

IFES RULE OF LAW WHITE PAPER SERIES

GLOBAL LESSONS LEARNED:  
CONSTITUTIONAL COURTS, JUDICIAL INDEPENDENCE AND  
THE RULE OF LAW

*April 2004*

VIOLAINE AUTHEMAN

*Editor*

KEITH HENDERSON

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The IFES Rule of Law Series is a collection of papers focused on capturing emerging global best practices and lessons learned on themes related to democratic principles, fundamental human rights and the Rule of Law. This paper was made possible by a grant from the United States Agency for International Development. It reflects the opinions of IFES and should in no way be construed as the official position of the United States Agency for International Development. Any person or organization is welcome to quote from this paper as long as proper citation is made.



**GLOBAL LESSONS LEARNED:  
CONSTITUTIONAL COURTS, JUDICIAL INDEPENDANCE AND  
THE RULE OF LAW**

**Abstract:** This paper is a cursory survey of the global landscape of Constitutional Courts and Tribunals with constitutional review powers from the perspective of international, regional and national principles on judicial independence and accountability, integrity and democratic development. In many transition and developing countries, academics, legal practitioners, human rights groups and others believe that this relatively new democratic institution has played a positive role in promoting a Rule of Law culture. Clearly, this is a potentially strong democratic institution that needs more attention and support from donors, civil society and national government.

In order to present a comprehensive institutional and cultural picture of Constitutional Courts, the paper touches upon a variety of interrelated themes, including (i) emerging international and regional consensus principles and trends; (ii) the rationale for the creation of Constitutional Courts; (iii) the composition of Constitutional Courts; (iv) the jurisdiction of Constitutional Courts and how it responds to country-specific needs; (v) the contribution of Constitutional Courts to judicial independence; and (vi) standing to bring a case to the Constitutional Court and public information mechanisms. The paper also raises some questions about the place of Constitutional Courts within the broader structure of powers in a democratic State governed by the Rule of Law. Finally, some reflections on public information and outreach programs to sensitize the public to issues of constitutional review are presented.

**Best Practices: Constitutional Courts**  
**A Tool to Promote Democracy and the Rule of Law**

1. **Right of constitutional review** – Most democracies around the world recognize some power to review the compatibility of legal norms to the Constitution and the principles enshrined therein to the courts. Two dominant models of this core, democratic check on the power of the legislative and executive branches of government exist: (i) diffuse constitutional review by courts under the control of the Supreme Court (American model); or (ii) concentrated constitutional review by a Constitutional Court or Chamber (European model);
2. **Creation of specialized Constitutional Courts/Chambers** – Many emerging democracies have chosen to create Constitutional Courts in order to strengthen their democratic institutional framework. While all constitutional courts have a power of constitutional review of legal norms, the way they exercise this power and any additional powers entrusted to them vary greatly from country to country.
3. **Independence of the judiciary** – Constitutional Courts, as guarantors of the integrity of the Constitution and of fundamental rights, have an important role to play in consolidating democracy and the Rule of Law and in promoting judicial independence. The structure, composition and powers of Constitutional Courts must therefore be carefully crafted in order to protect the underlying principles of democracy such as separation of powers and judicial independence.
4. **Institutional independence** – There is an emerging consensus that Constitutional Courts should be granted a certain number of guarantees likely to protect their independence, including: organizational autonomy; budgetary autonomy; clear rules of conflict of interest; objective and transparent appointment procedures; clear powers; binding effect of decisions; and high qualification requirements.
5. **Transparent appointments** – While there is no consensus as to the number of members or the length of their term, most specialists and reformers agree that the Constitutional Court members should be eminent jurists or public figures, known for their honesty and respect for constitutional principles. Moreover, their terms in office should be sufficiently long to guarantee their independence.
6. **Transparent and accountable decision-making process** – The nature of Constitutional Courts calls for the attribution of jurisdiction over a variety of issues, ranging from elections to civil liberties. While there is virtually no common package of powers identifiable among the Constitutional Courts existing around the world, there is consensus that these powers must be clearly defined and exercised in a transparent and objective manner in order to safeguard the integrity and legitimacy of the Court.
7. **Access to information** – Clear information mechanisms must be in place for the public to access information on Constitutional Court processes and decisions. Moreover, the public should be fully aware of existing complaint mechanisms and procedures for protecting their constitutional rights.

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“The power of constitutional review is the authority of courts to declare laws and executive actions unconstitutional. Although judiciaries in most countries exercise some degree of constitutional review, specific arrangements vary. There is also variation in who can ask for constitutional review.

In many countries making a transition to constitutional democracy, the judiciary has long been seen as a tool of the State and continues to be viewed with skepticism, if not disdain. Constitutional cases are often high profile cases that pit one political faction against another. If in these cases a judiciary is able to rule effectively to uphold constitutional principles, it can send a powerful signal to society. Judiciaries have gained enormous respect with such rulings, as seen in Central and Eastern Europe in the 1990s.

However, in several countries, governments have refused to comply with decisions of the constitutional court (e.g. Slovakia and Belarus) and substantially reduced the court’s power (e.g. Kazakhstan and Russia). This illustrates the dilemma constitutional courts often face: Should they make the legally correct decisions and face the prospect of non-compliance and attacks on their own powers, or should they make a decision that avoids controversy, protects them, and possibly enables them to have an impact in subsequent cases? Bold moves by constitutional courts can be instrumental in building democracy and respect for the courts themselves. However, the local political environment will determine the ability of the courts to exercise independent authority in these high stakes situations.

As a final cautionary note, the establishment of a constitutional court has not always contributed to strengthened judicial independence. In Zimbabwe, a proposal to establish such a court was clearly intended to interfere with judicial independence. The proposal would have removed the power of judicial review from the Supreme Court and transferred it to a Constitutional Court whose composition would have been open to considerable political manipulation. As with all aspects of the judiciary, constitutional courts are open to abuse.”<sup>1</sup>

**1. Introduction and Overview**

**a. Rationale for the Creation of Constitutional Courts and Tribunals Exercising Jurisdictional Constitutional Powers<sup>2</sup>**

Many countries have now completed their transition to democracy, adopting in the process constitutions that guarantee the fundamental rights of citizens and define the roles, powers and responsibilities of the three branches of the State: the Executive, the Legislature and the Judiciary. These rights now need to be fairly and effectively implemented in practice so that citizens benefit from the full enjoyment of the formal guarantees enshrined in the Constitution.

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1 IFES/USAID. 2001. Guidance for Promoting Judicial Independence and Impartiality. USAID Technical Publication. USAID: Washington, DC. Hereinafter the “Judicial Independence Guide”; available at [http://www.ifes.org/rule\\_of\\_law/description.html](http://www.ifes.org/rule_of_law/description.html) in Arabic, English, French and Spanish

2 For purposes of this paper, and for simplicity’s sake, the term “Constitutional Court” will be used throughout this paper to refer to all bodies exercising jurisdictional constitutional powers, including Constitutional Courts, Councils and Chambers, unless otherwise specified.

# IFES Rule of Law White Paper Series

## *White Paper #4, Constitutional Courts*

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In order to ensure that the rights protected by the Constitution, and more generally the constitutional order, are respected in practice, many countries have adopted mechanisms of constitutional review geared towards weighing laws and executive actions against the Constitution. In most countries, the judiciary exercises some degree of constitutional review, but the mechanisms, responsibilities and specific arrangements vary. A number of models have now emerged, one of them being the creation of a Constitutional Court to adjudicate cases challenging the constitutionality of laws and executive actions. Through constitutional review, the judiciary plays a key role in the balance of powers by upholding the Constitution and scrutinizing acts of the legislative and executive branch. If this power is used properly and with a certain degree of judicial activism, it can strengthen judicial independence, the legitimacy of the laws and courts, public trust in the judiciary and the Rule of Law.

