The Palestinian Constitutional Court

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An Assessment of Its Independence under the Emergency Regime

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CHAPTER ONE

INTRODUCTION

A *Context of the Book*

In most states, constitutional courts are established to uphold the constitution and hold state powers accountable to its provisions, seeking to maintain the prescribed balance between these powers. In authoritarian regimes, constitutional courts often perform significantly different functions. These include social control, legitimation, and maintenance of elite coherence within the regime, which they achieve by issuing judgments in favour of the regime or its interests. Such regimes control appointment and removal procedures to guarantee that only 'loyal' judges sit on the bench. Those 'loyal' judges, in turn, protect the regime's interests and can maintain a façade of legitimacy over its rule by incorrectly applying constitutional provisions that are intended to limit the powers of the regime and establish balance between state powers. As a result, these courts apply constitutional provisions incorrectly and delivered poorly-reasoned judgments, highlighting the courts' failure to perform their fundamental function, namely upholding the constitution.

The Supreme Constitutional Court in the West Bank of Palestine is an example of such a court. This book develops it as a case study that sheds light on the role of constitutional courts in authoritarian regimes.

The Palestinian judiciary has faced major problems since the establishment of the Palestinian Authority in 1993 after the signing of the Oslo Accords between the Israeli occupation forces and the Palestinian Liberation Organisation. Yasser Arafat, who led the Fatah movement, was elected as the first President of the Palestinian Authority. He was perceived by many legal scholars from the Arab region as an authoritarian ruler, who undermined the independence of the judiciary.

Following the election in 2006 of the Islamic party known as Hamas under the second President, Mahmoud Abbas, tension emerged between its newly-elected officials and the officials of the outgoing Fatah. The tension between

both parties escalated, and a civil war started in Gaza Strip in 2007, resulting in a coup d'état in June of that year. Since then, the elected government of Hamas has governed the Gaza Strip, and Fatah has governed the West Bank under a state of emergency that has worsened the authoritarian characteristics of its regime. To consolidate power in its hands, the emergency Fatah government in the West Bank has formed legislative, executive and judicial institutions, including a high court, that are totally separate to those of the Gaza Strip. This study focuses only on the West Bank Fatah regime because, after the coup, the elected government of Hamas has reconstituted the High Court in the Gaza Strip, resulting in a different high court with different judges to that in the West Bank.

After declaring the state of emergency in the West Bank, President Abbas immediately issued a decree-by-law that suspended the Parliament. Legal scholars have described this as a grave breach of the Basic Law (the supreme law in the Palestinian legal system).[1] As a result, the Parliament has been stripped of its power to enact laws, and the President has become the sole legislator, issuing decrees-by-law for the West Bank government. All these decrees were issued on the pretext that the West Bank is still under an emergency. Many Palestinian legal scholars dispute this and argue that it is based on an incorrect application of the Basic Law articles about a state of emergency. Continued reliance on the emergency is the foundation of the authoritarian practices and constitutional violations of the Fatah regime.[2]

Significant constitutional challenges have arisen due to this situation. The High Court, which until recently sat as the Supreme Constitutional Court and the High Court of Justice, has decided many constitutional cases submitted by citizens and human rights organisations who consider actions of the West Bank regime to be breaches of the constitutional provisions.

In April 2016, President Abbas deprived the High Court of its constitutional capacity by single-handedly appointing new judges to the first separate court to exclusively hear constitutional cases (hereafter, the term 'Constitutional Court' is used to refer to both the High Court sitting as the Supreme Constitutional Court prior to April 2016 and the new, separate Supreme Constitutional Court from April 2016, except where otherwise indicated). The new Court was criticised by the elected government of Hamas and many human rights organisations in the West Bank. Sami Abu-Zuhri, Hamas's spokesman, claimed that it is a factional court, established

[1] See below Chapter Three (E)(2).
[2] See below Chapter Three (E).

to give President Abbas fake legitimacy, and a tool that assists him in entrenching the regime's authoritarian rule by sidestepping the elected parliament that the President has unconstitutionally suspended.[3] The Palestinian Human Rights Organisations Council, along with five other human rights organisations, sent a memorandum to President Abbas expressing shock at the swift and secretive formation of the Court, particularly because President Abbas did not abide by the Basic Law that obliges the President to receive nominations for the Court's first bench from the High Judicial Council.[4] They urged the President 'not to make this Court a tool for political domination', and to focus on holding presidential and parliamentary elections to bring an end to emergency rule in the West Bank.[5]

The new Court has issued judgments that have been subject to major criticism by Palestinian and Arab constitutional law scholars. The judgments of the Court's predecessor, the High Court (which, as mentioned, used to sit as the constitutional court) have been subject to similar criticism. The commentaries of scholars on the most of constitutional judgments highlight significant concerns about the Court's independence and the functions it performs in the West Bank.

