



*A Practical Guide to*

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*Constitution Building:*

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The Design of the Judicial Branch

Nora Hedling

This paper appears as chapter 6 of International IDEA's publication *A Practical Guide to Constitution Building*. The full Guide is available in PDF and as an e-book at <http://www.idea.int> and includes an introductory chapter (chapter 1) and chapters on principles and cross-cutting themes in constitution building (chapter 2), building a culture of human rights (chapter 3), constitution building and the design of the executive branch and the legislature (chapters 4 and 5), and decentralized forms of government in relation to constitution building (chapter 7).



International IDEA resources on Constitution Building

## *A Practical Guide to Constitution Building:* The Design of the Judicial Branch

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## Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989, have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimising constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still belies constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states who may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today after the legacy of the 1990s is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,  
former President of Mauritius*

## Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen  
Secretary-General, International IDEA

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## Acronyms and abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

FYROM Former Yugoslav Republic of Macedonia

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# The Design of the Judicial Branch

## 1. Overview

This chapter explores the role of the judiciary within a constitutional democracy by considering some selected topics that are relevant to the allocation of judicial power in deeply divided states. The judiciary's most basic function is to settle disputes and administer justice by applying the law in the cases that come before it. In order to do so and uphold the rule of law (see also chapter 2 in this Guide), judicial systems and bodies must be designed to ensure accessible and impartial justice. This chapter cannot provide a comprehensive discussion of all aspects of judicial design, but rather focuses on three main aspects of the design of a judiciary that are contained in constitutions: judicial powers, including constitutional review; judicial independence; and legal pluralism.

As a part of the judiciary's role in administering justice, constitutions often charge judiciaries with enforcing the guarantees of the constitution, which sometimes entails oversight of government actors, bodies, and processes. For instance, most judiciaries are vested with some form of power of constitutional review, which allows them to review legislative or executive action for compliance with the constitution. Through constitutional review, judiciaries can place an important constitutional check on the political branches of government. However, the judiciary is rarely omnipotent: most constitutional systems limit the independence of the judiciary to some extent by affording the other branches a degree of influence over its composition and functions. Designing the judiciary therefore represents an important opportunity for constitutional practitioners to safeguard and ensure observation of the constitution. At the same time, the design of the judiciary, like that of other branches, requires careful reflection on the

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***Designing the judiciary represents an important opportunity to safeguard and ensure observation of the constitution. At the same time, the design of the judiciary, like that of other branches, requires careful reflection on the appropriate balance of power between the branches.***

appropriate balance of power between the branches. Likewise, the internal design of the judiciary, and particularly the incorporation of a plural legal system, presents unique opportunities and challenges. The context of the constitution-building process—a nation’s circumstances and history—should be at the heart of design of the judiciary.

The following sections outline various constitutional design options for the judiciary, flagging key considerations for practitioners. After briefly canvassing these options, the chapter analyses them through the prism of two factors, which are part of the underlying analytical framework of this Guide. The first factor is whether a particular judicial design tends to disaggregate or centralize governmental power, either in the judiciary or in another branch of government. Second, while judicial enforcement can be thought of as the quintessential legal safeguard and the last defence against infringement of individual rights, it is important to remember that political forces can be present in all branches and parts of government. Though judges are called upon to make decisions in service to the constitution and its laws only, they are also humans, with unique experiences and beliefs that may be impossible to separate entirely from their interpretation and application of the law. Options are therefore also considered in the light of both political and legal forces that can shape judicial functions and influence.

To achieve an optimal balance of powers, constitution builders must carefully consider their own objectives and circumstances. This chapter does not present one template that would be applicable to all systems; rather, it discusses several elements of judicial design, each with corresponding costs and benefits. Furthermore, when considering the judiciary, constitution builders should remember that, while the principles discussed here may prove helpful, the achievement of a particular objective—judicial independence, for instance—may require a closer look at constitutional arrangements and structures that go beyond the judicial branch. In other words, no single branch of government operates in isolation. Most of the examples given discuss constitutional provisions that expressly grant powers to the judiciary. It is important to note, however, that the lack of an express grant of authority within the constitution does not necessarily mean that the judiciary lacks the power in question under a given constitution. Judicial powers may be established by statute, or, especially in common law countries, may be developed through case law. For example, some constitutions do not directly address the question of judicial review

but the power is nevertheless exercised by the judiciary and is considered constitutionally valid practice. In the landmark decision of *Marbury v. Madison*, the Supreme Court of the United States firmly established the constitutionality of judicial review, elsewhere known as constitutional review, as a logical consequence of the Constitution’s distribution of powers.<sup>1</sup>

***The achievement of a particular objective—such as the independence of the judiciary—may require a closer look at constitutional arrangements and structures that go beyond the judicial branch. No single branch of government operates in isolation.***

Constitution builders must therefore be careful to consider not only provisions that are explicitly incorporated into the constitution, but also the practices, traditions and precedents that are likely to be accepted or tolerated, as well as the possible consequences of the arrangements and principles enshrined in the constitution. Constitutional provisions do not operate in isolation but interact with other constitutional provisions, other sources of law, and relevant circumstances, both historical and political, in a given society. Societal norms and traditions, as well as other sources of law—such as statutory law, common law, custom, or practice—will probably inform the meaning, accepted understanding and implementation of particular constitutional provisions.

### **Box 1. The judiciary: key ideas**

- The judiciary is traditionally the branch of government that interprets—rather than ‘creates’ or enforces—the law. Under modern constitutions this function can encompass many powers, but at a fundamental level the judiciary settles disputes and administers justice by determining facts and then applying existing law to those facts.
- Constitutional review is a cornerstone of the judicial power in most modern democracies. This entails ensuring that law and government action accord with constitutional guarantees, whether concerning the government’s authority to act, its structure, or the separation of powers—or what it is prohibited from doing, such as infringe individual liberties recognized by the constitution. The extent of review powers, as well as the involvement of other branches of government, varies widely.
- Modern judiciaries also exercise a number of other powers, many of which constitute either checks on other branches of government or other oversight mechanisms, possibly including powers such as the ability to monitor and regulate elections or political parties.
- Preserving judicial independence is critical to preserving the rule of law and to ensuring the proper functioning and impartiality of the court system. At the same time, constitutions should also promote a judicial system that is accountable and transparent. Judicial design should strive to maintain a balance among these sometimes competing values. Designing for these values can include the promotion of clarity and consistency in judicial processes and standards, rights to public hearings, and access to judicial information, as well as mechanisms that place a check on the exercise of judicial powers, such as a functioning appeals system, and oversight by other branches in the form of appointment and removal procedures. A key consideration in determining which mechanisms will be successful in achieving this balance will be the context in which the constitution will operate.
- Legal pluralism encourages the operation of several legal systems within a single constitutional order. Stated differently, it makes it possible to incorporate

existing legal norms and systems into the constitutional order and to provide legal autonomy to indigenous peoples and religious groups. Yet legal pluralism also raises important questions about the jurisdictional reach of each system, and the legal hierarchy of systems in the constitutional order. Legal pluralism raises particular challenges to enforcing constitutional rights across all the applicable legal systems.

## 2. Judicial powers

The core function of courts is to apply the law impartially to the many disputes that arise before them. This function is linked closely to the stability and legitimacy of the judiciary and the constitutional order. Impartiality is critical. That is, judges are called on to examine without prejudice the facts before them, and apply the law even-handedly and without regard to political views or personal preferences. Not only does impartiality provide the best possibility to provide justice in the dispute at hand; it also builds credibility and trust in the judiciary as an institution. Impartiality also sets the standard for judges in their performance of their other functions, including, importantly, their role in protecting the integrity of the constitution.

At the same time, judges are human, and it is possible that two impartial judges will arrive at different decisions when given the same set of facts. Applying the law to a unique set of facts to settle a specific dispute or case may require the interpretation of the law or the investigation of the question of what the law requires in a specific, possibly unforeseen, situation. The responsibility to apply the law thus entails a degree of power in determining its meaning. While some degree of creative function is unavoidable, it is by no means absolute. Different tools, such as appeals systems, detailed statutes, or a respect for the precedents established by earlier cases, temper the creative function and help to maintain consistency in the application of law throughout the judiciary.

***The core function of courts—to apply the law impartially to the disputes that arise before them—is linked closely to the stability and legitimacy of the judiciary and the constitutional order. Impartiality is critical.***

Nevertheless, the activity of interpreting and applying the law is an essential power of the judiciary and is also essential to the concept of the rule of law, which requires, among other things, equality before the law, fairness in the application of the law, and access to instruments of justice such as functioning courts. The function of applying the law also touches on the core activities of the other branches of government, particularly in the

legislative process. In addition to its day-to-day function of administering justice, the judiciary is also a branch of government. Constitutions vest power in the judiciary and other branches as part of a design intended to create a functioning system of government. The judiciary, therefore, has a relationship to the other branches. It provides checks on the activities of the other branches; it is also shaped in some ways by them. The rest of the chapter will focus on the judiciary's role in upholding the constitutional order and the way in which it interacts with the other branches of government. It will also look into some aspects of the internal structure of the judiciary, and specifically into the possibility of multiple court and legal systems operating together under one constitution.

## 2.1. Constitutional review

One of the core roles of modern judiciaries is to uphold constitutional guarantees. The judiciary performs this function through the exercise of constitutional review, also known as judicial review. Constitutional review takes many forms and can involve the exercise of various oversight mechanisms, but its objective is the same across jurisdictions—to uphold constitutional principles and provisions against any legislation, regulation, or other governmental action that might contravene them. Through constitutional review processes, courts evaluate legislation and other government acts to ensure that they are in compliance with the constitution. If the legislation or action contravenes the constitution, the courts will invalidate it. Constitutional law generally represents a higher law, with which all other laws and government action must comply. By engaging in constitutional review, the judiciary enforces this hierarchy. While constitutions usually bestow the power to enact laws upon the legislature, this distribution of authority is contingent on the passage of laws that do not contradict or ignore constitutional provisions and principles.

***Most judicial systems are endowed with some form of power to review legislative or executive action for compliance with the constitution.***

Constitutional review is one mechanism that enables the preservation and implementation of the constitution. It is a means of giving force to constitutional provisions and preventing acts that violate them.

### 2.1.1. What can be reviewed?

Constitutional review can extend to various types of law. At a basic level, constitutional review permits the judiciary to evaluate legislation for compliance with the requirements of the constitution. However, it usually extends to examination of other laws or actions, such as administrative decisions or executive acts, for compliance with the constitution as well. For instance, some constitutions allow judicial review of laws arising under international treaties.<sup>2</sup> Constitutional review can further extend beyond national legislation to laws passed at lower levels of government. In South Africa, the Supreme Court's review powers under the 1996 Constitution extend to all levels of government, including the provinces' constitutions, which must also comply with the national Constitution.<sup>3</sup> Similarly, under the Constitution of Serbia, the Constitutional Court has jurisdiction to review the general acts of autonomous provinces and local self-government units for compliance with the Constitution.<sup>4</sup>



It is also possible for the judiciary to review activities by the legislative or executive branches of government that raise questions concerning the division or separation of powers put forth in the constitution. Constitutional review of this sort aims to settle disputes not between private parties but between branches and bodies of government—to determine the competences of the various branches of government, including those of the judiciary itself. The Constitutional Court of the Republic of Korea (South Korea), among others, has the power to review the division of power among branches of government.<sup>5</sup> A court may also have the power to review the division of power between different levels of government, for example, between a regional government and the national government. The Constitution of Cameroon, for example, endows the judiciary with the power to settle disputes between the state and the regions, as well as disputes among the regions themselves.<sup>6</sup> The constitutions of India, Malaysia, Mexico and Nigeria, among others, also allow for review of the distribution of powers among the levels of government.<sup>7</sup>

***Constitutional review can extend not only to evaluating legislation for compliance with the requirements of the constitution but also to examination of other laws or actions, the division of power between different levels of government, and possibly review of government omissions, rather than actions.***

Finally, constitution builders may permit the judiciary to review government *omissions*, rather than actions. In Uganda, the Court of Appeal, sitting as the Constitutional Court, has such authority. Article 137(3)<sup>8</sup> allows an individual to petition the court that ‘any act or omission by any person or authority’ contravenes the Constitution. If the petition is deemed to be well founded, the court may provide redress.

### 2.1.2. Who reviews?

Just as the extent of constitutional review varies across countries, so too does the process it involves. The process of constitutional review relates closely, though not strictly, to the type of courts established by the constitution and to the operative legal system. The so-called American model of judicial review differs from the so-called European model of constitutional review in authorizing different institutions to engage in constitutional review. Under the American model, courts throughout the judiciary have inherent jurisdiction to engage in constitutional review. In other words, even lower courts may find that a law or a governmental action violates the constitution. In making such a determination, the court must decide the case in line with the demands of the constitution and refuse to apply the law in question on constitutional grounds.

These decisions are subject to appeal but, nevertheless, a form of constitutional review is performed. A Supreme Court, as the highest court of appeal, usually sits atop this system, with final say over the constitutionality of the laws being challenged. Because most supreme courts hear only a tiny fraction of all constitutional challenges made on the American model, lower courts decide the vast majority of constitutional issues. The Constitution of Estonia, among others, incorporates a form of judicial review that permits lower courts to decide questions of constitutionality.<sup>9</sup> Portugal, though it has

a Constitutional Court system, also enables lower courts to engage in review.<sup>10</sup> The empowerment of lower courts can be seen as a dispersal of the power of constitutional review across the judiciary (see also chapter 7 of this Guide, on decentralization). However, it ultimately requires all courts to align their decisions with the constitution, thereby in some ways limiting the source of their decisions to a centralized authority—the constitution itself. One benefit of this model of review is the possibility of appealing against a decision. Both lower and upper courts examine the issues and weigh in on

***In some countries, even lower courts may find that a law or a governmental action violates the constitution, although these decisions are subject to appeal. In others, constitutional review is functionally separated from the normally operating judicial branch.***

questions of constitutionality before they are decided with finality. This process takes time, however, which is a drawback. Under this model it could be years before a constitutional question reaches the highest court and a final decision is made. It can also result in inconsistency until a final decision is reached at the highest level, with lower courts deciding similar cases differently.

