



the center for  
**constitutional**  
transitions **at nyu law**

**Constitutional Courts after the Arab Spring:  
Appointment mechanisms and relative judicial independence**

**Center for Constitutional Transitions at NYU Law  
International Institute for Democracy and Electoral Assistance**

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## About this report

The **Constitutional Transitions Clinic** 'back office' is preparing a series of thematic, comparative research reports on issues in constitutional design that have arisen in the Middle East and North Africa. Zaid Al-Ali, Senior Adviser on Constitution Building at **International IDEA**, has acted as an adviser on these reports and has overseen **International IDEA**'s participation in the report-drafting process. These reports will be jointly published by **Constitutional Transitions** and **International IDEA** in English and Arabic, and will be used as engagement tools in support of constitution-building activities in the region (e.g. in Libya, Tunisia and Yemen). The forthcoming reports are:

- *Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence* (Spring 2014)
- *Semi-Presidentialism as Power Sharing: Constitutional reform after the Arab Spring* (Spring 2014)
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- *Anti-Corruption: Constitutional Frameworks for the Middle East and North Africa* (Fall 2014)
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This report has been prepared by the **Center for Constitutional Transitions at NYU Law**, affiliated with the New York University School of Law, but does not purport to present the school's institutional views, if any. All English-language translations of documents referred to in this report are unofficial, unless otherwise noted.



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## Executive summary

The Middle East-North Africa (MENA) region is experiencing an unprecedented moment of constitutional transition. Among other constitutional reforms, many countries in the region have adopted, are considering adopting or have strengthened systems of constitutional judicial review as a way of signalling the government's commitment to the rule of law. While constitutional judicial review is not new to the region, many countries have established a constitutional court—a specialist judicial body with exclusive jurisdiction over constitutional judicial review—in an attempt to strengthen the role of the courts in interpreting and enforcing the constitution. A constitutional court plays many important roles, including promoting the rule of law, protecting individual rights, providing a forum for resolving disputes, enforcing the separation of powers, holding different political players accountable to their constitutional commitments, serving as 'political insurance' for opposition parties and symbolizing the end of a period of authoritarian rule. The success of constitutional courts is closely tied to the success of constitutional democracy in the region.

Constitutional courts are often called upon to decide on a country's most pressing political issues, including questions about electoral laws and results, regulating the activities of political parties, enforcing the separation of powers among the branches of government, reforming the legal system after a period of authoritarian rule and overseeing constitutional amendment procedures. The litigants in these disputes are often political parties. Even if the cases do not frame the issues in this way, constitutional interpretation is a site of partisan political conflict among political parties, which constitutional courts are called upon to resolve.

The process of appointing judges is central to establishing or reforming a constitutional court. The judicial appointments process determines who will interpret the constitution. This report investigates how constitutional court appointment procedures can be designed to promote both judicial independence *and* judicial accountability to a democratically elected government. The fact that constitutional courts cannot avoid adjudicating disputes with partisan dimensions logically suggests that political actors should play a role in selecting constitutional court judges. Involving a wide range of political actors in the appointments process fosters a broad sense of political investment in the court, so that all actors have an incentive to continue supporting the court even when they are on the losing side of its decisions. Another reason to involve a broad variety of political actors in the appointment process is that although judges strive to interpret the law fairly and issue impartial decisions, they are only human, and a judge's political ideology will naturally play some role in how he or she views the law. The appointments process should be designed to strike an appropriate balance between the constitutional court's independence (insulating the court from political interference) and



its need to be responsive to the democratic society in which it operates. This report refers to this balance as *relative judicial independence*.

In the MENA region, the executive has historically dominated constitutional court appointments. Often, the executive controlled both appointments to the court and changes to the court's composition, adding judges to a court or removing them at will, which gave it tremendous influence over the court's judgements. Failing to involve other political actors in constitutional court appointments damaged the court's legitimacy in the eyes of political parties and the general public, and constitutional court decisions often protected the interests of the executive or the small group of elites that formed the court. Even in the midst of the Arab Spring, many of the newly formed constitutional courts in the region continue to give the executive significant, or even total, control over court appointments.

If carefully designed, the constitutional court appointments process can contribute to the formation of a relatively independent court that many different political constituencies play a role in shaping, which creates a sense of political investment in the court that encourages political actors to abide by the court's decisions, rather than challenge its legitimacy. The design of the constitutional court appointments process must be guided by three principles: (1) widespread participation from different political constituencies; (2) division of the powers to appoint and remove justices; (3) establishing qualifications to ensure the selection of judges of high legal expertise.

This report discusses and analyses four models for constitutional court appointments, with a particular emphasis on how effectively those models foster a sense of political investment on the part of multiple political actors. It examines how the four models have been applied in six countries: Germany, South Africa, Egypt, Iraq, Italy and Turkey. The report also compares the qualifications required for appointment to the constitutional court, and the rules for removing constitutional court judges, in these six countries. The four models, as well as the qualifications and removal sections, are briefly summarized below.

### ***The legislative supermajority model***

In a legislative supermajority appointments model, the legislature has primary control over the process of selecting judges. Depending on a country's political system, one or two chambers of the legislature are responsible for electing judges. A defining feature of the model is the required majority that a candidate needs for election: a supermajority. Whereas a simple majority would allow a governing party to dominate appointments procedures, a 'supermajority' of two thirds (or an even higher qualified majority) guarantees a role for opposition parties in the process. By requiring a supermajority vote to approve candidates, the judicial appointments process is intended to foster a process


of negotiation and compromise between government and opposition leaders. The model is used in Germany to appoint members of the Federal Constitutional Court (FCC). It has successfully promoted a widespread sense of political investment in the FCC among political parties. However, the supermajority requirement can lead to legislative deadlock in countries with a high degree of political party fragmentation, or where the intensity of partisan conflict makes compromise on a nominee difficult. At present, no country in the MENA region uses this model for constitutional court appointments. However, Morocco's new Constitution calls for Parliament to select half of the Constitutional Court's appointees, and requires a supermajority vote to do so. Tunisia's proposed June 2013 draft Constitution also includes a provision requiring the Chamber of Deputies to select candidates, which are nominated by other political actors, by a supermajority vote.

### *The judicial council model*

Judicial councils are created to insulate the appointments process from political actors by forming a council involving multiple political branches and, often, non-political groups such as bar associations, legal scholars and other civil society actors. This council oversees the appointments process, soliciting applications for court vacancies, interviewing candidates, and then either selecting a candidate or presenting a shortlist of candidates to the executive or legislature to make a final selection. A leading example of the judicial council model can be found in South Africa. Its Judicial Service Commission (JSC) plays a central role in appointments to the Constitutional Court of South Africa. The JSC includes executive appointees, members of both houses of Parliament, members of the judiciary, lawyers and law professors. The diversity of the JSC helps foster a sense of investment in the Court across the political spectrum, and it has largely succeeded in creating an independent Court whose decisions are widely respected. However, the continuing dominance of the African National Congress (ANC) in both the executive and legislative spheres allows the ANC to appoint the majority of the JSC's members, which may impact the Court's independence in the long term. Several countries in the MENA region have a judicial council, although not all such councils play a role in appointing constitutional court judges. The members of the Constitutional Court of Kuwait are selected by a judicial council composed of senior judges and political officials.

### *The judiciary-executive model*

The judiciary-executive model divides the power to appoint judges to a constitutional court between the judicial and executive branches. In most iterations of the model, the judiciary (most often senior judges of the highest courts) nominates either one or a shortlist of candidates to the constitutional court. The executive must then select a candidate or approve the selection made by the judiciary, and formally appoint the judge



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to the court. Other variations of this model provide that the executive nominates either one candidate or a list of candidates to the court, and the judiciary must approve the appointment. By relying on the joint consent of the judiciary and executive, the model intentionally excludes the legislature, in an effort to insulate the court from short-term political concerns. Egypt's Supreme Constitutional Court (SCC) and Iraq's Federal Supreme Court (FSC) are both appointed under variations of the judiciary-executive model. Because the model excludes many political actors from the appointments process, especially opposition political parties, the courts in both countries struggle with a low degree of political investment, leaving the courts vulnerable to accusations that their rulings are based on political loyalties. The experiences of Egypt and Iraq suggest that the constitutional court appointments process in a democracy requires the involvement of a broader range of actors than the judiciary-executive model permits.

### *The multi-constituency model*

The multi-constituency model involves multiple institutions in the judicial appointments process, including the various branches of government and, in some countries, civil society organizations as well. In this model, the institutions involved in appointments may have direct or indirect power over them. Institutions with direct appointment power may select candidates and appoint them to the court without having to consult with or gain the approval of any other actor. Institutions with indirect power are generally given either the power to nominate one or a list of candidates for the court or to approve or veto a candidate nominated by another institution, but do not have the power to both nominate and confirm a particular candidate. Most commonly, the seats on the court are divided among the various institutions that have appointment power. In contrast to the judicial council model, the institutions that have a role in selecting the court's judges generally work independently of each other during the selection process. The Italian Constitutional Court has been appointed under a multi-constituency appointments model since 1953. The Turkish Constitutional Court's appointments model was changed from a judiciary-executive model to a multi-constituency model through constitutional amendments passed in 2010. In Italy, the multi-constituency approach has created a strong sense of political investment in the Constitutional Court, although its experience also indicates that legislative appointments may be delayed if the parties in the legislature cannot arrive at a compromise on a candidate. The model was introduced in Turkey too recently to assess its impact; however, the change was in part motivated by the desire to create a more representative and responsive Constitutional Court. Tunisia's proposed June 2013 draft Constitution uses a variation of the multi-constituency model, combined with elements of the legislative supermajority model, for Constitutional court appointments.

## *Qualifications*


Specifying the required qualifications that constitutional court judges must hold is another way to ensure political investment from across the political spectrum. Setting out the level of education and professional achievement judges must have obtained, or specifying a minimum or maximum age at the time of appointment, ensures that the judges appointed to the constitutional court will have the expertise necessary to parse the complex and politically significant constitutional questions that will come before the court. It also creates an additional barrier to court packing: a political actor or party seeking to place its supporters on the constitutional court will have to ensure that the candidates it nominates possess the minimum qualifications specified in the constitution. Qualifications may also include a list of professions or offices that are incompatible with appointment to the constitutional court, usually political offices, which can help to insulate the constitutional court from political influence.

## *Removal*

Another important issue for the design of constitutional courts is the procedure for removing sitting judges from the bench. Removal and appointment procedures are mutually reinforcing. If it is easy for a single political actor to remove judges, this can be used as a mechanism to circumvent even the best-designed appointments process, by enabling the manipulation of the constitutional court's membership. Indeed, the threat of removal can be used as a subtle tool of influence over the judges. To protect against this, some countries only permit the removal of a constitutional court justice if the constitutional court itself votes in favour of removal, sometimes requiring a supermajority vote. Other countries require a multi-step process to remove a judge, in which several different branches of government must approve the removal before it can be enforced.

Many countries in the MENA region are currently considering these important questions regarding the formation of a constitutional court and the appointment mechanism for its judges. The Arab Spring sparked a regional debate over constitutional reforms, providing a unique opportunity to create a strong judicial institution that can help promote the rule of law and hold all political actors accountable to the constitution.

There are two regional trends. Countries such as Tunisia have proposed a procedure for appointing constitutional court judges that will involve many different political actors, thus fostering a broad sense of political investment in the court and helping to protect the court's independence. In contrast, Jordan, Morocco and Syria have all granted the executive branch an enormous amount of power over constitutional court appointments.



If constitutional court judges fear that angering the executive may cost them their positions, their decisions may be influenced more by the need to please the executive than by the law's requirements. Without establishing procedures and rules that will allow a constitutional court to withstand political pressure, it will serve as mere window dressing for rulers who wish to give the appearance of respect for the rule of law without creating real checks on their power.

# 1 Introduction

The Middle East-North Africa (MENA) region is experiencing an unprecedented moment of constitutional transition. Among other constitutional reforms, many countries in the region have adopted, are considering adopting, or have strengthened systems of constitutional judicial review as a way of signalling the government's commitment to the rule of law and separation of powers. While constitutional judicial review is not new to the region, many countries have established a constitutional court, a specialist judicial body with exclusive jurisdiction over constitutional judicial review, in an attempt to strengthen the role of the courts in interpreting and enforcing the constitution.

This report aims to contribute to constitutional debates on the design of constitutional courts, with a particular focus on mechanisms for appointing constitutional court justices. The report investigates how constitutional court appointment procedures can be designed to promote both judicial independence and judicial accountability to a democratically elected government. The report begins with an overview of the history of constitutional judicial review in the MENA region, an assessment of the benefits of establishing a constitutional court and a discussion of the key role such courts play in the adjudication of politically controversial issues. The report then reviews the two core considerations that shape the design of a constitutional court appointment procedure: judicial independence and judicial accountability.

Part 2 discusses the challenges that the MENA region and Turkey have faced in determining a judicial appointments process that strikes the right balance between judicial independence and accountability. Part 3 identifies the principles of constitutional court design that should guide policymakers as they determine the court's appointments procedures.

Part 4 provides a detailed discussion and analysis of four different models for appointing constitutional court judges and how they have been implemented in six countries: (1) the legislative supermajority model in Germany; (2) the judicial council model in South Africa; (3) the judiciary-executive model in Egypt and Iraq and (4) the multi-constituency model in Turkey and Italy. For each country example, the report provides a brief overview of the country's political and historical context that is relevant to the constitutional court appointments process, followed by a description of the appointments procedure used in that country and an analysis of how constitutional court appointments have unfolded in practice. The discussion of each appointment model concludes with a discussion of key policy considerations that policymakers considering the model should keep in mind. Part 5 reviews the qualifications that appointees to the court must hold in each of the six countries discussed in Part 4, and the procedures used in each country to remove a constitutional court judge from the bench.



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## ***1.1 Constitutional review in the Middle East-North Africa region***

The spread of constitutional courts in the MENA region follows a global wave of constitutional reforms that began in the late 1980s with the fall of the Soviet Union. The creation of a specialist court with exclusive jurisdiction over constitutional review, the task of which is to protect and enforce the supremacy of the constitution, has become an expected component of democratic transitions and democratic societies. Today, over 70 countries have a constitutional court or council.<sup>1</sup>

Judicial review is far from a recent phenomenon in the MENA region. In 1925, Iraq became the first country in the region to adopt a constitution that explicitly mentioned judicial review (Article 81); Egypt followed suit two decades later when the Supreme Administrative Court asserted the power of judicial review in the absence of express constitutional authorization. Egypt was also one of the first countries to propose a specialized court for constitutional review, in 1979. Many MENA region countries have established constitutional review, either through a supreme court, a specialized constitutional court or a constitutional council.<sup>2</sup>

Three different scenarios are currently unfolding in the region regarding constitutional courts. Countries that have recently experienced a transition from authoritarian rule are establishing new courts, including Iraq, Libya and Tunisia; Egypt is contemplating the future of its Supreme Constitutional Court (SCC), which was established under authoritarian rule but now operates in a drastically different political environment; and several monarchies that have not experienced a regime change but are facing popular calls for political reform are considering what role a constitutional court may play in meeting those demands.

### ***1.1.1 New courts in new democracies***

**Iraq:** Iraq's 2005 Constitution established a Federal Supreme Court (FSC) that has the power of constitutional review. The implementing legislation necessary to fully establish the FSC has not yet been passed by the Council of Representatives; as a result, the FSC is still operating under the Transitional Administrative Law (TAL) that came into force during Iraq's occupation. Under Article 44 of the TAL and Law No. 30/2005, the FSC consists of nine members, including the President of the Court.<sup>3</sup> Although the FSC is not a specialized constitutional court, its experience is highly instructive for (and relevant to) the MENA region. The FSC is discussed in detail in Part 4 of this report.

**Libya:** During Muammar Qaddafi's rule, Libya largely lacked a functioning judicial system. While in power, Qaddafi sought both to weaken the judiciary's independence and bypass the ordinary courts entirely by creating special military and 'revolutionary' courts to try Qaddafi's opponents and handle most political and security issues. Qaddafi did preserve the Supreme Court that was established by the 1951 Constitution (Article



141), with some modifications. The Supreme Court is divided into five chambers for different areas of substantive law: civil and commercial, criminal, administrative, constitutional and sharia. In the later years of his regime, Qaddafi took steps toward judicial reform, such as removing the Justice Ministry from the jurisdiction of the security forces, as part of his rapprochement with the European Union and the United States. However, since the fall of Qaddafi, the Libyan judiciary has suffered from a lack of adequately trained staff, widespread corruption and susceptibility to political influence. During the transitional period, the Supreme Court's Constitutional Chamber has ruled on a small number of constitutional cases. The Libyan constitution-drafting process is ongoing, and it remains to be seen what reforms a new constitution will introduce for Libya's judiciary.<sup>4</sup>


**Tunisia:** Tunisia's draft Constitution of June 2013 would establish a new constitutional court. Prior to the 2011 revolution, Tunisia had a Constitutional Council, but because only the President could refer matters to the Council and he had effective control over appointments to the Council, that body lacked independence from the executive. The Council was dissolved by decree shortly after the ousting of President Zine El Abidine Ben Ali. The June 2013 draft Constitution would establish a 12-member Constitutional Court, and sets out an appointment mechanism that is a variation of the multi-constituency model (discussed in Part 4 of this report). The President, the Prime Minister, the Supreme Judicial Council and the Speaker of the Chamber of Deputies would each nominate six candidates. At least two thirds of the nominees must be legal specialists. The Chamber of Deputies would then elect 12 judges, three from each of the four sets of nominees. Judges would be appointed for a nine-year, non-renewable term. Appointments would be staggered so that one third of the Court's members are appointed every three years.<sup>5</sup>

### *1.1.2 Existing constitutional courts in transition*

**Egypt:** The Egyptian Supreme Constitutional Court (SCC) was established by then-President Anwar Sadat in 1979, and was one of the few political institutions capable of standing up to the executive branch during President Hosni Mubarak's rule, at least for a time. After the 2011 revolution, the SCC has played a pivotal and often controversial role in Egypt's transition. The SCC is discussed in detail in Part 4. As Egypt's story continues to unfold, policymakers will be faced with important decisions regarding the SCC's composition and role under a new Egyptian Constitution.

### *1.1.3 New constitutional courts under existing governments*

**Jordan:** Jordan's 2011 Constitution created a new Constitutional Court to determine the constitutionality of laws and regulations. According to the Constitution, the Court is comprised of at least nine members, including the Court's President. The King



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appoints all members of the Court (Article 58) and its decisions are final and binding on all authorities (Article 59). The Jordanian Parliament enacted the implementing legislation for the Court, the Constitutional Court Law, in June 2012. In October 2012, King Abdullah issued a royal decree appointing the Court's nine members, including its President, Taher Hekmat, who had previously served as a government minister and senator. The King cited the need for a constitutional court to review legislation and heralded it as a 'major step and milestone in the process of reform and democratic renewal'.<sup>6</sup>

**Morocco:** The 1996 Moroccan Constitution established a Constitutional Council to review all organic laws and any other laws referred to the Council prior to their enactment. In February 2011, thousands of Moroccans participated in protests calling for political reforms, a new Constitution and true constitutional monarchy. Four months later, King Mohammed VI announced a new draft Constitution, including a provision to replace the Constitutional Council with a new Constitutional Court. In July 2011, a national referendum on the proposed Constitution passed with 98 per cent of participating voters in favour, according to official results. Under the new Constitution, the Constitutional Court is comprised of 12 members who serve for a non-renewable term of nine years. The King appoints six members (including one member nominated by the Secretary General of the Ulema Higher Council) and each house of Parliament elects three members, by a two-thirds majority vote.<sup>7</sup>

**Bahrain:** Bahrain established a Constitutional Court in 2002, when it adopted a new Constitution. After anti-government protests broke out in early 2011, prompted in part by the events of the Arab Spring, the government of Bahrain launched a series of constitutional reforms intended to strengthen its Parliament and limit the power of the monarchy. On 15 August 2012 the King of Bahrain also issued a royal decree, Law 38-2012, amending a number of the provisions of Law 27-2002, which originally created the Bahraini Constitutional Court. The decree established that the Court would be composed of a Chief Justice, a Deputy Chief, and five other justices, all appointed by the King for five-year terms, renewable once.<sup>8</sup>

**Kuwait:** Kuwait's 1962 Constitution called for the creation of a Constitutional Court, but it took 11 years for Parliament to pass the necessary legislation to establish the Court. A judicial council, composed of senior judges and government officials, appoints the members of the Court. The perceived legitimacy of the Court has ebbed and flowed over time, and many view it as being under the control of the Emir. Its rulings in many politically sensitive cases have favoured the executive or have avoided a decision by dismissing the cases on procedural grounds.<sup>9</sup>

## 1.2 Functions of a constitutional court


The primary rationale behind a constitutional court rests on the notion of constitutional supremacy—the idea that the constitution rules over all branches of government and political actors, and that the constitutional court acts as the guardian of the constitution. By definition, a constitutional court is an ‘organ of the state whose central purpose is to defend the normative superiority of the constitutional law within the juridical order’.<sup>10</sup>

In principle, constitutional review can take two forms: centralized or diffuse. In a centralized system, the model used by most European countries, including France, Germany and Italy, a dedicated body—a constitutional court or a constitutional council—is the only state organ with the power to make authoritative determinations on the constitutionality of a law or government action. When constitutional questions arise in cases before lower courts, they are referred to the constitutional court for adjudication. Diffuse or decentralized constitutional review, the model used in the United States, grants all courts in the judiciary the power of constitutional review. The Supreme Court is the highest court in the country, and it addresses questions of constitutionality when they arise in cases appealed from lower courts. The Supreme Court also hears non-constitutional cases brought on appeal from lower courts.

A number of factors shape the choice between centralized and diffuse review. First, a specialised constitutional court is well suited for integration into a civil law system, which generally includes specialised courts in other areas (civil and criminal law, administrative law, etc.). Diffuse review is almost always found in common law systems, in which all levels of court, including the Supreme Court, have jurisdiction over all questions of law, including constitutional law. Given that most countries in the MENA region have civil law systems, centralized review with a constitutional court is the natural option.

A constitutional court also offers a relatively quick and definitive method of determining the constitutional validity of laws and decrees, because cases can be brought directly to it. In a diffuse system, by contrast, multiple courts may issue conflicting decisions regarding a law’s validity. Only after cases have worked their way through the judicial system, i.e. when appellate courts or the supreme court make a determination, will there be a degree of certainty. Yet allowing an issue to percolate through the lower courts in a diffuse system allows a constitutional issue to be clarified and analysed by several courts, the judgements of which may assist the supreme court when it considers the issue.

Another argument in support of creating a specialised constitutional court centres on the nature of the cases such a court will hear. As discussed in Section 1.3, disputes over the constitution’s provisions often involve the most sensitive political issues facing a country, including a review of the country’s electoral laws and elections, the powers of



the various branches of government and other questions. Decisions on these issues will have a major impact on the country's politics. Due to the political nature of constitutional cases, it is best to create a specialized body so that its members can develop expertise in the area of constitutional jurisprudence and insulate the rest of the judiciary from politicization.

Finally, many countries have established a new constitutional court during the transition from an authoritarian regime to a democratic system. Constitutional courts present several advantages in such a scenario. First, establishing a specialist court charged with interpreting the constitution and ensuring its primacy signals that the country is committed to the rule of law and is making a clear break with its authoritarian past. The court bears a special responsibility for ensuring that the constitution is applied fairly and equally to all members of society, no matter how powerful. Second, the ordinary judiciary might be considered suspect, given its function under the former regime. Policymakers may feel more comfortable entrusting the power of constitutional review to a new institution, the members of which are selected by democratic representatives. This rationale motivated, in part, the creation of the German Federal Constitutional Court (FCC) after World War II and the creation of the Spanish Constitutional Court after the fall of General Franco. Yet Kenya's recent experience shows that it is possible to address concerns regarding a politically compromised judiciary by creating a new supreme court whose judges have been carefully vetted to ensure that they are fully committed to the new constitutional order. However, this option is not easily implemented in civil law systems, which are pervasive in the MENA region.

In sum, constitutional courts are increasingly prevalent and considered a core component of new democracies, particularly in the post-Soviet era and continuing into the Arab Spring. During democratic transition processes, political actors negotiate the terms of the new democracy, which are formalized in a written constitution. The new democracy then faces the pressing question of how to enforce that constitution. Since World War II, it has become standard practice to entrust the judiciary with the responsibility of enforcing the constitutional bargain. As a result, careful thought must be given to designing the mechanism of judicial enforcement. There is a clear trend toward establishing a new constitutional court to enforce the constitution.<sup>11</sup>

A constitutional court plays many important roles, including promoting the rule of law, protecting individual rights, providing a forum for resolving disputes, enforcing the separation of powers, holding different political players accountable to their constitutional commitments, serving as 'political insurance' for opposition parties and symbolizing the end of a period of authoritarian rule. Each of these functions is discussed below.

### ***1.2.1 Upholding the rule of law***

As guardians of the constitution, constitutional courts play a critical role in the broader mission of promoting and institutionalizing the rule of law. Under a system of rule of law, ‘authority operates on the basis of fixed, identifiable, and predictable legal rights rather than unlimited personal discretion’. An independent and effective constitutional court can contribute to predictability, stability and accountability in the administration of justice alongside the ordinary courts, ensuring that the law is applied fairly and equally to all. It does so by enforcing the constitution against public institutions and officials, and ensuring that ordinary courts uphold legal norms against the state as well.<sup>12</sup>

A country’s commitment to the rule of law also has other benefits. International investors often regard the existence of a properly functioning judiciary as a sign of a country’s stability and investment potential: a judiciary that offers fair judgements, timely procedures and a comprehensive body of law that clearly protects private property rights is a signal that a country is ready for investment. For example, in Egypt, President Anwar Sadat established the Supreme Constitutional Court in part to demonstrate to investors that the country was committed to the enforcement of property rights.<sup>13</sup>

### ***1.2.2 Protecting individual rights***

Constitutional democracies are intended to ensure majority rule while protecting the rights of individuals and minorities. Courts, and in particular constitutional courts, play an essential role in upholding these rights in a constitutional democracy. Constitutional courts can provide a forum for individual citizens or minority groups to bring complaints regarding government violations of their constitutionally protected rights.

### ***1.2.3 Providing a forum for the arbitration of disputes among political parties, branches of government and government officials***

As the body charged with determining the constitutionality of all laws and government actions and upholding the rule of law, a constitutional court provides a forum for resolving disputes among different political parties, branches of government or government officials, which routinely arise in constitutional democracies (for further examples, see Section 1.3 below). Furthermore, a constitutional court’s decisions are the final determination of whether a particular law or government act is permissible under the constitution. This can provide a valuable sense of finality in political disputes, thus preventing a dispute from becoming a protracted source of contention between political actors that undermines the ability of political institutions to function.



