

# JOURNAL OF DEMOCRACY

October 2006, Volume 17, Number 4 \$10.00



## **A “Left Turn” in Latin America?**

*Hector E. Schamis* ■ *Eduardo Posada-Carbó*

*Arturo Valenzuela & Lucía Dammert* ■ *Cynthia McClintock*

*Matthew Cleary* ■ *Christopher Sabatini & Eric Farnsworth*

## **Governance and Development**

*Kemal Derviş*

## **History Repeats Itself in Pakistan**

*Husain Haqqani*

---

*Valerie Bunce & Sharon Wolchik* on Electoral Revolutions

*Vitali Silitski* on the Belarus Election

*Karen Kramer/Steven A. Cook* on Arab Political Pacts

---

## **On Constitutional Courts**

*Donald L. Horowitz*

# CONSTITUTIONAL COURTS: A PRIMER FOR DECISION MAKERS

*Donald L. Horowitz*

*Donald L. Horowitz is James B. Duke Professor of Law and Political Science at Duke University. He is currently working on a book on constitutional design. Earlier versions of this article were prepared for deliberations in Afghanistan and Iraq.*

Judicial review is a growing institution. Originating in the United States two centuries ago, the power to declare governmental action, whether legislative or executive, unconstitutional has spread around the world in the last half century. As of 2005, more than three-quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions.<sup>1</sup> This figure includes a good many countries with undemocratic regimes, in which the effectiveness of judicial review might be subject to question, but the prevalence of the institution nonetheless testifies to the current fashion for judicial review.

The popularity of judicial review is a recent phenomenon. As we shall see, judicial review is a function performed either by a specialized constitutional court or by a court with more general jurisdiction, typically a supreme court. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts.<sup>2</sup> In 1978, only 26 percent of constitutions provided for a constitutional court,<sup>3</sup> while approximately 44 percent did by 2005.

There are regional variations in the relative popularity of the two types. For example, supreme-court review is more common than constitutional-court review in Latin America.<sup>4</sup> Worldwide, however, only about 32 percent of constitutions locate judicial review in a supreme court or other ordinary court.

It has become more and more difficult for constitution-makers to avoid judicial review. In the post-1989 period, constitution-making has become an international and comparative exercise in ways it was not previously. Increasingly, there are norms of constitutional process

and constitutional provisions propagated as desirable. Some part of the fashion for judicial review derived initially from a few conspicuous adoptions, as in Germany, Japan, and India. Some part derived, too, from the adjudication of new rights by new supranational institutions, particularly in Europe.<sup>5</sup> Once optional for new democracies, constitutional courts are now generally regarded as standard equipment. To be sure, it is possible for constitutional drafters to defy the counsel of international advisors and monitors of democratic progress by choosing, as Afghanistan and Iraq did, not to create constitutional courts. It is, however, exceedingly unusual to fail to provide for judicial review altogether, and the more common choice, exemplified by Indonesia (2002), Côte d'Ivoire (2000), Latvia (2003), Chile (2001), and Spain (1992), is the constitutional-court model.

Judicial review in either of its principal institutional forms is attractive to those political leaders who are uncertain about the future and wish to build in protection against a day when their adversaries may act against them.<sup>6</sup> The constitutional-court format may be more attractive than the ordinary supreme-court format, not merely because it has more adherents among organizations and individuals involved in international constitutional counseling, but because existing supreme courts may contain sitting judges who are still attached to the old regime or are in other ways biased toward one or another of the major democratic antagonists. Another potent reason to create a new constitutional court is the common failure of the existing courts to develop the rule of law in ways that support democratic institutions. That certainly was the rationale for a fresh start in Indonesia and some other countries, where sitting judges were frequently accused of corruption and incompetence. In such cases, creation of a wholly new structure, with new personnel, is regarded as essential to the success of the tasks with which the court is to be entrusted.

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

Not all constitutional courts manage to attain this valuable goal. Some become powerless structures, unable to gain public respect, compel compliance with their decisions, or restrain the appetites of politicians. Others become intrusive political actors, dictating in detail what legislatures and executives must or must not do, blocking the popular

will, and arrogating power to themselves. In the end, such a course compromises the political neutrality of the courts, makes the constitutional court itself a political issue, and risks achievement of the rule of law.

