the new Hungarian constitution, in relevant part, establishes that, “[p]ractices aimed at eugenics, the use of the human body or its parts for financial gain, or human cloning shall be prohibited.”

A. The democratic standards of European public law

The tone of this new Hungarian constitutional provision is not novel in European practice. For example, Article 24 of Serbian constitution establishes that “cloning of human beings shall be prohibited.” Similarly, Article 119 of the Federal Constitution of the Swiss Confederation states that “All forms of cloning and interference with genetic material of human reproductive cells and embryos is prohibited.”

B. The European Convention of Human Rights

The European Convention on Human Rights does not directly address eugenics and cloning, but the Council of Europe’s Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, better known as “Convention of Oviedo,” establishes some key provisions that protect life: “the interests and welfare of the human being shall prevail over the sole interest of society or science” (art.2); “where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo [being] the creation of human embryos for research purposes is prohibited” (art. 18).

Article III of the new Hungarian constitution fully harmonizes with the European Convention on Human Rights and the Convention of Oviedo. The European Court of Human Rights has always considered that the “desire to artificially procreate” is not guaranteed by article 12. In 2007, the Court recalled that “article 12 of the convention

73 Fundamental Law of Hungary, supra note 1, art. III, cl. 3.
74 Constitution of Serbia, 8 November 2006, CODICES, cit.
75 Federal Constitution of the Swiss Confederation, 18 April 1999, CODICES, cit.
does not guarantee a right to procreation.”  

The Court consistently interprets this provision as “not . . . guarant[ying] a right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned.”  

The Court has recognized this on several occasions.  

There is not a subjective right to procreate; there is only a protection against State interference in the freedom of couples to exercise their natural ability to have children by themselves.

C. The international law system

Generally, international law has heavily regulated eugenics practices. In an important resolution on human cloning, the European Parliament, regarding the United Kingdom’s proposal to permit medical research using embryos created by cell nuclear replacement (so-called “therapeutic cloning”), “consider[s] that ‘therapeutic cloning’, which involves the creation of human embryos solely for research purposes, poses a profound ethical dilemma, irreversibly crosses a boundary in research norms and is contrary to public policy as adopted by the European Union.” Consequently, the European Parliament called on the UK Government to review its position on human embryo cloning, and repeated its call to each Member State “to enact binding legislation prohibiting all research into any kind of human cloning within its territory and providing for criminal penalties for any breach”.

At its 82nd plenary meeting on 8 March 2005, the General Assembly of the United Nations enacted a Declaration on Human Cloning. In its Declaration, the Assembly, aware of the ethical concerns that certain applications of rapidly developing life sciences may raise with regard to human dignity, human rights and the fundamental freedoms of individuals, solemnly declared that “Member States are […] called upon to adopt the measures necessary to prohibit the application of genetic engineering techniques that may be contrary to human dignity.”

D. Conclusion

In the light of these comparative materials established by various international bodies, we can conclude that criticism of Hungary’s stance on eugenics appears to be unjustified and aimed at imposing a postmodern ideology.

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77 S. H. v. Austria (dec.), no. 57813/00, § 4, 15 November 2007.
78 X and Y v. United Kingdom, (dec.) no. 7229/75, 15 December 1977, D.R. 12, p. 32.
79 Margarita Šijakova and others v. The former Yugoslav Republic of Macedonia (Dec.), no. 67914/01, 6 March 2003 (“the right to procreation is not covered by Article 12 or any other Article of the Convention”)
80 X and Y. v. United Kingdom, supra note 78.
82 Id. § 2 (emphasis added).
83 Id. § 3.
84 Id. § 4 (emphasis added).
86 Id. at Annex ¶ (c) (emphasis added).
PART B: THE LEGAL QUESTIONS ARISING FROM THE NEW HUNGARIAN CONSTITUTION

Introduction

Along with debates around the values affirmed in the text, the adoption of the new Hungarian constitution also brought to the forefront a few legal issues which date back to the very early history the country.

The first and only written Constitution of the Republic of Hungary was adopted on 20 August 1949. From 1988 on, the idea of preparing a new constitution emerged in Hungary. This new foundational document was supposed to establish a multiparty system, a parliamentary democracy, and a social market economy. However, a new constitution could not be drafted and, in 1989, the National Assembly adopted a comprehensive amendment to the 1949 Constitution (Act XXXI of 23 October 1989). Although previous governments had already attempted to draft a new constitution, adoption had never been successful. The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force until the adoption of a new Constitution.  

Since 1989, the 1949 Constitution of the Republic of Hungary has been amended several times, beginning in 1990. Due to the two-thirds majority held by the ruling centre-right coalition, the amending process of the Constitution progressively intensified. As of late, the Constitution has been amended about ten times in the last months of 2010. Finally, the National Assembly initiated a project to rewrite the Constitution altogether.

These modifications have drawn the European institutions’ attention. On 21 February 2011, the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary, Mr. Tibor Navracsics, requested that the Venice Commission prepare a legal opinion on three particular issues arising in the drafting of a new constitution for the Republic of Hungary. On 7-8 March 2011, a working group of the Venice Commission traveled to Hungary in order to meet with Hungarian authorities, including the Ad-Hoc Committee in charge of the drafting of the constitution, and civil society. The mandate of the Venice Commission was not to examine every aspect of the new constitution, but rather to give its legal opinion on three specific issues arising in the context of preparing the text. The Commission also addressed some general concerns.

The analysis here follows same framework as in Part A, supra, notwithstanding the procedural criticisms expressed by the Commission. Notably, the ECLJ disagrees with some media reports which portrayed the Venice Commission’s analysis as a rejection by the European communities of Hungary’s reform as constitutionally invalid. This is untrue.

88 Id.
We will analyze the constitutional amendment of November 2010 which has reduced the powers of the Constitutional Court. On this specific point, we conclude that this new shift in the balance of constitutional powers is logical and perfectly in line with European democratic standards as those standards have matured over time.

The first question addressed to the Commission asked, “[T]o what extent may the incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights”.\(^\text{89}\) The Venice Commission found that updating the scope of human rights protection and seeking to adequately reflect, in the new Fundamental Law of Hungary, the most recent developments in the field of human rights protection, as articulated in the EU Charter, is a “legitimate aim and a signal of loyalty towards European values”.\(^\text{90}\) The Commission then advised against Hungary’s incorporation of the EU Charter of Fundamental Rights into its constitution. The Commission believed this would result, inter alia, in problems of interpretation and overlapping competences between domestic ordinary courts, the national Constitutional Court and the European Court of Justice. The Commission went on to state that, “[t]he substantive provisions of the EU Charter can however be used as a source of inspiration for the national constitutionally guaranteed human rights.”\(^\text{91}\) However, it also noted that particular attention should be paid in this context to the conformity of the domestic protection of human rights with the ECHR and other binding international human rights treaties.

I. The role and significance of the preliminary (ex ante) review among the competences of the Constitutional Court

The Commission answered the following two questions:

- **Who is entitled to submit a request for preliminary review?**

and

- **What is the effect of a decision passed by the Constitutional Court in a preliminary review procedure on the legislative competence of the Parliament?**\(^\text{92}\)

The Venice Commission began by noting “there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a priori review and who should have the right to initiate it.”\(^\text{93}\) The Commission concludes by stating that,

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\text{[i]n order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the ex ante review should be limited to the President of the country. The review should take place only after the adoption of the law in parliament and before its enactment and, for international treaties, before their ratification. In addition, wider non-}
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\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id. ¶ 11.2.

\(^{93}\) Id. ¶ 35.
binding ex ante review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures.\textsuperscript{94}

II. The role and significance of the \textit{actio popularis} in \textit{ex post} constitutional review

Finally, the Commission explained that the future constitution’s removal of the \textit{actio popularis} (which would avoid the danger of overburdening the Constitutional Court and the misuse of the remedies before it) would not infringe European constitutional standards.\textsuperscript{95} The authorities had explained that, in Hungary, the Constitutional Court receives approximately 1600 petitions per year; anyone, including those holding no legal interest, may seek constitutional review of a legal norm under an \textit{actio popularis} system.\textsuperscript{96} The Venice Commission opined that it was nonetheless advisable, particularly in light of Hungary’s constitutional heritage, to implement other mechanisms of constitutional review to avoid “repercussions on the scope and efficiency of the control.”\textsuperscript{97} For example, the Commission suggested retaining “limited elements of \textit{actio popularis}” by providing an “indirect access mechanism through which individual questions would reach the Constitutional Court for adjudication via an intermediary body (such as the Ombudsman or other relevant bodies).”\textsuperscript{98} In addition, the Venice Commission recommended that

the system of preliminary requests by ordinary courts be retained. The planned extension of the constitutional complaint to review also \textit{individual acts}, in addition to normative Acts, is a necessary compensation for the removal of \textit{actio popularis} and therefore a highly welcome development.\textsuperscript{99}

III. The general concerns expressed by the Venice Commission

As is evident from the above discussion, the Venice Commission has not rejected Hungary’s reform. First, any such rejection would have infringed the sovereignty of the Country. To the contrary, this project has been considered as a step forward by many. In short, there is no “constitutional emergency” in Hungary. While the Venice Commission has expressed some general concerns which Hungary may take into consideration, the bulk of criticism by opposition to the reform amounts to no more than pure political propaganda.

\textit{(1) The “Goulash soup”}

The most serious concern regards the procedural ground. The Venice Commission argued that the Hungarian government lacked transparency, failed to adequately consult with the opposition, and rushed the constitutional process.

Effectively, the procedural shortcomings of the reform process, including the limited timeframe for implementation, have opened the door to criticism. The Economist argues

\footnotesize{\textsuperscript{94} Id.¶75.2. \\
\textsuperscript{95} Id. ¶ 64. \\
\textsuperscript{96} Id. ¶¶ 55-59. \\
\textsuperscript{97} Id. ¶ 65. \\
\textsuperscript{98} Id. ¶ 66. \\
\textsuperscript{99} Id. ¶ 75(3).}
the process should not be like “Goulash soup,” stating that “[a] constitution ought to be above political horse-trading. Input from all parties should give it greater legitimacy, making it harder to alter. Yet over the past year the government has marginalised and alienated the opposition.”\textsuperscript{100} The radical nationalist \textit{Jobbik} voted against the supreme law while the Socialists and green party, \textit{Politics Can Be Different (LMP)} boycotted the vote. Hungary’s new supreme law will take effect on January 1, 2012. The main opposition, the Socialist Party, requested by letter that President Pal Schmitt not sign Hungary’s new constitution. The Socialists, as well as the LMP, have even refused to participate in the parliamentary debate, saying that the law served “to cripple and rob people and attempt to curb the constitution and democracy”.\textsuperscript{101}

In an interview with \textit{The Wall Street Journal} on 19 April 2011, Tibor Navracsics, the deputy prime minister, denied that the process had been rushed. A new constitution has been a goal of successive Hungarian governments since 1989. The debate has been an ongoing one for the past 20 years. In the April 2010 election campaign, this government’s key pledge centered on drafting and implementing a new constitution. Formal consultation started soon after the elections, in June of last year. All of Hungary’s opposition parties, numerous experts, and civil society groups were invited to participate. The majority did so and provided invaluable input. In addition, the government conducted an unprecedented public consultation exercise. Questionnaires were sent to eight million voters. More than one million responses were incorporated in the drafting process.\textsuperscript{102}

In any case, beyond the natural defensive explanation provided by the Hungarian government, it is astonishingly ironic to hear some voices from the European institutions explaining to a democratic State how a constitution should be democratically developed and adopted. The “European Constitution” has been largely imposed over European peoples, even against popular will explicitly expressed through referendum. As Mr von Krempach explains in the Blog, \textit{Turtle Bay and Beyond}, on [t]he first attempt, the so-called ‘Constitutional Treaty of the EU’, was subject to a referendum in only four of the 27 Member States: while Spain and Luxembourg voted ‘yes’, the outcome was negative in France and the Netherlands. And what happened next? A new draft Treaty with identical substance was adopted–the sole difference being that the word ‘Constitution’ was not used any more. This new draft was subject to a referendum only in one of 27 Member States (Ireland), and when the outcome of that referendum was negative, Ireland was pressed . . . to repeat the poll as many times as was necessary to get to a yes.\textsuperscript{103}

\begin{footnotes}
\textsuperscript{100} Goulash soup, The new constitution is being rushed through with limited consultation, THE ECONOMIST (7 April 2011), available at http://www.economist.com/node/18530690.
\textsuperscript{101} Socialists call on president Schmitt not to sign constitution, MTI.hu, Hungarian News Agency, April 26, 2011.
\textsuperscript{102} Hungary Rejects German Criticism of New Constitution, The Wall Street Journal, 19 April 2011.
\end{footnotes}
Mr von Krempach also explained that “23 new constitutions have been enacted in Eastern and Central Europe since 1990, and only 10 of these were subject to a popular referendum in the country concerned, whereas 13 were adopted by the legislative body alone.” He wondered why the absence of a referendum is suddenly problematic now when it never has been in the past. Moreover, as von Krempach further elaborated, “[i]f one takes a look beyond Eastern Europe, one will not avoid noticing that neither the US Constitution, nor the German Grundgesetz, nor the Austrian Constitution have ever been subject to any popular vote—yet these texts enjoy a high reputation and nobody would doubt their legitimacy.”

(2) The role of the Hungarian Constitutional Court in the context of the Visegrád Four.

In large part, the Venice Commission opinion on Hungary’s new constitution rejected the limitation of powers of the Constitutional Court as a result of a constitutional amendment in November 2010. According to this amendment, the Constitutional Court may assess the constitutionality of legislative acts related to the central budget, central taxes, stamp duties and contributions, custom duties and central requirements related to local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these legislative acts in case of violation of the abovementioned rights.

This last remark of the Venice Commission is not confined to the procedural aspects of the reform; it refers to the relationship between constitutional organs, namely the doctrine of separation of powers. Yet, the question of separation of powers must be addressed in context, considering crucial historical and cultural aspects of Hungary’s post-communist constitutional evolution. From this perspective, the reorganization of the Constitutional Court’s legal competences falls in line with the other key accomplishments of the democratic transition.

From the early stages of the democratic transition from communism, a majority of states in Central and Eastern Europe decided to grant relevant powers to newly established constitutional courts. This transition of power reflected the pressure from international organizations that desired to showcase these new constitutions as an important element in

104 Id.
105 Id.
106 The Visegrád Group, also called the Visegrád Four or V4, is an alliance of four Central European states – the Czech Republic, Hungary, Poland and Slovakia – for the purposes of cooperation and furthering their European integration. The Group’s name in the languages of the four countries is Visegrádská čtyřka or Visegrádská skupina (Czech); Visegrádi Együttműködés or Visegrádi négyek (Hungarian); Grupa Wyszehradzka (Polish); and Vyšehradská skupina or Vyšehradská štvorka (Slovak). It is also sometimes referred to as the Visegrád Triangle, since it was an alliance of three states at the beginning – the term is not valid now, but appears sometimes even after all the years since the dissolution of Czechoslovakia in 1993. The Group originated in a summit meeting of the heads of state or government of Czechoslovakia, Hungary and Poland held in the Hungarian castle town of Visegrád[2] on 15 February 1991 (not to be mistaken with Vyšehrad, a castle in Prague, the capital city of the Czech Republic, or with the town of Višegrad in Bosnia and Herzegovina). The Czech Republic and Slovakia became members after the dissolution of Czechoslovakia in 1993. All four members of the Visegrád Group became part of the European Union on 1 May 2004. From Wikipedia.org
the departure from communist systems. As observed by Huntington, Linz, Stepan, O’Donnel, Lipset and Whitehead,\(^{108}\) the assistance of international organizations was the most important characteristic of these constitutional transitions, highly different, form this point of view, to the proceedings of democratization of South America, Eastern Asia and, lastly, Africa and Middle East.\(^ {109}\) Another reason can be found in the fact that the Constitutional Courts (with the exception of Yugoslavia and Poland) were new organs and their members were considered less compromised with the soviet system.\(^ {110}\)

Many Jurists have explained that, in the context of Central and Eastern Europe, Hungary was a specific case. First of all, as says Catherine Dupré, “Hungary probably embodied the mildest form of communism in Central and Eastern Europe and the Kádár regime with its “goulash communism” had significantly relaxed the dogmas of Moscow.” Unlike some other communist countries, Hungary under communism was not completely cut off from the West. It managed to maintain privileged links with liberal democracies and with West Germany, in particular. As a result, “one can consider that Hungary was more or better prepared for the change of regime.”\(^ {111}\)

What is more, from a juridical point of view, the Hungarian Constitutional Court can be considered as one of the most powerful judicial organs of the entire region. To explain, this Court’s interpretation of human dignity stands as a prominent bulwark. The Hungarian interpretation of human dignity—“imported” from German constitutional case law since the case 8/1990 (focused on individuality and autonomy).\(^ {112}\) When the Hungarian Court, especially in the early stages of the transition, encountered a conflict between two incompatible rights, it has always emphasized the autonomy of the individual. In fact, the very function of human dignity and the general personality right is to protect individual autonomy in the absence of a specific right in the 1989 Constitution.

The picture of human beings in their society, namely the ideological message that individualism is good and state is bad, to use the words of Radoslav Procházka, reflected the general spirit of transition from communism. This led to the Constitutional Court’s self-appointment as an “agent of social change” engaged with the other constitutional


\(^{109}\) On the recent wave of democratization in Middle East, see A. PECORARIO, Fuoco sopra e sotto il Medio Oriente; Se prevarranno i partiti fondamentalisti; I generali e il Medio Oriente and La Rivolta araba arriva in Asia: il peso costituzionale della Turchia, diritticomparati.it (April 2011).


organs in the battle for accomplishing a specific “transitional political agenda.” In this sense, as Prochazka opined, the judicial review was a sort of “decommunisation tool” and mission of the Court was to “carrying the polities through the transition by building the fundamentals of constitutional law and practice.”

Something that, anyway, was not extraneous to the other similar institution in the region.

Considering the Hungarian context, the current critics toward this rebalancing of power are not totally groundless. But in the same time, we have to notice that Constitutional Courts know very well how to progressively extend their competency.

Conclusion

In sum, the Hungarian government should not be criticized for having attempted to redress the balance of powers of the constitutional organization of the State. The Hungarian Constitutional Court held powers which were much more extensive than those of any other court in the region. The same can be said about the leeway it was granted in adjusting adjudicative functions to its own liking. Accordingly, the Hungarian Court “emerge[d] as the most assertive negative legislator in the region and as a true co-leader in the process of Hungary’s legal and social transformation.”

Possibly, the legal (and political) self-promotion of the Constitutional Court as a leader of the transition served the early stages of the transition; it was a necessity to become familiar with the new paradigms of democracy and market society at that time.

However, the transition occurs only once. In the words of this powerful judicial body in a 1992 decision, “transitional specifics may not be relied upon as a default device legitimizing measures that would not be constitutionally perfect under ‘normal’ circumstances.”

After the emergency season, the political powers must go back to Parliament and Government, namely those organs which, through the different mechanism of the representative system, are expression of the popular sovereignty. What is more, the disputed amendment of November 2010 establishes that the Constitutional Court may assess the constitutionality of legislative acts related to a list of topics exclusively in connection with the rights to life and human dignity. As noted in the above-mentioned study of Catherine Dupré, after the collapse of communism, the genesis of the new legal order in Hungary was determined by massive Western involvement and an unprecedented movement of export/import of law. Indeed, it explains how the circumstances of the transition and the background of the importers determined the choice of German case law as a model and how the Court used it to construct its own version of the right to human dignity. Basically, the Hungarian Constitutional Court will continue to do what it has always done, but in a more balanced institutional organization of the separation of powers.

Thus, the Hungarian government, according to whom the new constitution “enshrines a classic separation of powers between Hungary’s legislature, executive and judiciary. The

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113 R. Procházka, Mission accomplished: on founding constitutional adjudication in Central Europe (Budapest, New York 2002).
114 W. Sadurski, Rights before court, a study of constitutional courts in post-communist states of Central and Eastern Europe (Springer 2005).
115 R. Procházka, supra note 113, at 29.
116 Hungarian constitutional Court, decision 11 of 5 March 1992.
Constitutional Court will become the court of last resort for citizens. It will no longer be able to rule on tax and budgetary issues, which will rightly remain the preserve of an elected parliament".\footnote{Hungary Rejects German Criticism of New Constitution, cit.} 

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The European Centre for Law and Justice is an international, Non-Governmental Organization dedicated to the promotion and protection of human rights in Europe and worldwide. The ECLJ holds special Consultative Status before the United Nations/ECOSOC since 2007.

The ECLJ engages legal, legislative, and cultural issues by implementing an effective strategy of advocacy, education, and litigation. The ECLJ advocates in particular the protection of religious freedoms and the dignity of the person with the European Court of Human Rights and the other mechanisms afforded by the United Nations, the Council of Europe, the European Parliament, the Organization for Security and Cooperation in Europe (OSCE), and others.

The ECLJ bases its action on “the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble of the Statute of the Council of Europe).
The Supreme Court [UK]

In October 2009, The Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

The Supreme Court’s 12 Justices maintain the highest standards set by the Appellate Committee, but are now explicitly separate from both Government and Parliament.

The Court hears appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases.

Additionally, it hears cases on devolution matters under the Scotland Act 1998, the Northern Ireland Act 1988 and the Government of Wales Act 2006. This jurisdiction was transferred to the Supreme Court from the Judicial Committee of the Privy Council.

The Supreme Court sits in the former Middlesex Guildhall, on the western side of Parliament Square.

This new location is highly symbolic of the United Kingdom’s separation of powers, balancing judiciary and legislature across the open space of Parliament Square, with the other two sides occupied by the executive (the Treasury building) and the church (Westminster Abbey).

The Supreme Court also decides devolution issues, that is issues about whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted or propose to act within their powers or have failed to comply with any other duty imposed on them. Devolution cases can reach the Supreme Court in three ways:

- Through a reference from someone who can exercise relevant statutory powers such as the Attorney General, whether or not the issue is the subject of litigation
- Through an appeal from certain higher courts in England and Wales, Scotland and Northern Ireland
- Through a reference from certain appellate courts

**Significance to the UK**

Courts are the final arbiter between the citizen and the state, and are therefore a fundamental pillar of the constitution.

The Supreme Court was established to achieve a complete separation between the United Kingdom’s senior Judges and the Upper House of Parliament, emphasising the independence of the Law Lords and increasing the transparency between Parliament and the courts.

In August 2009 the Justices moved out of the House of Lords (where they sat as the Appellate Committee of the House of Lords) into their own building on the opposite side of Parliament Square. They sat for the first time as a Supreme Court in October 2009.
The impact of Supreme Court decisions extend far beyond the parties involved in any given case, shaping our society, and directly affecting our everyday lives.

For instance, in their first legal year, the Justices gave landmark rulings on access to legal advice for Scottish suspects, the rights of gay asylum seekers, and the weight to be given to pre-nuptial agreements.

**The Supreme Court and Europe**

The Supreme Court is the highest court of appeal in the United Kingdom. However, The Court must give effect to directly applicable European Union law, and interpret domestic law so far as possible consistently with European Union law. It must also give effect to the rights contained in the European Convention on Human Rights.

Under the Treaty on the Functioning of the European Union (article 267), The Court must refer to the European Court of Justice (ECJ) in Luxembourg any question of European Union law, where the answer is not clear and is necessary for it to give judgment.

In giving effect to rights contained in the European Convention on Human Rights, The Court must take account of any decision of the European Court of Human Rights in Strasbourg. No national court should “without strong reason dilute or weaken the effect of the Strasbourg case law” (Lord Bingham of Cornhill in R (Ullah) v Special Adjudicator [2004] UKHL 26).

An individual contending that his Convention rights have not been respected by a decision of a United Kingdom court (including The Supreme Court) against which he has no domestic recourse may bring a claim against the United Kingdom before the European Court of Human Rights.

Source: http://www.supremecourt.gov.uk/
6. It might fairly be asked: what on earth is the purpose of the Supreme Court? When it was first mooted in government circles in what were very odd circumstances which I shall recount in a moment, the immediate reaction of the members of the appellate committee of the House of Lords was rather why was such an institution necessary. I am sure that everyone here knows that until October last year, the final court of appeal in England and Wales, in Northern Ireland and, in civil cases, in Scotland was the House of Lords. In the 19th century and earlier the appeal was to the whole House but it gradually became obvious that an appeal to the whole House was both cumbersome and inappropriate – cumbersome because an appeal court of, say 50 or more people is scarcely practical; and inappropriate because it was appreciated that the final appellate court should comprise experienced judges (or at least lawyers) and not lay peers.

7. If anyone is interested in the judicial role of the House of Lords in earlier times, I would refer them to a published lecture given by the present Master of the Rolls, Lord Neuberger, to the British Friends of the Hebrew University on 2 December last year. By the mid-19th century, only those peers with legal experience would hear cases. In fact the last time a non-legal peer cast a vote on an appeal before the Lords was 17 June 1834.1 The last time one attempted to do so was 1883, when Lord Denman, son of the first Baron Denman, Lord Chief Justice, attempted to cast his vote on the appeal in *Bradlaugh v Clarke*.2 Lord Selborne LC ignored his vote. According to Lord Neuberger, that was about the time when the Duke of Devonshire was supposed to have dreamt that he was addressing the House of Lords, and then woke up and found that he was . . .

8. There followed a number of attempts at reform which are also described by Lord Neuberger. Finally, the position was regularised by the Appellate Jurisdiction Act 1876, which by section 2 expressly provided for appeals to the House of Lords. By section 5 no appeal could be heard by the House of Lords unless at least three of the following were present: the Lord Chancellor, Lords of Appeal in Ordinary appointed under the Act or other peers who held or had held high judicial office. The Lords of Appeal in Ordinary came to be known as law lords. They were the first life peers. . . .

12. On 12 June 2003 the most senior judges in England and Wales (which did not include me) were . . . to have a strategic discussion about the administration of justice. . . .

13. As they were about to begin their discussions, word arrived of an announcement from Downing Street in these terms. The Lord Chancellor was to be abolished and replaced by a Secretary of State for Constitutional Affairs, who would have no judicial functions. The position had until then been that the Lord Chancellor was head of the judiciary and sat from time to time in the appellate committee of the House of Lords. He was also a member of the Cabinet and Speaker of the House of Lords. This was another part of Britain’s unwritten constitution which did not entirely conform to the principle of the separation of powers espoused by writers like Locke and Montesquieu . . .

14. . . .There would be a Judicial Appointments Commission to select judges, which had previously been the role of the Lord Chancellor. Last but not least, the law lords would be abolished and replaced by a Supreme Court. . .

15. As Lord Phillips put it in his Gresham lecture, no-one at Minster Lovell, who included senior civil servants, had had an inkling of these far-reaching changes. Not even the Queen had been informed. The shadow leader of the House of Lords, Lord Strathclyde described the proposed changes as ‘cobbled together on the back of an envelope’ . . .
16. Thereafter steps were taken to make the various reforms. It proved impossible to abolish the office of Lord Chancellor, if only because there were many statutory provisions conferring powers or imposing duties on the Lord Chancellor. In a note handed to the Prime Minister by Lord Irvine on 10 June 2003 he said that there were about 5,000 references to the Lord Chancellor in primary and secondary legislation.

**The purpose of the Supreme Court**

20. The purpose of the Supreme Court was to underline the independence of the judiciary. This is central to the operation of the rule of law, which is of the utmost importance to the working of a modern democracy. But what difference will it make? It can be said with force that the law lords were fiercely independent and that their jurisprudence over the last 130 years or so is plain evidence of their commitment to the rule of law. Further, the jurisdiction of the Supreme Court is the same as that of the House of Lords and the judges are the same. So what is the point of it? Under the Constitutional Reform Act, at the moment when the powers of the Supreme Court were brought into force, that is on 1st October 2009, all the judges who were law lords on that day and who had not resigned became justices of the Supreme Court by operation of law. Only Lord Scott resigned. He did so because he had almost reached his retirement age of 75. So the other eleven law lords automatically became members of the Supreme Court. I had the privilege of being the first person to be appointed to the Supreme Court who had not been a law lord. It can be said with great force that the eleven were hardly likely to approach their judicial function after 1st October 2009 differently from the way they had done before, especially since their responsibilities were the same. Equally, the twelfth person, namely me, would hardly be likely to make any difference.

21. So has it all been a waste of time and money? Only time will tell. How long a time it will take to tell nobody knows. You will I am sure remember that when Chou en Lai was asked (I think some time in the 1950s) what he thought of the French Revolution, he replied: ‘It is too early to say.’ . . .

33. Historically the House of Lords delivered speeches and not judgments. Although in recent years an appellate committee would occasionally deliver an opinion of the whole committee, it was not common. I can well understand that, if the judges were delivering speeches, it is not easy to have a joint speech. Now that the court is a court and only a court, there is no difficulty in having more single judgments of the court and, where the court is split, perhaps a majority judgment and a minority judgment. There is some evidence of a move in that direction already. In my opinion it is a desirable trend. Of course every justice is entitled to deliver a judgment of his or her own but it is to my mind very important that it should be clear what the true reason for (or *ratio decidenendi* of) the case is. When I was in the Court of Appeal I spent many happy hours pouring over the speeches of their lordships trying to work out what the *ratio* was. No doubt academics and counsel did (and do) the same. I would like to think that in the future the Supreme Court will do its utmost to ensure that the *ratio* is clear and to avoid concurring judgments which, on analysis, give different reasons for reaching the same conclusion or, at least to articulate the differences precisely. This is a very important point because one of the roles of the Supreme Court is to give guidance to the courts below, especially to judges of first instance.

*Lord Clarke is a Justice of the Supreme Court.*

Source: http://www.supremecourt.gov.uk/docs/speech_101111.pdf
Before the Constitutional Reform Act of 2005 we did not have an appropriate independent process for judicial appointments, which does not mean that those appointments were flawed. They were made on the recommendation of the Lord Chancellor who was a government minister. The Lord Chancellor’s Department made its own enquiries as to the most eligible candidates. Often these had not even applied to go on the bench, in which case the Lord Chancellor did his best to persuade them to do so.

Nevertheless, in my time in the law there was no question of the Lord Chancellor being influenced by political considerations in his appointments. He set out quite simply to appoint those who would make the best judges. Appointments to the judiciary were largely based on consultation with that judiciary. They were based on the views that the judges had formed of the abilities of those who appeared before them. These appointments were open to the criticism that they depended upon the views of a judiciary which was white, predominately male and drawn from the upper social class. The accusation was that judges recommended their own kind for appointment. The system was also open to the criticism that, if appointments were in fact not subject to political influence, this was not apparent as they were made by a Minister under a process that was not transparent.

The Constitutional Reform Act removed almost all the Lord Chancellor’s involvement in relation to judicial appointments and set up a Judicial Appointments Commission for England and Wales. Similar bodies were set up in Scotland and Northern Ireland. Judges are well represented on the Commission, but do not provide a majority and the Commission has to have a lay Chair. The Commission recommends candidates to the Lord Chancellor, who has a very limited power of veto. The Act gives the Commission a specific statutory duty to “encourage diversity in the range of persons available for selection for appointments”. This is easier said than done and so far the Commission has only had limited success, particularly in relation to the senior judiciary. Although the situation is improving, the limited diversity in the senior ranks of the judiciary in its turn impacts on applications for appointment to the Supreme Court. It is not satisfactory that our twelve members include only one woman and that most of us have very similar backgrounds. We take decisions that are not bound by the precedents of the lower courts and which often raise questions of social values.