B *Motivation for the Book*

Constitutional jurists from Palestine and other Arab countries have published many critiques of individual judgements issued by the High Court sitting as a constitutional court.[6] Most of these commentaries criticise the Court's application of constitutional and legislative provisions and highlight

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[3] Nidal al–Mughrabi and Ali Sawafta, 'With New Decree, Palestinian Leader Tightens Grip', *Reuters* (online), 11 April 2016 <https://www.reuters.com/article/us–palestinians–abbas–court–idUSKCN0X816B>.

[4] The Palestinian Centre for Defence of Liberties and Civil Rights (Hurryyat), *A Letter to President Mahmoud Abbas Concerning the Constitutional Court: Human Rights Organizations Demand the Formation of the Court be the Culmination of Restoring the Constitutional Life and Unifying the Judiciary* (4 April 2016) <https://www.hurryyat.net/en/a–letter–to–president–mahmoud–abbas–concerning–the–constitutional–court–human–rights–organizations–demand–the–formation–of–the–court–be–the–culmination–of–restoring–the–constitutional–life–and–unify/>.

[5] Ibid.

[6] See below Chapter Three (C)(3).

its incorrect interpretation of the Basic Law in the face of the constitutional challenges presented to it.

After the new Constitutional Court issued its first judgment, criticism increased of the Court's application of law. In their commentaries, Arab and Palestinian scholars frequently highlight faulty reasoning, poor argumentation, and incorrect interpretation of Basic Law provisions. This criticism has undermined the claims made by President Abbas and the Court's judges about it being a competent, independent court.[7]

Until now, there has been no attempt to comprehensively study the overall independence of the new Court and its predecessor over a specific period, or even to study all its judgments on a particular topic. This book fills both gaps by attempting the first comprehensive study of all judgments the Court has issued over the period from the coup in 2007 until 2017, as a lens through which the independence of the Court can be assessed.

As previous critiques were all published in Arabic, this book will also be the first to offer English-language readers insights into the Constitutional Court of Palestine. These insights are critical for international and human rights organisations that work for establishing constitutional governance in the West Bank. The book defines the core problems of the Court's performance, and thus helps them to better understand its actual role, saving them from the biased, unsubstantiated claims that the regime makes about the Court being an independent institution.

C *Aim and Scope*

This book aims to provide a comprehensive assessment of the Court's independence based on its governing law, known as the Law of the Supreme Constitutional Court No. 3 of 2006 ('LSCC'), and its judgments.[8] The LSCC is assessed against criteria of judicial independence taken from four global standards: Basic Principles on the Independence of the Judiciary by the UN,[9] Report of the Special Rapporteur on the Independence of Judges

[7] Ibid.

[8] *The Law of the Supreme Constitutional Court No. 3 of 2006* (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2006&MID=15122>.

[9] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1.

and Lawyers,[10] the Universal Charter of the Judges,[11] and International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.[12] These four standards offer comprehensive guidelines on what laws governing judicial institutions should stipulate to protect the independence of such institutions, including constitutional courts.

The judgments are assessed by the author using a critical analysis of the primary sources, particularly the Basic Law and the legislation examined by the Court. The analysis also draws on the work of leading jurists in the field, on relevant aspects of constitutional adjudication and the application of constitutional rules. Many of the secondary sources relied on for this purpose are written by Palestinian and other Arab jurists, who are familiar not only with the Palestinian Court but also with Constitutional Courts elsewhere in the Arab world. As the Palestinian Court is modelled, at least in part, on these, the writings of Arab jurists on Palestinian decisions are particularly useful for evaluating the reasoning of the Court.

Publications Palestinian and Arab jurists assess interpretations and applications of constitutional rules by Arab constitutional courts and provide commentary on their judgments. Accordingly, they are helpful in evaluating the reasoning employed in the Court's judgments.

This book examines all the 36 judgments of the Court issued between the coup in July 2007 and October 2017.[13] The judgments were collected from three sources. The first is the Muqtafi Legal Databank, which includes a database that 'encompasses almost all court judgments issued forth by the Palestinian high courts'.[14] It also includes all judgments issued by the new Court until October 2017.

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[10] Leandro Despouy, Special Rapporteur, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009).

[11] *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 1.