Much turns on the ability of constitutional designers and those who execute their design to put in place a constitutional court that has adequate powers and a proper relationship to the other branches of government and to the citizenry. Careless drafting can easily undo good intentions. A great many states around the world have become what Fareed Zakaria has called “illiberal democracies,”<sup>7</sup> elected regimes that routinely ignore constitutional limits on their power and deprive citizens of their rights and liberties. Properly designed constitutional courts can help to prevent such outcomes.

## The Two Models of Constitutional Adjudication

Constitutional courts are important, but not always indispensable, features of constitutional government. Britain developed a constitutional regime without judicial review of legislation or governmental action for its constitutionality.<sup>8</sup> Parliamentary supremacy did not produce an illiberal regime.<sup>9</sup> Switzerland has had relatively little judicial review and still has no separate constitutional court. Yet there are few more vibrantly liberal-democratic countries in the world. Judicial review initially developed in the United States of America as a way of enforcing the constitutionally mandated separation of powers among branches of the federal government and division of authority between the federal government and the states, more than the individual liberties guaranteed in the Bill of Rights. Most federal systems require judicial review to apportion authority between the center and the component units, but they do not necessarily require judicial review beyond that function. The institution of judicial review, however, has grown largely to enforce guarantees of human rights.

Some states, such as Japan, India, Israel, Canada, and Australia, have followed the American model of incorporating judicial review in the ordinary judicial hierarchy, with a single supreme court at the apex. Others, such as Germany, Italy, South Korea, the states of Eastern Europe since 1989, and South Africa have followed the original Austrian model, devised after World War I, by creating a separate constitutional court in which the power to review legislative and governmental action resides.

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

There are many variations in constitutions establishing constitutional courts. There are also great differences in the way such courts perform, and some of these differences are attributable to their design. Many constitutional courts make invaluable contributions to the establishment and maintenance of democratic institutions. Some, however, have a record of becoming embroiled in political struggles or making it difficult for government to accomplish its goals. The performance of some constitutional courts, which is perfectly appropriate in their home country, might be utterly inappropriate if transplanted to another new democracy. Careful attention to design should make it possible to create a court that supports, rather than impedes, the transition to and consolidation of a stable democratic regime.

### Variations Among Constitutional Courts

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

- the range of their jurisdiction and powers
- the parties who have access to these courts
- the mode of appointment of their judges
- the tenure of those judges
- the effect of judicial declarations of unconstitutionality
- the ease or difficulty of reversing constitutional-court decisions

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

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

ture abolished the procedure for the court to review legislation before it enters into force, leaving it with power to adjudicate only after passage.<sup>10</sup> Similarly, the Russian Constitutional Court, established in 1991, was quickly embroiled in the power struggle between Boris Yeltsin and the Russian parliament, and it found itself with fewer powers and less respect after 1995.<sup>11</sup> Whether constitutional adjudication occurs before or after passage of legislation, judicial review initiated by political authorities is more apt to insert a constitutional court in politics than is judicial review that is initiated by litigants or by the ordinary courts when the constitutional question is crucial to the determination of individual cases.

The South African provisions seem to avoid some of these dangers by limiting the jurisdiction of the Constitutional Court to cases appealed by litigants, referred to the court by the Supreme Court, or brought in exceptional circumstances where direct access to the court is in the interest of justice.<sup>12</sup> The South African Constitutional Court is clearly conceived as an adjudicator in concrete disputes. It has maintained high levels of public respect and support.

The original Austrian model allows ordinary courts and administrative courts to request the constitutional court to examine the constitutionality of statutes. Individual citizens may also lodge complaints alleging that governmental acts violate their constitutional rights. In Germany, individual complaints comprise something approaching 98 percent of all filings with the Constitutional Court. The remainder consists of referrals of constitutional questions to the court by other courts that cannot decide particular cases until constitutional questions embedded in those cases are resolved.