An alternative model of review, the European model, functionally separates constitutional review from the normally operating judicial branch. Under this model, a distinct Constitutional Court exercises exclusive jurisdiction over all constitutional claims. Some experts have argued that such a system—one that vests the power of constitutional review outside of the ordinary judiciary—better preserves the separation of powers. Under this conception, the Constitutional Court is thought of as an oversight body apart from all the branches of government with the only task of upholding the demands of the constitution. Therefore, theoretically, the system does not allow any single branch to hold too much power over another, thus preserving a clear division of power. Furthermore, it does not vest one *branch* with the ability to determine constitutionality. In contrast to the American model, the European model aggregates authority in one *court*, as no other judicial body can decide constitutional issues. Examples of constitutional courts that follow the European model of constitutional review are found in Benin, Germany, the Russian Federation, Turkey and Ukraine, among others.<sup>11</sup> A number of other countries feature institutions similar to constitutional courts that conduct constitutional review. Table 1 summarizes the features of the two systems.

**Table 1. The American and European models of constitutional review**

'American' model judicial review	'European' model constitutional review
Review of constitutional issues is decentralized: all courts possess the power to void or refuse to apply a statute on the grounds that it violates the constitution.	Constitutional review authority is centralized: only the Constitutional Court may void a statute for unconstitutionality.
The Supreme Court is the highest court of appeal in the legal order, not just for constitutional issues.	The Constitutional Court's jurisdiction is restricted to resolving constitutional disputes.
Review is 'concrete': it is exercised pursuant to ordinary litigation.	Constitutional review is typically 'abstract'. The Constitutional Court answers questions about constitutionality referred to it by judges or elected officials.

Source: Adapted from Sweet, Alex Stone, 'Constitutions and Judicial Power', in Daniele Caramani (ed.), *Comparative Politics* (Oxford and New York: Oxford University Press, 2008), box 9.1, p. 222.

### 2.1.3. Circumstances and timing of review

The timing of review and the circumstances under which it may take place are two additional elements affecting the process of review. The rules about when and under which circumstances a court is allowed to take up the question of constitutionality have great potential to expand or limit the strength of the constitutional review power. Constitutions vary on the timing and circumstances of review. As to timing, while some courts are empowered to assess the constitutionality of legislation prior to it becoming law, others may entertain a legal challenge only after enactment. Sri Lanka's Constitution allows the Supreme Court to review and reject pending legislation, but it cannot review laws once they have been enacted.<sup>12</sup> Proponents of pre-enactment constitutional review value the certainty it provides as to pending legislation. On the other hand, the effects and consequences of legislation may only be fully understood and felt after legislation is in place. Some observers therefore regard the possibility of review after enactment as essential.

***The rules about when and under which circumstances a court is allowed to take up the question of constitutionality have great potential to expand or limit the strength of the constitutional review power. In some countries, review of legislation is only possible prior to it becoming law; under other constitutions, constitutional review occurs only in the context of a specific case or controversy.***

Similarly, some constitutions grant the judiciary great discretion in determining when to review while others locate that discretion in other bodies or allow for review only upon some ‘triggering event’. Some constitutions require automatic judicial review of legislation prior to implementation. The French Constitution, for instance, requires review of ‘institutional acts’—statutes which are specifically required by the Constitution to give greater detail to constitutional provisions—before promulgation.<sup>13</sup> Similarly, in Chile, the Constitutional Tribunal reviews all organic laws before promulgation.<sup>14</sup> Under other constitutions, constitutional review occurs only in the context of a specific case or controversy. Under some constitutions, review procedures take place when an individual complains directly to the Constitutional Court alleging a violation of the constitution.<sup>15</sup> Given these myriad options, it is clear that endless combinations are possible to establish the rules of constitutional review. Though these processes may play out differently in different country contexts, some allow for greater freedom and opportunity in conducting constitutional review, thereby expanding judicial authority over questions of constitutionality. A greater level of freedom and opportunity for the judiciary to conduct constitutional review represents a greater degree of aggregation of power in the judicial branch.

Countries have altered review powers over time. One example is found in the Constitutional Council (Conseil Constitutionnel) in France. In the past, the Constitutional Council could probe the constitutionality of legislation only prior to the President’s signing it. In addition to the narrow timing of review, the Court could review many forms of legislation only upon the initiative of another branch—the President, Prime Minister, President of the Senate (Sénat) or National Assembly (Assemblée Nationale), or by 60 members of the Senate or National Assembly. As of March 2010, however, parties to individual cases could also request that the Constitutional Council review a law at issue for constitutionality.<sup>16</sup> The timing of review therefore also changed. In addition to review of laws before their promulgation, the Council may now also hear complaints about the constitutionality of a law that is already in effect. By expanding the scope of the Constitutional Council’s review powers, the French legislature aggregated power in the Council. Moreover, the legislature also moved France closer to a legal model of law-making, relying less on political accountability to reverse unconstitutional law.

Notably, the subject and circumstances of constitutional review are not always regulated in the constitution. Even where the existence of constitutional review is provided for and guaranteed constitutionally, many constitutions give little instruction regarding its operation. Instead, some constitutions provide the details of the review process by statute. Hungary provides an example of legislative influence over the processes of judicial review: while Article 32(A) of the Hungarian Constitution establishes a Constitutional Court and empowers it to exercise binding constitutional review, a legislative act sets the scope and various forms of review. Act XXXII of 1989 establishes this scope through detailed provisions on topics such as the standing, organization, and procedural rules of the Constitutional Court.<sup>17</sup>

### 2.1.4. Absence of constitutional review

Finally, some countries do not vest the power of constitutional review in the judiciary. These countries preserve the complete sovereignty of the legislature, insulating its enactments from oversight by a separate institution. In such a system, which is rare, the legislature, along with other branches and official actors, is charged with ensuring its own adherence to the constitution's edicts. This is the case under the Constitution of the Netherlands which states: 'The constitutionality of laws and treaties shall not be reviewed by the courts'.<sup>18</sup> Other constitutions provide for consultative bodies to offer input on questions of constitutionality but stop short from requiring the legislature to abide by their opinions. In Finland, the Constitutional Law Committee issues statements regarding the constitutionality and compliance with human rights treaties of proposals for legislation and other matters brought before it.<sup>19</sup> The legislature retains the authority to enact legislation regardless of the Constitutional Law Committee's stance and regardless of whether the President refuses to confirm the act. If the President refuses to confirm it, the Parliament may readopt the act, in which case it passes without confirmation.<sup>20</sup>

### 2.1.5. Further analysis

An analytical lens is used throughout this Guide which looks at the extent to which provisions or systems tend to aggregate or disperse power. This approach applies aptly to constitutional review. Constitutional review itself aggregates power in the judiciary, which has the final say on the requirements of the constitution, including what they mean for other branches. To a certain extent, the political branches must answer to the judiciary. From a broader perspective, however, constitutional review effectively disperses power among the branches so that no single branch exercises too much authority without the involvement of the other branches. The political branches of government draft and enforce laws, control taxes and spending, command the military, and manage the majority of government institutions. Constitutional review allows the judiciary to participate in or to oversee some of these processes. However, constitutional review arrangements also usually entail limits on the reach of the judiciary by requiring certain triggering events or by limiting the subjects of review.

In some cases, the judiciary can consider only cases or controversies or laws brought before it by litigants or other branches of government. Under other constitutions, the judiciary is limited to review of only certain laws. Thus, even independent judiciaries wield limited powers. Therefore, while constitutional review processes can be seen as tools to aggregate power or to disperse it across the branches, most functioning constitutions provide arrangements that do both. An appropriate balance can improve

***Constitutional review itself aggregates power in the judiciary, which has the final say on what the requirements of the constitution mean for other branches. From a broader perspective, however, it effectively disperses power among the branches of government. Most functioning constitutions provide arrangements that both aggregate power and disperse it across the branches of government.***

the functioning of the government and improve the legitimacy of the actions of other branches.

Most constitutional review arrangements constitute a strong form of legal protection. As a branch that is charged with the consistent and unbiased application of the constitution, the judiciary's oversight serves as a legal safeguard against breaches of the constitution. However, as this chapter discusses, constitution builders should not assume that the judiciary will be isolated from political pressure. Though there are mechanisms to reduce the political influence of judiciaries, they do not operate in isolation and are not immune from political forces. Political actors generally appoint judges, and one

***Most constitutional review arrangements constitute a strong form of legal protection. Oversight by the judiciary serves as a legal safeguard against breaches of the constitution. However, judiciaries do not operate in isolation and are not immune from political forces. Political actors generally appoint judges, and judges are not oblivious to what the people will accept or to what the executive will enforce.***

can expect them to select individuals who share their political outlook. While judges apply law to facts, this art permits space for judgement and discretion. And in deciding cases judges are not oblivious to what the people will accept or to what the executive will enforce. For these and other reasons, constitutional review constitutes both a legal and a political act. Again, it is desirable to strike a balance as to the extent and form of constitutional review powers by considering the specific country context.

## 2.2. Additional powers

In addition to enabling constitutional review, constitutions can empower courts to influence law-making by other means. One such means is by issuing advisory opinions on the constitutionality of laws, either prior to or after enactment. A second method is to involve the judiciary in the process of amending the constitution. The powers of the judicial branch can also extend to include general oversight powers on other branches of government or on administrative bodies. A constitution may give the judiciary a role in

***Constitutions can empower courts to influence law-making by means other than constitutional review, for example, by issuing advisory opinions on the constitutionality of laws, either before or after enactment, or being involved in the process of amending the constitution.***

impeaching the head of state or in dissolving parliament. Courts furthermore can regulate political parties or oversee electoral processes. Many constitutions—to preserve order and to avoid abuses of power during potential crises—require the executive to seek judicial authorization before declaring a state of emergency.

### 2.2.1. Advisory opinions

Advisory opinions can be thought of as a non-binding version of constitutional review. They are a means through which a court can advise other branches on the constitutionality of actions they are considering without obligating them to follow the court's opinion. For instance, an advisory opinion may be sought by the legislature while it is debating a law. Because advisory opinions are non-binding, they lack legal force. They constitute political, rather than legal, safeguards of the constitution. Nevertheless, as a political device, they can significantly influence the law-making process. Armed with an advisory opinion that doubts the constitutionality of a particular law, opponents of that law can rely on the opinion to increase the legitimacy of their arguments to great political effect. Similarly, a positive advisory opinion can insulate particular laws from political challenge. But advisory opinions still lack the influence of a binding legal decision; such opinions are not the final word on a matter. Political actors can overcome their legitimizing or de-legitimizing force. One example of this type of mechanism is found in Canada. In addition to its other review powers, the Supreme Court may issue advisory opinions which are not legally binding in response to 'reference questions' posed by the government, usually regarding the constitutionality of laws.<sup>21</sup>

### 2.2.2. Amendment of the constitution

Judicial powers may also extend to the process of amending the constitution. Constitutional amendment permits political actors to fundamentally change the legal and political framework of government. To promote stability, most constitutions thus permit only an arduous amendment process, which frequently involves several governmental bodies, political actors and branches of government. Some constitutions even allow judicial input. According to the South African Constitution, the Constitutional Court may have the opportunity to weigh in on the constitutionality of amendments.<sup>22</sup> Constitution builders may wish to include such a significant role for the judiciary in the amendment process, emphasizing the importance of particular constitutional principles. Indeed, without judicial support, political actors may be unable to amend certain provisions, no matter how politically unpopular they are. This arrangement removes particular issues from the political process, relying instead on the judiciary to effect constitutional change; it also concentrates significant authority in the judiciary. Ukraine features a similar amendment process.<sup>23</sup>

### 2.2.3. States of emergency

In order to facilitate swift and efficient responses in times of crisis, many constitutions endow a branch or actor with the power to declare a state of emergency or siege. This power is often vested in the executive branch because it is thought to be the best able to respond rapidly and decisively. The ability to declare a state of emergency can be a sweeping power, which often allows for the temporary suspension of constitutional provisions, including guarantees of certain rights and freedoms. Therefore, to prevent abuse of this potentially far-reaching power, most constitutions limit the ability of the executive to declare a state of emergency by placing limits on the circumstances that

qualify as an emergency or by requiring the support of other branches, including the judiciary. The constitution of Thailand, for instance, empowers the judiciary with the possibility of blocking the executive from declaring a state of emergency.<sup>24</sup> While the King may issue an emergency decree, it will not enter into effect without the support of the Council of Ministers and the National Assembly. A threshold number of National Assembly members, in turn, can trigger review by the Constitutional Court, which will decide whether the King's decree complies with constitutional requirements. To an extent, however, the Constitution does curtail the Constitutional Court's ability to block an emergency decree: any such decision requires a two-thirds majority of its members.<sup>25</sup> Nevertheless, the potential for judicial review surely curtails executive discretion in issuing an emergency decree.

#### 2.2.4. Impeachment processes

The judiciary can also enforce legal safeguards against the political misuse of the impeachment process or of the executive's authority to dissolve Parliament. Again, the mere potential of judicial involvement will probably reduce the number of calls by the legislature for the executive to be removed without a sound reason, just as it imposes an additional barrier making it more difficult for the executive to dissolve the

Parliament. Judicial censure of the legislature or the executive will probably have adverse political repercussions for those branches. Legal safeguards should thus improve the veracity of allegations that would lead to removal of the executive or the bases for dissolving Parliament. The judicial branches in Afghanistan and Sudan, for example, play a role in impeachment processes.<sup>26</sup>

***The powers of the judicial branch can also extend to a role in impeachment of the head of state or in the dissolution of parliament; regulating political parties or overseeing electoral processes; or authorization before a state of emergency can be declared.***

#### 2.2.5. Electoral administration

The judiciary can also exert a degree of influence over the political process by assisting the administration of elections or by regulating political parties. Constitutions in Germany, South Korea and Turkey, for example, empower the courts to regulate and even prohibit, under certain circumstances, political parties.<sup>27</sup> Courts in a number of countries such as France and Mongolia are constitutionally mandated to supervise elections and referendums.<sup>28</sup> The Constitutional Council wields particular influence in France's political process: as the guardian of fair elections, it can declare an election invalid. It also oversees the implementation of procedural rules affecting political parties, including campaign finance regulations.



### 3. Judicial independence and accountability

Having explored the various powers that the judiciary may exercise, this chapter now moves on to a discussion of the importance of judicial independence and the various constitutional mechanisms by which the other branches of government exercise influence or oversight over the judiciary. An independent judiciary, regardless of the specific powers and tasks assigned to it, is essential to a properly functioning constitution. Judicial independence is a touchstone of the rule of law, which demands the impartial application and interpretation of the law. It is also essential to the enforcement of human rights provisions and other constitutional guarantees, and to the strengthening of the judiciary's ability to engage in independent and meaningful dispute resolution and constitutional review.

Many constitutions make an express commitment to the principle of judicial independence. Of constitutions in force today, 65 per cent contain some such commitment.<sup>29</sup> The number has increased steadily with time. Figure 1 shows this trend towards an explicit commitment to judicial independence.