Constitutional Courts and the other institutions playing a role in upholding the fundamental rights guaranteed in the Constitution are an important element of the democratic process. The consolidation of democracy around the world and the emergence of the Rule of Law require that formal guarantees, rights and protection mechanisms be fully and effectively implemented. Constitutional review is one of the mechanisms that can help achieve this aim. Indeed, a Constitutional Court, or any Court with the power of constitutional review, has the opportunity, by means of its very powers, to play an important role in translating into reality the democratic institutional and legal framework.

### **b. Advantages and Shortcomings of Constitutional Courts**

The [Judicial Independence Guide](#) presents some global findings related to constitutional review, noting that the judiciary can gain enormous respect from the public through courageous rulings upholding constitutional principles in sensitive cases. This is clearly all the more important in countries which are in transition to democracy or where the judiciary has traditionally been dependent on the other branches of government or on partisan interests.

The [Judicial Independence Guide](#) also highlights a number of problems that may undermine the independence and authority of constitutional authorities, including the refusal of governments to comply with Constitutional Court decisions, the reduction or transfer of Constitutional Court powers, the manner in which Constitutional Court members are selected and their length of tenure. Moreover, Constitutional Courts have sometimes been created with the sole purpose of interfering with judicial independence and undermining the powers and independence of the judiciary.

This paper will attempt to highlight some of the roles and powers of Constitutional Courts and their role in strengthening (or not) judicial independence. To that end, we will try to present some of the lessons learned on constitutional review, judicial activism and judicial independence. These lessons are drawn primarily from the experiences of Constitutional Courts and other bodies with constitutional review powers in Asia, Europe and Latin America.

## **2. International and Regional Principles and Model Structures of Constitutional Review**

While there are no international or regional enacted guidelines or consensus principles calling for the creation of a Constitutional Court *per se*, the principle of constitutional review can be derived from some of the fundamental elements of the Rule of Law as established in international and regional human rights treaties<sup>3</sup> and

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3 See, *inter alia*, Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms (1953); Inter-American Convention on Human Rights (1978); African Charter on Human and People's Rights (1986)

their complementary guidelines. Indeed, the widely accepted principle of the separation of powers entails the existence of boundaries between powers and the need to protect these powers from encroachments.

Similarly, international and regional human rights treaties have created a body of quasi-constitutional norms that are now fairly well designed and accepted, at least in theory, such as the right to due process, the freedom of expression or the rights to life and liberty. The fundamental rights guaranteed in human rights treaties must be respected by signatory States which has two main consequences:

- The State must respect these principles in its domestic legislation as well as in any act or regulation of any branch of government; and
- The courts must uphold these principles, regardless of the letter of the domestic legislation, in individual cases.

In addition, the regional human rights tribunals created over the second half of the twentieth century, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the newly created African Court of Human Rights, are operating as supranational constitutional tribunals to the extent that they are primarily responsible for the protection of fundamental human rights and civil liberties. Decisions of the European Court of Human Rights and the Inter-American Court of Human Rights are binding on member States and have had a significant impact on the development of domestic constitutional law in many countries in Europe, Latin America and even elsewhere as shown by the South African Constitutional Court.

Two general models of constitutional review have emerged over time: the American model and the European model. The main distinction between these two models is the diffuse or concentrated nature of the control of the conformity of legal norms with the Constitution. Countries following the American model rely on the Supreme Court or a Constitutional Chamber within the Supreme Court for constitutional review. Countries following the European model present a more diverse selection of constitutional review structures with the creation of Constitutional Courts, Constitutional Councils or other Tribunals exercising constitutional review powers in some countries, while others rely on Constitutional Chambers within the Supreme Court.

### **American and European Constitutional Review Models**

#### **1) American Model of Constitutional Review**

The American model is a diffuse system of constitutional review in which every court may assess the constitutionality of legal norms. There is no separate Constitutional Court; rather, the Supreme Court has the final say in the constitutionality of acts and activities and in the interpretation of the Constitution. The most famous example of this model is the United States Supreme Court. Many countries in Latin America, Africa and Asia, including **Argentina, Mexico, Nigeria, India and Nepal**, as well as a handful in Europe and the Middle East, such as **Sweden and Israel**, have adopted this model.

#### **2) European Models of Constitutional Review**

All European models are concentrated systems of constitutional review. There are however three main trends, presented here from the most common to the least common:

- a) The Austrian or continental model** is a concentrated system in which a Constitutional Court has been created with exclusive jurisdiction over the control of the constitutionality of legislation. This model has been adopted in most European countries and some Latin American,

Middle Eastern, African and Asian countries, including the **Czech Republic, Poland, Russia, Spain, Chile, Costa Rica, Egypt, Lebanon, South Africa, South Korea and the Philippines;**

- b) The **German model** is a concentrated system in which the Constitutional Court has exclusive power to declare acts and activities unconstitutional, but all courts may set aside laws deemed unconstitutional, has been adopted in countries around the world, including **Germany, Brazil, Peru and Indonesia**. The residual powers of constitutional review recognized to the judiciary provide a more complete control of the constitutionality of norms ; and
- c) The **French model** is a concentrated system in which the Constitutional Court exercises only a preventive control by assessing the constitutionality of laws passed but not yet enacted by Parliament, has been adopted by a handful of countries including **France and Morocco**. This model limits constitutional review to its minimum and only exists in France and a handful of the countries influenced by the French legal system.

### 3. Creation and Composition of Constitutional Courts

While some exceptions remain, most countries in the world have now adopted systems of constitutional review to assess the conformity of legal norms to their Constitutions. Only five countries do not have any system of constitutional review: **the United Kingdom, the Netherlands, Lesotho, Liberia and Libya**. Yet, in the first two, some elements of constitutional justice can be identified, especially with the expansion of European case law both in the European Court of Justice (the court of the European Union) and in the European Court of Human Rights. Moreover, the Prime Minister of the **United Kingdom** recently proposed the creation of a Supreme Court to supplant the current system of judicial review within the House of Lords. The stated aim of this legislation is to promote more judicial independence. It could also open the door to the recognition of constitutional review powers to the judiciary.

Among the countries that have some system of constitutional review, some have followed the American model and created a diffuse system of constitutional review often under the ultimate control of the Supreme Court. In others, constitutional review powers are exercised outside of the courts, often by Parliament, as in **Finland, Pakistan, Australia or Cuba**. In most countries, however, a Constitutional Court or a Chamber with constitutional review powers has been created.