In general, a decision of a constitutional court holding a statute to be unconstitutional nullifies the statute, in whole or in material part. This is not the case in the United States, where a statute may be held to be unconstitutional merely as construed and applied, thereby leaving open the possibility that other applications of the statute may be consistent with the constitution. Even statutes held unconstitutional on their face in the United States may remain on the books, since there is no legal obligation on the legislature to repeal them. Some constitutional courts, on the other hand, write their decisions in such a way as to be quite specific about what may be required to rectify the constitutional defect in the law. In Central and Eastern Europe, legislators often follow the decisions of the courts word for word in amending statutes that have been held unconstitutional. The Italian Constitutional Court has the power itself to change the language of a statute to conform it to the constitution. (Such a power would be completely alien to American conceptions of the judicial function.) Where legislators are displeased by a decision of a constitutional court, they may, of course, amend the constitution. In some cases (notably, Poland), they may pass the same statute again, provided the legislative majority meets the same thresh-

old (usually two-thirds) as is required to amend the constitution. Elsewhere, the formal amendment process must be followed.

Some constitutional courts have gone much further than others in dictating to the legislature and executive. The Hungarian Constitutional Court has been unusually aggressive. If the Hungarian court finds that any interpretation of the statute would be unconstitutional, the whole statute is declared unconstitutional, even though the statute might have some other applications that are consistent with the constitution. The Hungarian court does not confine itself to sanctioning what must not be done; it lays down affirmative obligations on the other branches. It has required parliament to pass new rules regarding its own procedures, even in the absence of a constitutional provision pertaining to them. It has also intervened in parliamentary affairs by ordering parliament to provide representation on legislative committees to a small minority party. And the Hungarian court has held that parliament, by failing to pass certain legislation, was acting “unconstitutionally by omission.”<sup>13</sup> Between 1990 and 1995, the court did so on some 260 occasions, defining what the new law should look like and what the deadline for passage was. The Hungarian Constitutional Court has pronounced on the powers of the other branches of government in great detail, intruding even into budgetary matters. It accords little deference to parliament and leaves “little room for politics.”<sup>14</sup> Hungary, it is said, is not a parliamentary democracy, but a judicial one—or at least it was, until the court’s activism produced a serious political reaction in parliament.<sup>15</sup>

The most independent and judicious constitutional courts are composed of judges who have high legal qualifications and are appointed for long, nonrenewable terms. Members of the Italian Constitutional Court are elected for a fixed, nonrenewable term of nine years. One-third of the judges are selected by the senior judiciary; one-third are elected by parliament; and one-third are appointed by the president. But the choices are limited: Members of the court must be judges, professors, or lawyers who have had at least 25 years’ experience in practice. The underlying notion is that every judge of the Constitutional Court must be learned in the law. The obvious message is that constitutional adjudication is serious legal business, not to be confused with the political functions of government.

The appointment requirements elsewhere in Europe may be somewhat less strict, but they are generally similar. In France, members of the Constitutional Council have nine-year unrennewable terms. In Germany, judges of the Constitutional Court serve for twelve years, and they may not be renewed. In Central and Eastern Europe, terms range from seven to ten years and are generally nonrenewable, with the notable exception of Hungary, which allows a single renewal of a nine-year term.

In general, the appointment process is shared among parliament, the executive, and, in some cases, the judiciary, and judges selected for the

constitutional court are either legal scholars or senior judges of the ordinary courts. In Hungary and Poland, on the other hand, judges of the constitutional courts are appointed exclusively by parliament, a practice that has been criticized for its tendency to create “a ‘risk of excessive politicisation’ of the appointment process.”<sup>16</sup> The Hungarian selection process involves screening by a parliamentary committee in which each party has a vote, before election by a two-thirds vote in parliament. Unsurprisingly, Hungarian judges are essentially selected not as individuals but in groups, as a result of agreements among political parties. This is a process conducive to politicizing the court.

### Designing a Constitutional Court

Not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights. The Hungarian Constitutional Court’s judicial activism is undoubtedly in part a product of the judicial-selection process and the court’s very broad jurisdiction, but it is also said to be the result of a long Hungarian tradition of the supremacy of customary law over codified law.<sup>17</sup> The widespread disregard of decisions of the Russian Constitutional Court was due not only to difficulties in fitting the court into the Russian legal system but to the centrifugal and separatist forces prevailing in the country.<sup>18</sup> Those who design constitutional courts need to shape their contours carefully, taking account of traditions and current obstacles likely to affect the reception accorded their decisions.