[12] 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (International Commission of Jurists, 2007).

[13] October 2017 was the last month before Decree-by-law No. 19 of 2017 amending the LSCC took effect. Judgments issued after that date were subject to different articles than those in the original law and therefore cannot be analysed alongside these 36 judgments.

[14] Palestinian Legal and Judicial System (Muqtafi), *About Al–Mouqtafi* <http://muqtafi.birzeit.edu/en/about_muqtafi.aspx>.

The second source is the official Gazette published by the Palestinian Advisory and Legislation Bureau.[15] This Gazette is issued monthly in Arabic and contains almost all the Court's judgments. For unknown reasons, some of these issues do not contain all the judgments during the periods that they cover. Nevertheless, many of these omitted cases were significant to the regime and were later published by the third source relied upon to collect constitutional judgments, the *Justice and Law Journal*.

This journal has been published every four to six months since 2005 by a Palestinian civil society organisation named MUSAWA (the Palestinian Centre for the Independence of the Judiciary and the Legal Profession).[16] The journal publishes the commentaries of Arab and Palestinian constitutional jurists on the Court's judgments. It is unknown how MUSAWA obtained the judgments, as some of those contained in its journal are not available on either the Muqtafi or Bureau sites. It may be that some of MUSAWA's staff have visited the registration office of the Court and asked for these judgments in person.

In summary, this book assesses the independence of the Court by examining the LSCC according to global standards and examining the Court's judgments issued between the coup and October 2017 according to the published commentaries on them and the author's critical analysis of these judgments by reference to the Basic Law and other legal texts.

D *Significance of the Book*

The regime has ruled the West Bank under a state of emergency for the last twelve years, with no parliamentary or presidential elections since 2006. The book therefore contributes to the field of constitutional law by taking the Palestinian Court as a case study of a constitutional court in an authoritarian regime. Studying the Court's judgements issued within that period contributes to the scholarly analysis of judicial institutions in authoritarian contexts. In particular, the book assesses the Court's independence and explains what functions it has performed under the

[15] Advisory and Legislative Bureau, *الجريدة الرسمية* [The Official Gazette] <https://www.lab.pna.ps/newspaper>. All translations are by the author, except where otherwise indicated.

[16] The Palestinian Center for the Independence of the Judiciary and the Legal Profession (MUSAWA), *About Us* <http://www.musawa.ps/about/about–us.html>.

authoritarian regime of the West Bank, and what were the results of that performance for the interests of the regime.

This book will argue that the Court failed to perform its fundamental function stipulated in the Basic Law, which is to uphold the Basic Law by correctly reviewing the constitutionality of laws, regulations, presidential orders, executive actions, and administrative decisions. The analysis of the 36 judgments of the Court shows that the Court's reasoning and conclusions were incorrect in 27 of them. Given the other nine judgments are related to issues of no importance to the regime, it can be said that every decision relevant to the regime has been decided in its favour. This conclusion demonstrates the invalidity of the regime's claim that its actions are constitutional and supports an argument that the Court lacks independence, as indicated by the sheer weight of the number of significant cases decided in favour of the regime, the absence of cases decided against it, and the inherent unlikelihood that all the poorly-reasoned cases are solely the result of incompetence.

Another contribution of this book is to begin the task of determining whether and where a tangible solution to the problem of the undermined independence of the Court is likely to be found. Identifying the problems of this Court and examining how it has failed to hold the regime accountable under the Basic Law is an important step towards that determination. Ultimately, however, the book finds that it is highly unlikely that the Court can effectively perform its fundamental function of holding the ruling regime accountable under the Basic Law. In fact, according to the author's analysis of the LSCC and the Court's judgments, the Court is a major factor in obstructing opposition to the authoritarian regime in the West Bank, mainly because it attempts to legitimise the authoritarian practices of the regime in its judgments. Therefore, the book concludes that there is little hope of this Court becoming independent while authoritarianism under the state of emergency continues in the West Bank.

E *Structure of the Book*

Chapter Two provides the theoretical framework of the analysis. It outlines the relevant literature about constitutional courts, their characteristics, functions, competencies, and interactions with political powers in both democratic and authoritarian regimes. This explication is then used to justify specific measures for assessing their independence because constitutional courts are unlike any other court; they have the exclusive competence to invalidate legislative actions (in addition to executive actions

in some jurisdictions) that breach constitutional rules. In other words, they maintain the balance between state powers, and between the state and its people, as specified in the constitution.