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### **1.2.4 Separation of powers**

Constitutional courts can issue an authoritative determination on the competences assigned to the different branches of government, and can determine whether one branch is usurping powers that are constitutionally granted to a different branch.

### **1.2.5 Enforcing the constitutional pact**

Constitutional courts are often established during a country's transition from authoritarian rule to constitutional democracy. During the transitional period, various political actors negotiate the country's new constitution, which represents a statement of the country's values and system of government as well as a pact among political forces.

As part of this agreement, the negotiating parties may establish a constitutional court as a commitment to one another, and to the people, that they will uphold the terms of the constitution. If any single actor tries to violate the constitution's terms, the others can take that actor to court to enforce the constitutional pact.<sup>14</sup>

### **1.2.6 Political insurance**

During political transitions, in which multiple political parties are vying for control of the government, each party has an incentive to create a constitutional court as a form of political insurance to hedge against the risk of electoral loss. If a party finds itself in the opposition after a future election, it can bring a case before the court to protect its own interests from abuses of authority by the new governing party, which may attempt to entrench its authority, and to constrain the policy decisions of the governing party if it cannot defeat them in the legislature.<sup>15</sup>

### **1.2.7 Symbolic value**

A constitutional court can also have tremendous value as a symbol of a country's break with the past. In countries with a history of authoritarian rule and human rights violations, establishing a constitutional court is a concrete message that the rule of law has been established and that impunity will no longer be tolerated.

## **1.3 Constitutional courts and politically contested cases**

Once established, a constitutional court will necessarily become involved in some of the most fraught political issues of the day. It is the court's duty to uphold the constitution, which may involve resolving questions about electoral laws and results, regulating the activities of political parties, enforcing the separation of powers among the branches of government, reforming the legal system after a period of authoritarian rule and overseeing constitutional amendment procedures. The litigants in these disputes are often political parties. Even if the issues are not framed in this way, constitutional

interpretation is a site of partisan political conflict among political parties that constitutional courts are called upon to resolve. These issues are always sensitive, and never more so than in the context of a democratic transition. Constitutional courts are frequently called upon to adjudicate on constitutional disputes that have a partisan political character. As in Section 1.4 below, the principal challenge in designing a constitutional court's appointments process is to ensure that political parties on the losing side of constitutional cases accept the court's ruling and do not respond by attacking it.


### 1.3.1 Review of electoral laws and elections

Constitutional courts are often called upon to determine the constitutionality of electoral laws, to play a role in the oversight of elections and to certify electoral results. Their decisions can have a dramatic impact on the electoral fortunes of political parties. Germany's Federal Constitutional Court (FCC) has issued many rulings on the country's electoral laws, which include a requirement that a political party win at least 5 per cent of the vote nationwide in order to qualify for representation in the *Bundestag*, Germany's Parliament. The FCC has upheld the 5 per cent requirement in numerous cases, often brought by minority parties that won a large percentage of the vote in a particular region or among a particular demographic but failed to meet the 5 per cent threshold, on the grounds that the threshold is intended to protect against excessive party fragmentation in the *Bundestag* in order to ensure that it can function effectively.

However, the FCC made one exception to this requirement, in advance of the first election held after the reunification of West and East Germany in 1990. In this instance, the FCC suggested that the *Bundestag* create a one-time exception to the requirement, because many of the newly formed, small East German political parties were unlikely to secure 5 per cent of the vote nationwide. The *Bundestag* complied, and for the 1990 election only, permitted small East German parties to form joint tickets in order to give them a better chance of clearing the 5 per cent threshold and securing representation in the *Bundestag*.<sup>16</sup>

In the MENA region, Egypt's Supreme Constitutional Court (SCC) has played a pivotal, and controversial, role in reviewing the country's electoral laws on a number of occasions both under authoritarian rule (where it was alleged that the governing authorities had manipulated the rules in order to shape the outcome of electoral contests) and during the transition after the overthrow of President Hosni Mubarak.

Both during Mubarak's rule and during the country's constitutional transition, the SCC invalidated multiple electoral laws as unconstitutional. Under Mubarak, the SCC issued several rulings that struck down provisions of electoral laws that it found to be biased against independent candidates. In 2012, the SCC found the electoral law that



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governed Egypt's first post-revolution parliamentary elections unconstitutional, also due to its rules regarding independent candidates, and ordered the Supreme Council of the Armed Forces to dissolve Parliament (see Section 4.3.1).<sup>17</sup>

### ***1.3.2 Political party regulation***

Constitutional courts may also issue rulings that affect the formation and activities of political parties. The rules governing political parties determine who is legally eligible to contest elections, and therefore have a direct impact on the structure of democratic politics. The rules are prone to partisan abuse, because governing parties can use them to undermine their political opponents. This is a particularly fraught issue in countries emerging from authoritarian rule, where existing political parties may be institutionally weak or closely tied to the former authoritarian regime, and many new parties may rapidly form after the transition to democracy.

The actions of constitutional courts affect political parties in various ways. For example, the constitutions of some countries, including Germany, South Korea and Turkey, empower their constitutional courts to regulate (and even ban) certain political parties based on their substantive policy programmes and internal party organization. The Turkish Constitutional Court (TCC) has repeatedly, and controversially, ordered the closure of political parties—most notably those associated with political Islam and with Turkey's Kurdish minority—for violating the constitutional prohibition on political parties whose programmes and activities conflict with the principles of the democratic and secular republic or Turkey's indivisible integrity with its territory and nation (Constitution of Turkey, 1982, Article 68). As will be discussed in detail in Part 4, the TCC's recurring confrontations with Islamist-oriented parties eventually led to the adoption of extensive constitutional amendments that modified the procedure for appointments to the Court.

Constitutional courts also weigh in on party matters in the MENA region. In these cases, the bans on political party formation or political candidacies are statutory, and courts have been asked to rule on the constitutionality of those bans. The leading example is the Egyptian SCC, which has a long history of involvement in the regulation of political parties and candidates. In 1986, the SCC overturned a law that banned many opposition activists from participating in politics, paving the way for hundreds of political opponents of the ruling regime to re-engage in political activities. In June 2012, during the transitional period, the SCC overturned a law banning members of the Mubarak regime from running for election, holding that it was an unconstitutional deprivation of political rights. The ruling thus permitted Mubarak's former Prime Minister, Ahmed Shafik, to run for president. Shafik lost to Mohamed Morsi in a run-off election.<sup>18</sup>




Finally, South Africa's Constitutional Court upheld constitutional provisions that barred members of political parties from changing party affiliation after an election, a practice sometimes known as floor crossing. These provisions were originally adopted due to fears that the powerful African National Congress (ANC) would recruit members of Parliament (MPs) from smaller, minority parties to further consolidate its hold on legislative power. These protections for minority parties were later repealed through a constitutional amendment process led by the ANC, which was arguably motivated by the ANC's desire to take control of provincial legislatures controlled by opposition parties. The Court rejected constitutional challenges to this amendment, notwithstanding its partisan implications.<sup>19</sup>

### *1.3.3 Enforcing the separation of powers*

Constitutional courts may be called upon to define or clarify the competences of the different branches of government—including what each branch is responsible for doing, and what each branch may not do, according to the constitution. Although framed as disputes about the scope of authority of different branches of government, these debates may take on a partisan character if different political parties control the different branches, or if the manner in which these powers are exercised enhances the power of the governing party relative to the opposition.

In 2011, South African President Jacob Zuma relied on the Judges' Remuneration and Conditions of Employment Act to unilaterally extend the term of the Constitutional Court's then-Chief Justice Sandile Ngcobo beyond the constitutionally mandated maximum. Zuma's actions met with significant protest from opposition political parties, which culminated in a challenge brought before the Constitutional Court. The Court unanimously held that both the relevant section of the Act and Zuma's actions were unconstitutional, because the Constitution only authorizes the South African Parliament to extend the term of a Constitutional Court justice. Although framed in terms of the separation of powers, the effect of the judgement was to shift the decision regarding the extension of the Chief Justice's term from the ANC-dominated executive to Parliament, where opposition parties could participate in an open debate on the issue.<sup>20</sup>

Iraq's Federal Supreme Court (FSC) issued a controversial decision in 2010 regarding the power to introduce proposed legislation in the Council of Representatives. The 2005 Constitution's provisions on this power were somewhat ambiguous. Article 60(1) states that 'Draft laws shall be presented by the President of the Republic and the Council of Ministers.' Article 60(2) states that 'recommendations of law' may be presented by a Council of Ministers' subcommittee, or by at least ten members of the Council of Representatives. Article 61 further provides that the Council of Representatives shall enact federal laws. The FSC interpreted these articles to mean that



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only the executive branch has the power to introduce bills in the Council of Representatives; members of the Council of Representatives may only offer recommendations for potential legislation to the executive branch, which the executive may then choose to take up in a bill. The decision deprives the Council of Representatives of an independent power to make laws, and critics of the FSC point to the decision as evidence of the executive's influence over the Court.<sup>21</sup> The decision's effect is to diminish the role of opposition parties in setting the legislative agenda.

### ***1.3.4 Post-authoritarian legal reform***

After the end of an authoritarian regime, whether brought about by the popular overthrow of a leader or a negotiated transition to democracy, an important decision must be made regarding what to do with the body of law promulgated under the previous regime. A constitutional court can play an important practical and symbolic role in reforming a country's legal system. The court is specially tasked with evaluating the constitutionality of laws, making it the institution best situated to undertake a broad evaluation of authoritarian-era laws and determine which can pass muster under the new constitution. Furthermore, the creation of a constitutional court during the transitional process sends an important message: the new democratic regime has created an institution that can ensure not only that the rule of law will be respected in the future, but also that former injustices and repressive laws will be relegated to the past.

The constitutional courts created in Germany and Italy after the end of World War II played a critical role in marking a legal break with the horrors of the past. Both courts set about reviewing and dismantling the prior authoritarian legal regimes shortly after their establishment. For example, the Italian Constitutional Court's first ruling was a firm statement that not only did it have the authority to review laws passed before its creation, but also that it intended to strike down many of those laws, including the Fascist-era security laws that enabled so much repression of political activity and free expression. In its early years, Germany's FCC strengthened its moral authority by working to eliminate the remnants of the old regime. For example, in the 'Beamtenverhältnisse' case, the FCC ruled that the public officials who held office during the Third Reich were not entitled to stay in office in the new Federal Republic of Germany.<sup>22</sup>


### ***1.3.5 Overseeing constitutional amendment procedures***

Constitutional courts also play an important role in the process of amending a constitution. They may be called upon to ensure that a constitutional text sufficiently protects the interests of minority political parties, particularly if a single political party holds a clear majority in the legislature.

The Constitutional Court of South Africa was given a central role in overseeing the creation of the new South African Constitution. During the multiparty negotiation process that ended apartheid, an interim Constitution was created in 1993 to govern the country until a final Constitution was adopted. This interim Constitution included a set of constitutional principles with which the final Constitution, to be drafted by a Constitutional Assembly elected in 1994, would have to comply. The interim Constitution assigned the newly established Constitutional Court the task of determining whether the draft Constitution faithfully adhered to the negotiated general principles set out in the interim Constitution. In July 1996, the Constitutional Court received the draft Constitution for review and issued a ruling two months later in what is known as the Certification Decision. The Court refused to certify the draft Constitution, despite the fact that it was adopted by 86 per cent of the democratically elected Constitutional Assembly. According to the Court, the Constitution did not fully comply with the interim Constitution's principles. This sent a strong message that the post-apartheid judiciary's only duty was to uphold the rule of law, even when doing so was politically inconvenient or unpopular. However, the Court was also aware of the political implications of its decision, and made sure to issue a narrow ruling that endorsed the overwhelming majority of the Constitution and clearly identified the few issues that needed to be addressed to satisfy the interim Constitution's principles. These issues included better safeguards for the independence of the auditor-general and public protector (ombudsman), a more stringent process for amending the Constitution's Bill of Rights, and more clarity on the structure and functions of the provincial governments. The deficiencies identified by the Constitutional Court were united by a concern that the ANC would command legislative majorities for the foreseeable future, and therefore could abuse its power against opposition parties without sufficient constitutional safeguards. Ultimately, the Constitution was amended by the Constitutional Assembly and approved following a favourable second review by the Constitutional Court.<sup>23</sup>

### ***1.4 Relative judicial independence and political investment***

In order to maintain its authority and public legitimacy, a constitutional court must be perceived as independent. Judicial independence, however, is a highly contested concept. In essence, an independent court is one that is sufficiently insulated from political interference and control for its decisions to demonstrate the court's mandate to uphold the rule of law, rather than suggest its allegiance to a particular political official or party. Judges who fear retribution for unfavourable decisions, or whose decisions unjustifiably favour a particular political actor, cannot carry out their duty to administer justice. The constitutional court's decisions must be based on legally defensible arguments. Finally, various political actors and the public must perceive the court as independent in order to retain its legitimacy and support.<sup>24</sup>



However, a constitutional court operating in a democracy is also expected to be accountable to the public, as are the other branches of government, all of which operate with the consent of the governed. If the court has the power to strike down laws promulgated by representatives of the public, then the public must have some role in deciding who will sit on that court. A court whose decisions do not in any way reflect society's values and concerns is unlikely to retain the public's support, and will either come to be disregarded as an unjust body or dismantled by the elected branches. The same holds true for political parties. If the court has the power to issue constitutional decisions that affect the power, status and rights of political parties, then parties should have some role in appointing members of that court. Moreover, the court will become politically irrelevant if its judgements consistently stray far beyond the mainstream of the political spectrum.

Constitutional drafters creating a constitutional court must therefore strive for relative judicial independence: a court that operates independently of the influence of political concerns, while remaining responsive to a democratic society. This is a difficult balance to strike. A core component of relative judicial independence is a sense on the part of all political actors that they are politically invested in the court and its decisions, so that when the court issues decisions that are unfavourable to some groups, they will accept the decision rather than attempt to undermine (or even destroy) the court's legitimacy.

### ***1.5 The importance of constitutional court appointments***

The question of how to appoint constitutional court judges is central to the establishment of a well-functioning, independent court. Judges strive to interpret the law fairly and issue impartial decisions. Since constitutional courts cannot avoid adjudicating disputes with partisan dimensions, political actors should play a role in selecting constitutional court judges. Involving a wide range of political actors in the appointments process fosters a broad sense of political investment in the court, so that all actors have an incentive to continue supporting the court even when they are on the losing side of its decisions. Another reason for an appointment process that involves a broad variety of political actors is that although judges strive to interpret the law fairly and issue impartial decisions, they are only human, and a judge's political ideology will naturally play some role in how he or she views the law.<sup>25</sup>

This report analyses four of the most commonly used models for constitutional court appointments, with a particular emphasis on how effectively these models foster a sense of political investment on the part of multiple political actors. Part 2 discusses the challenges that the MENA region and Turkey have faced with respect to the appointments process and striking the right balance between judicial independence and accountability. Part 3 identifies the principles of constitutional court design that should guide policymakers as they determine the court's appointments procedures.

## 2 Constitutional court appointments: MENA region challenges

This report presents options for creating an appointments process that can promote an independent and accountable constitutional court in the MENA region. To do so, it is necessary to identify some of the region's recurring challenges related to judicial independence and accountability.

### 2.1 Threats to the court's independence


#### 2.1.1 Judicial appointments dominated by the executive

A constitutional court whose judges are selected solely by the executive, without the participation of any other political or civil society actors, stands little chance of being able to act independently. First, the executive will attempt to capture the court by selecting judges believed to be sympathetic to the executive's policies, in order to insulate itself from constitutional accountability. Second, the judges on the court, knowing that they owe their positions solely to the executive, will likely be unwilling to issue a ruling that the executive would oppose.

In the MENA region, the executive has historically exercised strong control over appointments to constitutional courts. In Egypt (discussed in detail in Part 4) President Mubarak was able to rein in the formerly assertive SCC by exerting his legal authority over court appointments, in particular the Chief Justice. In Kuwait, the Higher Judicial Council—which includes a representative from the executive branch, the Minister of Justice—technically controls the appointment of justices to the Constitutional Court. Although the Council includes members of the judiciary, the Ministry of Justice is involved in appointments to nearly all senior judicial posts. As a result, the Emir exercises significant influence over the Court in practice. This is reflected in the Court's jurisprudence, which generally either avoids ruling on controversial subjects or does so in a way that supports the Emir's interests.<sup>26</sup>

Morocco's 2011 Constitution, written by a group of experts selected by King Mohammed IV and approved in a popular referendum, establishes a Constitutional Court of 12 members. The King appoints six members, and each house of Parliament elects three of the remaining six members by a two-thirds majority vote (Article 130). While this procedure divides the appointment power between the King and Parliament, it still gives the King the power to appoint half of the Court's members—which in effect allows the judges appointed by the King to block any decision with which he disagrees.<sup>27</sup>

In Syria, the President appoints all justices on the newly formed Supreme Constitutional Court for a renewable period of four years (Constitution of Syria, 2012, Articles 141, 143). The appointments process mirrors that of the Syrian Supreme



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Constitutional Court created under the 1973 Constitution (Articles 139, 141). Under this process, the executive appoints the Court's members, who rely on continued executive support for their tenure; thus the judges have little incentive to exercise any measure of judicial independence.<sup>28</sup>

Similarly, in Jordan, the King appoints all nine members to the recently established Constitutional Court, including its President. The current President, Taher Hikmat, is a former senator who previously served in the government and as President of the Court of Cassation and the Higher Judicial Council. The King's complete control over Court appointments will likely influence its decisions, although it is too early to make a fair assessment of the Court's jurisprudence.<sup>29</sup>

Allowing any single political group or branch of government to dominate a constitutional court's appointments process is generally not recommended, with the possible exception of appointments controlled by a democratically elected legislature (i.e. the legislative supermajority model). The power to remove constitutional court justices is equally important. Constitutions that are silent on removal provisions—or constitutional provisions that permit judges to be removed relatively easily or unilaterally by the executive or another government actor—leave judges vulnerable to the influence of political actors.

### ***2.1.2 Executive manipulation of court composition***

If there are no firm standards set out in a country's constitution or ordinary laws defining the number of judges on the constitutional court, or if the constitution or other legislation that sets out the number of justices is easy to amend, then the executive may be able to change the number of judges on the court essentially at will if the appointments process is largely in its hands. The executive can add judges to the bench to ensure that a majority will always rule in its favour or force an unpopular judge off the bench. Egypt's SCC has experienced both forms of manipulation of court composition. During President Mubarak's rule, after the SCC declared a regime-crafted election law unconstitutional, Mubarak appointed a new Chief Justice known as a regime loyalist, who promptly appointed five new judges to the SCC, increasing the total number of judges on the bench by 50 per cent. This change in the Court's composition transformed the SCC from an institution that to some extent offered a real check on executive power into a body that was effectively under executive control. After the fall of Mubarak, the Egyptian Constitution passed in December 2012 reduced the number of judges on the SCC to 11 from the previous 19 (including the Chief Justice). This necessitated the removal of the eight most junior judges. One of those removed was a judge who had been an outspoken critic of the Muslim Brotherhood. While it is unclear whether the provisions in the 2012 Constitution were written with the purpose of removing this judge from the Court, this episode illustrates the ways in which

expanding or contracting the number of judges on the constitutional court can be used to further political ends.<sup>30</sup>

## ***2.2 Threats to the court's legitimacy: locating relative judicial independence***

Achieving relative judicial independence—i.e. an appropriate balance between judicial independence and public accountability—is extremely difficult. It is perhaps easier to discuss cases in which a constitutional court has demonstrably failed to achieve this balance than to provide examples of a court that has done so successfully. When the process of selecting a constitutional court's judges fails to reflect the need to secure political investment from a broad array of the political spectrum, the resulting court may be made up of judges who are supported by a particular political party; therefore the rulings may reflect that party's values and interests while ignoring those of other parties.

A court that consistently rules against majority interests in favour of minority groups, such as the military or political elite, is likely to provoke public frustration and anger. The judiciary is essentially defenceless: it depends on the goodwill of the government to comply with its decisions and relies on a measure of public support for (or at least tolerance of) the court's rulings. While widespread public support does not seem to be necessary to the survival of a court, widespread disapproval of a court can be very damaging, and sometimes fatal, to the court's existence. The history of the Turkish Constitutional Court (TCC), discussed in detail in Part 4, demonstrates this point. The formation of the TCC (including its appointments process) was dominated by the military, which sought to create an institution that would protect its interests and uphold its values. As a result, the TCC consistently issued decisions on controversial subjects, such as the closure of political parties with a religious affiliation, that upheld the preferences of the military elite even where popular opinion diverged (in one case considering the closure of an Islam-affiliated party, the AKP, after that party had won a majority in parliamentary elections). Eventually, the AKP won power through elections and was able to secure the passage of a series of constitutional amendments that changed the appointments process for the TCC and other important aspects of its structure.

Iraq's Federal Supreme Court, also discussed in Part 4, was created during a fraught period of foreign occupation by a small group of constitution drafters that was not representative of the broader Iraqi society. Because it was formed under a non-democratic process, and since the executive still largely dominates the appointments process, critics of the Court allege that it lacks independence and credibility and that its decisions are unfairly favourable to the executive.



## 3 Principles of constitutional design

The MENA countries, like most countries that have adopted a constitutional court, have faced challenges in determining a procedure for appointing constitutional court judges that secures the court's relative judicial independence as well as political investment in the court from a broad array of political parties. In part, this entails protecting the court from executive capture and promoting its accountability to a democratic government. Below, a series of principles for designing constitutional court appointment processes is discussed, including the need for widespread participation from various sectors of politics and society in the judicial selection process, the advisability of entrusting the power of appointment and the power of removal to different political actors, and the importance of specifying the qualifications that constitutional court judges must hold.

### *3.1 The appointments process should encourage widespread participation from different political constituencies*

Courts that are appointed by a single political actor, particularly the executive, are at high risk of being unduly influenced by that actor. Appointments processes that are dominated by only a few actors may stand a better chance of creating a court that operates independently of external influence, but since they still exclude many segments of the political spectrum from the selection of judges they may fail to create a broad sense of political investment in the court. An appointments process that instead aims to be inclusive of all interests by engaging different branches of government, political parties, civil society organizations, legal academia, bar associations and similar groups in some element of judicial selection is best able to create a court that represents society and that is supported by many different political interests. This engagement can take many different forms, including public consultation processes, inviting nominations from various sectors, making the appointments process as transparent as possible at all levels of the process, allowing a particular group to appoint a certain number of judges on the court, allowing a group to veto appointments made by others, or tasking one group with nominating a set number of candidates and another with selecting a certain number of judges from the nominations provided. The unique political and social context of a country will determine the best ways to promote inclusion in appointments processes and foster political investment in the constitutional court.

### *3.2 Different actors should oversee appointment and removal processes*

If the same political actor or institution is responsible for both selecting and removing constitutional court judges, that actor will most likely be able to unduly influence the court. Judges will be aware that they owe their jobs to this entity. Therefore the powers



to appoint and remove judges from the constitutional court should be granted to separate political actors or institutions. As discussed in Part 5, some countries only permit the removal of a constitutional court justice if the court itself votes in favour of removal, which sometimes requires a supermajority vote. Other countries require a multi-step process to remove a judge, in which several different branches of government must approve the removal before it can be enforced.

### ***3.3 Qualifications should be set to select judges with a high level of legal expertise***

In addition to carefully constructing an appointments procedure that involves a wide range of political constituencies, policy makers can help ensure that the constitutional court will act independently and issue decisions on firm legal grounds by delineating the specific qualifications that constitutional court judges must hold. As will be reviewed in Part 5, many countries require that judges appointed to the constitutional court have served for a number of years as a judge prior to their appointment and have attained a certain level of legal education. Some countries also specify a minimum age that judges must be in order to be appointed or a maximum age beyond which judges are not eligible for appointment. Finally, some countries do not allow judges to hold particular offices or professions (e.g. political positions) while they are on the bench because those offices are seen as incompatible with judicial independence.



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## 4 Judicial appointments: design options

The process of appointing judges is central to establishing or reforming a constitutional court. The judicial appointments process determines who will interpret the constitution, so the institution(s) or actor(s) with the power to appoint judges to a constitutional court wield considerable influence over it. An appointments process that promotes a sense of political investment in the constitutional court by involving a wide range of political actors stands a better chance of achieving relative judicial independence: the balance between independence and accountability.

Generally speaking, appointments processes are divided into two categories: unitary and mixed. Under a unitary model, one branch of government controls the judicial appointments process; the mixed model distributes the appointment power among multiple branches of government and in some cases involves civil society organizations. This section introduces four models for constitutional court appointments and describes the experiences of six countries in implementing those models: 1) the **legislative supermajority model** in Germany; 2) the **judicial council model** in South Africa; 3) the **judiciary-executive model** in Egypt and Iraq and 4) the **multi-constituency model** in Turkey and Italy. The legislative supermajority model is the only unitary model considered in this report. The remaining three are mixed models.

Each country example includes a brief overview of the country's political and historical circumstances that led to the decision to implement a certain type of appointments model, followed by an analysis of how constitutional court appointments have been made in practice. The discussion of each appointment model concludes with a discussion of key policy considerations that constitutional drafters examining that model and attempting to draw lessons from it should bear in mind, including an assessment of the level of political investment promoted by the model.

### *4.1 The legislative supermajority model: Germany*

In a legislative supermajority appointments model, the legislature has primary control over the process of selecting judges. Depending on a country's political system, one or two chambers of the legislature are responsible for the election of judges. A defining feature of the model is that a candidate needs a supermajority for election. Whereas a simple majority would allow a governing party to dominate appointments procedures, a 'supermajority' of two thirds (or an even higher qualified majority) makes it more likely that opposition parties will play a meaningful role in the process. By requiring a supermajority vote to approve candidates, the judicial appointments process is intended to foster a process of negotiation and compromise between government and opposition leaders. Countries using the legislative appointments model may choose to delegate the process of nominating and negotiating over candidates to a smaller group of legislators,


sometimes constituted as an official, permanent parliamentary subcommittee or an informal ad hoc working group.<sup>31</sup>

The legislative supermajority model is used to appoint one of the most admired and well-known constitutional courts in the world, the German Federal Constitutional Court (FCC). Germany's transition to democracy following World War II emphasized the supremacy of the Constitution and the rule of law. As in other post-authoritarian transitions, the government's institutions were designed to establish a new constitutional order and prevent the return of dictatorship.