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

Yet, when there is a shortage of highly qualified, politically neutral personnel, untainted by corruption, the temptation is great to load up a constitutional court with multiple tasks. In 2003, Indonesia created a constitutional court with jurisdiction to hear cases concerning the dissolution of political parties that do not meet certain legal requirements, to resolve challenges to election results, and to decide whether articles of impeachment voted by the lower house against a president or vice-president are legally sufficient to be forwarded to a joint legislative body for decision. All of these powers are in addition to the authority to decide on the constitutionality of statutes and to resolve disputes between governmental bodies. The Indonesian law is carefully crafted so as to limit the court to constitutional cases only after enactment of a challenged statute and only upon challenge by a party actually affected adversely by the statute. Indonesia decided against allowing the court to render advisory opinions to the political branches, but the range of matters confided to the court risks some involvement in major political controversies down the road.

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

### **A Few Pitfalls**

It is thus not difficult to choose provisions conducive to creating a court that supports constitutional government and human rights without preventing the legislature and executive from performing the important tasks they must perform. There are, however, a few specific issues that decision makers in new democracies might consider as they go about creating a constitutional court, if that is what they choose to do.

Many new democracies need to get things done—many things and many of them in a hurry: building infrastructure, reconstructing an educational system, creating a politically neutral army, reforming the legal system, and so on. The power to declare governmental action unconstitutional is the power to block things, to prevent them from getting done. That power, therefore, needs to be exercised with restraint and

with due respect to the political branches of government. Wide-ranging, vague powers confided to the courts risk thwarting that democratic voice. This makes it important to specify the jurisdiction of a constitutional court carefully. This is a delicate drafting job. In some countries, courts that adjudicate constitutional issues have spent much time laying down legal doctrine about when courts should *not* adjudicate constitutional issues, lest they overstep their legitimate powers and act undemocratically. This is a task that requires wisdom, training, and discretion. The appointment process needs to be crafted with a view to finding and attracting judges possessing such qualities, because the democratic accountability of constitutional courts in transitional societies is usually indirect at best: Such courts are not subject to the electoral process. Judges must, therefore, possess qualities of self-restraint.

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

A constitutional court with great potential for entanglement in bitter political controversy was created for Bosnia by the Dayton Accords of 1995.<sup>19</sup> Because of distrust among Bosnia's three main ethnic groups, three judges of the nine-member court are foreigners, so that no coalition of judges from any two groups—each with two members—could by itself form a majority. Among its other responsibilities, the Bosnian court is confided the power to review “for procedural regularity” declarations by a majority of upper-house legislators of one ethnic group or another that a proposed decision of the legislature is “destructive of a vital interest” of that group. If such a declaration is challenged by a majority of another group's upper-house legislators and the matter cannot be resolved in a brief conciliatory process, the issue is referred to the Constitutional Court.<sup>20</sup> With only the vaguest provisions to guide it, the court can easily find itself a focal point of ethnic controversy.

Even what may seem to be ordinary constitutional adjudication can create a constitutional crisis when a court is composed in this way in a divided society. In a highly controversial decision, the Bosnian Constitutional Court declared provisions of the constitutions of both entities comprising the state to be inconsistent with the Bosnian state constitution.<sup>21</sup> The provisions concerned the constitutional status of Croats and Bosniaks (Bosnian Muslims)—and their right to participate politically as groups—in the Republika Srpska and the reciprocal status of Serbs in the Croat-Bosniak Federation. At the time of the Dayton Accords, it was

understood that the recognition of the two entities constituted something of an ethnic partition, but in 2000 a divided Constitutional Court held that all three groups were “constituent peoples” in both entities and therefore had certain rights to be represented. The case had been brought by the Bosniak president of Bosnia-Herzegovina, and the court majority consisted of its two Bosniak judges and three foreigners. The result was a decision that seemed to harness the Constitutional Court to a Bosniak political agenda to create a more tightly bonded Bosnia. Both the composition of the court and its failure to leave this issue to the political process were problematic.