#### a. Historical Trends and Typology of Constitutional Courts and Tribunals Exercising Jurisdictional Constitutional Review

Many articles and books have been written on the historical development of Constitutional Courts and constitutional review powers. The roots of constitutional review can be found in ancient Greece.<sup>4</sup> Ancient Greek ventures in constitutional review led to centuries of European legal theory and periodic experiences such as the powers of jurisdiction organs to decide disputes related to the competence of State powers and some violations of rights in the 12<sup>th</sup> century German Empire or procedures that are the forerunners of modern constitutional

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4 The legal framework relied on two types of norms: (i) the *nomos*, which correspond to our contemporary constitutional norms; and (ii) the *psephismata*, which correspond to secondary legislation. In deciding cases, judges had to rely on secondary legislation only to the extent that it complied with constitutional norms. Illegal secondary legislation was to be declared void and the legislator who initiated it faced criminal charges. See, HARUTYUNYAN G. and A. MAVCIC. 1999. *Constitutional Review and its Development in the Modern World (A Comparative Constitutional Analysis)*. Available at <http://www.iatp.am/resource/law/harutunyan/monogr3/ogl.htm>

remedies in 13<sup>th</sup> through 16<sup>th</sup> century Spain.<sup>5</sup> Various aspects of constitutional theory and constitutional review were exported from Europe through the Spanish, French and English colonial expansion.

The **United States** was the first country to practice judicial review in its contemporary understanding. While the US Constitution of 1789 did not explicitly grant constitutional review powers to the Supreme Court, the landmark case of *Marbury v. Madison* (1803) established this principle. The Supreme Court held that it had the inherent constitutional right and duty to review the conformity of statutes to the Constitution. With this case and subsequent cases expanding the control of the constitutionality of laws and legality of secondary legislation by the courts, the US Supreme Court opened the door for the judicial protection of constitutional rights and principles through indirect review mechanisms.

**Historical trends in Europe** – European Constitutional Courts have generally been created in a climate of democratic change and out of a profound distrust of institutions which had failed to meet their constitutional responsibilities. A number have therefore retained some form of revolutionary and democratic legitimacy.<sup>6</sup> Constitutional Court creation in Europe follows three main phases, which are linked to post-World War II reconstruction and the democratic transitions of the 1970s and 1990s.

The first phase of Constitutional Court creation really emerged in the decades immediately following the Second World War. Immediately after the end of the war, **Austria** reenacted its 1920 Constitution, establishing a Constitutional Court which became the dominant model for most of Europe. In 1949, the **German** Constitutional Court was set up, adding some features of the American model to the traditional concentrated model retained in Europe. In 1958, **France** created a Constitutional Council, intended as a purely preventive and consultative organ of constitutional review.

The second and third phases of Constitutional Court creation occurred in the context of democratic transition. First, **Spain** and **Portugal** created Constitutional Courts inspired by the German model immediately after the end of dictatorships in the mid-1970s. Second, the 1990s were marked by the fall of communism throughout Eastern Europe and the former Soviet Union, which led to the adoption of democratic Constitutions and the creation of Constitutional Courts in former communist countries. Most of these countries replicated the Austrian Constitutional Court model, but some countries such as **Poland**, **Hungary** or the **Czech Republic** incorporated features of the American model into their constitutional review framework as a result of their historical ties to Germany.

**Historical trends in the Americas** – Some Latin American countries have well-established systems of constitutional review dating back to the nineteenth century. Most of these systems, with notable exceptions such as **Colombia**, follow the American model of diffuse constitutional review under the control of a Supreme Court. A second phase of constitutionalism saw the adoption of constitutional review systems in several Latin American and Caribbean countries over the course of the second half of the twentieth century. This second wave consists of a mix of influences from either the American model or European models of Constitutional Courts.

**Historical trends in Africa, the Middle East and Asia** – The main distinguishing characteristics between the scope of constitutional review in Africa, the Middle East and Asia from that in Europe or Latin America is that the courts' powers and structure varies from country to country and often represents mixed systems. Generally, European countries which, apart from notable exceptions such as the United Kingdom, France or Scandinavian countries, have established systems of constitutional review inspired by the Austrian and German models; and Latin American countries have been influenced by the American model. In Africa, the Middle East

5 See, MAYCIC, Arne. 2004. *A Tabular Presentation of Constitutional/Judicial Review around the World*. Available at <http://concourts.net/tab/>

6 See, SÓLYOM, László. 2003. *Constitutional Justice – Some Comparative Remarks*. Report of the Conference on Constitutional Justice and the Rule of Law, on the occasion of the tenth anniversary of the Constitutional Court of Lithuania. Vilnius, Lithuania.

and Asia, the creation of a Constitutional Court and/or the recognition of constitutional review have generally coincided with independence from the colonial power. For example, most francophone and Anglophone African countries created Constitutional Courts in the 1960s. However, in some countries, many believe that these Courts have proven little more than democratic window-dressing.

### **b. Constitutional Court Membership**

The *sui generis* nature of Constitutional Courts is reflected to a large extent in their membership. In countries in which constitutional review powers are the responsibility of a body separate from the Supreme Court, the members of Constitutional Courts are not selected and appointed based on the same requirements and procedures as those applicable to members of the judiciary.

The membership of Constitutional Courts raises three sets of considerations related to (i) the professional experience required to become a Constitutional Court judge; (ii) the appointment of Constitutional Court judges; and (iii) the structural, material and institutional conditions within which Constitutional Court judges exercise their functions.

**Professional experience requirements** – While prior judicial experience is not necessarily a requirement to become a Constitutional Court judge, most countries require at least some experience in administrative or legal affairs. There are however more general requirements which are common to most countries around the world. Due to the importance of their functions, judges of Constitutional Courts should be distinguished professionals whose integrity and morality cannot be called into question. In the end, it is the quality and integrity of its members that will provide the institution with the necessary legitimacy and respect.

**Appointment of Constitutional Court judges** – Constitutional Court judges should be selected through an objective and transparent process. Ideally, the process should be open to public scrutiny and participation in order to ensure that the candidates selected have the qualifications and professional ethics corresponding to this important function in society. Most countries have divided appointment responsibilities among several branches of government: they either participate together in making appointments or each branch appoints a given set of members.

Based upon a cursory review of appointment procedures around the world, it appears that the judiciary rarely plays a key role in the process of selecting Constitutional Court judges. However, in a number of countries the higher courts or the Judicial Council do play a role, either in the selection or in the nomination process. At the end of the day, Constitutional Court judges are often selected among highly respected jurists or eminent former State officials by the President with possible participation from Parliament or the Judiciary.

#### **Models for Appointment of Constitutional Court Judges**

1. Appointment by one branch of government upon nomination or selection of candidates by another – generally, the judiciary (the Supreme Court or the Judicial Council) selects candidates and the Parliament or the Executive formally appoints them: **Spain, Turkey**
2. Appointment of all members by one branch of government, generally, the Parliament: **Germany, Hungary;**
3. Appointment of a set of members by the Executive and of another by the Parliament: **France, Romania;**
4. Appointment of a set of members by each branch of government: **Italy, South Korea.**

**Work conditions and guarantees of independence** – While the length of the terms of office varies greatly from country to country, there is a global consensus that members of a Constitutional Court should have security of tenure and material independence throughout their judgeship. Work conditions should reflect the importance of the office and include access to adequate courtroom facilities and staff. All in all, the work conditions and outside activities of Constitutional Court judges should reflect the high status of their function and the independence of the Constitutional Court. Almost every country authorizes judges to participate in educational and artistic activities as these are not likely to call into question their personal independence or the independence of the institution that they represent.

The two main guarantees of independence relating to work conditions are (i) the recognition of the immunity of Constitutional Court judges from civil liability for actions and omissions in the course of their functions and (ii) strict rules of conflict of interest. Conflict of interest rules should establish a clear regime for the professions and activities incompatible with the function of judge of a Constitutional Court. Many of these incompatibilities are similar to those relevant for judges of the courts of general jurisdiction. It is widely acknowledged that Constitutional Court judges should not undertake any commercial or political activity during their term of office. Judges of Constitutional Courts also should not work in the Executive or Legislative, nor can they hold a remunerated office in the private sector.