#### 4.1.1 Germany: historical and political context

One of the key elements of Germany's Basic Law, its post-World War II Constitution adopted in 1949, was the creation of the FCC. In 1948, a meeting of constitutional experts was convened to draft a Constitution for the new state of West Germany. The draft produced by these experts was then reviewed and amended by a constituent assembly, the Parliamentary Council (composed of elected representatives from West Germany's regional state legislatures) and eventually became the Basic Law. The Allied powers overseeing Germany's post-Nazi era transition and the German Constitution drafters all agreed on the general desirability of judicial review. This principle was not new to Germany; the Weimar Constitution of 1919 had established a State High Court, which exercised a limited form of judicial review, and the post-war drafters sought to build on some of the old Constitution's democratic framework. The drafters wanted 'a clean and unequivocal break with the Nazi experience', and saw a constitutional court as a way to guarantee the enforceability of fundamental rights. The drafters created the FCC (*Bundesverfassungsgericht*) to serve this purpose, and as the institutional guardian of the Basic Law.<sup>32</sup>

Both the drafters' conference and the Parliamentary Council debated aspects of the new FCC, in particular the Court's composition and areas of competence. However, the details of the procedures for appointing judges to the FCC were only partially addressed in the Basic Law, which provides that half of the judges of the Court shall be appointed by each chamber of the German legislature: the directly elected *Bundestag*, the lower chamber, and the *Bundesrat*, the upper chamber elected indirectly by the German *Länder* (states) (Article 94). The Basic Law does not indicate the required majority needed to make an appointment or the total number of judges on the FCC. Furthermore, although the Basic Law stipulates that the FCC should consist of federal judges and other members, it does not indicate the proportions of each. These questions were left to the new German legislature to decide when drafting the implementing legislation for the FCC.



The German legislature ultimately passed this implementing legislation, the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*, hereinafter FCCA), in 1951. Both of the major parties represented in the legislature, the then-governing Christian Democratic Party (CDU) and their opposition, the Social Democratic Party (SPD), were convinced that a broad agreement on the Court's design was necessary so that the FCC would have a firm foundation on which to begin working, and legislators strove to find consensus while debating the FCCA. However, they took divergent positions during the FCCA drafting process on a number of specific issues. The CDU proposed a large Court of 24 judges, of whom half should be selected from federal judges and given lifetime tenure on the FCC, while the others would serve six-year terms. The CDU also proposed that the entire *Bundestag* should be involved in electing its half of the FCC.<sup>33</sup>

In contrast, the SPD proposed that the *Bundestag* form an Electoral Committee composed of eight members, with parties represented in proportion to their standing in the *Bundestag*, which would choose judges on behalf of the entire chamber. The SPD believed that delegating appointment powers to a separate committee would better facilitate agreement among political parties and prevent the ruling party from dominating the process. The SPD also proposed requiring a supermajority vote for appointments made by the Electoral Committee and by the entire *Bundesrat*, arguing that this would also help preclude the possibility that any one party could dominate the appointments process: the Electoral Committee would elect judges by a three-fourths supermajority and the *Bundesrat* would use a two-thirds supermajority. In addition, the SPD feared that the existing German judiciary—which was generally thought to be affiliated with the CDU, and which included officials who had served under the Nazi regime—would dominate the new Court. Therefore it also advocated a smaller Court of ten judges, four of whom would be selected from the high federal courts to serve seven-year terms, while the six other judges would serve five-year terms.<sup>34</sup>

After extensive negotiation, the final FCCA struck a balance between the demands of the CDU and SPD. In its original form, the FCCA created an FCC with 24 judges, with four seats on each of the two senates reserved for high federal court judges. The appointment procedures prescribed for each legislative chamber were different: the *Bundestag* would select 12 judges via an Electoral Committee, with a three-fourths vote required to appoint a judge, whereas the *Bundesrat* would appoint 12 judges by a two-thirds vote (some FCCA provisions were later amended; see Section 4.1.2). The FCCA passed by an overwhelming majority in February 1951 and the Court became operational later that year.<sup>35</sup>

#### **4.1.2 Germany: appointments procedure**

The FCC consists of two independent senates, or panels, with mutually exclusive jurisdiction and personnel. The twin-senate structure was originally intended to assign

specific sets of constitutional issues to each senate. The first senate focused on matters of constitutional interpretation, including constitutional complaints brought by citizens and cases referred from other courts. The second senate addressed questions involving constitutional organs (e.g. disputes between branches of government), contested elections, impeachment procedures and the regulation of political parties. However, this structure was substantially reformed in 1956, after it became clear that the two panels faced unequal workloads.<sup>36</sup>

Initially, each senate included eight members with renewable eight-year terms, plus four career judges who held lifetime tenure, for 24 judges in total. However, both the number of judges and their term lengths have changed over time. The number of justices was first reduced in 1956 from 24 to 20, and then again in 1963 from 20 to 16 (discussed in Section 4.1.3). In 1970, the FCCA was amended to introduce non-renewable terms, which was seen as beneficial for judicial independence. Today, eight justices sit on each senate for non-renewable terms of 12 years. At least three of the justices on each FCC senate must be selected from one of Germany's five federal supreme courts, and must have served there for at least three years prior to being appointed to the FCC. For each of the FCC's two panels, half of the judges on the panel (four) are elected by the *Bundestag* and half by the *Bundesrat*. Once either chamber selects a candidate, the President formally appoints him or her to the Court (FCCA Sections 2–10). Germany's Ministry of Justice also plays a small role in appointing judges to the FCC by providing two lists of potential candidates to the *Bundestag* and *Bundesrat*: one list containing the names of all sitting federal judges who meet the criteria for appointment to the FCC and another containing the names of all candidates nominated for election by political parties (FCCA Section 8). However, the legislature is not required to select FCC candidates from these lists, and in practice these lists have not been decisive.<sup>37</sup>

### ***Appointment of FCC judges: Bundestag***

The *Bundestag* appoints judges indirectly through a 12-person Electoral Committee, which holds closed sessions. The members of the Electoral Committee are elected by a party list system, so that opposition parties are proportionally represented on the Committee (FCCA Section 6). Each party can present its own list of potential committee members or compile a list along with its fellow coalition parties. In practice, most elected members are legal experts, party leaders or other highly regarded politicians. Once elected, the Committee's members hold their positions until the end of the parliamentary term, which usually lasts four years. The Committee originally elected judges by a three-fourths majority, but now does so by a two-thirds majority vote, which means that at least eight Committee members must vote in favour of a candidate for that candidate to be appointed to the FCC (FCCA Section 6).<sup>38</sup>



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### ***Appointment of FCC judges: Bundesrat***

The *Bundesrat* selects judges as a plenary body, with a two-thirds majority vote required to select a judge. In practice, a special *ad hoc* advisory committee agrees upon candidates before the full plenary vote. This committee, mainly composed of the justice ministers of the federal states and other selected party officials, conducts negotiations on judicial candidates ahead of the vote, so that the success of the candidate is generally assured before the official *Bundesrat* vote. This advisory committee also coordinates with the *Bundestag*'s Electoral Committee to avoid duplicate nominations.<sup>39</sup>

### ***Informal appointment procedures***

Because German politics has been dominated by two major political parties, the CDU and the SPD, appointments to the FCC tend to follow a *de facto* partisan quota system. There is an informal agreement that each major party will appoint half of the judges to each of the FCC's two senates. Moreover, the two parties subdivide 'their' seats on each senate between three judges who are also party members and one judge who is considered politically neutral (i.e. not a political party member; generally, these judges are law professors). Over the years, two smaller political parties, the Free Democratic Party (FDP) and *Bündnis 90/Die Grünen* (Greens), have managed to secure representation on the FCC through alliances with one of the major parties. Usually, this means that the CDU occasionally defers its right to nominate a candidate to the FDP, and the SPD defers its right to the Greens. However, other minority parties, in particular the socialist party *Die Linke*, are still excluded from the appointments process due to their lack of affiliation with the major parties.<sup>40</sup>

Despite this *de facto* quota system, the requirement that each nominee be approved by a two-thirds supermajority vote in the relevant legislative chamber serves as an important moderating influence on the parties that select candidates for nomination. The supermajority requirement helps to protect minority interests and continues to ensure that no candidate holding extremely left- or right-wing political views is appointed to the FCC.<sup>41</sup>

### ***4.1.3 Germany: appointments process in practice***

The FCC is widely considered to be a model for constitutional courts in new democracies, as well as an important factor in the success of Germany's post-war democratization. After 60 years in operation, the FCC's appointments process functions smoothly, thanks to both formal and informal rules for how the political parties represented in the German legislature select the Court's judges. However, in its early years (particularly the 1950s) the FCC faced several challenges to its independence, and the appointments process required amendment. A review of the FCC's early history


supplies useful insights about the use of the legislative supermajority model in practice, and lessons for policymakers who are considering adopting this method.

While the first set of appointments to the FCC was relatively uncontroversial, once created, the status of the FCC was hotly debated. The first post-war government, headed by Chancellor Konrad Adenauer of the CDU, repeatedly criticized the Court for its alleged interference in politics. Adenauer's frustration with the FCC stemmed from its early decisions, which held that some of the most important policies of his CDU government were unconstitutional, including Germany's post-war rearmament and the introduction of a government-controlled TV station. Even while criticizing the Court, however, Adenauer's government recognized the important role it would play in political disputes, and sought to use the Court to its advantage.<sup>42</sup>

In the early 1950s, the CDU and the opposition SPD were engaged in a dispute over the European Defence Community Treaty. The CDU advocated joining the treaty, which would have required a defence contribution by the German military, because German rearmament was a core component of Adenauer's foreign policy agenda. The SPD opposed the treaty both because they thought it would make the reunification of West and East Germany nearly impossible, and because they argued that its provisions demanded too many concessions from West Germany.<sup>43</sup>

Both the CDU and the SPD looked to the newly formed FCC for support, launching several petitions in short succession. First, in February 1952 the SPD requested an abstract review proceeding in the First Senate of the FCC to assess whether the Basic Law permitted the military defence contribution that the treaty would require. At the time, it was widely believed that 'the Court's First Senate was dominated by judges loyal to the SPD, while the Second Senate was believed to be controlled by judges favourable to the CDU'. The CDU, fearing that the First Senate would rule in the SPD's favour, also sought the FCC's help: at the request of the CDU, in June 1952 West Germany's President asked the plenary FCC for an advisory opinion regarding the constitutionality of the treaty. The CDU hoped that because the Second Senate was dominated by judges loyal to the CDU, a plenary session of the FCC would yield a majority in favour of the CDU, thus ending the SPD's suit.<sup>44</sup>

The First Senate rejected the SPD's petition on the grounds that it could not review a treaty that had not yet been ratified. However, the SPD intended to re-submit its challenge to the First Senate as soon as the treaty was ratified. The CDU attempted to block the SPD from doing so: in December 1952, immediately after the treaty's ratification by the *Bundestag*, the CDU filed another FCC petition, this time before the Second Senate (seen as sympathetic to the CDU), to prevent the SPD from challenging the constitutionality of the treaty in the First Senate.<sup>45</sup>



Although it was well known that the FCC justices held differing opinions on the constitutionality of the treaty, the justices recognized that both the CDU and the SPD were trying to ‘forum shop’ in a way that would damage the FCC’s reputation, especially if the First and Second Senates issued conflicting opinions on the treaty. In response to this concern, the FCC issued a plenary resolution on 8 December 1952 stating that an advisory opinion by the plenary Court would bind both of its Senates. The FCC’s President, Höpker Aschoff, went a step further the following day, when he opened the FCC’s proceedings by reading a statement that offered a stinging rebuke to both the CDU and SPD, affirming that all future advisory opinions offered by the plenary FCC would be binding on both Senates and explicitly stating that the FCC had created this rule to prevent ‘attempts to target a suit to a particular senate’s jurisdiction for exogenous and irrelevant reasons’. The FCC also made it publicly known that 20 of its 22 sitting justices had supported the creation of the rule, in a show of FCC unity.<sup>46</sup>

Realizing that the strategy of seeking a plenary opinion from the FCC on the constitutionality of the treaty would fail, the CDU withdrew its request, but continued to pursue the case it had filed with the Second Senate. Adenauer and Justice Minister Thomas Dehler also went on the attack against the FCC, publicly claiming that the resolution regarding the binding nature of plenary advisory opinions had no legal basis, and stating that the government would not accept the decision. Both Adenauer and Dehler suggested that the FCC’s structure might be changed by revising the FCCA.<sup>47</sup>

However, the CDU’s attack on the FCC was short-lived: after Adenauer and Dehler’s remarks were widely criticized in the German media, including by outlets sympathetic to the CDU, the government realized that its attack of the FCC was generating a massive public backlash and quickly took steps to reaffirm its support of the FCC. It dropped all references to altering the FCCA, though the CDU would renew its efforts to change the FCC a few years later. Meanwhile, the treaty became a moot point after France failed to ratify it.<sup>48</sup>


At the same time the dispute over the European Defence Community Treaty was playing out before the FCC, the SPD and the CDU were also in conflict over the appointment of new judges to the Court. When two vacancies arose on the Court in the early 1950s, the inability of the opposition SPD and the governing CDU to nominate candidates of whom the other party also approved—which was necessary to obtain a supermajority vote of approval for those candidates—led to lengthy delays in filling those vacancies. During this period of tension between the CDU and the FCC, as well as between the CDU and the SPD, the CDU government began to question the FCCA’s appointments procedures. The CDU sought to reduce the total number of judges on the FCC, in part because several of the judges whose terms were up for renewal in 1956 were believed to be opposed to the government’s proposals for German rearmament. It also wanted to reduce the three-quarters supermajority vote required for



the *Bundestag*'s Electoral Committee to elect a judge to the FCC to a simple majority, hoping that this would allow a CDU-led coalition in the *Bundestag* to overcome SPD opposition to its nominees. The SPD opposed these proposals, accusing the CDU of trying to pack the Court. The CDU also advocated reducing the total number of FCC judges to 12; eliminating the two-senate system; and abolishing the legislative appointments procedure in favour of a judicial council composed of the presidents of federal high courts, law professors and presidents of state constitutional courts, which would compile lists of nominees when vacancies arose, and from which the *Bundestag* and *Bundesrat* would make appointments. Because both the SPD and the *Bundesrat* opposed the CDU's proposals, the CDU backed down, but raised the issue again a year later.<sup>49</sup>

Ultimately, the German legislature passed a compromise plan in 1956 in which the CDU and SPD agreed to lower the number of judges in stages: from 24 to 20 immediately, and then from 20 to 16 in 1963. The plan also reduced the supermajority requirement for the selection of judges by the *Bundestag*'s Electoral Commission from three quarters to two thirds, which made arriving at a compromise agreement easier while still protecting against court packing by one party. The agreement to reduce the number of judges on the FCC appeared to be driven less by the government's desire to eliminate judges who did not support its programmes than by a general concern for the Court's administrative efficiency. Following this compromise, both the CDU and SPD began to nominate more centrist candidates to the FCC, which resulted in more judges being elected unanimously. While the compromise agreement did not eliminate tensions between the two parties or between the government and the FCC, controversies over FCC appointments became less common, and the informal agreement between the CDU and the SPD to divide FCC appointments between them solidified. A final amendment to the Court's appointments procedure was carried out in 1970, which limited all FCC judges to one non-renewable term of 12 years. This was done primarily to eliminate any suspicion that the German legislature could exert undue pressure on FCC judges, since prior to this amendment the German legislature was responsible for deciding whether or not to re-elect FCC judges after their eight-year term ended.<sup>50</sup>

After its turbulent beginnings in the 1950s and early 1960s, the FCC increasingly managed to isolate itself from party politics and strengthened its authority as an independent judicial body. In the following decades, the FCC issued many decisions that have been unpopular with both the government and the opposition, particularly regarding challenges brought by individual citizens alleging violations of their constitutional rights. Public support for the FCC, echoed and aided by the independent German media's support for the Court, has played a critical role in discouraging the executive's attempts to interfere with the FCC. As the Court's popularity with the public increased, Germany's political elites became far more reluctant to openly question



its legitimacy, limiting themselves to criticizing the merits or outcomes of particular cases. Indeed, the public's respect for the FCC occasionally prompts political parties to try to bolster their own popularity by claiming that its decisions validate their own policies; the government and opposition parties sometimes both claim that the same FCC decision supports their competing positions.<sup>51</sup>

Similarly, the process of appointing judges to the FCC moves relatively smoothly in most cases, thanks to the informal agreement between the CDU and the SPD on dividing seats on the Court between them. Even when the parties disagree over specific nominations, they usually keep the identities of nominees private until a compromise is reached. For the few nominations that are controversial enough to make headlines, the problems centred on the potential candidate's political views and ideological differences between the parties. For example, in 1993, the CDU opposed the SPD-nominated candidate Herta Däubler-Gmelin because she was an SPD party member and had a reputation for holding strong ideological opinions, for example opposing the NATO Double-Track Decision (which deployed missiles in Western Europe) even though a majority of her party favoured it. Däubler-Gmelin's nomination ultimately collapsed after the SPD failed to win the CDU's support during negotiations in the *Bundestag*. Another exceptional example was the 2008 SPD nomination of law professor Horst Dreier. Dreier was criticized from all sides: by conservatives for his liberal views on stem cell research and by liberals for his alleged support for limited exceptions to the absolute prohibition of torture, as in the 'ticking-time-bomb scenario'. Eventually, Dreier withdrew his candidacy.<sup>52</sup>

#### ***4.1.4 The legislative supermajority model: key constitutional considerations (medium level of political investment)***

Legislative control of judicial appointments can help bolster the constitutional court's accountability to the people, as represented by political parties. Democratically elected legislatures are intended to represent and reflect the will of their constituents. A court composed of justices chosen by the parties in the legislature improves the public's perception of the court as a political and moral authority and neutral arbiter. Furthermore, if this model is used in a federal state, where the second chamber of the legislature consists of state representatives (or where state-level officials are otherwise involved in selecting judges), it can promote a sense of political investment in the court on a regional level through the involvement of the second chamber.

Requiring a supermajority vote to approve a nominee for the constitutional court offers two benefits. First, it ensures that both the current legislative majority party and opposition parties are politically invested in the court's composition. The supermajority requirement guarantees that the governing party cannot elect a candidate without having consulted the opposition, and *vice versa*, except in rare cases in which one party


holds a supermajority in the legislature. Assuming that all major political forces are represented in a country's legislature, the legislative appointment procedure can be said to include the interests of the broader public and major societal groups. Studies of Germany's FCC show that the consensus-oriented appointments procedure generally prevents the Court from systematically discriminating against any given political actor, because most political interests are represented on the Court.<sup>53</sup>

Second, a supermajority requirement tends to favour moderate judicial candidates whose ideological views are acceptable to most or all major political parties. This can help provide a certain degree of stability in a court's rulings, and adherence to precedent. Of course, this could also be seen as a disadvantage, because it prevents candidates with especially progressive or conservative political views from being appointed to the bench, however impressive their legal qualifications may be.

The exact supermajority required should be carefully considered when implementing this model. If it is too high, it may result in deadlock or long delays in filling vacancies on the Court if the legislature is unable to identify nominees who can gain that level of support. For example, the supermajority required to confirm a nominee for the FCC in the Electoral Committee of the *Bundestag* was initially set at three-quarters. Yet after observing the lengthy delays in the appointments process resulting from the need to find a candidate who would gain such wide approval, Germany's major parties soon agreed to lower the supermajority to two thirds.

One potentially significant disadvantage of the legislative supermajority model is its inevitable ties to the political party system. This model may tend to privilege constitutional court candidates who are members of (or otherwise supported by) the country's dominant political parties, and disadvantage candidates who have no political affiliation or who are affiliated with minority parties. In turn, the court's membership may be less politically inclusive than desired. This is a particular concern for countries undergoing a democratic transition after authoritarianism, as are many MENA region countries. In these cases, one party may dominate the legislature while new political parties are struggling to win seats in the legislature and gain greater stature in the political system. Excluding smaller political parties from the appointments process will reduce the sense of political investment in the constitutional court felt by those parties and by the citizens who support them. Similarly, if the public perceives the appointments process as determined simply by political horse-trading rather than by seeking out the best candidates for the job, the court's legitimacy as a whole may be damaged.

The supermajority requirement also makes the success of this model highly contingent upon the ability of the political parties represented in the legislature to cooperate and compromise. If a vacancy arises on the constitutional court at a time when the major



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political parties are bitterly divided, obtaining the supermajority required to elect a judge to the court may be difficult, resulting in delays and deadlock in the nominations process. Furthermore, as the German experience shows, this model operates most smoothly when (1) the same political parties dominate politics over a long period of time and (2) those parties are able to reach an informal agreement on how to allocate seats on the court bench among themselves. In a more volatile legislative environment, it may be more difficult to muster sufficient support among different parties to reach the supermajority vote required to appoint a candidate. For this reason, the legislative supermajority model may be less suitable for MENA region countries emerging from authoritarian rule, because new democracies often experience a degree of volatility in political parties: new parties form while others dissolve, and political parties may gain or lose a large number of seats in parliament with every election cycle.

Unitary legislative control over judicial appointments has understandable advantages, particularly for countries emerging from authoritarian rule, where corrupt presidents and elites have previously co-opted the judiciary and appointments process. However, this model does not necessarily insulate judicial appointments from any executive branch influence. In a parliamentary system, this model also provides indirect leverage for the executive, since the executive is generally controlled by the majority party (or coalition) in the legislature.

If the legislative appointments model is used in a country in which the legislature is consistently dominated by the same party, the model may collapse into executive control of the appointments process because judges may be selected based on their loyalty to the ruling party. Just as the executive branch can capture a court, so too can a political party or legislative majority, if the political party structure does not create real competition between parties for control of the legislature.

### *The model as applied in Germany*

The experience of the FCC offers a few additional points for constitutional drafters to consider. One frequent critique of Germany's legislative supermajority model stems from the way in which the *Bundestag* selects judges. These judges are not elected by the full German legislature, but rather by an Electoral Committee formed of *Bundestag* members. Opponents of this system (most often smaller political parties) have repeatedly argued that this approach is undemocratic because the small Electoral Committee does not adequately represent all political parties in the *Bundestag*. In addition, the negotiations over nominees are led by a small group of powerful party representatives in strict confidence, rendering the whole process detached from public scrutiny and insufficiently transparent. However, attempts to amend the appointments procedure have thus far been unsuccessful; a 2012 FCC decision affirming the

constitutionality of the Electoral Committee makes any change in the near future highly unlikely.<sup>54</sup>


Seen as a whole, the German appointments procedure, combined with non-renewable limited terms for judges, has created a strong and independent Constitutional Court that is widely respected domestically and internationally. However, constitutional drafters considering the legislative supermajority model must take into account the many factors operating in Germany's favour when implementing this model, in particular its robust political party system. An appointments procedure run by the legislature requires the existence of strong, stable and competitive political parties that are capable of negotiating and compromising with each other. Other factors contributing to the FCC's success include the commitment to the rule of law that has evolved over time within the German judiciary, as well as the strong public support the Court enjoys, which is strengthened by an independent media. Finally, the creation of the FCC and its success may also be attributed to factors unique to Germany's democratic transition, such as the influence of the post-war occupying forces and the legacy of the Holocaust and the Nuremberg trials.<sup>55</sup>

#### ***4.2 The judicial council model: South Africa***

The judicial council model is a mixed appointments model. Judicial councils are intended to insulate judicial appointments from partisan politics, and to foster judicial independence by acting as an intermediary between the executive and legislative branches and the judiciary. In so doing, they generate political investment in the court by opposition political parties by reducing the risk that the governing party will capture the court through appointments. Judicial councils erect a buffer around appointments to the constitutional court by diversifying the appointments process through involving multiple political branches and, often, non-political groups such as bar associations, legal scholars and other civil society actors. There is no set formula for the composition of a judicial council; countries will select a council's membership according to their own political context.<sup>56</sup>

The judicial council's precise role in the constitutional court appointments process varies by country but, generally speaking, the council is responsible for some or all of the following:

- soliciting applications or nominations for vacancies on the constitutional court;
- reviewing the applicants or nominees and creating a shorter list of candidates to investigate more thoroughly;
- conducting in-person interviews of the candidates on this shorter list and/or other investigations (for example, requesting financial or other documentation from the



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candidate and speaking to each candidate's colleagues and peers about his or her qualifications and suitability); and

- selecting either one candidate to be appointed to the court by the executive or legislature or a shortlist of candidates from which the executive or legislature will select a person to appoint to the court.

Some judicial councils also oversee the discipline, promotion and/or removal of judges. One of the leading examples of the judicial council model is South Africa's Judicial Service Commission (JSC), which manages all judicial appointments. This Commission was created during South Africa's historic transition from apartheid to multiparty democracy in the early 1990s. In stark contrast to the apartheid-era judiciary, in which judges were unilaterally appointed by the executive branch and were generally barred from engaging in judicial review of Parliament's actions, the new South African Constitution sought to establish an independent and impartial judiciary. The Constitution also established a new Constitutional Court with full powers of judicial review. The JSC, in turn, was created to manage many judicial functions, including the selection of judges for the Constitutional Court.