To qualify for appointment to the Supreme Court you have to have held high judicial office or be a qualified legal practitioner. Selection to the Supreme Court is made by an ad hoc Commission made up of the President of the Court, the Deputy President and one member from each of the judicial appointments bodies in England and Wales, Scotland and Northern Ireland. At least one member of the Commission must be a non-lawyer. The appointment process includes an elaborate two stage process of consultation, which involves the Lord Chancellor. He has a very limited power of veto.

**Judicial Review**

Over 50 per cent of that workload now consists of public law cases. This makes it even more important that the Supreme Court really is independent of Her Majesty’s Government. These cases involve challenges to the legality of executive action. In my time in the law this has been a growth area. When I started claims for judicial review were comparatively rare. The courts were
reluctant to interfere with executive action. They applied what is known as the Wednesbury test under which an administrative decision will not be set aside unless no reasonable decision maker could have made it. This approach changed with the Human Rights Act. That act requires Judges to consider whether the conduct of officials complies with the requirements of the Human Rights Convention. This requires the judge to apply a test of proportionality rather than the Wednesbury test. The Human Rights Act has increased the number of public law cases that come before the court. But this is not the only, or even the major, cause of the increase. I believe that there are two causes. The first is the increased complexity of modern society which brings with it an increasing amount of executive control over the activities of the citizen. This has been coupled with a growing recognition by the citizen and by public interest bodies of the possibilities of challenging such action.

Perhaps the most important and most difficult role of the Supreme Court is to maintain a proper balance between executive and judicial decision making. The Strasbourg court allows States a degree of discretion in the manner in which they comply with their obligations under the Human Rights Convention. This is described as a margin of appreciation. It is important that the courts also recognise that the executive must be allowed a proper latitude in the exercise of discretionary powers. If there is a danger to judicial independence, and here I am speaking generally and not just in relation to the Supreme Court, it is that the courts will be seen by Government and the public to be overstepping their role and that Parliament may be tempted to attempt to restrict the powers of judicial review.

Ministers have in the past publicly expressed their concern at the way judges perform this role. In the Belmarsh case the House of Lords ruled that locking up alien terrorist suspects without trial was contrary to the Human Rights Convention. The Home Secretary, Charles Clarke, wanted to have a discussion with the Law Lords as to how he could lawfully deal with the terrorist problem. Lord Bingham declined his invitation. Such a conversation would have been inappropriate and infringed the principle of the separation of powers. Charles Clarke did not appreciate this. He stated publicly..

[The operation of the Human Rights Act] “sometimes appears to place the human rights of a suspected criminal ahead of the rights of those threatened by that criminality, the wider needs of society or the consequences for society of any particular decision. The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decisions for our society”.

Very recently Lord Howard, the former Tory leader, stated in a Radio 4 programme..

“The power of the judges, as opposed to the power of elected politicians, has increased, is increasing and ought to be diminished. More and more decisions are being made by unelected, unaccountable judges, instead of accountable, elected Members of Parliament who have to answer to the electorate for what has happened”.

These statements evidence a failure to understand the role of the judiciary. When we review administrative action we do not substitute our decisions for those of the executive. We check that the executive has acted in accordance with the law, as laid down by Parliament. Comments such as these underline the importance of these provisions in section 3 of the Constitutional Reform Act.

*Lord Phillips is President of the Supreme Court.*

LAW VERSUS THE EGYPTIAN STATE

The military regime that seized power in Egypt’s 1952 coup d’état placed the advancement of such substantive concerns as national independence, redistribution of national wealth, economic, development, and Arab nationalism over the procedural niceties of liberal democracy. Within a few months of assuming power, Gama ‘Abd al-Nasser and the Free Officers annulled the Constitution and dissolved all political parties, thus initiating a decided shift away from the established political order. Two years later, the regime moved against the Egyptian administrative court system, the Majlis al-Dawla. ‘Abd al-Raziq al-Sanhuri, president of the Majlis al-Dawla and architect of the Egyptian civil code, was physically beaten by Nasser supporters and forced to resign. By 1955, the Majlis al-Dawla was formally stripped of its institutional autonomy, and twenty prominent judges were forcibly retired or transferred to nonjudicial positions. Finally, a comprehensive law for the Majlis al-Dawla was issued in 1959 that restricted its power to review and cancel administrative acts. Given this history, it is curious that some two decades later, the regime not only rehabilitated the administrative court system but also established a new, independent Supreme Constitutional Court empowered to review regime legislation. An entrenched, authoritarian regime with viable political rivals rebuilt autonomous judicial institutions through which citizens could contest administrative decisions and challenge the constitutionality of regime legislation. Why?

Records from the period indicate that the regime consolidated power and undermined judicial institutions in the 1950s only with significant indirect costs. the nationalization of much of the private sector and elimination of all constraints on executive power produced a massive exodus of capital from the country at precisely the time that Egypt’s new leaders were attempting to mobilize national resources to build the economy. Egyptian citizen sent their wealth abroad at the staggering rate of $2 billion per year, or roughly three and a half times the rate of all domestic sources of investment. By the time of Nasser’s death in 1970, the economy was in extreme disrepair. The public sector was acutely inefficient and required constant infusions of capital, the physical infrastructure of the country was crumbling, massive capital flight deprived the economy of billions of dollars each year, and military spending consumed a full 20 percent of the gross national product.
Faced with economic stagnation and escalating pressure from international lenders throughout the 1970s, Nasser's successor, Anwar Sadat, pinned the regime's survival on attracting foreign direct investment, as well as investment from Egyptian nationals holding tens of billions of dollars in assets abroad. However, given the regime's history of nationalizing the vast majority of the private sector, it was difficult to convince investors that their assets would be safe from state seizure or adverse legislation on entering the Egyptian market. After a full decade of failed attempts to attract investment without implementing concrete institutional safeguards on property rights, the regime created an institutionally autonomous Supreme Constitutional Court with powers of judicial review. The new court was designed to assuage investor concerns and guarantee institutional constraints on executive actions, but it would also open new avenues for political activists to challenge the state.

A second unforeseen cost that the regime incurred as a result of undermining judicial institutions in the 1950s was an accelerated breakdown in administrative discipline within the state itself. The administrative courts had operated as an important institutional channel for individuals to sue state bureaucrats who had abused their power. The loss of these institutional channels combined with the rapid expansion of the Egyptian state resulted in the regime's inability to adequately monitor and discipline bureaucrats throughout the state's administrative hierarchy. Administrators and bureaucrats began to abuse their power and position to prey on citizens, and public sector managers siphoned off resources from the state. Corruption was exacerbated still further with the initiation of Sadat's open-door economic policy because it increased the opportunities for graft exponentially. The inconsistent application of legal codes by state bureaucrats also contributed to the uncertain investment environment, stifling attempts to attract both domestic and foreign private investment. Corruption not only affected the state's institutional performance but abuses of power also undermined the revolutionary legitimacy that the regime had enjoyed when it seized power in the 1950s.

To counteract these pathologies, the regime enhanced the independence and capacity of the administrative court system so it once again could serve as an avenue for individuals to expose corruption in the state bureaucracy. The regime increased the strength and autonomy of the administrative courts in 1972 and further still in 1984 by returning substantial control over appointments, promotions, and other internal functions, all of which had been weakened or stripped completely from them by presidential decrees two decades earlier. The government also expanded the institutional capacity of the administrative courts by establishing additional courts of first instance and mid-level appellate courts throughout the country. These new institutional channels increased the accountability of government bureaucrats, enabled the regime to monitor and discipline administrators diverging from their state-proscribed mandates, and facilitated the coordination of state policy.
Sadat also used the new Supreme Constitutional Court and the reformed administrative courts as centerpieces for a new legitimating ideology focused on the importance of “sayadat al-qanun” (the rule of law) and Egypt as “daulet mo’asasat” (a state of institutions). Institutional reforms and rule-of-law rhetoric were used by Sadat to distance his regime from the substantive failures of the Nasser regime and to build a new legitimating narrative that was distinct from the populist foundations of the state.

Although judicial reforms helped the government provide a credible commitment to property rights, attract private investment, strengthen discipline within the bureaucracy, and build a new legitimizing ideology, the new Supreme Constitutional Court and the reformed administrative courts did not advance the regime’s interests in a straightforward and unambiguous fashion. Instead, judicial reforms provided institutional openings for political activists to challenge the executive in ways that fundamentally transformed patterns of interaction between the state and society. For the first time since the 1952 military coup, political activists could credibly challenge government legislation by simply initiating constitutional litigation, a process that required few financial resources and enabled activists to circumvent the regime’s highly restrictive, corporatist political framework. Litigation became the primary strategy for political activists to challenge the government, and they did so with surprising success in ways that were never possible in the People’s Assembly. Figure 1.1 illustrates the growing capacity and the increasing willingness of the SCC to strike down regime legislation.

Judicial power expanded over a two-decade period largely because of synergistic interactions among the Supreme Constitutional Court, the administrative courts, and three groups active in civil society – legal professional associations, opposition parties, and human rights organizations. The SCC facilitated the reemergence of this “judicial support network,” provided its supporters with ongoing legal protection, and afforded institutional openings for political activists to challenge the regime. In return, the Supreme Constitutional Court depended on the judicial support network to monitor and document human and civil rights violations, initiate constitutional litigation, and come to its defense when it was under attack by the regime. A tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC.

Beginning in the 1990s, these domestic legal struggles were internationalized in several significant ways. First, the capacity of the human rights
movement was vastly expanded as a result of increased funding streams from international human rights organizations. Moreover, links to international human rights networks enabled activists to leverage international pressure on the Egyptian regime in coordination with domestic litigation strategies. Legal struggles were also internationalized in the 1990s on the initiative of the Supreme Constitutional Court itself. The SCC expanded its mandate by using international legal principles and the international treaty commitments of the Egyptian government to provide progressive interpretations of the Constitution. Ironically, the Egyptian government signed and ratified international conventions as window dressing with no expectation that they would someday be used by an institution.

The SCC pursued a progressive political agenda for over two decades by selectively accommodating the regime's core political and economic interests. In the political sphere, the SCC ruled that Egypt's Emergency State Security Courts were constitutional, and it conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. Given that Egypt has remained in a perpetual state of emergency, the Emergency State Security Courts and, more recently, the military courts have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power. Although the Supreme Constitutional Court had ample opportunities to strike down the provisions denying citizens the right of appeal to regular judicial institutions, it almost certainly exercised restraint because impeding the function of the exceptional courts would likely have resulted in a futile confrontation with the regime. Ironically, the regime's ability to transfer select cases to exceptional courts facilitated the emergence of judicial power in the regular judiciary and in the SCC. The Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it retained ultimate control of the political playing field. Supreme Constitutional Court activism may therefore be characterized as a case of bounded activism. SCC rulings had a clear impact on the contours of state-society contention and the construction of political discourse, but the SCC was ultimately contained within a profoundly illiberal political system.

The SCC supported the regime's core economic interests in a similar fashion by overturning socialist-oriented legislation from the Nasser era. The economic liberalization program, initiated in 1991, was bitterly resisted by disadvantaged socioeconomic groups and those ideologically committed to Nasser-era institutions of economic redistribution. But dozens of rulings in the areas of privatization, housing reform, and labor law reform enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic reform. Liberal rulings enabled the executive leadership to explain that they were simply respecting an autonomous rule-of-law system rather than implementing controversial reforms through more overt political channels.

By the late 1990s, however, the Egyptian government was increasingly apprehensive about Supreme Constitutional Court activism. Opposition
parties, human rights groups, and political activists had found a state institution with the capacity and the will to curb executive powers incrementally. A clear synergy had developed between the SCC and an emergent judicial support network. As the regime grew increasingly nervous about opposition advances through the SCC and the Court's growing base of political support, the regime moved to undermine their efforts. Over a five-year period, the regime employed a variety of legal and extralegal measures to weaken the judicial support network and ultimately to undermine the independence that the Supreme Constitutional Court had enjoyed for two decades. Political retrenchment was challenged inside and outside the courts, but political activists were unable to prevent regime retrenchment given the overwhelming power asymmetries between the state and social forces.

**LAW VERSUS THE STATE: JUDICIAL POLITICS IN AUTHORITARIAN REGIMES**

The Egyptian case challenges us to rethink our basic understanding of judicial politics in authoritarian regimes. Why do some authoritarian rulers empower judicial institutions? To what extent do judicial institutions open meaningful avenues of political contestation? How do courts in authoritarian systems structure political conflict and state-society interaction? What strategies do judges adopt to expand their mandate and increase their autonomy vis-à-vis authoritarian rulers? Are there discernible patterns of conflict and accommodation between judicial actors and state leaders over time? What are the implications of these judicial struggles for regime transition or sustained authoritarianism, and for commercial growth or economic decline? These are questions that comparative law scholars and political scientists seldom ask.

The first major objective of this study is to understand the dynamic complexity of judicial politics in authoritarian states. Cross-national comparisons presented in the next chapter suggest that many of the dysfunctions that plague the Egyptian state are common to other authoritarian states: (1) With unchecked power, authoritarian regimes have difficulty providing credible commitments to the protection of property rights, and they therefore have difficulty attracting private investment; (2) Authoritarian leaders face distinct disadvantages in maintaining order and discipline in their administrative hierarchies because of low levels of transparency; (3) With power fused into a single, dominant regime, unpopular policies are somewhat more costly to adopt because responsibility cannot be shifted to other institutions or parties, as is often done in pluralistic systems; (4) Unlike democratic systems, state legitimacy is linked almost exclusively to the success or failure of substantive policy objectives rather than to procedural legitimacy, which makes policy failure all the more damaging to state legitimacy.

Judicial institutions are sometimes deployed to provide remedies for these pathologies, whether through providing credible commitments to investors, imposing a coherent system of discipline within state bureaucracies, providing alternate institutions to implement unpopular policies, or bolstering regime legitimacy. However, the cases examined here also indicate that when courts are deployed to achieve these ends, they never advance the interests of authoritarian rulers in a straightforward manner.
Rather, courts inevitably serve as dual-use institutions, simultaneously consolidating the functions of the authoritarian state while paradoxically opening new avenues for activists to challenge regime policy. These courts often become important focal points of state-society contention.

It is important to stress two points of clarification at the outset. First, obviously not all authoritarian regimes choose to empower judicial institutions. The claim here is that regimes sometimes deploy judicial institutions to ameliorate the pathologies of authoritarian rule that are examined in the coming chapters. To the extent that courts are utilized, a judicialization of authoritarian politics will result. It is also critical to state at the outset that I do not wish to suggest that judicial institutions can, by themselves, act as guarantors of basic rights or affect basic transitions in regime type. Such expectations should be qualified even in established liberal democracies. In addition, as it should become abundantly clear in the chapters that follow, when regimes empower courts, they often adopt a variety of strategies to contain the impact of judicial activism. A better understanding of the pressures motivating judicial reform, and the dynamics of legal mobilization that result, can help us build a more nuanced model of judicial politics in authoritarian states.

INSTITUTIONALIZING AUTHORITARIAN RULE THROUGH COURTS

Judicial Institutions as Economic Infrastructure

Political economists have long observed that rulers wielding unrestrained power suffer from an inability to provide credible commitments that property rights will be respected by the state. Potential investors are acutely aware that the unrestrained state may alter property rights arrangements in response to short-term fiscal crises or simply for personal gain in the most predatory states. The most egregious form of property rights violations may be the outright seizure of private assets, but, short of nationalization, there are more subtle ways for the unrestrained state to unilaterally alter property rights, such as changing the tax structure, imposing new restrictions on foreign exchange or the repatriation of profits, or altering a variety of other regulatory mechanisms. Insecure property rights discourage private investment, and firms continuing to operate in such an environment of uncertainty “tend to have short time horizons and little fixed capital, and will tend to be small scale” in an effort to minimize risk. An abundant body of empirical research supports these hypotheses. In the Middle East alone, it is estimated that $600 billion was held abroad in the 1990s.

However, not all regimes are the same. Mancur Olson makes an important distinction between rulers with short time horizons and those with long time horizons. According to Olson, rulers with an insecure hold on power have short time horizons and a greater incentive to expropriate assets. In contrast, authoritarian rulers with a secure hold on power have longer time horizons and therefore prefer to invest in institutions that promote economic activity because, over the long term, an expanded tax base
will result in a larger fiscal stream to the state. Such rulers have a greater
incentive to establish institutions that promote the security of property
rights, both among contracting parties in society and vis-à-vis the state
itself. "An autocrat who is taking a long view will try to convince his sub-
jects that their assets will be permanently protected not only from theft
by others but also from expropriation by the autocrat himself. If his sub-
jects fear expropriation, they will invest less, and in the long run his tax
collections will be reduced."

What practical measures can such an autocrat take to strengthen
property rights and make his commitment to sustained economic reform
credible? New institutionalists propose a number of reforms designed to
ensure multiple veto-points on the policymaking process. On the most
fundamental level, state powers can be restrained through the classic,
horizontal division of power among the executive, legislative, and judi-
cial branches. Veto-points may also be expanded vertically, with power
dispersed among different levels of governance, such as in "market-
preserving federal" systems. Additionally, states can provide credible
commitments designed to guarantee that specific policy arenas will be pro-
tected from political influence, such as by granting independence to central
banks. For new institutionalists, the proper design of political institu-
tions is critical to the success of market economies because they help
guarantee policy stability:

Appropriately specified political institutions are the principal way in which
states create credible limits on their own authority. These limits are abso-
lutely critical to the success of markets. Because political institutions affect
the degree to which economic markets are durable, they influence the level
of political risk faced by economic actors. Attention to political institutions
is thus essential to the success of an economic system.

Among the various mechanisms that new institutionalist scholars focus
on, independent and effective courts are considered perhaps the most
important state institutions for establishing a credible and stable prop-
erty rights regime. Judicial institutions provide the infrastructure through
which firms can enforce agreements and defend property rights vis-à-vis
other firms. Similarly, judicial institutions empowered to review execu-
tive and legislative actions are essential to the security of property rights
vis-à-vis the state. Here, specialized constitutional courts not only enable
citizens to challenge infringements on property rights but court rulings
also act as important barometers of the state's respect of property rights
more generally, both in qualitative and quantitative terms. Qualitatively,
most infringements of property rights by the state are relatively ambigui-
ous, except in the most egregious cases of state interference. Quantita-
tively, it is nearly impossible for any one firm to monitor all state agencies
effectively and to assess the state's general level of respect for property
rights. Constitutional courts can, at least in theory, guard against the out-
right expropriation of private assets, but perhaps more important, they
can guard against the "creeping expropriation" that political risk analysts
identify as a far more common risk for private investors.
The new institutionalist literature on property rights (perhaps unwittingly) brings a central dilemma facing today's authoritarian states into sharp relief. Because independent judicial institutions are among the primary means to establish credible commitments to property rights, authoritarian regimes face a concrete choice between accepting institutional constraints on power or maintaining unrestrained power and forgoing the economic benefits that are thought to accompany institutional reform. To some extent, postcolonial authoritarian regimes have faced the stark choice between political control and economic growth for some decades, and authoritarian rulers have all too often sacrificed the latter for the former. But the global trend toward economic liberalization over the past two decades has made the pressure for institutional reforms all the more intense.

The simultaneous opening of economies throughout the former Eastern Bloc countries, Latin America, Asia, and Africa has meant fierce international competition over a finite amount of investment capital, and judicial reform has been identified as one of the most important institutional enhancements necessary for creating a competitive investment environment. In the age of global competition for capital, it is difficult to find any government that is not engaged in some program of judicial reform designed to make legal institutions more effective, efficient, and predictable. Although the challenges of globalization are formidable for many developing countries, the option of opting out is increasingly one of economic suicide.

*The State versus Itself: Judicial Institutions and Administrative Discipline*

Many authoritarian regimes also empower judicial institutions to bolster administrative discipline and coordination within the state bureaucracy. Political scientists often imagine authoritarian states as organizations that are far more unified than they are in reality. Reification of the state, or the process of imagining state organizations as a unified set of institutions working in lockstep with one another, is seductive when considering state functions in authoritarian regimes for two reasons. First, we commonly assume that authoritarian rulers maintain absolute authority over their subordinates, and second, low levels of transparency often obscure our ability to observe the considerable discord and breakdowns in hierarchy that occur regularly in authoritarian settings. But the Weberian ideal of a rational bureaucracy does not adequately capture the dynamics of how state institutions operate in real-world contexts. Far from acting in unison, each bureaucrat has his or her own set of personal interests and ideological preferences that are often at odds with those of the central regime. A variety of studies from the state-in-society approach also demonstrate that state institutions are transformed from the moment they begin to interact with social forces championing various competing agendas.

Counteracting this centrifugal force is one of the primary challenges for the central leadership of any state, but it is a particular challenge for authoritarian leaders for precisely the same reason that we, as observers of the state, tend to reify it: authoritarian rulers suffer from a lack of transparency in their own state institutions. Part of the difficulty of collecting accurate information on bureaucratic functions can be attributed to the

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hierarchical structure of modern states more generally, as articulated by Martin Shapiro:

Certain pathologies arise in the hierarchical lines designed to transmit information up and commands down the rational-legal pyramid. Such 'family circles'—conspiracies among the lower-level workers to block or distort the flow of information upward—are successful in large part because of the summarizing that is essential to such a hierarchy...the process of successive summarization gives lower levels ample opportunity to suppress and distort information, particularly that bearing on their own insubordination and poor performance.

Accurate information on bureaucratic misdeeds is even more difficult for authoritarian regimes to collect because the typical mechanisms for discovery, such as a free press or interest group monitoring of government agencies, are suppressed to varying degrees. Moreover, because administrators are unaccountable to the public and because fear of retribution typically pervades political life, authoritarian rulers at the top of the administrative hierarchy receive little or no feedback from the public, making it particularly difficult to assess the day-to-day functions of state agencies. The classic principal-agent problem, which has been examined extensively in democratic settings, is therefore aggravated in authoritarian political systems. With low levels of transparency and exacerbated principal-agent problems, local administrative officers regularly circumvent, undermine, or subvert central government policies in order to promote their own competing policy agendas or simply to translate their administrative power into supplementary income streams. These dynamics are so commonplace, that a completely alternate set of norms often emerges around how much one is expected to line a bureaucrat's pocket with every interaction, whether to renew a driver's permit, process paperwork for a court case, or secure a business license. At a minimum, low levels of transparency and principal-agent problems can undermine the central regime's developmental goals.

At its worst, low levels of transparency within state agencies can mask the emergence of power centers aspiring to challenge the central regime. We have grown accustomed to various coping strategies that authoritarian regimes use to maintain their control of state institutions, including the retention of particularly sensitive posts in the military and the central security agencies for trusted relatives, or, alternately, through the constant rotation of officials whose loyalty cannot be trusted based on blood relations. However, the ad hoc shuffling of state functionaries and the reliance on familial, tribal, clan, and personal solidarities are tremendously inefficient and have distinct limitations in modern states with complex bureaucracies. More institutionalized methods of monitoring are necessary for authoritarian states with expansive bureaucracies.
In his seminal study, *Courts*, Martin Shapiro observes that judicial institutions are used as one of several strategies to promote discipline within the state's administrative hierarchy because they generate an independent stream of information on bureaucratic misdeeds that is driven by citizens themselves. Shapiro explains that "a 'right' of appeal is a mechanism providing an independent flow of information to the top on the field performance of administrative subordinates." This observation helps explain why even authoritarian regimes with little regard for civil liberties often preserve the right of citizens to have their day in court. Courts play "fundamental political functions" by acting as avenues ". . . for the upward flow of information [and] for the downward flow of command." .

China provides an excellent example of how courts are employed by the central government in order to resolve the principal-agent problems between the center and periphery. Two of the most urgent political problems facing the Chinese central government today are rampant corruption by local government officials and tenuous control over the periphery. The two problems are interrelated. Since the late 1970s, when China began its slow transition to a free-market economy, local government officials found it all too easy to abuse their administrative powers because they face few practical constraints from administrative superiors in the central government. Local government officials provide the basic services, issue licenses and permits, and collect taxes. Abuse of these powers is extremely common, particularly because local government officials often have a significant stake in local commerce. The Chinese proverb, "the mountains are high and the Emperor is far away," has been used by many to describe the inability of the central government to effectively monitor and punish local officials abusing their administrative powers. Not surprisingly, such abuse of power and corruption at the local level produced extensive public protests. The Chinese media reported 100,000 local protests between 1997 and 2000. By 2004, the number of "mass protests" reported by the Chinese government had risen to 74,000 incidents per year.

How has the Chinese central government dealt with this critical problem? Interestingly, in the same way that Egypt did before it—through the rapid expansion of an administrative court system. Efforts began in earnest in 1988 with the establishment of 1,400 specialized administrative courts across the country. An Administrative Litigation Law was issued the next year, and more enabling legislation followed over the next several years. The administrative courts were designed to provide Chinese citizens with an avenue through which they could contest the decisions of local officials based on a variety of charges, including the inconsistency, arbitrariness, or capriciousness of administrative decisions; inappropriate delay; procedural irregularities; or manifest unjustness. Citizens have increasingly used the administrative courts to challenge local officials. Within six years of their establishment, more than 50,000 administrative cases were raised annually, and within ten years, the number of new cases doubled to 100,000 annually. This is still a low rate of administrative litigation given China's massive population, but the swift rise in cases
indicates that administrative courts are increasingly regarded as viable avenues through which citizens may challenge corruption and the low-level abuse of power. What is perhaps most surprising, particularly for those who would dismiss judicial institutions in an authoritarian state, is the fact that plaintiffs win 40 percent of the cases that they initiate, in whole or in part.

Although paradoxical at first blush, the administrative courts also serve important functions for the central government. First, court cases provide valuable information about which bureaucrats are abusing their powers at the local level, as well as the nature and extent of the problem. The central government can then use that information to discipline subordinates and shape more effective administrative laws. Second, administrative courts provide legal recourse and some sense of justice and equity to those who suffer at the hands of local officials. This function appears to be an increasing priority for the central government as a means to stave off the political instability that corruption and abuse of power at the local level produce. Administrative courts, moreover, relieve political pressures and perform a legitimizing function without opening up the political system. Finally, reducing corruption, abuse of power, and manipulation of local markets is crucial for the promotion of both market rationality and secure property rights.

There are, of course, a host of problems that the administrative courts face, from lack of sufficient autonomy from the state to citizen fear of bureaucratic retaliation and problems with the implementation of court rulings. But despite these difficulties, there are clear indications that the government is moving ahead to strengthen the institutional capacity of the court system. Peerenboom confirms that “Jiang Zemin endorsed rule of law in part because he sees it as a tool for strengthening Party rule. Rule of law is a way to rein in increasingly independent local governments and ensure that central Party and government policies are carried out. It is also a weapon to be used in the fight against corruption and a means of promoting economic development.”

*The State versus Itself: Judicial Institutions and the Maintenance of Elite-Level Cohesion*

Judicial institutions are also sometimes empowered by authoritarian rulers to maintain cohesion among regime insiders. It has long been noted that the Achilles heel of any authoritarian regime is the difficulty in maintaining consensus within the ruling coalition. Authoritarian leaders are acutely aware that if elite-level cleavages are not managed properly, their regimes can rapidly cannibalize themselves. On occasion, judicial institutions are used to formalize ad hoc power-sharing arrangements among regime elites. Pinochet’s Chile provides the most lucid example of how constitutions have been used to formalize pacts among competing factions within authoritarian regimes and how judicial institutions are sometimes used to balance the competing interests among those factions. The 1980 Chilean Constitution and the 1981 Tribunal Constitucional were designed
to arbitrate among the four branches of the military, which were organized along distinct corporatist lines with strong, cohesive interests. Rules of standing prevented opponents of the regime from using the Tribunal to challenge the government. In other cases, such as the regime that ruled Brazil from 1964–1985, the first military administration wished to institutionalize the rotation of power and codify concrete limits on presidential powers in order to prevent the regime from slipping into a personalistic form of authoritarian rule, or “caudillismo.”

Cooperation among regime elites also requires some minimum level of transparency within the state hierarchy. As noted in the previous section, perhaps the most self-destructive pathology common to authoritarian regimes is the lack of reliable information about the functions of state institutions. Aggravated principal-agent problems lie at the root of administrative abuse and corruption in authoritarian regimes. But more fundamentally, the absence of reliable information on state functions can mask the emergence of power centers that can challenge the authority of the central regime. Moreover, lack of transparency typically feeds the paranoia and uncertainty that are often endemic among key players within authoritarian regimes. This uncertainty encourages factions to seize power as a defensive move, before their rivals beat them to the punch. This problem is acute within newly formed regimes with low levels of institutionalization. Conscious of the fragility of their coalitions and the distinct possibility of cannibalizing themselves, some regimes adopt judicial institutions as a way of counteracting these pathologies.

In the Egyptian case, both Nasser and Sadat came to the conclusion that centralized modes of monitoring did not produce reliable information about the conduct of the state’s own administrative hierarchy. They both became concerned that they would fall victim to the emergence of alternative “power centers,” particularly within the military, the police, and the intelligence services. Sadat spoke repeatedly about the need to strengthen legal institutions as a way of policing the state and short-circuiting the possibility of power grabs. Similarly, Pereira finds that the Brazilian courts “gathered information on the security forces and provided a kind of balancing mechanism to political leaders, effecting compromises between different factions within the regime.”

The Delegation of Controversial Reforms to Judicial Institutions

Authoritarian regimes can also benefit from autonomous judicial institutions by channeling divisive political questions into the courts. This phenomenon is more familiar in democratic settings, where elected leaders sometimes delegate decision-making authority to judicial institutions to avoid divisive and politically costly issues. According to Graber, “The aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy.” Seen from this perspective, some
of the most memorable U.S. Supreme Court rulings may not be markers of judicial strength vis-à-vis other branches of government; rather, they might be regarded as strategic modes of delegation by officeholders and as strategic compliance by judges (with somewhat similar policy preferences) who are better insulated from the political repercussions of controversial rulings.

Classic examples from U.S. politics abound. Graber argues that

*Dred Scott v. Sandford* epitomizes political attempts to steer a disruptive partisan fight into safer legal channels. Rather than take the responsibility for resolving the burning issue of the 1850s, members of the dominant Democratic Party coalition openly encouraged the Supreme Court to decide when and whether persons could bring slaves into United States territories.

A little more than a century later, the Supreme Court would issue another famous racially charged ruling in *Brown v. Board of Education*, again largely because segregation was a politically contentious issue that was costly for many politicians to take on. In *Brown*, courts not only found themselves in the role of deciding on the unconstitutionality of segregation, but judges also ended up having to implement the ruling through hundreds of lower court decisions, essentially setting policy that many would see as the role of legislative and administrative bodies.

There are many more examples in the areas of business and labor policy. Graber contends that the Sherman Antitrust Act of 1890 is an excellent example of elected officials using legislation as a vehicle for inviting independent judicial policymaking. Party moderates in the late nineteenth century, unwilling or unable to agree on the extent to which powerful monopolies should be regulated by the national government, drafted a bill with exceptionally vague language for the purpose of forcing the Court in the guise of statutory interpretation to determine the scope of the federal commerce power. . . .

Is it possible that the political interests motivating this delegation to judicial institutions can similarly come into play in authoritarian polities? The dominant assumption in the comparative politics and public law literature is that authoritarian rulers simply have no need to avoid politically sensitive issues because they are unaccountable to the public. But although it may be true that authoritarian rulers are more insulated from *some forms* of public pressure (most obviously, they do not have to face direct opposition through free and fair elections), even the harshest of authoritarian regimes will regularly steer clear of issues that are identified as too politically costly for fear that controversial policies will produce mass opposition to the regime or splits within the ruling coalition. Authoritarian regimes, particularly those with flagging popular legitimacy, often avoid the implementation of controversial policies, even when such avoidance comes at great expense to the national interest or the long-term viability of the regime.
Economic reform is just one example of a contentious issue that cuts across all developing countries, but inevitably, there are a variety of controversial issues specific to local contexts that authoritarian leaders also prefer to avoid. For example, in the Egyptian context, the religious versus secular nature of the state is a perennial tension. Although the regime periodically uses religious institutions and symbolism to shore up its legitimacy, the piety card is a double-edged sword because of the state’s inability to monopolize religious rhetoric. The question of religion and the state is one that the regime therefore prefers to circumvent, both to avoid public discontent and to smooth over possible rifts within the ruling elite itself. Once again, the regime benefits from having judicial institutions to which such problematic and intractable disputes can be delegated in precisely the same way that politicians defer to courts in democratic systems.