Chapter Three outlines the historical and political setting of the Court to demonstrate how the judiciary in the West Bank has been placed in a context that obstructs genuine judicial independence. From Ottoman rule, through the British mandate, to the Israeli occupation, the judiciary in the West Bank has been rightly perceived as lacking independence. Following the establishment of the Palestinian Authority, this perception has not changed, for many reasons, which include: indifference to judicial decisions and lack of administrative experience in new governmental officials; the parallel tribal system of conflict resolution; international donor focus on economic, short-term support rather than governmental reform; the declaration of a state of emergency after the coup; and the violations against judges commited by Israeli forces. All these reasons have undermined the independence of the Palestinian judiciary and made it more susceptible to undue interference by the regime.

Chapter Four assesses the *de jure* independence of the Court; that is, its independence in theory, based on a comparison of what the LSCC requires and the principles of judicial independence set out by international organisations. It concludes that the Court lacks *de jure* independence because of numerous inconsistencies between its structure in accordance with the LSCC and those standards.

In particular, this assessment shows that the executive controls the tenure of judges, which makes it highly likely that the regime appoints 'loyal' judges. It also concludes that the jurisdiction of the Court has been unconstitutionally curtailed in the LSCC to exclude presidential orders, executive actions, and administrative decisions. This means that the Court is not provided with the full authority to review such actions according to the Basic Law.

To finalise assessment of the Court's independence, Chapters Five and Six assess the *de facto* independence of the Court; that is, its independence in practice, based on an evaluation of the validity of its reasoning in each judgment it has issued. Both Chapters conclude that the Court has incorrectly applied rules of constitutional adjudication in almost all cases of interest to the regime.

This book argues that by issuing incorrect judgments, the Court has performed five functions that courts commonly perform in authoritarian regimes. Tamir Moustafa explained these common functions in general; this book demonstrates how the Constitutional Court performed them to unduly serve the interests of the regime.[17] The functions include: social control to marginalise opposition, legitimating authoritarian actions, maintaining cohesion within the regime's elite, providing credible commitments to potential investors, and handling controversial reforms so as to shift responsibility away from the regime.

The conclusions of this book help to form a comprehensive, thorough understanding of the Court's actual role. According to the Basic Law, the Court is responsible for holding the regime accountable. However, overall, the Court, in fact, has been unduly serving the interests of the regime since the coup of 2007.

[17] Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tamir Moustafa and Tom Ginburg, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

CHAPTER TWO

CONSTITUTIONAL COURTS AND AUTHORITARIANISM

A *Introduction*

This chapter sets out the overall theoretical framework of this book. It provides the foundation of the analysis for the following chapters by explaining what constitutional courts are, their independence, and functions in authoritarian regimes. Explaining those three topics is necessary to justify the criteria that following chapters will be using to assess the independence of the Court, both in terms of assessing the *de jure* independence as represented in the LSCC, and the *de facto* independence as represented in the Court's judgments. More importantly, explaining these topics is necessary to understand the place and functions of the Court, both in the context of the regime and in the Arab context, which will be analysed in Chapter Three. The scope of this chapter is limited to understanding constitutional courts in a global context, while Chapter Three will demonstrate how the Court and some other courts in Arab regimes relate to that context. The reason for differing that demonstration to Chapter Three is, first, its relevance to the assessment of the Court's *de jure* independence and, second, the comparison between the LSCC and the law governing the Egyptian Constitutional.

This chapter consists of four sections. The first explains the main models of constitutional review, the reasons for creating constitutional courts, and functions of these courts. It demonstrates the different types of judicial review and shows why specialist, as opposed to decentralised, review has been preferred by many countries worldwide. It also elucidates the features of constitutional courts that distinguish them from other lower and higher courts.

The second section explicates the concept of judicial independence, its definition and elements. It demonstrates the principles of judicial independence related to each element: personal, institutional, and procedural. These

principles are helpful in assessing the *de jure* independence of constitutional courts. Additionally, this section highlights the difference between *de jure* and *de facto* independence.

The third section synthesises the discussion about authoritarianism, with particular emphasis on how authoritarian regimes establish and maintain a façade of judicial independence, including how these regimes respond to critical judgments of higher courts. Accordingly, the scope of this section excludes the normative debates about the classification of authoritarian regimes and their conceptual differences, because of the relative similarity between how these regimes deal with courts in practice.

The last section clarifies what functions courts perform in authoritarian regimes, and why these regimes find them useful in certain aspects. This clarification is necessary to understand the unstated reasons behind pronouncing judgments that benefit these regimes. The functions are: social control, legitimation, controlling administrative agents as well as maintaining elite cohesion, providing credible commitments to potential investors, and handling controversial reforms.