Regarding political party membership, positions tend to vary, as some countries impose an absolute prohibition on judges while others only prohibit membership around election periods. The prohibition of political party membership is all the more crucial in countries in which the Constitutional Court is the judge of the validity, legitimacy and integrity of elections.

#### 4. Jurisdiction of Constitutional Courts

Before any presentation of the various powers entrusted to Constitutional Courts, some preliminary distinctions regarding the mode in which they intervene will provide some general insight into understanding their powers.

**Preventive v. subsequent (repressive) control** – Preventive control is exercised before the entry into force of the law reviewed, while subsequent control is exercised once the law has become effective. For example, in **France**, the Constitutional Court is charged with reviewing the constitutionality of laws passed by Parliament before they are implemented. On the other hand, in the **United States**, the Supreme Court only rules on the constitutionality of laws through litigated cases that emerge through the federal court system. Some countries, such as **Romania** or **Portugal**, have given their Constitutional Court the power to exercise both a preventive and a subsequent review of the constitutionality of statutes and/or regulations.

**Abstract v. concrete constitutional control** – Abstract judicial control is generally exercised by courts to review the constitutionality of legislation while concrete control is exercised in a specific case based on a constitutional challenge in a litigated case and specific factual situation. All preventive controls are necessarily abstract in nature because the law under scrutiny has not yet entered into force and has therefore not been applied. Subsequent (repressive) controls can be either concrete or abstract, depending on the powers allocated to the Court and on whether it can hear individual cases.

For example, the **United States** Supreme Court exercises a concrete control rooted in the application of the alleged unconstitutional law to a given factual situation. On the other hand, in **Austria**, the Constitutional Court may be called upon to exercise an abstract control of the constitutionality of laws which have already entered into force, through requests for preliminary rulings by the judiciary. Similarly, in countries such as **Hungary**, the *actio popularis* enables any citizen to seize the Constitutional Court to exercise an abstract control of the constitutionality of promulgated laws.

### a. Legal Framework and Separation of Powers

The core function of Constitutional Courts is the constitutional review of legal norms, i.e. the assessment of the compatibility of legal norms with the principles enshrined in the Constitution. Responsibilities related to the constitutional review of legal norms are intrinsically linked to the notions of separation of powers and fundamental rights. Moreover, they derive directly from the definition of Constitutional Courts as guardians of these principles within the State institutional and legal framework. Constitutional review powers can be divided into three main categories: (i) interpretative powers; (ii) powers related to the constitutionality of norms; and (iii) powers related to the distribution of powers among public authorities.

#### i. Interpretative Powers

A number of Constitutional Courts have been entrusted with the power to interpret fundamental legal norms and various procedural rules. This power is justified by the need to guarantee the uniformity of interpretation of constitutional provisions and of legal norms. Interpretative functions are generally exercised in a consultative and advisory capacity and may include:

- Interpretation of the Constitution;
- Interpretation of international treaties;
- Interpretation of laws and other norms, such as executive decrees and regulations; and
- Matters related to the conformity with the Constitution of the implementation of a law, decree, regulation or any other norm.

#### **Interpretation of a Draft Constitution: The Case of South Africa**

The South African Constitutional Court played a central role in the transition to democracy of apartheid South Africa by overseeing the process of adoption of the new Constitution in 1996. Albie Sachs, Justice of the Constitutional Court of South Africa, noted in a presentation in November 1997 that “in September 1996, the Constitutional Court of South Africa ... declared the Constitution of South Africa to be unconstitutional.”<sup>7</sup>

The Constitutional Assembly was entrusted with the responsibility of drafting the new Constitution. In order to guarantee the protection of fundamental and minority rights, a list of guiding principles was adopted: the Thirty-Four Principles. The Constitutional Court was entrusted with the responsibility of controlling the conformity of the newly drafted Constitution with the Thirty-Four Principles, representing principles of constitutional value to be reflected in the Constitution.<sup>8</sup>

After receiving challenges to the draft Constitution from a variety of stakeholders, including political parties, public entities and individuals, the Constitutional Court held a number of hearings on issues ranging from the separation of powers and local government to the right to family life and the right to strike. Relying on Constitutions and constitutional case law from Courts around the world, the Constitutional Court held “that there were nine respects in which the new constitutional text failed to comply with the Thirty-Four Principles ... We sent back the text to the Constitutional Assembly ... to make the necessary revisions”<sup>9</sup>.

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7 See, Albie Sachs, 1996, *Constitutional Developments in South Africa*, 28 N.Y.U. J. Int'l L. & Pol. 695 (1996)

8 *Idem*, “The next question was who would ensure that there was proper compliance ... So it was agreed that the newly created Constitutional Court – which already had the tasks of upholding the bill of rights and ensuring that the basic structures of the new Interim Constitution were complied with and that powers and functions were properly adhered to – would now have this extra task of checking the new constitutional text against the Thirty-Four Principles, if it either put something in that conflicted with the Principles, or omitted to put something in that should have been there in order to comply with the Principles, we would have to declare accordingly and send the matter back to the Constitutional Assembly.”

9 *Idem*.

## ii. Control of the Constitutionality of Legal Norms

Most Constitutional Court activities are usually related to reviewing the constitutionality of legal norms, especially laws (i.e. acts of Parliament) and, sometimes, decrees (i.e. acts of the Executive). These powers enable Constitutional Courts to serve as a guardian of the Constitution and to ensure that the Executive and Legislative respect the legal norms enshrined in the Constitution. These powers include:

- Review of constitutional provisions;
- Review of international treaties;
- Conformity of laws and/or Parliamentary regulations with the Constitution;
- Conformity of executive decrees and regulations with the Constitution;
- Conformity of acts of the head of State with the Constitution;
- Conformity of acts of territorial entities and/or rules of national and local administrative units with the Constitution;
- Conformity of national legal norms with international treaties.

### **Conformity of International Treaties to the Constitution: The Case of Colombia**

The Colombian Supreme Court, exercising its power of constitutional review, held in 1986 that Law 27 of 1980, approving the ratified 1979 extradition treaty between Colombia and the US, was contrary to the Colombian Constitution. This landmark decision came after a seventy-year-old majority opinion that a law approving a ratified international treaty could not be subject to constitutional review. The Court's opinion effectively nullified the law incorporating the treaty into the domestic legal framework.

If a law or act is declared contrary to the Constitution, Constitutional Courts may annul the law or act, in full or, in case the unconstitutional provisions can be severed, in part. Some Constitutional Courts also have positive decision-making powers and may declare the law or act conditionally constitutional. Conditional constitutionality means that the law under scrutiny conforms to the Constitution only if interpreted or applied in a certain way. Similarly, the Constitutional Court may decide to simply declare the law inapplicable in certain circumstances.

### **Judicial Remedies to the Unconstitutionality of Laws: The Case of Peru**

Article 112 of the 1993 Peruvian Constitution limits the President to two terms of office. In 1996, the Peruvian legislature adopted Law 26,657, which interpreted article 112 as applying only to Presidents elected after 1993. The constitutionality of the law was challenged before the Constitutional Court by opposition parliamentarians. Justice Rey Terry, acting as Rapporteur, submitted a working paper that took the position the law was not generally applicable to all Presidents, and that it was written only to benefit President Fujimori (who had held presidential office before and after the entry into force of the 1993 Constitution). The Constitutional Court adopted Justice Rey Terry's position and declared the law "inapplicable" to President Fujimori. The net effect of this ruling was to prevent him from seeking a third term. In this case, declaring the law unconstitutional or inapplicable to President Fujimori had the same effect, but a ruling of inapplicability only required a simple majority vote where as a qualified majority is required to declare a law unconstitutional.