***Judicial independence is a touchstone of the rule of law.***

**Figure 1. The percentage of constitutions that contain an explicit declaration regarding the independence of the central judicial organs, by year (N=550)**



*Note:* N is the sample size—the number of historical (since 1789) and current constitutions surveyed for these statistics. According to the source, 550 out of roughly 800 constitutions in force since that time, including over 90 per cent of constitutions introduced since the Second World War, contain an explicit declaration regarding the independence of the central judicial organs.

*Source:* constitutionmaking.org, Report on judicial independence, available at <<http://www.constitutionmaking.org/reports.html>>.

A docile and dependent judiciary leaves power unchecked in the political branches, weakens the defence of individual rights, and opens up possibilities for corruption. An overly assertive judiciary, on the other hand, can significantly frustrate self-governance and political accountability. Moreover, in order to maintain the guarantees of the rule of law, the judiciary must be accountable for the effective and timely administration of justice. A constitution may therefore provide for some degree of influence over or oversight of the judiciary by the political branches or other oversight bodies, such as judicial councils, to fulfil the demands of judicial accountability. To strike the proper balance between judicial independence and judicial accountability, constitution builders must carefully consider the context of their own country. Many factors, both within the four corners of the constitution and outside it, affect judicial independence. This section focuses on three constitutional design options that directly affect judicial independence and accountability.

The first concerns the selection of judges, a particularly effective means by which other branches of government can influence the judiciary. In many countries, given the stakes, this issue has turned contentious. The second issue relates to judicial independence is term limits. Long terms of service insulate judges from political reprisals for unpopular decisions; they reduce the inappropriate consideration of personal concerns in deciding cases; and they grant judges the autonomy and independence to rule on legal—rather than political—grounds. On the other hand, long terms of service may also be seen as limiting change and progress within the law. The third issue is the removal of judges from the bench. Constitutional protections against arbitrary or politically motivated dismissal of judges can take many forms.

***Three design options directly affect judicial independence and accountability—the way in which judges are selected and appointed, limits to the term for which judges can serve, and the ways in which judges can be removed.***

### 3.1. The selection of judges

As is apparent from the discussion above, the authority to select judges significantly affects the balance of power. Most constitutions allocate this power to the political branches, generally the President or the Prime Minister, though it is rare that a constitution allows the president or prime minister to make appointments without the support, input, or approval of another body or branch. Nevertheless, some executives are powerful in this area. In Zimbabwe, the President, in consultation with a Judicial Service Commission, appoints judges.<sup>30</sup> Yet the President also appoints most of the members of this commission, which in some ways defeats the purpose of a shared appointment power.

In some countries the legislature exercises more control in the appointment of judges. In the Former Yugoslav Republic of Macedonia (FYROM), the legislature elects members of both the Constitutional Court and the Republican Judicial Council, which proposes the election and discharge of judges, evaluates competence, and oversees accountability measures.<sup>31</sup> Under many constitutions, the executive and legislative branches are both involved in the appointment of judges to the highest courts. In Hungary, the legislature alone appoints members of the Constitutional Court, whereas the President appoints members of the Supreme Court.<sup>32</sup> In Indonesia, the legislature and the executive are both involved in the appointments to the Supreme Court, the Judicial Commission, and the Constitutional Court.<sup>33</sup>

Even if judges strive to set aside their political or personal beliefs when interpreting the law, their experiences and perspectives will inevitably influence decisions. Political actors who appoint judges will naturally attempt to select individuals who share their first principles. The power of appointment—when involving the executive or the legislature—thus represents a political check on the judiciary. That is, constitutions that permit the political branches to appoint judges support a measure of political influence on the character and composition of the judiciary.

***The power of appointment by the executive branch or the legislature represents a political check on the judiciary.***

By delegating the responsibility for selecting judges to numerous actors, a constitution can mitigate the risk that any one individual will exert too much influence over the development of the law. Such a system may also weed out the most ideologically extreme judges, as most candidates will represent a compromise reached through political negotiation. The constitutions of both Ethiopia and South Africa, for example, involve a Judicial Council in the process of appointing Constitutional Court judges.<sup>34</sup> In Brazil, the President nominates candidates for the judiciary who must then win approval by the legislature.<sup>35</sup> To maximize diversity of opinion within the judiciary, the Italian Constitution entrusts the President, the Parliament and the lower courts with designating one-third of the members of the Constitutional Court each.<sup>36</sup>

Legal safeguards may reinforce judicial independence. Many constitutions contain explicit selection criteria that narrow the pool of potential judges. Such criteria may include age limits, ethnicity, regional origin, legal qualifications and experience requirements.<sup>37</sup> Constitution builders may select certain criteria to achieve a particular balance in the judiciary, to ensure diversity of views, or to encourage a professional, rather than political, judiciary.

Another kind of legal safeguard involves the appointment of judges by an independent, impartial body. The Constitution of Bosnia and Herzegovina commissions an international body, the European Court of Human Rights, to select three of the nine judges sitting on its Constitutional Court.<sup>38</sup> Other constitutions include domestic independent bodies in the selection of judges, though such bodies usually act alongside the political branches. In Uganda, for example, a Judicial Service Commission appoints lower-court judges but in appointing the judges of the highest court its role is to advise the President on appointments which are then approved by the Parliament.<sup>39</sup>

Impartial judicial councils or judicial service commissions with appointment authority certainly safeguard and even strengthen judicial independence by significantly reducing political control over the issue.

***Another kind of legal safeguard is the appointment of judges by an independent, impartial body.***

The judiciary itself can participate in, or even exclusively control, the appointment process. Such arrangements would maximize judicial independence but also aggregate power within the judiciary. While the judiciary, as compared to the political branches, might select more impartial and capable judges—although no evidence exists to support this claim—it would most likely select judges who were less representative of a nation's citizens. Moreover, vesting appointment authority strictly within the judiciary would remove a significant political check against an already non-political institution, and may require—as a countermeasure—infringements on judicial independence elsewhere. Under the Constitution of Portugal, elected judges are authorized to appoint a portion of members to the bench.<sup>40</sup> The judiciary also exercises appointment powers in Bulgaria where the judges of the highest courts may appoint members to lower courts.<sup>41</sup> Similarly, under Afghanistan's Constitution, the Supreme Court recommends judges for lower-court appointments.<sup>42</sup> Table 2 illustrates the appointment procedure under selected constitutions.

**Table 2. The selection of judges**

Executive appointment without a commission	Executive appointment with a commission	Appointment by a commission	Appointment by the legislature	Career judiciary
Afghanistan	Albania	Algeria	China	France
Argentina	Angola	Bulgaria	Cuba	Germany
Australia	Canada	Croatia	Laos	Italy
Bangladesh	Dominican Republic	Cyprus	FYROM	Japan
Belarus	England and Wales	Lebanon	Mexico	Portugal
Belgium	Greece	Spain	Montenegro	
Cambodia	Israel	Yemen	Rwanda	
Chad	Namibia			
Czech Republic	Poland			
New Zealand	Russia			
Turkey	South Africa			
Uzbekistan	Zimbabwe			

*Note:* Some constitutions call for multiple methods of selection judges; the table lists the primary one.

*Source:* adapted from Liptak, Adam, 'Rendering Justice, With One Eye on Re-election', *New York Times*, 25 May 2008, available at <<http://goo.gl/80vUZ>>.

### 3.2. Term of service

A judge's term of service can also affect judicial independence, as job security empowers judges to decide cases without regard to considerations of personal welfare and employment. Political safeguards here serve no function and would defeat the object of judicial independence. The strongest form of legal protection is life tenure, which is provided for in the constitutions of Argentina<sup>43</sup> and Estonia,<sup>44</sup> among others. To a lesser extent, a standard retirement age promotes judicial independence by freeing judges of reappointment concerns.<sup>45</sup> Other options include defined long terms, or short initial terms followed by life tenure.<sup>46</sup>

Although long terms of service can strengthen judicial independence, they can also weaken judicial accountability, both to the other branches of government and to the electorate. Short terms of service and systems of reappointment obviously have

the opposite effect: judges will need to perform effectively—as determined by the appointment, or reappointment, body, usually the executive or, as happens, although rarely, the electorate, to keep their jobs. In Guatemala, for instance, Supreme Court justices serve five-year terms, after which they must be re-elected by the legislature in order to continue serving.<sup>47</sup> In Japan, justices of the Supreme Court are appointed by the Cabinet but are subject to a review by the people after selection and every 10 years thereafter.<sup>48</sup> Finally, another option regarding term limits for judges in the highest court is to exclude the possibility of re-election or reappointment. This is the case for members of the Constitutional Court in Germany, who serve 12 years without the possibility of re-election, although the rule is found in the federal law regulating the Constitutional Court rather than in the German Constitution.<sup>49</sup>

***Job security allows judges to decide cases without regard to considerations of personal welfare and employment, but long terms of service could weaken judicial accountability, both to the other branches of government and to the electorate.***

### 3.3. Removal of judges

The questions of how and under what circumstances a sitting judge can be removed from the bench also significantly affect judicial independence. To maintain impartiality and the unbiased application of the law, judges must not fear arbitrary dismissal or transfer. Yet because a judge's behaviour actually may warrant dismissal or transfer, many constitutions clearly articulate the limited circumstances that would justify removal. Some constitutions designate political actors as the proper authority to remove judges. The Constitution of Albania, for instance, allows the legislature to effect removal.<sup>50</sup> In Gambia, the President, in consultation with the Judicial Service Commission, may terminate the appointment of a superior court judge while the National Assembly is empowered to set in motion proceedings for removal on the grounds of misconduct or infirmity.<sup>51</sup>

***To maintain impartiality and the unbiased application of the law, judges must not fear arbitrary dismissal or transfer. Many constitutions clearly articulate the limited circumstances that would justify their removal.***

The greater the number of actors involved, the more likely it is that competing political forces will be able to deter improper removal. In India removing judges requires the approval of both the Parliament and the executive branch.<sup>52</sup> Although this arrangement does not eliminate the potential for political abuse, requiring agreement between the branches reduces its likelihood.

Involving the judiciary in the removal process constitutes one means of protecting judicial independence. A judicial council or judicial service commission, used to appoint judges, might also act as a gatekeeper blocking politically-motivated dismissals.<sup>53</sup> Another method of involving the judiciary in dismissals—thereby protecting judicial independence and aggregating power in the judiciary—is requiring, as Sweden does, a

judicial finding supporting dismissal.<sup>54</sup> Germany's Constitution similarly institutes legal safeguards to ensure judicial independence by mandating that the removal, transfer or suspension of a judge cannot proceed without a judicial decision supporting removal or without strict adherence to removal protocol.<sup>55</sup> Impeachment of German federal judges—that is, removal of judges for violating principles of the Basic Law or constitutional order—requires both the involvement of the legislature and a two-thirds majority supporting removal in the Constitutional Court. Germany, therefore, has constructed significant barriers—including the dispersal of power to multiple bodies, as well as both legal and political safeguards—to removing a judge for politically motivated reasons, thereby significantly strengthening judicial independence.

***The greater the number of actors involved, the more likely it is that competing political forces will be able to deter improper removal of a judge. Involving the judiciary in the removal process is one means of protecting judicial independence; other legal safeguards to prevent arbitrary removal include vesting oversight of the process in independent bodies.***

Other legal safeguards preventing arbitrary removal include vesting oversight of the process in independent bodies, and instituting immunity protections. Croatia appoints independent bodies to decide removal cases.<sup>56</sup> Provisions granting immunity to judges for acts within their official capacity also aim to support independent judicial decision making.<sup>57</sup> On the other hand, immunity clauses, if improperly applied, can promote corruption and prevent judicial accountability.

An independent judiciary requires not only the formal provisions mentioned above, but also a commitment by political leaders to the rule of law—to abiding by constitutional provisions and judicial decisions. The other branches of government must also avoid involving the judiciary in political disputes or in activities outside the judiciary's core capacity to settle disputes and interpret the law.

An independent and properly functioning judiciary also may necessitate practical considerations such as adequate funding. While constitutional provisions may support judicial independence and impartiality, the executive must implement measures to fight corruption, enforce judicial decisions, and promote public confidence in the judiciary. While constitutions often compel transparency concerning some judicial functions—such as the right to a public hearing—legislative and administrative measures can also promote transparency, particularly as to other aspects of judicial proceedings and to the processes of selecting and retaining judges.

***An independent judiciary requires not only the formal provisions mentioned above, but also a commitment by political leaders to abide by constitutional provisions and judicial decisions. The other branches must also take measures to fight corruption, enforce judicial decisions, and promote public confidence in the judiciary.***





## 4. Legal pluralism

The final section of this chapter considers the concept of legal pluralism. Legal pluralism is most frequently incorporated into the constitutional design in divided societies where different groups adhere to competing legal norms or systems. By recognizing the multiple legal norms, legal systems and sources of law that exist in a country, constitutions can bestow a unique legal status on certain groups or in certain regions. Legal pluralism allows constitution builders to acknowledge marginalized legal systems—such as those based on religious norms or indigenous legal systems—and provides an opportunity to empower oppressed groups and to legitimize and preserve traditional cultural norms and practices. Particularly in post-conflict settings, constitutional recognition of multiple sources of law can significantly resolve societal tensions. Moreover, because legal pluralism allows not only for the incorporation of multiple sources of law but also for multiple court systems, it can create an opportunity for diversity in the administration of justice. By decentralizing the administration of justice, legal pluralism can also provide increased possibilities of justice administered at regional and local levels, by courts at levels closer to the communities they serve. However, legal pluralism presents challenges: constitution builders must construct a coherent constitutional framework and legal system from disparate and sometimes conflicting legal systems and norms. In order for plural legal systems to function properly, constitution builders must determine the scope of each legal system and identify the fundamental rights applicable across all legal systems. Before exploring these questions, we first survey the various sources of law that can constitute legal systems.

***Legal pluralism may be incorporated into the constitutional design in divided societies where different groups adhere to competing legal norms or systems, such as those based on religious norms or indigenous legal systems.***

In contrast to legal pluralism, a unified legal system constitutionally recognizes only one legal system. Though constitution builders may trace the legal norms represented in a

unified legal system to numerous sources—including religious tenets or international law, for example—the constitution legitimizes one system for interpreting and applying the law.