As in democratic environments, the expansion of judicial policymaking as the result of strategic delegation is not an indication of judicial strength vis-à-vis the executive. Rather, judicial policymaking expands and contracts with the general consent of the regime. But to the extent that judicial institutions perform useful policymaking roles, courts can gain some degree of leverage with which to push the regime.

Law and Legitimacy in Authoritarian Regimes

The selective delegation of policymaking to judicial institutions points to a broader concern of authoritarian leaders – the maintenance of political legitimacy in lieu of credible mechanisms of public accountability. Legitimacy is perhaps the most difficult concept for political scientists to pin down, because it is extraordinarily difficult (if not impossible) to measure, and it is neither a necessary nor sufficient ingredient for political stability. However, nearly everyone acknowledges that states devote extraordinary resources toward promoting willful compliance, in part because it is less costly and more effective than coercion alone.

In comparison to their democratic counterparts, authoritarian regimes face particular challenges when it comes to establishing and maintaining political legitimacy. Because they are unelected, authoritarian regimes typically pin their legitimacy to the achievement of substantive outcomes, such as income redistribution, land reform, economic growth, political stability, and the like. But, to various degrees, rulers will also attempt to make up for their questionable procedural legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule.

In some cases, authoritarian rulers use courts as a fig leaf for a naked grab at power. For example, after seizing control of the Philippine government in September 1972, Ferdinand Marcos swiftly declared martial law, took over the media, arrested political opponents, and banned political parties. Oddly enough, however, he did not shut down the Philippine Supreme Court. On the contrary, in his first public statement, Marcos reassured the public that “the judiciary shall continue to function in accordance with its present organization and personnel.” Moreover, he claimed that his new government would have effective “checks and bal-
ances,” that would be enforced by the Supreme Court in a new framework of “constitutional authoritarianism.” The important point here is not whether there were in fact effective checks and balances on the Marcos regime – there were not. Rather, the interesting observation is that Marcos felt compelled to make such statements and to keep the Supreme Court functioning to provide legal cover for his seizure of power. Such staged deference to liberal legality indicates that Marcos was well aware that his claim to procedural legitimacy was problematic at best. By leaving judicial institutions with a considerable degree of independence from executive interference, Marcos could claim more credibly that “constitutional authoritarianism” was not simply a laughable oxymoron. Similarly, Anthony Pereira observed that in Brazil, “...the regime pointed to the courts to claim legitimacy” whose legitimacy in turn “...was bolstered by a certain measure of autonomy.” The same has been noted in cases as diverse as Franco’s Spain, Egypt, and China.

In many cases, authoritarian regimes switch to the rule of law as a legitimizing narrative only after the failure of their initial policy objectives or after popular support for the regime has faded. Nasser (1954–1970) pinned his legitimacy on the revolutionary principles of national independence, the redistribution of national wealth, economic development, and Arab nationalism. Judicial institutions were tolerated only to the extent that they facilitated the regime’s achievement of these substantive goals. In contrast, Anwar Sadat (1970–1981) explicitly pinned his regime’s legitimacy to “sayadat al-qamar” (the rule of law) and used rule-of-law rhetoric hundreds of times throughout his eleven years at the head of Egypt’s authoritarian state.

A similar transformation to rule-of-law rhetoric has occurred in China. Mao Zedong undermined judicial institutions after founding the People’s Republic of China in 1949, but rule-of-law rhetoric is now increasingly employed by the regime in part to fill the ideological vacuum left after the state’s clear departure from communism. In both cases, incoming leaders Anwar Sadat and Deng Xiaoping used rule-of-law rhetoric to distance themselves from the spectacular excesses and failures of their predecessors and to build a new legitimizing ideology. Their successors – Hosni Mubarak, Jiang Zemin, and Hu Jintao – continue to use judicial institutions to consolidate their institutional capacity and to employ rule-of-law rhetoric to bolster their legitimacy.

This is not to say that these regimes were consistently supportive of judicial independence or that they had stable policies vis-à-vis judicial institutions during the periods demarcated. Instead, authoritarian rulers typically have contradictory impulses. Courts can perform crucial roles for regimes struggling to resolve the pathologies of authoritarian rule, but they also entail variable costs that rulers may not wish to tolerate. The claim here is simply that each of these regimes attempted to garner support at various moments by declaring their fealty to the rule of law. For such a legitimizing function to succeed, however, judicial institutions must enjoy some degree of real autonomy from the executive, and they must, at least on occasion, strike against the expressed will of the regime.
THE AMBIGUITY OF JUDICIAL INSTITUTIONS: LAW AND RESISTANCE IN AUTHORITARIAN REGIMES

The preceding discussion underlines some of the distinct pathologies that entrenched authoritarian states face: (1) With unchecked power, rulers have difficulty providing credible commitments to property rights, and they therefore have difficulty attracting private investment. (2) Authoritarian leaders face distinct disadvantages in maintaining order and discipline in their administrative hierarchies because of low levels of transparency and accountability to the public. (3) With power fused into a single, dominant regime, unpopular policies are somewhat more costly to adopt because responsibility cannot be shifted onto other institutions or parties, as is often done in other systems. (4) Unlike in democratic systems, legitimacy in authoritarian regimes is linked almost exclusively to the success or failure of specific policy objectives, rather than to procedural legitimacy.

The cases reviewed here make clear that judicial institutions are often used by authoritarian regimes to ameliorate these pathologies, whether through providing credible commitments to investors, enabling the central regime to maintain unity and discipline within state institutions, providing an alternate institution to implement unpopular policies, or by helping bolster regime legitimacy. It is perhaps no coincidence that some of the most long-lived authoritarian regimes are the ones that have institutionalized their rule and structured their domination of society.

Once established, however, judicial institutions do not advance the interests of authoritarian rulers in an unambiguous manner. Rather, courts simultaneously consolidate the functions of the authoritarian state while opening new avenues for activists to challenge regime policy. This is perhaps an inevitable outcome because the success of each of these regime-supporting functions depends on some measure of real judicial autonomy. In other words, commitments to property rights are not credible unless courts have independence and real powers of judicial review. Administrative courts cannot stamp out corruption effectively unless they are independent from the political and bureaucratic machinery that they are charged with supervising and disciplining. The strategy of “delegation by authoritarian institutions” will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime. And finally, rule-of-law rhetoric also rings empty unless courts are perceived to be independent from the government and they rule against government interests from time to time. Not all regimes will empower courts to capitalize on these functions, but those that do create a uniquely independent institution with public access in the midst of an authoritarian state.

Legal Mobilization in Authoritarian Settings: Small Arms Fire in a Rights Revolution?

Scholars working in the state-society tradition observe that when social forces engage state institutions from the bottom up, they inevitably transform those institutions in ways that were often not initially intended by central decision makers. As a result, authoritarian leaders frequently find themselves locked in conflict with the very institutions that were
initially created to advance state interests. This dynamic is especially true of judicial institutions, which enjoy a unique degree of institutional autonomy, a prominent position as the nerve center of state functions, and a unique position vis-à-vis society. These three institutional attributes give courts the capacity to act as dual-use institutions through which activists can challenge the state.

Groups that engage the courts might include human rights organizations, opposition activists, business associations, legal professional associations, and other organizations in civil society, not to mention hundreds of thousands of individuals who file cases on their own initiative. Courts represent crucial avenues for these actors to challenge state policy because most other formal avenues are, by definition, closed down in authoritarian states. Litigation also affords strategic advantages to political activists because it provides opportunities to challenge the state without having to initiate a broad social movement, a task that is all but impossible in highly restrictive political environments. This ability to circumvent collective action problems is one of the most significant benefits of legal mobilization even in consolidated democracies where civil liberties are relatively secure. However, the ability to initiate litigation in lieu of broad political and social mobilization is even more crucial for opposition movements in authoritarian systems in which the state forcefully interferes with political organizing. Finally, courts can sometimes provide a measure of protection to nascent civil society organizations when they are under attack by the state, essentially becoming their main guardians.

As in any other setting, judicial institutions also provide less tangible but equally important symbolic resources for rights advocates. Courts offer a unique space for the opposition to turn the state’s own institutions on itself. Activists search for the bold judge who is willing to turn on his master and, like saboteurs, throw monkey wrenches into the state’s moving parts. When activists win in court, they not only win in the case at hand, but they also expose the legal shortcomings of the regime and provide fodder for the opposition press. When they lose, on the other hand, they expose the gap between the regime’s rule-of-law rhetoric and the narrow margins for achieving institutional remedy. Litigation is thus used to raise the salience of political issues even when activists are almost certain that they will not win their case.

In turn, political activists can perform a number of critical tasks that courts cannot do by themselves. Rights organizations can provide research and documentation of government malfeasance and initiate the litigation that fuels the expansion of judicial power. Moreover, groups in civil society can play the essential role of raising the legal consciousness of the public through covering the court cases in opposition newspapers, organizing national and international conferences, and mobilizing international resources in support of legal battles, as in Keck and Sikkink’s “boomerang pattern.” Finally, and perhaps most critically, these groups form a popular base of support, making it more difficult for a regime to undermine judicial institutions. Because courts do not wield power in
and of themselves, they must depend on opposition parties, groups active in civil society, and the broader public to come to their defense if the regime decides that judicial activism has grown too costly. The unique opportunities afforded through courts make opposition parties and non-governmental associations vigorous supporters of judicial independence.

In authoritarian contexts, the fate of judicial power and legal channels of recourse for political activists are essentially intertwined. Political activists mobilize resources to monitor the regime, initiate litigation, raise public consciousness about the importance of judicial institutions, and come to the defense of the courts when necessary. In turn, empowered judicial institutions have a greater capacity to expand civil liberties, provide avenues for activists to challenge the state, and protect civil society from government domination. Together, they constitute a judicial support network. The relationship between reform-minded judges and their supporters is reciprocal and dynamic, but not simply in a strategic sense. Repeated interactions also reconstitute the identities, goals, and belongings of actors over time.

Legal professionals play unique roles in these struggles because of their ability to mobilize on both sides of the political equation. On the supply side, judges occupy the strategic position of interpretation, application, and sometimes review of regime legislation. On the demand side, both judges and lawyers are motivated to protect their own professional and institutional interests. As agents of the state, judges generally administer the will of the regime, but they never do so in an automatic fashion. Legal professionals everywhere are part of self-conscious communities, and in most developing countries they are acutely aware of their central role in political life. The identities and aspirations of judges, lawyers, and law professors are further shaped by their legal training, which at a minimum will emphasize “thin” (procedural) conceptions of the rule of law, but also inevitably contains “thick” (substantive) conceptions of the rule of law to varying degrees. Finally, transnational epistemic communities also shape how judges understand their role in advancing a thick conception of the rule of law. Dedicated actions in support of rule-of-law principles are thus guided by both interest-based considerations and identity-based, expressive actions.

Legal professional associations, such as lawyers’ associations, judges’ associations, law faculties, and the like, also provide the organizational structures that help legal professionals advance their collective interests in a coordinated fashion. Countries like Egypt illustrate how legal professional associations have stood at times at the forefront of struggles to expand rights provisions for more than a century, even though colonial occupation was followed by home-grown authoritarian rule. Cases like China, on the other hand, illustrate how quickly lawyers take up these roles, despite the tremendous personal cost, when only a generation earlier the legal profession was virtually nonexistent. Finally, comparisons with eighteenth-century Europe remind us that, even in the Western
experience, democracy was not a necessary condition for legal professionals to advance rights claims.

Reform-minded judges attempt to push the envelope as much as possible by tacitly cooperating with political activists while simultaneously capitalizing on the critical roles they play for authoritarian rulers (attracting investment capital, maintaining discipline and coordination within state institutions, and helping bolster regime legitimacy) to leverage pressure in the direction of political reform. Simultaneously, authoritarian rulers attempt to maximize the benefits that courts confer while attempting to constrain the ability of judges to challenge the core interests of the regime. Within these narrow margins, the game of judicial politics is played out.

HOW REGIMES CONTAIN COURTS

Nowhere in the world do courts operate free of political constraints. Despite the myth of judicial independence, judges always face political limitations on how far they can push legal claims, a topic that has now been studied, debated, and rehashed by scholars in great detail in democratic contexts. Courts in authoritarian states face acute limitations, but the most serious constraints are often more subtle than tightly controlled appointment procedures, short term limits, and the like. Regimes contain judicial activism without infringing on judicial autonomy through at least four principal strategies. They (1) provide institutional incentives that promote judicial self-restraint and “core compliance,” (2) engineer fragmented judicial systems, (3) constrain access to justice, and (4) incapacitate judicial support networks.

Judicial Self-Restraint and Core Compliance

Judges everywhere are finely attuned to the political environment that they operate within – they anticipate the likely political fallout of rulings under consideration, and they are generally aware of both the reach and limitations of their power. The assumption that courts serve as handmaidens of rulers obscures the strategic choices that judges make in authoritarian contexts, just as they do in democratic contexts. Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.

Core interests vary from one regime to the next depending on substantive policy orientations, but all regimes seek to safeguard the core legal mechanisms that undergird its ability to sideline political opponents and maintain power. Reform-oriented judges therefore occupy a precarious position in the legal/political order. They are hamstrung between a desire to build oppositional credibility among judicial support networks on the one hand, and an inability to challenge core regime interests for risk of retribution, on the other hand. Given this precarious position, reform-minded judges typically apply subtle pressure for political reform only at the margins of political life.
On occasions when the anticipated response of the government or judicial support networks is ambiguous, judges assess the probable political fallout of rulings by issuing legal briefs from research organs within the court or by leaking information on pending judgments to the press. For example, the commissioners’ body of the Egyptian Supreme Constitutional Court sometimes issues several different “recommended rulings” prior to the final, binding ruling. Prospective rulings that push the limits of political action too far will produce swift feedback indicating the displeasure of the regime and give some sense of whether judicial support networks will counterbalance regime pressure.

Core regime interests are typically challenged only when it appears that the regime is on its way out of power. In most cases, reform-oriented judges bide their time in anticipation of the moment that the regime will weaken to the extent that defection is no longer futile, but can have an impact on the broader constellation of political forces. Strategic defection in such a circumstance is also motivated by the desire of judicial actors to distance themselves from the outgoing regime and put themselves in good stead with incoming rulers. The more typical mode of court activism in a secure authoritarian regime is to apply subtle pressure for political reform at the margins and to resist impinging on the core interests of the regime.

The dynamics of “core compliance” with regime interests are noted in dozens of authoritarian states...

The important dynamic to note in each of these instances is that authoritarian regimes were able to gain judicial compliance and enjoy some measure of legal legitimation without having to launch a direct assault on judicial autonomy. The anticipated threat of executive reprisal and the simple futility of court rulings on the most sensitive political issues are usually sufficient to produce judicial compliance with the regime’s core interests. An odd irony results: The more deference that a court pays to executive power, the more institutional autonomy an authoritarian regime is likely to extend to it.

The internal structure of appointments and promotions can also constrain judicial activism quite independent of regime interference. The judiciary in Pinochet’s Chile is a good example of a court system that failed to act as a meaningful constraint on the executive, despite the fact that it was institutionally independent from the government. According to Hilbink, this failure had everything to do with the process of internal promotion and recruitment, wherein Supreme Court justices controlled the review and promotion of subordinates throughout the judiciary. The hermetically sealed courts did not fall victim to executive bullying. Rather, the traditional political elite controlling the upper echelons of the court system disciplined judges who did not follow their commitment to a thin conception of the rule of law. This example illustrates why judicial independence is not a concept that is easy to pin down. A court system can enjoy complete formal independence from the executive in terms of appointments, promotions, discipline, and the like. However, the same functions subject judges to a corporatist form of control that is equally stifling when practiced within the judiciary.
FRAGMENTED VERSUS UNIFIED JUDICIAL SYSTEMS

Authoritarian regimes also contain judicial activism by engineering fragmented judicial systems in place of unified judiciaries. In the ideal type of a unified judiciary, the regular court hierarchy has jurisdiction over every legal dispute in the land. In fragmented systems, on the other hand, one or more exceptional courts run alongside the regular court system. In these auxiliary courts, the executive retains tight controls through non-tenured political appointments, heavily circumscribed due process rights, and retaining the ability to order retrials if it wishes. Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. With such auxiliary courts waiting in the wings, authoritarian rulers can extend substantial degrees of autonomy to the regular judiciary.

Examples can be found in a number of diverse contexts. In Franco’s Spain, Jose Toharia noted that “Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure.” Yet Toharia also observed that the fragmented structure of judicial institutions and parallel tribunals acted “to limit the sphere of action of the ordinary judiciary.” This institutional configuration ultimately enabled the regime to manage the judiciary and contain judicial activism, all the while claiming respect and deference to independent rule-of-law institutions. Toharia explains that “with such an elaborate, fragile balance of independence and containment of ordinary tribunals, the political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts... it has been able to claim to have an independent system of justice and, as such, to be subject to the rule of law.”

All other things being equal, there is likely to be a direct relationship between the degree of independence and the degree of fragmentation of judicial institutions in authoritarian contexts. The more independence a court enjoys, the greater the likely degree of judicial fragmentation in the judicial system as a whole. Boundaries between the two sets of judicial institutions also shift according to political context. Generally speaking, the more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction. The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts is expanded.

In authoritarian states, the regular judiciary is unwilling to rule on the constitutionality of parallel state security courts for fear of losing a hopeless struggle with the regime, illustrating both the core compliance function at work and the awareness among judges that they risk the ability to champion rights at the margins of political life if they attempt to challenge the regime’s core legal mechanisms for maintaining political control. Returning to the Egyptian example, the Supreme Constitutional Court had ample opportunities to strike down provisions that deny citizens the right of appeal to regular judicial institutions, but it almost certainly exercised restraint because impeding the function of the exceptional courts would result in a futile confrontation with the regime. Ironically, the regime’s ability to transfer select cases to exceptional courts
facilitated the emergence of judicial power in the regular judiciary. As we see in the coming chapters, the Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents. To restate the broader argument, the jurisdiction of judicial institutions in authoritarian regimes is ironically dependent on the willingness of judges (particularly those in the higher echelons of the courts) to manage and contain the judiciary’s own activist impulses. *Judicial activism in authoritarian regimes is only made possible by its insulation within a fundamentally illiberal system.*

*Constraining Access to Justice*

Authoritarian rulers can also contain judicial activism by adopting a variety of institutional configurations that constrain the efforts of litigants and judges. At the most fundamental level, civil law systems provide judges with less maneuverability and less capacity to create “judge-made” law than their common law counterparts. Historically, the rapid spread of the civil law model was not merely the result of colonial diffusion, in which colonizers simply reproduced the legal institutions of the mother country. In many cases, the civil law model was purposefully adopted independent of colonial imposition because it provided a better system for rulers to constrain, if not prevent, judge-made law. Although the differences between civil law and common law systems are often overstated and even less meaningful over time as more civil law countries adopt procedures for judicial review of legislation, civil law judges are still more constrained than their common law counterparts because they lack formal powers of judicial review. More important than any legal constraints is the norm that judges in civil law systems are to apply the law mechanically, resulting in a tendency toward thin rather than thick conceptions of the rule of law.

Regimes can engineer further constraints on the *institutional structure* of judicial review, the *type* of judicial review, and the *legal standing* requirements. Some of these institutional choices are straightforward. For example, a regime can better constrain judges by imposing a centralized structure of judicial review in place of a decentralized structure. Centralized review yields fewer judges who must be bargained with, co-opted, or contained, resulting in predictable relationships with known individuals. It was precisely for this reason that Nasser abolished the diffused system of “abstention control” and imposed a centralized structure of judicial review under the tight control of the executive. A similar centralization of review powers was imposed by the Turkish military in the 1982 Turkish Constitution.

Other institutional characteristics are fixed according to the function that courts are designed to perform. For example, courts established to arbitrate between factions within the state, such as Pinochet’s *Tribunal Constitucional*, can deny standing to nonstate actors. In contrast, constitutional courts that are created to bolster property rights and attract investment must grant standing to nonstate actors; doing otherwise would
defeat their raison d'etre. Here, judicial review entails risks for the regime because it opens an avenue through which activists can mobilize on noneconomic issues. On the other hand, access to judicial review opens an avenue for laws counterproductive to regime interests to be challenged and defeated by nonstate actors, which is a convenient way for authoritarian rulers to delegate politically controversial reforms.

Most regimes also limit the types of legal challenges that can be made against the state. This was an important constraint on the Mexican Supreme Court under the PRI. Similarly, article 72 of the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, but it does not mention political rights, such as the freedom of association, assembly, free speech, and freedom of publication. These select issue-areas speak volumes about the intent of the central government to rein in local bureaucrats while precluding the possibility of overt political challenges through the courts. However, it is also clear that these constraints are renegotiated constantly. Furthermore, it is not clear that the instrumental functions that authoritarian regimes wish to gain from judicial institutions (investment, bureaucratic discipline, legitimation, and so forth) can be achieved without substantive individual rights provisions.

Incapacitating Judicial Support Networks

Finally, authoritarian regimes can contain court activism by incapacitating judicial support networks. In his comparative study, The Rights Revolution, Epp shows that the most critical variable determining the timing, strength, and impact of rights revolutions is neither the ideology of judges, nor specific rights provisions, nor a broader culture of rights consciousness. Rather, the critical ingredient is the ability of rights advocates to build organizational capacity that enables them to engage in deliberate, strategic, and repeated litigation campaigns. Rights advocates can reap the benefits that come from being “repeat players” when they are properly organized, coordinated, and funded. Although Epp’s study is concerned with courts in democratic polities, his framework sheds light on the structural weakness of courts in authoritarian regimes.

The weakness of judicial institutions vis-à-vis the executive is not only the result of direct constraints that the executive imposes on the courts; it is also related to the characteristic weakness of civil society in authoritarian states. The task of forming an effective judicial support network from a collection of disparate rights advocates is all the more difficult because activists not only have to deal with the collective action problems that typically bedevil political organizing in democratic systems, but authoritarian regimes also actively monitor, intimidate, and suppress organizations that dare to challenge the state. Harassment can come in the form of extralegal coercion, but more often it comes in the form of a web of illiberal legislation spun out from the regime. With the legal ground beneath them constantly shifting, rights organizations find it difficult to build organizational capacity before having to disband and reorganize under another umbrella association.
Given the interdependent nature of judicial power and support network capacity in authoritarian polities, the framework of laws regulating and constraining the activities of judicial support networks is likely to be one of the most important flashpoints between courts and regimes.

If we shift our conceptual lenses to account for the divergent interests of the center and periphery of the state once again, the deep complexity of these legal encounters comes into sharper focus. In some political contexts, litigation is blocked not by the central government, but by local officials wishing to protect their interests. This interference can undermine the ability of the central government to police the bureaucracy through administrative courts. As a result, the central government may be motivated to strengthen other important rights provisions that enable citizens to use the administrative courts without fear of retaliation by local officials.
The Emergence of Constitutional Power
(1979–1990)

When the Supreme Constitutional Court initiated operations in 1979, Egypt was in the midst of simultaneous economic and political transitions.

RESTORING PROPERTY RIGHTS: SCC RULINGS
IN THE ECONOMIC SPHERE

With independence from the government, the Supreme Constitutional Court took a lead role in shaping a new legal framework that demarcated limits on state powers in the economy. As early as May 1981, the Court demonstrated its commitment to restore private property rights and its willingness to do so outside the bounds established by the regime. The Court considered a challenge to law 150/1964, under which the regime had sequestered private property, and law 69/1974, which had reversed the sequestration order but concurrently placed limits on the amount of compensation that could be awarded. As we saw in the last chapter, Sadat reversed sequestration orders in the mid-1970s to demonstrate the regime’s new respect for private property while at the same time limiting the amount of compensation that individuals could obtain. The SCC found both laws unconstitutional, opening the door to hundreds of challenges to sequestration orders in the regular courts, at considerable financial expense to the government.

The SCC made further moves in the same direction in April 1983, with rulings on three laws issued between 1961 and 1963 concerning the nationalization of industry. The contested articles denied citizens the ability to challenge the value of compensation for nationalizations, even though valuations were made by committees that were political and not judicial in nature. The Court ruled that these provisions violated article 68 of the Constitution, which guaranteed judicial supervision of administrative acts. Once again, the SCC cleared the way for hundreds of new compensation claims as a result of its ruling.

On June 25, 1983, the SCC declared land confiscations from the Nasser era to be unconstitutional. Law 104/1964, which had denied compensation for land reform measures in 1952 and 1961, was ruled to be in conflict with articles 34 and 36 of the Constitution. Another landmark ruling was issued in March 1985 on decree law 134/1964, which had placed caps on compensations up to £E 15,000 for the nationalizations of property under laws 117, 118, and 119 of 1961. The Court declared that the decree law was in violation of articles 34, 36, and 37 of the Constitution providing for the protection of private property.
These and a number of similar rulings by the Supreme Constitutional Court restored private property rights, limited state powers to expropriate private investment, and helped reduce the perceived risks associated with private investment in Egypt. Although these rulings went in the same direction as government efforts to reverse the nationalization and sequestration measures, the Supreme Constitutional Court pushed far beyond the partial compensation that the government was prepared to offer. Business reports from the period noted the establishment of the Court as a crucial step in providing concrete institutions for the protection of property rights, and private investment increased at a rate that vastly exceeded that during the first decade of the open-door economic policy. After concentrating on the most blatant violations of property rights from the Nasser years, in the 1990s the SCC began to review property rights provisions in other areas such as taxation, landlord-tenant relations, and the status of the public sector.

THE POLITICAL SPILLOVER: SCC RULINGS IN THE POLITICAL SPHERE

The SCC and the Breakdown of Egypt's Corporatist Political Landscape

At the heart of Sadat's managed political liberalization was a new political parties law. Law 40 of 1977 established a corporatist framework for a multiparty system, bounded by extensive executive controls. It empowered an executive-dominated Political Parties Committee to consider applications for party licenses and to regulate ongoing party activities. Simply achieving legal status is extremely difficult under law 40/1977 because party platforms must be in harmony with the Constitution while at the same time remaining distinct from existing political parties. These two requirements provided the Political Parties Committee the pretext to reject dozens of party applications. In fact, between 1977 and 2000 the Political Parties Committee approved only one application for the Socialist Labor Party. All other opposition parties came into existence as the direct result of administrative court rulings that overturned the decisions of the Political Parties Committee, or as a result of Supreme Constitutional Court decisions in the case of the Nasserist Party.

Once a party gains legal status, its activities continue to be constrained by the political parties law. As is typical of laws governing political activity in Egypt, vague guidelines in law 40 are backed by draconian penalties for violations, giving the regime maximum formal and informal leverage over political opponents. Article 4 of law 40/1977 declares that "[t]he principles, objectives, and programs of a party should not contradict... the maintenance of national unity, social order, the democratic socialist system and its socialist gains." Moreover, party programs must not violate "the principles of the July 23 and May 15 revolutions" in addition to a variety of other requirements. These vague guidelines, in combination with article 17 of the same law, empower the Political Parties Committee to suspend the publication of party newspapers and to temporarily suspend party activities.
The requirement that political parties have distinct political platforms, coupled with the ongoing ability of the Political Parties Committee to discipline opposition parties, created a corporatist framework. Entry into the political arena was restricted, and parties with legal status must follow informal understandings of how far they can challenge the regime before facing punishment. Rif'at al-Said of the Tagammu’ Party likens the situation to animals tied to a rope; parties are set free to do as they like, but if they set out on a path that the regime is displeased with, they are easily reeled back in. As a result, opposition parties rarely push the informal limits on political organizing for fear that they will be punished by the Political Parties Committee and lose their ability to participate in the political system.

This corporatist system of political management is reinforced by severe constraints on party activity. The emergency law, which has been applied for all but six months since 1967, places severe restrictions on public gatherings and makes demonstrations and public speeches impossible without the regime’s prior consent. Furthermore, the emergency law empowers the state security forces to detain individuals without charges for a thirty-day period, a privilege that the regime makes full use of, particularly during the election season. Law 2/1977 also provides for life imprisonment with hard labor for organizers of even peaceful demonstrations. Additionally, opposition parties have no access to the state-controlled media, and their only real connection to the public is through opposition newspapers, which, as we see in this chapter, are also controlled in a similar corporatist fashion.

Buttressing these external party constraints are internal constraints on opposition party members. The internal organization of opposition parties is fundamentally nondemocratic, with leadership turnover usually occurring only with the death of party leaders. Opposition activists who attempt to push the limits of political activism are duly disciplined from within their own parties. When internal factions occasionally arise to challenge party leadership, the Political Parties Committee typically enters the fray to back regime-friendly opposition blocs. This corporatist system of managing the political arena crippled opposition party activities throughout the 1980s and resulted in a widening disconnect between party leadership and the public at large.

The regime’s corporatist system of managing the political arena was buttressed still further by a proportional representation (PR) system that governed both national and local elections through the 1980s. Under the PR-list system, only members of official political parties were allowed to participate in elections on party lists. This system effectively excluded political activists who wished to operate outside the constraints of the regime’s corporatist arrangement. At the same time, the PR-list system empowered the opposition party leadership (who decided the order of their opposition candidates on the list) to maintain party discipline and to sideline party members willing to risk an open confrontation with the regime. In other words, the PR-list system subjected individuals otherwise unwilling to participate by the corporatist rules of the game to internal party constraints and easy management by the regime. Finally, an 8 percent minimum threshold posed a formidable barrier to most opposition parties, and the votes for parties falling short of this threshold were transferred to the party winning the plurality of seats.
To circumvent these obstacles in the 1984 People's Assembly elections, the Wafàd Party entered into an awkward alliance with the Muslim Brotherhood. For the Wafàd Party, cooperation with the Brotherhood increased the chances that they would pass the 8 percent threshold. For the Brotherhood, this informal coalition allowed them to participate in the elections without legal party status. Together, they managed to win 12.7 percent of the national vote, which translated into fifty-eight seats. However, no other opposition parties were able to gain representation because they did not reach the 8 percent threshold. Votes for all other opposition parties were transferred to the regime's National Democratic Party.

After the election, lawyer and political activist Kamal Khaled successfully transferred a case to the Supreme Constitutional Court, challenging the laws governing elections for the People's Assembly. Khaled charged that the PR-list system prevented citizens from running for office as independents and therefore denied them the right to participate in political life if they were not affiliated with a registered political party.

By December 1986, the commissioner's body of the SCC issued its preliminary report recommending that the electoral law be ruled unconstitutional for contradicting articles 8, 40, and 62 of the Constitution. Opposition parties applauded the decision and, in a joint press conference, called for the reform of election laws, the dissolution of the People's Assembly, and a new round of elections. To the surprise of many, the regime agreed to all three opposition demands. The People's Assembly was dissolved after a national referendum, new electoral laws were drafted, and new elections were held in 1987.

This was the first time in Egyptian history that an electoral law was deemed unconstitutional. Throughout the 1980s, however, the Supreme Constitutional Court continued to chip away at the regime's corporatist system of political control by striking down election laws at both local and national levels.

