



# CONSTITUTIONAL REVIEW IN NEW DEMOCRACIES<sup>1</sup>

## EXECUTIVE SUMMARY

The establishment of a judiciary with the power of constitutional review — determining whether government actions comply with the constitution's provisions — is now considered a standard component of a democracy. It is increasingly common to entrust the power of constitutional review to a specialised constitutional court that can issue authoritative decisions on the constitutionality of laws and government actions and can interpret the constitution's provisions.

A constitutional court can play many important roles, including reviewing the constitutionality of legislation, protecting individual rights, providing a forum for the resolution of disputes in a federal system, enforcing the separation of powers, certifying election results, and assessing the legality of political parties.

Establishing a court with the power to review the constitutionality of laws and government actions provides political parties and groups with a form of “insurance” for future scenarios in which they may not be in government and want to make sure that a government formed by their opponents acts within the limits of the constitution. A constitutional court is a means of institutionalising the commitment made by all parties when drafting the constitution to abide by its provisions. Furthermore, foreign investors often regard an independent and well-functioning judiciary as a sign of a country's stability and investment potential. There are many options in designing a constitutional court, yet some recommendations can be made on a number of key design questions:

1. **Relationship between ordinary courts and constitutional court:** Ordinary courts should be allowed to engage in limited review of constitutional questions that arise in the course of cases before them. This review may be limited to ensuring that statutes are applied in a constitutional manner. Alternatively, if ordinary courts can consider challenges to statutes, they may be subject to later review of their decisions by the constitutional court. Either option promotes judicial efficiency by eliminating the need for ordinary courts to halt proceedings while they consider constitutional issues.
2. **Court membership:** Judges should be protected from undue political pressure. An appointment procedure that involves many different political actors, rules that strictly define the causes for which a judge may be removed and the procedure for removal, judicial qualifications based on merit and expertise, and non-renewable terms for judges can all help to foster judicial independence.
3. **Jurisdiction:** A constitutional court should have jurisdiction over all matters that involve a constitutional question. While granting a constitutional court broad jurisdiction allows the court to exert substantial influence over a country's politics, restricting the court's jurisdiction in a way that declares any area of constitutional law “off-limits” is incompatible with the court's role as the final arbiter of the law.
4. **Access:** The question of whether individual citizens will be able to petition the court is perhaps the most pressing design question related to access to the constitutional court. Petitions from citizens may foster stronger public support for the court, but may also significantly increase the court's workload. Barring citizens from petitioning the court is likely to reduce the number of cases involving violations of constitutional rights that come before the court, which may in turn result in weaker enforcement of constitutional rights.
5. **Remedies:** A constitutional court must have the power to grant remedies for constitutional violations that can address a wide range of situations, and that have a real impact; for example, the power to issue injunctions compelling a government actor to take action, or to refrain from acting, in a particular matter.

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# 1. ESTABLISHING CONSTITUTIONAL REVIEW IN TRANSITIONS TO DEMOCRACY

During processes of democratic transition, political actors negotiate the terms of the new democracy and formalise those terms in a written constitution. The new democracy will face the pressing question of how to enforce that constitution. After World War II, it has become standard practice to entrust the judiciary with the responsibility of interpreting the constitution and determining whether government decisions and actions are constitutional. The UN High Commissioner for Human Rights and the Independent Expert on the promotion of a democratic and equitable international order have both noted the importance of establishing constitutional review.<sup>2</sup>

Careful thought must be given to the design of the mechanism for judicial enforcement. There is a clear trend towards establishing a new constitutional court to interpret the constitution. This Briefing Paper presents an overview of the basic design questions that policymakers will have to address when constructing a constitutional court. These include: the court's membership; the process for selecting the court's judges and the mechanism for removing judges; the court's jurisdiction; access to the court; forms of review; and judicial remedies in response to constitutional violations.

## 1.1. SYSTEMS OF CONSTITUTIONAL REVIEW: CENTRALISED VERSUS DIFFUSE

Constitutional review can take two forms: centralised or diffuse.

In a centralised system, the model used by most European countries, including France, Germany and Italy, a dedicated body — a constitutional court or a constitutional council — is the only state organ granted the power to make authoritative determinations on the constitutionality of a law or government action. When constitutional questions arise in cases before lower courts, they are referred to the constitutional court for adjudication.

Diffuse or decentralised constitutional review, the model used in the United States, grants all courts in the judiciary the power of constitutional review. A supreme court is the highest court in the country, and it addresses questions of constitutionality when they arise in cases appealed from lower courts. The supreme court also hears non-constitutional cases brought on appeal from lower courts.