Civil law represents the most prevalent legal system, which predominantly relies on written legal codes as the source of law. Civil law judges apply constitutional provisions and general legislation to reach decisions. Under the common law system, by contrast, judges rely not only on statutory codes and constitutional provisions, but also on a body

***Particularly in post-conflict settings, constitutional recognition of multiple sources of law can significantly reduce societal tensions. By decentralizing the administration of justice, legal pluralism can also provide increased possibilities of justice administered at regional and local levels, by courts at levels closer to the communities they serve.***

of judge-authored legal opinions or case law that acts as legal precedent, binding inferior judges presented with similar facts, though precedent can be overturned and cases that involve even slightly different facts can be distinguished from precedential cases. Under common law systems, the precise contours and meaning of law emerge as the body of case law on a particular subject grows. In this sense, the common law intrinsically changes and develops over time.

Customary systems, often unwritten, develop from the societal norms, customs and practices of a particular community. Indigenous law provides one example; religious law—based on religious texts and practices—provides another. The most widespread religious legal system is Sharia, or Islamic law; its main sources are the Qur'an and the Sunnah teachings.<sup>58</sup> While Sharia functions as the sole legal system in some countries, it often coexists with others under a pluralist legal framework.

Legal pluralism can boost judicial legitimacy.<sup>59</sup> Multiple legal systems can often exist within a single country regardless of constitutional recognition, particularly in countries with religiously or ethnically diverse populations. Many of the systems have deep roots and are relied upon by the communities they serve. Similarly, post-colonial countries often have a number of legal systems operating simultaneously because colonial powers implemented aspects of their own legal systems, such as commercial law, while also maintaining aspects of traditional legal systems. Thus most constitutions actually do not impose or create legal pluralism, but rather accept or incorporate it into the

***However, legal pluralism presents challenges. Constitution builders must construct a coherent constitutional framework and legal system from disparate and sometimes conflicting legal systems and norms. For plural legal systems to function properly, constitution builders must determine the scope of each legal system and identify the fundamental rights applicable across all legal systems.***

existing constitutional order. The strength and legitimacy of the judiciary hinge almost exclusively on the perception of the political branches and the people. That perception suffers when the constitutional order fails to recognize legal systems that are actually used and respected by the people—and weakens the force of judicial decisions, which are based on the pre-existing constitutional order. Thus legal pluralism can enhance judicial authority.

As mentioned previously, however, legal pluralism also creates significant challenges. One relates to questions of jurisdiction—which courts have authority to decide which cases over which people? Sometimes a legal system may apply on a regional basis. This often occurs in federal systems, where each region—perhaps applying a distinct system of law—has jurisdiction over matters within the region that are not reserved for the federal centre. In another form of legal pluralism, one or more legal system may apply exclusively to a group based on membership. Such an arrangement could have a regional element but not always. For example, indigenous groups may have the right to maintain and apply indigenous law as part of a broader constitutional grant of territorial autonomy. Under some constitutions, the application of religious law to settle disputes among members of that religion is possible, as in India.<sup>60</sup> The application of a legal system also may be limited to certain areas of law in which a case arises.<sup>61</sup> For instance, religious law and courts may govern family law matters in certain cases.

***Which courts will have authority to decide which cases over which people? Sometimes a legal system may apply on a regional basis; one or more legal system may apply exclusively to a group based on membership; religious law may apply to disputes among members of a particular religion in certain areas of law, such as family or inheritance law.***

#### 4.1. Legal pluralism and constitutional conflict

Even if the constitution clearly delineates the circumstances under which, or people to which, different legal systems apply, conflicts still may arise. If fundamental rights enshrined in a constitution conflict with legal systems recognized by that constitution, drafters must determine which will prevail, or how this determination will be made. Critics have pointed out that legal pluralism can threaten the rights of the vulnerable, particularly women. Under some legal systems, the standard of gender equality set by constitutions and international instruments is not met. Difficulties can arise especially in the area of social and family law settings. The Committee on the Elimination of Discrimination against Women is among organizations that have expressed concern over legal pluralism where it is linked to discrimination.<sup>62</sup>

Though many constitutions have attempted to address any tensions between competing constitutional and legal values, no one single approach has emerged. Constitution builders have granted varying levels of discretion to individual legal systems.

***If fundamental rights enshrined in a constitution conflict with legal systems that are also recognized by that constitution, drafters must determine which will prevail, or how this determination will be made.***

Many constitutions have adopted the principle of constitutional supremacy, declaring that if laws or principles in recognized legal systems conflict with constitutional provisions, constitutional provisions prevail. International law has reinforced this approach.<sup>63</sup> The Constitution of Mozambique, for example, embraces legal pluralism only ‘insofar as [different legal systems] are not contrary to the fundamental principles and values of the Constitution’.<sup>64</sup> To enforce this hierarchy, another provision creates links between

***Many constitutions have adopted the principle of constitutional supremacy, declaring that if laws or principles in recognized legal systems conflict with constitutional provisions, constitutional provisions prevail.***

courts and other forums whose purpose is the settlement of interests and the resolution of disputes<sup>65</sup>—a provision that allows for legislation to ensure that higher national, and often constitutional, courts can review the decisions of indigenous or religious courts.

Colombia offers an example of a Constitutional Court that has narrowly tailored the supremacy principle. The Colombian Constitution of 1991 granted significant autonomy to indigenous groups, including the authority to apply their own law within their territories.<sup>66</sup> In a series of cases, the Constitutional Court balanced this grant of autonomy against individual rights recognized by the Constitution. In 1996 the Court issued a decision in *Gonzalez Wasorna v. Asamblea General de Cabildos Indigenas Region Chami y Cabildo Mayor* that recognized the supremacy of fundamental rights but limited interference in indigenous laws only to narrowly defined circumstances.<sup>67</sup> Specifically, the Court found that restrictions on indigenous laws must satisfy two conditions: they must be necessary to protect a superior constitutional guarantee and they must do so in the least restrictive way. The Court further found that ‘superior’ constitutional guarantees reach only the highest human values—the right to life, the prohibition against torture and the prohibition against slavery.

At the other end of the spectrum, some constitutions recognize—in so-called exclusionary clauses—not the supremacy of the constitution, but the complete autonomy of legal systems in defined areas of the law. These arrangements amount to a significant dispersal of judicial and national power. Literally, exclusionary clauses specifically exclude certain areas of law, very often family law, from constitutional guarantees against discrimination. The Constitution of Lesotho 1993 provides one example: Article 18(4)b prohibits any law from discriminating on the basis of ‘race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’—but this provision does not reach laws concerning ‘marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description’. Botswana and Gambia feature similar provisions.<sup>68</sup>

***Some constitutions have exclusionary clauses, recognizing the complete autonomy of legal systems in defined areas of the law, for example, excluding certain areas of law, often family law, from constitutional guarantees against discrimination.***

Exclusionary clauses prevent constitutional protections in the areas covered, such as family law and wills and estates. It is therefore possible for otherwise prohibited discrimination to occur. Because of this possibility, exclusionary clauses have been criticized as inconsistent with the requirements of international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>69</sup> This is not to say, however, that any single legal system has a monopoly on the value of equality. Nor are legal pluralism and a broader constitutional embrace of multiculturalism necessarily at odds with the preservation of equality.<sup>70</sup> The

consequences of various judicial design choices and other constitutional design options should be contemplated by constitution-building practitioners with careful regard for the particular historic, social, and political contexts of the countries in which they work.



# 5. Conclusion

The judicial branch is indispensable to a properly functioning constitutional democracy. The rule of law cannot hold without the judiciary settling disputes by impartially applying the law. The judiciary also plays a unique role in upholding the arrangements and guarantees of the constitution by exercising judicial review, which empowers the judiciary to ensure that the other branches of government act within the bounds of the constitution. To meet this great responsibility adequately, the judiciary requires a certain degree of independence and freedom. But judicial independence does not equate with judicial autonomy, or rule by judges. The political branches also may command a degree of accountability and transparency from the judiciary, mostly to preserve judicial integrity. Constitution builders must also carefully consider the internal structure and organization of the judiciary to ensure not only the coherent operation of the law, but also its legitimacy. Constitutional recognition of multiple legal systems simultaneously can strengthen judicial legitimacy while respecting different cultures, traditions, and norms in a divided society. But legal pluralism raises significant challenges to the constitutional order. Before adopting legal pluralism, constitution builders must sort out issues of jurisdiction, the hierarchy of laws, and the constitutional protection of rights.

**Table 3. Issues highlighted in this chapter**

Issues	Questions
<b>1. Role of the judiciary</b>	<ul style="list-style-type: none"><li>• What is the role of the judicial branch?</li><li>• How does the judiciary contribute to ensuring the rule of law?</li><li>• What checks and balances exist between the judiciary and other branches?</li></ul>

<p><b>2. Constitutional review</b></p>	<ul style="list-style-type: none"> <li>• What is the role of the judicial branch in enforcing the guarantees of the constitution?</li> <li>• What laws and decisions can be reviewed in a process of constitutional review?</li> <li>• Which courts can exercise judicial review?</li> <li>• What are the circumstances under which review can take place?</li> <li>• When does constitutional review take place?</li> </ul>
<p><b>3. Judicial powers</b></p>	<ul style="list-style-type: none"> <li>• What is the role of the judiciary in law-making?</li> <li>• What is the role of the judiciary in amending the constitution?</li> <li>• What checks may the judiciary exercise over other branches?</li> <li>• How is the judiciary involved in the administration of elections and political parties?</li> </ul>
<p><b>4. Judicial independence and accountability</b></p>	<ul style="list-style-type: none"> <li>• Why is judicial independence important?</li> <li>• What mechanisms exist to ensure accountability of the judiciary?</li> <li>• How are judges selected? Who selects them? Under which criteria?</li> <li>• How long might judges serve?</li> <li>• How are judges removed?</li> </ul>
<p><b>5. Legal pluralism</b></p>	<ul style="list-style-type: none"> <li>• How can a constitution bring together multiple legal systems?</li> <li>• How does legal pluralism contribute to the legitimacy of legal systems?</li> <li>• What happens when legal systems existing under a constitution conflict?</li> </ul>



# Notes

All the articles of constitutions referred to in the endnotes are reproduced in the Annexe.

- <sup>1</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).
- <sup>2</sup> See, for example, Article 121 of the Constitution of Afghanistan (2004).
- <sup>3</sup> Articles 167, 143 and 144 of the Constitution of the Republic of South Africa (1996).
- <sup>4</sup> Article 167(4) of the Constitution of the Republic of Serbia (2006).
- <sup>5</sup> Article 111(1) of the Republic of Korea (1948 as amended 1987).
- <sup>6</sup> Article 47(1) of the Republic of Cameroon (1972 as amended 1996).
- <sup>7</sup> Article 232 of the Constitution of the Federal Republic of Nigeria (Promulgation Decree (1999); Article 131 of the Constitution of the Republic of India (1950 as amended 1996); Article 128 of the Constitution of Malaysia (1957 as amended 1994); Article 105 of the Political Constitution of the United Mexican States (1917 as amended 2007).
- <sup>8</sup> Article 137(3) of the Constitution of the Republic of Uganda (1995).
- <sup>9</sup> Section 152 of the Republic of Estonia (1992).
- <sup>10</sup> Article 204 of the Constitution of the Portuguese Republic, (1976 as amended 2005). See also the Constitutional Courts site, available at <<http://www.concourts.net/>>.
- <sup>11</sup> Mavčič, Arne, articles in the *Constitutional Review* (2001), updated texts available at <<http://www.concourts.net/>>.
- <sup>12</sup> Articles 80(3) and 120 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2000).
- <sup>13</sup> Articles 46(5) and 61 of the Constitution of the French Republic (1958 as amended 2005).
- <sup>14</sup> Article 82 of the Political Constitution of the Republic of Chile (1980).
- <sup>15</sup> Article 32/A (3) of the Constitution of the Republic of Hungary, (1949 as amended 2007); Article 167(6) of the Constitution of the Republic of South Africa, (1996 as amended 2007).
- <sup>16</sup> See Conseil Constitutionnel of France, <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/a-la-une/juin-2010-la-publicite-des-audiences-au-conseil-constitutionnel.48374.html>>.
- <sup>17</sup> Hungarian Act XXXII on the Constitutional Court, 19 October 1989.
- <sup>18</sup> Article 120 of the Constitution of the Kingdom of the Netherlands (1983 as amended 2002).
- <sup>19</sup> Section 74 of the Constitution of the Republic of Finland (2000 as amended 2007).
- <sup>20</sup> Section 77 of the Constitution of the Republic of Finland (2000 as amended 2007).
- <sup>21</sup> Section 53 of the Canadian Supreme Court Act (R.S., 1985, c. S-26), available at <<http://laws.justice.gc.ca/eng/S-26/page-1.html>>.

- <sup>22</sup> Article 167(4)(d) of the Constitution of the Republic of South Africa (1996 as amended 2007).
- <sup>23</sup> Articles 157 and 159 of Constitution of Ukraine (1996).
- <sup>24</sup> Section 185 of the Constitution of Thailand (2007) .
- <sup>25</sup> Section 185 of the Constitution of Thailand (2007).
- <sup>26</sup> Article 69 of the Constitution of the Islamic Republic of Afghanistan (2004); Article 60(2) of the Interim National Constitution of the Republic of the Sudan, 2005 (Revised).
- <sup>27</sup> Article 69 of the Constitution of the Republic of Turkey (1982 as amended 2007); Article 21 of the Basic Law of the Federal Republic of Germany (1949 as amended 2006); Article 8(4) of the Constitution of the Republic of Korea (1948 as amended 1987).
- <sup>28</sup> Article 58 of the Constitution of the French Republic (1958 as amended 2008); Article 66(2)(2) of the Constitution of Mongolia (1992).
- <sup>29</sup> constitutionmaking.org, Report on judicial independence available at <<http://www.constitutionmaking.org/reports.html>>.
- <sup>30</sup> Article 84 of the Constitution of the Republic of Zimbabwe (1979).
- <sup>31</sup> Articles 104 and 109 of the Constitution of the Republic of Macedonia (1991 as amended 2005).
- <sup>32</sup> Articles 19(3)(k), Article 32A(4), and Article 48 of the Constitution of the Republic of Hungary (1949 as amended 2003).
- <sup>33</sup> Articles 24A-C of the Constitution of the Republic of Indonesia (1945 as amended 2002).
- <sup>34</sup> Section 174 of the Constitution of the Republic of South Africa (1996); Article 81 of the Constitution of the Federal Democratic Republic of Ethiopia (1995).
- <sup>35</sup> Article 101 of the Constitution of the Federative Republic of Brazil (1998).
- <sup>36</sup> Article 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- <sup>37</sup> Article 118 of the Constitution of the Islamic Republic of Afghanistan (2004); Article 182(VI) of the Constitution of the Plurinational State of Bolivia (2009); Articles 106 and 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- <sup>38</sup> Article VI(1)(a) of the Constitution of Bosnia and Herzegovina (1995).
- <sup>39</sup> Articles 142 and 148 of the Constitution of the Republic of Uganda (1995).
- <sup>40</sup> Article 222 of the Constitution of the Portuguese Republic (1976 as amended 2005).
- <sup>41</sup> Article 147 the of Constitution of the Republic of Bulgaria (1991); see also Article 135 of the Constitution of the Italian Republic (1948 as amended 2003).
- <sup>42</sup> Article 132 of the Constitution of the Islamic Republic of Afghanistan (2004).
- <sup>43</sup> Article 110 of the Constitution of the Argentine Nation (1994).
- <sup>44</sup> Article 147 of the Constitution of the Republic of Estonia (1992).
- <sup>45</sup> Article 77 of the Political Constitution of the Republic of Chile (1980); Article