#### ***4.2.1 South Africa: historical and political context***

Apartheid-era South Africa was characterized by legalized political and social discrimination against the majority black population (as well as other non-white ethnic groups) perpetrated by the Afrikaner-dominated National Party. Under apartheid, the President officially made all judicial appointments; in practice, the Minister of Justice played the key role in selecting appointees, sometimes on the advice of the chief justice or judge president of the relevant judicial division. There was no transparency in the selection process for judicial appointees, but there is general agreement that many judicial candidates were chosen for their pro-apartheid political views and personal connections. Until the beginning of South Africa's democratic transition in 1990, the judiciary was entirely white and almost entirely male. In the early years of apartheid, courts lacked the express power to review the constitutionality of legislation and did so exceedingly rarely; in 1983 a new Constitution explicitly stripped the courts of judicial review powers over parliamentary acts. Judges had no power to strike down laws that violated human rights, and very few judges even spoke out against the racist apartheid system. Most judges limited themselves to determining Parliament's intent in promulgating the law and enforcing it.<sup>57</sup>


As a result, when South Africa began the process of democratic transition, judicial reform was a key focus area during the negotiations between the National Party, the African National Congress (ANC) and other opposition parties. The ANC, which was virtually certain to take power after the first democratic elections were held, sought to transform South Africa's judiciary, making it more diverse and transparent, granting it

the power of judicial review, and creating a new, powerful Constitutional Court to be the final arbiter on the constitutionality of government actions and to bolster public confidence in the judiciary.<sup>58</sup>

The importance of South Africa's Constitutional Court cannot be overstated. Viewed as the 'institutional embodiment of South Africa's new democracy', its structure and functions were widely debated during the negotiations that shaped South Africa's democratic transition. These negotiations took place in two stages: an initial phase in which an interim Constitution was agreed upon by the ANC and the National Party to govern the country until democratic elections were held, and a second phase during which the newly elected Parliament produced a final Constitution for a post-apartheid South Africa.<sup>59</sup>

During negotiations for the interim Constitution, it was generally agreed that 'an overwhelmingly white and male judiciary [could] not adequately and fairly deliver justice to a majority black and female population'. But there was disagreement over the appointment process. The National Party, anticipating a future role in government, wanted to retain as much power for the executive over judicial appointments as possible, as did many ANC representatives. However, some members of the ANC and a host of other political parties and interest groups that participated in the negotiation process sought to create a more participatory appointments process that included a broader variety of actors that would insulate judicial appointments from the governing party (the ANC).<sup>60</sup>

The Democratic Party, which had served as the main opposition party during apartheid, also advocated a participatory process that would include non-governmental actors, such as members of the legal profession. Many academics and civil society groups also supported this position. Another model proposed during negotiations was that appointments be made by the President in consultation with a joint standing committee of Parliament. Under this model, each nominee would need to gain the approval of a three-fourths majority of a joint sitting of both houses of Parliament before being appointed by the President. This proposal proved short-lived, however: the Democratic Party opposed it because they wanted non-political actors to play a role in appointments as well, to prevent the process from becoming a mere exercise in political horse-trading between parties. The National Party opposed the proposal because they favoured executive-controlled appointments, on the assumption that South Africa's transitional government would include members of minority parties who would have veto powers in certain circumstances. As a result, they strongly favoured judicial appointments by the President, acting on the advice of the cabinet, because they believed that they would have veto power as a minority cabinet member. The ANC, which everyone expected to control a majority in the new government, also supported this model.<sup>61</sup>



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However, when it became clear that no minority party would have the option of a veto over Constitutional Court nominees, the Democratic Party opposed the executive-based appointments system and insisted that the parties renegotiate the appointments process. The Democratic Party warned that giving the executive control over Constitutional Court appointments would allow it to manipulate the process and jeopardize the Court's independence from its inception. A wide variety of media outlets, along with prominent representatives of the legal and judicial professions (including the deans of various law schools around South Africa), joined the Democratic Party to oppose an executive-based appointment system and press for the inclusion of members of the legal profession in the appointments process as a way to erect a buffer between the governing party (the ANC) and the Court.<sup>62</sup>

Building on these proposals, the Democratic Party argued that the JSC, which was established during the negotiations as the body that would carry out appointments for all other courts in South Africa, should also appoint the Constitutional Court's judges. Negotiations over the membership of the JSC had been hotly contested, and the ultimate compromise created a large commission that included members of the legislature, the judiciary, the executive, the legal profession, civil society and academia. This satisfied proponents of an independent commission by ensuring that the Commission would include a large contingent of legal professionals while also preserving a role for the executive and the legislature, thereby promoting the idea of judicial accountability to the public. The Commission's appeal lay in its diverse composition. Ultimately, this proposal won the day in the negotiation process. The interim 1993 Constitution set out the rules for appointing the first Constitutional Court judges (Articles 97–99). With a few minor changes, these rules were implemented in South Africa's 1996 Constitution, which uses a judicial council model for Constitutional Court appointments (Article 178).<sup>63</sup>

#### ***4.2.2 South Africa: appointments procedure***

The South African Constitutional Court is comprised of 11 justices: the Chief Justice, the Deputy Chief Justice and nine other justices (Article 167). Justices are usually appointed for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first (Article 176). However, in certain cases a justice may remain on the bench for 15 years, or until he or she reaches the age of 75, if necessary to fulfil the legal requirement of 15 years of active service. Appointments to the Constitutional Court are managed by the JSC, which also facilitates disciplinary matters and the administration of justice generally (Article 178).<sup>64</sup>




### *Composition of the Judicial Service Commission*

The JSC is comprised of 23 members. Compared to judicial councils in other countries, the JSC has a relatively large number of members, because it is intended to represent ‘a wide section of the South African legal and political establishment’ and to include as many different interest groups as possible. Eleven of the JSC’s members are appointed by the President: the presiding Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, the Minister of Justice, two practicing advocates and two practicing attorneys (who are appointed by the President after being nominated by their respective professions) and four laypersons selected after consultation with the leaders of all parties represented in the National Assembly (Article 178(1)). Six of the remaining 12 members of the JSC are chosen from among members of the National Assembly, the lower house of Parliament. At least half of those six must be members of opposition parties (Article 178(1)(h)). Another four members are chosen from among the permanent delegates to the National Council of Provinces, the upper house of Parliament (Article 178(1)(i)). The remaining two members must be a law professor designated by his or her peers at South African universities, and one judge president, also designated by his or her judicial peers (Articles 178(1)(g) and (c), respectively).<sup>65</sup>

### *The appointments process*

The first stage of the appointments process is identical for all judicial appointments, including the Constitutional Court. When a judicial vacancy arises, the head of the relevant court notifies the JSC, which publishes a call for nominations. Candidates are required to submit a completed application, which includes the candidate’s resume, a statement confirming that he or she is a member in good standing in his/her professional organization, and a questionnaire that ‘solicits information about the applicant’s personal and professional life, including the applicant’s contribution in the struggle against apartheid, commitment to the principles underlying the Constitution, financial interests, practice, and other relevant experience’. This application package is then circulated among JSC members, and a subcommittee is appointed to examine the applications and select a shortlist of candidates to interview.<sup>66</sup>

In determining which candidates to interview, the Constitution requires that consideration be given to South Africa’s gender and ethnic composition (Article 174(2)) in the interest of creating a diverse and representative judiciary. The JSC has indicated that they consider this to mean more than simply increasing the numbers of black justices and women on the bench: ‘the values and visions of the appointed individuals must also comport with the explicit social justice commitments embodied in the Constitution’. Once the subcommittee has selected the candidates to be interviewed, the list is distributed to the plenary JSC. Once approved, the list of interviewees is published and interviews are conducted, which are open to the public.<sup>67</sup>



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At this stage in the selection process, the JSC's role differs depending on whether the vacancy pertains to the Constitutional Court or another court within the South African judiciary. In all cases, the President makes the formal appointment to the Court. However, for all appointments except those to the Constitutional Court, the President is bound by the advice of the JSC (Article 174(6)). In practice, this means that the JSC recommends only one candidate after the interview process, who is then appointed by the President.<sup>68</sup>

The President appoints the Chief Justice and Deputy Chief Justice of the Constitutional Court after consulting with the JSC and the leaders of the political parties represented in the National Assembly. For the remaining nine members of the Court, the President's appointment power is subject to important limitations due to the Court's crucial political role. The JSC is required to prepare a list of candidates for the President with three names more than the total number of appointments to be made. The President must make the appointments from this prepared list of nominees, but may reject the first list of candidates or particular candidates on the list, giving reasons for the rejection. In this case, the JSC must supplement the list with additional candidates. The President must choose candidates from this supplementary list; an additional list of candidates cannot be requested. The President must also consult with the Constitutional Court's Chief Justice and the leaders of all parties represented in the National Assembly before making a final decision on whom to appoint. At any given time, at least four of the justices on the Court must have served as judges prior to their appointment to the Constitutional Court.<sup>69</sup>

#### **4.2.3 South Africa: appointments process in practice**

In a short span of time, South Africa's Constitutional Court has become one of the most respected in the world. Thanks both to the prominent jurists who were the Court's first appointees after its creation, and to the ruling ANC's early commitment to respecting the rule of law, the Court has been able to operate as an effective check on executive and legislative power. It has also played a key role in consolidating South Africa's democratic transition.<sup>70</sup>

The Constitutional Court has not shied away from confrontations with the ANC-led government. Among many decisions striking down or demanding modification of ANC-supported laws and policies, the *Treatment Action Campaign* (TAC) and *Glenister* decisions stand out for the international attention they received and their impact on the government.

In 2001, South African civil society organizations, led by the TAC, lodged a legal challenge against the government's HIV/AIDS prevention and treatment strategy. They argued that the government had an obligation to implement an effective strategy to


prevent the transmission of HIV from a mother to her child, and that the government programme in place at the time violated South Africans' constitutional rights by restricting access to nevirapine, a drug shown to prevent mother-to-child transmission. The government had ample supplies of nevirapine, but argued that further research on the safety of the drug and a comprehensive implementation programme were needed before it was made widely available.<sup>71</sup>

In a landmark judgement, the Court held that the government's restrictions on the distribution of nevirapine did not fulfil its constitutional obligation to provide reasonable measures within available resources for the progressive realization of the right to health. It ordered the government to revise its HIV/AIDS strategy, including the removal of restrictions on access to nevirapine. The judgement was an embarrassment to then-President Thabo Mbeki and his Ministry of Health, which had already been widely criticized by public health specialists for its insufficient response to the AIDS epidemic in South Africa.<sup>72</sup>

The *Glenister* case concerned South Africa's anti-corruption unit. In 1999, the government created the Directorate of Special Operations (known as the Scorpions), a special investigative unit focused on corruption and organized crime. The Scorpions' work drew both praise and criticism. After numerous investigations into high-ranking ANC members, including then-Deputy President Jacob Zuma, the government accused the Scorpions of acting outside their jurisdiction and closed the unit. Opponents criticized the ANC for shuttering what many people saw as a highly effective investigative team, and alleged that the Scorpions unit was closed because of the embarrassment it had caused the ANC. It was replaced by a new Directorate for Priority Crime Investigation, nicknamed the Hawks.<sup>73</sup>

Hugh Glenister, a businessman, challenged the constitutionality of the law that closed the Scorpions and replaced the unit with the Hawks. In 2011, the Constitutional Court ruled that this law was unconstitutional because the Constitution obligates the government to establish an effective anti-corruption mechanism, and that the structure of the Hawks did not fulfill this obligation because the unit was insufficiently independent: the law's requirement that a Ministerial Committee coordinate the Hawks' activities, and the insufficient job security protections for members of the Hawks, rendered the unit vulnerable to government pressure. The Court's ruling required the government to remedy these flaws in the Hawks' structure.<sup>74</sup>

A number of ANC officials have publicly criticized the Court and called for reforming various aspects of the judiciary, presumably in response to Court decisions ruling against the ANC's position on various issues. These statements are generally swiftly taken up for debate in the media and by various civil society actors, and often result in criticism of the ANC. Only a few years into the JSC's operations, then-ANC Secretary-General



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Kgalema Motlanthe raised the possibility in 1998 of reviewing the JSC's role, remarks which were likely prompted by ANC displeasure with the JSC's appointments. In 2005, the National Executive Committee of the ANC said that 'many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems', warning that this could result in 'popular antagonism' toward the judiciary. Again in 2008, ANC Secretary-General Gwede Mantashe made remarks about the Constitutional Court that suggested he viewed it as 'counter-revolutionary'; the ANC distanced itself from the comments and Mantashe later claimed he was misquoted. Finally, in 2012, President Zuma called for a review of the Constitutional Court's decisions, possibly including its powers. The results of this review and its practical impact on the Court have yet to be seen.<sup>75</sup>

The ANC has not yet taken serious steps toward changing the Constitutional Court or the JSC's central role in the appointments process. However, the Court enjoys only limited public support in South Africa, and like any other court, it has no means of resisting changes to its structure, powers or appointments process. The ANC's persistent control of the executive and legislative branches highlights how vulnerable the Court could be if the ANC decides to alter the appointments procedure or exert more influence over selecting members of the JSC. The Court's appointments procedure has already drawn criticism, chiefly due to the ANC's dominance of the JSC and a perceived lack of transparency in the selection process.<sup>76</sup>

### ***One-party dominance***

The ANC's continuing popularity has an impact on Constitutional Court appointments that may have serious long-term implications for the Court's independence. The JSC was intended to encompass a wide range of political interests and to reflect the diversity of South African society. For this reason, the JSC's members include both political and non-governmental actors, and the government's power to select Commission members is divided between the executive branch and the two chambers of Parliament. In practice, because of its electoral dominance, the ANC selects the majority of the JSC's members, raising questions as to whether the JSC can be considered truly independent.

As described above, the President appoints 11 of the JSC's 23 members. Four of these appointees must be nominated by the advocates' and attorneys' professions, however, and should not be viewed as purely presidential appointments. In addition, the Chief Justice of the Constitutional Court and the President of the Supreme Court of Appeal are nominated by the President after consultation with the JSC and, in the case of the Chief Justice, with the party leaders in the National Assembly (Article 174), thus somewhat tempering the President's ability to make these appointments unilaterally. However, both the National Assembly and the National Council of Provinces (NCOP), which together select another ten of the Commission's members, are dominated by the


ANC, which holds 66 and 65 per cent of the seats in the National Assembly and the NCOP, respectively. Thus even with the Constitution's requirement that three of the six National Assembly appointees to the JSC must be members of the opposition, the ANC effectively has the power to appoint well over half of the Commission's 23 members.<sup>77</sup>

In the early years of the JSC's operations, the large size of the Commission and the wide range of interest groups represented appeared to prevent any one group from dominating its decisions. The fact that the vast majority of Commission members were lawyers, judges or law professors also appeared to temper political influence over the Commission. These factors help to insulate the JSC against ANC dominance, although the ANC has recently taken several steps that may suggest an increased effort to exert influence over the Court.<sup>78</sup>

In 2009, it replaced a member of the opposition party Democratic Alliance (the only member of the opposition from the NCOP on the JSC) with an ANC member. The replacement was completely legal; the Constitution does not require that any set number of opposition members from the NCOP be appointed to the JSC. However, in earlier years the parties in the NCOP had followed an informal practice of designating Commission members in proportion to the relative strength of party representation in the NCOP, thereby reserving at least one seat on the Commission for an opposition party member. As of 2011, that practice appears to have been abandoned, and all Commission members from the NCOP are now ANC designates.<sup>79</sup>

Concerns about the ANC's influence over the Court have been heightened by controversies over its Chief Justice, who according to the Constitution is selected by the President. In 2011, President Jacob Zuma attempted to extend then-Chief Justice Sandile Ngcobo's term beyond the constitutionally mandated maximum length, relying on the Judges' Remuneration and Conditions of Employment Act as his legal basis for doing so. This decision was widely criticized and resulted in a challenge brought before the Constitutional Court, which unanimously held that both the relevant section of the Act and the President's extension of Chief Justice Ngcobo's term were unconstitutional.<sup>80</sup>

Chief Justice Ngcobo ultimately stepped down, but President Zuma again drew criticism when it came time to select his replacement. Deputy Chief Justice Dikgang Moseneke was viewed as a frontrunner for the position, having served as acting Chief Justice after Ngcobo's departure. However, Moseneke was reportedly disfavoured by President Zuma for personal reasons, and the President appeared to snub Moseneke by appointing Mogoeng Mogoeng (who many perceived to be less qualified) instead. However, other Constitutional Court appointments made by Presidents Zuma and Kgalema Motlanthe (a caretaker president who took office after the resignation of



President Thabo Mbeki) have been widely applauded, and provide reason to contest the accusation that the ANC is trying to pack the Court. Former Chief Justice Sandile Ngcobo, initially appointed to the Court by Nelson Mandela and promoted to Chief Justice by Zuma, has been praised for his independence and support for democratic participation. Justice Edwin Cameron, appointed by Motlanthe, is an openly gay and HIV-positive judge who publicly criticized former President Mbeki's HIV/AIDS policies.<sup>81</sup>

### *Transparency*

Apartheid South Africa's completely opaque process of selecting judges made transparency in judicial selection processes a key goal for the new South African democracy. The JSC is intended to help fulfil this goal. It publishes all judicial vacancies with an open call for nominations, publishes the shortlist of candidates selected for an interview, solicits comments on those candidates prior to the interviews from several different legal associations (including the South African Law Society and the Bar Council), opens the candidate interviews to the public, and often refers to third-party information provided to the Commission about a particular candidate during interviews, rather than keeping such opinions confidential. The print media is also permitted to attend the JSC's interviews and report on them, further contributing to the transparency of the process.<sup>82</sup>

Overall, the JSC's procedures for selecting judicial appointees are markedly more transparent than the apartheid-era appointments process. However, the first stages of the JSC's process, when it reviews applications for a posted judicial vacancy and decides which candidates to shortlist for interviews, are less transparent. It does not publish a list of all individuals who apply for a judicial vacancy, which makes it difficult to discern how they select the shortlisted group to interview. Furthermore, the JSC's post-interview deliberations on which candidates to recommend for appointment are also not public. The JSC defends this practice by arguing that it protects the privacy of individuals who are not shortlisted, that making deliberations public would make Commission members more reluctant to express their unvarnished opinions of candidates' qualifications, and that little would be gained by disclosing its private deliberations. The JSC has also made public the criteria it looks for in judicial candidates, which sheds some light on the focus of their private deliberations; these criteria include characteristics such as intellectual ability, fairness, independence, perceptiveness, courage and integrity.<sup>83</sup>

The developments summarized here have fuelled fears that the ANC is attempting to exert undue influence over the Constitutional Court, though it is too early to assess the validity of those fears. Some scholars note that fewer applicants are coming forward when the JSC announces a vacant judicial post, and have suggested that this may be due

to the perception that the JSC is controlled by the ANC, and that therefore the successful candidate has been chosen before the appointment process even begins. It is not yet clear whether these issues will affect the Court's independence, and at present the Constitutional Court continues to be one of the most admired in the world.<sup>84</sup>

#### ***4.2.4 The judicial council model: key constitutional considerations (high level of political investment)***

The judicial council model's greatest strength is the opportunity it presents to involve a wide spectrum of society in the judicial appointments process. Diversity of membership on the council both reduces the risk that any one political group will be able to dominate the appointments process and promotes a broad sense of political investment in the court, since many different actors play a role in forming the court. For example, the South African JSC includes members of the legislature (including members of opposition parties) and the judiciary, legal professionals and law professors. Its inclusion of non-governmental members, and the constitutional requirement that a set number of seats (three) be reserved for opposition political parties, are both good ways to promote the representation of many different interests on the judicial council. Particularly if a country's history suggests that one political party may remain dominant for long periods of time, creating constitutional requirements that aim to guarantee opposition party representation on the judicial council at all times is advisable.

Although the JSC was designed to include a wide range of political constituencies, South Africa's experience also shows that a judicial council is not immune from capture by a political party. Although South Africa's political context is unusual—few democracies in the world feature one political party that is as consistently dominant in both the executive and legislative branches as the ANC—it nonetheless provides a lesson for policymakers considering adopting a judicial council. South Africa's President is responsible for appointing almost half of the JSC. When these seats are added to the seats appointed by Parliament, which is dominated by the ANC, the President's party appoints a clear majority of the members of the JSC. Given the concern in South Africa that this may lead to ANC control of the JSC, policymakers composing a Judicial Council should take care to ensure that no single actor or political group can control a large proportion of seats on the Judicial Council. Ultimately, the Constitutional Court will only be as independent as the judicial council that selects its judges. This risk has not materialized yet in South Africa, but there is the danger that it could. Therefore careful attention must be given to the composition of a judicial council to reduce the risk of capture by a dominant political party. One option for dealing with this problem is to ensure that institutions controlled by the governing political party do not appoint a majority of seats on a judicial council.





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### *The importance of transparency in a judicial council's proceedings*

The South African experience also highlights the importance of transparency in the judicial council's proceedings. On the whole, the JSC is highly transparent. However, the lack of transparency in the candidate shortlisting process has raised concerns, and opened the JSC to accusations of bias towards ANC-friendly candidates. Over time, this may result in diminished political and popular support for the JSC as an effective barrier against executive capture of the judiciary.

### *Insulation of judiciary from partisan politics promotes judicial independence*

A judicial council also creates a barrier between the process of selecting judges and the often combative atmosphere of partisan politics. This can be particularly helpful for encouraging public trust in the judiciary in countries emerging from authoritarian rule, where the judiciary may previously have been under the control of the executive. While the executive and legislative branches often select members of the council, they are not directly involved in the appointments process (with certain exceptions, as in South Africa, where the executive appoints the Constitutional Court's Chief Justice). This can help counter accusations that judges' decisions are politically motivated, because the judges are not selected directly by political parties. Over time, this can promote public trust and confidence in the judiciary as an independent arbiter of political disputes.

### *4.3 The judiciary-executive model: Egypt and Iraq*

The judiciary-executive model is a mixed appointment model that divides the power to appoint judges to a constitutional court between the judicial and executive branches. In most iterations of the model, the judiciary (most often representatives of the highest courts) nominates either one or a shortlist of candidates to the constitutional court. The executive must then select a candidate (or approve the selection made by the judiciary) and formally appoint the judge to the court. Other variations of the judiciary-executive model provide that the executive nominates either one candidate or a list of candidates to the court, and the judiciary must appoint the single candidate or a name from the list. By relying on the joint consent of the judiciary and executive, the model intentionally excludes the legislature.

The stated rationale behind the judiciary-executive model is to create an independent court that is insulated from the short-term political concerns of the legislature, while maintaining accountability to the public through the executive. Excluding the legislature is designed to protect the appointments process from being held hostage by political parties that may try to place their supporters on the court or that are unable to agree with other parties regarding the best candidates for the court. However, because it is also desirable for the members of a court to have a degree of accountability to the public



through the elected branches of government, the judiciary-executive model includes a key role for the executive (president or prime minister), who is typically elected. Judicial involvement in appointments is intended to ensure that they are based on a candidate's qualifications and legal training rather than political affiliation, thereby safeguarding judicial independence. Including both the judiciary and the executive in appointments helps prevent the executive from exercising too much control over appointments and simply selecting judges who will rule in its favour, while also preventing the appointments process from becoming too insular and detached from the broader political context, as might be the case if the judiciary were solely responsible for selecting the constitutional court's membership.


However, the model carries significant risks. Completely removing the legislature from the constitutional court appointments process is likely to generate distrust of the court on the part of political parties. Because parties will have little ability to influence appointments to the court, they will not invest in it politically, and they may attack the court as illegitimate or biased if its rulings displease various political parties. Furthermore, because the only elected official involved in appointments is the president or prime minister—who may not be directly elected by citizens—the court is unlikely to be seen as democratically accountable to the public, further diminishing its public support. The constitutional court will thus be highly susceptible to attack from politicians who are unhappy with its rulings.

The experiences of Egypt and Iraq, which both use the judiciary-executive model for appointments, underscore the problems that can arise. The Egyptian case illustrates how the model can leave the judiciary vulnerable to domination by the executive branch, and shows how the judiciary has struggled to balance independence with political accountability during the post-Mubarak transition. The Iraqi experience demonstrates how a flawed constitution-drafting process, coupled with a difficult and volatile political context and the use of the judiciary-executive model, can result in a court whose legitimacy is seriously damaged by perceptions that it is dominated by the executive branch.

### **4.3.1 Egypt**

#### **4.3.1.1 Egypt: historical and political context**

The 1971 Egyptian Constitution created the Supreme Constitutional Court (SCC), which began operating after the passage of implementing legislation in 1979, Law No. 48 of 1979 (SCC Law). Then-President Anwar Sadat and the drafters of the SCC Law faced both external and internal pressure to create an independent constitutional court to replace the Nasser-controlled Supreme Court, which was created in 1969 by presidential decree and composed solely of Nasser-appointed judges known for their



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loyalty to the regime. During the decade that the Supreme Court functioned, from 1969 to 1979, the Court issued over 300 rulings, ‘not one of which significantly constrained the regime’. In response, the legal profession and civil society within Egypt demanded reforms guaranteeing greater judicial independence. It has been suggested that an independent constitutional court was also desirable to the government because it would help bolster the state’s credibility with respect to the protection of private property interests, attracting badly needed foreign investment.<sup>85</sup>

The SCC was created by an autocratic government, which left little room for debate among political actors over the appointments process. Instead of various political forces coming together to establish an appointments process that all found reasonably satisfying, the decision on how to appoint SCC judges was left to then-President Sadat and the drafters of the SCC Law, who were party loyalists. The result was an appointments process that was legally dominated by the executive, but informally left largely under the control of the Egyptian judiciary.

While Sadat advanced judicial independence in Egypt with the creation of the SCC, he still sought to retain ultimate authority over the Court by controlling the appointments process. Under the 1971 Constitution and the SCC Law, the President had the formal authority to appoint the Chief Justice, assuming that his chosen candidate satisfied the minimum qualifications (SCC Law article 5). Despite this formal authority over SCC appointments, for the first two decades of its existence, the SCC followed an informal procedure whereby the President promoted the most senior serving justice on the SCC to be Chief Justice. For the other justices on the SCC, the Chief Justice and the General Assembly of the Court (which consisted of all members of the Court (SCC Law article 7)) each nominated one candidate, and the President appointed one of these two candidates (SCC Law Article 5). In practice, the Chief Justice and the General Assembly of the Court always nominated the same person, whom the President would then appoint. In effect, the SCC became a self-perpetuating body, relatively free from executive control. Throughout the 1980s and 1990s, the SCC distinguished itself in the MENA region as a relatively independent court, issuing decisions that had a real impact on limiting autocratic rule and pressuring successive authoritarian regimes for greater rights and freedoms. As will be discussed below, however, the SCC did not always rule against the regime, and many of its rulings upheld key elements of the autocratic state and politically repressive practices.<sup>86</sup>

At the end of the 1990s, the informal judiciary-controlled appointments process broke down under President Mubarak’s rule. The SCC continued to issue rulings that curtailed executive power to an extent, particularly in the areas of press freedoms, operations of non-governmental organizations (NGOs), electoral law and tax law. These rulings against Mubarak’s regime ultimately proved to be more than he was willing to tolerate, and in the early 2000s he reasserted his formal authority over the


appointments process and appointed a Chief Justice who was loyal to his government. Because the Chief Justice controls the SCC's docket and oversees the process of writing the Court's decisions, he is a very influential member of the Court. Furthermore, because the SCC Law did not specify the number of judges on the Court, the Chief Justice immediately increased the SCC's size by 50 per cent, appointing new judges who were aligned with the executive.

Because executive influence over the SCC had never been legally curtailed, the continuation of its informal judiciary-controlled appointments was completely dependent on the goodwill of the executive. Mubarak was able to bring the SCC to heel as soon as he wished. He was able to capture the Court through the formal appointments procedure (which remained the same as in the 1970s) and its subsequent decisions reflected the influence of the executive.<sup>87</sup>

Following the fall of Mubarak in 2011, the SCC has continued to function, first under the rule of the Supreme Council of the Armed Forces (SCAF), then under President Mohamed Morsi's rule and now (at the time of publication) under an interim authority appointed by the SCAF. Egypt has operated under a series of constitutional frameworks during this period that have preserved the authority of the SCC to adjudicate on constitutional disputes: the Constitutional Declaration of 30 March 2011 (Article 49), the 2012 Constitution of Egypt (Article 175) and the Constitutional Declaration of 8 July 2013 (Article 18). An important issue throughout this process has been the procedure for appointing justices to the SCC. In response to Mubarak's previous domination of the Court and the changing political landscape, the SCC pressured the SCAF to pass a decree that amended the SCC's appointments procedure—instituting a procedure similar to the informal one that was followed until Mubarak began exercising more authority over the selection of judges—in June 2011. The SCC is currently functioning under the appointments model set out under this decree, although the constitutional situation is far from stable.<sup>88</sup>

#### ***4.3.1.2 Egypt: appointments procedure***

While the June 2011 SCAF decree still governs the SCC's appointments procedure, Egypt's now-suspended 2012 Constitution changed other aspects of the SCC. Under the 2012 Constitution, the SCC was composed of 11 judges, including one Judge President. Other than stating that the President appointed SCC judges by decree, the 2012 Constitution did not specify the procedure for appointments to the SCC, deferring that question and many others to future implementing legislation (Article 176). While the 2012 Constitution was in force, no new legislation regarding the SCC's appointments procedure was passed; therefore the appointments procedure outlined in the June 2011 SCAF decree is still in force. For similar reasons, the term length of SCC judges is still governed by pre-transition legislation, which allows SCC judges to remain



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on the Court until they reach the mandatory retirement age, which is currently set at 70.<sup>89</sup> The Constitutional Proclamation of 8 July 2013 likewise leaves these matters to legislation (Article 18) that has yet to be enacted.