B *The Characteristics of Constitutional Courts*

1 *Main Models of Constitutional Review*

Generally, judicial systems have at least two levels of courts: a lower level that decides on a particular case for the first time; and a higher level that provides the losing party with the chance to appeal the decision that a lower court has made. Matters of critical importance to the state organs receive specific arrangements, the most important example of which is constitutional or judicial review.

In most (but not all) models, the core function of this review is to adjudicate on the constitutionality of legislation, declaring it invalid if found to be in conflict with the constitutional provision related to it, according to the interpretation of the adjudicator.[1] Some scholars also highlight the authority

[1] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 816; Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, Inc., 2011) 267; Chen, Albert H Y and Miguel Pioares Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet,

to interpret a constitutional text upon request as a fundamental element defining constitutional review.[2] However, this element is encompassed by the core function mentioned above, because deciding on the conformity of legislation with the constitution necessarily requires the court to interpret the related constitutional text. Before expanding on the characteristics of this review, it is important to explain to what judicial institution this review is assigned.

Globally, states that allow for constitutional review have two main approaches in deciding which judicial institution has the jurisdiction to perform such review. The first is allowing lower courts to perform constitutional review, under the oversight of the generalist high court, which acts as an appellate body for constitutional decisions made by such lower courts. This is known as the 'decentralised' or the American model, as it is predominant in North America and the Caribbean, and is a characteristic of many common-law states.[3]

The second approach is establishing a separate institution with an exclusive jurisdiction to perform constitutional review. This is known as the 'centralised', or European model, since it originated, and still prevails, in Europe. It has also been adopted in parts of Africa, Asia, and the Middle East.[4] It is important to clarify that 'constitutional courts' is the typical name of these separate institutions. Some states use the term 'tribunal' or 'chamber' rather than 'court'; others use the term 'division' when such institution is not organically detached from the higher court. Nonetheless, the term 'constitutional court' will be used here to refer to such separate institution. The importance of differentiating between the two approaches lies in the impact of establishing a centralised system, which will be elucidated after explaining what a constitutional court is, and what its functions are.

The Austrian Constitution of 1920 first established the centralised model. Hans Kelsen was a drafter of that constitution and the inventor of this model

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Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Taylor and Francis, 2013) 97.

[2] Andrew Harding, Peter Leyland and Tania Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009) 4.

[3] Sweet, 'Constitutional Courts', above n 1, 820; Chen and Maduro, above n 1, 100.

[4] Sweet, 'Constitutional Courts', above n 1, 820.

of a separate, specialised constitutional court.[5] According to Kelsen, a centralised model consists of four foundational components:

> A) A court with exclusive jurisdiction over deciding on the constitutionality of legislation.[6] In constitutional literature, courts that have this component are the standard meaning of the expression 'constitutional courts'.[7]
>
> B) A monopoly on constitutional interpretation, without presiding over the litigation process itself, as this court answers constitutional questions submitted to it.[8]
>
> C) Conduct constitutional review of legislation in abstract, i.e. decide on the constitutionality of legislation before it is applied to an actual case, in contrast to concrete review, which requires having a litigated case with the challenged legislation being relevant to it.[9]
>
> D) Conduct review principaliter, i.e. to answer requests of which the sole or only matter is the constitutionality of the legislation, as opposed to review

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[5] See below (A)(3). Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4(2) *Journal of Politics*; Chen and Maduro, above n 1, 98; Harding, Leyland and Groppi, above n 2, 3. This is the reason why some scholars call this model 'Kelsenian': Sweet, 'Constitutional Courts', above n 1, 818; Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 268.

[6] Chen and Maduro, above n 1, 99; Sweet, 'Constitutional Courts', above n 1, 818.

[7] See, eg, Alec Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2000); Herman Schwartz, *The Struggle for Constitutional Justice in Post–Communist Europe* (University of Chicago Press, 2000); Wojchiech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post–Communist Europe: A Comparative Perspective* (Kluwer Law International, 2002); Wojchiech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); Victor Ferreres Comella, 'Constitutional Courts and Democratic Values: A European Perspective' in (Yale University Press 2009); Kasia Lach and Wojchiech Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009).

[8] Chen and Maduro, above n 1, 99; Sweet, 'Constitutional Courts', above n 1, 818.

[9] Sweet, 'Constitutional Courts', above n 1, 818, 823; Chen and Maduro, above n 1, 99.