The regime's new electoral law governing People's Assembly elections did as little as possible to comply with the Supreme Constitutional Court ruling. The new electoral law divided the country into twenty-four multi-member districts for proportional distribution among party lists. At the same time, to comply with the SCC ruling, the new law reserved two seats per district for independent candidates. However, it also maintained the 8 percent minimum threshold that was required to gain representation and, moreover, the new district boundaries were so skewed that opposition parties were put at a severe disadvantage by the disproportional districts. For example, one district with five million residents was allocated thirteen seats in the People's Assembly, whereas another district with only two million residents was allocated sixteen seats. In contrast, a third district with 350,000 residents had five seats.

With skewed districts, electoral fraud, the 8 percent minimum threshold, and the continued weakness of opposition parties, the NDP predictably maintained an overwhelming majority in the 1987 People's Assembly elections, taking 348 of 448 seats compared to a combined total of 100 seats for the opposition. With a supermajority in the People's Assembly, the regime's National Democratic Party was once again able to
nominate Mubarak as the sole candidate for the presidency in a national referendum held in October 1987. Electoral corruption orchestrated by the Ministry of Interior ensured that Mubarak received 97 percent voter approval and six more years in power.

Meanwhile, opposition candidates challenged the electoral fraud that occurred in the People's Assembly elections. The administrative courts proved their readiness to confront the regime when they annulled the electoral results of seventy-eight seats, lending judicial support to opposition claims that the regime regularly used electoral fraud to systematically undermine the performance of the opposition. However, the NDP-dominated People's Assembly recognized only seven of these court decisions, thereby establishing a pattern of institutional conflict that would grow only more severe in future election cycles.

Once again, Kamal Khaled demonstrated that the surest way to challenge the regime was through the Supreme Constitutional Court. Khaled immediately initiated a lawsuit contesting the new electoral arrangement, and by December 16, 1987, his appeal was transferred to the SCC. Khaled contended that the new election law should be ruled unconstitutional for three primary reasons. First, Khaled contended that political parties provided their candidates with financial resources that were denied to independent candidates, and therefore independent candidates could not compete on equal terms. Moreover, because political parties received resources from state coffers, this funding meant that the state itself was favoring parties over individual candidates. Second, Khaled argued that the number of seats allocated to different electoral districts did not correspond to the number of residents or registered voters. Finally, Khaled argued that because only 48 seats were allocated to independent candidates and the remaining 400 seats were reserved for party competition under the list system, individual candidates were at a further disadvantage compared to party members. Khaled held that the election law again violated articles 8, 40, and 62 of the Constitution, which guarantee equality of Egyptian citizens and the right to participate in political life.

Government attorneys responded that article 5 of the Constitution established a multiparty system in Egypt, but the People's Assembly reserved the right to organize elections in whatever way it deems fit as long as a multiparty system is maintained. The SCC disagreed with the government's plea and argued that the intent of article 5 of the Constitution was to replace the single-party rule of the Arab Socialist Union and that, although the government had the power to decide on the preferred electoral system, this power did not give it the right to infringe on citizen's rights to equal opportunity and equality before the law as defined by articles 8 and 40 of the Constitution. The SCC also agreed with Khaled's contention that the new electoral system still favored established political parties at the expense of independent candidates. When the government attorney argued that citizens were at liberty to join political parties if they wished to share in the opportunities provided by established parties, the SCC responded that article 47 of the Constitution guaranteed the freedom of opinion and therefore citizens should not be compelled to participate
in political programs. Two similar rulings from the Supreme Constitutional Court forced comparable reforms to the system of elections for both the Shura Council (the Upper House) and local council elections nationwide.

With its ruling of unconstitutionality on May 19, 1990, the SCC once again forced the dissolution of the People’s Assembly, new election laws, and early elections in 1990. A national referendum confirmed the process and on September 26, 1990 the law governing elections to the People’s Assembly was amended. The result of the 1990 SCC ruling was a complete abandonment of the PR-list system and the adoption of the single-member district system for elections to the People’s Assembly. The country was divided into 222 districts, and each district was allocated two seats, one reserved for workers and peasants as stipulated in article 87 of the Constitution, and the other for open competition. Opposition activists applauded the amendments, but also called for more sweeping reforms that would ensure clean elections, including the reform of voter lists, repeal of the emergency law, and comprehensive judicial supervision of elections. Instead, the government issued law 206/1990, which gerrymandered district boundaries to the substantial advantage of the ruling NDP by cutting across opposition strongholds.

When it became apparent that the regime was not willing to implement further reforms to guarantee that the 1990 People’s Assembly elections would be free and fair, the Wafd Party, Labor Party, Liberal Party, and the Muslim Brotherhood all decided to boycott the elections with the vocal support of the majority of professional syndicates.

Clearly, the 1987 and 1990 SCC rulings on election laws did not undermine the regime’s dominance, but they were not without effect. The long-term impact of the rulings was to disable the regime’s corporatist technique for maintaining political control. Prior to the SCC reforms, the government easily managed the political field by negotiating with only a handful of relatively weak opposition parties. The parties themselves exercised internal controls on activists who dared to challenge the government outside the bounds that were implicitly negotiated between the government and opposition parties. After the SCC induced electoral reforms, however, opposition activists were no longer beholden to opposition party leaders, who controlled the position of candidates on party lists. Moreover, the SCC rulings enabled Islamist candidates to compete as independents. This had serious implications for the type of opposition trends that would be represented in future People’s Assemblies. Finally, SCC rulings forced the regime to shift its method of maintaining political control from an unfair legal framework to one that increasingly depended on physical coercion, intimidation, and electoral fraud.
Emergency State Security Courts (Mahkamat Ann al-Dawla Tawari') handle all trials prosecuted under the emergency law. The Emergency State Security Courts are staffed with judges from the regular judiciary in addition to two military officers, if so desired by the president, but there is no right to appeal for the defendant. After the court renders a decision, it is sent to the president, who has the power to overturn the court’s ruling or demand a retrial. In theory, the Emergency State Security Courts are only to be used for short periods of time during a war or similar crisis. In practice, these courts form a parallel legal system, given the fact that Egypt has been in a perpetual state of emergency for all but eighteen months since 1967. The loose wording of the emergency law itself gives the government wide latitude to transfer cases that are perceived as politically threatening out of the jurisdiction of the regular judicial system. The broad powers of the president over the Emergency State Security Courts ensure that once cases enter this parallel legal tract, the government will almost certainly win favorable rulings.

By 1983, dozens of cases were transferred to the Supreme Constitutional Court contesting the provision that denies defendants the right to appeal rulings of Emergency State Security Courts in the regular judiciary. The SCC delivered a ruling on one of these challenges in 1984. The case was initiated when a defendant facing a detention charge in an Emergency State Security Court launched an independent challenge against the action in an administrative court. The plaintiff contended that the provision in law 50/1982, granting the Emergency State Security Courts exclusive jurisdiction over all appeals of cases prosecuted under the emergency law, violated articles 68 and 172 of the Constitution. The administrative court transferred the case to the SCC where the plaintiff argued that the lack of appeal outside of the State Security Court system violated his right to due process and the competency of the administrative courts.

The Supreme Constitutional Court ruled the provision constitutional based on article 171 of the Constitution, which states that “[t]he law shall regulate the organization of the State Security Courts and shall prescribe their competencies and the conditions to be fulfilled by those who occupy the office of judge in them.” The SCC reasoned that article 171 of the Constitution, establishing the State Security Courts, must be interpreted as proof of their legitimacy as a regular part of the judicial authority. Based on this reasoning, the SCC rejected the plaintiff's claim concerning article 68 protections, guaranteeing the right to litigation and the right of every citizen to refer to his competent judge. The SCC also reasoned that the provision of law 50/1982, which gives the State Security Courts the sole competency to adjudicate their own appeals and complaints, was not in conflict with article 171 of the Constitution. Moreover, the SCC ruled that the procedures governing State Security Court cases were in conformity with the due process standards available in other Egyptian judicial bodies, such as the right of suspects to be informed of the reasons for their detention and their right to legal representation.
Human rights advocates and pro-democracy reformers were not the only activists to use the new Supreme Constitutional Court to challenge the government. Moderate Islamists also quickly came to understand that litigation was one of the few available avenues to challenge the status quo from within the formal legal/political system. Whereas all political activists used the Supreme Constitutional Court to successfully challenge the regime's political controls, Islamist activists additionally attempted to use SCC powers of judicial review to challenge what they believed to be the secular foundations of the state.

Islamist challenges of secular laws were based on article 2 of the Egyptian Constitution, which states, "Islamic jurisprudence is the principal source of legislation." Article 2 was included in the 1971 Constitution and was strengthened further by a constitutional amendment in 1980 in order to bolster the religious credentials of the regime at a time when Sadat was using the Islamist trend to counterbalance Nasserist power centers within the state and society. Sadat probably never imagined that article 2 would open the door to constitutional challenges by both Islamist-oriented activists in civil society and lower court judges sympathetic to the Islamist movement, just as he never imagined he would be assassinated by Islamist militants one decade later. After Sadat's assassination, Islamist challenges to secular laws were transferred to the SCC in droves.

On May 4, 1985, the SCC issued a landmark ruling on the constitutionality of interest in a case launched by none other than the Sheikh al-Azhar, 'Abd al-Halim Mahmud, against the offices of the President of the Republic, the Prime Minister, and the President of the Legislative Committee of the People's Assembly, in addition to Fu'ad Gudah, who had a concrete, personal interest in the case. The case was a spectacular clash between the head of state versus the most authoritative Muslim religious figure in Egypt and arguably throughout the Muslim world. The case at hand concerned a mere £E 592 that an administrative court had ordered al-Azhar medical school to pay for medical equipment in addition to the 4 percent interest rate that had accrued on the overdue payment. Sheikh Mahmud used the dispute as an opportunity to challenge article 226 of the civil code, which provides for interest on overdue payments. Al-Azhar's position was simple: article 2 of the Constitution declares Islamic jurisprudence the principal source of legislation, and by the Sheikh al-Azhar's reading of the shari'a, article 226 was in clear violation of the prohibition on riba. The implications of such a decision were tremendous because any ruling of unconstitutionality would have far-reaching effects on the entire Egyptian economy and on the regime's relationship with the Islamist movement.

In its final ruling, the SCC drew on the Report of the General Committee, which had prepared the amendment of article 2 of the Constitution in 1980:

The departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic law requires patient efforts and careful practical considerations. Hence, legislation for changing economic and social conditions that were
not familiar and were not even known before, together with the innovations in our contemporary world and the requirements of our membership in the international community, as well as the evolution of our relationships and dealings with other nations — all these call for careful consideration and deserve special endeavors. Consequently, the change of the whole legal organization should not be contemplated without giving the law-makers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur’an, the Sunna and the opinions of learned Muslim jurists and the ‘Ulama…

The SCC agreed with the reasoning of the General Committee and argued that if citizens were allowed to challenge laws that were issued before the 1980 amendment to the Constitution, it would “lead to contradictions and confusion in the judicial process in a manner that would threaten stability.” The SCC concluded that the legislature must be given the opportunity to review all laws and bring them into conformity with the shari’a over time. In the interim, the amended article 2 of the Constitution would not have retroactive effect and instead would be applied only to laws that were issued after the 1980 amendment that made Islamic law the principal source of legislation.

With this ruling, the SCC neutralized a significant Islamist legal challenge and dismissed dozens of similar challenges to article 226 that had collected on its docket. Simultaneously, the ruling provided a legal basis to reject scores of other Islamist challenges to a wide variety of pre-1980 legislation, from personal status laws to aspects of the criminal code. However, in the process of making its non-retroactivity ruling, the SCC also implicitly established the principle that laws issued after the 1980 amendment were justiciable and that they must be in conformity with the shari’a. Prominent legal scholars such as Ibrahim Shihata observed that this reasoning placed the SCC in an uncomfortable position regarding future cases invoking article 2 of the Constitution, rather than definitively putting the question to rest.
The Rapid Expansion of Constitutional Power
(1991-1997)

The Egyptian government . . . benefited tremendously from a number of SCC rulings in the economic sphere that effectively dismantled the economic foundations of the Nasserist state. Liberal SCC rulings in the area of housing reform, privatization, land reform, and labor law enabled the executive leadership to avoid the direct opposition of groups both inside and outside the state with a vested interest in maintaining the status quo.

The SCC Transforms Owner-Tenant Relations

Since independence, one of the most pressing economic problems in Egypt has been a chronic housing shortage. At first glance, it appears that the housing crisis is the direct result of the population explosion and chronic poverty that are typical of a country at Egypt's level of development. With an annual population growth rate between 2.2 percent to 3 percent for several decades, Egypt has approximately one million new citizens to house every eight months. When this growth is combined with rural-to-urban migration, urban centers like Cairo experienced a staggering annual population growth rate of nearly 4 percent per year for several decades. On closer examination, however, it is apparent that Egypt's housing crisis is as much the result of socialist-era rent-control laws as it is the result of poverty and demographic dynamics.

In an effort to control the skyrocketing cost of housing and win political support among the urban poor, Nasser repeatedly extended rent-control laws held over from World War II. On seizing power, the Free Officers promptly issued law 199 of 1952 and brought all rental contracts signed between 1944 and 1952 under a state rent-control system. Rental rates were reduced by 15 percent and frozen at that level. In 1958, the regime extended the reach of rent-control laws to all rental contracts signed between 1952 and 1958. Again, the regime reduced rents by 20 percent and froze their rates at that level. In 1961, all new leases signed between 1958 and 1961 were similarly reduced by 20 percent and frozen.

In addition, these rent-control laws made it nearly impossible for owners to expel their tenants, and rental contracts would live on even after the death of the original tenant. Spouses, children, and other relatives to the third degree of relation had the right to continue the rental contract at the same rate on the single condition that they had resided with the original tenant for one year prior to his or her death. Similar provisions in the rent-control laws extended the same privileges to tenants using rental units for commercial or professional purposes. This extension covered
millions of rental contracts for small grocery markets, doctors’ offices, lawyers’ offices, and the like. After decades of double-digit inflation, tenants were still obliged to pay only the amount that was fixed at the time that rent control went into effect, a sum that was typically as little as ten pounds a month for a good apartment in central Cairo. High rates of inflation, coupled with the right of the tenant to maintain the rental contract indefinitely for generations, had the practical effect of completely transferring property rights from building owners to their tenants.

Although the socialist-era rent-control laws were intended to provide housing relief for Egypt’s urban masses, the actual effect of the laws was quite the opposite. Rent control created several perverse economic incentives that greatly aggravated Egypt’s housing crisis. First, the rent-control regime resulted in a sharp decrease in private sector investment in the formal housing sector. Once considered among the most lucrative sectors in Egypt, investors shied away from building new rental properties. Second, under the rent-control laws, building owners no longer had the incentive or the financial means to maintain existing rental properties, and as a result, buildings suffered from premature decay and even collapse. Finally, landlords renting apartments in the formal sector would only sign new rental contracts if they received large, illegal side payments known as “key money” (khati rigl) in advance in order to offset the depreciation in the value of rent payments after inflation took its toll. The only alternative was to purchase a new unit outright, but again, doing so required a tremendous sum of money that had to be paid in advance. With a poorly functioning banking system and a legal system that is unable to enforce contracts efficiently and effectively, Egypt has not been able to develop an adequate home mortgage system. Even modest housing in the formal sector was (and continues to be) out of reach for most Egyptians.

Unable to afford even basic housing in the formal sector, low-income Egyptians have been forced into a burgeoning informal sector composed of squatter settlements, which typically circle major urban centers. It is estimated that between 1973 and 1983, a period of rapid inflation with the initiation of the open-door economic policy, 60 to 80 percent of all new housing construction was in the informal sector. This ashwa‘i housing is unplanned and unregulated, often with no running water, no waste disposal, and no other basic services. Moreover, the informal housing sector has negative implications for both residents and the state beyond the obvious deficiencies in infrastructure, planning, and public health. Because informal housing operates outside the formal legal system, residents are unable to use their property as a form of collateral, even for small loans. For the state, the proliferation of informal housing and the increase of illegal side payments in the formal sector crippled its ability to tax property owners and generate development revenue.

By the 1970s, there were already clear indications that the rent-control regime had generated tremendous economic and social problems, particularly for couples wishing to marry and begin new households. In an attempt to deal with the housing crisis, the government issued a series of amendments to law 52/1969 in 1976, 1977, and 1981. The amendments made slight adjustments to the formula for assessing rents by tying rates to
the cost of construction materials and land. The modifications allowed for slightly higher rates for apartment buildings constructed after 1981, but in the process the government continued to expand the coverage of the rent-control regime to include all new buildings in the formal sector instead of allowing new rental contracts to be priced according to market forces. In a move that is typical of the Egyptian government in so many areas, the regime chose to continue with a failed policy for fear that any attempt to rationalize the system would lead to political rupture. The risks were very real; full liberalization of rent-control laws would mean a dramatic increase in rental rates, and the economic burden for many would result in evictions and major social dislocation. Tentative government moves to consider the amendment of rent-control laws were met by furious opposition in the popular press. But in the meantime, every year that the government postponed reform, Egypt's housing crisis became more severe and the political implications of housing reform more perilous.

The distortions created by the housing regime reached absurd levels by the early 1990s. The Ministry of Housing estimated that, despite the severe housing shortage, at least two million flats remained unoccupied across the country. Because signing a rental contract essentially resulted in the complete transfer of property rights from the building owners to their tenants, owners simply preferred to leave their apartments vacant, rather than be subject to the provisions of the rent-control laws. The rent-control laws created incentives that were perfectly rational on an individual level, but absolutely dysfunctional in the aggregate.

By the 1990s, the Supreme Constitutional Court began to take on the politically sensitive task of dismantling the rent-control regime by itself. Already in its decision on April 29, 1989, the SCC ruled that rental units used for religious or cultural purposes should not be exempt from paying the small increases in rent provided for in law 136/1981. In 1992 and 1994, the SCC invalidated extraordinary rental rights provided to legal professionals at the expense of owners. Shortly thereafter, a similar ruling invalidated the privileged rental provisions for the medical profession. By 1995, the SCC went beyond tinkering at the edges and began to make more aggressive rulings.

In a decision in March of that year, the SCC ruled that article 29 of law 49/1977 was unconstitutional. This provision extended rental contracts to relatives by blood or marriage to the third degree, if they had occupied the unit with the original tenant for at least one year prior to the tenant's death. The SCC ruled that the provision extending the rental contract to relations of the third degree by marriage constituted an infringement of the property rights of the landlord.

On February 22, 1997, the Supreme Constitutional Court struck down a provision of law 49/1977 that froze rental prices at their 1977 level and automatically passed rental contracts for commercial properties from tenants to their family members on their death. The law essentially allowed commercial tenants to occupy small shops and businesses and to pay the same rent that they did back in 1977, even after decades of inflation. The SCC ruled that this was an unacceptable infringement on the property rights of landlords. The impact of the SCC ruling was far reaching, affecting over 800,000 commercial
tenants by conservative estimate and up to several million tenants by other figures.

Fearful that the SCC ruling could result in hundreds of thousands of evictions and massive social and economic dislocation, the government quickly introduced new legislation to regulate landlord-tenant relations for commercial properties. Law 6/1997 allowed for the continuation of rental contracts after the death of the tenant under three conditions: (1) the inheritor should be a first- or second-degree relative of the original tenant, (2) the rental unit must be used for the same kind of commercial activity that the original tenant engaged in, and (3) the lease may not be transferred to relatives more than once time. The new law also increased rents by various rates depending on when buildings were constructed, in addition to providing for an annual increase in the rental price by up to 10 percent.

The SCC ruling, coupled with the new law, produced a formula that was extremely useful to the regime. The ruling of unconstitutionality allowed the government to modify law 49/1977 without facing direct opposition from millions of tenants. At the same time, the new provisions provided for the continuation of most rental contracts at higher, but not completely free-market rates, which would have entailed massive social and economic disruption. The government was able to capitalize on its moderate position; tenants were not evicted, as they feared, yet landlords were able to collect far more revenue than they had been able to for years. The new law allowed prices to reach market equilibrium over time, with 10 percent increases per year. Moreover, because the new law provided for the continuation of the rental contract after the death of the original tenant (the core concern of the SCC ruling), the regime would have another opportunity to modify landlord-tenant relations for commercial spaces in the future when landlords inevitably challenge the constitutionality of the new law.

Later in the same year, the ruling on commercial tenancy was followed by a string of fresh SCC rulings on owner-tenant relations in the residential sector. In August 1997, the SCC ruled that tenants cannot transfer their contract rights to others and that owners have the right to break the lease if another individual replaces the original tenant. The SCC made concurrent rulings in ten other cases challenging the same provision of law 49/1977 on the same grounds. A similar decision came in October 1997, when the SCC ruled article 7 of law 49/1977 unconstitutional, thereby prohibiting tenants from exchanging apartments. The following month, the SCC struck down another provision of the same law that had allowed tenants to sublet their apartments.

For over a decade, SCC rulings in the urban housing market were consistently free market in orientation, effectively diffusing one of the most volatile elements of the economic reform agenda. Justices were well aware that, by striking down the legal foundations of the Nasser-era economy in this piecemeal fashion, they were effectively legislating from the bench; moreover, they were proud of it. Justice Nusayr made clear that the Court was “...very interested in changing the economic system in Egypt.” He
explained that, “of course we are looking at the legal principles and circumstances in each case, but there is an awareness that we have an important role to play in renewing our country and our economy.” Leftists criticized the SCC for overstepping its role, deflecting direct criticism from state policy as a whole.

Interestingly, Mark Graber notes exactly the same dynamic in his study of U.S. politics. Graber observes that “[t]he aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the public, or at least not as accountable as they would be had they personally voted for that policy.” The striking similarity between legislative-judicial dynamics in the United States and Egypt indicates once again that one should not automatically assume that judicial politics in democratic and authoritarian states are fundamentally different. In many cases, the interests and strategies of legislators and judges are indistinguishable across regime type.

*The Internationalization of SCC Judgments*

Supreme Constitutional Court jurisprudence was internationalized under the leadership of Chief Justice ‘Awad al-Murr. Beginning in 1992, SCC rulings began to note that the Egyptian government had signed and ratified international conventions, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Court used these international conventions to build progressive interpretations of constitutional provisions and to lend legal and moral weight to its rulings. This was particularly useful in light of the odd character of the 1971 Constitution, which has many ambiguous and sometimes contradictory rights provisions. Ironically, the Egyptian government signed and ratified these conventions as window dressing, with no expectation that they would be used by an institution like the SCC to strike down repressive legislation.

SCC justices also began to consult foreign court rulings under the leadership of ‘Awad al-Murr, and SCC rulings increasingly invoked foreign case law, most notably from the French Constitutional Council and the U.S. Supreme Court. Through the mid-1990s, between one-quarter and one-half of all SCC rulings incorporated specific aspects of international legal or foreign court rulings. Even more rulings referred to “accepted international standards,” broadly stated, and to the comparable judicial principles of other “civilized nations.”

SCC justices acknowledged quite frankly that these techniques helped them strengthen rulings and provide progressive interpretations of constitutional provisions. For example, one prominent SCC justice explained that “the recent tendency of the court to interpret constitutional guarantees in light of the international human rights standards and rules which are applied in the democratic countries gives the court the capacity to broaden its interpretation of constitutional rights and freedoms. As a
result, I believe that the court must continue in this direction.” Despite the benefits articulated by SCC justices themselves, references to foreign court rulings and international human rights frameworks were not costless. References to foreign court rulings also left the SCC vulnerable to accusations of subversion of the Egyptian legal order.

The SCC’s internationalization of domestic legal struggles went beyond engaging with international treaty commitments and foreign court rulings. It also involved pragmatic efforts to forge links with the international legal community and with domestic civil associations linked to the international human rights community. This effort was most evident in two international conferences convened in Cairo in 1996 and 1997 under the auspices of the Supreme Constitutional Court and the British Council. Both conferences drew hundreds of representatives from throughout the Arab world, Africa, Europe, and the United States. Over three days, SCC justices, foreign judges, and NGO activists exchanged views in dozens of panels on the importance of rule-of-law institutions for the protection of human rights. The SCC used the event to showcase its record and to announce that, in less than two decades, it had arrived on the international scene.

Early Challenges to SCC Independence

There were, however, early signs that the government was increasingly uncomfortable with SCC activism under ‘Awad al-Murr. In addition to direct threats to the Court through private channels, prominent regime insiders made public attacks in the mid-1990s. The first such challenge came from Fathi Sorur, the Speaker of the People’s Assembly in 1996. In a lengthy interview published in al-Musawwar, Sorur accused the SCC of imposing deviant interpretations of the Constitution, diverging from the interests of the nation, and destabilizing the legal framework of the state. In a candid foreshadowing of what was in store for the Court five years later, Sorur suggested that continued SCC activism may produce a crisis similar to President Franklin D. Roosevelt’s confrontation with the U.S. Supreme Court. Sorur’s proposed solution was to allow for a process of abstract review of legislation in its draft stage, and only on the request of the President, the Speaker of the People’s Assembly, or the Prime Minister. After examination at the draft stage, laws would then be immune from future review. Sorur’s chilling interview with al-Musawwar was followed by an attack by Mustafa Abu Zeid, a former Minister of Justice and socialist public prosecutor. Abu Zeid supported Sorur’s proposal and went so far as to accuse the SCC of efforts to “apply the text of the American Constitution.”

Here, the Court was beginning to pay a clear price for its references to foreign court precedents and international human rights frameworks in its rulings.

‘Awad al-Murr responded forcefully to Sorur’s prior revision proposal with an extensive interview of his own in which he articulated the fundamental role that the SCC played in upholding constitutional protections of civil and political rights, and how prior revision would undermine its work. ‘Awad al-Murr continued to vigorously address the danger of prior review at nearly every public lecture, both during and after his tenure as
chief justice. When asked about the prior revision proposal during a lecture at Cairo University, al-Murr insisted that prior revision is unsuitable because courts often do not know the implications of legislation until laws are actually put into practice. But more troublesome, al-Murr asserted, is how the regime would abuse a system of prior revision.

Do you think that Dr. Fathi Sorur will one day refer to the court a bill and ask it to determine whether it is right or wrong? Do you imagine that the Prime Minister who sends a bill to pass through the People’s Assembly will ask for our opinion of it? Do you think we have an opposition with 60 persons who have an interest in asking whether the law is right or wrong? But let us suppose that we had that number in the opposition and they asked us to review a bill. We will even suppose that the Prime Minister has his country’s interest at heart and asks us whether the bill is right or wrong. Do you know what the Egyptian Prime Minister would do? He would send you 20 bills on the same day, saying that the cabinet approved these laws, which might be of different years, and ask our opinion in the constitutionality of them all. Every bill would be of 200 articles or so, and the Constitutional Court would be required to decide in 30 days on four, five, or six thousand articles. It took us a year to decide on one article. Imagine if we were asked to decide in six months on all the bills approved by the executive authority before they were signed by the President. They will dump all bills on us to get the seal of approval of the Constitutional Court, and the result would be that the constitutionality of these bills could not be challenged later on. . . . If you want to destroy the Constitutional Court, let’s shift to prior revision.

Opposition parties and NGOs lined up behind ‘Awad al-Murr’s position.’ The fallout from Fathi Sorur’s public statements in the opposition press demonstrated once again that the SCC enjoyed support from a number of actors in Egyptian society. As the regime began to issue veiled threats against the Court, NGOs pushed back in the opposite direction. Human rights NGOs, such as the Center for Human Rights Legal Aid, insisted that “the constraints against institutions directly filing complaints should be lifted so that political parties, syndicates, and NGOs can file direct cases on the constitutionality of legislation.”

Interestingly, SCC justices credited the public response as the reason why the government did not carry out its threat to rein in the Court. Moreover, they credited themselves for having shaped the public’s attitude. . . .

"Isn't amending the Constitution so easy that it can be done overnight?"

"Yes, in Egypt it can take place in a second."

Question-and-answer session at a lecture by former Chief Justice ‘Awad al-Murr at Cairo University, September 25, 2000

By the late 1990s, the Egyptian government was increasingly apprehensive about Supreme Constitutional Court activism. In less than two decades of operation, the SCC had become the most important avenue for political activists to challenge the regime, and the Court continued to issue scores of rulings that incrementally undermined the regime's levers of control. Egyptian human rights groups were exposing the repressive nature of the government both at home and abroad, and rights groups had begun to formalize their strategies of constitutional litigation. By 1998, rights groups were raising dozens of petitions for constitutional review every year. Intent on reasserting its authority, the regime steadily tightened its grip on the SCC, the human rights movement, and opposition parties in the late 1990s.

Beginning in 1998, the regime engaged in a full-fledged campaign to undermine the human rights movement after the Egyptian Organization for Human Rights published an extensive report on a particularly shocking episode of sectarian violence that occurred in the village of al-Kosheh in August 1998. The EOHR report uncovered not only the details of one of Egypt's worst bouts of sectarian violence, a politically taboo subject in itself, but also that hundreds of citizens were tortured at the hands of state security forces for weeks following the incident. In response to the report, Hafez Abu Sa'ada, secretary general of the EOHR, was charged by state security prosecutors with "receiving money from a foreign country in order to damage the national interest, spreading rumors which affect the country's interests, and violating the decree against collecting donations without obtaining permission from the appropriate authorities." Abu Sa'ada was detained for six days of questioning and then released on bail. The trial was postponed indefinitely, but the charges remained on the books. Abu Sa'ada's interrogation served as a warning to the human rights community that strong dissent and foreign funding would no longer be tolerated by the government. In the aftermath of Abu Sa'ada's interrogation, the EOHR acquiesced to government pressure and stopped accepting foreign funding.
The following year, the government issued a new law governing NGO activity that tightened the already severe constraints imposed by law 32/1964. Law 153/1999 first eliminated the loophole in the previous NGO law that had allowed organizations to operate as civil companies. All human rights organizations were forced to submit to the Ministry of Social Affairs (MOSA) or face immediate closure. The new law additionally forbade NGOs from engaging in “any political or unionist activity, the exercise of which is restricted to political parties and syndicates.” Moreover, MOSA maintained the right to dissolve any organization “threatening national unity or violating public order or morals:...” The new law also struck at the Achilles heel of the human rights movement by further constraining its ability to receive foreign funding without prior government approval. Finally, law 153 prevented NGOs from even communicating with foreign entities without first informing the government. These new regulations were clear attempts by the regime to place new constraints on human rights groups that were effectively leveraging international pressure on the Egyptian regime through transnational human rights networks. The greatest asset of the human rights movement now became its greatest vulnerability.

Moreover, the vulnerability of the human rights movement went beyond the material support and institutional linkages that were jeopardized by the new law; the moral authority of the movement was increasingly challenged as the government framed its dependence on foreign support as nothing short of sedition. Law 153/1999 was accompanied by a smear campaign in the state-run press in which rights groups were portrayed as a treasonous fifth column, supported by foreign powers that only wished to tarnish Egypt’s reputation and sow internal discord.

The new NGO law, the government intimidation, and restrictions on foreign funding threatened to shut down the entire human rights movement.

With the future of the human rights movement looking bleak, a ray of hope emerged in April 2000 when the commissioner’s body of the Supreme Constitutional Court issued its preliminary report on a constitutional challenge to law 153/1999. The case involved an NGO from Tanta by the name of al-Gam’iyya al-Shariyya, which was fighting an order by the Ministry of Social Affairs that barred several of its members from running in elections for the NGO’s board of directors. The advisory body of the SCC recommended that law 153 be ruled unconstitutional, the Constitution, requiring the administrative courts to arbitrate disputes between citizens and state authorities. Finally, the commissioner’s body determined that law 153/1999 imposed unreasonable restrictions on the freedom of association, enshrined in article 195 of the constitution.