According to the June 2011 SCAF decree, the General Assembly of the Court selects the SCC's Chief Justice from among the Court's three most senior members, and the President formally appoints the Chief Justice. For all other appointments to the SCC, the decree requires the President to give precedence to the Court's Commissioner's Body, which is a group of judges that helps the SCC judges prepare cases and opinions. It is responsible for managing the cases that come before the SCC and issuing advisory reports detailing the issues raised in the cases.<sup>90</sup>

#### ***4.3.1.3 Egypt: appointments process in practice***

As mentioned above, during the 1980s and 1990s the SCC was able to exercise a degree of independence, ruling against the Mubarak regime in numerous decisions. The Court was one of the only institutions in authoritarian Egypt that presented any real challenge to the regime. The SCC issued important rulings regarding electoral laws and press liberties. In 1993, the SCC struck down a provision in the criminal code that required defendants in libel cases to present proof for published statements within five days. The SCC found that the five-day limit was too restrictive and interfered with the ability of the press to monitor the government. The SCC also found a provision of the Press Law that required newspapers to receive prior approval from the Council of Ministers before publishing to be unconstitutional. In addition, the SCC struck down Article 15 of Law 40/1977, which imposed vicarious criminal liability on the heads of political parties for material published in party newspapers in cases claiming libel of public officials, as well as a similar law imposing vicarious criminal liability on newspaper editors for libellous statements published in their papers. The SCC also issued several decisions that strengthened protections for NGOs in Egypt, including a 2000 ruling that struck down Law 153/1999, which severely restricted the activities and rights of NGOs. The SCC's relative independence enabled constitutional litigation to become a promising avenue for NGOs and human rights groups to challenge illiberal legislation.<sup>91</sup>


However, the SCC's ability to check executive power was far from unlimited. While it produced liberal judgements in the area of human rights, it was aware of its limited institutional capital and careful not to rule on matters that struck at the heart of the regime. The SCC upheld the constitutionality of Egypt's emergency state security courts, which were responsible for handling all cases prosecuted under the emergency law. The President had ultimate authority over state security courts, and could 'overturn the court's ruling or demand a retrial'. The SCC often delayed ruling on politically sensitive topics (including electoral laws and the use of military courts to try civilians), sometimes for years, in an effort to avoid a direct confrontation with Mubarak's regime.

Through a cautious approach that expanded rights and freedoms in peripheral areas while preserving the core mechanisms of state repression, the SCC was able to maintain its institutional security under an authoritarian regime.<sup>92</sup>

In July 2000, the SCC issued a decision on Egypt's Political Participation Law (Law 73/1956). The case had been pending before the Court for ten years, but the ruling was issued in the midst of heated debate between the regime and opposition parties over regime-sponsored amendments to the Political Participation Law, the impact of which would have facilitated the rigging of elections by the regime. The SCC's ruling found part of the law unconstitutional because it did not provide for full and direct monitoring of elections by the judiciary, as the Constitution required. The SCC further found that since the parliamentary elections of 1990 and 1995 were carried out under the law, the assemblies formed as a result of the elections were unconstitutional. The decision 'struck at the heart of [Mubarak's] regime-managed liberalization'. In the election following the ruling in 2000, many leading members of Mubarak's National Democratic Party were defeated.<sup>93</sup>

This SCC decision proved to be a greater exercise of judicial power than Mubarak was willing to tolerate. In 2001, the retirement of SCC Chief Justice Galal provided Mubarak with an opening to exert greater influence over the Court. Mubarak broke the long-standing informal rules for appointments, choosing a loyal member of his regime and a high-ranking official in the Ministry of Justice, M. Fathi Naguib, as the new Chief Justice. Naguib had been the author of 'the vast majority of the government's illiberal legislation during the previous decade'. Mubarak stunned the SCC, legal scholars, opposition parties and human rights groups by ignoring decades of SCC appointment norms. While the President always had the legal authority to appoint whomever he wanted to the role of Chief Justice, he had never asserted that authority until that point. The SCC judges, as well as legal scholars, expected Mubarak to continue the tradition of promoting the most senior sitting SCC judge to Chief Justice.<sup>94</sup>

However, Mubarak had lost patience with the SCC's rulings against the regime, and Naguib's appointment signalled a shift in the balance of power between the executive and the SCC. Naguib's loyalty to the regime was well established. Naguib justified his appointment by arguing that since the Constitution required the Chief Justice to step in as President in the event that the President is incapacitated and the Speaker of the People's Assembly is unavailable, Mubarak needed a Chief Justice he could fully trust. Naguib also argued that his new role did not threaten the independence of the SCC because a majority of justices was required to determine a ruling. In practice, however, former SCC judges have affirmed that there are strong informal norms controlling the Court's operation that discourage junior justices from going against the Chief Justice's will, and that 'even if a majority dares to vote against the will of the Chief Justice, he can



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simply refuse to sign the ruling'. Naguib also offered a more frank explanation for his appointment, stating in a 2002 interview that the SCC's past rulings had favoured the opposition parties, and 'were not in the interests of the country. This needed to be corrected'.<sup>95</sup>

After his appointment, Naguib moved swiftly to change the ideological composition of the SCC by appointing more justices who were loyal to the regime. Because neither the Constitution nor the SCC Law specified the total number of justices on the Court, Naguib immediately appointed five additional justices to add to the SCC's existing nine. Moreover, while Naguib's method for appointing these new justices to the SCC was technically legal, it violated another informal SCC procedural norm: he selected the new justices from ordinary courts (mainly the Court of Cassation and the Cairo Court of Appeals) rather than recruiting from the State Council, from which junior SCC justices had most often been recruited. The State Council was Egypt's administrative judicial organ, and was viewed by some as more willing to challenge the executive than the ordinary courts. It is unclear whether the sitting SCC judges protested these new appointments, because deliberations over new appointments were not made public.<sup>96</sup>

With Chief Justice Naguib in office and the addition of his handpicked judges to the Court, the SCC changed almost overnight from a powerful, relatively independent institution to one controlled almost entirely by the executive. Executive control over the SCC continued after Naguib's death with Mubarak's appointment of Mamduh Mara'i, who had 'spent much of his career in the inspection department of the Ministry of Justice', as Chief Justice in 2003.<sup>97</sup>

The impact that Mubarak's assertion of control over the SCC had on its independence can be clearly seen in its subsequent rulings. After the appointment of Chief Justice Naguib and the new judges, the Court modified its earlier ruling on the question of authority over election monitoring. After the 2000 elections, the SCC was asked to interpret the meaning of 'judicial authorities' in the electoral law that called for the judicial monitoring of elections, at Mubarak's request. The SCC ruled that 'judicial authorities' included the State Cases Authority and the Administrative Prosecution Authority, which were both under the control of the Ministry of Justice. This decision was a defeat for opposition parties, as it enabled the government to once again tamper with election results through biased election monitoring bodies.<sup>98</sup>


The SCC issued another ruling on elections that similarly favoured the regime. In 2005, Egypt held its first multi-candidate presidential election. Prior to these elections, the ruling party-dominated People's Assembly announced a constitutional amendment that introduced sweeping changes to the election laws that created extremely favourable conditions for the ruling party in the upcoming elections. The amendment required the SCC to review the constitutionality of the new electoral laws within 15 days. Once the

SCC had approved the laws (or requested changes to the laws from the People's Assembly), the laws could not be subject to future challenges. Under the leadership of Chief Justice Mara'i, the SCC approved the constitutional amendment, despite the fact that many opposition political leaders and judges viewed it as 'deeply flawed, contradicting both the spirit and the letter of multiple articles of the constitution'. Notably, the 2005 constitutional amendment regarding Egypt's electoral laws also made the SCC's Chief Justice the head of the Presidential Elections Commission. After Mara'i completed his term of office, Mubarak continued to select Chief Justices who had not previously served on the SCC, appointing Maher Abd al-Wahid in 2006 and Farouk Sultan in 2009. Sultan not only had not served on the SCC, but had 'no background in constitutional issues...[and] his career has brought him through some of the more sordid parts of the Egyptian judicial apparatus—military courts [and] state security courts'.<sup>99</sup>

After the overthrow of Mubarak in 2011, the SCC attempted to reclaim its control over judicial appointments. While the details of its interactions with the Supreme Council of the Armed Forces are unknown, it won an important concession from SCAF with the decree law on SCC appointments, which gives SCC judges an important role in appointments decisions and limits the President's choices regarding candidates (see Section 4.3.1.2). During the constitution-drafting process, the SCC indicated its displeasure with proposed articles on the judiciary by calling a press conference. It is unclear what influence this had on the drafters, but the final version of the Constitution says little about the SCC, deferring most important questions about the Court to future legislation.<sup>100</sup>

However, the SCC also issued several highly controversial decisions regarding parliamentary elections during the transition and under the 2012 Constitution, which drew criticism from many quarters and demonstrated the disadvantages of mechanisms that create barriers between the Court, political actors and the general public. In June 2012, the SCC found the electoral law governing the first elections to the House of Representatives (the lower chamber of Egypt's Parliament) after the political transition invalid, on the grounds that the rules governing independent candidates had not been correctly applied in the elections. The SCC ordered SCAF to dissolve the body, which SCAF subsequently did, effectively leaving post-Mubarak Egypt without a fully functioning Parliament (the upper chamber, the Shura Council, was not affected by this ruling). The SCC's decision provoked strong public criticism from certain groups, particularly the Muslim Brotherhood. The Freedom and Justice Party, the political wing of the Muslim Brotherhood, won 235 seats (47.2 per cent) in the election in question and perceived the ruling as politically motivated in favour of secular political groups. Defenders of the Court argued that its decision simply fulfilled its mandate to uphold the Constitution.<sup>101</sup>





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After the dissolution of Parliament and the passage of the 2012 Constitution, the SCC was again called upon to review an electoral law, because the 2012 Constitution required the Court to exercise mandatory prior review over election laws (Article 177). The SCC rejected a new electoral law drafted by the Shura Council for parliamentary elections, stating that several provisions of the law did not satisfy the 2012 Constitution, and returned the law to the Shura Council for revision. The SCC's rejection of the draft electoral laws meant that elections for a new House of Representatives under the 2012 Constitution were never held. The SCC issued another controversial decision in June 2013, ruling that the electoral law under which the Shura Council was elected was also unconstitutional. However, the Court did not order the dissolution of the Shura Council, finding that the 2012 Constitution granted the Council the power to legislate until new parliamentary elections were held. While the SCC's decisions on parliamentary elections were generally considered sound in terms of their legal reasoning, the Court drew criticism because its decisions appeared to consistently favour anti-Islamist interests over those of Islamist parties. Regardless of its motives, many perceived the Court as biased. In a transitional political environment that is radically different from the authoritarian regime under which the SCC was created, the vulnerabilities that result when a court's members have been selected without any participation by a broad cross-section of political parties from across the spectrum or the public became clear.<sup>102</sup>

The 2012 Constitution did not go into great detail regarding the structure and processes of the SCC, and has now been suspended. While it was in force, the SCC's appointments processes remained intact, but the Court was made smaller. Whereas the 1971 Constitution left the number of justices unspecified, the 2012 Constitution set the number at 11 (the Chief Justice and ten judges), forcing the removal of several sitting justices—which some perceived as a political move on the part of then-President Morsi and the Freedom and Justice Party to remove justices who were viewed as opponents and potential impediments to the legislation they were drafting.<sup>103</sup> As Egypt's transition continues to unfold, the SCC will need to continue to adapt to the changing political context.

### **4.3.2 Iraq**

#### **4.3.2.1 Iraq: historical and political context**

While Iraq's modern judicial system dates back to the British mandate period following the fall of the Ottoman Empire, for the purposes of this report, this section will address the judiciary during the period of Saddam Hussein's rule and following the invasion of Iraq in 2003.<sup>104</sup>




Before the Ba'ath Party came to power in 1968, the Iraqi judiciary was a relatively independent institution governed by the Council of Judges, which was headed by the President of the Court of Cassation, the highest court in Iraq. The Judicature Act, also known as the Judicial Authority Act, governed the Iraqi judiciary. It was intended to establish the judiciary as an independent government institution equal in stature to the executive and legislative branches. The Council of Judges oversaw all judicial appointments in this era. During the 1950s and 1960s, the Iraqi courts displayed a degree of judicial independence, ruling against the executive in a limited number of cases.<sup>105</sup>

The Ba'athist Constitution and Saddam Hussein's rise to power in the late 1960s and 1970s marginalized the judiciary and ended any separation of judicial and executive power. In 1979, through legislation, Hussein abolished the Council of Judges and brought the Iraqi judiciary under the legal control of the Ministry of Justice, thereby effectively introducing executive control over judicial appointments (Ministry of Justice Act 101/1977). Hussein also established special revolutionary and military courts that were directly answerable to the executive rather than the Court of Cassation. These courts, staffed with Ba'ath Party members with no legal training, were established to deal with matters of state security and corruption. The revolutionary courts had the power to deny habeas corpus, and their decisions were final, with no right of appeal.<sup>106</sup>

The judiciary's record under Hussein's regime is ambiguous. He generally avoided using the civil courts and relied on the revolutionary and security courts to support his regime, leaving the general judiciary essentially intact and led by experienced and independent judges. Yet some judges and lawyers supported the Ba'ath police state, which undermined Iraqi confidence in the judiciary as a whole. In addition, Hussein sometimes called on the regular courts to carry out his executive orders. Judges who resisted these efforts or refused to carry out executive orders were subject to intimidation, torture or forced retirement.<sup>107</sup>

Following the 2003 invasion of Iraq and the fall of Hussein's regime, the United States and United Kingdom assumed the role of occupying powers and created the American-led Coalition Provisional Authority (CPA). Among other measures, the CPA established a Judicial Review Committee, which vetted judges based on merit, Ba'athist affiliation and allegations of past corruption to determine their eligibility for continued judicial service. The Committee reviewed approximately 870 judges and dismissed approximately 20 per cent for incompetence, corruption or high-level Ba'athist membership. In September 2003 the CPA also formally re-established the Council of Judges, composed of the most senior judges on Iraq's highest courts and the directors of the legal and prosecutorial supervisory authorities, and gave it authority over Iraq's judicial and prosecutorial system (CPA Order No. 35). This action removed the



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judiciary from the Ministry of Justice's control, and was intended to help insulate it from executive pressure.<sup>108</sup>

In March 2004, the Iraqi Governing Council adopted an interim Constitution, the Law of Administration for the State of Iraq for the Transitional Period (TAL), which established a system of government for Iraq during the transitional period and provided a framework for drafting the permanent Constitution. When the TAL came into effect on 28 June 2004, the CPA dissolved and transferred governing authority to the Iraqi Interim Government, headed by interim Prime Minister Ayad Allawi. The TAL continued efforts to reconstruct the Iraqi judiciary, including the creation of a Federal Supreme Court (FSC) with the power of judicial review (TAL Article 44). The drafters of the TAL included key leaders of Hussein-era opposition groups. The TAL, however, was criticized for being drafted by a body that did not fully represent Iraqi society, in a non-transparent process.<sup>109</sup>

The drafters of the TAL were acutely aware of the role that courts can play in deciding high-stakes political matters. They also feared the creation of a supreme court that could, over time, usurp executive and legislative power and become an ideological force like Iran's Guardian Council. As a result, the drafters of the TAL deliberately crafted the provisions establishing the FSC in order to ensure the Court's moderation and preclude manipulation by political factions, focusing specifically on the composition of the Court. The appointments procedure set out in the TAL gave the Higher Juridical Council (HJC)—which replaced the Council of Judges and is composed of the presidents of Iraq's highest courts—the power to nominate a list of candidates to the FSC (TAL Articles 44, 45). The three-member Presidency Council was given the power to appoint judges from the list of nominees (TAL Article 44). The goal of this mechanism was to ensure that judicial appointments were based on candidates' professional abilities rather than political allegiances, while at the same time seeking to imbue the FSC with a sense of legitimacy and accountability. As discussed below in Section 4.3.2.2, this appointment mechanism remains in place, with Iraq's President replacing the transitional Presidency Council.<sup>110</sup>

The TAL was an interim constitutional document that was replaced by the 2005 Constitution, which preserved the new FSC (Article 92) and the Higher Juridical Council. However, while there was relatively little controversy over drafting the TAL's provisions on the FSC, the Court generated heated debates during the process of drafting the 2005 Constitution. Initially, religious groups wanted a constitutional council that would review laws prior to enactment to ensure they were in accordance with sharia law. Secular and Kurdish parties favoured an FSC with the power of constitutional review. The drafters were able to persuade the Shi'a Alliance to agree to the FSC rather than a constitutional council; however, the Shi'a parties also sought to

secure a set number of seats on the FSC for Islamic jurists. The Kurdish and secular parties opposed this, fearing the idea of an FSC packed with sharia scholars.<sup>111</sup>


Iraq's constitution-drafting process was complex and difficult, and its democratic legitimacy has been challenged by many Iraqis. An initial draft of the Constitution was formulated by a Constitutional Committee made up of 55 members, whose membership reflected the political groups represented in Iraq's Transitional National Assembly, the interim body governing the country until the passage of a new Constitution. However, the Committee was effectively dissolved when an ad hoc body referred to as the Leadership Council—a very small group that had the active participation of the US Embassy—took over drafting duties and produced a final draft Constitution without meaningful participation from the Constitutional Committee. This draft text was adopted in a referendum in October 2005.<sup>112</sup>

The final text of the 2005 Constitution does not specify the number of judges on the FSC. It only requires that the Court include experts in Islamic jurisprudence and legal scholars in addition to judges (Article 92). It defers the questions of the size of the Court and the precise mechanism for appointing its members to implementing legislation passed by a two-thirds supermajority of the Council of Representatives (Article 92). This framework gave Shi'a Islamists a symbolic victory by explicitly providing for Islamic experts on the Court, but also gave secular parties significant leverage over the implementing legislation through the supermajority requirement and the stipulation that at least one member of the Court must be a judge.<sup>113</sup>

The drafters' decision to defer so many of the issues necessary to the FSC's operation to future implementing legislation, and the requirement that the legislation be passed by a supermajority, have severely impeded the FSC's ability to establish itself as a credible and independent body. The Council of Representatives has thus far failed to pass the implementing legislation, creating uncertainty around the FSC's authority and leaving the question of its appointments procedure unanswered. Further complicating matters, the Council of Representatives in December 2012 passed the Federal Court Act, which would have separated the Higher Juridical Council (HJC) from the FSC by removing the FSC's Chief Justice as head of the HJC. However, the FSC struck down the Federal Court Act in September 2013, reinstating Chief Justice Medhat Al-Mahmoud as head of the HJC, and thus restoring his role in selecting candidates for nomination to the FSC.<sup>114</sup>

#### ***4.3.2.2 Iraq: appointments procedure***

Given the continuing lack of implementing legislation following the passage of the 2005 Constitution, the FSC still operates under the relevant provisions of the TAL and Law No. 30/2005, which were passed during the transitional period of occupation, as well as



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the applicable provisions of the 2005 Constitution. The TAL provides that the FSC consists of nine members (Article 44). Under the TAL and Law No. 30/2005, the HJC, in consultation with the regional judicial councils, nominates three judges for every FSC vacancy (TAL Article 44; Law No. 30/2005 Article 3). The HJC includes the presidents of Iraq's highest courts and is headed by the President of the Court of Cassation (TAL Article 45). The President of the FSC also serves as the head of the HJC.<sup>115</sup>

Under the TAL, Iraq had a Presidency Council made up of three members, one to represent each of the major sectarian groups in Iraq: Shi'a, Sunni and Kurd. The Presidency Council considered the three nominees submitted to it by the HJC, and either had to reach a unanimous agreement on a nominee for the FSC or reject all three nominees and request a new list of nominees (TAL Article 44). The unanimous vote requirement was intended to ensure that the major sectarian groups all had a role in selecting the FSC's members. This appointments procedure purposely bypassed the National Assembly. To initially constitute the nine-member FSC, the HJC proposed 25 nominees, from which the Presidency Council selected nine members and named one of them, Medhat al-Mahmoud, Chief Justice. Under the 2005 Constitution, the Presidency Council continued to operate for the first legislative term after the Constitution's enactment, from 2006–10. At the end of that term, a President elected by the Council of Representatives replaced the Presidency Council (Articles 70, 138). The President has since taken on the role formerly played by the Presidency Council in appointing FSC judges.<sup>116</sup>

Iraq's Parliament, the Council of Representatives, has not yet passed the implementing legislation that will determine the permanent appointments procedure for the FSC under the 2005 Constitution. Scholars of the Iraqi legal system suggest that the delay is due in part to the ongoing debate over the inclusion of Islamic jurists on the FSC and to the supermajority required to pass the legislation, which in the current political environment is exceptionally difficult to reach. On 5 February 2011, the Council of Representatives held a first reading of proposed draft legislation for the FSC. The 2011 draft law would establish a 13-member FSC with a Chief Justice and eight other judges (for a total of nine judicial positions), and a four-member advisory board made up of two ordinary legal specialists and two Islamic law specialists. Under the draft law, for the nine judicial positions, the HJC would propose three candidates for each FSC position, from which the President would select one. This appointments procedure is very similar to that defined in the TAL. For the four members of the advisory board, the Ministry of Higher Education would nominate four civil law judges, and the two Islamic endowment authorities (one Sunni and one Shi'a) would nominate four Islamic judges. The Council of Ministers would then select two candidates from each group, and the Council of Representatives would approve the candidates selected by a majority vote. The 2011 draft law also stipulates that FSC judges must have at least 20 years of


experience and would serve a six-year term. This appointments process, if enacted, would ensure the involvement of a wide range of actors in the selection of FSC appointees: the judiciary, the President, the Council of Ministers, the Council of Representatives, and both secular and Islamic legal scholars.<sup>117</sup>

#### 4.3.2.3 *Iraq: appointments process in practice*

The FSC is in a precarious legal position. Its authority rests in the TAL, which has been largely superseded by the 2005 Constitution. Due to the Council of Representatives' failure to pass implementing legislation, the FSC's jurisdiction, composition and appointments procedure all remain uncertain, even while the FSC tries to operate and exercise necessary judicial review. The appointments procedure established under the TAL was intended to put experienced civil law judges on the Court who would be less influenced by, or better able to withstand the pressures of, Iraq's complicated and tense transitional politics. Indeed, the FSC has been called upon to decide many controversial political issues. Their rulings have led critics to suggest that the FSC, in particular Chief Justice Medhat al-Mahmoud, is loyal to Prime Minister Nouri al-Maliki and that its decisions are unjustifiably favourable to the current executive. Supporters of the Court argue that its rulings are based on legally defensible positions and reflect judicial restraint in entering into highly charged political disputes.<sup>118</sup>

One example of a controversial FSC ruling resulted from the 2010 parliamentary election, in which the Iraqiyya coalition, led by Ayad Allawi, narrowly won the highest number of seats in the Council of Representatives. Iraqiyya won two more seats than the State of Law Coalition, led by Nouri al-Maliki. Article 76(1) of the 2005 Constitution states: 'The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.' The legal question presented by the elections was who, according to Article 76, was empowered to form a government. Article 76 does not define the term 'bloc'. Iraqiyya argued that Article 76 should grant the right to form a government to the *party* that won the largest number of seats; the State of Law coalition argued that the provision should be interpreted to mean that the right to form a government fell to whichever parties could form the largest *coalition* after the election, even if the coalition did not include the *party* that won the largest number of seats. The FSC adopted State of Law's interpretation. The decision left open the possibility that either Maliki or Allawi could form a government, depending on who could win support amounting to the greatest number of seats in the Council of Representatives.<sup>119</sup>

Both in Iraq and abroad, the FSC's decision was perceived as politically motivated. Allawi publicly dismissed the FSC opinion and challenged the FSC's jurisdiction,



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questioning the Court's legitimacy because it was implemented under the TAL rather than the Constitution. Furthermore, some saw the decision as anti-democratic since Iraqiyya had won more seats in the election. There are, however, numerous legal and practical arguments in favour of the FSC's decision. Iraq is a parliamentary system, which means that the government derives its right to govern from parliamentary approval, not simply from gaining the most votes in an election. The FSC's opinion notes that the Prime Minister must survive a vote of confidence from the Council of Representatives, and therefore, a post-electoral majority alliance will be necessary to form a government from a practical standpoint. Furthermore, allegations that the FSC decision was biased toward Maliki should also be considered in light of the fact that the FSC certified Iraqiyya's electoral victory despite Maliki's challenge to the electoral results.<sup>120</sup>

The FSC again drew accusations of bias toward Maliki in a subsequent ruling related to its decision on the 2010 elections. After the FSC's decision, the various political parties entered into negotiations in order to ultimately form coalitions, the largest of which would win the right to form the new government. These negotiations failed to produce widespread agreement, leading to a stalled Council of Representatives and no government. The 2005 Constitution requires the Council to elect a Speaker during its first session and the President of the Republic within 30 days of the first session (Articles 55, 72(2)). In October 2010, the FSC ruled the Council of Representatives' refusal to elect a Speaker and President unconstitutional, because this deadline had passed without an election for either position. At the time of the FSC's ruling, Maliki's party claimed to be close to forming a majority coalition. The FSC's ruling may have further favoured Maliki and hindered Allawi because it forced an end to negotiations among the various parties that, if allowed to continue, may have eventually included the Iraqiyya party in the final arrangement. Maliki was able to gain sufficient support to form the largest coalition, and proceeded to form a government in the wake of the FSC's ruling.<sup>121</sup>

Another FSC decision regarding executive powers exhibits troubling signs of bias toward the executive—and, by implication, the governing party. The case focused on a number of independent commissions established in Iraq's Constitution, including the Independent High Electoral Commission (IHEC). The 2005 Constitution provides that some of these commissions fall under the oversight of the Council of Representatives, and others under the executive; most significantly, the electoral commission is placed under the 'monitoring' of the Council of Representatives (Article 102). In December 2010, the Prime Minister's office requested that the FSC review the constitutional provisions on the independent commissions and their oversight. The Court's ruling, issued in January 2011, declares that the work of the independent commissions is more executive in nature, and thus the commissions should *all* fall under

the executive's authority (not that of the legislature) in order to avoid a violation of the principle of the separation of powers.<sup>122</sup>

This ruling is difficult to defend from a legal perspective, given the clarity of the 2005 Constitution regarding which branch of government oversees the commissions. It is also politically significant, given the importance of the IHEC. This decision could give Prime Minister Maliki direct influence over the body that will oversee future elections, including his own, although to date the IHEC remains relatively independent. The FSC's decision was widely criticized, and according to some scholars it prompted the Council of Representatives to fast-track legislation on the FSC's appointments procedures, leading to the first reading of the draft law on the FSC on 5 February 2011 (see Section 4.3.2.2).<sup>123</sup>


#### ***4.3.3 The judiciary-executive model: key constitutional considerations (low level of political investment)***

The judiciary-executive model excludes many political actors from the judicial appointments process. In most variations of the model, only the judiciary—and often, only the highest levels of the judiciary—and the executive are involved in appointments decisions. The legislature, legal academia, civil society and often a large portion of the judiciary, do not participate at all in deciding who will sit on the constitutional court. Using this model makes it more difficult to create a sense of political investment in the court among the many actors that are excluded, especially opposition political parties, given the partisan character of the disputes resolved by constitutional courts, as Egypt and Iraq illustrate.