If the Constitutional Court has power to exercise concrete constitutional review, the Court can hear requests for preliminary rulings on constitutional issues referred by the courts of general jurisdiction before which the case has been filed.

### iii. Distribution of Powers among Public Authorities

In some countries, Constitutional Courts have been given the responsibility for resolving conflicts between public authorities.<sup>10</sup> These conflicts can be (i) horizontal: between two branches of government at national, regional or local level; (ii) vertical: between government entities at two different levels of government; or (iii) negative: failure to act from any branch or entity of government at any level. These attributions may include:

- Distribution of powers among top government bodies;
- Distribution of powers between the national government and regional or local administrative authorities;
- Distribution of powers among regional or local administrative authorities;
- Distribution of powers between the Courts and other government bodies;
- Omission of regulation and legal gaps.

#### Conflicts of Jurisdiction between Several Courts or Jurisdictional Bodies: The Case of Thailand

In the 2000 parliamentary elections, the Constitutional Court declared that the Election Commission of Thailand (ECT) was the court of ultimate appeal for contests challenging “election results”. Prior jurisdiction had been granted to the civil and criminal courts, and the new laws and procedures made it unclear what the extent of the jurisdiction of the ECT was, especially whether the ECT had the power to annul election results or to order recounts. The Constitutional Court held that the ECT had full jurisdiction over any cases challenging the electoral process and “election results”. This gave the ECT the opportunity to tackle widespread fraud and vote buying practices, disqualifying 42% of the provincial winners on the grounds of vote buying or electoral irregularities.

### b. Election Judge

In many countries following European models of constitutional review, the Constitutional Court has been entrusted with a variety of powers in relation to electoral and political processes. This is particularly true of Constitutional Courts which are created in a context of democratic transitions, such as the post-communist European Constitutional Courts created in the 1990s. Granting powers over electoral and political processes to the newly created Constitutional Courts was a way to both guarantee a review of these processes in light of constitutional principles and to insulate this control in the hands of an institution that had not been a participant in the previous regime.

Some Constitutional Courts, like those of **Spain, Turkey, Indonesia** and **South Korea**, also have powers to regulate and especially to dissolve political parties. The use of these powers by the Turkish Constitutional Court has given rise to a significant number of cases before the European Court of Human Rights. These cases have given the European Court of Human Rights the opportunity to set boundaries and criteria for appropriate dissolution, balancing public order and national security interests against freedom of association rights.<sup>11</sup>

10 See, LOPEZ GUERRA, Luis. 2002. *Conflict Resolution in Federal and Regional Systems*. Presented at the Conference on Legal Frameworks to Facilitate the Settlement of Ethno-political Conflicts in Europe. Baku, Azerbaijan.

11 The European Court of Human Rights has ruled that party dissolutions were valid or constituted breaches of the freedom of association (article 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms) depending on the circumstances of the case. See, *inter alia*, European Court of Human Rights, *Socialist Party and others v. Turkey* (05/25/1998) violation of article 11; *Freedom and Democracy Party (Özdep) v. Turkey* (12/08/1999) violation of article 11; and *Refah Partisi (the Welfare Party) Erbakan, Kazan and Tekdal v. Turkey* (07/31/01) no violation of article 11.

Constitutional Court powers related to electoral and political processes may include:

- Capacity to hold office (Head of State and/or other representatives);
- Control of the constitutionality of acts and activities of political parties;
- Control of the conformity of electoral processes with the Constitution (this regards the actual holding of the election, not the election law);
- Control of the conformity of referenda with the Constitution;
- Confirmation of election results;
- Oath of the Head of State;
- Authorization/dissolution of political parties;
- Impeachment of the Head of State; and
- Impeachment of other State representatives.

#### **Challenges to Elections Results: The Case of Cameroon**

In the aftermath of the 2002 parliamentary election, the Cameroonian Constitutional Council was seized with a number of complaints challenging the validity and integrity of the results of the election in several districts based on a number of grounds:

- (i) Discrepancies affecting the final count of votes;
- (ii) Vote counting in the dark;
- (iii) Falsified or destroyed reports of election results;
- (iv) Ballot stuffing;
- (v) Multiple voting;
- (vi) Irregular opening and closing of polling stations;
- (vii) Delayed arrival of voting materials;
- (viii) Intentional misleading of voters by changing the color of ballots; and
- (ix) Absence of opposition party observers during the vote and count.

The Constitutional Council annulled the results of the election in a number of precincts and districts, based on evidence of one or more of the abovementioned violations. In its judgment regarding the district of Haut-Nkam, the Cameroon Constitutional Council decided that there was no need to annul the election to remedy the violations. Instead, the Council held that 867 ballots in favor of one of the party lists had been incorrectly voided and that they should have been counted as valid. The parliamentary seats were redistributed among party lists based on the recount.

### **c. Human Rights and Civil Liberties**

During the second half of the twentieth century human rights and civil liberties have emerged as universal values guaranteed under international and regional treaties. Many of these rights have been enshrined in Constitutions and laws in virtually all constitutional democracies around the world. In many countries, and especially in those with Spanish<sup>12</sup> or German<sup>13</sup> influence, the responsibility for protecting human rights and civil liberties has been largely given to a Constitutional Court. Such powers include:

12 As early as the seventeenth century, Spain had developed remedies to protect individual fundamental rights. These remedies, the precursors of constitutional actions such as *amparo*, were adopted in Latin America during colonial times and remain an important aspect of constitutional practice in these countries.

13 The German Constitutional Court, created immediately after World War II, is rooted in the abstract control of the constitutionality of legal norms and all courts are granted powers to protect individual fundamental rights to all courts.

- Hearing direct appeals for preliminary constitutional rulings from proceedings before the courts of general jurisdiction;
- Hearing constitutional complaints from ordinary citizens (*actio popularis*);
- Hearing constitutional complaints related to the protection of individual human rights; and
- Specific complaint procedures, such as habeas corpus or *amparo*.

### **The Recognition of Fundamental Rights and Judicial Activism: The Case of Hungary**

Under Hungarian law, the Constitutional Court has jurisdiction over constitutional complaints related to the protection of individual human rights only after judicial remedies before the courts of general jurisdiction have been exhausted and a final court decision rendered. It may therefore take months, if not years, before these cases reach the Constitutional Court.

Under the leadership of its former President, László Sólyom, the Constitutional Court of Hungary rendered a number of groundbreaking decisions. Many of these decisions were rendered in cases submitted to the Court through the *actio popularis*, a constitutional complaint which enables anyone to challenge the constitutionality of a promulgated law before the Court. Here are two examples of how the Constitutional Court used its powers of constitutional review to expand the scope and protection of human rights and civil liberties:

1. In October 1990, only one year after its creation, the Constitutional Court held that capital punishment violated the right to life and human dignity as protected under the Hungarian Constitution and international human rights obligations. While this decision was not popular among Hungarians, there was no backlash against the Court in part due to the soundness of the legal reasoning and the high degree of respect enjoyed by the Court;
2. The Constitutional Court also ruled that laws that provide criminal penalties for those charged with “insulting or criticizing” public officials had limited application. The Court balanced the protection of honor and good reputation of an office or official against the right to freedom of expression of citizens. The Court held that the scope of citizen rights to free speech is broader with regard to public officials than to other persons. The Court therefore limited criminal defamation in relation with public officials and expanded citizens’ right to free speech.