> incidenter, a review that is incidental to a case being heard before other courts, seeking to decide who wins it.[10]

Importantly, many contemporary 'specialist' courts have modified designs compared to this blueprint regarding the two last characteristics, i.e. conducting abstract review and review *principaliter*, as such courts are authorised to conduct concrete review and review *incidenter* as well. Germany, Spain, and Italy have constitutional courts with such modified designs.[11]

In addition to the two approaches of 'centralised' and 'decentralised' reviews, hybrid or mixed models also exist in many states such as Cyprus, Greece, Portugal, and Estonia.[12] In these models, there is no precise division of powers between the constitutional court and lower courts regarding constitutional questions, as lower courts have the authority to decide whether a certain appeal against the constitutionality of legislation, relevant to the case before them, is serious. Thus, lower courts determine if the appeal should be referred to the constitutional court or disregarded. While deciding on the seriousness of such appeal, lower courts engage in debates of a constitutional nature, and might bring in perspectives different to those the constitutional court has presented in its previous judgments.[13] Another characteristic of these hybrid models is that lower courts can refuse to apply certain legislation if they consider it unconstitutional and can then refer it to the constitutional court, but only the latter has the authority to declare the legislation invalid.[14] This characteristic differentiates these hybrid models from the decentralised model, in which lower courts can decide on the constitutionality of contested legislation.

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[10] Chen and Maduro, above n 1, 99.

[11] Ibid 102; Harding, Leyland and Groppi, above n 2, 20; See, Tania Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel' System of Constitutional Review' in in Andrew Harding and Peter Leyland (eds), Constitutional Courts: A Comparative Study, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009) 125.

[12] Comella, 'Constitutional Courts and Democratic Values', above n 7, 154; Harding, Leyland and Groppi, above n 2, 5; Sweet, 'Constitutional Courts', above n 1, 820 n 16.

[13] Harding, Leyland and Groppi, above n 2, 4; Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 273.

[14] See Vicki C. Jackson and Mark V. Tushnet, *Comparative Constitutional Law,* University Casebook Series (Foundation Press, 2nd ed, 2006) 466.

2 *The Functions of Constitutional Courts*

Adjudicating on issues related to constitutionality of legislation is the core function assumed by constitutional courts, i.e. assessing consistency between the constitution and legislation, especially with regards to the competencies of state organs, separation of powers, and civil rights. In some states, this function might be extended to include reviewing procedures for drafting a new constitution or amending it.[15]

The assessment can take place before or after the legislation is promulgated; the first is known as 'a priori' (also 'preventive' and 'ante factum') review, and the second is called 'a posteriori' (or 'ex-post facto') review.[16] Constitutional courts differ regarding their competence to perform either or both of these sorts of assessments.

Other extra or 'ancillary' functions of constitutional courts often include, *inter alia*: controlling the executive by reviewing the constitutionality of its actions; hearing impeachment claims against high officials; and controlling elections and the regulation of political parties by hearing electoral petitions and reviewing the constitutionality of their actions, merger, and dissolution.[17]

With regards to reviewing the acts of the executive power, legal systems apply different approaches, depending largely on the existence of other judicial avenues of such review. If administrative courts in a certain state already have the right to perform constitutional review of executive actions, then that review will be reserved for them and not shared with the constitutional court.[18] This situation might cause tension between administrative courts and the constitutional court if they apply different approaches to constitutional interpretation in their respective jurisdictions, which could lead to disjointed constitutional jurisprudence.

Moreover, reserving the review of executive actions to administrative courts would become an even more grave limitation of the constitutional court's powers if it means that the latter has no jurisdiction over delegated legislation, i.e. legislation that is drafted by the executive upon the

[15] Harding, Leyland and Groppi, above n 2, 7; Sweet, 'Constitutional Courts', above n 1, 820.
[16] Harding, Leyland and Groppi, above n 2, 7; Comella, 'Constitutional Courts and Democratic Values', above n 7, 7.
[17] Comella, 'Constitutional Courts and Democratic Values', above n 7, 6; Chen and Maduro, above n 1, 101.
[18] Harding, Leyland and Groppi, above n 2, 8.

delegation of the legislator. The legislator might abuse such reservation to avoid the constitutional court's oversight over proposed legislation by delegating authority it to the executive officials, because delegated legislation is overseen by administrative courts.[19]

An issue related to the difference between core and extra functions is the actual centrality and importance of them for regimes. In other words, are all core functions significant while extra functions are marginal? Comparative analysis of constitutional courts shows the difficulty of answering this question. Harding and Leyland make it clear that:

> In some systems, judicial review of legislation appears to be rather insignificant in practice, being only occasionally invoked and rarely successful, whereas in others scrutiny of elections or dissolution of political parties or ascertainment of jurisdiction of regional governments appears particularly important.[20]

In the Asian context, Ginsburg provides examples that support Harding and Leyland's claim, demonstrating that:

> In Thailand, cases involving constitutional review of legislation were not nearly as important as the Court's role in supervising the electoral process. The most prominent case in Korea's constitutional history was an impeachment case, far from the exercise of judicial review as classically defined. Giving the Council of Grand Justices on Taiwan the ability to declare political parties unconstitutional marked a major step in ensuring that such declarations would be conceived of in legal rather than political terms, and reflected a shift toward the rule of law.[21]

On the other hand, experiences from other states suggest that judicial review of legislation is a core function of some constitutional courts. In Indonesia, one focus has been on disputes related to privatisation programs and the government has attempted to pass subsidiary legislation on the issue of privatisation to avoid the constitutional courts' jurisdiction.[22] Also, in Spain,

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[19] Andrew Harding and Peter Leyland, 'Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009) 317.
[20] Harding, Leyland and Groppi, above n 2, 8.
[21] Tom Ginsburg, 'Constitutional Courts in East Asia: Understanding Variations' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009) 94.
[22] Harding and Leyland, 'Constitutional Courts of Thailand and Indonesia', above n 19, 325, 339.

disputes regarding legislation that delegates powers to regional entities have been a central focus of the constitutional court.[23] In South Africa, the constitutional court has increasingly focused on human rights cases, and reviewed the constitutionality of legislation related to them.[24] These examples, both underlining the relative insignificance of judicial review in some states in general and its centrality in others, show how constitutional review of legislation is not necessarily the central and most important function a constitutional court can perform. For each constitutional court, it is useful to carefully assess the significance of their various functions by reference to the particularities of their respective political contexts, seeking to understand the preeminent role they play.

3 *The Preference for Specialist Constitutional Courts*

A tendency towards preferring the centralised systems, i.e. establishing a specialist constitutional court, especially after the Second World War, is largely dependent on four factors.[25] First, some new-constitution framers were suspicious of ordinary courts. The framers did not distrust the judges themselves but did not have enough confidence in ordinary courts that operated under previous authoritarian regimes, because these courts were often reluctant to enforce the application of constitutional norms. Therefore, for the framers of new constitutions, it was unacceptable to entrust the same judicial institutions with the power of constitutional review. They believed that ordinary judges should not be involved in the process of scrutinising the constitutionality of legislation, a heavily 'political' process, because that is the exclusive jurisdiction of constitutional courts as supervisors of the constitutionality of legislation on which success of a transition might depend.[26] Rather, they preferred to establish a separate, specialist court and assign that power to it.[27] Chen and Maduro assert that:

> In the case of countries undergoing a transition from authoritarianism to democracy, existing judges would be unlikely to have either the training or the independence from prior regimes to function with legitimacy as constitutional adjudicators; hence the more viable option is to establish a

[23] Ibid 339.
[24] Ibid.
[25] Harding, Leyland and Groppi, above n 2, 12.
[26] Chen and Maduro, above n 1, 101; and Jackson and Tushnet, above n 14, 467–8.
[27] Harding, Leyland and Groppi, above n 2, 13–4.

> constitutional court staffed by a small number of respected and untainted jurists.[28]

By establishing a separate court, the constitution framers acknowledged that interpreting the constitution to conduct judicial review is a burdensome duty, as constitutions are generally open-ended and contain assertions of fundamental moral principles. Therefore, having especially qualified judges to declare legislation unconstitutional is required, particularly because it is enacted by popularly elected parliament.[29] As early constitutional courts proved their worth as institutions for maintaining the supremacy of their countries' constitutions in Austria and Germany, many later constitution framers decided to follow suit. From the 1970s to 1990s, new constitutions in Central and Eastern Europe, the Middle East, and Asia provided for specialist constitutional courts.[30]

Secondly, establishing a constitutional court can improve the balance in state structure. The new constitutional court, with its new judges appointed by the new political elite, is authorised to protect the sovereignty of the constitution, while ordinary judges are bound by the supremacy of legislation. When political parties negotiate about drafting a new constitution, concentrating constitutional review in a single court seems less costly compared to decentralising that review, because they would be able to define its composition and agree on a selection method for its judges.[31]