The judiciary-executive model may be suited to certain political contexts, particularly non-democratic regimes, in which insulating the constitutional court from politics may serve to protect the court's independence. The judiciary-executive model was used in Egypt under a long period of autocratic rule. The model, combined with an informal practice that allowed the judiciary to essentially control the entire appointments process for many years, allowed Egypt's SCC to maintain a degree of independence, including issuing rulings that constrained executive power, under an authoritarian regime.

This model may also be attractive in countries with weak legislatures that are prone to extreme polarization and fragmentation. Legislative politics tend to be dominated by party rivalries and short-term political concerns. The judiciary-executive model specifically excludes the legislature from appointing judges to the constitutional court, which may help to ensure that judicial appointments are not delayed by legislative deadlock and that political parties will not use appointments to pack the constitutional court with sympathetic judges.





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However, the experiences of Egypt and Iraq illustrate the difficulties of employing the judiciary-executive model. Both countries are currently experiencing difficult political transitions. In Egypt, the judiciary remained largely intact after the end of authoritarian rule. As a result, many political parties, as well as many members of the public, view the judiciary as a remnant of the former regime, and rightly or wrongly will disregard its decisions as biased. In Iraq, the situation is somewhat different. Iraq carried out a controversial vetting process to remove judges who were considered too tainted by Hussein's regime to continue in their posts and created a new FSC. However, the FSC's provisional appointments mechanism follows the executive-judiciary model and therefore excludes any involvement by opposition political parties, even those that have significant numbers of seats in the Council of Representatives. But although the Iraqi context is different, the result is the same: a lack of political investment in the FSC from across the political spectrum.

In this context, the use of the judiciary-executive model has produced constitutional courts that are vulnerable to accusations of elite capture. Iraq's FSC has issued several controversial decisions in favour of Prime Minister Maliki, leading many to conclude that it is not impartial and must be reformed. While the Egyptian SCC was viewed as somewhat successful under a non-democratic regime, it has lost credibility and accountability during the transition; the changing political landscape has created new demands and public expectations of democratic accountability and transparency in the judiciary. In both situations, it may be advisable to adopt a different appointments process that allows the full range of post-authoritarian political constituencies to be involved in selecting constitutional court judges.

### *Vulnerability to executive capture*

In authoritarian political contexts, the judiciary-executive model offers limited protection against elite capture of the judiciary. The Egyptian SCC relied for many years on an informal agreement that allowed it to control its own appointments. It was this informal practice, rather than the legal procedures set out for appointments, that allowed the SCC a measure of independence. However, Mubarak was able to discard this informal agreement as soon as he chose, and when he did, it effectively ended the SCC's ability to operate independently. The Iraqi example also indicates that under democratic rule, the judiciary-executive model may allow a president or prime minister to exercise (or be perceived as exercising) undue influence over the court.

### *Dangers of postponing important questions to implementing legislation*

Iraq's experience also offers a lesson to policymakers in the process of drafting a new constitution. Iraq's Constitution drafters, caught in a dispute over the composition of the FSC and the selection of its members, ultimately deferred these questions to future




implementing legislation. However, in Iraq's polarized political environment, it has so far proven impossible for the Council of Representatives to reach a satisfactory compromise on the implementing legislation. The FSC is thus in a sort of legal limbo, operating under a largely defunct law from the occupation period.

While negotiations during the constitution-drafting process can be arduous, the process may provide the best opportunity to agree on the critical questions surrounding a constitutional court, especially regarding who will sit on the court and how they will be appointed. During the drafting process, all parties are aware of the need to compromise, and the deadline for producing a draft constitution may help push the parties toward an agreement. In contrast, the environment in a legislature is quite different: party representatives are more concerned with short-term needs and protecting the interests of their party and constituents than they are with the broader interests of the country. No single party in a legislature has a strong incentive to reach an agreement on the court, and there is no firm deadline for doing so, which may lead to long delays in the court's implementation, as has been the case in Iraq (and in Italy, as discussed below).

#### ***4.4 The multi-constituency model: Turkey and Italy***

The multi-constituency model involves multiple institutions in the judicial appointments process, including the various branches of government and, in some countries, civil society organizations. In this model, the institutions involved may have direct or indirect power over appointments. Institutions with direct appointment power may select candidates and appoint them to the court without having to consult with, or gain the approval of, any other actor. Institutions with indirect power are generally given either the power to nominate one or a list of candidates for the court, or to approve or veto a candidate nominated by another institution; they do not have the power to both nominate and confirm a particular candidate. Most commonly, the seats on the court are divided between the various institutions with appointment power.

Under this model, the various institutions and branches of government that have a role in selecting the court's judges generally work independently of each other during the selection process; in other words, the different actors charged with appointing judges do not consult with one another when making their decisions. This distinguishes the multi-constituency model from the judicial council model, discussed earlier, in which a council composed of representatives from a range of governmental and non-governmental bodies works together to select candidates for the court. Much like the judicial council model, however, the multi-constituency model's goal is to create an inclusive appointments process that involves many different constituencies in determining the best candidates for the constitutional court. The resulting court, it is hoped, will reflect the varying political and social forces in the country and promote a



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sense of political investment in the court on the part of all the actors involved in appointments.

Turkey and Italy use this model. Turkey adopted it in 2010, when it enacted constitutional amendments to significantly reform the Turkish Constitutional Court (TCC). The amendments changed the process of appointing justices to the TCC from a model dominated by the judiciary (which was indirectly influenced by the military) to a multi-constituency model that includes a more diverse pool of actors, including the judiciary, the Turkish Grand National Assembly, the President, civil society organizations and bar associations. The amendments also expanded the size of the TCC from 11 permanent and four alternate justices to 17 permanent justices. Proponents of these constitutional amendments argued that they would open up the appointments procedure in Turkey and allow more political parties, as well as non-political entities, greater influence over the composition of the court. By comparison, the Italian Constitutional Court, often seen as a leading example of the multi-constituency model, adopted this model at the time of the Court's formation after the end of World War II. The Italian Constitutional Court has 15 members; the President, Parliament and the highest courts in the judiciary each appoint five justices, following their own internal nomination and selection procedures.

#### **4.4.1 Turkey**

##### **4.4.1.1 Turkey: historical and political context**

To understand the history of the Turkish Constitutional Court (TCC), it is necessary to begin with a brief explanation of the formation of the modern Turkish state. Following the dissolution of the Ottoman Empire after World War I, Turkey began a transition to a republican political system led by the Turkish National Movement, and Mustafa Kemal (also known as Atatürk), the Turkish Republic's first President. He spearheaded the efforts to build a new Turkish state and institutionalized an official ideology for the new republic, which is generally referred to as Kemalism.


Under Kemalism, outward manifestations of religion, ethnicity or other non-Kemalist ideologies were considered subservient to the national goal of a unified state, and subject to state regulation or repression as appropriate. Kemalism remains the dominant ideology among many ruling and secular Turkish elites, particularly the military. However, supporters of political Islam have repeatedly attempted to form political parties to contest power and challenge Kemalism. In the last decade, Turkey has seen the rise of the Justice and Development Party (AKP), which has Islamic roots. Founded in 2002, it quickly came to power, winning a majority of seats in Turkey's parliament, the Grand National Assembly (GNA), in the 2002 elections. For many in Turkey, particularly the secular elites, the AKP and its supporters pose a direct challenge to the

Kemalist legacy; understanding this dynamic is critical to understanding the current political landscape in Turkey and the TCC's role in this conflict.

The TCC was originally established in Turkey's 1961 Constitution, which was drafted after a military coup by a constituent assembly composed primarily of representatives from the military and the Republican People's Party (CHP), a Kemalist party aligned with the military. The 1961 Constitution employed a multi-constituency appointments model for the TCC, wherein appointment power over the 15 regular and five alternate justices was divided among the highest courts, the National Assembly, the Senate, the President, and (to a lesser degree) Turkey's universities and the Military Court of Cassation (Constitution of Turkey, 1961, Article 145). The TCC under the 1961 Constitution has been characterized as a powerful activist court, and its decisions on key political issues often defied the interests of the military, including rulings declaring military security courts unconstitutional and refusing to sanction a new state-sponsored body to curb the autonomy of Turkey's universities.<sup>124</sup>

In 1980, Turkey's military staged another coup, citing frustration with the political status quo and civilian institutions deemed anathema to Kemalism. Seeking to solidify the military's dominance and enshrine secular, nationalist principles, the military annulled the 1961 Constitution and drafted a new one. This drafting process was heavily dominated by the military and did not include any participants with connections to political parties. The resulting 1982 Constitution promoted the development of Turkish civilization (according to the values of Kemalism) and entrenched the military's dominance over political institutions. The 1982 Constitution also brought the TCC firmly to heel, correcting what the military viewed as the Court's partisan role in politics. In order to ensure that the TCC would be sympathetic to its political aims, the military reformed the Court's appointments process. In a drastic departure from the model used under the 1961 Constitution, the military eliminated the legislature's role in TCC appointments, instead granting the President (who, from 1982–89, was the leader of the military coup, Kenan Evren) the power to appoint all TCC justices, selecting them from nominations made by the high courts, including the military courts, and the Council of Higher Education which was also influenced by the military (Constitution of Turkey, 1982 (prior to 2010 amendment), article 146). In short, the Turkish military replaced the 1961 Constitution's multi-constituency model with a variation of the judiciary-executive model that was shaped by military personnel and ideology.<sup>125</sup>

Notably, the Supreme Board of Judges and Prosecutors (HSYK), made up of Ministry of Justice personnel and high court judges, controlled promotions to the high courts from which TCC justices were largely drawn under the 1982 Constitution. Because the HSYK was comprised of members sharing a pro-secular, pro-military ideology, 'the narrow composition of the HSYK facilitated the imposition of an ideological litmus test on judicial promotions, ensuring that the high judiciary [comprising most of the pool of



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judges from which TCC judges could be selected] was a relatively politically homogeneous group'.<sup>126</sup>

After this restructuring of the TCC, it fulfilled the role the military had intended for it as a protector of Kemalist values. The 1982 Constitution gave the TCC the explicit power to regulate political parties, including reviewing their budgets, and the power to order the closure of any party that violated the indivisibility of the state and its territorial integrity or the principles of a democratic and secular republic. Relying on these constitutional provisions, the TCC frequently, and controversially, shut down Kurdish and Islamist parties. In fact, the TCC's dissolution of certain political parties was so normalized that 'spare parties' would be formed for members of one party to join in case the original party was dissolved.<sup>127</sup>

Kurdish parties were generally closed on the grounds that their platforms advocating greater Kurdish autonomy and better protection of cultural rights violated the Kemalist principles of Turkish unity and nationalism. Islamist parties enjoyed similar fates. The TCC closed five political parties affiliated with Islamism on the grounds that they violated the Constitution's secularity requirements. These closures occurred even as electoral results indicated that many Turkish citizens supported these parties and had chosen them as their democratic representatives in the GNA; two of these five parties had won notably high proportions of seats in the GNA in the election prior to their closure by the TCC.<sup>128</sup>

One of the successors to the parties closed by the TCC was the AKP, which has governed Turkey since 2002. Since its formation in 2002, the AKP won significant victories in parliamentary elections in 2002 and 2007, and in 2011 won a near-absolute majority of all votes cast, earning it 327 of the 550 seats in the GNA. The TCC became a key institutional platform for Kemalist elites to challenge the AKP's growing dominance. Despite the AKP's repeated victories in democratic elections, several legal challenges were mounted in an effort to thwart the party's aims and, ultimately, to close it.

One of these challenges involved the selection of the Turkish President, who at that time was elected by the GNA according to the 1982 Constitution (article 102). When it came time to elect a new President in 2007, the AKP controlled enough seats in the GNA to elect its chosen candidate, Abdullah Gül, an observant Muslim who is considered a political moderate. In an attempt to prevent the AKP from electing Gül, the Kemalist-aligned Republican People's Party (CHP) brought a challenge before the TCC arguing that a vote to select a President required a 'super quorum' of at least two thirds of the members of the GNA. There was no such rule in the 1982 Constitution, and 'the CHP's interpretation would mean that opposition groups unable to seat their own preferred candidate would be able to indefinitely postpone or derail the


appointment of another candidate so long as they could persuade one third of MPs to boycott the vote'. Nevertheless, the TCC ruled in the CHP's favour, reading a two-thirds voting quorum into the Constitution for the first time.<sup>129</sup>

In response, the AKP called early elections in 2007 and won a landslide victory. However, other efforts were made to prevent the AKP from governing. A substantial number of Turkish citizens saw the AKP as a threat to Turkey's constitutional commitment to secularism. In 2008, Turkey's chief prosecutor sought the closure of the AKP before the TCC, arguing that the party had become a focal point for anti-secular activities. Most of the evidence presented in support of the closure related to the AKP's efforts to end Turkey's ban on headscarves. The case 'was the first time a *sitting* elected government was threatened with ouster by judicial action', and many characterized the actions of the TCC and the prosecutor as a 'judicial coup'. The court nearly unanimously found the AKP guilty of anti-secular activities. But the TCC declined to order the AKP's closure because only six of the 11 judges voted for closure, just short of the two-thirds majority of seven judges required to dissolve a political party. Instead, the TCC penalized the AKP by reducing its state funding.<sup>130</sup>

In response to what was seen as the TCC's assertion of power over the political sphere, the AKP introduced a package of constitutional amendments in 2010 that, among other changes, sought to change the process of appointing judges to the Court. By 2010, a popular movement had emerged in support of constitutional reform. A broad coalition of academics, journalists, politicians, NGO representatives and members of the public criticized the 1982 Constitution for its non-democratic origins and for hindering Turkey's effort to become part of the European Union.<sup>131</sup>

The 2010 amendments altered the constitutional framework of the TCC in several important ways:

- The number of TCC judges was increased from 11 permanent and four alternate judges to 17 permanent justices (Article 146, amended 2010).
- The GNA was given the power to appoint three of the 17 TCC judges (Ibid.).
- The pool of candidates from which TCC judges are selected was broadened (Ibid.). Prior to the amendments, seven of the 11 TCC judges were appointed from the five next-highest courts: the High Court of Appeals (Court of Cassation), the Council of State, the Military High Court of Appeals (Military Court of Cassation), the Military High Court of Administration and the Court of Accounts. Senior lawyers and administrators and members of the Council of Higher Education provided the pool for the remaining four. The 2010 amendments reduced the proportion of TCC judges drawn from the highest courts and made a wider range of judges, lawyers and administrators eligible to be TCC candidates.<sup>132</sup>

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- The composition of the Supreme Board of Judges and Prosecutors (HSYK), which controls judicial promotions to Turkey's appellate courts, was changed (Article 159, amended 2010). Prior to the amendments, the HSYK consisted of senior judges, the Minister of Justice and the Undersecretary to the Ministry. The amendments significantly expanded the size of the HSYK and supporters of the amendments argued that they made the body 'more representative' of the [judicial] profession at all levels'.<sup>133</sup>

The constitutional amendments as a whole extended beyond changes to the appointment and composition of the TCC, and were the subject of heated political debate. While the amendments sought to liberalize the military-dominated 1982 Constitution, because they dismantled some of the privileges preserved for the military and secular elites, they were also treated as a clash between secular and Islamist forces. The increase in the number of TCC justices prompted accusations from opponents that the AKP was attempting to pack the Court. Opponents also criticized the AKP for putting the constitutional amendments to a referendum as a single package, so that voters were forced to approve the whole slate of amendments even if they only supported some. Others argued that the modifications to the TCC appointments process represented a modest effort to constrain executive influence over appointments, in part by involving the GNA in the process. The constitutional amendments ultimately passed in the referendum by a wide margin.<sup>134</sup>

#### ***4.4.1.2 Turkey: appointments procedure***

Prior to 2010, the 1982 Constitution provided for appointments using a variation of the judiciary-executive model, in which the executive appointed candidates nominated by the judiciary. The President appointed all 11 permanent judges and four alternate judges to the TCC (Constitution of Turkey, 1982 (prior to 2010 amendment), Article 146). Seven of the TCC's 11 permanent judges were drawn from Turkey's high courts, including the military high courts. The other four were selected from the Council of Higher Education, senior administrative officers and lawyers (Ibid.). This approach to appointments ensured that the judges appointed to the TCC would share a 'relative ideological conformity', and ultimately created a Court that many viewed as disconnected from popular opinion and democratic will.<sup>135</sup>

Turkey adopted a multi-constituency model for appointments to the TCC in 2010. In particular, the 2010 constitutional amendments significantly changed the appointments process set up in the 1982 Constitution, including altering the number of judges on the court, their term length and the procedure for appointing them. The 1982 Constitution called for 11 permanent justices and four alternates. There was no set term limit for the judges, but retirement was mandated at 65 years (Articles 146, 147). Because the minimum age at which a judge could be appointed to the TCC was 40, a single judge

could theoretically serve for 25 years (Article 146). The 2010 amendments increased the number of judges to 17, all of whom are permanent. Judges now serve one non-renewable term of 12 years; the mandatory retirement age remains 65 (Article 147, amended 2010).


The multi-constituency model adopted by the 2010 amendments also created a broader pool from which TCC judges could be selected and introduced greater legislative influence over the appointments process. The President selects 14 of the 17 TCC judges from specific institutions and professional categories. Seven of these 14 come from Turkey's high courts: three from the High Court of Appeals (Court of Cassation), two from the Council of State, one from the Military High Court of Appeals (Military Court of Cassation) and one from the Military High Court of Administration. For each of these seven positions, the President appoints a candidate from a list of three judges nominated by the courts' plenary assemblies. The President appoints three of the 14 from candidates nominated by the Council of Higher Education; the Council nominates three candidates for each seat from a pool of legal academics, economists and political scientists. Finally, the President appoints four of the 14 from among lawyers, prosecutors and judges from the lower courts, and senior administrative officers (Article 146, amended 2010).

The GNA appoints the remaining three judges according to the following guidelines. The Court of Accounts submits a list of three candidates, selected from among its President and members, for each of two seats on the TCC. The heads of Turkey's bar associations submit a list of three candidates (who are self-employed lawyers) for the third seat. The GNA then votes to elect a judge to each of the three seats. In the first round of voting, a candidate must win a two-thirds majority to be appointed. If a candidate does not prevail in the first round, there is a second round of voting, in which a candidate must win an absolute majority. If no candidate succeeds in winning an absolute majority in the second round, there is a run-off between the two candidates who received the most votes; the winner of that run-off vote is appointed (Ibid.).

#### ***4.4.1.3 Turkey: appointments process in practice***

Because the multi-constituency model has only been in place for a short time, it is not yet possible to accurately assess its impact on the TCC. Turkey is also considering drafting a new Constitution, which may introduce additional changes to the Court. Supporters of the changes to the TCC argue that it is now a more inclusive body and that it is formed through a more participatory judicial selection process. Opponents claim that the changes amount to court packing, and point to a 2012 TCC ruling that current President Abdullah Gül of the AKP may remain in office until 2014, and may then run for a new term, as proof that the TCC is now under the influence of the AKP. Yet assertions that the ruling, which resolved an ambiguity stemming from a 2007





constitutional amendment providing for the popular election of the President, was unfairly favourable to the AKP do not take into account the fact that the AKP opposed allowing Gül to run for a second term. As one major Turkish newspaper commented, the ruling ‘failed to satisfy either the opposition parties or the [AKP] government as it runs counter to both sides’ political plans’. In any case, the history of the TCC, and the adoption of the multi-constituency appointments model, provide a useful example for policymakers.<sup>136</sup> However, more recent AKP-led proposals for further judicial reforms have been widely criticized as an attack on judicial independence.

#### **4.4.2 Italy**

##### **4.4.2.1 Italy: historical and political context**

The Italian Constitutional Court was established during Italy’s transition from fascism under Mussolini to a republic at the close of World War II. In 1946, a Constitutional Assembly was elected and tasked with drafting a new Constitution. The Assembly was divided among the major political parties of the era, including Communists and Socialists (the left wing of the political spectrum), the Christian Democrats, Liberals and Republicans (considered moderate), and right-wing parties, including the monarchists and a small group of neo-fascists. The left and moderate parties controlled the vast majority of seats in the Assembly, with the Communists and Socialists holding a combined 219 seats and the Christian Democrats, Liberals and Republicans holding 271 out of a total of 556.<sup>137</sup>

##### ***Debates during the Constitutional Assembly***

During the Constitutional Assembly’s proceedings, the Christian Democrats supported the creation of a constitutional court with the power of judicial review to ensure that Parliament’s actions complied with the proposed Constitution. Other arguments made in favour of a constitutional court were the need for a body capable of protecting and enforcing the long list of rights contained in the proposed Constitution. The left-wing alliance of Communists and Socialists, joined by the Liberals, opposed the creation of a constitutional court on the grounds that Parliament, as the elected representative of the Italian people, should be sovereign. The left also opposed the establishment of a constitutional court because it expected to win a majority in the upcoming parliamentary elections, and was against creating institutions that could limit its power once elected. For similar reasons, the Christian Democrats’ support for a court was in part due to their anticipation of a possible left-wing victory at the polls; they saw a court as a form of ‘political insurance’ that could compel the ruling party to respect the Constitution. Ultimately, the argument that a constitutional court was needed to limit Parliament’s powers proved persuasive.<sup>138</sup>



When the Italian Constitutional Court was debated in the Constituent Assembly, several proposals were made with respect to how to appoint the Court's judges. The subcommittee responsible for producing the first draft of the Constitution initially suggested that the lower house of Parliament should elect the judges. A later version of the draft modified this proposal, providing for parliamentary elections of judges from candidate lists selected by the judiciary and law professors. Negotiations continued to expand the number and types of political actors with a role in the appointments process. Left-wing parties in the Constitutional Assembly wanted to ensure that appointments to the Court were sufficiently democratically accountable by involving three different political constituencies: the judiciary, the Parliament and the President. Italy's President is elected by Parliament, rather than directly by the people, and is explicitly designated in the Constitution as a representative of national unity, thus bringing a theoretically non-partisan element to the appointments process (Article 87).<sup>139</sup>

The final version of the Italian Constitution, which took effect in 1948, provided for a Constitutional Court of 15 judges, of whom five are appointed by the President, five by the Parliament in a joint sitting of both houses and five by the highest courts of the judiciary (Article 135). Several important questions regarding the details of the appointments procedure—including how the judiciary would make its appointments to the Court and what majority would be required in Parliament to make its appointments—were left to Parliament to decide in future implementing legislation.