On June 3, 2000, the Supreme Constitutional Court issued its final ruling in the case, striking down the most important piece of legislation governing associational life in decades. The Court crafted and delivered the ruling in a strategic way that maximized its impact while minimizing the chances of a direct confrontation with the regime. The SCC found that the law had not been submitted to the Shura Council for debate, a formal requirement of the Constitution, and that it violated the jurisdic-
tion of the administrative courts. The Court added that several aspects of law 153/1999 interfered with the freedom of association, but the SCC did not rule the law unconstitutional on those grounds. By finding the law unconstitutional on procedural rather than substantive grounds, the ruling was less confrontational yet simultaneously loaded with the implicit warning that if the next NGO law contained substantive restrictions on the freedom of association, it too could be ruled unconstitutional.

The timing of the ruling also appears to have been strategic. The SCC issued the ruling only five days before the end of the 2000 People's Assembly session, making it impossible for the government to issue a new NGO law in time to replace law 153/1999. As a result, rights groups were effectively granted a five-month lease on life. Moreover, the ruling effectively forced the government to run a new NGO law through the People's Assembly, giving opposition parties, rights groups, and professional syndicates the opportunity to pressure the government to soften up the bill the second time around. Finally, this lease on life came at a critical time for human rights activists and pro-democracy reformers. National elections for the next People's Assembly were only months away and activists hoped to play a prominent role in monitoring the elections as they had done for the first time in 1995.

The ruling was a bold move by the SCC not simply to defend the freedom of association for its own sake. The ruling also had the convenient result of extending the life of human rights NGOs, which had become loyal supporters of SCC independence, as well as a critical conduit through which the SCC received the litigation that was necessary to expand its mandate. Prior to the ruling, Chief Justice Muhammad Wali al-Din Galal had been viewed by many as less willing to confront the regime than his predecessor, 'Awad al-Murr. The NGO decision proved that the golden era of the Supreme Constitutional Court had not yet passed. . . .

REINING IN THE SUPREME CONSTITUTIONAL COURT

With the retirement of Chief Justice Wali al-Din Galal in late 2001, the government had its opportunity to reins in the SCC. To everyone's surprise, including SCC justices, Mubarak announced that his choice for the new chief justice would be none other than Fathi Nagib, the man who held the second most powerful post in the Ministry of Justice. Opposition parties, the human rights community, and legal scholars were stunned by the announcement. Not only had Fathi Nagib proved his loyalty to the regime over the years but he was also the very same person who had drafted the vast majority of the government's illiberal legislation during the previous decade, including the oppressive law 153/1999 that the SCC had struck down only months earlier. Moreover, by selecting a chief justice from outside of the Supreme Constitutional Court, Mubarak also broke a strong norm that had developed over the previous two decades. Although the president always retained the formal ability to appoint whomever he wished for the position of chief justice, constitutional law scholars, political activists, and justices themselves had come to
believe that the president would never assert this kind of control over the Court and that he would continue to abide by the informal norm of simply appointing the most senior justice on the SCC. Mubarak proved them wrong.

The challenge to SCC independence was compounded when Fathi Nagib immediately appointed five new justices to the Court. Although the procedure was again technically legal, it contravened a number of conventions that had developed over two decades of Court appointments. Almost all appointments to the SCC had been made at the junior level of commissioner counselor, with an eventual advancement to the level of justice. But four of Nagib's appointments came directly from the Court of Cassation and the fifth from the Cairo Court of Appeals at the senior level of justice. The appointments also expanded the number of sitting justices on the Court by 50 percent. It is unclear whether or not there was resistance from other SCC justices because the deliberations over new appointments are closed to the public.

On reaching the SCC, Nagib proposed that the Court be divided into three separate benches: one for petitions of constitutional review, one for interpretation of legislation, and one for questions of jurisdiction between courts. The prospect of a divided bench coupled with the regime's demonstrated willingness to pack the Court raised the possibility that progressive judges would be isolated on the benches concerned with jurisdictional disputes and legislative interpretation, leaving the far more important role of constitutional review to the new, more compliant appointees. Although Nagib's initial attempt to implement this reform was rebuffed by other SCC justices, credible sources believed that this issue remained unresolved, and renewed attempts to introduce a divided bench may still be in store.

Nagib justified the five new appointments by arguing that almost all SCC justices had come from the administrative courts and that their expertise needed to be balanced by other justices with backgrounds in criminal and civil law fields. When asked if it was a problem that many of the laws that the SCC would review were written by him, Nagib responded that he would simply step aside during deliberations of any law that he had a hand in writing. Nagib also explained that Mubarak's selection of a chief justice from outside the SCC did not set a troubling precedent for the future independence of the court. He reasoned that article 84 of the Constitution mandates that the chief justice will temporarily fill the post of President of the Republic in the event that the President is incapacitated and the Speaker of the People's Assembly is unavailable. For this reason, according to Nagib, the president should have the ability to select a chief justice that he trusts fully. If this person comes from outside the SCC, the president should be free to select him, provided the candidate meets the minimum requirements of age and legal training.

Nagib also contended that his appointment did not jeopardize the independence of the SCC because other justices effectively balance the powers of the chief justice, and the chief justice is unable to impose his will without the support of the majority of justices. However, this view was not shared by former members of the Court, who reported that justices can go against the will of the chief justice in theory, but strong informal norms
dictate otherwise. One former justice stated that the internal decision-making structure of the court is not democratic under the leadership of most chief justices and that even if a majority dares to vote against the will of the chief justice, he can simply refuse to sign the ruling. Because of this informal norm, former justices explain, it is crucial that the chief justice be an activist justice.

Nagib further defended his appointment by contending that there were "technical deficiencies" in SCC rulings that he was charged with remediying: "It was important for me to be selected to take care of technical deficiencies in the rulings of the court. These are not political deficiencies — there was simply a problem with the level of the court rulings." But, when pressed, Nagib was astonishingly candid about what he meant by the "technical deficiencies" of Supreme Constitutional Court rulings:

They [SCC justices] were issuing rulings that were bombs in order to win the support of the opposition parties. They were very pleased with the rulings, but the rulings were not in the interests of the country. This needed to be corrected. Now the President [Mubarak] can be assured that the Court will make rulings that are in the interest of the country and yet still maintain its independence.

The prominent role that the SCC played in political life through the 1980s and 1990s was recognized by everyone, but Nagib's blunt recognition of the political objectives motivating his appointment was truly remarkable.

Without the ability to mobilize opposition on the streets, the judicial support network responded to this fundamental attack in the same way that it had responded to presidential decree 168/1998, which had constrained SCC powers of judicial review in questions related to taxation. Newspapers printed articles criticizing Nagib's appointment, and NGOs such as the Center for the Independence for the Judiciary and Legal Profession issued statements of protest. Without the ability to press for change in the People's Assembly, activists again headed for the courts. Long-time activist Essam Islambuli attempted to challenge the constitutionality of the executive decree, charging that the appointment contravened constitutional guarantees of judicial independence, abandoned norms of internal recruitment and promotion, and resulted in a conflict of interest because Nagib himself had authored so many of the laws being contested before the SCC. Government lawyers claimed executive sovereignty and ironically argued that the petition for judicial review of Mubarak's appointment should be rejected because article 174 of the Constitution guarantees SCC independence. The administrative court rejected the government's contentions, agreed with the merits of the constitutional claim raised by Islambuli, and referred the case to the SCC. Once again, the Supreme Constitutional Court was put in the terribly awkward position of having to arbitrate between the regime and political activists at loggerheads over its own powers and autonomy from the executive. It was inconceivable that the SCC would rule in favor of Islambuli's challenge, not only because of the political sensitivity of the case, but also because Nagib had assumed control of the Court in the meantime. As in the 1998 attack on the Court, there was no countervailing force that could effectively check the imposition of Nagib as chief justice.
CONCLUSION

In an authoritarian polity, the potential for any given reform movement is perhaps best measured by the way that the regime responds to its new adversaries. If the regime does little or nothing at all and critics are left to organize free of interference, the opposition probably does not pose a viable threat to the regime’s control. But when the state takes far-reaching actions to control its opponents, it is a sure sign that the regime believes it faces a credible threat from the opposition or at least a potential threat that it would like to confront early on, rather than giving it the ability to gain momentum.

The Egyptian government’s aggressive response to both the Supreme Constitutional Court and the judicial support network is proof that constitutional litigation increasingly posed a credible threat to the regime’s tools for maintaining control. The SCC provided an effective new avenue for critics to challenge the state through one of its own institutions. Success in battling the government’s restrictive NGO law, as well as litigation forcing full judicial supervision of elections, illustrated how human rights groups and opposition parties had become increasingly adept at using the courts to challenge the government and defend their interests. Moreover, the SCC’s willingness to confront the government with the landmark rulings on NGOs and full judicial monitoring of elections proved once again the commitment of SCC justices to a political reform agenda. It also demonstrated their determination to protect the judicial support network that had initiated litigation (thereby enabling the court to expand its mandate) and come to the defense of the SCC when under attack.

However, the ultimate collapse of the human rights movement, the continued weakness of opposition parties, and the institutional assault on the SCC demonstrate how litigation by itself, without support from broad sectors of society, was insufficient to protect the SCC/civil society coalition from collapse. Just as the SCC and Egypt’s civil society coalition built a movement based on the converging interests of the Court, opposition parties, human rights organizations, and the legal profession, so too was the government able to incapacitate this cooperative effort by successively undermining each element of the movement through legal and extralegal tactics. Rather than follow through on its threats to neutralize the Supreme Constitutional Court outright in the mid-1990s, the government instead adopted the subtler strategy of simply moving against the SCC’s judicial support network. The Lawyers’ Syndicate was neutralized by 1996, human rights associations faced near total collapse by 1999 due to intimidation and restrictions on foreign funding, and opposition parties were progressively weakened throughout the period, despite SCC rulings on political rights. By undercutting each element of the support network, the government effectively killed two birds with one stone: undermining support groups impaired their ability to monitor the regime’s increasingly aggressive human rights violations, while at the same time disabling their capacity to raise litigation and mount an effective defense of the SCC when it came under attack. New life came to the opposition movement beginning in 2003, but popular mobilization proved to be too little and too late to restore Supreme Constitutional Court independence. Instead, SCC leadership was transferred from one regime insider to the next, from
Fathi Nagib to Mamduh Mara‘i to Maher ‘Abd al-Wahed. In the process, the SCC was transformed from the most promising avenue for political reform to a weapon in the hands of the regime to constrain the regular judiciary and sideline political opponents.

The 1973 Constitution of Pakistan places the Supreme Court of Pakistan above four provincial High Courts and “such other courts as may be established by law.” The Supreme Court has original jurisdiction by which it may issue declaratory judgments over any dispute between the federal and provincial governments or hear a petition if the matter is of public importance and no other adequate remedy exists. The Court has appellate jurisdiction from another court’s “judgment, decree, final order or sentence.” The Constitution also makes the Supreme Court’s legal rulings unquestionably final and binding on other courts and executive officials. Furthermore, the Supreme Court can rely on the cooperation of other officials, as the Constitution provides that “all executive and judicial authorities throughout [sic] Pakistan shall act in aid of the Supreme Court.”

The intent of Pakistan’s founders to have a judiciary protected from executive control is clear: “The judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day [of the country’s founding].” However, the President of Pakistan has considerable authority over the appointment of the Chief Justice and Justices. The Constitution provides that the Supreme Court is to be headed by the Chief Justice of Pakistan and otherwise consists of a number of judges that may be determined by the National Assembly or the President. The Chief Justice is appointed by the President, “and each of the other Judges shall be appointed by the President after consultation with the Chief Justice.” Before entering office, the Chief Justice “shall make an oath before the President, and any other Judge of the Supreme Court shall make [an oath] before the Chief Justice.” If the office of the Chief Justice is vacant or if the Chief Justice “is absent or is unable to perform the functions of his office due to any other cause,” the President can appoint the most senior of the remaining justices “to act as the Chief Justice of Pakistan.” The justices of the Pakistan Supreme Court do not have lifetime tenure; they only hold office until they reach sixty five years of age, resign, or are “removed from office in accordance with the Constitution.”

Historically, . . . the Pakistan Judiciary “was not known for its independence.” Since the country was founded, the Courts have refrained from questioning executive and legislative actions in any meaningful way, deferentially arguing that “the power of judicial review should be exercised with caution” and “judges must take care not to intrude upon the domain of the other branches of Government.”

Article 58(2)(b) [of the Constitution] . . . provides the President “with untrammeled discretionary powers to dissolve [The National Assembly] on a largely subjective judgment of [its] performance.” The Supreme Court’s judicial review of Article 58(2)(b) dissolutions provides insight into the willingness, or lack thereof, of the Court to check Executive power in the decades leading up to the Musharraf presidency. The image that emerges is of a judiciary that was neither decidedly independent nor thoroughly controlled by the Executive. Rather, the Court’s willingness to question the Executive ebbed and flowed as judges strayed between both statutory and precedent-based decisions and also judicial extensions of their own political preferences. With the first use of Article 58(2)(b), the Pakistan judiciary used the Constitution to narrowly define the Article 58(2)(b) power but not actually reversed the Executive action. Ultimately, judges vacillated between stringent and relaxed tests, and though each use of Article 58(2)(b) was legally challenged, it was “invariably judicially legitimized[,] . . . undermining judicial integrity, capacity, and consistency.”

†Note: The order of the material in this article has been rearranged.
Article 58(2)(b) was added to the Constitution in 1985 by General Zia-ul-Haq, the army chief who became President after a military coup in 1977. The operative clause allows the President to “dissolve the National Assembly in his discretion, where, in his opinion:” (a) the Prime Minister has lost the confidence of the National Assembly and no other member can fulfill the role, or (b) when “a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.” Since General Zia first used the Article to dissolve the National Assembly, “four elected governments were dissolved through it in the short span of eight years.” In 1997, the National Assembly led by Prime Minister Nawaz Sharif eliminated Article 58(2)(b) with the Thirteenth Amendment, but President Musharraf reinstated Article 58(2)(b) with the Legal Framework Order, 2002, and the Seventeenth Amendment.†

General Zia-ul-Haq first used Article 58(2)(b) on May 29, 1988 when he announced that he was dissolving Prime Minister Muhammad Khan Junejo’s National Assembly. Zia charged “that the National Assembly was not up to the task of adequately performing its role and had failed to safeguard the property, honor, and security of the people.” In its first opportunity to interpret Article 58(2)(b), the Supreme Court in Pakistan v. Muhammad Saifullah Khan (Haji Saifullah) (1989) based its judgment on detailed constitutional interpretation and severely limited the power, “exuding enthusiasm for the restoration of democracy, openly professing faith in a parliamentary system.”

Justice Nasim Hasan Shah, writing for the ten justice majority, held that the Article 58(2)(b) power could only be used when “the machinery of the Government has broken down completely, its authority [has] eroded and the government cannot be carried on in accordance with the provisions of the Constitution.” Justice Shah created a two-step process that the President had to follow: “first, the President had to form an objective opinion ... based on some material and factual grounds, which in turn were judicially reviewable.” “Secondly, if [the President’s] objective opinion was that the government qualified to be dissolved because it met the test, it was within the President’s discretion to dissolve it.” Nevertheless, despite finding that Zia’s justification for dissolving the National Assembly did not meet the stringent test and thus that the dissolution was illegal, the Court was not willing to restore the Assembly. Without any legal basis and “rather ambiguously, Justice Shah stated that ... national interest lay in the holding of elections, rather than in reviving the assemblies.” Though the Court was willing to make legal arguments against President Zia’s dissolution, the interpretation was never truly enforced and the executive action stood.

The second use of Article 58(2)(b) dissolution was performed by President Ghulam Ishaq Khan on August 6, 1990 to dissolve the National Assembly led by Prime Minister Benazir Bhutto.† Unlike General Zia’s weakly supported allegations, President Khan’s “order of dissolution [was] precise ... and supported by documentary evidence.” In Ahmed Tariq Rahim v. Pakistan (1992), a twelve judge majority of the Supreme Court upheld the dissolution order. “Without any preliminary justifications or analysis,” the Court opted for a broader test than the Haji

† [Art. 58(2)(b) was again removed by the Constitution (Eighteenth Amendment) Act, 2010, eff. April 19, 2010. http://www.pakistani.org/pakistan/constitution/part3.ch2_notes.html#44A.]

† [Benazir Bhutto was prime minister from 1988 to 1990 and 1993 to 1996. She spent 1998 to 2007 in exile Dubai, returning to Pakistan in October 2007 under an agreement with President Pervez Musharraf, who had taken power in a coup in 1999. (See pp. 218 & 234 below.) She was assassinated in December 2007. Her husband, Asif Zardari, widely accused of corruption during Bhutto’s terms, is today President (see below pp. 237, 240 & 243.).]
Saifullah precedent. Justice Shafiur Rahman, writing for the majority, “did not explain why he had departed from the previous [more stringent Haji Saifullah] test, which was based on precedent and consensus, and with which he was in full agreement.” He created a standard that allowed the use of Article 58(2)(b) “not just [as] a curative action, but also a preventative one.” Defining Article 52(2)(b) dissolution as “an extreme power, to be exercised where there is an actual or imminent breakdown of the constitutional machinery,” without elaborating upon what those situations would entail, the Justice left more discretion to “the President’s judgment call ... [based on] a more subjective evaluation of the state of affairs in the country.”

The Court in Tariq Rahim proved still weaker and less willing to assert any real power than it was in Haji Saifullah. Any justification for creating a weaker test that seriously expanded presidential power was “at worst nonexistent and at best highly unconvincing,” and the opinion “barely ... evaluated the substantive content and merit of the actual grounds for dissolution.” The result was that “it was already becoming clear that when the judiciary was entrusted with the task of mediating between confrontational political forces” like the President, Prime Minister, and the National Assembly, “it was unavoidable for the judiciary to come out looking tarnished.”

The third dissolution occurred when President Khan again used Article 58(2)(b) to dismiss the National Assembly led by Prime Minister Nawaz Sharif. Sharif, previously President Khan’s protege, started moving away from his mentor’s political ideology. President Khan responded by dissolving the National Assembly on April 18, 1993. The Supreme Court’s subsequent actions showed the justices’ own interest in speaking on the highly politicized issue. Invoking its original jurisdiction, the Court took the case before any lower courts. Chief Justice Nasim Hasan Shah also suggested that the Court had already planned its ruling by making public statements “to the effect that the Court would reach a result that would be appreciated by the public.”

In arguably “the single most irreconcilable judicial opinion in all the dissolution cases,” Muhammad Nawaz Sharif v. President of Pakistan (1993), Justice Rahman reverted back to the narrower Haji Saifullah test without even mentioning his own opinion in Tariq Rahim. Justice Rahman then “conducted [an] ... exhaustive analysis” of President Khan’s reasoning behind the dissolution and found it unpersuasive. Not only did the Court find the dissolution unconstitutional, it went a step further and restored the dismissed Assembly. Though the result was arguably good in a democratic sense, concurring opinions showed evidence that the inexplicable flip to a narrow test was due to members of the judiciary’s “deep political polarizations ... [and] subtle, though noticeable indications of [the Justices’] personal political preferences” for Nawaz Sharif.

The fourth and final dissolution case was a repeat performance. Benazir Bhutto was reelected to another term as Prime Minister in 1993 and developed a tense personal and political relationship with President Farooq Leghari. Serious tensions also arose between Bhutto and Chief Justice Sajjad Ali Shah, 92 Serious allegations against Prime Minister Nawaz Sharif received substantially less attention from the court, “while [Benazir] Bhutto got more than her fair share of reprimands for lesser crimes” when the Court upheld the dissolution of her National Assembly. In reverting to the narrower Haji Saifullah test, Justice Rahman decided that the President could not claim a deadlock and dismiss the Prime Minister without first obtaining a vote of no-confidence from the National Assembly. Bhutto overcame a vote of no-confidence before President Khan dissolved her government, but this “badge of legitimacy was apparently found to be insufficient for Benazir Bhutto in [Tariq Rahim].”

93 “At the height of their strained relationship, in a veiled attack, Benazir accused [Leghari] and the military intelligence of involvement in the murder of her brother ... who was gunned down in front of his house in mysterious circumstances on September 20, 1996.”
which “started with a disagreement over a judicial appointment and became progressively worse as the Chief Justice pronounced unfavorably against several Benazir [judicial] appointments.” Prime Minister Bhutto was ousted and arrested by military troops on November 4, 1996; President Leghari used Article 58(2)(b) to dissolve the National Assembly the next day.

Through her political statements and policies directed at judges, Bhutto “had antagonistically pushed the judiciary into a corner” and Chief Justice Shah “proved to be not above showing [his resentment] in his judgment.”

One day before hearing the case of the second Bhutto dissolution, however, the Court decided Mahmood Khan Achakzai v. Pakistan (1997), a challenge to the Eighth Amendment and Article 58(2)(b) itself. The Court unanimously upheld the Eighth Amendment, arguing that since previous legislatures had allowed the amendment to stand, there was clear “ratification by implication.” In Benazir Bhutto v. President of Pakistan (1998), the Supreme Court upheld the dissolution using a relaxed test somewhere between Haji Saifullah and Tariq Rahim that showed “benign acceptance of the presidential grounds for dissolution.”

The Article 58(2)(b) cases hardly proved the Pakistan judiciary to be an independent body that was willing to serve and to ensure a balance of powers through judgments based on law and logic. Instead, the decisions were characterized largely by the Justices’ personal political preferences and weak judicial review, hypothetically used but rarely enforced to overturn executive action. Though the Court initially placed strict limitations on the President’s use of Article 58(2)(b) in the Haji Saifullah case, this was largely an academic and theoretical exercise in judicial review and its logical result was never realized. Then, without any legal explanation, the Court in Tariq Rahim created a new, deferential interpretation of Article 58(2)(b) that greatly expanded presidential power. Furthermore, with no legal explanation, but with actions that reeked of political preference, the Court reverted to the strict Haji Saifullah standard to keep its favored Prime Minister, Nawaz Sharif, in office.

The Court’s approach to the Nawaz Sharif and second Benazir Bhutto dissolutions showed that the Court was willing to use thorough judicial review and even enforce its result to the benefit or detriment of its preferred candidate. However, the largely halfhearted judicial review would become characteristic of the Pakistan judiciary when analyzing executive action, and the Executive could naturally come to rely on this deference. When first tested by the new regime, the Supreme Court’s approach to Musharraf’s coup would provide an example both of this political deference and Musharraf’s successful actions to further tilt the Court in the Executive’s favor.

General Pervez Musharraf’s Military Rule

Chief of Army Staff General Pervez Musharraf commandeered executive power through a bloodless military coup on October 13, 1999, deposing Prime Minister Nawaz Sharif. Over the next few years as President, Musharraf retained his position as Chief of Army Staff while consolidating executive power in his person. The coup began on October 13, 1999, when, reacting to long-standing tensions between the two, Prime Minister Sharif fired Musharraf while the General was on an official visit to Sri Lanka.

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94 Bhutto had also “allegedly victimized the Chief Justice’s family, and there was widespread news coverage of a government-sponsored police raid on the house of the Chief Justice’s daughter, with the motive to involve his son-in-law in a corruption case.”

95 The court first made life difficult for Bhutto. Her petition was dismissed twice “on flimsy procedural grounds,” and “her request for an early hearing was declined as the Supreme Court first took up less urgent petitions ... and did not cut short its winter break in spite of the prevailing political crisis.” “The press and public opinion largely saw these as unnecessary procedural hurdles to frustrate Benazir.”
When Musharraf tried to fly back into Karachi on a Pakistan International Airlines flight, Prime Minister Sharif ordered that the plane, full of civilians and running out of fuel, not be allowed to land.

The army high command responded by marching troops into Islamabad and placing Prime Minister Sharif and his loyalists under house arrest. The army also cut telephone lines and the signal to the Pakistan State Television station, on which Mr. Sharif had been expected to announce General Musharraf’s “resignation.” Soldiers marched into the Karachi airport and forced the air traffic controllers to allow the plane to land. By the time Musharraf landed, the army “controlled the TV stations, administrative buildings, the power and communications infrastructure - and had the entire cabinet under guard.” When the army restored television broadcasts, “a terse announcement ran across the bottom of the screen stating that Prime Minister Nawaz Sharif had been dismissed.”

For the next nine years of his presidency, General Musharraf continued to solidify his position by increasing the power of the President while still retaining his position as Chief of Army Staff. On October 14, 1999, Musharraf issued the Proclamation of Emergency declaring himself the Chief Executive of Pakistan, and promulgated a Provisional Constitutional Order (PCO) to replace the 1973 constitution. The PCO also suspended the National Assembly and provincial assemblies, and prohibited the judiciary from acting against the Chief Executive. In January 2000, Musharraf ordered the judiciary to take a new oath of office by swearing to uphold the 1999 PCO. Six judges refused and were dismissed from their posts; they were replaced by judges who had sworn to uphold General Musharraf’s and subsequent executive actions. On May 12, 2000, the Supreme Court, composed of judges who had taken this new oath of office, heard the Zafar Ali Shah case and approved Musharraf’s military coup under a doctrine of state necessity.

The Supreme Court’s Early Deferential Holdings on Musharraf’s Rule

Iftikhar Chaudhry was appointed to the Supreme Court in February 2000 after serving ten years as a judge in the Balochistan High Court. As a junior justice, “Chaudhry did not betray any signs of breaking with the past traditions in order to chart an independent course for himself.” He voted with the majority in the Zafar Ali Shah case to validate Musharraf’s emergency rule and immunize him from actions taken in connection with the emergency, and in the Seventeenth Amendment case to uphold the amendment that increased Executive power. These actions left him “despised” by some of the legal community for making pro-Executive decisions, and “he was widely criticized for legitimizing martial law.” In these two cases, the Supreme Court held to the Judiciary’s tradition of validating army takeovers by affirming the destruction of civilian rule and securing for Musharraf both immense executive power and confidence in judicial support.


In the Zafar Ali Shah case, the petitioner challenged “the validity and legal effect of the army take-over” and the issuance of General Musharraf’s Proclamation of Emergency (Proclamation), the Provisional Constitutional Order No. 1 of 1999 (PCO), and the Oath of Office (Judges) Order, 2000 (Oath). The Proclamation and PCO, as a result of the Senate, National, and Provisional Assemblies led by Prime Minister Nawaz Sharif were dissolved and the Constitution was held in abeyance. The PCO ordered that the Court could not “call or permit to be called in question the Proclamation of Emergency ... or any Order made in pursuance thereof,” and that “no judgment ... whatsoever shall be made ... against the Chief Executive [Musharraf] or any
authority designated by him.” The Oath stated that a Supreme Court judge “shall not continue to hold that office if he ... does not make [the] Oath.” Judges were thus required to continue to “function and exercise their respective powers and jurisdiction [only] subject to the Proclamation and PCO as amended.” Only those justices, including Chaudhry, who had taken the oath and sworn to uphold Musharraf’s orders heard the Zafar Ali Shah case.

Petitioners argued that the Proclamation and the PCO were unconstitutional because they violated the constitutional principle that State power be exercised only “through the chosen representatives of the people ... based on Federalism, [a] Parliamentary form of Government, [and the] Independence of [the] Judiciary.” They further argued that the army takeover had “impaired the judicial trichotomy of powers by eliminating the Executive, suspending the Legislature, and making an attempt to curtail the independence of the Judiciary.” The 2000 Oath was also challenged on the ground that it restricted the Supreme Court’s power of judicial review.

First, the Court went through a long and detailed discussion of the Pakistani judiciary’s independence, claiming that the power of judicial review was inherent and could never be removed by any legislation. The Court held that even if the Martial Law Orders did attempt to take away jurisdiction, the Court still had “the power of judicial review to judge the validity of any act or action of the Armed Forces.” The Court also held that “the Superior Courts continue to function under the Constitution” and that “the mere fact that the Judges ... have taken a new oath under the Oath of Office (Judges) Order No.1 of 2000, does not in any manner derogate from this position.” But, while recognizing the President’s power, the Court held that judicial power still existed, “notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive.” Finally, the Court could not review the cases of judges who either had not taken the oath or were not given the oath because they were “past and closed transactions.”

Despite its claims of supreme and inherent judicial review, the Court mostly accepted Musharraf’s claims without substantial analysis. With resounding unanimity, the Supreme Court held that the army takeover and all three contested orders were legitimate; the army takeover was “extra-constitutional” but still valid under a doctrine of “State necessity.” The Court agreed with General Musharraf that the government had completely broken down and that there was no constitutional solution to the problem since Article 58(2) had been repealed. The Court held that Musharraf’s actions “as were required for the orderly running of the State and all acts, which tended to ... promote the good of the people, [were] also validated.” The Court also confirmed immense power for Musharraf, holding that “as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State,” he was now entitled to “perform all such acts and promulgate all legislative measures” that would achieve his declared objectives, which “tended to advance or promote the good of the people,” or that were required for “the ordinary orderly running of the state.”

The Court did provide some limits - Musharraf was required to hold elections for the National and Provisional Assemblies within ninety days and achieve his declared objectives within three years of the October 12, 1999 takeover. The Court also reserved for itself the power to “re-examine the continuation of the Proclamation of Emergency ... at any stage if the circumstances so warrant.” The Court concluded, “This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.”

It is not surprising that the Zafar Ali Shah
Court validated the army takeover - after all, the only judges who were allowed to hear this case were those who had sworn to uphold Musharraf’s rule. The paradox is the passion with which the Court both proclaims its own authority and supports Musharraf’s reasons for subordinating the entire country to himself and the army. This deference continues even in the face of a Provisional Constitution that makes a clear attempt to block the Judiciary’s power to act against the government. What emerges from the Zafar Ali Shah case is not a system that respects federalism, but rather a judiciary that touts its own independence while acknowledging that it is subordinate to the Executive’s claims of acting in the national interest. As Chief Justice Khan wrote, “the power of judicial review should be exercised with caution,” and “judges must take care not to intrude upon the domain of the other branches of Government.”

Moreover, even though the Court argued that the attempt to limit judicial review is futile and invalid, the fact that the attempt was made showed that General Musharraf expected such unquestioning deference from the Judiciary. For all its words, the Supreme Court demonstrated in this case that it would provide such deference, even lamenting the repeal of the president-centric Article 58(2)b, which could have avoided the situation entirely. The claims of inherent judicial power were a facade; justices who had pledged to support the army rule graciously validated it, and “whatever independence and commitment to constitutional ethos had been displayed by the Court in some of the early [Article 58(2)b] dissolution judgments seems like ancient, forgotten history.”

* * *

To mixed reactions, Musharraf declared himself President of Pakistan on June 20, 2001, removing Sharif-appointed President Rafiq Tarar. After September 11, 2001, Musharraf became an American ally in the War on Terror, not in the least because Pakistan shares its northern border with Afghanistan. The Bush administration looked to Musharraf for military and intelligence support in fighting Al-Qaeda and the Taliban in Pakistani tribal areas. Pakistan received economic and military aid from the United States, and President Bush called Musharraf a “leader of great courage and vision.”

Reassuring the country that he was “not power hungry,” and that he wanted to create “real democracy,” Musharraf declared on April 5, 2002 that he would allow a referendum to extend his term as president for five years, even after the new National Assembly elections in October. The promises of democracy fell through, however, on August 21, 2002, when Musharraf announced twenty-nine constitutional amendments that expanded the power of the president. Among the changes was the Seventeenth Amendment [passed on December 31, 2003] . . .

B. The Seventeenth Amendment Case (2005)

The Seventeenth Amendment . . . validated the President to Hold Another Office Act, 2004 (Office Act), [which allowed] . . . General Musharraf to hold both the Chief of Army Staff and President of Pakistan offices; [the Amendment thereby] exempted him from the Constitution’s express prohibition of the dual role. It also validated the Proclamation of Emergency and all orders following it and immunized Musharraf from any litigation resulting from those orders. Additionally, the Seventeenth Amendment validated the 2002 Legal Framework Order, which added the infamous Article 58(2)(b) dissolution powers back into the Constitution, and set a sixty-five year retirement age for Supreme Court justices.