Third, in civil law countries, there is a need for legal certainty, since there are no 'binding precedents' in such countries.[32] By establishing a constitutional court, its judgments regarding the constitutionality of a certain legislation could be made final and binding on all other courts, which prevents other courts from pronouncing different judgments, and provides significant legal certainty for the public.[33]

Fourth, constitutional courts have symbolic value as marks of a state's democratic character.[34] Besides having highly-qualified judges, constitutional courts have significant public credibility because in most centralised

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[28] Chen and Maduro, above n 1, 101, citing Jackson and Tushnet, above n 14.
[29] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 269.
[30] Sweet, 'Constitutional Courts', above n 1, 818–9; Harding, Leyland and Groppi, above n 2, 14. See Lach and Sadurski, above n 7.
[31] Sweet, 'Constitutional Courts', above n 1, 818.
[32] Chen and Maduro, above n 1, 101.
[33] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 270.
[34] Harding, Leyland and Groppi, above n 2, 14 n 44.

systems constitutional judges are selected through the participation of the executive and the legislative powers in addition, sometimes, to the judiciary. This engagement also provides these courts with a symbolic status as supervisors of legislative and executive powers.[35] This public credibility also promotes prioritising human rights protection as the primary purpose of constitutional courts, defending such rights against potential violation from the legislative or the executive power.[36]

4 *The Incentives for Establishing Constitutional Courts in Democratic Regimes*

This section demonstrates the role constitutional courts play in democratic regime. Although this is not significantly relevant to constitutional courts in authoritarian regimes, such as that of the West Bank, it helps explain the role of constitutional courts in a wider global context, which includes democratic regimes.

Political elites in democratic regimes see constitutional courts as useful in maintaining a cohesive interpretation of the constitution and constraining those in power from exceeding their constitutional authority. This is different from what non-democratic regimes use constitutional courts for, which will be discussed later, after explaining the difference between both types of regimes.

Constitutional courts provide a solution for a bundle of problems related to the constitution. Generally, a constitution is regarded as a form of contract produced after negotiations between political elites, often with substantial public involvement, to set rules of legitimate governance in the state. Because of the impossibility of agreeing on all specific rules of governance and the differences between elites' interests, constitutions are documents with intentionally long life that broadly form a set of 'goals and objectives' that help divided elites to agree.[37] Thus, meaningful uncertainty and incompleteness are common features of many constitutions, making it necessary to have 'completing' procedures, which constitutional courts might be the most suitable institutions to perform. While performing such procedures, constitutional courts are helpful in managing two main problems; as Stone Sweet explains:

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[35] Chen and Maduro, above n 1, 101, Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 270.
[36] Sweet, 'Constitutional Courts', above n 1, 819.
[37] Ibid 822.

> The first concerns disagreements about the nature and content of rights. The left-wing contingent favours positive, social rights, and limits on the rights to property. The right is hostile to positive rights, and they want stronger property rights. They compromise, producing an extensive charter of rights that (1) lists most of the rights that each side wants, (2) implies that no right is absolute or more important than another, and (3) is vague about how any future conflict between two rights, or a right and a legitimate governmental purpose, will be resolved. Secondly, they face a problem of credible commitment: How will rights be enforced?[38]

Moreover, while realising that electoral competition is the path to power, political elites agree on constraining provisions that would be imposed on those who win the elections and become rulers. Therefore, the constitution should have a set of constraints and enabling institutions, and both need an umpire that resolves disputes between them, keeping the protection of the constitution's superiority as that umpire's core objective.[39]

In regimes undergoing a transition from authoritarianism to democracy, constitutional courts are major contributors in facilitating that process. This contribution occurs only if the leaders perceive the constitutional court as a trustworthy institution, because if they suspect it to be tainted by the earlier authoritarian regime, then those leaders will probably change the constitutional bench. They provide a platform for peaceful settlement of disputes that emerge during the transition, for removing the remaining authoritarian elements from the legal system, and for affirming the state's new legitimacy, which is based on constitutional values rather than previous authoritarian rule.[40]

5 *The Features of Specialist Constitutional Courts*

The above analysis of constitutional courts' functions indicates the central role those courts play in the political arena. There are two features that constitutional courts possess, which make them significantly different from other lower and higher courts. First, constitutional judgments are irreversibly final in the sense that it is not possible to change their effects through legislative avenues, although a few systems allow for legislative override through absolute majority. Legislators can change unfavourable

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[38] Ibid 821.
[39] Ibid; Harding, Leyland and Groppi, above n 2, 4.
[40] Kim Lane Scheppele, 'Constitutional Interpretation after Regimes of Horror' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (Hart Publishing, 2009) 233.