## 1.2. WHY ESTABLISH CENTRALISED CONSTITUTIONAL REVIEW

Opting for centralised constitutional review with a constitutional court offers several advantages over a system of diffuse constitutional review. First, a specialised constitutional court is well suited for integration into a civil law system, which generally includes specialised courts in other areas (civil and criminal law, administrative law, etc.). A constitutional court also offers a relatively quick and definitive method of determining the constitutional validity of laws and decrees. In a decentralised system, by contrast, multiple courts may issue decisions regarding a law's validity, and these decisions may conflict with each other. Only after cases have worked their way through the judicial system to the country's highest courts will there be a degree of certainty, when appellate courts or the supreme court make a determination. A constitutional court, in contrast, is designated as the only government institution that can conduct constitutional review, and its decisions will then be followed by the rest of the judiciary. Furthermore, in systems in which the constitutional court can be accessed without first having to approach the lower courts (see section 6), the constitutional court can issue a decision more quickly than is possible in a decentralised system.<sup>3</sup>

Another argument in support of creating a specialised constitutional court centres on the nature of the cases such a court will hear. As discussed below (section 5), disputes over the constitution's provisions often involve the most sensitive political issues facing a country, including review of the country's electoral laws and elections, the powers of the various branches of government and other questions. Decisions on these issues will have a major impact on the country's politics. Some scholars argue that because of the political nature of constitutional cases, it is best to create a specialised body so that the judges on that body can develop expertise in the area of constitutional jurisprudence and insulate the rest of the judiciary from politicisation.<sup>4</sup>

Many countries have established a new constitutional court when in transition from an authoritarian regime to a democratic system. Constitutional courts present several advantages in this scenario. First, establishing a specialist court charged with interpreting the constitution and ensuring its primacy signals the country is committed to the rule of law and is making a clear break with its authoritarian past. The court bears a special responsibility for ensuring that the constitution is applied fairly and equally to all members of society, no matter how powerful. Second, the ordinary judiciary might be suspect given its function under the former regime. Policymakers may feel more comfortable entrusting the power of constitutional review to a new institution whose members are selected by democratic representatives (see section 3). This rationale motivated, in part, the creation of the German Federal Constitutional Court (FCC) after World

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<sup>2</sup> Hungary must revoke worrying constitutional changes – Pillay, UN Office of the High Commissioner for Human Rights, 18 June 2013, <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=13464&LangID=E>; Report of the Independent Expert on the promotion of a democratic and equitable international order, UN Human Rights Council, A/HRC/24/38, 1 July 2013, para. 44, [http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38\\_en.pdf](http://www.ohchr.org/Documents/Issues/IntOrder/A-HRC-24-38_en.pdf).

<sup>3</sup> Victor Ferreres Comella, *The rise of specialised constitutional courts*, in *Comparative Constitutional Law* (Ginsburg and Dixon, eds.) (Elgar, 2011), p. 268.

<sup>4</sup> Ferreres Comella, *ibid.*, p. 269.

War II and the creation of the Spanish Constitutional Court after the fall of General Franco.

Establishing a court with the power to review the constitutionality of laws and government actions also provides political parties with a form of “insurance” for future scenarios in which they may not be in government and want to make sure that a government formed by their opponents acts within the limits of the constitution. A constitutional court is a means of institutionalising the commitment made by all parties when drafting the constitution to abide by its provisions.<sup>5</sup> For example, when Italy’s Constitutional Assembly debated the question of creating a new Constitutional Court in 1946, the political parties that expected to find themselves in the opposition after parliamentary elections were strong supporters of the Court, in part because they saw the Court as a way to hold the ruling party to account.<sup>6</sup>

Furthermore, foreign investors often regard an independent and well-functioning judiciary as a sign of a country’s stability and investment potential. For example, in Egypt, President Anwar Sadat established the Supreme Constitutional Court in part to demonstrate to investors that the country was committed to the enforcement of property rights.<sup>7</sup>

### 1.3. RELATIONSHIP BETWEEN CONSTITUTIONAL COURTS AND OTHER COURTS

The formation of a new constitutional court can create conflicts with other courts in the judicial system. In particular, it is likely that a constitutional court and the higher courts will clash regarding the jurisdictional “territory” of each court. These tensions can arise in both common and civil law systems: in common law systems, between the constitutional court and the supreme court; in civil law systems, between the constitutional court and the courts of last resort of each specialised division (which we term “supreme courts”). Furthermore, constitutional courts that are set up as part of a transition to democracy may include judges who are more invested in the new democratic order than the judges comprising the rest of the judiciary; the constitutional court’s judgments consequently may reflect better the aspirations of the new constitutional era than ordinary courts.<sup>8</sup>

Given the complexity of many legal disputes, it is impossible to achieve a perfect separation between the competence of the constitutional court and that of the ordinary courts. Nor is such a separation necessarily desirable, since the norms enshrined in the constitution are intended to pervade a country’s entire system of government, rather than being confined to one particular institution.<sup>9</sup>

Policymakers should consider the following questions when designing a constitutional court and clarifying its relationship to other courts:

- Will ordinary courts (lower courts and supreme courts) have the power to issue opinions regarding a law or executive action’s constitutionality? During the early years of operation of the German Federal Constitutional Court (FCC), the FCC and Germany’s supreme courts repeatedly clashed over whether the supreme courts could make such judgments when a lower court referred a constitutional question to the FCC (the referral had to go through the relevant supreme court before reaching the FCC). The conflict was resolved when Germany’s parliament amended the Federal Constitutional Court Act (FCC Act) in a way that eliminated the role of supreme courts in the process of referring a question to the FCC. The FCC may request an opinion on a matter’s constitutionality from a supreme court if it chooses, however (FCC Act, Art. 82).<sup>10</sup>
- Will ordinary courts (lower courts and supreme courts) have the power to strike down a statute, or will the constitutional court be the sole court with this power? Portugal allows ordinary courts to set aside statutes as unconstitutional on their own authority, with the possibility of appeal to the Constitutional Court (Constitution of Portugal Art. 280).<sup>11</sup>
- Must the constitutional court rely on supreme courts’ interpretations of statutes? Requiring the constitutional court to do so may reduce friction between it and supreme courts. Italy’s Constitutional Court has developed an informal practice of relying on the interpretations of statutes made by the Court of Cassation, while reserving the right to determine whether those interpretations fall within the limits of the constitution.<sup>12</sup>

One proposal to structure the relationship between constitutional courts and ordinary courts is to allow ordinary courts to engage in review of constitutional questions that arise in the course of cases before them, subject to later review by the constitutional court. Under this proposal, findings by lower courts that an executive or legislative action is unconstitutional are not implemented until the constitutional court has reviewed and approved the judgment. An administrative benefit of this proposal is that lower courts do not have to halt proceedings each time a constitutional question arises and await the constitutional court’s review of the matter.<sup>13</sup> South Africa follows this approach (Constitutional Court Complementary Act, Section 8). Another approach is to permit lower courts to invalidate a particular application of a statute on constitutional grounds, but to

<sup>5</sup> See Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, in *Constitutional Courts: A Comparative Study* (Harding and Leyland, eds) (Wildy, Simmons & Hill, 2009).

<sup>6</sup> Mary Volcansek, *Constitutional Politics in Italy* (Macmillan, 2000), p. 16-17.

<sup>7</sup> Tamir Moustafa, *The Struggle for Constitutional Power* (Cambridge, 2007), p. 4-6.

<sup>8</sup> Ferreres Comella, *ibid.*, p. 274.

<sup>9</sup> Frank Michelman, *The interplay of constitutional and ordinary jurisdiction*, in *Comparative Constitutional Law* (Ginsburg and Dixon, eds.) (Elgar, 2011), p. 279.

<sup>10</sup> Lech Garlicki, *Constitutional courts versus supreme courts*, *International Journal of Constitutional Law* (2007), p. 51 note 14.

<sup>11</sup> Ferreres Comella, *ibid.*, p. 273.

<sup>12</sup> Garlicki, *ibid.*, p. 55.

<sup>13</sup> Michelman, *ibid.*, p. 288-89.

reserve the power of invalidating the statute itself to the constitutional court.

#### 1.4. ESTABLISHING AN EFFECTIVE CONSTITUTIONAL COURT

Creating an effective constitutional court, which checks governmental power, and whose decisions are respected and complied with, requires more than simply setting up a constitutional court. It requires policymakers to take steps to secure the court's independence and protect it from capture by political elites, and to generate a broad degree of political support for the court from across the political spectrum. Policymakers must also ensure that there is an adequate pool of trained professionals who qualify as candidates for nomination to the court, as well as staff to support the court's day-to-day functions.

Enshrining the principle of an independent judiciary in the constitution is a first step towards fostering the constitutional court's independence. But more is needed. A court's ability to operate independently is primarily affected by the degree to which political actors can influence or pressure the court. To insulate the constitutional court from political pressure, policymakers should consider:

- Creating an appointments process that involves a wide range of political actors, including members of the political opposition (see section 3);
- Establishing rules that make the removal of a constitutional court judge difficult and that limit the reasons for which a judge can be removed (see section 4);
- Prescribing defined, non-renewable term lengths for judges (see section 2); and
- Defining the professional qualifications that an individual must hold to be eligible for appointment to the constitutional court (see section 2).

An independent judicial council can help promote judicial independence. Judicial councils are typically comprised of senior members of the judiciary, and in some cases lawyers, law professors and/or political appointees without legal training. South Africa's Judicial Service Commission (JSC) includes all of the aforementioned, as well as parliamentarians. Judicial councils are often tasked with overseeing promotions within the judiciary, disciplining judges, and training lawyers and judges. Placing control over judicial promotions and discipline with a judicial council removes these matters from the political sphere, in an effort to ensure that these decisions are based on a judge's merits and not on how popular his or her decisions are with political actors. The task of training lawyers and judges is also crucial, particularly in countries where there are relatively few qualified legal professionals, or where a history of authoritarian dominance over the judiciary has raised questions about the impartiality of judges appointed by the authoritarian regime.<sup>14</sup>

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<sup>14</sup> For a more detailed treatment of strategies for the promotion of judicial independence, see "International Standards for the Independence of the

## 2. COURT MEMBERSHIP

Policymakers creating a new constitutional court will need to decide how many judges will sit on the court; the length of judges' terms and whether those terms are renewable; and whether to set a mandatory retirement age for judges. The qualifications that constitutional court judges must hold should also be determined.