Some Constitutional Courts do not have express powers to protect human rights. However, they can indirectly contribute to the protection of human rights, notably by giving constitutional value to certain human right principles which are not explicitly recognized in the Constitution and by assessing the constitutionality of laws against these principles as well as the formal Constitution. In the 1970s, the **French** Constitutional Council took such an active role and expended the notion of “constitutional norms” far beyond the Constitution itself, incorporating scores of international human right principles into the body of “constitutional norms”.

## **5. Constitutional Courts and Judicial Independence**

Constitutional review is an important element of the democratic structure in that it provides judicial mechanisms designed to guarantee basic constitutional principles, fundamental rights and civil liberties. In countries that have established a Constitutional Court to fulfill this function, the Court should be guaranteed independence and its members should be eminent personalities shielded from outside attachment to the powers of the State. Many of the elements of judicial independence for the Courts of general jurisdiction apply to Constitutional Courts as well.

### a. Guarantees of Judicial Independence

#### Key Elements of the Independence of Constitutional Courts

- Organizational and administrative autonomy
- Budgetary autonomy
- Professional and ethical membership requirements
- Transparent, objective appointment and discipline
- Security of tenure
- Independent, binding decision-making powers
- Judicial immunity
- Conflict of interest rules and high standards of professional conduct
- Public access to information

**Organizational, administrative and budgetary autonomy** – Countries have traditionally given administrative and budgetary autonomy to Constitutional Courts. The Courts have their own budgets and their own rules of internal organization and operation. Moreover, Constitutional Courts usually have both technical and administrative support staff to assist the judges.

**Decision-making powers** – Unlike courts of general jurisdiction, Constitutional Courts have a wide range of decision-making powers. First, they rule in first and last resort on issues falling under their jurisdiction. Second, the decisions of Constitutional Courts are not limited to rulings on the constitutionality or unconstitutionality of laws or decisions. Constitutional Courts around the world have developed a number of “positive” or interpretative decisions designed to provide the powers of the State with constitutional guidelines and standards geared towards protecting rights and preventing constitutional transgressions. Third, some Constitutional Courts are taking an active role in the development of constitutional law through decisions that incorporate international law and fundamental human right principles into domestic law.

**Judicial independence** – The creation of Constitutional Courts may or may not result in a positive contribution to the institutional independence of the judiciary. While there are a number of ways in which a Constitutional Court can promote or infringe upon judicial independence, the most common appear to be through some of its powers and decisions. In the case of **Zimbabwe**, the intended objective for creating a Constitutional Court was aimed at diverting traditional judicial powers from the courts of general jurisdiction. Generally speaking, the transfer of powers from the courts of general jurisdiction (and the Supreme Court) to a Constitutional Court, the independence of which is not properly guaranteed under the law or in practice, will undermine the independence and legitimacy of the judiciary.

There are also cases in which Constitutional Court decisions have called into question the independence of the judiciary. In **Guatemala**, candidacy requirements for the 2003 presidential election were the starting point for a judicial battle between the Constitutional Court and the Supreme Court over whether Efraín Ríos Montt, who ruled Guatemala in the early 1980s following a bloody coup, could run for President despite a constitutional provision barring any leader of a coup from being President. The Supreme Court rejected the candidacy based on the Constitution, but its decision was reversed by the Constitutional Court on the grounds that the Constitution had been adopted after Mr. Ríos Montt had been head of State. This decision was confirmed by the Constitutional Court in a second (and final) ruling following a suspension of the first ruling by the Supreme Court. In **Ukraine**, the Constitutional Court rendered a similar decision, ruling that a provision limiting presidential terms to two did not apply to the current president because the Constitution came into force after he was first elected.

**Peru** provides an example of attacks directed against the independence of Constitutional Court. In 1996, three judges of the Constitutional Court were impeached by Congress and dismissed following a controversial decision barring President Fujimori. These judges brought a case before the Inter-American Commission of Human Rights, which ruled in their favor and transferred the case to the Inter-American Court of Human Rights. The Inter-American Court held that the impeachment and removal of the three judges violated the guarantee of judicial independence under article 8 of the Inter-American Convention of Human Rights.<sup>14</sup>

### **b. Relationships between Constitutional Courts and other Courts<sup>15</sup>**

There are two types of relationships between Constitutional Courts and other courts. The first are the relationships with other courts at the national and local level. The second are relationships with supranational tribunals such as the regional human rights courts. As regards the latter, the creation of human rights and other regional tribunals has led to new challenges for Constitutional Courts, especially as fundamental human rights principles of international law are increasingly incorporated into domestic constitutional law. These supranational tribunals have contributed positively to constitutional case law by defending and upholding many of the fundamental rights and civil liberties which are now enshrined in Constitutions around the world.

The relationships of Constitutional Courts with other courts at the national and local level are conditioned by a number of factors, which can be grouped into three main categories: (i) judicial organization; (ii) judicial procedures; and (iii) judicial functions.

#### **Constitutional Court Contribution to Judicial Independence: The Case of Poland**

In 1993, the Polish Constitutional Court defined judicial independence and expanded its scope when it declared a number of provisions of the 1993 Organic Law of the Courts unconstitutional. The Court ruled that judicial independence required the courts to adjudicate cases without yielding to external pressure or personal bias. It struck down provisions giving the Ministry of Justice excessive powers in the appointment and dismissal of court presidents and establishing unclear criteria for dismissal. One year later, the Constitutional Court ruled the financial independence of judges significantly strengthened their independence.<sup>16</sup>

**Judicial organization** – Factors related to judicial organization will govern the organic and hierarchical relationship of courts within the judiciary. The place of the Constitutional Court within the judicial organization, or outside of it, will play an important role in defining these relationships. For example, in some countries, the Constitutional Court is purposefully not integrated within the judiciary and is considered a freestanding entity. Moreover, the Constitutional Court is first and foremost the guarantor of the Constitution and the rights enshrined therein, which gives it a special status if not priority in the hierarchy of judicial and quasi-judicial bodies.

Another factor related to judicial organization is the role played by the judiciary, or by the Judicial Council as governing body of the judiciary, in the appointment of Constitutional Court members. While this is not true in every country, frequently some Constitutional Court members are nominated or appointed by the judiciary. Moreover, some countries require judicial experience to qualify for appointment to the Constitutional Court.

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<sup>14</sup> *Constitutional Court Case*, Judgment of January 31, 2001, Inter-Am. Ct. H.R., Series C No.71 (2001)

<sup>15</sup> Much of the information in this subsection is derived from: *Information in the Relations between the Constitutional Courts and the Other National Courts, Including the Interference in this Area of the Action of the European Courts*, Report of the XIIIth Congress of the Conference of European Constitutional Courts, 2002

<sup>16</sup> See, Constitutional Court of Poland, Judgment of 09.11.1993, K.11/93 and Judgment of 08.11.1994, P1/94.