### *Debates in Parliament*

The results of Italy's first parliamentary elections in 1948 'shifted the political landscape and disproved the fears and ambitions of the two sides during the Constituent Assembly', causing a subsequent shift in the positions of the major political parties regarding the Italian Constitutional Court and significantly delaying the process of adopting the implementing legislation necessary to enable appointments to the Court to be made. The Christian Democrats won an absolute majority of seats in Parliament and reversed the position they took in the Constituent Assembly; they became less eager to pass the legislation necessary for the Court to begin functioning once they took control of the government. The Communists and Socialists, finding themselves in the political opposition, eventually came to support the Constitutional Court. Subsequent battles in Parliament over the implementing legislation, including disputes over the details of the appointment procedures, delayed the passage of this legislation until 1953. The first set of judges for the Constitutional Court was not sworn into office until December 1955.<sup>140</sup>



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#### ***4.4.2.2 Italy: appointments procedure***

According to the Italian Constitution, the Constitutional Court consists of 15 judges, each of whom serves a non-renewable nine-year term. Appointment of these 15 judges is divided equally among the President, Parliament and the highest courts: each appoints five judges (Article 135).<sup>141</sup>

The implementing legislation that was finally passed in 1953 further specified the appointments procedure set out in the Constitution with respect to the judges appointed by the judiciary (five) and Parliament (five). The five appointments to the Constitutional Court made by the judiciary are subdivided among the three highest ordinary and administrative courts: the Court of Cassation (which elects three judges), the Council of State and Court of Accounts (which each elect one judge). Each of these courts forms a panel, whose members are specified by law, to appoint the judges, and the panels approve appointments by an absolute majority vote. For the five parliamentary appointments, the implementing legislation adopted a supermajority requirement. A judge must win election by a three-fifths majority of the total number of members of Parliament. If this majority is not obtained on the first ballot, the majority requirement is lowered to three-fifths of those voting for subsequent ballots. This supermajority requirement was motivated in part by explicitly political concerns. The ruling Christian Democrats wanted to prevent the Communists from being able to appoint a candidate to the Court. A three-fifths majority requirement would mean, in theory, that political parties would have to work together to find a candidate acceptable to multiple parties. The calculation was that in a worst-case scenario, two-fifths of Parliament would be opposed to a Communist candidate for the Constitutional Court. However, the Communists were able to negotiate for one seat on the Constitutional Court after subsequent elections reduced the Christian Democrats' majority in Parliament.<sup>142</sup>

The supermajority requirement was raised to two-thirds in 1967, thus further encouraging the nomination of candidates who could command the support of multiple political parties. If no one has been elected after three voting rounds, the majority needed is lowered to three-fifths.<sup>143</sup>

#### ***4.4.2.3 Italy: appointments process in practice***


In practice, the Italian appointments process has functioned relatively smoothly. Appointments to the Constitutional Court made by the high courts are quick, and an informal norm has developed by which the judges generally appoint presidents of sections of the high courts to the Court. The supermajority requirement for Parliament's appointees to the Constitutional Court at first caused considerable delays in selecting judges. After the 1953 parliamentary elections, no one party held a three-

fifths majority in Parliament. It took the political parties three years to establish an informal compromise, which would hold until 1994: the five seats selected by Parliament were divided among parties based on the number of parliamentary seats each held. Under this informal arrangement, the Christian Democrats appointed two of the five judges, the Socialists and Communists each appointed one, and the final appointment rotated among the smaller parties.<sup>144</sup>

The three-year delay was also due in part to a dispute over presidential appointments, which were not addressed in the 1953 implementing legislation. In the Constitutional Court's first years, the President and the government argued over whether the President's appointments required a government countersignature. After President Giovanni Gronchi made the Court's first five presidential appointments without seeking the approval of the government, 'the precedent was set that presidents named individuals to the Court without formal consultation'. Although the President is seen more as a statesman than as a political actor, and thus his judicial appointments are perceived as less politically motivated than those of Parliament, presidential appointments have 'paralleled the partisan affiliations of the parliamentary appointees'. The President generally appoints pre-eminent legal scholars who are perceived as political centrists, rather than judges or lawyers. The President has also made appointments with symbolic significance, such as appointing Fernanda Conti as the first female Constitutional Court justice in 1996.<sup>145</sup>

Parliament's informal agreement to allocate seats according to party representation helped the appointments process work effectively for several decades. As in Germany, the supermajority requirement and the tacit understanding among parties in Parliament has also meant that candidates who hold 'extreme' views are not typically chosen. However, the importance of this informal agreement, and its inherent vulnerability, were highlighted in the mid-1990s. In 1992, prosecutorial investigations into corruption resulted in almost all the officials in power losing their seats in the election following the investigation. Italy's political parties underwent a drastic reorganization, with new parties emerging and some older parties changing their names in the process. Since the new political parties elected to Parliament had no informal agreement regarding Constitutional Court appointments, three seats on the Court remained vacant until 1996 because Parliament could not agree on a candidate who could obtain the necessary two-thirds majority vote. The seats were finally filled when the new parties represented in Parliament agreed to allocate the appointments among them in a similar manner to the prior agreement: the right (Forza Italia) controls two appointments, the left (the Democratic Party of the Left and its allies) controls two, and the final seat rotates among the remaining minority parties.<sup>146</sup>

Generally, the Italian Constitutional Court has a low political profile. Its decisions are rarely at the centre of mainstream political discussions, and there is relatively little



animosity between the Court and the legislative and executive branches. For the first 30 years of its rule, the Constitutional Court was reluctant to get involved in disputes among the branches of the central government or in matters of an overtly partisan character. Instead of risking the appearance of partiality to any one institution or political party, the Constitutional Court has abstained from hearing certain cases, and intervenes in high-level political disputes only when it perceives a serious threat to the constitutional order. However, as explained below, this changed after Silvio Berlusconi came to power.<sup>147</sup>

Moreover, the Constitutional Court has, on many occasions, issued bold decisions with far-reaching consequences for the government in power and which have protected the political opposition. In its very first case, the Constitutional Court issued a decision that affirmed its own authority and declared its independence. At issue were some of the Fascist-era security laws requiring government authorization to distribute flyers or newspapers, or to hold a public demonstration using sound amplifying equipment. In Parliament and the press, those hostile to the idea of judicial review argued that the Constitutional Court lacked the authority to determine the constitutionality of laws passed prior to the 1948 Constitution. This argument ‘was an undisguised attempt to preserve the entire corpus of Fascist law’. The Christian Democrats, in fact, were using the security laws in the early 1950s to repress workers’ demonstrations from the left of the political spectrum. The Constitutional Court’s ruling firmly asserted its authority to review all legislation in force, regardless of its date of origin, and struck down the public security laws for violating the Italian Constitution’s guarantee of freedom of expression, thereby protecting the right to political expression of the government’s political opponents. The Constitutional Court proceeded to systematically dismantle the fascist-era legal corpus. These rulings were popular with the public, and shored up the Constitutional Court’s support base.<sup>148</sup>

The Court’s overall policy of avoiding involvement in high-stakes political issues has helped it avoid serious criticism from the other political branches and the public. In fact, during the corruption investigations in 1992 that brought many politicians under criminal investigation, the Constitutional Court was ‘the only national institution that remain[ed] untarnished’. However, the rise of Silvio Berlusconi, a controversial politician and businessman who served as Prime Minister several times, brought about a confrontation that the Constitutional Court could not avoid.<sup>149</sup>


Berlusconi repeatedly clashed with the Constitutional Court. In 2003, he proposed constitutional amendments related to the Court’s composition and appointments process. The amendments would have decreased the number of judges appointed by the President and the judiciary from five to four each and increased the number of parliamentary appointees from five to seven. The amendments would also have changed the method by which Parliament selected its nominees: instead of being selected by

both houses of Parliament in joint sitting, the reform proposed that a Federal Senate (a new body that was proposed in the reform package that would have represented Italy's regional governments) would make the appointments. The result of these constitutional amendments would have been to increase the number of appointees selected by political parties rather than by actors perceived as less politically charged (the judiciary and the President) and to give the federal regions more influence over appointments, which would have had implications for the Court's consideration of cases involving conflicts between different regions or between a region and the central government.<sup>150</sup>

Critics called the proposed constitutional amendments an attack on the Constitutional Court's independence. After the package of reforms failed to pass in Parliament by the required two-thirds majority, Berlusconi unsuccessfully attempted to secure their adoption through a constitutional referendum held in 2006. His attempts to alter the composition of, and appointments to, the Constitutional Court occurred around the same time that he was engaged in an effort to delay or prevent his prosecution on various criminal charges, including fraud and bribery. While serving as Prime Minister from 2001–06, and again from 2008–11, Berlusconi secured passage in Parliament of laws that would have effectively protected him from prosecution, either by granting high-ranking political officials immunity from prosecution while in office or by delaying the start of proceedings against officials while they held office. On several occasions, the Constitutional Court struck down all or part of these laws. In 2009, after the second Constitutional Court judgement (which found one of these laws unconstitutional on the grounds that it violated the principle of equality before the law), Berlusconi lashed out against the Court and called for judicial reform. In 2011, when the Court overturned parts of another law that would have suspended criminal proceedings against him while he remained in office, Berlusconi stated that he would seek reforms of the Court, including requiring a two-thirds majority vote of the 15-member Court in order to find a law unconstitutional. These hostile proposals to change the Constitutional Court stalled after Berlusconi lost power in November 2011.<sup>151</sup>

#### ***4.4.3 The multi-constituency model: key constitutional considerations (high level of political investment)***

The multi-constituency model provides perhaps the greatest opportunity of any of the models reviewed in this report to promote a constitutional court with judges who represent a diverse cross-section of the political spectrum and, more generally, a broad variety of stakeholders. A multi-constituency model can include as many different constituencies as constitutional drafters choose—including (but not limited to) elected and unelected branches of government, educational councils, bar associations, legal academia and NGOs. Furthermore, the model can be designed to guarantee that each constituency successfully places candidates on the constitutional court, either indirectly or directly. In Turkey, various constituencies produce lists of nominees, from which the



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President or the GNA must choose the judges to appoint to the TCC. In Italy, each branch of government is constitutionally guaranteed the right to appoint one third of the Italian Constitutional Court's judges. This is in stark contrast to the judicial council model, in which various constituencies are represented on the council that selects judicial candidates, but no constituency is guaranteed that a nominee of their choice will be appointed to the court.

The involvement of various branches of government and civil society organizations can have several positive consequences for the stability of the constitutional order. Smaller political parties or minority interests have more ways in which to influence the court's composition in a multi-constituency model. Different actors may be more willing to abide by the court's rulings, even when the rulings hinder their current interests, because they are politically invested in the court through their role in selecting the justices. A diverse constitutional court is likely to foster moderate viewpoints and decisions, since compromise among many different opinions will be necessary to issue a final decision in a case. Furthermore, the public is likely to perceive a diverse constitutional court as more independent and less influenced by any one political actor or ideology.<sup>152</sup>

The multi-constituency model provides an opportunity to directly engage many different political and non-governmental actors in the constitutional court appointments process. Italy and Turkey have designed their appointments processes somewhat differently, but both approaches reflect an effort to involve many different political forces in the selection of constitutional court judges.

Italy's decision to divide appointments equally among the three branches of government—the presidency, Parliament and judiciary—appears to have fostered strong support for its Constitutional Court from the elected branches of government. All three branches of government have an equal role in selecting the Court's judges, which creates a sense of fairness and balance. The Italian President's position as a representative of national unity, coupled with political judgement, has meant that presidential appointments to the Court also contribute to its reputation as non-partisan and impartial. Finally, the inclusion of the judiciary in the process increases the likelihood that the most highly qualified members of the judiciary are selected for the Court.

Turkey adopted the multi-constituency model too recently to determine its impact on the TCC, or whether it has contributed to a sense of political investment in the TCC among a broader range of political actors and the public. However, the move to a multi-constituency appointments model in 2010 has expanded the pool of candidates eligible for appointment to the TCC and allows more government institutions and civil society organizations to play a role in determining who will sit on the Court.


Turkey's new multi-constituency appointments process is sometimes criticized for not including enough constituencies. While it does allow a broader range of actors to participate in the appointments process, that range is still somewhat narrow. The President selects 14 of the TCC's 17 members from a pool of candidates largely drawn from the judiciary. At first glance, this does not appear to be much of a departure from the pre-2010 judiciary-executive model used for TCC appointments. However, the pool of candidates now eligible for appointment is much broader than it was prior to the 2010 reforms. Yet the three judges selected by Turkey's legislature are also drawn from a relatively narrow pool of nominations from the Court of Accounts and Turkey's bar associations. Thus, some scholars suggest that the new appointments process may not seriously alter the TCC's composition, and will preserve executive control over TCC appointments. The inclusion of two military judges on the TCC has also been controversial; it raises questions regarding whether the military should play any role in the judiciary in a democracy and whether such judges can be impartial, considering that they may choose to return to the military justice system after their term on the Court. For similar reasons, countries in the MENA region should consider insulating the constitutional court appointments process from military influence, given the controversial role that some military forces in the region play in political issues.<sup>153</sup>

### ***Potential danger in allocating appointments to the executive***

In Italy and Turkey, the executive unilaterally appoints a certain number of judges to the constitutional court: five in Italy and four in Turkey. Allowing the executive to select constitutional court judges without any consultation or oversight from the other branches of government carries an obvious risk, as the executive has a strong interest in selecting judges who are inclined to uphold its policies. In Italy, this danger has been mitigated by the fact that the President's role is to act as a figure of national unity, and because he or she is not popularly elected. In other nations, this may not be the case. Given the MENA region's history of executives who attempt to use their appointment powers to influence constitutional courts, policymakers should consider constraining the executive's role in a multi-constituency model, either by allowing a different political actor to review and ultimately approve its nominations to the court or by requiring the executive to make its allotted appointments from a shortlist of candidates selected by a different political actor.

### ***Potential for deadlock in legislative appointments***

Italy, like Germany, has developed an informal agreement among the parties represented in the legislature to allow parties to 'control' a certain number of seats on the court, in proportion to their representation in Parliament. The Italian case shows the risk inherent in such informal agreements. In 1994, when the balance of power in Parliament shifted dramatically, the informal arrangement collapsed, resulting in years



of deadlock as the new parties represented in Parliament fought over appointments to the Constitutional Court. In countries transitioning away from authoritarianism, like some MENA region countries, political parties may be weak and fragmented. In this situation, relying on parliament to select some or all of the constitutional court's members carries the risk that court appointments may be delayed by parties' inability to agree on nominees.



## 5 Judicial qualifications and removal procedures

Specifying the qualifications that constitutional court judges must hold is another way to ensure political investment from across the political spectrum. Setting out the level of education and professional achievement judges must have obtained, or specifying a minimum or maximum age at the time of appointment, ensures that the judges appointed to the court will have the necessary expertise to parse the complex and politically significant constitutional questions that will come before the court. But it also creates an additional barrier to court packing: a political actor or party seeking to place its supporters on the court will have to ensure that its candidates possess the minimum qualifications specified in the constitution. Qualifications may also include a list of professions or offices that are incompatible with appointment to the constitutional court, usually political positions, which can help to insulate the court from political influence. Some countries also require the court to include, at any given time, a set number of members with experience in the judicial sector (for example, a set number of career judges). This section briefly compares the age restrictions and professional or legal qualifications stipulated by the six countries discussed in this report.

Another important issue for the design of constitutional courts is the procedures for removing sitting judges from the bench. Removal and appointment procedures are mutually reinforcing. If it is easy for one political actor to remove judges, the removal mechanism can be used to undermine even the best-designed appointments process by enabling the manipulation of the court's membership. Indeed, the threat of removal can be used to influence the judges. It should be noted, however, that it is relatively rare for a country to remove a sitting constitutional court judge. It is more common for political actors to seek to influence the court through the appointment process than to remove a judge with whom they disagree.

### 5.1 Judicial qualifications

Table A compares the judicial qualifications for constitutional court judges in Egypt, Germany, Iraq, Italy, South Africa and Turkey. Four of these six (Germany, Italy, South Africa and Turkey) appoint constitutional court judges for a defined, non-renewable term. Egypt and Iraq do not specify a term length; Egypt sets a mandatory retirement age for judges, while Iraq only states the minimum and maximum ages a judge must be when appointed. Most countries also provide fairly specific professional qualifications that judges must hold to be appointed, including a high level of achievement as a judge, lawyer or academic. These professional qualifications limit the range of individuals that may be selected as a constitutional court judge. Iraq and South Africa are less specific regarding the qualifications required, which creates a broader pool of potential court nominees.

Table A. Age and experience requirements for constitutional courts

Country	Age restrictions	Professional/legal experience
Egypt <sup>154</sup>	No younger than 45; mandatory retirement at 70.	Judges may be selected from the following groups: <i>Members of the Supreme Court</i> , <sup>155</sup> <i>Judiciary</i> : Current or former members of the judicial bodies holding the rank of counsellor or its equivalent for at least five consecutive years; <i>Academics</i> : Current or former law professors who have held the position of a professor at an Egyptian university for at least eight consecutive years; <i>Lawyers</i> : Must have practised before the Court of Cassation or the High Administrative Court for at least ten consecutive years.
Germany <sup>156</sup>	No younger than 40; mandatory retirement at 68; judges may only serve one 12-year, non-renewable term.	Judges must meet the basic qualifications for judicial office: successful completion of legal studies and a subsequent period of preparatory training. FCC judges may not simultaneously hold office in the legislative or executive branch and must not have any other professional occupation except professor of law. Six of the 16 FCC members must be selected from among judges sitting on the highest ordinary and administrative courts (career judges).

Iraq <sup>157</sup>	No younger than 28 or older than 45.	Degree from Iraq's Judicial Institute and three years' legal experience, or appointment by presidential order and ten years legal experience.
Italy <sup>158</sup>	No specific age requirements, but judges may only serve one nine-year, non-renewable term.	Must be a judge on one of Italy's higher courts (ordinary or administrative), a full professor of law or a lawyer with 20 years' experience in practice. Judges may not simultaneously be members of Parliament or a Regional Council.
South Africa <sup>159</sup>	No specific age requirements, but judges may only serve one non-renewable 12-year term, and must retire at 70. In certain cases a judge may remain on the bench for 15 years, or until he or she reaches the age of 75, if necessary to fulfil the legal requirement of 15 years of active service. <sup>160</sup>	Judges must be 'appropriately qualified' and 'fit and proper'. The Court must always have at least four members who were judges at the time they were appointed.
Turkey <sup>161</sup>	No younger than 45; mandatory retirement at 65. Judges may only serve one 12-year, non-renewable term.	Judges may be selected from the following groups: <i>Academics:</i> Must be an associate professor or professor. <i>Lawyers:</i> Must have practiced for at least 20 years. <i>Government officials:</i> Must have completed higher education and worked in public service for 20 years. <i>Judges and prosecutors:</i> Must have at least 20 years of work experience.



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## **5.2 Removal procedures**

All six of the countries reviewed in this report give the judiciary a key role in determining whether or not a constitutional court judge may be removed from the bench. In Egypt, Germany and Italy, the court itself must vote in favour of removing a judge. Iraq and South Africa both require that several different branches of government, including the judiciary, agree upon a judge's removal before it can be carried out. Turkey makes removal automatic for judges convicted of certain offences, but requires a vote of the Constitutional Court to remove a judge due to incapacity. Notably, five of the six countries reviewed here ensure that the power to remove a judge is either divided among several different political actors or is not granted to the same actor that is in charge of the appointments process, thus reducing the risk that any one political actor can capture the Court. Iraq's removal procedure is very similar to its appointments procedure, but because three different political actors must approve a judge's removal from the FSC, the risk is somewhat mitigated that a judge could be removed for political reasons rather than reasons related to his or her competence or fitness for service.

### **5.2.1 Egypt**

The Supreme Constitutional Court is responsible for disciplining its members. At the request of the Chief Justice, a committee will investigate a judge accused of being untrustworthy or derelict in his or her duties. During the investigation, the member is put on mandatory leave with salary. After a hearing, the General Assembly of the Court decides whether the member must resign. Their decision is final and irrevocable.<sup>162</sup>

### **5.2.2 Germany**

The Federal Constitutional Court controls the discipline and removal of its judges. According to Section 105 of the FCC Act, FCC judges may be involuntarily dismissed only if they are permanently unfit for service, have been sentenced without appeal because of a 'dishonourable act' or to over six months' imprisonment, or if they have committed a 'gross breach of duty'. A dismissal requires a two-thirds majority vote of the FCC's two chambers sitting in plenary, after which the Federal President formally dismisses the judge. No FCC judge has been removed to date.<sup>163</sup>

### **5.2.3 Iraq**

Under the Transitional Administrative Law, no judge may be removed unless he or she is convicted of a crime involving moral turpitude or corruption or suffers permanent incapacity (TAL Article 47). To remove a justice, the Higher Juridical Council must recommend removal, the Council of Ministers must decide on removal and the Presidency Council (now the President) must approve the removal (TAL Article 47). If a judge is accused of a crime involving moral turpitude or corruption, he or she shall be

suspended from work until the case is adjudicated (TAL Article 47). Iraq's 2005 Constitution also limits judicial removal; however, the exact causes for removal and discipline, as well as the removal procedures, are deferred to implementing legislation, which has not yet been drafted (Article 97).

#### **5.2.4 Italy**

The Italian Constitutional Court controls the process of removing its judges. No judge may be removed except by a vote of two thirds of the Court itself. Judges may only be removed due to incapacity to perform their duties or for gross misconduct.<sup>164</sup>

#### **5.2.5 South Africa**

South Africa requires a two-step process to remove a Constitutional Court judge. First, the Judicial Service Commission must find that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. Second, the JSC's ruling must be referred to the National Assembly; a judge's removal requires a two-thirds majority vote. Once both of these steps have been completed, the President of South Africa must remove the judge (Article 177). This process has not been used to date.

#### **5.2.6 Turkey**

Turkey's Constitution stipulates that a judge's membership on the Turkish Constitutional Court will terminate automatically if he or she is convicted of an offence requiring dismissal. Judges may also be removed by an absolute majority vote of the members of the TCC if it is definitely established that he or she is unable to perform his or her duties on account of ill health (Article 147).



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## 6 Analysis of the June 2013 draft Constitution of Tunisia

Several countries in the MENA region are in the process of drafting new constitutions, or substantially reforming existing constitutions. The process in Tunisia is among the most successful so far, and the Constituent Assembly's discussions regarding judicial design are some of the most advanced debates taking place in the region. The draft Constitution issued by Tunisia's Constituent Assembly in June 2013 incorporates elements of the multi-constituency model as well as the legislative supermajority model into its Constitutional Court appointments process.

### 6.1 *Appointments procedure and qualifications*

#### **Draft Constitution of the Republic of Tunisia (June 2013)**

**Article 115:** The Constitutional Court is composed of 12 members having no less than 15 years of high expertise, two-thirds of whom must be legal specialists.

The President of the Republic, the Speaker of the Chamber of Deputies, the Prime Minister, and the Supreme Judicial Council shall each nominate six candidates, two-thirds of whom must be legal specialists.

Adopting one-half from each nominating party, the Chamber of Deputies shall elect twelve members by a two-thirds majority. The elected members' mandate shall be for one-term period lasting for nine years.

In the event that the required majority is not reached, the remaining candidates shall, with the same majority required, stand for election again. In the event of failure to reach the required majority, other candidates shall be nominated and the election process shall be repeated following the same method.

One-third of the members of the Constitutional Court shall be renewed every three-year period. Any vacancies in the hierarchy of the Court shall be filled by virtue of the means adopted during appointment.

The members of the Court shall, from amongst the members, elect a President and a Vice President of the Court.

The June 2013 draft Constitution prescribes a two-step process for Constitutional Court appointments. In the first step, the President, the Speaker of the Chamber of Deputies, the Prime Minister and the Supreme Judicial Council compile separate lists of candidates. This ensures the involvement of the two main public office holders in the executive branch in the proposed semi-presidential system, as well as representatives of the legislative branch and the judiciary in the selection of judges, which promotes political investment in the Court by a wide range of political actors and other constituencies (e.g. the judiciary). In addition, the qualifications that two thirds of each list (four of the six judges on each list) must be legal specialists and that all candidates

have at least 15 years of ‘high expertise’ will reduce the risk of nominations of candidates based on political loyalties rather than legal expertise.

The second step of the appointments process charges the Chamber of Deputies with electing the Court’s judges from the four lists of candidates. The Chamber must elect three judges from each list of six candidates, which guarantees that each of the political actors empowered to propose candidates will play a role in shaping the Court. Furthermore, judges must be elected by a two-thirds supermajority of the Chamber of Deputies, which encourages the different political parties represented in the Chamber to work together to reach compromises on candidates. In particular, it makes it very unlikely that a governing coalition would be able to choose its preferred candidates over the objections of opposition parties.


Overall, the appointments model set out in the June 2013 draft Constitution ensures the involvement of a wide range of political actors in the judicial selection process, thus promoting a strong sense of political investment in the Constitutional Court. It should be noted that requiring a legislative supermajority to elect a candidate can be difficult, and could potentially result in lengthy delays in appointing judges, as shown in the discussions of the German FCC (Section 4.1) and the Italian Constitutional Court (Section 4.4.2). In the June 2013 draft, even if a candidate does not obtain a two-thirds supermajority vote in the first round of voting, he or she must obtain the same supermajority in the second round of voting in order to be appointed. A better option may be to lower the supermajority required in the second round of voting in order to reduce the risk of legislative deadlock over Court appointments.

## 6.2 Removal procedure

### **Draft Constitution of the Republic of Tunisia (June 2013)**

**Article 104:** No judge may be transferred without his consent, no judge may be dismissed, and no judge may be suspended, deposed, or subjected to a disciplinary punishment except in such cases and in accordance with the guarantees provided for by the law and by virtue of a justified decision issued by the Supreme Judicial Council.

Tunisia’s June 2013 draft Constitution defers the question of removal of Constitutional Court judges to legislation, apart from indicating that the Supreme Judicial Council will play a role in removal proceedings. This is a worrisome omission. As discussed in Section 3.2, the power to remove a judge can have just as much impact on the Court’s independence as the appointment power. The Constitution should clearly state the reasons for which a judge may be removed (e.g. misconduct or incapacity) and the procedure for removing a judge. Moreover, the powers of appointment and removal should not be accorded to the same actor(s). For example, as shown in Section 5.2,



some countries only permit the removal of a constitutional court judge if the court itself votes in favour of removal. Some countries also require that two different political bodies (e.g. the judicial council and the legislature) approve the removal of a judge.




## 7 Conclusion

Many countries in the MENA region are currently considering a range of important questions regarding the formation of a constitutional court and the appointment mechanism for its judges. The Arab Spring sparked a regional debate over constitutional reforms, providing a unique opportunity to create a strong judicial institution that can help promote the rule of law and hold all political actors accountable to the constitution. At present, there are two regional trends emerging. Countries such as Tunisia have proposed a procedure for appointing constitutional court judges that will involve many different political actors, thus fostering a broad sense of political investment in the court and helping to protect its independence. This sense of political investment will provide an incentive for all political actors to continue supporting the court even when they are on the losing side of its decisions.

In contrast, Jordan, Morocco and Syria have all granted the executive branch an enormous amount of power over constitutional court appointments. If court judges fear that angering the executive may cost them their positions, their decisions may be influenced more by the need to please the executive than by the law's requirements. Without establishing procedures and rules that will allow a constitutional court to withstand political pressure, the court will serve as mere window dressing for rulers who wish to give the appearance of respect for the rule of law without creating real checks on their power.

The appointments process should be designed to strike an appropriate balance between (1) the need to protect the constitutional court's independence and insulate it from political interference and (2) its need to be responsive to the democratic society in which it operates. Establishing the professional qualifications that judges must hold in order to be appointed to the court, and providing safeguards against the removal of judges for political reasons, are further measures that should be taken to protect the court's independence. With these principles in mind, we offer the following general recommendations for countries in the MENA region:

- **Encourage a broad degree of political investment in the constitutional court by involving a wide range of political actors in the appointments process.** The judicial council and multi-constituency models both provide for the inclusion of a large number of political interests, including political parties, civil society organizations, and judicial and legal organizations, as well as academics, in the appointments process.
- **Do not grant any one political actor the power to appoint a majority of the constitutional court's members.** This will protect the court from undue pressure from politicians, and will help avoid the perception that it is biased toward any particular political actor or party. For this reason, the judiciary-executive model is



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not generally recommended for countries in the MENA region, because it gives the executive too much power over court appointments and excludes many other political actors from the process.

- **Exercise caution when involving the legislature in constitutional court appointments.** Many of the countries studied in this report, including Germany, South Africa, Italy and Turkey, give the legislature a role in selecting some of the court's members. Caution is required in deciding exactly how large a role to give the legislature, and in setting the rules for how the legislature will make its appointments. Countries with a history of weak political parties, or if there is likely to be a great deal of instability in terms of which parties are represented in the legislature, should not adopt an appointments procedure that requires a supermajority vote of the legislature to make court appointments, such as the legislative supermajority model. This model requires political parties to cooperate on constitutional court appointments over time based on relationships of trust and reciprocity. It is difficult for political parties to develop such practices if the party system is weak. In such situations, parties in the legislature will likely find it hard to reach a broad consensus on a given nominee because of the lack of trust, which can result in significant delays in filling vacancies. However, there are other ways to involve the legislature in court appointments; for example, South Africa includes members of the legislature on its Judicial Service Commission.
- **Require candidates for the constitutional court to meet a high professional standard.** Establishing specific qualifications for judges regarding their level of education and professional achievement has two benefits. First, it ensures that judges appointed to the court will have the knowledge and skills necessary to adjudicate complex constitutional issues. Second, it encourages the court's independence by limiting the pool from which political actors may nominate judges. A political party or president will find it harder to pack the court with loyal supporters if nominees must meet specific requirements to be considered eligible.
- **Clearly state the grounds upon which a judge may be removed, and the procedure for removal, in the constitution.** Enumerating the reasons why a judge may be removed, such as incapacity or a criminal conviction, helps protect judges from attack by political actors by ensuring that they cannot be removed for purely political reasons. Enshrining the removal procedure in the constitution offers further protection by making it difficult to alter. Furthermore, the power to remove a judge should not be given to the same political actor that appoints the judges, in order to reduce the susceptibility of judges to political pressure.