**Number of members:** The number of judges on a constitutional court varies widely by country. Latvia's Constitutional Court is among the smaller bodies, with seven members (Constitutional Court Law, Art. 3), while Turkey's Constitutional Court (TCC) is among the largest, with 17 members after constitutional amendments in 2010 (Constitution of Turkey, Art. 146). It is generally advisable to create a constitutional court with an uneven number of judges, to avoid ties during votes on cases. The number of judges on the court should also be specified, preferably in the constitution. This prevents other branches of government from attempting to pack the court with additional members in an effort to obtain more sympathetic judgments, as former Egyptian President Hosni Mubarak did in the early 2000s.<sup>15</sup>

**Length of term:** The length of a constitutional court judge's term can affect the court's ability to function independently. Many constitutional courts prescribe a defined term length for judges, often nine to 12 years (although term lengths vary greatly around the world).<sup>16</sup> This allows new judges to be appointed to the court relatively frequently, which helps to ensure that the court's judgments are not too far removed from the prevailing moral and political views of the society.<sup>17</sup> Constitutional court judges' terms may be renewable, or non-renewable. Terms that are renewable (for example, by the legislature) are likely to influence a judge's rulings to some extent, because the judge might feel pressure to issue judgments that will please the political actors who hold the power to renew or end the judge's term.<sup>18</sup> Germany initially allowed FCC judges' terms to be renewed, but switched to non-renewable terms for FCC judges in 1970 to eliminate any possibility that members of parliament might grant or deny renewal for political reasons.<sup>19</sup> However, non-renewable terms (including lifetime appointments) may reduce judges' incentives to perform effectively and their sense of accountability to political actors.<sup>20</sup> The Venice Commission generally recommends "a fixed and relatively long term with no scope for re-election" for constitutional court judges.<sup>21</sup>

Judiciary," Democracy Reporting International and the Center for Constitutional Transitions, October 2013.

<sup>15</sup> Tamir Moustafa, *ibid.*, p. 198-201.

<sup>16</sup> Ferreres Comella, *ibid.*, p. 270; Violaine Autheman, *Global Lessons Learned: Constitutional Courts, Judicial Independence and the Rule of Law*, IFES Rule of Law White Paper Series (2004), p. 7.

<sup>17</sup> Ferreres Comella, *ibid.*, p. 270.

<sup>18</sup> International Institute for Democracy and Electoral Assistance, *A Practical Guide to Constitution-Building: The Design of the Judicial Branch* (2011), p. 19.

<sup>19</sup> Donald Kommers, *Autonomy versus Accountability: The German Judiciary, in Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001), p. 148-49.

<sup>20</sup> International IDEA, *ibid.*, p. 19-20.

<sup>21</sup> Venice Commission, *The Composition of Constitutional Courts* (1997), p. 9.

**Retirement age:** Some countries prescribe a mandatory retirement age for constitutional court judges. They may also set a minimum age that judges must reach before they are eligible for appointment to the constitutional court. The retirement age may be implemented either instead of a set term length, or in addition to it. For example, judges on Germany's FCC may only serve one 12-year term; in addition, they must retire at age 68 even if they have not reached the end of their term (FCC Act, Art. 4).

## 2.1. JUDICIAL QUALIFICATIONS

Setting constitutional requirements for the level of education and professional achievement that constitutional court judges must have obtained ensures that the judges appointed to the court will have the expertise necessary to adjudicate the difficult and politically significant constitutional questions brought before the court. Specifying judicial qualifications also creates an additional barrier to court-packing, because a political actor or party seeking to place its supporters on the constitutional court will have to ensure that the candidates it nominates possess the minimum qualifications specified in the constitution. Qualifications may also identify certain public offices that are incompatible with appointment to the constitutional court, usually elected political positions. This also helps to insulate the constitutional court from political influence.

Judicial qualifications may include:

**Educational or professional expertise:** Many countries require constitutional court judges to have prior experience as a lawyer or judge. Others also allow professors and politicians to be appointed. The French Constitutional Council's members are not required to have legal training, and all former Presidents automatically become members of the Council (Constitution of France, Art. 56). While the majority of the Turkish Constitutional Court's members have been judges prior to their appointment, a certain number of candidates for appointment to the TCC may also be economists or political scientists (Constitution of Turkey, Art. 146).