**Judicial procedures** – Factors related to judicial procedures correspond primarily to the impact on the judiciary of three possible interventions of the Constitutional Court. First, in some countries, the Constitutional Court is competent to decide cases of conflict of jurisdiction between several courts. Through this power, the Constitutional Court may receive additional respect as a fundamentally independent institution, especially to the extent that it remains the judge of its own jurisdiction in most countries. Second, many countries recognize the possibility for courts to suspend proceedings before them in order to solicit a preliminary ruling of the Constitutional Court on the constitutionality of a law. Such is the case in **Austria** or **Portugal**, for example. Third, complaints arising from proceedings initiated before a court may be submitted to the Constitutional Court. This is the case in all Latin American countries and **Spain** through specific recourses for the protection of constitutional rights, including that of *amparo*.

**Judicial functions** – Factors related to judicial functions derive from the nature of the intervention of the Constitutional Court and its effects. Depending on the country, the role of the Constitutional Court may be limited or extensive, which shapes its interaction with the judiciary. Whether the Constitutional Court may control the constitutionality of laws and procedures in a direct or indirect, preventive or subsequent, abstract or concrete manner will not have the same consequences for the degree of interference with the judiciary that this intervention causes. Similarly, the effects attached to the decisions of the Constitutional Court may affect its relationship to the courts of general jurisdiction. Decisions of unconstitutionality may apply *erga omnes* (general) or *intra partes* (only parties), *ex tunc* (retroactive) or *ex nunc* (only for the present and future). For example, decisions only applicable *intra partes* will not affect the courts in general, except maybe as an element of general interpretative guidance. On the other hand, an annulment *erga omnes* means that all courts must subsequently disregard the annulled law in their decisions.

## 6. Standing and Public Information

### a. Legal Standing

Legal standing before the Constitutional Court varies from country to country depending on the nature of the claim. For purposes of presenting legal standing rules, claims before Constitutional Courts are divided into three main categories: (i) direct constitutional challenges; (ii) preliminary questions; and (iii) constitutional complaints. Before going into each category in detail, it is worth pointing out that some countries, like **Macedonia** and **Austria**, have introduced mechanisms for *ex officio* constitutional review, through which the Constitutional Court may review the constitutionality of legal norms on its own initiative.

**Direct constitutional challenges** – Challenges to the constitutionality of legal norms are in principle open to political authorities, such as the President, the government, ministers, parliamentary groups or members. Some countries also allow judicial authorities, such as the highest courts in **Ukraine** and **Poland**, the Attorney General in **Portugal** and **Romania** or any court in **Croatia**, to initiate constitutional review proceedings before the Constitutional Court. Exceptionally, public officials such the Ombudsman or representatives of local State entities are allowed to bring direct constitutional challenges before the Constitutional Court. In these cases, the claims are limited to the protection of specific interests.

A minority of countries have introduced the possibility of *actio popularis*, which gives legal standing to individuals and legal persons to challenge the constitutionality of legal norms directly before the Constitutional Court. In some countries, such as **Hungary** and **Croatia**, there are no limitations on the legal standing of individuals. In others, individuals must demonstrate a specific interest (**Austria**) or are only allowed to challenge certain acts (**Georgia**).

**Preliminary questions** – Most countries provide for the possibility of preliminary questions to the Constitutional Court. Under this procedure, all courts or, in some cases, only the highest courts may suspend judicial proceedings and refer a question to the Constitutional Court on the conformity to the Constitution of a legal norm to be applied in the proceedings.

### **Preliminary Questions: Three Models**

1. **Mandatory referral** – Mandatory suspension of judicial proceedings and referral to the Constitutional Court whenever a doubt arises as to the constitutionality of a legal norm to be applied in the proceedings (**Austria, Romania**);
2. **Shared review in practice** – In principle, mandatory suspension of judicial proceedings and referral to the Constitutional Court, but, in practice, shared review by the Constitutional Court and the courts of general jurisdiction (**Spain**);
3. **Limited referral** – Mandatory referral to the Constitutional Court only if the court is convinced that the legal norm is unconstitutional or fails to find an interpretation that would make it compatible with the Constitution (**Czech Republic, Germany**).

**Constitutional complaints** – The notion of constitutional complaints covers a variety of actions created to provide aggrieved citizens, in defense of their rights, or public officials, in defense of their institutions, with a subsidiary legal remedy. Complaints generally arise when a violation of constitutional rights and civil liberties attributable to an act or omission of a State entity is alleged. Legal standing is only recognized after all legal remedies have been exhausted, i.e. the complaint has unsuccessfully gone through the courts and all appeals have been exhausted. Constitutional complaints are restricted to challenges of individual decisions and legal acts of the courts (and other jurisdictional bodies) and of administrative authorities that affect the constitutional rights of the complainant.

### **b. Public Information**

Because the Constitutional Court is the guarantor of democratic principles and fundamental rights, its activities directly affect the public. The important role played by the Court makes public access to information and transparency in the appointment and decision-making processes all the more important. The primary beneficiaries of the activities of the Constitutional Court are citizens, and they must therefore be informed in a timely and effective manner of mechanisms to access the Court as well as of the outcome of constitutional review proceedings.

**Public access to court information** – It is essential for the public to have access to Constitutional Court information and procedures. The first step in ensuring public access to this information is the sensitization of the public to constitutional issues, especially citizens' constitutional rights and the existence of complaint or review mechanisms. Conveying this information may require basic educational and outreach campaigns. The establishment of public affairs offices within Constitutional Court can also provide a vehicle for the efficient and effective transmission of information.

**Public access to court proceedings** – It is essential for the public to have access to Constitutional Court hearings. In most countries, constitutional review proceedings rely primarily, if not exclusively, on written documents, thereby limiting opportunities for public hearings to a minimum. In the event that hearings are conducted, there does not seem to be any justification for barring the public from these hearings. In addition, complaints and arguments may be published by the Constitutional Court itself.

**Public access to court decisions** – It is essential for the public to have access to Constitutional Court decisions. These decisions should be published in official bulletins and legal journals. It is also advisable to make this information widely available through information databases, media coverage or the Internet. Circulation of Constitutional Court decisions, as well as constitutional complaint procedures and adjudication rules through the media and computerized information systems will broaden public access to information. Moreover, the wide publication of decisions and related information will contribute to the transparency of the Constitutional Court and fuel the pluralism of opinions and debate on constitutional issues, in furtherance of the inherently public nature of the activities of Constitutional Courts.



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**WEB RESOURCES:**

- European Commission for Democracy through Law or Venice Commission (contains a database on constitutional case law in Europe) – <http://venice.coe.int/>
- International Constitutional Law (resources) <http://www.oefre.unibe.ch/law/icl/>



**ANNEX 2**  
**CONSTITUTIONAL COURTS AROUND THE WORLD:**  
**MODELS AND JURISDICTION**

**TABLE 1: EUROPE (Selected Countries) – MODELS**

Country	Constitutional Court/Council			Supreme Court or Special Chamber of the Supreme Court			Other	Without Constitutional Judicial Review
	European Model	French Model	Mixed Euro-American Model	European Model	American Model	Mixed Euro-American Model		
Albania								
Belarus								
BiH*								
Bulgaria								
Croatia								
Czech R.*								
France								
FRY*								
Georgia								
Germany								
Greece								
Hungary								
Italy								
Latvia								
Macedonia								
Netherlands								
Poland								
Portugal								
Romania								
Russia								
Slovakia								
Spain								
Sweden								
Turkey								
UK*								
Ukraine								

\* “BiH” = Bosnia and Herzegovina; “Czech R.” = Czech Republic; “FRY” = Former Republic of Yugoslavia; and “UK” = United Kingdom