- 291 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999).
- <sup>46</sup> Article 105 of the Constitution of the Republic of Korea (1948 as amended 1987).
- <sup>47</sup> Articles 207 and 215 of the Constitution of the Republic of Guatemala (1985 as amended 1993).
- <sup>48</sup> Article 79 of the Constitution of Japan (1946).
- <sup>49</sup> Article 4 of the Federal Constitutional Court Act of Germany (1951 as amended 2009).
- <sup>50</sup> Article 128 of the Albanian Constitution (1998).
- <sup>51</sup> Article 141 of the Constitution of the Gambia (1997).
- <sup>52</sup> Article 124 of the Constitution of the Republic of India (1950 as amended 1995).
- <sup>53</sup> Article 123 the Constitution of the Republic of Croatia (1990 as amended 2001); Article 105 of the Constitution of the Italian Republic (1948 as amended 2003).
- <sup>54</sup> Chapter 12, Article 8 of Sweden's Instrument of Government (1975 as amended 2002).
- <sup>55</sup> Articles 97 and 98 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009).
- <sup>56</sup> Article 122 of the Constitution of the Republic of Croatia (1990 as amended 2001).
- <sup>57</sup> Article 134 of the Constitution of the Republic of Slovenia (1991 as amended 2003).
- <sup>58</sup> Otto, Jan Michiel, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy* (Leiden: Leiden University Press, 2008).
- <sup>59</sup> Lee Van Cott, D., 'A Political Analysis of Legal Pluralism in Bolivia and Colombia', *Journal of Latin American Studies*, 32 (2000), pp. 207–34.
- <sup>60</sup> Lubin, Timothy, Davis, Donald R. Jr and Krishnan, Jayanth K. (eds), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press, 2010).
- <sup>61</sup> See Article 121 and 'State List' of the Constitution of Malaysia (1957 as amended 1994) which designate certain areas of jurisdiction to Syariah courts.
- <sup>62</sup> See for example CEDAW Annual Report, UN document A/58/38, 18 August 2003, para. 160, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/468/20/PDF/N0346820.pdf?OpenElement>>, commenting on reporting by the Republic of the Congo: 'The Committee expresses concern at the continued existence of legal pluralism with discriminatory components and obsolete provisions in customary law and statutory law, the latter including criminal law regarding adultery; the labour and taxation laws; and family law, particularly with regard to the difference in the age at which women and men may enter into marriage.'
- <sup>63</sup> Yrigoyen Fajardo, Raquel, 'Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries', *Beyond Law, Informal Justice and Legal Pluralism in the Global South*, 10/27 (2004), citing Agreement 169 of the 1989 International Working Group on Indigenous People and Tribes in Independent Countries, which states that there should not be incompatibility between customary

law and the fundamental rights defined by the national legal system or with internationally recognized human rights.

- <sup>64</sup> Article 4 of the Constitution of the Republic of Mozambique (16 November 2004), available at <<http://www.unhcr.org/refworld/docid/4a1e597b2.html>> (accessed 27 February 2011).
- <sup>65</sup> Article 212 (3) of the Constitution of the Republic of Mozambique (16 November 2004), available at <<http://www.unhcr.org/refworld/docid/4a1e597b2.html>> (accessed 27 February 2011).
- <sup>66</sup> Article 246 of the Political Constitution of Colombia (1991 as amended 2005).
- <sup>67</sup> *González Wasorna v. Asamblea General de Cabildos Indígenas región Chamí y Cabildo Mayor Único*, Decision, T 349/96.
- <sup>68</sup> Article 15(4)(c) of the Constitution of Botswana (1966); Article 7(f) of the Constitution of the Gambia (1997).
- <sup>69</sup> Articles 2(f), 5, 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 3 September 1981; Article 5, 1249 U.N.T.S. 13.
- <sup>70</sup> For a closer analysis of exclusionary clauses and the relevant issues, see Bond, Johanna, 'Constitutional Exclusion and Gender in Commonwealth Africa', 20 August 2010, *Fordham International Law Journal*, 31 (2008), available at <<http://ssrn.com/abstract=1662654>>; Volpp, Leti, 'Feminism versus Multiculturalism', *Columbia Law Review*, 101/5 (June 2001), pp. 1181–1218 published by the Columbia Law Review Association, Inc., available at <<http://www.jstor.org/stable/1123774>>; Okin, Susan Moller, 'Is Multiculturalism Bad for Women?', in Joshua Cohen et al. (eds), *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999).

# Key words

Judiciary, Judicial power, Judicial systems, Constitutional review, Judicial review, Concrete review, Abstract review, Advisory opinions, Reference questions, Constitutional amendment, Judicial independence, Judicial accountability, Judicial appointment, Term limits, Rule of law, Legal system, Legal pluralism, Conflict of laws, Indigenous law, Traditional law, Legal safeguards, Checks and balances, Separation of powers, Judicial activism, Legal interpretation, Judicial access, Supreme Court, Constitutional Court, High Court, Civil law, Common law

## Additional resources

- **UN Basic Principles on the Independence of the Judiciary**

<[http://www.abanet.org/rol/docs/judicial\\_reform\\_un\\_principles\\_independence\\_judiciary\\_english.pdf](http://www.abanet.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf)>

This document contains information about the United Nations Resolution, adopted in 1985, outlining basic principles for securing and promoting the independence of the judiciary in national settings.

- **Constitutional Courts: Comparative constitutional analysis**

<<http://www.concourts.net/index.php>>

Concourts.net presents comparative analyses of the system of constitutional review systems in more than 150 countries. It provides tables, charts and maps, as well as explanations of different aspects of constitutional review.

- **Constitution Making**

<<http://www.constitutionmaking.org/>>

Constitutionmaking.org is a joint project of the Comparative Constitutions Project (CCP) and the United States Institute of Peace (USIP). Its goal is to provide designers with systematic information on design options and constitutional texts, drawing on the CCP's comprehensive dataset on the features of national constitutions since 1789.

- **United States Agency for International Development (Guidance for Promoting Judicial Independence and Impartiality)**

<[http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law/](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/)>

The United States Agency for International Development (USAID)'s Rule of Law programme provides resources on rule-of-law issues to USAID field missions and bureaux, other US government entities, and the broader democracy and governance community. This page contains information about the programme and links to a number of relevant publications, including 'Guidance for Promoting Judicial Independence and Impartiality'.

- **Legal and Judicial Reform in Central Europe and the Former Soviet Union**

<[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/08/08/000094946\\_03073004032060/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/08/08/000094946_03073004032060/Rendered/PDF/multi0page.pdf)>

This report was compiled using the experience of the judges, lawyers, legislators, business people and development assistance officials who are working day by day to bring legal reform to five key transition countries.

## Glossary

Advisory opinions	A non-binding opinion issued by a <i>Constitutional Court</i> advising the legislature as to the constitutionality of a proposed piece of legislation
Checks and balances	A system that allows each branch of government to exercise limited control over other branches in order to ensure proper and legal behaviour, as well as balance political powers and dynamics
Civil law	A legal system which places emphasis on the codification of laws
Common law	A legal system which places emphasis on following precedent from earlier legal decisions to decide cases
Conflict of laws	The situation when aspects of legal systems within the same country are contradictory
Constitutional amendment process	The means by which an alteration to a constitution, whether a modification, deletion or addition, is accomplished
Constitutional Court	A high court primarily responsible for interpreting the constitution and deciding whether other national laws are in compliance with it or are unconstitutional. A Constitutional Court is usually a specialized court that will not occupy itself with other types of cases that are not directly related to the constitution.
Constitutional review (also judicial review)	The powers of a court to decide upon the constitutionality of an act of the legislature or the executive branch and invalidate the act if it is determined to be contrary to constitutional provisions or principles
Customary law	Legal systems, often unwritten, developed from the societal norms, customs and practices of a particular community
Judicial accountability	A principle to ensure judicial compliance with the rule of law, enforced by other branches through oversight, and checks and balances

Judicial appointment	The mechanism by which members of the judiciary are selected. A common system has the executive offer nominations to the legislature which then has the power to confirm or reject nominees.
Judicial independence	Freedom from influence from other branches of government or actors; judicial independence is considered fundamental to a functioning judiciary and to a democratic society.
Judicial review/ constitutional review	The powers of a court to decide upon the constitutionality of an act of the legislature or the executive branch and invalidate that act if it is determined to be contrary to constitutional provisions or principles
Judicial system	The entire judicial framework of a nation, including the court system, judicial norms and practices, and laws
Judiciary	The branch of government that is endowed with the authority to interpret the law, adjudicate legal disputes, and otherwise administer justice
Legal interpretation	The act or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed or will
Legal pluralism	The existence of multiple legal systems under one constitution, often taking the form of multiple, separate, regional or specialized court systems
Legal safeguards	Legal rules established to prevent the misuse of powers by branches of government. Often take the form of checks and balances to be exercised by one branch over another.
Separation of powers	The distribution of state power among different branches and actors in such a way that no branch of government can exercise the powers specifically granted to another
State of emergency	A temporary period during which extraordinary powers are granted, usually to the executive branch, in order to deal with extenuating circumstances that are deemed an emergency
Supreme Court	In most cases, the highest court within the legal system, which is often an appellate tribunal with high powers and broad authority within its jurisdiction

# About the author

Nora Hedling is a key staff member with International IDEA's Constitution Building Processes Programme, where her work focuses primarily on the development of knowledge tools. She has previously researched in the areas of election law and judicial reform at the University of Minnesota and with the US Department of State, among others. She has also worked in both the non-profit and the education sectors. Ms. Hedling holds a Bachelor of Arts degree from Tufts University and a Juris Doctor degree from the University of Minnesota Law School and is a member of the Minnesota State Bar. Most recently she received a Master's in European Law at Stockholm University where she was awarded the Oxford University Press Law Prize.



# Annexe. Constitutional and statutory provisions referenced in this chapter

These texts appear in the order in which they are referred to in the endnotes and the chapter text. The constitutional provisions are reprinted here from the International Constitutional Law (ICL) Project (<http://www.servat.unibe.ch/icl/info.html>), unless otherwise noted.

## Article 121 of the Constitution of Afghanistan (2004)

The Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.

## Article 167 of the Constitution of the Republic of South Africa (1996)

- (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
- (2) A matter before the Constitutional Court must be heard by at least eight judges.
- (3) The Constitutional Court -
  - (a) is the highest court in all constitutional matters;
  - (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
  - (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- (4) Only the Constitutional Court may -
  - (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
  - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
  - (c) decide applications envisaged in section 80 or 122;
  - (d) decide on the constitutionality of any amendment to the Constitution;
  - (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
  - (f) certify a provincial constitution in terms of section 144.
- (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
  - (a) to bring a matter directly to the Constitutional Court; or
  - (b) to appeal directly to the Constitutional Court from any other court.
- (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Article 143 of the Constitution of the Republic of South Africa (1996)

- (1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for -
  - (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
  - (b) the institution, role, authority and status of a traditional monarch, where applicable.
- (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1) -
  - (a) must comply with the values in section 1 and with Chapter 3 ; and
  - (b) may not confer on the province any power or function that falls -
    - (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
    - (ii) outside the powers and functions conferred on the province by other sections of the Constitution.

Article 144 of the Constitution of the Republic of South Africa (1996)

- 1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.
- (2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified -
  - (a) that the text has been passed in accordance with section 142; and
  - (b) that the whole text complies with section 143.

Article 167(1)(4) of the Constitution of the Republic of Serbia (2006)

Article 167 Jurisdiction

- (1) The Constitutional Court decides on:
  - 4. compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law, . . .

Article 111 (1) of the Republic of Korea (1948 as amended 1987)\*

- (1) The Constitutional Court shall have jurisdiction over the following matters:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

\* Reprinted from and available from the Constitutional Court's Website <http://www.ccourt.go.kr/home/english/index.jsp>

Article 47(1) of the Republic of Cameroon (1972 as amended 1996)\*

Article 47 (1) The Constitutional Council shall give a final ruling on:

- the constitutionality of laws, treaties and international agreements;
- the constitutionality of the standing orders of the National Assembly and the Senate 'prior to their implementation;
- conflict of powers between State institutions; between the State and the Regions, and between the Regions.

\* Reprinted from and available at <http://confinder.richmond.edu/>

Article 232 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999)\*

- (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.
- (2) In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly.

Provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.

\* Reprinted from and available at <http://www.nigeria-law.org/>

Article 131 of the Constitution of the Republic of India (1950 as amended 1996)

Original jurisdiction of the Supreme Court

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute -

- (a) between the Government of India and one or more States; or
- (b) between the Government of India and any State of States on one side and one or more other States on the other; or
- (c) between two or more States.

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.

Article 128 of the Constitution of Malaysia (1957 as amended 1994)\*

- (1) The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -
  - (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
  - (b) disputes on any other question between States or between the Federation and any State.
- (2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Supreme Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.
- (3) The jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law.

\* Reprinted from and available at <http://confinder.richmond.edu/admin/docs/malaysia.pdf>

Article 105 of the Political Constitution of the United Mexican States (1917 as amended 2007)\*

The Supreme Court of Justice shall resolve, under the related legislation, legal affairs as follows:

- I. The constitutional controversies -- except those involving an electoral dispute -- between:
  - a) The Federation and a State or the Federal District;
  - b) The Federation and a municipality;
  - c) The Executive Branch of Federal Government and the Congress: the Executive Branch of Federal Government and at least one congressional Chamber or the Executive Branch of Federal Government and the Permanent Commission acting as representatives of either the federation or

the Federal District;

- d) A couple of States;
- e) A State and the Federal District;
- f) The Federal District and a Municipality
- g) Two municipalities located at different States;
- h) A couple of Powers within a single State disagreeing about the constitutionality of their actions or executive orders;
- i) A State and one municipality located within it disagreeing about the constitutionality of their actions or executive orders:
- j) A State and a municipality located within a different State disagreeing about the constitutionality of their actions or executive orders: and
- K) A couple of governmental agencies of the Federal District disagreeing about the constitutionality of their actions or executive orders.