Many constitutions specify the level of educational training or number of years of experience a constitutional court judge must have in his or her profession before being appointed to the court. For example, candidates for Italy's Constitutional Court must be drawn from one of the following professional categories:<sup>22</sup>

- A judge (active or retired) on one of Italy's higher courts (ordinary or administrative);
- A full professor of law; or
- A lawyer with 20 years' experience in practice.

**Incompatible qualifications:** Some countries also identify a set of professions or offices that constitutional court judges may not hold. Judges on Germany's FCC may not simultaneously hold office in the legislative or executive

branch, and may not maintain any other profession, except that of law professor (FCC Act, Art. 3).

**Other requirements:** Relatively rarely, some constitutions require that the constitutional court's membership fulfil certain representation requirements. For example, the South African Constitution states that "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed," (Art. 174) a requirement designed to promote the transformation of the judiciary after the end of apartheid from an overwhelmingly white and male body to one that exemplifies South Africa's diversity.

## 3. APPOINTMENT MECHANISMS

The procedure for appointing judges to the constitutional court is one of the most important questions policymakers will face when establishing the court. While judges strive to interpret the law fairly and issue impartial decisions, their political views will naturally play some role in how they apply the constitution. Because of the important constitutional questions that come before constitutional courts, and the powerful impact the court's decisions can have on politics, it is widely accepted that political actors should play a role in selecting constitutional court judges. It is also advisable to include a wide range of political actors in the appointments process, in order to encourage them to invest politically in the court, so that those political actors who lose before the court and disagree with its judgments will nonetheless abide by the court's judgments rather than attacking the court and attempting to undermine it. Three common models for constitutional court appointments include the legislative-supermajority model, the judicial-council model, and the multi-constituency model.<sup>23</sup>

### 3.1. LEGISLATIVE SUPERMAJORITY MODEL

Some countries give the power to appoint constitutional court judges to the legislature. This helps to balance the power given to the court to strike down acts promulgated by the legislature. Germany's two legislative houses, the *Bundestag* and *Bundesrat*, each appoint half of the judges on Germany's FCC by a supermajority of two-thirds, a rule intended to prevent the ruling party from controlling all constitutional court appointments (as would likely be the case if only a simple majority were required), and to encourage parties to work together to compromise on candidates.<sup>24</sup> However, Germany's experience also shows that legislative control of constitutional court appointments can lead to deadlock and delays in filling vacancies on the court where parties are unable to reach an agreement.

<sup>23</sup> For a detailed treatment of these models, see the forthcoming report on constitutional court appointments by the Center for Constitutional Transitions and International Institute for Democracy and Electoral Assistance, available at <http://constitutionaltransitions.org/>.

<sup>24</sup> In the *Bundestag* a special committee, in which all parliamentary factions are represented proportionally, appoints the judges with a two-thirds majority vote. In the *Bundesrat*, the entire chamber votes.

<sup>22</sup> Constitution of Italy, Art. 135.

Many countries divide the power to appoint constitutional court judges among several different political and non-governmental actors. Two examples of this approach are the judicial-council model and the multi-constituency model.

### 3.2. JUDICIAL COUNCIL MODEL

In order to insulate the constitutional court from political influence, some countries have created a judicial council with the responsibility of nominating candidates for the constitutional court. South Africa's Judicial Service Commission (JSC) includes members of the legislature and the judiciary, as well as lawyers, law professors and members appointed by the President. When there is a vacancy on the Constitutional Court, the JSC solicits applications, decides on a short list of candidates to interview, holds interviews that are open to the public, deliberates on the candidates, and presents a list of three candidates to the President, who must then choose one. If the President rejects the list presented, he must give reasons, and the JSC then compiles another list of three candidates, from which the President must make an appointment (Constitution of South Africa, Art. 174).

### 3.3. MULTI-CONSTITUENCY MODEL

A multi-constituency approach to constitutional court appointments also involves a wide range of actors, but under this model, each institution makes its appointments to the court separately, rather than working together to make a final decision on a candidate. In 2010, Turkey amended its Constitution, implementing a multi-constituency model for appointments to the Turkish Constitutional Court. The purpose of these amendments, in part, was to allow a broader range of actors to play a role in shaping the TCC, which was perceived by many as dominated by a small group of elites. Prior to the amendments, the President appointed all of the TCC's members, drawing them from lists of nominees selected by Turkey's high courts (including military courts) and the higher education council, and directly appointing four members from among senior lawyers and administrators (Constitution of Turkey, Art. 146, prior to amendment in 2010). After the 2010 constitutional amendments, Turkey's legislature, the Grand National Assembly, appoints three of the TCC's members from nominations made by the Court of Auditors and Turkey's bar associations. The President still appoints the majority of TCC members, but in addition to selecting some members from nominations made by the high courts and by the higher education council, the President also makes four direct appointments from the ranks of prosecutors and judges on lower courts. In effect, the 2010 amendments have significantly expanded the pool from which candidates may be selected for appointment to the TCC (Constitution of Turkey, Art. 146).