TABLE 2: EUROPE (Selected Countries) – JURISDICTION

	Interpretation of legal norms	Constitutionality of legal norms (a priori)	Constitutionality of legal norms (a post.)	Disputes bet. the powers of the State	Disputes bet. national and local State entities	Legal gaps and omissions	Eligibility of candidates	Political parties	Constitutionality of election processes	Confirmation of election results	Impeachment	Complaint on human rights	Other human right protection
Albania													
Belarus													
BiH*													
Bulgaria													
Croatia													
Czech R.*													
France													
FRY*													
Georgia													
Germany													
Greece													
Hungary													
Italy													
Latvia													
Macedonia													
Netherlands													
Poland													
Portugal													
Romania													
Russia													
Slovakia													
Spain													
Sweden													
Turkey													
UK*													
Ukraine													

\* “BiH” = Bosnia and Herzegovina; “Czech R.” = Czech Republic; “FRY” = Former Republic of Yugoslavia; and “UK” = United Kingdom

**TABLE 3: SUB-SAHARAN AFRICA (Selected Countries) – MODELS**

Country	Constitutional Court/Council			Supreme Court or Special Chamber of the Supreme Court			Other	No Constitutional Judicial Review
	European Model	French Model	Mixed Euro-American Model	European Model	American Model	Mixed Euro-American Model		
Angola								
Benin								
Botswana								
Burundi								
DRC*								
Ghana								
Guinea								
Guinea B.*								
Ivory Coast								
Kenya								
Liberia								
Malawi								
Mali								
Namibia								
Niger								
Nigeria								
Rwanda								
SA*								
Senegal								
Sudan								
Tanzania								
Uganda								
Zimbabwe								

\* “DRC” = Democratic Republic of Congo; “Guinea B.” = Guinea Bissau; and “SA” = South Africa

TABLE 4: SUB-SAHARAN AFRICA (Selected Countries) – JURISDICTION

	Interpretation of legal norms	Constitutionality of legal norms (a priori)	Constitutionality of legal norms (a post.)	Disputes bet. the powers of the State	Disputes bet. national and local State entities	Legal gaps and omissions	Eligibility of candidates	Political parties	Constitutionality of election processes	Confirmation of election results	Impeachment	Complaint on human rights	Other human right protection
Angola													
Benin													
Botswana													
Burundi													
DRC*													
Ghana													
Guinea													
Guinea B.*													
Ivory Coast													
Kenya													
Liberia													
Malawi													
Mali													
Namibia													
Niger													
Nigeria													
Rwanda													
SA*													
Senegal													
Sudan													
Tanzania													
Uganda													
Zimbabwe													

\* “DRC” = Democratic Republic of Congo; “Guinea B.” = Guinea Bissau; and “SA” = South Africa

**TABLE 5: MIDDLE EAST AND NORTH AFRICA (Selected Countries) – MODELS**

Country	Constitutional Court/Council			Supreme Court or Special Chamber of the Supreme Court			Other	No Constitutional Judicial Review
	European Model	French Model	Mixed Euro-American Model	European Model	American Model	Mixed Euro-American Model		
Algeria		■						
Bahrain							■	
Cyprus	■							
Egypt	■							
Iran					■			
Israel					■			
Kuwait							■	
Lebanon	■							
Libya								■
Morocco		■						
Oman							■	
Palestine	■							
Syria	■							
Tunisia							■	
Yemen				■				

TABLE 6: MIDDLE EAST AND NORTH AFRICA (Selected Countries) – JURISDICTION

	Interpretation of legal norms	Constitutionality of legal norms (a priori)	Constitutionality of legal norms (a post.)	Disputes bet. the powers of the State	Disputes bet. national and local State entities	Legal gaps and omissions	Eligibility of candidates	Political parties	Constitutionality of election processes	Confirmation of election results	Impeachment	Complaint on human rights	Other human right protection
Algeria													
Bahrain													
Cyprus													
Egypt													
Iran													
Israel													
Kuwait													
Lebanon													
Libya													
Morocco													
Oman													
Palestine													
Syria													
Tunisia													
Yemen													

**TABLE 7: ASIA (Selected Countries) – MODELS**

Country	Constitutional Court/Council			Supreme Court or Special Chamber of the Supreme Court			Other	No Constitutional Judicial Review
	European Model	French Model	Mixed Euro-American Model	European Model	American Model	Mixed Euro-American Model		
Afghanistan							■	
Australia							■	
Bangladesh					■			
Burma							■	
Cambodia	■							
China							■	
India					■			
Indonesia						■		
Japan					■			
Kazakhstan	■							
Malaysia					■			
Mongolia	■							
Nepal					■			
NZ*					■			
Pakistan							■	
Philippines				■				
Singapore					■			
SK*	■							
Thailand	■							
Vietnam							■	

\* “NZ” = New Zealand; and “SK” = South Korea

TABLE 8: ASIA (Selected Countries) – MODELS

	Interpretation of legal norms	Constitutionality of legal norms (a priori)	Constitutionality of legal norms (a post.)	Disputes bet. the powers of the State	Disputes bet. national and local State entities	Legal gaps and omissions	Eligibility of candidates	Political parties	Constitutionality of election processes	Confirmation of election results	Impeachment	Complaint on human rights	Other human right protection
Afghanistan													
Australia													
Bangladesh													
Burma													
Cambodia													
China													
India													
Indonesia													
Japan													
Kazakhstan													
Malaysia													
Mongolia													
Nepal													
NZ*													
Pakistan													
Philippines													
Singapore													
SK*													
Thailand													
Vietnam													

\* “NZ” = New Zealand; and “SK” = South Korea

**TABLE 9: AMERICAS (Selected Countries) – MODELS**

Country	Constitutional Court/Council			Supreme Court or Special Chamber of the Supreme Court			Other	No Constitutional Judicial Review
	European Model	French Model	Mixed Euro-American Model	European Model	American Model	Mixed Euro-American Model		
Argentina								
Bolivia								
Brazil								
Canada								
Chile								
Colombia								
CR*								
Cuba								
DR*								
Ecuador								
El Salvador								
Guatemala								
Haiti								
Honduras								
Jamaica								
Mexico								
Nicaragua								
Panama								
Paraguay								
Peru								
T&T*								
Uruguay								
USA								
Venezuela								

\* “CR” = Costa Rica; “DR” = Dominican Republic; and “T&T” = Trinidad and Tobago

TABLE 10: AMERICAS (Selected Countries) – MODELS

	Interpretation of legal norms	Constitutionality of legal norms (a priori)	Constitutionality of legal norms (a post.)	Disputes bet. the powers of the State	Disputes bet. national and local State entities	Legal gaps and omissions	Eligibility of candidates	Political parties	Constitutionality of election processes	Confirmation of election results	Impeachment	Complaint on human rights	Other human right protection
Argentina			■										■
Bolivia			■								■		■
Brazil			■			■						■	■
Canada			■										■
Chile		■	■					■		■	■		■
Colombia			■								■	■	■
CR*		■	■										■
Cuba			■										■
DR*			■										■
Ecuador		■	■	■								■	■
El Salvador			■	■								■	■
Guatemala		■	■	■								■	■
Haiti			■										■
Honduras			■									■	■
Jamaica			■										■
Mexico			■		■							■	■
Nicaragua			■	■	■								■
Panama			■									■	■
Paraguay			■										■
Peru		■	■	■									■
T&T*			■										■
Uruguay			■										■
USA			■										■
Venezuela			■										■

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