The resolutions taken by a majority of eight votes of justices of the Supreme Court shall declare the general invalidation of an executive order as long as the respective controversy has been generated by State or municipal executive orders appealed by the Federation, by municipal executive orders appealed by the States or by the application of paragraphs c), h) and k) of this article.

In any other case, the effects, of the Supreme Court of Justice's resolutions shall affect only the contesting parties.

II. The unconstitutionality lawsuits directed to resolve a probable contradiction between a general norm and this Constitution;

The unconstitutionality lawsuits shall be submitted to the Supreme Court of Justice during a period of time of thirty days which shall be computed from the contested general norm's publishing date onwards. Those entitled to submit such legal actions shall be:

- a) A thirty three percent out of the total number of members of the Chamber of Deputies appealing a law enacted by the Congress including the Federal District's legislation;
- b) A thirty three percent out of the total number of members of the Chamber of Senators appealing a law enacted by the Congress, including the Federal District's legislation or appealing any international treaty ratified by the Mexican State;
- c) the Attorney General appealing a federal or state legislation, including the Federal District's legislation, or the international treaties ratified by the Mexican State;
- d) A thirty three percent out of the total number of members of a State Legislature appealing a law enacted by such State Legislature;
- e) A thirty three percent out of the total number of members of the Federal District's Assembly of Representatives appealing a law enacted by such an

Assembly; and

- f) The national chairmen of the political parties registered at the Federal Electoral Institute appealing federal and local electoral laws; the state chairmen of the political parties registered at the state electoral authorities shall also be authorized to appeal electoral laws enacted by the representative State Legislature.

Such shall be the only procedure available to appeal the unconstitutionality of electoral laws.

Both federal and local electoral legislations shall be published and promulgated at least ninety days before the starting date of their respective electoral process. During electoral processes, electoral laws shall not be modified.

The Supreme Court of Justice's resolutions taken by a majority of eight justices shall declare invalid the challenged norms.

- III. The appeals submitted either by a Unitary Circuit Tribunal or the Attorney General against the District Judge's rulings resolving the trials in which the Federation is a contesting party and which are particularly interesting and important. The same procedure shall be applied to those appeals selected by the Supreme Court itself.

The invalidity declarations which paragraphs I and II of this article refer to, shall not have a retroactive effect except those related to the resolution of criminal offences which shall be regulated by general principles and criminal law.

Any defiance of the resolutions mentioned at paragraphs I and II of this article shall be punished under article 107, paragraph XVI, subparagraphs 1 and 2 of this Constitution.

\* Reprinted from and available at <http://biblio.juridicas.unam.mx>; Translation by Carlos Pérez Vázquez

#### Article 137(3) of the Constitution of the Republic of Uganda (1995)\*

137. Questions as to the interpretation of the Constitution.

- (3) A person who alleges that—
  - (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
  - (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

\* Reprinted from and available at [www.constitutionnet.org](http://www.constitutionnet.org)

#### Section 152 of the Constitution of the Republic of Estonia (1992)

- (1) If any law or another legal act is in conflict with the Constitution, it shall not be

applied by the Court in trying a case.

- (2) If any law or other legal act is in conflict with the provisions and spirit of the Constitution, it shall be declared null and void by the National Court.

Article 204 of the Constitution of the Portuguese Republic (1976 as amended 2005)

#### Compliance with the Constitution

In matters that are brought to trial, the courts shall not apply rules that contravene the provisions of this Constitution or the principles enshrined therein.

Article 80(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2000)\*

80. When Bill becomes law.

- (3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever.

\* Reprinted from and available at the Official Government Website <http://www.priu.gov.lk/>

Article 120 of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978 as amended 2001)\*

120. Constitutional jurisdiction of the Supreme Court.

The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution:

Provided that-

- (a) in the case of a Bill described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a Referendum by virtue of the provisions of Article 83;
- (b) where the Cabinet of Ministers certifies that a Bill which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill;
- (c) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires

approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraphs (1) and (2) Of Article 82; or

- (d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires to be passed with the special majority required by Article 84 or whether any provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

\* Reprinted from and available on the Official Government Website at <http://www.priu.gov.lk/>

Article 46(5) of the Constitution of the French Republic (1958 as amended 2005)

Institutional Acts shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution.

Article 61 of the Constitution of the French Republic (1958 as amended 2005)

- (1) Organic laws, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and standing orders of the parliamentary Assemblies, before their implementation, must be submitted to the Constitutional Council which rules on their constitutionality.
- (2) To the same end, acts of Parliament may, before their promulgation, be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty deputies, or sixty senators.
- (3) In the cases provided for by the two preceding paragraphs, the Constitutional Council must rule within one month. However, at the Government's request, this period is reduced to eight days if a matter is urgent.
- (4) In these same cases, referral to the Constitutional Council suspends the time limit for promulgation.

Article 82 of the Constitution of the Republic of Chile (1980)\*

Article 82 - Powers of the Constitutional Court are:

1. To exercise control of the constitutionality of the constitutional organic laws prior to their promulgation, and of the laws that interpret some precept of the Constitution;
2. To resolve on questions regarding constitutionality which might arise during the processing of bills or of constitutional amendment and of treaties submitted to the approval of Congress;



3. To resolve on questions which should arise over the constitutionality of a decree having force of law;
4. To resolve on questions which should arise regarding constitutionality on calling a plebiscite, without prejudice to the powers corresponding to the Elections Qualifying Court.
5. To resolve on complaints in case the President of the Republic does not promulgate a law when he should, or when he promulgate a text different from that which constitutionally corresponds or when he issues an unconstitutional decree;
6. To decide, when required by the President of the Republic in conformity with Article 88, on the constitutionality of a decree or resolution of the President which the Office of the Comptroller General may have objected to, for deeming it unconstitutional;
7. To declare the unconstitutionality of organizations, movements or political parties, in accordance with the provisions of Article 8 of this Constitution;
8. To declare, in conformity with Article 8 of this Constitution, the responsibility of persons who attempt or who should have attempted against institutional order of the Republic. However, if the affected person were the President of the Republic or the President-elect, said declaration shall, in addition, require the agreement of the Senate, adopted by a majority of its members in office;
9. To report to the Senate on the cases referred to in Article 49, No 7, of this Constitution;
10. To decide on the constitutional or legal inabilities preventing a person from being appointed Minister of State, from remaining in that post, or from performing other functions simultaneously;
11. To pronounce itself on ineligibilities, incompatibilities and grounds for ceasing the terms of office of congressmen; and
12. To decide on the constitutionality of supreme decrees issued by the President of the Republic within his reglamentary powers, when such decrees are issued on matters that might be reserved to the law by mandate of Article 60.

The Constitutional Court may conscientiously analyze facts when taking cognizance of the powers indicated in Nos 7, 8, 9 and 10; likewise, when dealing with grounds for ceasing the post of a member of Congress.

In the case of No 1, the Chamber of origin shall forward to the Constitutional Court the respective bill within the five days following completion thereof by Congress.

In the case of No 2, the Court may only take cognizance of the matter at the request of the President of the Republic, or of either of the Chambers, or of a fourth of their members in office, provided such request is made before the law has been promulgated.

The Court must take a decision within a period of ten days counted from the date on which the request has been received, unless it decides to postpone it for another ten

days for serious and justified reasons. The request shall not suspend consideration of the bill; however, the part thereof which is objected to may not be promulgated until the aforementioned period has expired, except when it deals with the Budgetary Law Bill or with the Bill related to the declaration of war proposed by the President of the

Republic.

In the case of No 3, the questions may be formulated by the President of the Republic within a period of ten days, when the Comptroller General objects to a decree having force of law on grounds of unconstitutionality. The questions may also be raised by either of the Chambers or by a fourth of their members in office in case the Office of the Comptroller General should have registered a decree having force of law objected to for being unconstitutional. This request must be made within a period of thirty days from the time of publication of the respective decree having force of law.

In the case of No 4, the question may be raised at the request of the Senate or the Chamber of Deputies, within ten days of the date of publication of the decree which sets the date for the plebiscite. The Court shall establish the definitive text of the questions submitted to plebiscite in its decision when appropriate. If the decision is issued less than thirty days prior to the date on which the plebiscite should be held, the Court shall establish a new date, extending between thirty and sixty days following the decision.

In the cases of No 5, the question may be raised by either of the Chambers or by one-fourth of their members in office, within thirty days following publication or notification of the objected text, or within sixty days following the date on which the President of the Republic should have promulgated the law. If the Court accepts the demand, it shall promulgate in its decision the law which had not been promulgated or rectify the incorrect promulgation thereof.

In the case of No 9, the Court may only take cognizance of the matter at the request of the Chamber of Deputies or of a fourth of its members in office. Public action shall be available to petition the Court regarding the powers conferred thereupon by Nos 7,8 and 10 of this Article. However, if in the case of No 8, the person affected were the President of the Republic or the President elect, the petition shall be filed by the Chamber of Deputies or a fourth of its members in office.

In the case of No 11, the Court may only take cognizance of the matter at the request of the President of the Republic or of at least ten Congressmen in office.

In the case of No 12, the Court may only take cognizance of the matter at the request of either Chamber made within thirty days following the publication or notification of the objected text.

\* Reprinted from and available at <http://confinder.richmond.edu/>

Article 32/A (3) of the Constitution of the Republic of Hungary (1949 as amended 2007)

- (3) Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law.

Article 167(6) of the Constitution of the Republic of South Africa (1996 as amended 2007)

167 Constitutional Court

- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
  - (a) to bring a matter directly to the Constitutional Court; or
  - (b) to appeal directly to the Constitutional Court from any other court.

Article 120 of the Constitution of the Kingdom of the Netherlands (1983 as amended 2002)

The constitutionality of laws and treaties shall not be reviewed by the courts.

Section 74 of the Constitution of the Republic of Finland (2000 as amended 2007)

Section 74 Supervision of constitutionality

The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.

Section 77 of the Constitution of the Republic of Finland (2000 as amended 2007)

Section 77 Confirmation of Acts

- (1) An Act adopted by the Parliament shall be submitted to the President of the Republic for confirmation. The President shall decide on the confirmation within three months of the submission of the Act. The President may obtain a statement on the Act from the Supreme Court or the Supreme Administrative Court.
- (2) If the President does not confirm the Act, it is returned for the consideration of the Parliament. If the Parliament readopts the Act without material alterations, it enters into force without confirmation. If the Parliament does not readopt the Act, it shall be deemed to have lapsed.

Section 53 of the Canadian Supreme Court Act (R.S., 1985, c. S-26)

SPECIAL JURISDICTION

References by Governor in Council

Referring certain questions for opinion

53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
- (a) the interpretation of the Constitution Acts;
  - (b) the constitutionality or interpretation of any federal or provincial legislation;
  - (c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
  - (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

Article 167(4)(d) of the Constitution of the Republic of South Africa (1996 as amended 2007)

- (4) Only the Constitutional Court may -
- (d) decide on the constitutionality of any amendment to the Constitution;

Articles 157 and 159 of the Constitution of Ukraine (1996)\*

Article 157

The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.

Article 159

A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.

\* Reprinted from and available on the Constitutional Court's website at <http://ccu.gov.ua/en/index>

Section 185 of the Constitution of Thailand (2007)\*

Before the House of Representatives or the Senate approves an Emergency Decree under

section 184 paragraph three, members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with section 184 paragraph one or paragraph two, and the President of that House shall then, within three days as from the receipt thereof, refer it to the Constitutional Court for decision. After the Constitutional Court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion.

When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or senators under paragraph one, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court under paragraph one has been notified.

In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with section 184 paragraph one or paragraph two, such Emergency Decree shall not have the force of law ab initio. The decision of the Constitutional Court that an Emergency Decree is not in accordance with section 184 paragraph one or paragraph two must be given by votes of not less than two-thirds of the total number of members of the Constitutional Court.

\* Reprinted from and available on the Constitutional Court's website at <http://www.constitutionalcourt.or.th/english/>

#### Article 69 of the Constitution of the Islamic Republic of Afghanistan (2004)

- (1) The President is responsible to the nation and the House of Representatives [Wolesi Jirga] in accordance with this article.
- (2) Accusations of crime against humanity, national treason or crime can be leveled against the President by one third of the members of the House of Representatives [Wolesi Jirga].
- (3) If two third of the House of Representatives [Wolesi Jirga] votes for charges to be brought forth, the House of Representatives [Wolesi Jirga] shall convene a Grand Council [Loya Jirga] within one month.
- (4) If the Grand Council [Loya Jirga] approve the accusation by a two-thirds majority of votes the President is then dismissed, and the case is referred to a special court.
- (5) The special court is composed of three members of the House of Representatives [Wolesi Jirga], and three members of the Supreme Court appointed by the Grand Council [Loya Jirga] and the Chair of the Senate [Meshrano Jirga].
- (6) The lawsuit is conducted by a person appointed by the Grand Council [Loya Jirga].
- (7) In this situation, the provisions of Article 67 of this Constitution are applied.

Article 60 Immunity and Impeachment of the President and the First Vice President

- (2) Notwithstanding sub-Article (1) above, and in case of high treason, gross violation of this Constitution or gross misconduct in relation to State affairs, the President or the First Vice President may be charged before the Constitutional Court upon a resolution passed by three quarters of all members of the National Legislature.

\* Reprinted from and available at [http://www.sudan-embassy.de/c\\_Sudan.pdf](http://www.sudan-embassy.de/c_Sudan.pdf)

Article 69 of the Constitution of the Republic of Turkey (1982 as amended 2007)

Article 69 Principles to be Observed by Political Parties

- (1) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.
- (2) The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.
- (3) Political parties shall not engage in commercial activities.
- (4) The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income, expenditure and acquisitions of political parties by the Constitutional Court as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law. The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments rendered by the Constitutional Court as a result of the auditing shall be final.
- (5) The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.
- (6) The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.
- (7) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities. A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly

or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.

- (8) Instead of dissolving them permanently in accordance with the above-mentioned paragraphs, the Constitutional Court may rule the concerned party to be deprived of State aid wholly or in part with respect to intensity of the actions brought before the court.
- (9) A party which has been dissolved permanently cannot be founded under another name.
- (10) The members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party.
- (11) Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.
- (12) The foundation and activities of political parties, their supervision and dissolution, or their deprivation of State aid wholly or in part as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.

Article 21 of the Basic Law of the Federal Republic of Germany (1949 as amended 2006)

Article 21 Political parties

- (1) The political parties participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They have to publicly account for the sources and use of their funds and for their assets.
- (2) Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.
- (3) Details are regulated by federal statutes.