Tunisia's June 2013 draft Constitution proposes a multi-constituency model for appointments to its newly created Constitutional Court, and also incorporates elements of the legislative supermajority model (June 2013 draft Constitution, Art. 115). It sets out a two-step process. In the first step, the President, the Speaker of the Chamber of Deputies, the Prime Minister, and the Supreme Judicial Council each compile separate lists of candidates. This ensures the involvement of a wide range of political actors and other constituencies (e.g.

the judiciary). However, in the event that the Prime Minister and the Speaker of the Chamber of Deputies are members of the same political party, Tunisia's proposed process may not offer as many opportunities for the involvement of opposition parties as hoped for. In the second step, the Chamber of Deputies elects the Court's judges from the four lists of candidates. The Chamber of Deputies must elect three of the judges from each list of six candidates, which guarantees that each of the political actors empowered to propose candidates will play a role in shaping the Court. Furthermore, judges must be elected by a three-fifths supermajority of the Chamber of Deputies, which encourages the different political parties represented in the Chamber to work together to reach compromises on candidates.

## 4. REMOVAL MECHANISMS

The rules for removing constitutional court judges can be just as important as the rules established for judges' appointment. Rules that make it too easy to remove a judge, such as by granting one political institution the power to remove a judge without requiring the approval or ratification of the decision by any other institution, or without an appeals process, leave constitutional court judges vulnerable to political pressure. Judges cannot act independently if they fear that they will be removed as a result of their decisions.

For this reason, it is important to establish clear, specific rules regarding the *causes* for which a constitutional court judge can be removed, and the *procedure* for removal. It is also important that these rules be difficult to change once established, to protect judges' independence. Including these rules in the constitution, rather than in an ordinary statute, serves this purpose by requiring a constitutional amendment to alter the procedure for removing a constitutional court judge.

### 4.1. JUSTIFICATIONS FOR REMOVAL

Most countries only permit the removal of constitutional court judges for a narrow set of reasons, most commonly incapacitation due to illness (physical or mental), conviction for a serious crime or for judicial misconduct.

### 4.2. PROCEDURE FOR REMOVAL

The exact procedure for removing a constitutional court judge varies by country. In many countries, including Italy and Germany, the constitutional court itself must vote in favour of a judge's removal. Sometimes a supermajority vote of the court is required to approve the removal — in Italy and Germany, a two-thirds majority is required (Constitutional Law No. 1 of 11 Mar. 1953, section 7 [Italy]; FCC Act, Art. 105 [Germany]). This places the decision to remove a judge in the hands of her colleagues, in an effort to ensure that an evaluation of the claim against the judge — judicial misconduct, for example — is as depoliticised as possible.

South Africa sets out a two-step process for a Constitutional Court judge's removal. First, the Judicial Service Commission must make a finding that the judge is guilty of gross misconduct, is grossly incompetent or suffers from incapacity. Second, the National Assembly must approve a

resolution calling for the judge's removal by a two-thirds majority vote, after which the President formally removes the judge (Constitution of South Africa, Art. 177). This removal process requires two institutions to agree on a judge's removal, and requires a supermajority vote in the legislature.

## 5. JURISDICTION

The jurisdiction of constitutional courts varies widely, and may include any of the following areas:<sup>25</sup>

**Legislative acts:** The constitutional court will almost certainly be authorised to review the constitutionality of laws, internal decisions made by the legislature (e.g. with respect to the legislative process), and/or legislative omissions or inaction in cases where the constitution imposes positive duties to enact legislation.

**Executive officials and agencies:** Constitutional courts may be tasked to review the constitutionality of executive actions and decisions, to adjudicate disputes regarding the competence of an agency, and/or to preside over impeachment proceedings or corruption trials against state officials.

**The federal system:** In a federal system, constitutional disputes will inevitably arise among the different levels of government, requiring a forum for resolution. Disputes might arise between the central government and sub-national governments, or among sub-national governments themselves. These will often concern the constitutionality of a law passed or action taken by the national government or a sub-national government. Almost all federal constitutions provide for some form of constitutional review.<sup>26</sup> Germany's Federal Constitutional Court has extensive jurisdiction over issues related to the federal system of government (FCC Act, Art. 13).

**Rights protection:** If individual citizens can petition the constitutional court to allege violations of their constitutional rights by legislation or executive action (section 6), the resulting decisions will interpret the content and scope of the rights enshrined in the constitution, and define the obligations of the state to enforce those rights.