Petitioners challenged the validity of the Seventeenth Amendment, the 2002 LFO, the Office Act (2004) and other supplemental legislations that would give effect to the Amendment’s provisions. In analyzing the claims, the Supreme Court limited the scope of its judicial review, arguing that a constitutional
amendment “can be challenged only on one ground, viz., it has been enacted in a manner not stipulated by the Constitution itself.” The Court held that because Parliament was properly constituted and General Musharraf’s presidency had been approved at the time the Amendment was made, no procedural objection could be sustained. A substantive objection was improper for the Court to hear, because “[a] constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.” Even if the amendment violates “certain salient features of the Constitution, no constitutional amendment could be struck down by the superior judiciary” on those grounds.

The Court concluded with a sentiment that its hands were tied, stating that it “must make every attempt to reconcile the statute to the Constitution and only when it is impossible to do so, must it strike down the law.” Thus, the Court refused to overturn the Seventeenth Amendment and its supporting orders, stating that if they were struck down, “this entire constitutional edifice will collapse,” because all major officers of the country “will cease to hold office at once.” “In short,” said the Court, it was “not the function of the judiciary” to strike down a law where such an action “would invite chaos and create a constitutional crisis. This Court must allow the government to function and the institutions to gain strength and mature with time.”

C. The Court Before Chief Justice Chaudhry

The Zafar Ali Shah case and the Seventeenth Amendment present a paradoxical picture of the Pakistani judiciary. The Court asserted its inherent power of judicial review in Zafar Ali Shah but then carved out a very narrow scope in which to operate in the Seventeenth Amendment. It claimed that it was prevented from acting by the principles of federalism, but continued to justify extra-constitutional orders that allowed the President to take power and act without hindrance from the legislature or judiciary. Furthermore, though the Court limited its judicial review, claiming that it was not the Court’s place to speak on a political question, it certainly had no qualms about using strong language to empower the President. In both instances, the Court uses such strong language to legitimize and support Musharraf’s rule so as to call into question its purported narrow role, even going so far in the Zafar Ali Shah case as to lament the repeal of Article 58(2)(b) that would have consolidated even more power in Musharraf’s person.

Thus, the state of the judiciary before Chaudhry became Chief Justice [through his appointment by Musharraf on May 7, 2005] was one where it at least acquiesced to and at most staunchly supported expansive executive power, explaining away difficulties with claims of separation of powers and state necessity. Extreme deference was given to executive power, leaving the stage open for the subjugation of the Pakistani government to General Musharraf’s military rule. Neither case is particularly telling of then Justice Chaudhry’s judicial viewpoints, though he voted with the majority and was criticized for his pro-government stance. He did take the Oath and presided as a justice in both the Zafar Ali Shah and the Seventeenth Amendment cases (Justice Irshad Hasan Khan and Justice Nazim Hussain Siddiqui presided as Chief Justice, respectively). Regardless of what prompted Chaudhry to take the Oath and vote with the Zafar Ali Shah majority to validate the takeover, he would soon make it clear that he was not willing to give Musharraf free reign over the country.
III. JUDICIALIZATION OF GOVERNANCE (2005-2007)

How did proregime judges expand judicial power leading to a confrontation with the regime? I argue that while the Pakistani Supreme Court has traditionally legitimized military regimes, economic liberalization under Musharraf opened the space for public interest litigation in urban development, deregulation, and privatization. In this context, a supportive media encouraged the strategic judges, who were already influenced by expansive regional jurisprudence, to employ judicial power toward political liberalization. The backlash against Chaudhry was a consequence of this expanding virtuous cycle of judicial power and independence.

Public Interest Litigation and Judicial Functions

When Chaudhry became the chief justice in 2005, he started an ambitious program of public interest litigation. The practice involving the Court’s original jurisdiction, *suo motu* powers, and relaxing standing in matters of public interest were not new in Pakistan (Menski, Alam, and Raza, 2000). But Chaudhry expanded the exercise by establishing the Human Rights Cell at the Supreme Court. A careful examination of the chronological sequence of public interest litigation illustrates how the Court deviated from the judicial functions expected in authoritarian contexts.

Construction Safety and Urban Planning

Economic growth under Musharraf’s rule had increased the demand for high-rise office space and urban housing, but the enforcement of safety regulations and urban planning had not improved. In October 2005, an earthquake hit Pakistan that claimed the lives of seventy-five thousand people. In this context, the Supreme Court heard a petition from the residents of a collapsed high-rise residential tower in Islamabad against the Capital Development Authority (CDA) and the construction companies. The petitioners argued that the CDA had failed to protect the life, liberty, and property of the residents by ignoring repeated complaints about material defects in the tower. The Supreme Court ordered the CDA to provide accommodation to the residents and to find who was responsible for the defective construction (*Saad Mazhar v. Capital Development Authority* 2005). Two months later, the Court converted the petition into a large-scale judicial investigation of the earthquake damage, ordering provincial officials to provide a report on the government schools, colleges, and universities that had collapsed, and what action had been taken against the officials responsible for the substandard construction.

The quake provided an opportunity for the Supreme Court to aggressively intervene in construction safety in general. In April 2006, the Supreme Court took a case on appeal from the Lahore High Court, which had refused to stop the Lahore Development Authority (LDA) from allowing construction of high-rise buildings without adequate safety standards. The Supreme Court’s investigation revealed that not a single structural engineer was working with the LDA to ensure structural stability. In May 2007 (while the chief justice was suspended), a two-member bench would stay the construction of all buildings over three stories, affecting more than one thousand structures in Lahore.

As the Court was expanding its role in construction safety, it also moved toward the enforcement of urban planning regulations. The Court accepted a petition against the CDA to prevent the lease of a public park in Islamabad for the construction of a miniature golf course. In February 2006, the Court held that the lease agreement violated the fundamental right of access to public spaces established in Article 26.
of the Constitution (Moulvi Iqbal Haider v. Capital Development Authority 2006). Relying on the Islamabad precedent, the Court also took *suo motu* action in a series of cases involving commercial projects in public spaces in Karachi and Lahore.

The construction safety and urban planning cases were instances of administrative control of low-level corruption. But the jurisprudence in those cases was also an unprecedented expansion of the Court’s fundamental rights jurisdiction. The space for judicial intervention in construction safety and urban planning was opened by both economic development and the earthquake. When the Court froze projects that civil society groups were unable to stop, the media started taking notice.

**Deregulation of Price Controls**

After the construction safety and urban planning cases, the Chaudhry Court intervened in oil and sugar price controls. Both cases involved market shocks in the context of deregulation and high-level corruption. In the case of oil, the international price shock of 2004-2005 provided the context. The Ministry of Petroleum had delegated the power to set the price of petroleum to a consortium of oil companies called the Oil Companies Advisory Committee (OCAC), with no parliamentary oversight. When the international oil price rose to US $ 70 per barrel in the beginning of August 2005, the OCAC increased the petroleum price, but when the oil price dropped to US $ 62 per barrel at the end of the month, the OCAC did not correspondingly decrease the petroleum price (Daily Times 2005). In May 2006, a three-member bench of the Supreme Court, headed by Chaudhry, heard the petitions challenging the oil hike, and asked the National Accountability Bureau (NAB) to investigate (Goraya 2006). After the initial hearings, this bench sent the case to a larger bench to investigate whether the OCAC collaborated with corrupt officials from the Ministry of Petroleum to fix an unreasonable petroleum price (Business Recorder 2006).

In the case of sugar, the country faced a national crisis in 2005-2006. The price of sugar more than doubled in less than a year, from Rs. 21 (US 35 [cents]) per kilogram (2.2 lbs.) in February 2005 to Rs. 45 (US 75 [cents]) per kilogram in January 2006. A Supreme Court bench headed by Chaudhry took *suo motu* notice of the price hike in 2006 and asked the NAB to investigate. Their report implicated eight current ministers (as well as Nawaz Sharif, the exiled prime minister, and Asif Zardari, Benazir Bhutto’s husband) and claimed that the government’s “soft policy” was responsible for the sugar crisis (Business Recorder 2007). Even though the oil and sugar cases were not decided before March 2007, when Chaudhry was suspended, cooperation from the NAB probably made the Court confident about compliance, and the media encouraged the Court to do more.

Instead of helping the regime to deflect blame for the unpopular deregulation measures, the price controls cases exposed the regime and targeted high-level corruption. The space for judicial intervention in price controls, welcomed and encouraged by the media, was opened by the discontents of economic liberalization.

**Privatization of Public Enterprises**

After price controls, the public interest litigation reached Shaukat Aziz, Musharraf’s handpicked prime minister. Aziz was a Citibank vice president in New York before Musharraf appointed him finance minister in 2000 to spearhead economic liberalization. Aziz became prime minister in 2004, but retained the position of finance minister and chairman of the Privatization Commission to oversee the sale of state enterprises such as Pakistan Telecommunication Corporation Ltd. (PTCL), Pakistan State Oil (PSO), and Pakistan Steel Mills (PSM). PTCL was privatized in 2005 with the help of Citibank, amid labor union protests. When the
government refused the union’s demands, the workers threatened to bomb the telecom facilities, and the army had to secure the infrastructure.

In this political context, PSM was privatized in April 2006, also amid labor union protests. The opposition parties and labor unions raised charges of corruption against the Privatization Commission. They argued that the enterprise was sold for a price lower than its land value, not to mention the inventory and the equipment. On a petition filed by the union in May 2006, the Supreme Court heard the case. The union had relied on a famous Indian case, *S. P. Gupta v. Union of India* (1981), to assert standing. In an exceptionally bold decision in August 2006, the Court annulled the Share Purchase Agreement and the Letter of Acceptance of the deal, effectively reversing the sale (*Watan Party v. Federation of Pakistan* 2006). After the PSM case, the Chaudhry Court also went after accepted positions against the privatization of PSO and PTCL.

The PSM case is considered the principal factor behind the regime’s confrontation with the Court. But the case needs to be seen as part of a pattern of expansionary rulings of construction safety, urban planning, and price controls. Furthermore, instead of enforcing contracts and supporting foreign direct investment, the Supreme Court was expanding power by reviewing contracts and canceling them based on corruption concerns. Once again, the space for judicial intervention had been opened by the regime’s economic liberalization agenda.

**Missing Persons (Illegal Detentions)**

The public interest litigation response to corruption, used so far to combat the effects of economic liberalization, was now applied to questions of basic legal rights. During the course of the US “war on terror,” the Musharraf regime had started the practice of secretly detaining people. However, human rights groups argued that the missing persons were mostly political adversaries from Baluchistan, as opposed to members of the Taliban or al-Qaeda. The regime had been involved in a conflict with the Bugti tribe in Baluchistan over provincial autonomy and natural gas revenues. Musharraf saw the “war on terror” tactics useful in this context as well.

Some estimate that as many as 6,000 persons had been missing, whereas the Human Rights Commission of Pakistan had documented only 400 persons. Being a Baluchistan native, Chaudhry took particular notice of the disappearances. In November 2006, the Supreme Court took the case of 41 missing persons and demanded the Ministry of Interior to produce them (Human Rights Commission of Pakistan 2006). At first the regime denied any knowledge, but one month later officials informed the Supreme Court that 20 persons had been found. The Supreme Court ordered the authorities to trace all the other disappearances (Asian Center for Human Rights 2007). In March 2007, the Human Rights Commission of Pakistan supplied another list of 148 missing persons to the Court, alleging that the intelligence agencies were detaining these people as well. A bench headed by Chaudhry took the petition and sent notices to provincial and federal governments. The next day, Chaudhry was suspended.

Pakistan’s intelligence agencies are the most important institution within the military, serving as the backbone of the army’s domestic and regional politics. By expanding the reach of judicial power to intelligence agencies, the Chaudhry Court had gone too far. Instead of the social control over dissidents and political opponents, the Court was expanding its power by taking up the popular cause of missing persons. The media was enthusiastic about this role and encouraged the Court to move toward further political liberalization.
**Presidential Election**

The most significant threat to the Musharraf regime came not from what the Court had done, but what it could potentially do in the October 2007 presidential election. As the Supreme Court was continuously expanding its reach, the media and civil society were demanding that the Court address the constitutional question of Musharraf’s eligibility to run for election while still in military service. Musharraf had obtained a one-time exception for dual office in 2002 when he “amended” the Constitution, and the Supreme Court upheld the amendment. But with the Supreme Court taking an activist posture, Musharraf could no longer trust the bench to perform another constitutional maneuver to legitimize his eligibility for presidential election. The Supreme Court had shown the ability to confront vital regime interests and policies and to challenge higher regime officials in each successive public interest case. There were reports that Chaudhry would be willing to move forward with the media’s demands in deciding Musharraf’s eligibility as well. It was in this context that Musharraf suspended Chaudhry on March 9, 2007.

**The Determinants of Judicial Power**

I have argued that the Chaudhry Court intervened in economic policy through public interest litigation and changed the Court’s political function from regime legitimization to political liberalization. The factors that triggered the demand for this change included neoliberal economic and illiberal political directions of the Musharraf regime. The factors that supplied the support for this change included Chaudhry’s strategic leadership and regional jurisprudential developments. In the process, explained below, the media played the role of channeling public sentiment to the Court.

![FIGURE 1. Pakistan’s GDP Growth Rate (annual %)](http://data.worldbank.org/)

Economic Liberalization and Its Discontents--Creating Demand

Pakistan underwent rapid economic growth under Musharraf, particularly after September 11, 2001, based on foreign direct investment (FDI) and US military and economic aid (A. Shah 2006) (see Figure 1). In this period, Musharraf’s finance minister and later prime minister, Shaukat Aziz, was aggressively implementing economic liberalization policies (Husain 2003; Musharraf 2006, 181-96; Burki 2007). However, economic growth and economic policies were encouraging corruption and creating new governance challenges: the scale of unsafe high-rise construction was proliferating dangerous buildings; the scramble for prime real estate was bringing an increase in violations of zoning regulations; the deregulation of price controls was pressuring oil and sugar prices to skyrocket; and the privatization of state enterprises was generating scandals such as those around PSO, PTCL, and PSM.

Public law scholars suggest that economic liberalization expands judicial power since independent courts are useful for targeting low-level corruption, enforcing contracts, attracting investors, and accepting blame for unpopular economic measures. The regime tolerates independent courts because of the judiciary’s economic function of fostering growth. In Pakistan, while courts targeted low-level corruption, they also canceled contracts, scrutinized investors, and exposed the regime for unpopular economic outcomes. The regime tolerated the Chaudhry Court because of the judiciary’s political function of regime legitimization. But once empowered, the Court began to dismantle the regime’s social control and became unreliable for regime legitimization.

Supportive Media

Since the Pakistani Supreme Court, as an institution, has almost always performed the function of legitimating political authority, the public image of the judiciary has rarely been positive. However, when Chaudhry started expanding public interest litigation, public and media distrust of the judiciary started decreasing. Editorials in major newspapers began to hail the Supreme Court, in general, and Chief Justice Chaudhry, in particular (S. Shah 2006). As noted in an op-ed by Ayaz Amir, a prominent journalist,

There is much with which the judiciary can be charged and no one is saying it is a perfect institution. But the trend under the present chief justice to take note, often suo motu, of issues affecting the public interest, issues that seldom claimed the attention of the Supreme Court before, is setting a powerful new precedent. . . . It shows that provided the will is there derelict and largely moribund articles of the Constitution can be infused with new life and made relevant to the people. It also demonstrates that at its best the judiciary can indeed become a guardian of the people’s interests and, who knows, in time even of their liberties. . . . There is, however, a conundrum at play in this suo motu activism in that it sheds a bad light on other institutions, including the lower judiciary. If other institutions were functioning well, if the rule of law was being enforced, if public officials were doing their job, there would be no need for matters such as those relating to park spaces and the cutting of trees to come before the Supreme Court. . . . Someone has to pick up the slack. It goes to the credit of Chief Justice Iftikhar Mohammad Chaudhry that he is doing exactly this and not hiding behind the excuse, that would have been readily available to anyone less energetic, that the Supreme Court was meant for “higher” things (such as, I suppose, the doctrine of necessity).

Chaudhry showed a keen interest in the Court’s media image. The Supreme Court Report in 2006 included a section called
“Supreme Court and the Media,” consisting of eighteen press reports on the achievements of the Chaudhry Court. Lawyers critical of Chaudhry called his tactics a “media circus” and argued that Chaudhry was using *suo motu* action for self-aggrandizement.

Since Chaudhry had been a regime loyalist, his sensitivity to public and media image can provide an explanation for the transformation of the Court’s political function. As the Chaudhry Court delivered on public interest cases, the media embraced it as the people’s court and encouraged it to address pressing constitutional and political issues as well. Amir wrote,

The Supreme Court, mercifully, has stepped in [to the PSM privatization scandal], doing what the government should have done in the first place: scrutinising the deal thoroughly. . . . A strange situation we are witnessing: the Supreme Court under Chief Justice Iftikhar Mohammad Chaudhry slowly picking its way through the ruins and retrieving some of its lost honour and credibility. People have lost faith in other institutions. They have lost faith in leadership. The very desperation this situation creates is making people look to the Supreme Court as the last station on the line, the only forum capable of providing relief. . . . We are heading into uncertain times. All sorts of questions are likely to come to the fore in the next year and a half: the president’s uniform, the question of his re-election, from fresh assemblies or the present ones, etc. . . . Who then will be the nation’s compass to guide it through the raging storms which lie ahead? I think when that time comes all eyes will be on the Supreme Court. Let us pray it is able to live up to the heavy burden of expectations placed on its shoulders.

**Strategic Judges--Offering Supply**

The presence of strategic judicial leadership often becomes a significant factor in judicial power. As Martin Shapiro states, no effective judicial protection of rights may occur unless one or more judges combine significant leadership in moving their fellows in the right direction with a sufficient sense of political strategy. . . . A sense of when and where and how more or less incrementally a particular court can move to restrain a regime without triggering damaging or devastating reprisal is even essential in liberal democracies and all the more so in authoritarian states.

In Pakistan, Chaudhry’s leadership was perhaps a necessary condition for the emergence of an expansive judicial role in public interest litigation. A chief justice has substantial institutional powers in Pakistan, but it was only Chaudhry who was able to utilize these powers. In addition, Chaudhry’s sensitivity to the media was responsible for extending judicial power from public interest to political questions. While his expansion of judicial power would trigger a reprisal from the regime, his sense of political strategy would permit him to confront the regime even after he was taken off the bench.

**Regional Influence**

The Supreme Court may also have been inspired by its Indian counterpart, which has a long-standing tradition of public interest litigation. The Pakistani petitioners were pushing the scope of jurisprudence by using Indian case law in public interest litigation. The use of Indian precedents, for example, *S. P. Gupta* in the PSM case, points toward this development. During this period, the two governments were also taking a series of confidence-building measures in an effort to resolve tensions. Exchange programs from various levels of government, including the judiciary, were under way. In 2005, delegations of high court judges from Pakistan visited India and met with Chief Justice Y. K. Sabharwal of the Indian Supreme Court. These
exchange programs may have fostered an epistemic community and provided an impetus for or affirmation of public interest litigation in Pakistan. In addition, the role of the Indian Supreme Court in urban issues was reported in the Pakistani media. On the issue of public interest litigation, a columnist stated in the cultural context of Pakistan’s obsession with comparison to India, “What India can do, perhaps Pakistan now, with enlightenment and moderation to the fore, can do even better.” Criticizing the Supreme Court’s backlog of cases, another commentator stated, “India, with seven times the population, no less criminal or litigious than ours, has only 26 justices but the cases on its roster are fewer.”

**Regime Compliance**

An important factor at play in expanding judicial power is regime compliance. To be sure, not every case was decided before Chaudhry moved to the next. But the regime’s cooperation in preliminary measures gave the Court a signal of compliance. But why did the regime comply? The core function of courts in Pakistan during authoritarian periods has been to provide legal legitimacy to the reigning regime. But in the process, courts carve out some judicial power as well. The regime knows that a court that validates everything, legitimizes nothing. So the regime complies with court orders to enhance judicial credibility. In Musharraf’s case, judicial credibility was particularly valuable in legitimizing his forthcoming presidential reelection. Furthermore, expansionary rulings do not threaten a military regime in the same way as they threaten a democratic regime since ultimate power depends not on some constitutional balance but on the armed forces. So the Musharraf regime could comply with the judicial decisions without fearing a judicial coup. Moreover, Musharraf did not see judicial activism as a threat until the prime minister was implicated in the PSM case, and the intelligence directors involved in illegal detentions convinced him that Chaudhry was threatening core regime interests. Even so, Musharraf was confident that he could simply force the chief justice to resign.

**The Virtuous Cycle of Judicial Power**

How does a Court that was hand picked by Musharraf and ruled loyally in his favor in every extraconstitutional measure until 2005 become a threat to the regime in two years? We need to look at the sequence of Supreme Court cases and who was implicated in them to understand judicial empowerment. The construction safety and urban planning cases starting in late 2005 implicated city or provincial officials. The price control cases in early 2006 implicated federal ministers. The privatization cases in mid-2006 implicated the prime minister. The illegal detention cases in late 2006 implicated the army and intelligence agencies. Finally, the presidential election issue that emerged in early 2007 implicated the president. With each step, the Chaudhry Court was acting against a government official more powerful than the official in the previous step, moving sequentially from city officials to federal ministers to the prime minister to the Pakistan army, and ultimately to Musharraf. The Chaudhry Court was becoming confident because of encouragement from the media and society.

A. Pakistan Steel Mills Case (2006)

The state-owned Pakistan Steel Mills Corporation (PSMC) was the biggest producer of steel in Pakistan. Though the company was initially financially weak, a restructuring of its operations greatly increased its financial standing. The undervalued sale was a “pet project” of Prime Minister Shaukat Aziz, who headed the Cabinet Committee on Privatization. The eventual purchaser, Arif Habib, was allegedly an associate or friend of the Prime Minister. From the beginning, Chief Justice Chaudhry’s decision in Pakistan Steel Mills showed his willingness to broaden the statutory interpretation and the scope of judicial review to encompass as much of the contested government action as possible. Chief Justice Chaudhry accepted the petition using suo motu jurisdiction, a part of the Court’s original jurisdiction which allows the Court to accept a case “on the application of any aggrieved party” if the matter is of public importance and no other adequate remedy exists. Chaudhry used case precedent to broaden the scope of both of these elements and argued that “petitioner cannot be refused relief and penalized for not throwing himself again (by way of revision or review [as other petitions had been unsuccessful or denied]) on [the] mercy of authorities who are responsible for such excesses.”

The government, through Aziz’s Cabinet Committee on Privatization, had decided to privatize PSMC and had begun to value the shares, publicize information, and solicit bids for PSMC. A consortium of three companies, Magnitogorsk Iron & Steel Works, Al-Tuwariqi Group, and Arif Habib Group, bought 75% of the stock for Rs 21.68 billion (approximately $ 362 million) at Rs 16.80 per share. The consortium also achieved management control of PSMC. Petitioner, the Pakistan Steel Peoples Workers Union, brought suit against the Government of Pakistan. The main contentions were against the transparency and propriety of the sale process, namely (a) that the privatization package was improperly amended once a final sale had been approved by the Council of Common Interest; (b) that only the three individual buyers and not the consortium had been approved as buyers; and (c) that PSMC had been grossly undervalued as an incentive to the consortium.

Chaudhry continued his expansive interpretation of issues throughout the case. He conceded that “in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter” and that “while exercising power of judicial review [the Court] may not express opinions on ... issues requiring technical expertise and specialized knowledge.” But Chaudhry reframed the issue so that it was no longer a political question, arguing “in the instant case, however, we are seized not with a [technical] issue as such but with the legality, reasonableness and transparency of the process of privatization... . These are well established basis for [the] exercise of judicial review.”

The Court addressed both the process of valuing the PSMC and the purchase and sale itself in order to determine the validity and transparency of the sale. At the onset, Chaudhry recognized that, according to the Privatization Ordinance of 2000, which allowed the sale, “it should have been the endeavor of on the part of the Privatization Commission to ... fetch [the] highest price” possible for the company. Instead, the valuation did not include the land upon which PSMC rested and its assets were grossly understated. Though the Privatization
Commission recommended a price of Rs. 17.43 per share, the CCOP decided on a price of Rs. 16.18 per share. Furthermore, the CCOP approved “huge” incentives for the final buyer that were not included in the initial public offering, including payment of loans and acceptance of legal liability for workers’ claims by the Government of Pakistan.

The Court also held that the approval of the Consortium was improper; procedural irregularities hinted at a result-driven approval process skewed in favor of Arif Habib. The CCOP and Privatization Commission knew that Arif Habib was involved in nine civil and criminal cases; this questioned his corporate credentials and should have disqualified him, but the issue was not discussed by the groups. Last, in the final contract, the eventual purchasers were different from the initial bidderp - while the consortium consisted of Magnitogorsk Iron & Steel Works, Al-Tuwairqi Group, and Arif Habib Group, the final contract was between the Government of Pakistan, Arif Habib Securities Limited, and Arif Habib himself.

Summarizing the valuation and approval procedures, Chaudhry stated that the process “reflected indecent haste” by the Privatization Commission and the CCOP, and that “this unexplained haste casts reasonable doubt on the transparency of the whole exercise.” The entire process of privatization, from the initial proposal by the Pakistani Government to the final valuation report to the eventual sale, occurred within two days. Chaudhry also stated that CCOP’s decision “betrays total disregard of the rules and the relevant material” and thus “fails the test of reasonableness laid down ... for the exercise of the power of judicial review.” He also reflected a sense of duty, stating that when “faced with such a situation a Constitutional Court would be failing in its Constitutional duty if it does not interfere to rectify the wrong more so when valuable assets of the nation are at stake.” The Court’s final holding invalidated the sale and purchase of the Pakistan Steel Mills Corporation.

This was an embarrassing result for General Musharraf and Prime Minister Aziz. Musharraf’s reaction to this ruling can be seen in the Proclamation of Emergency promulgated on November 3, 2007. The Proclamation claims that emergency rule is justified because of the “increasing interference by some members of the judiciary in government policy, adversely affecting economic growth” and the “weaken[ing of] the writ of the government [by] ... constant interference in executive functions, including ... economic policy, price controls, [and] downsizing of corporations.” Chief Justice Chaudhry later related that the Pakistan Steel Mills decision brought the ire of General Musharraf and Prime Minister Shaukat Aziz upon him; Aziz told Chaudhry that “Musharraf was “very angry’ with him.” But Chaudhry would not budge: “I told the prime minister in very categorical terms that I had no business to appease anybody and had decided the case in accordance with the Constitution and the law.”

B. Terrorism Cases

In 2001, as an ally in the US-led War on Terror, Pakistan began to arrest and detain citizens and foreign nationals who were suspected to be linked to terrorist activities. Political opponents of the Pakistani government, such as activists or minority ethnic groups demanding more rights from the federal government, “were [especially targeted as] victims of enforced disappearance.” They were “arbitrarily detained ... , denied access to lawyers, ... and held in undeclared places of detention run by Pakistan’s intelligence agencies, with the government concealing their fate or whereabouts.” When asked about enforced disappearances, General Musharraf responded, “I don’t want even to reply to that, it is nonsense, I don’t believe it, I don’t trust it.”
In the face of Musharraf’s denials, Chaudhry’s willingness to stretch the traditional Pakistani judicial role continued when he led the charge to take General Musharraf and the military to task on the secret terrorism detentions. In December 2005, the Supreme Court took judicial notice of a newspaper article about the “enforced disappearance” of an activist and began to challenge the Pakistani government about his and other enforced disappearances.

* * *

Musharraf recognized that Chaudhry’s new activism might threaten his chances of running for President, since Musharraf was still holding the office of Chief of Army Staff and his re-election would require a constitutional amendment ratified by the Supreme Court. On March 9, 2007, Musharraf attempted to dismiss Chief Justice Chaudhry for “misuse of office.” The charges against Chaudhry included nepotism, demanding the use of official transportation, and writing orders that conflicted with what he previously stated in open court. Chaudhry was summoned to the Army House, General Musharraf’s official residence, and questioned about his actions in the presence of Prime Minister Shaukat Aziz and other uniformed officials. However, Chief Justice Chaudhry challenged the charges against him and refused to resign. Thereafter, on March 13, 2007, the Supreme Court held a hearing to determine the validity of the charges against Chaudhry. On July 20, 2007, the Supreme Court threw out the charges against Chaudhry and reinstated him, declaring that Musharraf’s order restraining Chaudhry from holding the office of Chief Justice was “illegal.”

In addition to the resounding verdict reinstating Chaudhry, another victory occurred—a powerful boost to the confidence of the Pakistani legal community as a whole. The March 9, 2007 dialogue between Chaudhry, Musharraf, and Prime Minister Shaukat Aziz was broadcast on national television, “meant to show the nation that even the Chief Justice was not above the law.” Musharraf’s ploy backfired and the attempt to fire Chief Justice Chaudhry “unleashed outrage against the military.” Thousands of lawyers in black suits and ordinary Pakistani citizens took to the streets in protest; commentators called Chaudhry the “judge who said no.”

Musharraf’s attempt to discredit Chaudhry had exactly the opposite effect, and the increase in support for Chaudhry corresponded with the unprecedented “rate of evaporation of support for Musharraf.” . . . With renewed vigor after his reinstatement, he continued to hear petitions on disappeared persons and led the Judiciary’s challenge to Musharraf’s election to the Presidency while the General still held the position of Chief of Army Staff.

* * *

Even after Chaudhry was temporarily suspended in March 2007, the other Supreme Court justices continued to hear missing persons cases. Chaudhry rejoined his colleagues in the cause when reinstated on July 20, 2007. The Supreme Court continued to take suo motu notice of disappearances and held regular hearings to determine the whereabouts of the detainees; between October 2006 and November 2007, the Supreme Court traced at least 186 disappeared people.

Supreme Court justices claimed that no government official would escape scrutiny. Chief Justice Chaudhry, in his characteristic style of direct, demanding questioning, told the director-general of the Federal Investigation Agency, “[the prisoner] must be produced today or you will be sent to the lock-up.” The Court also began issuing orders to government officials to appear before the Court and to locate the disappeared people. Each missing person’s case brought before the court was individually researched to determine
the person’s whereabouts. Chaudhry made it clear, however, that his goal was not to release guilty people, but to ensure that each detainee was ensured his rights and that the families of the missing persons could know the missing person’s location. “We are not asking for immediate release of the disappeared, but want legal proceedings according to the law by regularizing the arrest of people who had later gone missing,” said Chaudhry.

The last case on enforced disappearances was heard on November 1, 2007, two days before Musharraf declared a state of emergency on November 3, 2007. Analysts comment that “the timing of the proclamation of emergency and of the dismissal of judges of the higher judiciary coincided with the increasingly insistent demands of the Supreme Court to call high officials of the intelligence agencies to testify.” Similar to the results of Pakistan Steel Mills Case, the animosity between Musharraf and Chaudhry resulting from the prosecutions was again apparent from the Proclamation of Emergency: “Some members of the judiciary [are] working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the government.”
Toward the Political Function: The Return of Bhutto and Sharif

After the Supreme Court dismissed the reference against Chaudhry in July 2007, the regime could no longer expect the Court to serve the political function of providing legitimacy. Musharraf was seeking a second term in the October 2007 presidential election, and he turned to Bhutto in desperation. Seven days after the restoration of Chaudhry, on July 27, Musharraf met with Bhutto in Abu Dhabi in the United Arab Emirates to negotiate her return to Pakistan under a power-sharing deal. Musharraf offered to drop the charges against her (and her party members) under a so-called National Reconciliation Ordinance (NRO). He also agreed to amend the Constitution to allow her to contest for a third term as prime minister. In return, Musharraf demanded that Bhutto work with him as the president for five more years.