Article 8(4) of the Constitution of the Republic of Korea (1948 as amended 1987)

If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring action against it in the Constitutional Court for its dissolution, and, the political party is dissolved in accordance with the decision of the Constitutional Court.

Article 58 of the Constitution of the French Republic (1958 as amended 2008)

- (1) The Constitutional Council ensures the regularity of the election of the President of the Republic.
- (2) It examines complaints and proclaims the results of the vote.

Article 66(2)(2) of the Constitution of Mongolia (1992)

Article 66 (2) The Constitutional Court, in accordance with Paragraph (1), issues judgements to the National Parliament on:

- 2) the constitutionality of national referendums and decisions of the central election authority on the elections of the National Parliament and its members as well as on presidential elections;

Article 84 of the Constitution of the Republic of Zimbabwe (1979)

Article 84 Appointment of judges

- (1) The Chief Justice, Deputy Chief Justice, Judge President and other judges of the Supreme Court and the High Court is appointed by the President after consultation with the Judicial Service Commission.
- (2) If the appointment of a Chief Justice, Deputy Chief Justice, Judge President or a judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1), the President causes the Senate to be informed as soon as is practicable.
- (3) The appointment of a judge in terms of this section, whether made before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 4) Act, 1984, may be made for a fixed period and any judge so appointed may, notwithstanding that the period of his appointment has expired, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced or heard by him while he was in office.

Article 104 of the Constitution of the Republic of Macedonia (1991 as amended 2005)

- (1) The Republican Judicial Council is composed of seven members.
- (2) The Assembly elects the members of the Council.
- (3) The members of the Council are elected from the ranks of outstanding members of the legal profession for a term of six years with the right to one reelection.
- (4) Members of the Republican Judicial Council are granted immunity. The Assembly decides on their immunity.
- (5) The office of a member of the Republican Judicial Council is incompatible with the performance of other public offices, professions or membership in political parties.



Article 109 of the Constitution of the Republic of Macedonia (1991 as amended 2005)

The Constitutional Court of the Republic of Macedonia is composed of nine judges.

The Assembly elects the judges of the Constitutional Court by a majority vote of the total number of Representatives. The term of office of the judges is nine years without a right to re-election.

The Constitutional Court elects a President from its own ranks for a three year term without a right to re-election.

Judges of the Constitutional Court are appointed from the ranks of outstanding members of the legal profession.

Article 19(3)(k) of the Constitution of the Republic of Hungary (1949 as amended 2003)

Article 19

- (3) Within this sphere of authority, the Parliament shall--
- k) elect the President of the Republic, the Prime Minister, the members of the Constitutional Court, the Parliamentary Ombudsmen, the President and Vice-Presidents of the State Audit Office, the President of the Supreme Court and the General Prosecutor;

Article 32A(4) of the Constitution of the Republic of Hungary (1949 as amended 2003)

The Constitutional Court shall consist of eleven members who are elected by the Parliament. Members of the Constitutional Court shall be nominated by the Nominating Committee which shall consist of one member of each political party represented in the Parliament. A majority of two-thirds of the votes of the Members of Parliament is required to elect a member of the Constitutional Court.

Article 48 of the Constitution of the Republic of Hungary (1949 as amended 2003)

- (1) Based on the recommendation made by the President of the Republic, the Parliament shall elect the President of the Supreme Court; based on the recommendation made by the President of the Supreme Court, the President of the Republic shall appoint the Deputy Presidents of the Supreme Court. A majority of two-thirds of the votes of the Members of Parliament is required to elect the President of the Supreme Court.
- (2) The President of the Republic shall appoint professional judges in the manner specified by law.
- (3) Judges may only be removed from office on the grounds and in accordance with the procedures specified by law.

Articles 24A-C of the Constitution of the Republic of Indonesia (1945 as amended 2002)

Article 24A

- (3) Candidate justices of the Supreme Court are proposed by the Judicial Commission to the DPR for approval and shall subsequently be formally appointed to office by the President.

Article 24B

- (3) The members of the Judicial Commission are appointed and dismissed by the President with the approval of the DPR.

Article 24C

- (3) The Constitutional Court is composed of nine persons who must be constitutional justices and who must be confirmed in office by the President, of whom three shall be nominated by the Supreme Court, three nominated by the DPR, and three nominated by the President.

Section 174 of the Constitution of the Republic of South Africa (1996)

Section 174 Appointment of judicial officers

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a citizen of South Africa.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court; and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.
- (4) The other judges of the Constitutional Court are appointed by the President as head of the national executive, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
  - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
  - (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
  - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from

the supplemented list.

- (5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
- (7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
- (8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

#### Article 81 of the Constitution of the Federal Democratic Republic of Ethiopia (1995)

##### Article 81 Appointment of Judges

- (1) The President and Vice-President of the Federal Supreme Court shall, upon recommendation by the Prime Minister, be appointed by the House of Peoples' Representatives.
- (2) Regarding other Federal judges, the Prime Minister shall submit to the House of Peoples' Representatives for appointment candidates selected by the Federal Judicial Administration Council.
- (3) The State Council shall, upon recommendation by the Chief Executive of the State, appoint the President and Vice-President of the State Supreme Court.
- (4) State Supreme and High Court judges shall, upon recommendation by the State Judicial Administration Council, be appointed by the State Council. The State Judicial Administration Council, before submitting nominations to the State Council, has the responsibility to solicit and obtain the views of the Federal Judicial Administration Council on the nominees and to forward those views along with its recommendations. If the Federal Judicial Administration Council does not submit its views within three months, the State Council may grant the appointments.
- (5) Judges of State First-Instance Courts shall, upon recommendation by the state Judicial Administration Council, be appointed by the State Council.
- (6) Matters of code of professional conduct and discipline as well as transfer of judges of any court shall be determined by the concerned Judicial Administration Council.

#### Article 101 of the Constitution of the Federative Republic of Brazil (1988)

The Justices of the Federal Supreme Court shall be appointed by the President of the Republic, after the choice is approved by the absolute majority of the Federal Senate.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full professors of law, and from among lawyers with at least twenty years of practice.
- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.
- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article 118 of the Constitution of the Islamic Republic of Afghanistan (2004)

A member of the Supreme Court shall have the following qualifications:

- The age of the Head of the Supreme Court and its members should not be lower than forty at the time of appointment
- Shall be a citizen of Afghanistan.
- Shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan.
- Shall have high ethical standards and a reputation of good deeds.
- Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court.
- Shall not be a member of any political party during the term of official duty.

Article 182(VI) of the Constitution of the Plurinational State of Bolivia (2009)\*

In order to become a Magistrate of the Supreme Court of Justice one must satisfy the general requisites established for public servants: be thirty years of age; have a law degree, having performed judicial functions, practiced as a lawyer or have been a university professor, honestly and ethically, for eight years and not have been sanctioned with dismissal by the Judiciary Council. The determination of merit will take into account

the performance as an originary authority under its system of justice.

\* From Constitution of the Plurinational State of Bolivia, Translated to English by Luis Francisco Valle V.

Article 106 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) Appointment to the judiciary is based on competitive examinations.
- (2) The law on the organization of the judiciary may provide for honorary magistrates, possibly by election, to perform the duties of single judges.
- (3) By proposal of the superior council of the judiciary, full professors of law as well as lawyers with at least fifteen years practice and registered for practice in higher courts, may be appointed to the court of cassation for exceptional merits.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full professors of law, and from among lawyers with at least twenty years of practice.
- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.
- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article VI(1)(a) of the Constitution of Bosnia and Herzegovina (1995)

- 1) The Constitutional Court of Bosnia and Herzegovina shall have nine members.
  - (a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

Article 142 of the Constitution of the Republic of Uganda (1995)\*

142. Appointment of judicial officers.

- (1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.
- (2) Where—
  - (a) the office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant;
  - (b) a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or
  - (c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a Justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office.
- (3) A person appointed under clause (2) of this article to act as a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.

\* Reprinted from and available at [www.constitutionnet.org](http://www.constitutionnet.org)

Article 148 of the Constitution of the Republic of Uganda (1995)\*

148. Appointment of other judicial officers.

Subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in article 147(3) of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.

\* Reprinted from and available at [www.constitutionnet.org](http://www.constitutionnet.org)

Article 222 of the Constitution of the Portuguese Republic (1976 as amended 2005)\*

Article 222 (Composition and status of judges)

1. The Constitutional Court shall be composed of thirteen judges, ten of whom shall be appointed by the Assembly of the Republic and three co-opted by those ten.

2. Six of the judges who are appointed by the Assembly of the Republic or are co-opted shall obligatorily be chosen from among the judges of the remaining courts, and the others from among jurists.
3. The term of office of judge of the Constitutional Court shall be nine years and shall not be renewable.
4. The judges of the Constitutional Court shall elect its President.
5. Constitutional Court judges shall enjoy the same guarantees of independence, security of tenure, impartiality and absence of personal liability and shall be subject to the same incompatibilities as the judges of the other courts.
6. The law shall lay down the immunities and other rules governing the status of Constitutional Court judges.

\* Reprinted from and available at <http://www.en.parlamento.pt/>

Article 147 of the Constitution of the Republic of Bulgaria (1991)

- (1) The Constitutional Court shall consist of 12 justices, one-third of whom shall be elected by the National Assembly, one-third shall be appointed by the President, and one-third shall be elected by a joint meeting of the justices of the Supreme Court of Cassation and the Supreme Administrative Court.
- (2) The justices of the Constitutional Court shall be elected or appointed for a period of nine years and shall not be eligible for re-election or re-appointment. The make-up of the Constitutional Court shall be renewed every three years from each quota, in a rotation order established by law.
- (3) The justices of the Constitutional Court shall be lawyers of high professional and moral integrity and with at least fifteen years of professional experience.
- (4) The justices of the Constitutional Court shall elect by secret ballot a Chairman of the Court for a period of three years.
- (5) The status of a justice of the Constitutional Court shall be incompatible with a representative mandate, or any state or public post, or membership in a political party or trade union, or with the practicing of a free, commercial, or any other paid occupation.
- (6) A justice of the Constitutional Court shall enjoy the same immunity as a Member of the National Assembly.

Article 135 of the Constitution of the Italian Republic (1948 as amended 2003)

- (1) The constitutional court consists of fifteen justices; one third being appointed by the president, one third by parliament in joint session, and one third by ordinary and administrative supreme courts.
- (2) Justices are chosen from among magistrates including those in retirement, from among supreme ordinary and administrative courts, from among university full professors of law, and from among lawyers with at least twenty years of practice.
- (3) Justices are appointed for nine years, their term beginning the day they are sworn in and with no re-appointment.

- (4) At the end of this term justices have to leave office and may no longer exercise its functions.
- (5) The court elects from among its members and according to rules established by law its president who shall remain in office for three years and may be re-elected, but not exceed the ordinary term of justices.
- (6) The office of justice is incompatible with membership in parliament or in a regional council, with the exercise of the legal profession, or with any other position and office defined by law.
- (7) When sitting to decide on a case of impeachment against the president, the court consists of sixteen additional members, who are drawn by lot from a list of citizens elected by parliament every nine years, from among those possessing the qualifications for election to the senate, by the same procedures as for the appointment of the ordinary justices.

Article 132 of the Constitution of the Islamic Republic of Afghanistan (2004)

- (1) Judges are appointed with the recommendation of the Supreme Court and approval of the President.
- (2) The appointment, transfer, promotion, punishment, and proposals to retire judges are within the authority of the Supreme Court in accordance with the law.
- (3) The Supreme Court shall establish the General Administration Office of the Judicial Power for the purpose of better arrangement of the administration and judicial affairs and insuring the required improvements.

Article 110 of the Constitution of the Argentine Nation (1994)\*

The Justices of the Supreme Court and the judges of the lower courts of the Nation shall hold their offices during good behavior, and shall receive for their services a remuneration to be ascertained by law and which shall not be diminished in any way while holding office.

\* Reprinted from and available at [http://www.argentina.gov.ar/argentina/portal/documentos/constitucion\\_ingles.pdf](http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf)

Article 147 of the Constitution of the Republic of Estonia (1992)

- (1) Judges shall be appointed for life. The bases and procedures for recalling judges shall be determined by law.
- (2) Judges may be recalled only by a Court decision.
- (3) Judges may not hold any other elected or appointed office, except in cases prescribed by law.
- (4) Guarantees for the independence and the legal status of judges shall be determined by law.



Article 77 of the Political Constitution of the Republic of Chile (1980)

As long as Judges perform their duties properly, they shall remain in office; however, lower court Judges shall perform their respective judgeship for the period determined by law.

Notwithstanding the above, Judges shall cease their functions upon completing the age of 75 years; or resignation or legal supervening disability or in case they are deposed from their positions for legally sentenced cause. The norm relative to age shall not apply with regard to the President of the Supreme Court who shall remain in his post through the end of his term.

At any rate, the Supreme Court may, upon demand by the President of the Republic, upon request made by an interested party or by an official letter, declare that Judges have not performed their duties properly, and, subject to the statement by the defendant and to a report from the respective Court of Appeals, the majority of its members may agree to remove them from office. These agreements shall be communicated to the President of the Republic in order that they may enter into effect.

The President of the Republic, at the proposal or decision of the Supreme Court, may authorize exchanges or order the transfer of Judges or other officials and employees of the Judiciary from one post to another of equal rank.

\*Reprinted from and available at <http://confinder.richmond.edu/>

Article 291 of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (1999)

- (1) A judicial officer appointed to the Supreme Court or the Court of Appeal may retire when he attains the age of sixty-five years and he shall cease to hold office when he attains the age of seventy years.
- (2) A judicial officer appointed to any other court, other than those specified in subsection (1) of this section may retire when he attains the age of sixty years and he shall cease to hold office when he attains the age of sixty-five years.
- (3) Any person who has held office as a judicial officer -
  - (a) for a period of not less than fifteen years shall, if he retires at or after the age of sixty-five years in the case of the Chief Justice of Nigeria, a Justice of the Supreme Court, the President of the court of Appeal or a Justice of the Court of Appeal or at or after the age of sixty years in any other case, be entitled to pension for life at a rate equivalent to his last annual salary and all his allowances in addition to any other retirement benefits to which he may be entitled;
  - (b) for a period of less than fifteen years shall, if he retires at or after the age of sixty-five years or sixty years, as the case may be, be entitled to pension for life at a rate as in paragraph (a) of this subsection pro rata the number of years he served as a judicial officer in relation to the period of fifteen years,

and all his allowances in addition to other retirement benefits to which he may be entitled under his terms and conditions of service; and

(c) in any case, shall be entitled to such pension and other retirement benefits as may be regulated by an Act of the National Assembly or by a Law of a House of Assembly of a State.