**The constitution-making process:** A constitutional court may be called upon to adjudicate disputes that arise during a constitution-drafting process, or to review the constitutionality of amendments to the constitution. For example, South Africa's Constitutional Court was required to review the 1996 Constitution before it entered into force to certify that it complied with the principles set out in the interim 1994 Constitution.<sup>27</sup> Colombia's Constitutional Court

rejected then-President Alvaro Uribe's attempt to amend the Constitution to allow him to run for a third term, on the grounds that the amendment would weaken many of the core constitutional constraints on presidential power, and thus constituted an unlawful "substitution" (or alteration) of the Constitution (Sentencia C-141 (2010)).<sup>28</sup>

**Political parties and elections:** Some constitutional courts are granted the power to determine the legality of political parties, review the constitutionality of actions taken by parties or certify electoral results. For example, the Turkish Constitutional Court has played an active and controversial role in banning political parties when it determined that the platforms of those parties violated the Constitution's principles.

**International law:** A constitutional court may be authorised to determine a state's obligations under international agreements and treaties to which it is a party, whether a state has met those obligations, and the constitutionality of treaty obligations.

Constitutional courts may be granted jurisdiction over any or all of these areas. In some cases, the constitutional court's jurisdiction is quite restricted: in Belgium, for example, the Constitutional Court may only review legislation, including conflicts of law within Belgium's federal system (Constitutional Court of Belgium, Art. 142). However, many constitutional courts are granted relatively broad jurisdiction including many of the areas described above.

## 6. ACCESS TO COURT

Cases may come before the constitutional court in a variety of ways, including referral by other courts or from other branches of government, or through individual complaints brought by citizens.<sup>29</sup>

**Referral from other courts:** In a centralised system of constitutional review, any court adjudicating a matter that involves a question of constitutional interpretation must generally refer that question to the constitutional court (section 1.3). Proceedings in the lower court are halted while the constitutional court reviews the matter, and the constitutional court's determination is binding on the lower court.

**Referral from the legislature or government officials:** In some countries, members of the legislature may petition the constitutional court directly. Sometimes a certain number

<sup>25</sup> Four of these categories are identified in: Andrew Harding, Peter Leyland, and Tania Groppi, *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, in *Constitutional Courts: A Comparative Study* (Harding and Leyland, eds.) (Wildy, Simmons & Hill 2009).

<sup>26</sup> Alec Stone Sweet, *Constitutional Courts*, in the *Oxford Handbook of Comparative Constitutional Law* (Rosenfeld and Sajó, eds.) (Oxford, 2012), p. 821.

<sup>27</sup> Certification Decision, CCT 23/96.

<sup>28</sup> See David Landau, *Should the Unconstitutional Constitutional Amendments Doctrine be Part of the Canon?*, ICONnect, 10 June 2013, <http://www.iconnectblog.com/2013/06/should-the-unconstitutional-constitutional-amendments-doctrine-be-part-of-the-canon/>. For discussion of other countries whose constitutions explicitly forbid the amendment of certain constitutional provisions, or whose constitutional courts have declared certain constitutional provisions to be unamendable, see Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 *American Journal of Comparative Law* 657 (2013).

<sup>29</sup> See Harding, Leyland, and Groppi, *ibid.*, p. 9.

of legislators are required to join the petition for it to be admissible, a requirement that can impact opposition political parties' ability to petition the court. For example, France requires at least 60 senators or members of the National Assembly to refer an Act of Parliament to its Constitutional Council (Constitution of France, Art. 61). Some constitutions also grant certain government officials the power to petition the constitutional court, for example a human rights ombudsman, the speaker of a house of parliament, the president, or the heads of independent commissions (e.g. the electoral commission).

**Individual complaint mechanism:** Some countries grant citizens the power to bring a case directly before the constitutional court. This power may also be extended to civil society organisations engaged in public-interest litigation. Colombia's Constitution grants every citizen the right to petition the Constitutional Court to challenge the constitutionality of laws, executive decrees and amendments to the Constitution (Art. 241). Individual complaints are a powerful tool for ensuring that a constitution's bill of rights is enforceable. They may also help to generate popular support for the court, as its decisions contribute to the protection of citizens' rights. However, allowing any citizen to bring a complaint is also likely to increase the number of cases on a court's docket, and requires that the constitutional court have sufficient infrastructure (law clerks, secretaries) to manage the flow of cases.

## 7. FORMS OF CONSTITUTIONAL REVIEW

Constitutional courts can engage in constitutional review of statutes either before the statute has entered into force (*a priori* review) or thereafter (*a posteriori* review). Some countries only permit the constitutional court to exercise one or the other forms of review, while other countries grant the court the power to exercise both. The German FCC may conduct both *a priori* and *a posteriori* review (German Basic Law, Arts. 93 (1) & 100; FCC Act, Art. 13 (6) & (11), Arts. 76-82).