Since the lawyers were mobilizing to oust Musharraf, they saw Bhutto’s cooperation with him as a betrayal. They rejected the NRO and asked the Supreme Court to invalidate the ordinance. The NRO was enacted on October 5 (National Reconciliation Ordinance 2007), but seven days later the Supreme Court blocked it from going into effect. The judicial review of the NRO cast uncertainty over Musharraf’s power-sharing deal with Bhutto to legitimize the regime. Nevertheless, Bhutto returned to Pakistan on October 18, and she was not arrested despite the existing charges against her.

In a counterbalance move, while blocking the return of Bhutto, the Chaudhry Court encouraged the return of Nawaz Sharif. After the 1999 coup, Sharif had been forced to sign an agreement with the Musharraf regime to go into exile for ten years to avoid incarceration. When the details of the Bhutto-Musharraf deal started to emerge, Sharif filed a petition under the Supreme Court’s original jurisdiction over fundamental rights to return to the country. A seven-member bench, presided over by Chaudhry, concluded that the exile agreement had no legal validity, stating that Sharif and his brother “have an inalienable right to enter and remain in [the] country, as citizens of Pakistan” (Pakistan Muslim League (N) v. Federation of Pakistan 2007).

In order to oust Bhutto, Sharif came back to Pakistan from London on September 10, 2007. It was clear that the regime would take steps to prevent him from entering the country, but presumably Sharif was expecting the people to pour into the streets in protest to force the regime to back down. However, Sharif’s return failed to mobilize the masses. Security officials arrested him at the airport and sent him back into exile to Saudi Arabia. In response to Sharif’s deportation, the Court initiated contempt of court proceedings against the government. A four-member bench presided over by Chaudhry held a hearing on September 28 and sent notices to several top officials. The respondents played dumb and shifted the responsibility from one agency to another.

96 [As noted earlier, the Constitution appeared to bar Musharraf from serving as President and Chief of Army Staff at the same time. He was willing at this point to resign as Chief of Army Staff, but given his concerns about what the Court might rule, only after first being elected president a second term.]

97 Benazir Bhutto had been in exile since 1998 to avoid corruption charges filed during Nawaz Sharif’s 1997-1999 term. The Musharraf regime had pursued the charges despite eight years of failing to convict her. Musharraf’s military regime had established its legitimacy after the 1999 coup based on the promise to deliver “true democracy,” as opposed to the “sham democracy” of 1988-1999 under Bhutto and Sharif. Musharraf had amended the Constitution to include term limits for the office of prime minister in order to exclude Sharif and Bhutto, each of whom had served two (incomplete) terms as prime minister.
Musharraf’s term as President was to expire on November 15, 2007, and he planned to run for re-election while still holding the position of Chief of Army Staff. His main obstacle to this arrangement lay in Chief Justice Chaudhry and the Supreme Court’s final decision on whether Musharraf’s position as Army Chief made his candidacy for President unconstitutional. Musharraf planned to resign the army post only after he was elected President by the National and Provincial Assemblies. His advisors predicted the tension and recommended this plan of action, so that in case “the chief justice attacked him, he [could] stay as army chief.” Opposition parties filed petitions opposing Musharraf’s candidacy, but the Supreme Court, in a nine-member bench headed by Justice Rana Bhagwandas, allowed Musharraf to take part in the election. However, the Court also ruled that the Election Commission could not certify the results until a final decision was reached on Musharraf’s candidacy. This prevented Musharraf from taking the oath of office even if the election went in his favor.

On October 6, 2007, the assemblies elected Musharraf President after a boycott by opposition parties; as ordered, the Election Commission did not certify the result. After hearing lengthy opposition challenges to Musharraf’s election, an eleven-member panel headed by Justice Javed Iqbal decided to delay a planned hearing and ruling on the issue until November 12, three days before Musharraf’s term was to expire.

Delivering the resolution on November 1, 2007, Justice Iqbal warned the government against any extreme action, saying “no group should think that it can take the Supreme Court hostage,” and “no threat will have any effect on this bench, whether it is martial law or [a state of] emergency ... Whatever will happen, it will be according to the constitution and rules.” However, on November 2, Justice Iqbal announced that the Court would continue hearings “because of the climate of political uncertainty.” Justice Iqbal’s words proved an inadequate warning; even international voices sensed the tensions between the Executive and the legal community, whose armies of black-suited lawyers had been protesting in the streets since Musharraf’s candidacy was allowed. Amid circulating drafts of a provisional constitutional order allowing emergency rule, US Secretary of State Condoleezza Rice spoke out against any “extra-constitutional means” of government.

On November 3, 2007, Musharraf declared a state of emergency and held the Constitution in abeyance. Apart from two clauses citing a general increase in terrorism, the Proclamation of Emergency placed the blame upon the judiciary for “working at cross purposes with the executive and legislature in the fight against terrorism,” “interfering ... in government policy, adversely affecting economic growth,” and “constant interference in executive functions” that demoralized the police force. The proclamation also stated that while “the Government is committed to the independence of the judiciary and the rule of law and holds the superior judiciary in high esteem, it is nonetheless of paramount importance that the Honourable Judges confine the scope of their activity to the judicial function and not assume charge of administration.”

Mimicking the setup to the Zafar Ali Shah
case, a new Oath of Office (Judges) Order was promulgated and all federal judges were automatically suspended until they swore to uphold the Proclamation of Emergency and the PCO No. 1 of 2007. Chief Justice Chaudhry responded quickly on the evening of November 3, heading a seven-justice panel to pass an emergency order annulling the Provisional Constitutional Order, directing all judges not to take the new Oath of Office to uphold it, and restraining military officers from following the decree. Shortly thereafter, Chief Justice Chaudhry and other judges who refused to take an oath to uphold the new PCO were placed under house arrest.

By proclaiming emergency rule, General Musharraf had “fired the entire Supreme Court” and many of the High Court Judges; specifically, he had restrained them under house arrest and replaced them with judges who had taken a new oath to uphold his emergency rule. Now protected from Chaudhry and the Judiciary who had been ruling against him, Musharraf resigned his commission and took the oath of President as a civilian. Before resigning however, he transferred the power of lifting emergency rule to the President, therefore ensuring that he still held the reins of power. Justice Abdul Hameed Dogar, who had taken the oath to uphold Musharraf’s second emergency rule, was sworn in as Chief Justice. On November 4, Chief Justice Dogar overruled Chaudhry’s annulment, validating the emergency declaration. The reconstituted Supreme Court then dismissed the challenge to Musharraf’s election on November 22, 2007.

Musharraf resigned his post as Army Chief on November 28, 2007, and, the next day, amidst continued protest from the legal and political community, was sworn in as a civilian president. Even though he had less power as a civilian president in Pakistan’s Prime Minister-led parliamentary democracy, the powers Musharraf had secured for the position with his November 3 emergency decree boosted his presidency. Specifically, Musharraf reserved for himself “the power to lift the de facto martial law” that he imposed in November.

After the imposition of emergency rule [on Nov. 3, 2007], the lawyers began to cooperate more directly with opposition parties. Protests became much larger and more diverse as a result. In addition, new protest groups emerged and came to include not only secular urban elites, but also some poorer and more religious Pakistanis. According to Minallah, “It was a very interesting mixture. It was from every class... Even people from the religious political parties ... would be [protesting] with us outside the Supreme Court.”

Musharraf ended emergency rule in December 2007 under intense international pressure, and continued protests forced him to resign as President in August 2008. However, the new President, Asif Zardari, delayed reinstating the judges, perhaps out of fear that Chaudhry would declare unconstitutional the National Reconciliation Ordinance (NRO), an executive order issued by Musharraf in 2007 that gave Zardari and others immunity from corruption charges. Zardari lost much of his popularity very soon after taking office, in part because of his failure to reinstate Chaudhry, but also because of declining economic performance, rising food prices, nationwide fuel shortages, and ongoing violence in Pakistan’s Northwest Frontier Province. Nevertheless, although some lawyers’ protests continued through the fall and winter of 2008, the movement appeared to lose its momentum. Protests began to swell once again only after Zardari attempted to sideline opposition leader Nawaz Sharif - Zardari’s main political rival and a strong supporter of the lawyers - by declaring federal rule in Sharif’s home-province of Punjab. Shortly thereafter, the (unreconstituted) Supreme Court issued a ruling declaring Sharif and his brother, Shahbaz Sharif, ineligible to run for office. In response, the lawyers planned a massive protest in cooperation with Sharif and a number of opposition parties, promising to stage a sit-in in the capital until Chaudhry was restored.

With the Pakistani government seemingly on the verge of collapse, a last-minute flurry of negotiations led Zardari, at long last, to reinstate the last of the deposed judges, including Chaudhry, on March 16, 2009. In the months after Chaudhry returned to the bench, the Court proceeded to remove all of the judges Musharraf appointed during the emergency, to reverse the ruling against Nawaz and Shahbaz Sharif, and to declare the NRO unconstitutional.

... Beneath the idealistic sheen of the lawyers’ protests, the strategic maneuverings of elites were a prime driver of the movement and a key determinant of its success. First and foremost, the lawyers themselves were from an elite profession, and from a certain perspective their protests could be understood as a narrow defense of the professional interests of the bar. More importantly, political leaders like Sharif benefitted enormously from their affiliation with the lawyers, and there is significant reason to doubt many of these leaders’ genuine commitment to judicial independence. The fact that lawyers’ protests did not regain momentum until Zardari attempted to sideline Sharif in 2009 is evidence that the success of the movement had less to do with the popular salience of the rule of law than it did with political opposition to Zardari.

But even this more complicated picture of the movement seems to miss many details. There is something about the rapid emergence of Chaudhry as a popular hero and the salience of the lawyers’ struggle to Pakistanis of diverse backgrounds that the elitist models of judicial power struggle to explain.

A. Bottom-Up Pressure for Judicial Independence
Despite efforts among elites of all sorts to exploit, dominate, and appropriate the popular energy surrounding the lawyers, some aspects of the movement nevertheless remained outside of anyone’s control. In a number of different institutional contexts, pressure from below forced or at least encouraged elites to ally themselves with the cause of judicial independence. An example given by Aitzaz Ahsan is instructive: Prior to the March 2009 protests, Ahsan met with Sharif to try to convince him to participate in the upcoming sit-in. When Sharif expressed doubts about the wisdom of a sit-in, Ahsan told him, “If either one of us doesn’t go through with this, our political careers are over.” In the end, Sharif endorsed the sit-in.

In addition, although well-educated elite bar leaders like Muneer Malik, Aitzaz Ahsan, and Ali Ahmed Kurd directed the overall movement strategy from above, much of the impetus for the lawyers’ protests came from the youngest and often the poorest members of the profession. These so-called “common lawyers” tended to be more politically active than their elite counterparts. “Older lawyers are professionals who are very prone to compromises,” explained I.A. Rehman, a Pakistani historian and human rights activist. “They’re not made of the stuff of street fights. It’s the younger lawyers who took the beatings. When a poor lawyer does this, people see it as heroism.” Thus, when spontaneous lawyers’ protests erupted after Musharraf removed the Chief Justice, it was the young lawyers who led the charge. Moreover, because Pakistani bar associations elect new leaders every year, the lawyers’ experiences of protest and repression resulted in an increasingly resistance-oriented bar leadership. Hamid Khan explained the situation as follows: “This year, all those people who were seen to be active in the movement were elected. All those who were seen to be inactive, or toeing the line, were badly defeated. So the commitment [to resistance] comes from the fact that [bar leaders] need to face the electorate.”

The media, too, faced new incentives to side with the lawyers over “the establishment.” Media restrictions and blackouts cost private news channels significant sums of money, but because the public wanted the media to stand alongside the Supreme Court as a check on governmental excess, it remained in many stations’ long-term financial interest to continue providing credible, independent news coverage. Geo TV took a particularly principled stand on the lawyers’ issue, refusing to tailor its coverage to Musharraf’s dictates, and the station paid particularly high costs as a result. However, the CEO of Geo TV, Mir Ibrahim Rahman, reported that the station’s approach nonetheless made good business sense. “We were able to raise [our] rates afterwards because we had increased credibility. Accurately covering the lawyers in the face of repression became a long-term business strategy.” In this way, the actions of the Chief Justice and the lawyers “literally raised the cost of indifference”; to maintain its credibility, “The media had to tell the truth.”

B. Some Effects of the Movement on Political Culture

There is a cyclical, self-fulfilling dynamic to the popular mobilization on behalf of judicial power in Pakistan that cannot be wholly explained by the elite-focused public choice models discussed above, and that could be a force for solidifying judicial review in the future. The movement has refashioned the terrain of Pakistani politics in ways that would seem to increase the willingness and ability of the Pakistani people to take advantage of the Courts’ coordinating function. Indeed, the collision between legal profession, street politics, and the Chief Justice at the center of the lawyers’ movement has reached deep into the psyche of the Pakistani body politic, helping to educate the general public, to shape
the institutional and collective identities of lawyers, activists, and judges, and to alter the incentives of political parties.

1. Public Education and Collective Identity-Formation. - At the very least, the movement educated a large number of Pakistanis on the meaning of their constitution and the potential role of the courts and the legal profession in interpreting and defending it. For example, in the weeks following the declaration of emergency rule, television stations like Geo TV ran specials on the content and meaning of the constitution; bookstores sold out of copies of the constitution in major cities like Lahore. Osama Siddique explained the popular reaction to the movement as follows:

No one likes lawyers all over the world[, but] a month [into the state of emergency,] ordinary citizens began offering [protesting lawyers] bottles of water, [and] shouting “Go Musharraf Go.” So there was a public education going on... . Even the average Joe would say, “You know, I think Musharraf really did something ridiculous. How can one person send away sixty judges?”

In addition, participation in protest activities seems to have strengthened what social psychologists call protesters’ “collective identity.” For example, many lawyers came to see themselves as participants in a narrative of lawyers’ resistance to illegitimate state authority stretching all the way back to independence. Activists were quick to point out that Gandhi, Jinnah, Nehru, and Iqbal were all lawyers, and that lawyers had prominent roles in movements against Ayub Khan, Zulfikar Ali Bhutto, and Zia. And for many students, organizing against military rule had a profound impact on their political awareness and sense of self. Sundas Hurrain, a student activist from Lahore, experienced a kind of personal awakening through acts of protest: “It was this great feeling .... It was us asserting our agency, and our humanity in a sense.” For others, enduring threats, beatings, and arrests only solidified their determination to push for political change and increased their sense of solidarity with fellow protesters. . . .

2. A New Politics? - Perhaps most importantly, there is some evidence that the movement has encouraged the emergence of a new issue-based democratic politics. Traditionally, Pakistani elections have hinged on feudal loyalties and political patronage: a designated representative of the local landholding elite secures the votes of rural Pakistanis through threats and bribes; the locals trust that he will protect them and funnel governmental resources in their direction. Similarly, leadership of major political parties has been treated like a family inheritance. Even though they compete in national and local elections, Pakistan’s parties are so internally corrupt and exclusive that Pakistanis routinely categorize them alongside the military establishment as a form of elite “vested interests.” . . .

Even as the lawyers sacrificed some of this independence by cooperating with the parties, many believed that by mobilizing contentious political activity around a specific issue rather than an individual political leader, the lawyers effectively showed the political parties the way toward a more genuine and responsive democratic politics. To Tariq Mahmood, for example, criticizing the lawyers for the political affiliations of their followers simply made no sense. “We gave a general invitation to everyone,” he said. “[If] I’ve taken a stand [and] you’ve opted to support me, nobody should blame me!” In other words, if the parties supported the lawyers’ stance because the people cared about these issues, and the parties wanted to reap the resulting electoral benefits, this was a sign not of cooptation but of an emerging political maturity within Pakistan’s electoral market.

Many activists perceived this shift toward
the politicization of the lawyers’ movement, and of Pakistani society at large, as the movement’s most important achievement. As one student activist reported:

For the first time in Pakistan, we’ve changed the agenda of the political parties. Nawaz Sharif’s party, now all its manifesto is focused on the rule of law, on the restoration of the judges. This is our achievement... . Being nonpartisan, we’ve changed the direction of the political parties, we’ve forced on them what the people want. And we’ve achieved it very quickly. In just a few months, we’ve shown the political parties what to do.

... Time will tell whether the lawyers’ movement results in more accountability among Pakistani political parties over the long term. But between 2007 and 2009 the record is clear: a mobilized citizenry forced nearly every major political party in Pakistan to endorse the ideas of judicial independence and the restoration of the judiciary from before the state of emergency. These parties eventually included even Zardari’s Pakistan People’s Party, which had every reason to fear a truly independent judiciary given the corruption charges against Zardari and the pending judicial review of the NRO. In short, the independent actions of judges, by encouraging and giving voice to a broad-based social movement, empowered newly organized social interests “on whose voluntary cooperation rulers [came] acutely [to] depend,” and to whose demands these rulers had no choice but to respond.
The period between Chaudhry’s restoration (June 20, 2007) and martial law (November 3, 2007) provides several theoretical insights about judicial power and the legal complex.

**Judicialization of Politics**

The Chaudhry Court was interested not only in shaping the electoral politics but also in advancing its own institutional interests. As Bhutto’s return was Musharraf’s response to the empowered bench, the Court blocked the NRO in an attempt to prevent her from coming back. The Court also allowed Sharif to return in order to level the electoral playing field and to entrench the judicial support structures in the event of Bhutto’s return. Similarly, the Court’s refusal to intervene in the first Musharraf case, but its intervention in the second, indicates how the Court strategically picked battles, weighing its political and institutional interests by tracking the direction of the lawyers’ movement and public opinion, as well as employing the *Marbury* tactic. However, the Court underestimated the regime’s ability to resort to constitutional deviation.

The main force that initiated the judicialization of politics was the public interest litigation in response to the discontents of economic liberalization. However, when the Court survived the regime backlash with the help of the legal complex, it was emboldened to continue the trajectory of transforming its political function to political liberalization. Riding on the wave of the lawyers’ movement, the media, and public opinion, the Court aggressively pursued direct confrontation with the regime. However, since judicial power was not a result of an implicit bargain with the regime, the Court eventually had to face raw political facts in the form of martial law.

**The Legal Complex between Legal and Insurgent Mobilization**

When does the legal complex use not only legal strategy, but also insurgent politics? What are the conditions under which we can expect a mobilization of the legal complex in the streets in addition to the courts? The organizational capacity of bar associations can marshal lawyers in a systematic way, comparable to political parties. If the lawyers and judges who are willing to struggle for political liberalism are able to consolidate the control of bar associations, then we can expect a well-organized movement of the legal fraternity extending to rallies and protests. However, a consolidated bar leadership alone cannot explain the historic mobilization of lawyers in Pakistan.

From a comparative perspective, there are many instances when the bar leadership in a country coalesces and organizes for political liberalism but does not use the streets. The leadership of protests and rallies remains with opposition parties and human rights groups. In such cases, lawyers often march in the streets, but in their capacity as political party officials and activists rather than legal professionals. For example, Moustafa shows that the activist lawyers in Egypt were part of the Muslim Brotherhood, human rights groups, or liberal opposition parties. Similarly, Ginsburg shows how lawyers in Korea joined academics and student activists, forming the People’s Solidarity for Participatory Democracy in order to mobilize for political liberalism in the 1990s. In these cases, the lawyers focused on legal strategy or formal politics, whereas the activists organized the rallies.

What differentiates Pakistan from such cases is the role of its political parties. When
Bhutto was planning to return to Pakistan under a power-sharing deal with Musharraf, the PPP was unwilling to sabotage this deal. Sharif’s deportation without any significant protests makes it clear that PML(N) was unable to take action, even when his return was imminent. In Pakistan’s political context, the legal complex assumed the leadership of the protest movement to demand the end of the Musharraf regime and the transition to democracy. . . .

The lawyers’ movement against the Musharraf regime and the PPP government is one of the few effective struggles against state power at the national level in Pakistan’s history. The movement set off events that allowed Bhutto and Sharif to each return from exile; forced Musharraf to resign as the army chief and to hold relatively free general elections; and pushed the Parliament to impeach Musharraf, thereby forcing him to resign from the presidency. Ironically, the bar and the bench had to engage in another struggle against the democratic government of the PPP to restore Chaudhry. The movement allied with opposition parties, lobbied US policy-making circles, and used insurgent methods to finally restore the chief justice. Despite some of the movement’s contradictions, the historic struggle has made the bar and the bench emboldened in completing the transition toward political liberalism in Pakistan.
Pakistan’s highest court escalated its clash with the government on Monday by initiating contempt-of-court proceedings against Prime Minister Yousaf Raza Gilani for failing to pursue corruption charges against his boss, President Asif Ali Zardari.

The Supreme Court was clearly infuriated after the government’s lawyer said that the government had given no instructions on how to respond to the court’s demands.

Justice Nasir-ul-Mulk ordered Mr. Gilani to appear on Thursday to explain why he should not be charged with contempt, a count that could open the door to his dismissal from office.

“We are left with no option,” Justice Mulk told a courtroom packed with lawyers, journalists and politicians.

Hours later, Prime Minister Gilani promised to obey the judicial order. “I will personally appear before the courts,” he told Parliament during a late-evening debate. “They called me on the 19th, and I am going to show up. Can there be any greater respect than this?”

Prime ministers are rarely called to court in Pakistan, and the order was a measure of the seriousness of the clash between the two institutions, as a hawkish military hovered in the background amid sporadic rumors of a coup.

Last week the military, which has done little to disguise its loathing for the president and the prime minister, warned of “potentially grievous consequences” if the government did not halt its unusually frank public criticism of the army.

Few analysts believe that a coup is imminent, but speculation is rife that the military is using the court as a means of ousting President Zardari through constitutional means.

The army chief, Gen. Ashfaq Parvez Kayani, met with the president and the prime minister over the weekend apparently in a show of unity. But the military has quietly supported two legal cases that, in different ways, challenge the government’s authority.

In the Supreme Court, the seven justices showed little patience with government explanations of inaction against Mr. Zardari. “You parade yourself as if all Pakistan is in your hands,” one justice told a lawyer for the country’s main anticorruption body, which also came in for withering judicial criticism.

At issue in the case is a longstanding corruption dispute. The Supreme Court wants the government to write to prosecutors in Switzerland, requesting that they reopen an investigation into the president’s finances in that country.

Mr. Zardari insists that he enjoys immunity from prosecution, and his supporters say he is the victim of a politically driven prosecution.

The case is complicated by the rivalry between Mr. Zardari and the chief justice of the Supreme Court, Iftikhar Muhammad Chaudhry. The president opposed Chief Justice Chaudhry’s reappointment in 2008, setting off street protests led by lawyers and opposition parties that forced the president to relent.

Since then, critics say, the Supreme Court has pursued the Swiss corruption case with unusual alacrity.

The government has fallen back on its parliamentary majority to bolster its flagging fortunes. Prime Minister Gilani said he would obey the court’s orders during a debate on a vote of confidence in his shaky coalition government.

Mr. Gilani told Parliament that he had petitioned for the release of judges who had been incarcerated under the presidency of Gen. Pervez Musharraf in 2007. “I am a prime minister who is willing to be beaten up for the
sake of the judges,” he said to a chorus of supportive desk-banging from party loyalists. “Why would I not be loyal to them now? There is loyalty, there is discipline; what else is needed?”

The confidence resolution passed, allowing the government to demonstrate to its military and judicial rivals that its political support remained intact. But the main opposition party, the Pakistan Muslim League-N, boycotted the vote.

“The best way for improvement is a dispassionate self-analysis and soul-searching,” Chaudhry Nisar Ali Khan, the leader of the opposition, said before walking out. “Otherwise such difficulties will be repeated and continue to embarrass the government.”

The government’s judicial difficulties are compounded by a second legal action centered on allegations that it sought the American government’s help to stave off a possible coup after Osama bin Laden was killed in Pakistan last May by American commandos.

The principal witness in that case, an American businessman of Pakistani origin named Mansoor Ijaz, was scheduled to appear Monday in Islamabad before a three-judge panel investigating the allegations, but failed to show up. Mr. Ijaz’s lawyers told the panel that he had not yet applied for a visa and would appear on Jan. 24.

Both General Kayani and the opposition Pakistan Muslim League-N support the investigation into the memorandum that sought American help.
ISLAMABAD, Pakistan — Once they were heroes, cloaked justices at the vanguard of a powerful revolt against military rule in Pakistan, buoyed by pugnacious lawyers and an adoring public. But now Pakistan’s Supreme Court is waging a campaign of judicial activism that has pitted it against an elected civilian government, in a legal fight that many Pakistanis fear could damage their fragile democracy and open the door to a fresh military intervention.

From an imposing, marble-clad court on a hill over Islamabad, and led by an iron-willed chief justice, Iftikhar Muhammad Chaudhry, the judges have since 2009 issued numerous rulings that have propelled them into areas traditionally dominated by government here. The court has dictated the price of sugar and fuel, championed the rights of transsexuals, and, quite literally, directed the traffic in the coastal megalopolis of Karachi.

But in recent weeks the court has taken interventionism to a new level, inserting itself as the third player in a bruising confrontation between military and civilian leaders at a time when Pakistan — and the United States — urgently needs stability in Islamabad to face a dizzying array of threats.

Judges say their expanded mandate comes from the people, dating back to the struggle against the military rule of Gen. Pervez Musharraf that began in 2007, eventually helping to pry him from power. Memories linger of those heady days, when bloodied lawyers clashed with riot police officers, and judges were garlanded and paraded as virtual saints.

In recent months, however, the Supreme Court has ventured deep into political peril in two different cases. Last week, as part of a high-stakes corruption case, it summoned Prime Minister Yousaf Raza Gilani to testify in court under threat of contempt charges that, if carried to conviction, could leave him jailed and ejected from office.

The court has also begun an inquiry into a scandal known here as Memogate, a shadowy affair with touches of soap-opera drama that has engulfed the political system since November. It has claimed the job of Pakistan’s ambassador to the United States and now threatens other senior figures in the civilian government, under accusations that officials sought American help to head off a potential military coup.

Propelled by accounts of secret letters, text messages and military plots, the scandal has in recent days focused on a music video featuring bikini-clad female wrestlers that is likely to be entered as evidence of immorality on the part of the central protagonist, Mansoor Ijaz, an American businessman of Pakistani origin.

Hearings resume Tuesday when Mr. Ijaz is due to give evidence. The fact that the courts have become the arena for such lurid political theater has reignited criticism, some from once-staunch allies, that the Supreme Court is worryingly overstepping its mark.

“In the long run this is a very dangerous trend,” said Muneer A. Malik, a former president of the Supreme Court Bar Association who campaigned for Justice Chaudhry in 2007. “The judges are not elected representatives of the people and they are arrogating power to themselves as if they are the only sanctimonious institution in the country. All dictators fall prey to this psyche — that only we are clean, and capable of doing the right thing.”

The court’s supporters counter that it is reinforcing democracy in the face of President Asif Ali Zardari’s corrupt and inept government. On Saturday, Justice Chaudhry
pushed back against the critics.
The court’s goal was to “buttress democratic and parliamentary norms,” he told a gathering of lawyers in Karachi. Deep-rooted corruption was curtailing justice in Pakistan, he added.

“Destiny of our institution is in our own hands,” he said.

Mr. Chaudhry was appointed to the Supreme Court under General Musharraf in 2000. Two years later he wrote a judgment that absolved the military ruler for his 1999 coup. But Mr. Chaudhry shocked his patron and his country seven years later with decrees that challenged General Musharraf’s pre-eminence. Senior security officials were ordered to track down individuals being illegally held by the military intelligence agency, the Inter-Services Intelligence Directorate, or ISI, in some cases working with the F.B.I. and C.I.A. The privatization of state companies came under sharp scrutiny.

Then, on March 9, 2007, General Musharraf tried to fire Justice Chaudhry and placed him under house arrest. Protesting lawyers rushed into the streets in support of the chief justice. New cable television channels broadcast images of the tumult across the country. Power drained from General Musharraf, who resigned 18 months later.

The euphoria was soon tempered, however, by growing tensions with the new government. Mr. Zardari hesitated to reinstate Mr. Chaudhry, believing that he was too close to his political rivals and the military.

The standoff led to fresh street protests in 2009, led by the opposition leader Nawaz Sharif. That March, amid dramatic scenes that included a threatened march on the capital, Mr. Zardari relented and Justice Chaudhry returned to the bench.

Within months, the Supreme Court had cleared the way for the possible prosecution of Mr. Zardari in a Swiss corruption case dating to the 1990s. The government cited Mr. Zardari’s presidential immunity, and argued, along with some international analyst groups, that the court was specifically targeting the president.

But among the wider public, the court was winning broad support. It engaged in a series of muscular interventions to champion the cause of ordinary Pakistanis, some of which broke new ground. Judges expanded the civil rights of hijras, transgendered people who traditionally suffered discrimination, called senior bureaucrats and police officials to account, halted business ventures that contravened planning laws, including a McDonald’s restaurant in Islamabad and a German supermarket in Karachi, and issued a decree against the destruction of trees along a major road in Lahore.

The court’s populist bent has infuriated the government but won cheers from urban, middle-class Pakistanis — the same people who had supported the lawyers’ drive against General Musharraf. Largely young, frustrated by traditional politics and angered by official graft, they constitute a political class that has in recent months flocked to Imran Khan, the cricket star turned politician who is enjoying a sudden surge in popularity, and is a strong defender of the judiciary.

But the court’s activism has also taken many erratic turns. Justice Chaudhry has fought trenchant battles to win control of judicial appointments, a process traditionally in the government’s purview. While the judiciary has vigorously pursued Mr. Zardari, it absolved Mr. Sharif of his alleged crimes. And critics accuse Mr. Chaudhry of failing to reform the chaotic lower courts, which remain plagued by long backlogs. “Three years after the restitution of the chief justice, the delivery of justice remains as poor as it has ever been,” said Ali Dayan Hasan, of Human Rights Watch.

The gravest charges, though, swirl around the
memo scandal. Mr. Ijaz claims to hold an unsigned memorandum showing that Mr. Zardari’s government sought covert United States government help to avert a military coup in the poisonous aftermath of the American raid that killed Osama bin Laden in May.

But the memo’s provenance is unclear and Mr. Ijaz’s credibility has come under assault in the news media. Last week a music video that went viral on the Internet showed Mr. Ijaz acting as the ringside commentator in a wrestling contest between two bikini-clad women and that, in one version, featured full nudity — a shocking sight in conservative Pakistan.

The furor, which made front-page news, injected a fresh sense of absurdity into proceedings that already were under question, and that many here insist would never have started without military intervention: the Supreme Court ordered the inquiry on Dec. 30 at the direct request of the army chief, Gen. Ashfaq Parvez Kayani, and the ISI director general, Lt. Gen. Ahmed Shuja Pasha, who harbor little love for Mr. Zardari. Also, the court ignored other claims by Mr. Ijaz that the army secretly sheltered bin Laden, and sought outside support to mount a coup — acts that, if proven, could be equally treasonous.

Suspicions about the court’s impartiality were renewed last Friday, when Mr. Chaudhry ordered the government to disclose whether it intended to fire General Kayani or General Pasha — even though such decisions are normally the government’s prerogative.

The titanic three-way struggle among generals, judges and politicians comes at a time when Pakistan has become increasingly chaotic. Taliban insurgents continue to roam the northwest, the economy is in dire straits and urgently needed reforms in education, health and other social sectors have been largely ignored.

From the standpoint of the United States, the deadlock has diverted the spotlight from military airstrikes that killed 26 Pakistani soldiers in November and brought the two countries’ troubled relationship to a new low. But it has also drawn attention away from a pressing priority of the United States in Pakistan: engaging cooperation here to help negotiate a peace settlement with the Afghan Taliban as a major troop withdrawal slated for 2014 draws near.