Even more problematic was a proposal contained in the Annan Plan for Cyprus that was rejected in a referendum in 2004 but will surely form part of any new negotiation there. That plan would have empowered a newly created court, consisting of six Cypriots (three Greeks and three Turks) and three foreign judges, to resolve deadlocks in any governmental body in which Greeks and Turks could not agree. The reason for the proposal was that, to induce Turkish-Cypriot acceptance, the new constitution included in the Annan Plan deliberately made it possible for the Turkish minority to create deadlocks by blocking government action. In addition to deciding constitutional questions, the three foreign judges would have been called upon to take sides in major political disputes in a deeply divided society. Breaking ethnopolitical deadlocks is a nonjudicial function that risks undermining the acceptance of constitutional adjudication. A constitutional court cannot be a substitute for self-government.

## Judicial Review and Islamic Law

In Islamic countries, a special problem concerns the intersection of the constitution with *shari'a* (Islamic law). Many constitutions in Muslim countries declare that Islam forms a foundation for the state. Some go further and state that no law in conflict with Islamic principles, or some specified version of them, may be enacted. Typically, lawmakers look to *shari'a* for principles that inform legislation, and in some cases they may wish to borrow ideas and institutions from other Islamic countries. (All Islamic countries also borrow from non-Islamic sources in crafting their legal institutions.<sup>22</sup>) Legislation is one common and sensible way in which Islamic principles have been infused into ongoing legal systems.<sup>23</sup> The institution of judicial review provides another, possibly more disruptive way in which *shari'a* principles can be incorporated into the legal system. Consider a constitution with a provision authorizing the constitutional court to declare invalid any law in violation of the constitution and another provision declaring that no law contradicting the principles of Islam may be enacted. Now it is possible that the latter clause may be deemed simply to be an injunction to the

legislature, rather than a grant of power to the constitutional court, in which case the problem of judicial review for repugnancy to Islamic principles will not arise. Even if it does arise, the wording of the repugnancy clause may be sufficiently limited—for example, that no law contrary to the fundamental or universally accepted tenets of Islam may be enacted—that occasions for judgments of unconstitutionality will be few. But the enactment of a broad repugnancy clause in conjunction with a broad judicial-review clause certainly raises serious questions.

There is a great difference between a well-considered law reform, enacted by the legislature with attention to *shari'a*, and the possibility that a court might, in a single stroke, declare large portions of a country's statute book unconstitutional. For one thing, law reform under the supervision of the legislature and executive involves the input of many more people and permits the study of a variety of alternatives; judicial decisions involve many fewer actors (who may or may not be in the mainstream) and an up-or-down vote, without regard to the plurality of alternatives. The former is likely to be more democratic and more judicious. For another thing, abrupt invalidation of existing legal institutions and doctrines that do not conform to a court's conception of *shari'a* principles can disrupt the economy and unsettle societal expectations at a time when economic recovery and social stability are especially crucial. A great legal vacuum and great uncertainty would result from such decisions, with negative consequences for the administration of justice. Many Muslim countries have borrowed European commercial-law principles, even (as in Iraq) whole civil codes, some of which might not stand the strictest scrutiny if wide-ranging repugnancy review were available. Such countries need a body of reliable legal doctrine so that the legal system can be made to function while decisions about the future legal regime are being considered with care.

If this is so, it suggests that the power of judicial review might well be confined to the invalidation of governmental action for its failure to meet established norms protecting human rights or for its failure to conform to the distribution of powers between the central government and units of a federation. Judicial review for repugnancy to Islam is not a power known to *shari'a*, and it would be ironic indeed if the imported institution of judicial review were to serve this function in any far-reaching way.

## Constitutional Courts and Ordinary Justice

The focus on constitutional adjudication may also have the inadvertent but unfortunate effect of encouraging the neglect of the legal system overall. The rule of law in new democracies depends as much on ordinary law and the predictability and regularity of its application as it does on constitutional law. In law, as in life, what is routine is often more

important than what is exceptional. Attention to constitutional adjudication should not be allowed to preempt attention to reviving the legal system, to getting courts functioning again, to setting up institutions of legal education and sending law students overseas for training as well—in other words, to creating a fair, honest, and worthy system of justice. In countries temporarily short of able judges, it would be a pity if a constitutional court siphoned off the best legal talent, merely because the constitutional court became a particularly glamorous institution.