### 7.1. A PRIORI REVIEW AND ADVISORY OPINIONS

Constitutional courts may be granted the authority to review the constitutionality of proposed laws before they are enacted by the legislature, or after they have been enacted but before they have been implemented, known as *a priori* review. The purpose of *a priori* review is to detect unconstitutional laws before they result in a constitutional violation causing actual harm. *A priori* review is generally initiated by political officials: members of the legislature (often representatives of the political opposition) or the executive, or representatives of regional governments.<sup>30</sup> France requires its Constitutional Council to review all institutional acts (statutes which implement or give greater detail to constitutional provisions),

and all Private Members' Bills before they are enacted (Constitution of France, Art. 61).<sup>31</sup>

Constitutional courts may also be permitted to issue advisory opinions. The government generally requests advisory opinions, usually regarding the constitutionality of proposed laws, although they may also request guidance regarding the interpretation or effect of a constitutional provision.

### 7.2. A POSTERIORI REVIEW

Most constitutional courts have the power to review the constitutionality of laws after they have been enacted, known as *a posteriori* review.<sup>32</sup> This type of review normally occurs when a case involving a constitutional question reaches the constitutional court on appeal or referral from a lower court.<sup>33</sup> *A posteriori* review allows the court to review a law's constitutionality after it has been in effect for long enough for its real world impact to be seen. It is sometimes easier to assess whether a law will violate constitutional rights or other provisions after it has been implemented.

## 8. REMEDIAL POWERS

Constitutional courts can be given a range of remedies to use when issuing a judgment, which determines the effects of their rulings. These options include:

**Declarations of unconstitutionality:** The rules governing declarations of invalidity vary. In principle, constitutional courts could declare either an entire law or part of a law unconstitutional. Their judgments could take immediate effect or be delayed to give the legislature time to amend the law or issue a new law. Some courts take a particularly cautious approach to issuing declarations of invalidity. The Italian Constitutional Court, for example, has developed a practice of issuing "interpretative rulings" in which it declares that one particular interpretation of a statutory provision is unconstitutional, or that there is only one constitutional interpretation for a statutory provision, thus requiring all courts to interpret the provision in that way in future cases.<sup>34</sup> Only when statutory language clearly violates the constitution will the Italian Constitutional Court issue a declaration of invalidity.

**Finality of the judgment:** In some systems, the constitutional court's decision is binding and irrevocable. Relatively rarely, constitutions have granted the legislature the power to override a constitutional court's decision. For example, prior to 2003, the Romanian Constitution allowed Parliament to override a Constitutional Court decision striking down a law if a two-thirds majority of each chamber passed the law again (Constitution of Romania, Art. 145, prior to

<sup>31</sup> Private Members' Bills are bills proposed by one member of Parliament, rather than bills proposed on behalf of the government.

<sup>32</sup> See the tables comparing constitutional courts around the world in Autheman, *ibid.*, p. 21-30.

<sup>33</sup> In some systems, the constitutionality of laws can also be reviewed 'in abstract' without reference to a specific case.

<sup>34</sup> Garlicki, *ibid.*, p. 54.

<sup>30</sup> Stone Sweet, *ibid.*, p. 823.

amendment in 2003). In 2003, Romania amended its Constitution to remove this provision (Constitution of Romania, Art. 147). Of course, the Constitution could be amended in response to a constitutional court decision. Constitutional courts may also issue certain types of decisions, such as advisory opinions, that are not binding on other branches of government or on the lower courts.

**Annulment of electoral results:** Where a constitutional court has jurisdiction to certify a country's elections, it may have the power to annul the results of the election if it finds that constitutional rights were violated during the electoral process. Annuling the results of an election can have severe and far-reaching consequences for a country's democracy, and can lead to periods of upheaval and uncertainty if the elected body is dissolved as a result of the court's decision (as happened when Egypt's Supreme Constitutional Court annulled the country's first post-Mubarak parliamentary elections, held in 2011/12). Policymakers should keep the potential consequences in mind when deciding what powers to grant the constitutional court regarding electoral laws and elections.

**Injunctions and interim orders:** Like ordinary courts, constitutional courts may also have the power to issue injunctions, which are orders that command someone to take a certain action, or forbid them from doing so. Constitutional courts may also be able to issue interim orders while adjudication of a case is ongoing, such as an order that reinstates a plaintiff at her job while the court evaluates a claim that her termination was the result of unconstitutional discrimination.

## 9. CONCLUSION

Constitutional courts play an important role in consolidating democracy and contributing to the rule of law. As the institution charged with determining the meaning of provisions in the constitution and resolving the constitutional disputes that will invariably arise between political actors or parties in any democratic government, the design of the constitutional court and the powers it is given deserve careful consideration from policymakers.

There is no ideal form for a constitutional court. The court's design will depend on a country's unique political and social context. However, when deciding what the constitutional court will look like, policymakers should keep in mind that a robust constitutional democracy requires a court that has sufficient powers to ensure that the constitution is respected as the supreme law of the land. Policymakers should also consider establishing rules that will encourage the appointment of well-qualified, distinguished individuals as constitutional court judges, and will protect their ability to operate independently of the other branches of government. How policymakers decide to answer the design questions outlined in this paper will have a lasting impact on the constitutional court's ability to play its role effectively.

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