“In the midst of this institutional wrangling, nobody has a clear plan as to how politics or foreign policy are going to move forward, said Dr. Paula Newberg of Georgetown University, who has written a book about Pakistani constitutional politics. “Pakistan could easily have a much brighter future. But it gets itself worn down by these incessant disputes about where power lies.”
ISLAMABAD, Pakistan — The simmering crisis between Pakistan’s government and judiciary flared dramatically on Thursday when the Supreme Court announced it would pursue contempt charges against the prime minister, Yousaf Raza Gilani, for failing to reopen a corruption investigation into the finances of his boss, President Asif Ali Zardari.

The Supreme Court said it would start proceedings for contempt of court against Mr. Gilani on Feb. 13. If convicted, he faces up to six months in jail and possible disqualification from public office.

The court order was a significant escalation of long-simmering tensions between the judiciary and the government and threatened to plunge the country into fresh political turmoil as its leaders debated the contours of a new strategic relationship with the United States.

Since 2009, the Supreme Court, led by Chief Justice Iftikhar Muhammad Chaudhry, has insisted that the government write a letter to the authorities in Switzerland, asking them to reopen a corruption investigation against Mr. Zardari that stretches back to the 1990s and involves his finances in that country.

The government has responded with stalling tactics, using various ruses to dodge the order in court, while in public it has contended that Mr. Zardari enjoys immunity from prosecution while in office.

But the court’s forbearance ended last month when it ordered Mr. Gilani to appear before it under threat of contempt charges. Amid dramatic scenes, Mr. Gilani turned up on Jan. 19, flanked by supporters, and he was represented by Aitzaz Ahsan, one of the country’s most famous lawyers.

Tensions seemed to ease when Mr. Ahsan promised that Mr. Gilani was ready to debate the immunity issue in court, effectively conceding that the government was ready to resolve the case through legal means.

But that truce ended on Thursday when Mr. Ahsan argued that the government simply could not write the Swiss letter, prompting the court to make good on its threats of contempt charges, and in the process reviving a perilous institutional clash involving Pakistan’s top politicians, generals and judges.

“It seems like the court has run out of patience,” said Cyril Almeida, a political columnist with Dawn, a leading English-language newspaper. “It’s in a mood to wrap this up quickly — either to ensure the government writes the letter, or let the gallows
come crashing down on Gilani’s premiership.”

In mid-January, the severity of the crisis fueled speculation that the military was considering a possible coup against the government. Whether it escalates further may now hinge on a calculation of politics rather than the law.

Some experts believe that even if Mr. Gilani writes the letter to Switzerland, prosecutors in that country will be unlikely to restart the corruption investigation. But Mr. Zardari, who already suffers an unenviable reputation for graft, may be unwilling to hand a political weapon to his rivals — particularly with a likely general election looming before the end of this year.

“Zardari has an aggressive style of politics and feels that confrontation has a certain value,” Mr. Almeida said. “But I feel that calculation may change now.”

The court drama comes just days after the other judicial crisis facing the government, involving accusations of treason and popularly known as Memogate, started to recede from the front pages.

The central witness in that crisis, Mansoor Ijaz, an American businessman of Pakistani origin, failed to turn up in Pakistan to testify. On Monday, a panel of judges allowed the man who faces the gravest charges, Husain Haqqani, a former ambassador to Washington, to leave the country.

Mr. Ijaz claimed in a newspaper article in October that he had sent a secret memo to the Obama administration in May on behalf of Mr. Zardari’s government, seeking American help in warding off a possible coup after the Pakistani military was humiliated by the American commando operation that killed Osama bin Laden that month. Mr. Ijaz later said that Mr. Haqqani was behind the memo. Mr. Haqqani denied the accusation, but he was forced to step down.

The furor comes at a bad time for the United States, which is keen to resume a diplomatic and strategic relationship that has been effectively frozen since a Nov. 26 border clash in which American warplanes killed 24 Pakistani soldiers.

Pakistan says it now wants to reconfigure the strategic relationship along more pragmatic lines. A parliamentary committee has come up with proposed changes that are expected to be debated in a special joint sitting of both houses of Parliament sometime in the next two weeks, Foreign Minister Hina Rabbani Khar told reporters on Thursday.

Ms. Rabbani Khar had just returned from a trip to the Afghan capital, Kabul, where she met with President Hamid Karzai and other Afghan political leaders. The trip coincided with a leaked NATO report based on detainee testimony that highlighted strong links between Pakistani intelligence and Taliban insurgents.

In Islamabad, Pakistan’s capital, the foreign minister stressed that Pakistan supported “Afghan-led” talks with the Taliban, and was willing to do whatever President Karzai asked, including mediating with the Taliban and the Taliban-affiliated Haqqani network.

There are also signs that the Obama administration is taking a more hard-nosed approach to Pakistan. In the past week, President Obama has for the first time publicly stated that the C.I.A. is carrying out drone attacks in Pakistan’s tribal belt, a campaign that is deeply unpopular in Pakistan.

And defense secretary Leon E. Panetta admitted a Pakistani doctor who had helped locate Bin Laden at his hide-out in Abbottabad, 35 miles north of Islamabad, had been working for the CIA.
Declan Walsh, Court Challenges Put Unusual Spotlight on Pakistani Spy Agency, N.Y. Times, Feb. 6, 2012

Long unchallenged, Pakistan’s top spy agency faces a flurry of court actions that subject its darkest operations to unusual scrutiny, amid growing calls for new restrictions on its largely untrammeled powers.

The cases against the agency, the Inter-Services Intelligence Directorate, have uncertain chances of success, analysts say, and few believe that they can immediately hobble it. But they do represent a rare challenge to a feared institution that is a cornerstone of military supremacy in Pakistan.

In the first case, due for a hearing on Wednesday, the Supreme Court has ordered the ISI to produce in court seven suspected militants it has been holding since 2010 — and to explain how four other detainees from the same group died in mysterious circumstances over the past six months.

The second challenge, due for a hearing on Feb. 29, revives a long-dormant vote-rigging scandal, which focuses on illegal donations of $6.5 million as part of a covert, and ultimately successful, operation to influence the 1990 election.

The cases go to the heart of the powers that have given the ISI such an ominous reputation among Pakistanis: its ability to detain civilians at will, and its freedom to meddle in electoral politics. They come at the end of a difficult 12 months for the spy service, which has faced sharp criticism over the killing of Osama bin Laden by American commandos inside Pakistan and, in recent weeks, its role in a murky political scandal that stoked rumors of a military coup.

Now its authority is being challenged from an unexpected quarter: the chief justice, Iftikhar Muhammad Chaudhry. Only weeks ago, Justice Chaudhry, an idiosyncratic judge, faced accusations of being soft on the military when he inserted the courts into a bruising battle between the government and army.

Now Justice Chaudhry seems determined to prove that he can take on the army, too.

“This is a reaction to public opinion,” said Ayaz Amir, an opposition politician from Punjab. “The court wants to be seen to represent the popular mood.”

The court’s daring move has found broad political support. Last Friday, Chaudhry Nisar Ali Khan, the leader of the opposition in Parliament, compared the military to a “mafia” during a National Assembly debate about the plight of the four detainees who died in ISI custody.

On Saturday, Jamaat-e-Islami, Pakistan’s largest religious party, tabled a proposed law that would curtail the ISI’s powers of detention — a symbolic act, given the party’s limited support base, but nonetheless a significant one.

Wednesday’s court hearing could be a significant step for the “disappeared” — hundreds of Pakistanis who have vanished into ISI custody over the past decade, amid allegations from human rights groups of torture and extrajudicial executions.

The case concerns the plight of 11 men accused of orchestrating three major suicide attacks against army and ISI bases from November 2007 to January 2008. The men were tried by an antiterrorism court and acquitted in April 2010, only to disappear moments after their release from jail.

Months later, the men turned up in ISI custody, and then they started to die. One detainee died last August and two more in December, within 24 hours of each other. Then on Jan. 21 a fourth man, 29-year-old Abdul Saboor, was declared dead. An
unidentified ISI official called the detainee’s brother, Abdul Baais, with the news.

“I stopped my car and started crying,” Mr. Baais, recalled in an interview in Lahore, the capital of Punjab, where he runs a store that sells Islamic texts.

The ISI directed Mr. Baais to a fuel station on the outskirts of Peshawar, the capital of Khyber-Pakhtunkhwa Province, formerly North-West Frontier Province, where he found his brother’s body lying in an ambulance.

“His body was cold as ice and thin as a crow,” said Mr. Baais, producing a flush of photographs that showed an emaciated corpse with long, scarlet welts across the back.

Mr. Baais said he believed that his brother, whose corpse weighed just about 66 pounds, had been poisoned to death. But he said the family had wanted to bury his brother quickly, and no autopsy was done.

Now he fears that two other brothers, Majid and Basit, who are in ISI custody in connection with the same bombings, could face a similar fate. “They could be next to die,” he said.

A senior security official, speaking on the customary condition of anonymity, gave a different version of events. He admitted that the 11 men had been in ISI custody but insisted that they had been legally detained. He said they had died of natural causes, including heart disease and hepatitis.

He produced a document detailing their alleged roles of in the 2007 and 2008 bombings — Mr. Saboor and his brothers procured the vehicles that were used in the attacks, he said — and blamed Pakistan’s weak criminal justice system for their failed prosecutions.

“These guys are known terrorists, yet now they are being presented as victims,” the official said. “All of them admitted their crimes in 2008, so there was no need to torture them — they had already confessed.”

The Supreme Court has thus far been unsatisfied by ISI explanations, and has demanded further details, raising hopes among campaigners for the fate of at least 380 people thought to be still in ISI custody.

“Times are changing,” said Amina Masood Janjua, whose husband has been missing since 2005. “The Supreme Court is finally asserting itself.”

An even stern test of the Supreme Court’s resolve may lie in the second case facing the ISI, known as Mehrangate.

The case dates from 1996, when the Supreme Court established that the ISI had distributed the equivalent of $6.5 million through Mehran Bank to a right-wing political alliance before the 1990 election. Lt. Gen. Asad Durrani, who was the head of the ISI at the time, told the court that the purpose of the donations was to defeat the incumbent prime minister, Benazir Bhutto, whom the army deeply distrusted.

“It was a practice within the ISI to support candidates during the elections,” he said at the time.

Despite the startling evidence, the Mehrangate case languished in the courts for years, presumably out of deference to military sensitivities. It suddenly resurfaced last month at the court’s instigation, much to the surprise of the retired air force officer who brought the original case.

“I had written to the Supreme Court again and again over the years, with no reply,” said Asghar Khan, a retired air marshal who is now 91. “So I’m very glad they’ve taken this up now. I hope they do something.”

The Feb. 29 hearing into Mehrangate has the potential to open a political Pandora’s box. The former ISI chief, Mr. Durrani, now a prominent media commentator, could be exposed to prosecution; among the
beneficiaries of the ISI slush fund is the opposition leader, Nawaz Sharif. If allegations that he pocketed $1.6 million are proved, he could be barred from public office.

Yet the prospects for any real drive against the ISI remain poor. Last month a commission of inquiry, headed by a Supreme Court justice, issued its report into the death of Syed Saleem Shahzad, an investigative reporter who was killed last May.

Although the ISI bore the brunt of accusations at the time, the commission said it could not identify a culprit; Human Rights Watch accused the commission of giving the ISI “a free ride.”

“It illustrates the ability of the ISI to remain beyond the reach of Pakistan’s criminal justice system,” said Brad Adams, the Asia director at Human Rights Watch.

Kamran Shafi, a former army officer who has been an outspoken critic of the ISI, said he was skeptical that Pakistan’s spymasters could be held to account. “I’d be surprised if this amounts to anything more than window-dressing,” he said.

Others counseled patience, saying that the case could be a harbinger of changes in the military’s relationship with power and its own people. A vigorous media, the criticisms over the Bin Laden killing, and the military’s failure to mount a coup in recent weeks, signal that things may be changing in Pakistan, they say.

“Mehrangate will be the litmus test of the Supreme Court’s resolve,” said Mr. Amir, the opposition politician. “Thus far its bark has been worse than its bite. If there’s a new attitude, we’ll see it in this hearing.”
Pakistan PM Yousuf Raza Gilani Charged with Contempt, BBC News, Feb. 13, 2012

Pakistan PM Yousuf Raza Gilani has been charged with contempt in an appearance before the country’s Supreme Court.

Mr Gilani is accused of failing to re-open corruption cases against President Asif Ali Zardari.

The prime minister, who faces jail and being barred from office if convicted, pleaded not guilty.

Mr Gilani argues that the president, who denies the corruption charges, has immunity as head of state.

President Zardari is accused of using Swiss bank accounts to launder bribes.

The Supreme Court has said Mr Gilani defied a court order to write to the Swiss authorities and ask them to re-open the cases against Mr Zardari.

Mr Gilani is expected to argue that he received legal advice that it would have been unconstitutional to pursue the cases.

Mr Zardari says the charges against him are politically motivated.

Helicopters hovered overhead and hundreds of riot police were guarding the Supreme Court as Mr Gilani arrived.

The case has now been adjourned until 28 February. Mr Gilani will not have to appear on that date.

This could now become a lengthy process as even if Mr Gilani is convicted, he will have the right to appeal, reports the BBC’s Aleem Maqbool in Islamabad.

The case is part of a stand-off between the government and the judiciary, which many believe is being backed by the military as it pursues the case against the civilian administration.

Many are concerned that the case will distract Mr Gilani’s focus from Pakistan’s many complex problems to his own survival, our correspondent adds.

“It’s a sad day for Pakistan,” Qamar Zaman Kaira, a senior member of Mr Zardari and Mr Gilani’s Pakistan People’s Party (PPP), said outside court, according to AFP.

In 2009 the Supreme Court overturned an amnesty dating from the period of former President Pervez Musharraf which protected President Zardari and hundreds of other politicians from being prosecuted for corruption.

In an interview with Al-Jazeera television last week, Mr Gilani acknowledged he would have to stand down if convicted.

“If I’m convicted, then I’m not even supposed to be a member of the parliament,” he said.
A newly assertive Supreme Court is taking on the Pakistani government and army in a series of high-profile cases, signaling a power shift in a country vital to U.S. efforts to fight Islamist militants and negotiate peace in Afghanistan.

The jury is still out on the implications. Some believe the court’s actions are part of a necessary, if messy, rebalancing in a country that has long been dominated by the army or seen chaotic periods of rule by corrupt politicians. Others view the court as just another unaccountable institution undermining the elected government.

The U.S. believes a stable, civilian-led democracy in Pakistan is in its interests. But the diffusion of power could make it even more difficult for Washington to prod the country to do its bidding, especially given rampant anti-American sentiment.

The army has been the principal point of contact for the U.S. in the decade since it resuscitated ties with Pakistan to help with the Afghan war. While the army remains the strongest Pakistani institution, recent events indicate it has ceded some of that power to the Supreme Court and the country’s civilian leaders.

“Welcome to the new Pakistan, where power centers are diffuse, outcomes less certain and no grand conspirator to make it all come together, or fall apart, at the appropriate time,” columnist Cyril Almeida wrote recently in Dawn, a Pakistani newspaper.

The Supreme Court’s activism was on full display Monday.

The court charged Pakistan’s prime minister with contempt for refusing to reopen an old corruption case against the president. Later, it ordered two military intelligence agencies to explain why they held seven suspected militants in allegedly harsh conditions for 18 months without charges.

Some government supporters have accused the court of acting on the army’s behalf to topple the country’s civilian leaders, especially in a case probing whether the government sent a memo to Washington last year asking for help in stopping a supposed military coup.

But no evidence has surfaced to support that allegation, and the court’s moves against the military seem to conflict with the theory. The judges have also taken up a case pending for 15 years in which the army’s powerful Inter-Services Intelligence agency, or ISI, is accused of funneling money to political parties to influence national elections.

“There may be a confluence of interests between the court, the army and the political opposition, but the court’s agenda is also institutional: It is determined to establish itself as a player to be feared and respected,” said Almeida.

The court’s actions against the army are a significant turnaround. For much of Pakistan’s nearly 65-year history, the court has been pliant to the army’s demands and validated three coups carried out by the generals.

The current chief justice was on the court in 2000 when it endorsed a coup by Gen. Pervez Musharraf. He has pledged the judges will never take such action again, but it’s unclear whether the court has the will or authority to challenge the army if it fights back.

The Pakistani media have largely applauded the court’s activism against the army, which has also had its power checked by a more active media and the demands of a bloody war against a domestic Taliban insurgency.

The court’s pressure on the civilian government has been more controversial.

Prime Minister Yousuf Raza Gilani could be sent to prison and lose his job if convicted of
contempt, while the memo scandal is seen as a threat to President Asif Ali Zardari.

The chief justice has tussled with Zardari in the past, and some have alleged the cases against the government are partially driven by a personal vendetta against the president.

“I think the Supreme Court is going too far,” said Pakistani political analyst Hasan-Askari Rizvi. “In the past, it was the army that would remove the civilian government, and now it’s the Supreme Court, another unelected institution trying to overwhelm elected leadership.”

Supreme Court justices are appointed by the president based on recommendations from a judicial commission working in conjunction with parliament. The judges can serve until the age of 65 and can be removed only by a judicial council.

The cases have distracted the government from dealing with pressing issues facing the country, including an ailing economy and its battle against the Pakistani Taliban.

Moeed Yusuf, an expert on Pakistan at the United States Institute of Peace, said the jockeying for power between the army, Supreme Court and civilian government was expected given the shifting political landscape and could be beneficial to the country in the long run.

“No country has managed to bypass several phases of such recalibration before they have arrived at a consensual, democratic and accountable system where institutions finally are able to synergize rather than compete endlessly,” Yusuf wrote in a column in Dawn.

The political turmoil has likely complicated U.S. efforts to repair its troubled relations with Pakistan and get the country to focus on helping negotiate peace with the Afghan Taliban, with whom Islamabad has historical ties.

U.S. attempts to enlist Pakistan’s cooperation could get even more difficult as power is carved up among the various actors, said Rizvi, the political analyst.

“No single group will totally dominate the system,” said Rizvi. “That will slow down decision making further in Pakistan because nobody can take full responsibility for making a decision.”
Article 356 of the Indian Constitution allows the federal government to dissolve Indian state governments in the event of a failure of their constitutional machinery. The Indian central government did so in four states in 1992 after Hindu fundamentalists destroyed the Babri Mosque at Ayodhya, which had been built in the 1528. Ayodhya, located in the state of Uttar Pradesh, is a holy place for Hindus in India. The Hindu fundamentalists asserted that the mosque had been built on the site of a prior Hindu temple, which invading Moghals had destroyed. The destruction of the mosque sparked riots across the nation in which several thousand people died. The federal government dissolved certain state governments that it said were dominated by Hindu fundamentalists. The Uttar Pradesh government was in the hands of a Hindu fundamentalist party at the time, the Bharatiya Janata Party (BJP). (A subsequent Indian government investigation implicated senior BJP leaders in instigating the attack on the mosque.) In a 1977 case, the Indian Supreme Court had ruled the imposition of presidential rule to be essentially unreviewable. In this case, however, the Court ruled that invocation of the Article 356 power was judicially reviewable. In the course of reaching this decision, some of the justices described the nature of Indian federalism.

Ahmadi, J. . . .

Federal Character of the Constitution

13. India, as the Preamble proclaims, is a Sovereign, Socialist, Secular, Democratic Republic. It promises liberty of thought, expression, belief, faith and worship, besides equality of status and opportunity. What is paramount is the unity and integrity of the nation. In order to maintain the unity and integrity of the nation our Founding Fathers appear to have leaned in favour of a strong Centre while distributing the powers and functions between the Centre and the States. This becomes obvious from even a cursory examination of the provisions of the Constitution. There was considerable argument at the Bar on the question whether our Constitution could be said to be ‘Federal’ in character . . .

16. . . . Article 2 empowers Parliament to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Under Article 3 Parliament can by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by unifying any territory to a part of any State; increasing the area of any State; diminishing the area of any State; altering the boundaries of any State; or altering the name of any State. The proviso to that article requires that the Bill for the purpose shall not be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon. On a conjoint reading of these articles, it becomes clear that Parliament has the right to form new States, alter the areas of existing States, or the name of any existing State. Thus the Constitution permits changes in the territorial limits of the States and does not guarantee their territorial integrity. Even names can be changed. Under Article 2 it is left to Parliament to determine the terms and conditions on which it may admit any area into the Union or establish new States. In doing so, it has not to seek the concurrence of the State whose area, boundary or name is likely to be affected by the proposal. All that the proviso to Article 3 requires is that in such cases the President shall refer the Bill to the Legislatures of the States concerned likely to be affected “to express their views”. Once the views of the States are known, it is left to Parliament to decide on the proposed changes.

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Parliament can, therefore, without the concurrence of the State or States concerned change the boundaries of the State or increase or diminish its area or change its name. These provisions show that in the matter of constitution of States, Parliament is paramount. This scheme substantially differs from the federal set-up established in the United States of America. The American States were independent sovereign States and the territorial boundaries of those independent States cannot be touched by the Federal Government. It is these independent sovereign units which together decided to form into a federation unlike in India where the States were not independent sovereign units but they were formed by Article 1 of the Constitution and their areas and boundaries could, therefore, be altered, without their concurrence, by Parliament. It is well-known that since independence, new States have been created, boundaries of existing States have been altered, States have been renamed and individual States have been extinguished by parliamentary legislation.

20. In State of Rajasthan v. Union of India, Beg, C.J., observed:

“A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of its provisions carry with them and the use that has been made of them, more unitary than federal.”

Further, the learned Chief Justice proceeded to add

“In a sense, therefore, the Indian Union is federal. But, the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated, and socially, intellectually and spiritually uplifted. In such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government.”

It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strongly ‘unitary’ features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Governments in emergency situations, vide Articles 352 to 360 of the Constitution.

21. It is common knowledge that shortly after we constituted ourselves into a Republic, the Princely States gradually disappeared leading to the unification of India into a single polity with duality of governmental agencies for effective and efficient administration of the country under central direction and, if I may say so, supervision. The duality of governmental organs on the Central and State levels reflect demarcation of functions in a manner as would ensure the sovereignty and integrity of our country. The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution makers. It was perhaps for that reason that our Founding Fathers thought that a strong Centre was essential to ward off separatist tendencies and consolidate the unity and integrity of the country.

22. A Division Bench of the Madras High Court in M. Karunanidhi v. Union of India while dealing with the contention that the Constitution is a federal one and that the States are autonomous having definite powers
and independent rights to govern, and the Central Government has no right to interfere in the governance of the State, observed:

“[T]here may be a federation of independent States, as it is in the case of United States of America. As the name itself denotes, it is a Union of States, either by treaty or by legislation by the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To apply the meaning to the word ‘federation’ or ‘autonomy’ used in the context of the American Constitution, to our Constitution will be totally misleading.”

After tracing the history of the governance of the country under the British rule till the framing of our Constitution, the Court proceeded to add is follows:

“The feature of the Indian Constitution is the establishment of a Government for governing the entire country. In doing so, the Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relations between the two. In a sense, if the word ‘federation’ can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the Centre and States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union.”

23. Under our Constitution the state as such has no inherent sovereign power or autonomous power which cannot be encroached upon by the Centre. The very fact that under our Constitution, Article 3, Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, etc., militates against the view that the States are sovereign or autonomous bodies having definite independent rights of governance. In fact, as pointed out earlier in certain circumstances the Central Government can issue directions to States and in emergency conditions assume far reaching powers affecting the States as well, and the fact that the President has powers to take over the administration of States demolishes the theory of an independent or autonomous existence of a State. It must also be realised that unlike the Constitution of the United States of America which recognises dual citizenship [Section 1(1), 14th Amendment], the Constitution of India, Article 5, does not recognise the concept of dual citizenship. Under the American Constitution all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside whereas under Article 5 of the Indian Constitution at its commencement, every person domiciled in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India. Article 9 makes it clear that if any person voluntarily acquires the citizenship of any foreign country, he will cease to be a citizen of India. These provisions clearly negative the concept of dual citizenship, a concept expressly recognised under the American Constitution. The concept of citizenship assumes some importance in a federation because in a country which recognises dual citizenship, the individual would owe allegiance both to the Federal Government as well as the State Government but a country recognising a single citizenship does not
face complications arising from dual citizenship and by necessary implication negatives the concept of State sovereignty.

24. Thus the significant absence of the expressions like ‘federal’ or ‘federation’ in the constitutional vocabulary, Parliament’s powers under Articles 2 and 3 elaborated earlier, the extraordinary powers conferred to meet emergency situations, the residuary powers conferred by Article 248 read with Entry 97 in List I of the VIIth Schedule on the Union, the power to amend the Constitution, the power to issue directions to States, the concept of a single citizenship, the set-up of an integrated judiciary, etc., etc., have led constitutional experts to doubt the appropriateness of the appellation ‘federal’ to the Indian Constitution. Said Prof. K.C. Wheare in his work Federal Government:

“What makes one doubt that the Constitution of India is strictly and fully federal, however, are the powers of intervention in the affairs of the States given by the Constitution to the Central Government and Parliament.”

Thus in the United States, the sovereign States enjoy their own separate existence which cannot be impaired; indestructible States having constituted an indestructible Union. In India, on the contrary, Parliament can by law form a new State, alter the size of an existing State, alter the name of an existing State, etc., and even curtail the power, both executive and legislative, by amending the Constitution. That is why the Constitution of India is differently described, more appropriately as ‘quasi-federal’ because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions.

K. RAMASWAMY, J. The appeals and transferred cases raise questions of far-reaching consequences in the working of the federal structure under the Constitution of India.

156. In the elections held in February 1990, the Bhartiya Janata Party, for short BJP, emerged as majority party in the Legislative Assemblies of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh and formed the Governments in the respective States. One of the programmes of the BJP was to construct a temple for Lord Sri Rama at his birthplace Ayodhya. That was made an issue in its manifesto for the elections to the legislative assemblies. On December 6, 1992 Ram Janmabhoomi-Babri Masjid structure (there is a dispute that after destroying Lord Sri Rama temple Babur, the Moghul invader, built Babri Masjid at the birthplace of Lord Sri Rama. It is an acutely disputed question as to its correctness.) However Ram Janmabhoomi-Babri Masjid structure was demolished by the kar sevaks gathered at Ayodhya, as a result of sustained momentum generated by BJP, Vishwa Hindu Parishad for short VHP, Rashtriya Swayamsevak Sangh, for short RSS, Bajrang Dal for short BD, Shiv Sena for short SS and other organisations. Preceding thereto when the dispute was brought to this Court, the Government of India was made to act on behalf of the Supreme Court and from time to time directions were issued to the State Government which gave an assurance of full protection to Sri Ram Janmabhoomi-Babri Masjid structure. On its demolition though the Government of Uttar Pradesh resigned, the President of India by Proclamation issued under Article 356 dissolved the State Legislature on December 6, 1992. The disastrous fall out of the demolition was in the nature of loss of precious lives of innocents, and property throughout the country and in the neighbouring countries. The President, therefore, exercised the power under Article 356 and by the Proclamations of December
15, 1992, dismissed the State Governments and dissolved the Legislative Assemblies of Rajasthan, Madhya Pradesh and Himachal Pradesh and assumed administration of the respective States.

158. The federal character of the Constitution carries by its implication an obligation to exercise the power under Article 356 only when there is a total breakdown of the administration of the State. In interpreting Article 356 the court should keep in view the legislative and constitutional history of Article 356 and corresponding provisions of Government of India Act, 1935. The exercise of the power under Article 356 impinges upon federalism and visits with great political consequences. Therefore, court should exercise the power of judicial review and interdict and restrict wide scope of power under Article 356. The scope of judicial review would be on the same or similar grounds on which the executive action of the State is challengeable under constitutional or administrative law principles evolved by this Court, namely, non-compliance with the requirements of natural justice, irrational or arbitrary, perverse, irrelevant to the purpose or extraneous grounds weighed with the President, misdirection in law or mala fide or colourable exercise of power, on all or some of the principles.

FEDERALISM AND ITS EFFECT By ACTS DONE UNDER ARTICLE 356

165. The polyglot Indian society of wide geographical dimensions habiting by social milieu, ethnic variety or cultural diversity, linguistic multiplicity, hierarchical caste structure among Hindus, religious pluralism, majority of rural population and minority urban habitus, the social and cultural diversity of the people furnish a manuscript historical material for and the Founding Fathers of the Constitution to lay federal structure as foundation to integrate India as a united Bharat. Federalism implies mutuality and common purpose for the aforesaid process of change with continuity between the Centre and the States which are the structural units operating on balancing wheel of concurrence and promises to resolve problems and promote social, economic and cultural advancement of its people and to create fraternity among the people. Article 1 is a recognition of the history that Union of India’s territorial limits are unalterable and the States are creatures of the Constitution and they are territorially alterable constituents with single citizenship of all the people by birth or residence with no right to cessation. Under Articles 2 and 4 the significant feature is that while the territorial integrity of India is fully ensured and maintained, there is a significant absence of the territorial integrity of the constituent States under Article 3. Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or part of States or uniting any territory to a part of any State or by increasing the area of any State or diminishing the area of any State, or alter the boundary of any State.

166. In Berubari Union and Exchange of Enclaves Reference under Article 143(1) of the Constitution of India, in re Gajendragadkar, J. speaking for eight-judge Bench held that:

“Unlike other federations, the Federation embodied in the said Act was not the result of a pact or union between separate and independent communities of States who came together for certain common purposes and surrendered a part of their sovereignty. The constituent units of the federation were deliberately created and it is significant that they, unlike the units of other federations, had no organic roots in the past. Hence, in the Indian Constitution, by contrast with other Federal Constitutions, the emphasis on the preservation of the territorial integrity of the constituent States is absent. The makers of the Constitution were aware of
the peculiar conditions under which, and the reasons for which, the States (originally Provinces) were formed and their boundaries were defined, and so they deliberately adopted the provisions in Article 3 with a view to meet the possibility of the redistribution of the said territories after the integration of the Indian States. In fact it is well-known that as a result of the States Reorganisation Act, of the original 27 States and one Area which were mentioned in Part D in the First Schedule to the Constitution, there are now only 14 States and 6 other Areas which constitute the Union Territory mentioned in the First Schedule. The changes thus made clearly illustrate the working of the peculiar and striking feature of the Indian Constitution.”

167. Union and States Relations under the Constitution (Tagore Law Lectures) by M.C. Setalvad at p. 10 stated that

... one notable departure from the accepted ideas underlying a federation when the power in the Central Government to redraw the boundaries of States or even to destroy them.”

168. The Constitution decentralises the governance of the States by a four tier administration i.e. Central Government, State Government, Union Territories, Municipalities and Panchayats. See the Constitution for Municipalities and Panchayats: Part IX (Panchayats) and Part IX-A (Municipalities) introduced through the Constitution 73rd Amendment Act, making the peoples’ participation in the democratic process from grass-root level a reality. Participation of the people in governance of the State is sine qua non of functional democracy. Their surrender of rights to be governed is to have direct encounter in electoral process to choose their representatives for resolution of common problems and social welfare. Needless interference in self-governance is betrayal of their faith to fulfil self-governance and their democratic aspirations. The constitutional culture and political morality based on healthy conventions are the fruitful soil to nurture and for sustained growth of the federal institutions set down by the Constitution. In the context of the Indian Constitution federalism is not based on any agreement between federating units but one of integrated whole as pleaded with vision by Dr B.R. Ambedkar on the floor of the Constituent Assembly at the very inception of the deliberations and the Constituent Assembly unanimously approved the resolution of federal structure. He poignantly projected the pitfalls flowing from the word “federation”.

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