In short, judicial review can be exercised through the ordinary courts or a constitutional court. A carefully designed and properly limited constitutional court could be of inestimable benefit to the creation of the rule of law. Equally, a badly designed constitutional court, with unspecified or poorly specified powers, can become an object of political struggle, an impediment to democracy, and a negative influence on the development of the legal system. It is worth taking great pains to get this job done correctly. In this connection, some thought might be given to empowering the constitutional court (or the ordinary courts, if there is no constitutional court) to invalidate a statute or governmental action only when it contravenes specific articles of the constitution. That is one way to have the benefits of judicial review without some of the potential pitfalls that an open-ended grant of power to the courts might create.

#### NOTES

1. Except as otherwise indicated, these figures and the figures that follow derive from the Comparative Constitutions Project being conducted by Professors Tom Ginsburg and Zach Elkins of the University of Illinois, who kindly made the data available.

2. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 7–8.

3. Ginsburg, *Judicial Review in New Democracies*, 9.

4. Patricio Navia and Julio Ríos-Figueroa, “The Constitutional Adjudication Mosaic of Latin America,” *Comparative Political Studies* 38 (March 2005): 189–217.

5. See Said Amir Arjomand, “Law, Political Reconstruction and Constitutional Politics,” *Sociology* 18 (March 2003): 7–32.

6. For an argument to this effect, see Ginsburg, *Judicial Review in New Democracies*, 22–33.

7. Fareed Zakaria, “The Rise of Illiberal Democracy,” *Foreign Affairs* 76 (November–December 1997): 22–43.

8. For the argument that Britain enjoys a form of judicial review for constitutionality in spite of the doctrine of parliamentary supremacy, see Lori Ringhand, “Fig Leaves, Fairy Tales, and Constitutional Foundations,” *Columbia Journal of Transnational Law* 43 (Spring 2005): 865–904.

9. For an argument that legislative supremacy in a democratic regime would not produce results inferior to those produced by judicial review, see Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (April 2006): 1346–1406.

10. See Sarah Wright Shreive, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* 26 (Summer 1995): 1201–33.

11. Herbert Hausmaninger, "Judicial Referral of Constitutional Questions in Austria, Germany, and Russia," *Tulane European and Civil Law Forum* 12 (Winter 1997): 25–37.

12. There is also an unutilized provision for referral of a dispute between organs of the state when the constitutionality of executive action is challenged. See generally Pius N. Langa, "The Role of the Constitutional Court in the Enforcement and Protection of Human Rights in South Africa," *St. Louis University Law Journal* 41 (Fall 1997): 1259–77.

13. Kim Lane Scheppele, "The New Hungarian Constitutional Court," *East European Constitutional Review* 8 (Fall 1999): 81–87.

14. Scheppele, "The New Hungarian Constitutional Court."

15. See Kim Lane Scheppele, "Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments," in Adam Czarnota, Martin Krygier, and Wojciech Sadurski, eds., *Rethinking the Rule of Law after Communism* (Budapest: Central European University Press, 2005), 53–54. For the recurrent hazards of judicial policy making, see Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution, 1997).

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

17. Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002), 50, 57.

18. Alexei Trochev, "Implementing Russian Constitutional Court Decisions," *East European Constitutional Review* 11 (Winter–Spring 2002): 95–103.

19. *Constitution of Bosnia and Herzegovina*, Art. VI.

20. *Constitution of Bosnia and Herzegovina*, Art. IV(3)(e)–(f).

21. Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina, Case No. 5/98-III (2000).

22. In Saudi Arabia, for example, the Companies Law of 1965 drew on Egyptian and European sources, and in 1982 a Board of Grievances was explicitly modeled on the French Conseil d'Etat. In Malaysia, statutes on evidence and civil procedure in Islamic courts and even some Islamic family-law provisions are based largely on British models. See Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change," *American Journal of Comparative Law* 42 (Spring and Summer 1994): 233–93, 543–80.

23. See Horowitz, "The Qur'an and the Common Law."