(4) Nothing in this section or elsewhere in this Constitution shall preclude the application of the provisions of any other law that provides for pensions, gratuities and other retirement benefits for persons in the public service of the Federation or a State.

\* Reprinted from and available at <http://www.nigeria-law.org/>

Article 105 of the Constitution of the Republic of Korea (1948 as amended 1987)

(1) The term of office of the Chief Justice is six years and he cannot be reappointed.

(2) The term of office of the Justices of the Supreme Court is six years and they may be reappointed as prescribed by law.

(3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court is ten years, and they may be reappointed under the conditions as prescribed by law.

(4) The retirement age of judges is determined by law.

Article 207 of the Constitution of the Republic of Guatemala (1985 as amended 1993)

Article 207 - Requirements to be a magistrate or judge

Magistrates and judges must be of Guatemalan origin, of recognized integrity, be in enjoyment of their rights as citizens and be registered lawyers, with the exceptions established by law with respect to the latter requirement in relation to specific judges of private jurisdiction and judges of lower courts.

The law shall specify the number of judges as well as the organization and functioning of courts and procedures to be observed, according to the matter in question.

The role of magistrate or judge is incompatible with any other employment, with leadership positions in unions and political parties, and with the quality of minister of any religion.

The magistrates of the Supreme Court of Justice take an oath before the Congress, swearing to promptly and fully administer justice. The other magistrates and judges, take an oath before the Supreme Court.

\* Translated from the Spanish version available here: <http://pdba.georgetown.edu/>

Article 215 of the Constitution of the Republic of Guatemala (1985 as amended 1993)\*

Article 215 - Election of the Supreme Court.

The magistrates of the Supreme Court shall be elected by the Congress of the Republic

for a period of five years, from a list of twenty-six candidates proposed by a nominating committee composed of one representative of the rectors of the universities of the country, who shall chair the committee, deans of law schools and legal and social science departments from each university in the country, an equal number of representatives elected by the General Assembly of the College of Lawyers and Notaries of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeals and other courts referred to in Article 217 of this Constitution.

The choice of candidates requires the vote of at least two-thirds of the members of the committee.

In voting to integrate on the Nominating Committee or the list of candidates, no representation will be accepted.

The magistrates of the Supreme Court shall elect from among its members, by the affirmative vote of two-thirds, the chief justice, who shall hold office for a year and may not be reappointed during the period of the Court.

\* Translated from the Spanish version available here: <http://pdba.georgetown.edu/>

#### Article 79 of the Constitution of Japan (1946)

- (1) The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.
- (2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter.
- (3) In cases mentioned in the preceding paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.
- (4) Matters pertaining to review shall be prescribed by law.
- (5) The judges of the Supreme Court shall be retired upon the attainment of the ages as fixed by law.
- (6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

#### Article 4 of the Federal Constitutional Court Act of Germany (1951 as amended 2009)

- (1) The term of office of the judges shall be twelve years, not extending beyond retirement age.
- (2) Immediate or subsequent re-election of judges shall not be permissible.
- (3) Retirement age shall be the end of the month in which a judge reaches the age of 68.
- (4) Upon expiration of his term of office a judge shall continue to perform his functions until a successor is appointed.

Article 128 of the Albanian Constitution (1998)

The judge of the Constitutional Court can be removed from office by the Assembly by two-thirds of all its members for violations of the Constitution, commission of a crime, mental or physical incapacity, acts and behavior that seriously discredit the position and reputation of a judge. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification of the existence of one of these grounds, declares the removal from duty of the member of the Constitutional Court.

Article 141 of the Constitution of the Gambia (1997)\*

141. Tenure of office of judges

- (1) No office of judge shall be abolished while there is of judges a substantive holder thereto.
- (2) Subject to the provisions of this section, a judge of a Superior Court-
  - (a) may retire on pension at any time after attaining the age of sixty five years;
  - (b) shall vacate the office of judge on attaining the age of seventy years; or
  - (c) may have his or her appointment terminated by the President in consultation with the Judicial Service Commission.
- (3) Notwithstanding that he or she has attained the age at which he or she is required to vacate his or her office as provided in this section, a person holding the office of judge may continue in office for a period of six months after attaining that age to enable him or her to deliver judgment or do any other thing in relation to proceedings that were commenced before him or her previously thereto.
- (4) The Chief Justice, a justice of the Supreme Court, the Court of Appeal and the High court and members of the Special Criminal Court may only be removed from office for inability to perform the functions of his or her judicial office, whether arising from infirmity of body or mind, or for misconduct.
- (5) A judge may be removed from his or her office if notice in writing is given to the Speaker, signed by not less than one-half of all the voting members of the National Assembly, of a motion that judge is unable to exercise the functions of his or her office on any of the grounds stated in subsection (4) and proposing that the matter should be investigated under this section.
- (6) Where a notice of a motion is received by the Speaker under subsection (5), the Speaker shall forthwith cause a vote to be taken on the motion without debate
- (7) If such motion is adopted by the votes of not less than two-thirds of all the members of the National assembly-
  - (a) The National Assembly shall, by resolution, appoint a tribunal consisting of three persons, at least one of whom shall hold or shall have held high judicial office who shall be the chairman of the tribunal;
  - (b) the tribunal shall investigate the matter and shall report to the National Assembly through the Speaker whether or not it finds the allegations specified in the motion have been substantiated.

- (c) If the tribunal reports to the National Assembly that it finds the particulars of any such allegation have not been substantiated, no further proceedings shall be taken under this section in respect of that allegation;
  - (d) If the tribunal reports to the National Assembly that it finds that the particulars of any such allegation have been substantiated, the National Assembly shall consider the report at the first convenient sitting and if, on a motion supported by the votes of not less than two-thirds of all the members, the National Assembly resolves that the judge be removed from office, the judge shall immediately cease to hold office.
- (8) Where a tribunal is established under this section in respect of any judge, the judge shall stand suspended from office. The suspension shall cease to have effect if the tribunal reports that none of the allegations against the judge has been substantiated or if a motion for his or her removal from office is not supported as provided in paragraph (d) of subsection (7).
- (9) All proceedings in a tribunal under this section shall be held in camera and the judge concerned shall have the right to appear and be legally represented before the tribunal.

\* Reprinted from and available at <http://www.ncce.gm/files/constitution.pdf>

Article 124 of the Constitution of the Republic of India (1950 as amended 1995)

Article 124 Establishment and Constitution of Supreme Court

- (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
- (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that -

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
  - (b) a judge may be removed from his office in the manner provide in clause (4).
- (2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.
- (3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and -
    - (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist.

Explanation I: In this clause "High Court" means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.

Explanation II: In computing for the purpose of this clause the period during which a person has been an advocate, any period during which a person has held judicial office not inferior to that of a district judge after he became an advocateshall be included.

- (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
- (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).
- (6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
- (7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court of before any authority within the territory of India.

Article 123 the Constitution of the Republic of Croatia (1990 as amended 2001)

- (1) Judges shall, according to the Constitution and law, be appointed and relieved of duty by the National Judicial Council, which will also decide on all matters concerning their disciplinary responsibilities.
- (2) In the process of appointment and relief of judges the National Judicial Council shall obtain the opinion of the authorized committee of the Croatian Parliament.
- (3) The National Judicial Council shall consist of eleven members elected by the Croatian Parliament in conformity with law, from among notable judges, attorneys-at-law and university professors of law. The majority of members of the National Judicial Council shall be from the ranks of judges.
- (4) Presidents of courts may not be elected as members of the National Judicial Council.
- (5) Members of the National Judicial Council shall be elected for a four-year term and no one may be a member of the National Judicial Council for more than two subsequent terms.
- (6) The President of the National Judicial Council shall be elected by secret ballot

by a majority of the members of the National Judicial Council for a two-year term of office.

- (7) The jurisdiction and the proceedings of the National Judicial Council shall be regulated by law.

Article 105 of the Constitution of the Italian Republic (1948 as amended 2003)

The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote, and discipline members of the judiciary.

Chapter 12, Article 8 of Sweden's Instrument of Government (1975 as amended 2002)

- (1) Proceedings under penal law on account of a criminal act committed by a member of the Supreme Court or the Supreme Administrative Court in the exercise of his official functions shall be brought before the Supreme Court by a Parliamentary Ombudsman or by the Justice Chancellor.
- (2) The Supreme Court shall likewise examine and determine whether, in accordance with the provisions laid down in this connection, a member of the Supreme Court or the Supreme Administrative Court shall be removed from office or suspended from duty, or shall be obliged to undergo a medical examination. Proceedings to this effect shall be initiated by a Parliamentary Ombudsman or by the Justice Chancellor.

Article 97 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009)

Independence of judges

- (1) The judges are independent and subject only to the law.
- (2) Judges appointed permanently on a fulltime basis in established positions cannot, against their will, be dismissed or permanently or temporarily suspended from office or given a different posting or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided for by statute. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98 of the Basic Law of the Federal Republic of Germany (1949 as amended 2009)

- (1) The legal status of the federal judges is regulated by a special federal statute.
- (2) Where a federal judge, in his official capacity or unofficially, infringes the principles of this Constitution or the constitutional order of a State [Land], the Federal Constitutional Court may decide by a two-thirds majority, upon the request of the House of Representatives [Bundestag], that the judge be given a different office or retired. In a case of intentional infringement, his dismissal

may be ordered.

- (3) The legal status of the judges in the States [Länder] is regulated by special State [Land] statutes, insofar as Article 74 I No. 27 does not provide otherwise.
- (4) The States [Länder] may provide that the State [Land] minister of Justice together with a committee for the selection of judges decides on the appointment of judges in the States [Länder].
- (5) The States [Länder] may, in respect of State [Land] judges, enact provisions corresponding to those of Paragraph II. Existing State [Land] constitutional law remains unaffected. The decision in a case of impeachment of a judge rests with the Federal Constitutional Court.

Article 122 of the Constitution of the Republic of Croatia (1990 as amended 2001)

- (1) Judicial office shall be permanent.
- (2) Exceptionally to the provision of section 1 of this Article, at the assuming of judicial duty for the first time, judges shall be appointed for a five-year term. After the renewal of the appointment, the judge assumes his duty as permanent.

A judge shall be relieved of his judicial office:

- at his own request,
  - if he has become permanently incapacitated to perform his office,
  - if he has been sentenced for a criminal offence which makes him unworthy to hold judicial office,
  - if, in conformity with law, so decides the National Judicial Council due to the commission of an act of serious infringement of discipline,
  - when reaching seventy years of age.
- (3) Against the decision of being relieved from his duty the judge shall have the right to appeal to the Constitutional Court within the term of 15 days from the day the decision has been served, onto which the Constitutional Court shall decide in the procedure and composition determined by the Constitutional Act on the Constitutional Court of the Republic of Croatia.
  - (4) Against the decision of the National Judicial Council on disciplinary responsibility, the judge shall have the right to appeal to the Constitutional Court of the Republic of Croatia within the term of 15 days from the day the decision has been served. The Constitutional Court shall decide on the appeal in the way and the procedure determined by the Constitutional Act on the Constitutional Court of the Republic of Croatia.
  - (5) In the cases from sections 4 and 5 of this Article, the Constitutional Court shall decide within the term not longer than 30 days from the day the appeal has been submitted. The decision of the Constitutional Court excludes the right to the constitutional complaint.
  - (6) A judge shall not be transferred against his will except in the case the Court is abolished or reorganized in conformity with law.



- (7) A judge shall not hold an office or perform work defined by law as being incompatible with his judicial office.

Article 134 of the Constitution of the Republic of Slovenia (1991 as amended 2003)

- (1) No one who participates in making judicial decisions may be held accountable for an opinion expressed during decision-making in court.
- (2) If a judge is suspected of a criminal offence in the performance of judicial office, he may not be detained nor may criminal proceedings be initiated against him without the consent of the National Assembly.

Article 121 of the Constitution of Malaysia (1957 as amended 1994)\*

- (1) Subject to Clause (2) the judicial power of the Federation shall be vested into High Courts of co- ordinate jurisdiction and status, namely-
  - (a) one of the States of Malaya, which shall be known as the High Court in Malaya and shall have its principle registry in Kuala Lumpur; and
  - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principle registry at such place in the States of Sabah and Sarawak as the Yang di- Pertaun Agong may determine;
  - (c) (Repealed);

and in such inferior courts as may be provided by federal law.

- (2) The following jurisdiction shall be vested in a court which shall be known as the Mahkamah Agung (Supreme Court) and shall have its principle registry in Kuala Lumpur, that is to say-
  - (a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decision of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court);
  - (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
  - (c) such other jurisdiction as may be conferred by or under federal law.
- (3) Subject to any limitations imposed by or under federal law, any order, decree, judgement or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.
- (4) In determining where the principal registry of the High Court in Borneo is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Justice of the High Court.

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Article 4 of the Constitution of the Republic of Mozambique (16 November 2004)\*

The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution.

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Article 212(3) of the Constitution of the Republic of Mozambique (16 November 2004)\*

The law may establish institutional and procedural mechanisms for links between courts and other forums whose purpose is the settlement of interests and the resolution of disputes.

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Article 246 of the Political Constitution of Colombia (1991 as amended 2005)

The authorities of the indigenous [Indian] peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures as long as these are not contrary to the Constitution and the laws of the Republic. The law will establish the forms of coordination of this special jurisdiction with the national judicial system.

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Article 15(4)(c) of the Constitution of Botswana (1966)\*

15. Protection from discrimination on the grounds of race, etc.

- (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

- (a) for the appropriation of public revenues or other public funds;
- (b) with respect to persons who are not citizens of Botswana;
- (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

\* Reprinted from and available at [http://www.chr.up.ac.za/undp/domestic/docs/c\\_Botswana.pdf](http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf)

Article 7(f) of the Constitution of the Gambia (1997)\*

7. The laws of The Gambia

In addition to this Constitution, the laws of The Gambia consist of—

- (a) Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;
- (b) Any orders, Rules, Regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;
- (c) The existing laws including all decrees passed by the Armed Forces Provisional Ruling Council;
- (d) The common law and principles of equity;
- (e) Customary law so far as concerns members of the communities to which it applies;
- (f) The sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.

\* Reprinted from and available at <http://www.ncce.gm/files/constitution.pdf>

# International IDEA at a glance

## **What is International IDEA?**

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

## **What does International IDEA do?**

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

## **Where does International IDEA work?**

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.