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## Appendix: selected constitutional and legal provisions on constitutional courts

### *Egypt*

#### *Constitution of the Arab Republic of Egypt*

(11 Sept. 1971, as amended 22 May 1980, 25 May 2005, 26 March 2007)<sup>165</sup>

#### *Article 174:*

The Supreme Constitutional Court shall be an independent, self-standing judiciary body, in the Arab Republic of Egypt, seated in Cairo.

#### *Article 175:*

The Supreme Constitutional Court shall exclusively undertake the judicial control of the constitutionality of the laws and regulations, and shall undertake in the manner prescribed by the law the interpretation of legislative texts. The law shall determine the other competencies of the court, and regulate the procedure to be followed before it.

#### *Article 176:*

The law shall regulate the manner of the formation of the Supreme Constitutional Court, and define requirements to be satisfied by its members, rights and immunities.

#### *Article 177:*

Members of the Supreme Constitutional Court shall not be removed from office. The Court shall call to account its members, in the manner prescribed by the law.

#### *Constitution of the Arab Republic of Egypt*

(26 Dec. 2012 (suspended))<sup>166</sup>

### Section 4: The Supreme Constitutional Court

#### *Article 175: Mandate and procedures*

The Supreme Constitutional Court is an independent judicial body. It is based in Cairo. It is exclusively competent to decide on the constitutionality of laws and regulations. The law defines the Court's other competencies and regulates the procedures that are to be followed before the Court.

*Article 176: Composition*

The Supreme Constitutional Court is made up of a president and ten members. The law determines the judicial or other bodies and associations that nominate them, the manner in which they are to be appointed, and the requirements to be satisfied by them. Appointments take place by a decree from the President of the Republic.

*Article 177: Constitutionality of electoral laws*

The President of the Republic or the Speaker of the Council of Representatives present draft laws governing presidential, legislative or local elections before the Supreme Constitutional Court, to determine their compliance with the Constitution prior to dissemination. The Court reaches a decision in this regard within 45 days from the date the matter is presented before it; otherwise, the proposed law is considered approved.

If the Court deems one or more parts of the text non-compliant with the provisions of the Constitution, its decision is implemented.

The laws referred to in the first paragraph are not subject to the subsequent control stipulated in Article 175 of the Constitution.


*Law No. 48 of 1979 (Law Governing the Operations of the Supreme Constitutional Court)<sup>167</sup>**Article 3:*

The Court shall be formed of the Chief Justice and a sufficient number of members. Judgements and decisions of the court, shall be entered by a quorum of seven of its members.

The Chief Justice or the next senior member, shall preside over the sessions of the court. Where the office of the Chief Justice is vacant, or in the case of his absence or impairment, all competencies attributed thereto shall be carried out in accordance with descending seniority of the members of the Court.

*Article 4:*

Nominees for membership of the court must meet all the requirements for the general judicial service specified in the law on the judicial power, and must be not less than forty-five calendar years of age.



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They may be chosen from among the following groups:

- (a) Members of the Supreme Court.
- (b) Current or former members of the judicial bodies holding the rank of a counsellor or its equivalent for at least five consecutive years.
- (c) Current or former law professors who have held the position of a professor at an Egyptian university for at least eight consecutive years.
- (d) Attorneys-at-law who have practiced before the court of cassation, or the high administrative court for at least ten consecutive years.

*Article 5:*

The President of the Republic appoints the Chief Justice of the Court by a presidential decree. Members of the court are also appointed by a presidential decree after consulting with the Supreme Council of the Judicial Bodies; from among two candidates, one is chosen by the general assembly of the Court, and the other by the Chief Justice. At least two thirds of the appointees to the bench must be chosen from the other judicial bodies. The presidential decree that appoints a member shall indicate his position and seniority.

*Article 26:*

The Supreme Constitutional Court is empowered to provide the definitive interpretation of laws, enacted by the legislature, and presidential decrees with the force of law issued in accordance with the constitution if, during the course of their application, they arise divergent points of view, and they have an importance that necessitates uniform interpretation.

**Germany**

*Grundgesetz Für die Bundesrepublik Deutschland [Basic Law]*  
(23 May 1949, as last amended July 21, 2010)<sup>168</sup>

*Article 92: Court organization*

The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.



*Article 94: Composition of the Federal Constitutional Court*

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a Land.

(2) The organisation and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

*Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz in der Fassung der Bekanntmachung vom 11. August 1993) (BGBl. I S. 1473)<sup>169</sup>*

## § 2

(1) The Federal Constitutional Court shall consist of two panels.

(2) Eight judges shall be elected to each panel.

(3) Three judges of each panel shall be elected from among the judges of the supreme Federal courts of justice. Only judges who have served at least three years with a supreme Federal court of justice should be elected.


## § 3

(1) The judges must have reached the age of 40, be eligible for election to the Bundestag, and have stated in writing that they are willing to become a member of the Federal Constitutional Court.

(2) They must be qualified to exercise the functions of a judge pursuant to the Judges Act.

(3) They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding organs of a Land. On their appointment they shall cease to be members of such organs.

(4) The functions of a judge shall preclude any other professional occupation save that of a lecturer of law at a German institution of higher education. The functions of a



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Judge of the Federal Constitutional Court shall take precedence over the functions of such lecturer.

#### § 4

(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.

#### § 5

(1) Half of the judges of each panel shall be elected by the Bundestag and the other half by the Bundesrat. Of those to be selected from among the judges of the supreme Federal courts of justice one shall be elected by one of the electoral organs and two by the other, and of the remaining judges three shall be elected by one organ and two by the other.

(2) A judge shall be elected at the earliest three months before the expiration of his predecessor's term of office or, if the Bundestag is dissolved at the time, within one month of the first meeting of the Bundestag.

(3) If a judge relinquishes his office prematurely, his successor shall be elected within one month by the same Federal organ as that which elected his predecessor.

#### §6

(1) The judges to be elected by the Bundestag shall be elected indirectly.

(2) The Bundestag shall, by proportional representation, elect a twelve-man electoral committee for the Federal Constitutional Court judges. Each parliamentary group may propose candidates for the committee. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the list. If a member of the electoral committee retires or is unable to perform his functions, he shall be replaced by the next member on the same list.

(3) The eldest member of the electoral committee shall immediately with one week's notice call a meeting of the committee to elect the judges and shall chair the meeting, which shall continue until all of them have been elected.

(4) The members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.

(5) To be elected, a judge shall require at least eight votes.

## § 7

The judges to be elected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat.

## §105

(1) The Federal Constitutional Court may authorize the Federal President to

1. retire a Judge of the Federal Constitutional Court because of permanent unfitness for service;


2. dismiss a Judge of the Federal Constitutional Court if he has been sentenced without appeal because of a dishonourable act or to over six months' imprisonment or, if he has committed a gross breach of duty, so that his remaining in office is ruled out.

(2) The plenum of the Federal Constitutional Court shall decide on the institution of proceedings pursuant to paragraph 1 above.

(3) The General Procedural Provisions and the provisions of Articles 56 (1) and 55 (1), (2), (4) to (6) above shall apply *mutatis mutandis*.

(4) Authorization pursuant to paragraph 1 above shall require the consent of two thirds of the members of the Court.

(5) After institution of proceedings pursuant to paragraph 2 above the plenum of the Federal Constitutional Court may temporarily remove the judge from office. The same shall apply if principal proceedings have been instituted against the judge because of a misdemeanour. Temporary removal from office shall require the consent of two thirds of the members of the Court.



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(6) Upon dismissal pursuant to paragraph 1 (2) above the judge shall forfeit all claims arising from his office.

## *Iraq*

### *Law of Administration for the State of Iraq in the Transitional Period*

(8 Mar. 2004)<sup>170</sup>

#### *Article 44:*

- (A) A court called the Federal Supreme Court shall be constituted by the law in Iraq.
- (B) The jurisdiction of the Federal Supreme Court shall be as follows:
  - (1) Original and exclusive jurisdiction in legal proceedings between the Iraqi Transitional Government and the regional governments, governorate and municipal administrations, and local administrations.
  - (2) Original and exclusive jurisdiction, on the basis of a complaint from a claimant or a referral from another court, to review claims that a law, regulation, or directive issued by the federal or regional governments, the governorate or municipal administrations, or local administrations is inconsistent with this Law.
  - (3) Ordinary appellate jurisdiction of the Federal Supreme Court shall be defined by federal law.
  - (C) Should the Federal Supreme Court rule that a challenged law, regulation, directive, or measure is inconsistent with this Law, it shall be deemed null and void.
  - (D) The Federal Supreme Court shall create and publish regulations regarding the procedures required to bring claims and to permit attorneys to practice before it. It shall take its decisions by simple majority, except decisions with regard to the proceedings stipulated in Article 44(B)(1), which must be by a two-thirds majority. Decisions shall be binding. The Court shall have full powers to enforce its decisions, including the power to issue citations for contempt of court and the measures that flow from this.
  - (E) The Federal Supreme Court shall consist of nine members. The Higher Judicial Council shall, in consultation with the regional judicial councils, initially nominate no less than eighteen and up to twenty-seven individuals to fill the initial vacancies

in the aforementioned Court. It will follow the same procedure thereafter, nominating three members for each subsequent vacancy that occurs by reason of death, resignation, or removal. The Presidency Council shall appoint the members of this Court and name one of them as its Presiding Judge. In the event an appointment is rejected, the Higher Juridical Council shall nominate a new group of three candidates.

*Article 45:*

A Higher Juridical Council shall be established and assume the role of the Council of Judges. The Higher Juridical Council shall supervise the federal judiciary and shall administer its budget. This Council shall be composed of the Presiding Judge of the Federal Supreme Court, the presiding judge and deputy presiding judges of the federal Court of Cassation, the presiding judges of the federal Courts of Appeal, and the presiding judge and two deputy presiding judges of each regional court of cassation. The Presiding Judge of the Federal Supreme Court shall preside over the Higher Juridical Council. In his absence, the presiding judge of the federal Court of Cassation shall preside over the Council.


*Constitution of the Republic of Iraq*

(15 Oct. 2005)<sup>171</sup>

*Article 92:*

First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.



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*Article 97:*

Judges may not be removed except in cases specified by law. Such law will determine the particular provisions related to them and shall regulate their disciplinary measures.

***Italy***

*Costituzione della Repubblica Italiana*

(27 Dec. 1947, as amended 4 Dec. 1992, title 7, sec. 1)<sup>172</sup>

*Article 135:*

The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts.

The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.

Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be re-appointed.

At the expiry of their term, the constitutional judges shall leave office and the exercise of the functions thereof.

The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges.

The office of constitutional judge shall be incompatible with membership of Parliament, of a Regional Council, the practice of the legal profession, and with every appointment and office indicated by law.

In impeachment procedures against the President of the Republic, in addition to the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate,

which the Parliament prepares every nine years through election using the same procedures as those followed in appointing ordinary judges.

*Article 137:*

A constitutional law shall establish the conditions, forms, terms for proposing judgements on constitutional legitimacy, and guarantees on the independence of constitutional judges.

Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court. No appeals are allowed against the decision of the Constitutional Court.

*Constitutional Law No. 1 of 9 February 1948: Provisions governing the review of constitutionality and guaranteeing the independence of the Constitutional Court<sup>173</sup>*

*Section 3:*

Judges of the Constitutional Court may only be removed or suspended from office by a decision of the same Court on the grounds of physical or civil incapacity or gross misconduct in the exercise of their office.

While in office, judges of the Constitutional Court shall enjoy the same immunities as members of both Houses of Parliament provided by Article 68(2) of the Constitution. The authorisation referred to in that Article shall be issued by the Constitutional Court.

*Constitutional Law No. 1 of 11 March 1953: Supplementary Constitutional Provisions regarding the Constitutional Court*

*Section 7:*

The judges of the Constitutional Court may be removed or suspended from office under Section 3 of Constitutional Law No. 1 of 9 February 1948 but only after a resolution to this effect has been adopted by the Constitutional Court with a two-thirds majority vote of the judges present.

*Section 8:*

Any judge of the Constitutional Court who fails to perform his functions for six consecutive months shall cease to hold office.

*Constitutional Law No. 2 of 22 November 1967: Amendment to Article 135 of the Constitution and provisions relating to the Constitutional Court*

*Section 3:*

The judges of the Constitutional Court appointed by Parliament are elected at a joint sitting of both Houses, by secret ballot, with a majority consisting of two thirds of the members of the Assembly. After the third ballot a majority consisting of three fifths of the members of the Assembly is sufficient.

*Section 4:*

The judges of the Constitutional Court appointed by the highest ordinary and administrative courts following the procedures laid down by statute shall be elected by majority vote, on condition that they obtain a number of votes in excess of one half of the number of the members of the panel.

If this majority is not obtained on the first ballot, on the following day a second ballot shall be held between the candidates obtaining the largest number of votes in the previous day's ballot, with twice as many candidates as there are positions to be filled. The candidates obtaining the highest number of votes are elected. In the event of a tie, the oldest candidate shall be elected or entered for a tie-breaking ballot.

## **South Africa**

*Constitution of the Republic of South Africa*  
(1996)<sup>174</sup>

*Article 165: Judicial authority*

1. The judicial authority of the Republic is vested in the courts.
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
3. No person or organ of state may interfere with the functioning of the courts.
4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.



5. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

*Article 167: Constitutional Court*


1. The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

[Subs. (1) substituted by s. 11 of the Constitution Sixth Amendment Act of 2001]

2. A matter before the Constitutional Court must be heard by at least eight judges.
3. The Constitutional Court
  - a. is the highest court of the Republic; and
  - b. may decide
    1. constitutional matters; and
    2. any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court;
  - c. makes the final decision whether a matter is within its jurisdiction.

[Subs. (3) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2013]

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, the High Court of South Africa, or a court of similar status, before that order has any force.



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[Subs. (5) substituted by s. 3 of the Constitution Seventeenth Amendment Act of 2013]

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 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 South African citizen.
2. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are 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 Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

[Subs. (3) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001]

4. The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice 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.

[Subs. (4) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001]

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.

[...]

*Article 177: Removal*


1. A judge may be removed from office only if
  - a. the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
  - b. the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
2. The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
3. The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

*Article 178: Judicial Service Commission*

1. There is a Judicial Service Commission consisting of
  - a. the Chief Justice, who presides at meetings of the Commission;
  - b. the President of the Supreme Court of Appeal;

[Para. (b) substituted by s. 16 (a) of the Constitution Sixth Amendment Act of 2001]

- c. one Judge President designated by the Judges President;
- d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
- e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

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- f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
  - g. one teacher of law designated by teachers of law at South African universities;
  - h. six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
  - i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
  - j. four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
  - k. when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.

[Para. (k) substituted by s. 2 of the Constitution Second Amendment Act of 1998, s. 16 of the Constitution Sixth Amendment Act of 2001 and s. 10 of the Constitution Seventeenth Amendment Act of 2013]

[...]

## ***Turkey***

*Constitution of the Republic of Turkey*

(7 Nov. 1982 (prior to 2010 amendment))<sup>175</sup>

### *Article 146 – The Constitutional Court – Organization*

The Constitutional Court shall be composed of eleven regular and four substitute members.

The President of the Republic shall appoint two regular and two substitute members from the High Court of Appeals, two regular and one substitute member from the Council of State, and one member each from the Military High Court of Appeals, the High Military Administrative Court and the Audit Court, three candidates being nominated for each vacant office by the Plenary Assemblies of each court from among their respective presidents and members, by an absolute majority of the total number of members; the President of the Republic shall also appoint one member from a list of three candidates nominated by the Higher Education Council from among members of

the teaching staff of institutions of higher education who are not members of the Council, and three members and one substitute member from among senior administrative officers and lawyers.

To qualify for appointments as regular or substitute members of the Constitutional Court, members of the teaching staff of institutions of higher education, senior administrative officers and lawyers shall be required to be over the age of forty and to have completed their higher education, or to have served at least fifteen years as a member of the teaching staff of institutions of higher education or to have worked actually at least fifteen years in public service or to have practiced as a lawyer for at least fifteen years.

The Constitutional Court shall elect a President and Deputy President from among its regular members for a term of four years by secret ballot and by an absolute majority of the total number of members. They may be re-elected at the end of their term of office. The members of the Constitutional Courts shall not assume other official and private functions, besides their main functions.

*Article 147: Termination of Membership*

The members of the Constitutional Court shall retire on reaching the age of sixty-five. Membership in the Constitutional Court shall terminate automatically if a member is convicted of an offence requiring his dismissal from the judicial profession; it shall terminate by a decision of an absolute majority of the total number of members of the Constitutional Court if it is definitely established that he is unable to perform his duties on account of ill health.


*Constitution of the Republic of Turkey*

(7 Nov. 1982, as amended 12 Sept. 2010)<sup>176</sup>

*Article 146- Constitutional Court formation:*

The Constitutional Court shall be composed of seventeen members.

The Grand National Assembly of Turkey shall elect, by secret ballot, two members from among three candidates to be nominated by and from among the president and



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members of the Court of Accounts, for each vacant position, and one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers. In this election to be held in the Grand National Assembly of Turkey, for each vacant position, two-thirds majority of the total number of members shall be required for the first ballot, and absolute majority of total number of members shall be required for the second ballot. If an absolute majority cannot be obtained in the second ballot, a third ballot shall be held between the two candidates who have received the greatest number of votes in the second ballot; the member who receives the greatest number of votes in the third ballot shall be elected.

The President of the Republic shall appoint three members from High Court of Appeals, two members from Council of State, one member from the High Military Court of Appeals, and one member from the High Military Administrative Court from among three candidates to be nominated, for each vacant position, by their respective general assemblies, from among their presidents and members; three members, at least two of whom being law graduates, from among three candidates to be nominated for each vacant position by the Council of Higher Education from among members of the teaching staff who are not members of the Council, in the fields of law, economics and political sciences; four members from among high level executives, self-employed lawyers, first category judges and public prosecutors or rapporteurs of the Constitutional Court.

In the elections to be held in the respective general assemblies of the High Court of Appeals, Council of State, High Military Court of Appeals, High Military Administrative Court, the Court of Accounts and the Council of Higher Education for nominating candidates for membership of the Constitutional Court, three persons obtaining the greatest number of votes shall be considered to be nominated for each vacant position. In the elections to be held for the three candidates nominated by the heads of bar associations from among self-employed lawyers, three persons obtaining the greatest number of votes shall be considered to be nominated.

To qualify for appointments as members of the Constitutional Court, members of the teaching staff shall be required to possess the title of professor or associate professor;

lawyers shall be required to have practiced as a lawyer for at least twenty years; high level executives shall be required to have completed higher education and to have worked for at least twenty years in public service, and first category judges and public prosecutors with at least twenty years of work experience including their period of candidacy, provided that they all shall be over the age of forty-five.

The Constitutional Court shall elect a president and two deputy presidents from among its members for a term of four years by secret ballot and by an absolute majority of the total number of its members. Those whose term of office ends may be re-elected. The members of the Constitutional Court shall not assume other official and private duties, apart from their fundamental duties.

*Article 147: Term of office of the members and termination of membership*

The members of the Constitutional Court shall be elected for a term of twelve years. A member shall not be re-elected. The members of the Constitutional Court shall retire when they are over the age of sixty-five. The appointment of the members to another office whose term of office expires prior to their mandatory age of retirement and matters regarding their personnel status shall be laid down in law.

Membership in the Constitutional Court shall terminate automatically if a member is convicted of an offence requiring his/her dismissal from the judicial profession, and by a decision of an absolute majority of the total number of members of the Constitutional Court if it is definitely established that he/she is unable to perform his/her duties on account of ill-health.

## Endnotes

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- <sup>1</sup> Grote, 'Models of Institutional Control', p. 221; Venice Commission, 'List of Constitutional Courts'.
- <sup>2</sup> Iraq's first constitution established the Iraqi High Court, which was composed of nine justices, five of whom, including the president, came from the Senate; the remaining four were senior judges. Brown, *Constitutions in a Non-Constitutional World*, pp. 148–9, 219 note 12.
- <sup>3</sup> Article 44 of the TAL and Law No. 30/2005.
- <sup>4</sup> International Crisis Group, 'Trial by Error', pp. 2, 9–15.
- <sup>5</sup> Constitution of Tunisia, 1959, Articles 66, 72–5; draft Constitution of Tunisia, June 2013, Article 115; Tunisian Decree Law No. 2011-14, 23 March 2011, Article 2.
- <sup>6</sup> Royal Hashemite Court of Jordan, 'Jordan Enacts New Political Parties'; Barakat, 'Jordan: Constitutional Law Court Newly Established in Jordan'.
- <sup>7</sup> Constitution of Morocco, 1996, Articles 78, 80, 81; Constitution of Morocco, 2011, Article 130; *Economist*, 'Morocco's Referendum: A Very Small Step'.
- <sup>8</sup> Max Planck Institute, 'Bahrain'; Bahrain Decree Law 38-2012.
- <sup>9</sup> Brown, *Constitutions in a Nonconstitutional World*, pp. 148–51; Kuwait Law No. 14 of 1973.
- <sup>10</sup> Stone Sweet, 'Constitutional Courts', p. 817.
- <sup>11</sup> Issacharoff, 'Democratic Hedging', pp. 963–4.
- <sup>12</sup> Brown, *The Rule of Law in the Arab World*, p. 9.
- <sup>13</sup> Macdonald and Kong, 'Judicial Independence as a Constitutional Virtue', p. 845; Moustafa, *The Struggle for Constitutional Power*, pp. 4–6.
- <sup>14</sup> Macdonald and Kong, 'Judicial Independence as a Constitutional Virtue', pp. 844–5.
- <sup>15</sup> See Ginsburg, *Judicial Review in New Democracies*.
- <sup>16</sup> Kommers, *Constitutional Jurisprudence*, pp. 186–91.
- <sup>17</sup> Kirkpatrick, 'Blow to Transition'; Moustafa, *The Struggle for Constitutional Power*, pp. 162–3.
- <sup>18</sup> Moustafa, *The Struggle for Constitutional Power*, 103; *BBC News*, 'Q & A: Egypt's Supreme Court Rulings'; Greene, 'Ahmed Shafik'.
- <sup>19</sup> Issacharoff, 'Democratic Hedging', pp. 996–8.
- <sup>20</sup> *Justice Alliance of South Africa v. President of Republic of South Africa* (2011) CCT 53/11.
- <sup>21</sup> Iraqi Federal Supreme Court Decision 43/2010; Hamoudi, 'Decision 88'.
- <sup>22</sup> Italian Constitutional Court Judgement No. 1/1956; Volcansek, 'Political Power and Judicial Review in Italy', p. 495; Kommers, *The Constitutional Jurisprudence*, p. 568 note 40; BVerfGE 3, p. 58 [Beamtenverhältnisse Case].



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- <sup>23</sup> Issacharoff, 'Democratic Hedging', pp. 994–5; Certification Decision of the Constitution of the Republic of South Africa (1996) CCT 23/96.
- <sup>24</sup> Harding, Leyland, and Groppi, 'Constitutional Courts', p. 15.
- <sup>25</sup> Hedling, 'The Design of the Judicial Branch', p. 2.
- <sup>26</sup> Brown, *Constitutions in a Nonconstitutional World*, p. 151; Hussain, *A Critical Study*, pp. 346–7.
- <sup>27</sup> Ottaway, 'The New Moroccan Constitution'; Constitution of Morocco, 2011, article 130.
- <sup>28</sup> Brown, *Constitutions in a Nonconstitutional World*, p. 150.
- <sup>29</sup> Constitution of Jordan, 2011, Article 58; *Jordan Times*, 'Profiles of Constitutional Court Members'.
- <sup>30</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 198–9; El Deeb, 'Former Judge Challenges Egypt's Constitution'; Albrecht, 'Egypt's 2012 Constitution', p. 4.
- <sup>31</sup> Harding, Leyland and Groppi, 'Constitutional Courts', p. 17. Regarding simple majority requirements, see, for example, the Polish Constitutional Tribunal, where appointment power is exclusively vested in Parliament but the legislature decides by simple majority. In Poland, the Sejm (lower house of Parliament) appoints judges by simple majority in the presence of at least half of the total number of deputies (Constitutional Tribunal Act of Poland, 1997, Article 5, para. 4). The arrangement is beneficial in the sense that it allows for faster appointments to be made. The main weakness of this type of system is that it can result in extreme politicization of the appointment process, in which the current parliamentary majority largely controls nominations and the role of the opposition is essentially meaningless. Although the opposition has the power to nominate candidates, those candidates have little chance of success. See Sadurski, 'Twenty Years after the Transition', pp. 5–6.
- <sup>32</sup> Schoenberger, 'The Establishment of Judicial Review', pp. 8–9; Kommers, *The Constitutional Jurisprudence*, pp. 6–8.
- <sup>33</sup> Geck, *Wahl und Amtsrecht*, pp. 13–14; Kommers, *Judicial Politics in West Germany*, pp. 79–82; Kommers, *The Constitutional Jurisprudence*, pp. 8–9.
- <sup>34</sup> Nicolauß, 'Der Parlamentarische Rat', p. 128; Pieper, *Verfassungsrichterwahlen*, p. 37; Kommers, *Judicial Politics in West Germany*, pp. 79–80.
- <sup>35</sup> Vanberg, *The Politics of Constitutional Review in Germany*, p. 63; Kommers, *Judicial Politics in West Germany*, p. 88.
- <sup>36</sup> Kommers, *The Constitutional Jurisprudence*, pp. 16–18.
- <sup>37</sup> Kommers, 'Autonomy versus Accountability', pp. 148–9; Geck, *Wahl und Amtsrecht*, p. 22.

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<sup>38</sup> Kommers, *Judicial Politics in West Germany*, p. 114; Kommers, 'Autonomy versus Accountability', p. 150.

<sup>39</sup> Kommers, *Judicial Politics in West Germany*, p. 117; Kommers, *The Constitutional Jurisprudence*, p. 22.

<sup>40</sup> Kommers, 'Autonomy versus Accountability', p. 149; Volcansek, 'Appointing Judges,' p. 378; Hönnige, *Verfassungsgericht*, p. 170. Die LINKE was founded in 2007 when two other parties, the WASG and PDS, merged. It has not yet formed part of a governing coalition on the federal level. However, Die LINKE is represented in the federal Parliament and in many state Parliaments, especially in Eastern Germany.

<sup>41</sup> Schlaich and Koriath, *Das Bundesverfassungsgericht*, p. 30; Pasquino and Ferejohn, 'Constitutional Adjudication', p. 1678.

<sup>42</sup> Adenauer once called the Court 'Germany's dictator' (Willoweit, *Deutsche Verfassungsgeschichte*, p. 368), whereas Dehler claimed that one of its judgements was void (Lembcke, 'Das Bundesverfassungsgericht', pp. 155–7). Kommers, *Judicial Politics in West Germany*, p. 128; BVerfGE 1, p. 281; BVerfGE 2, p. 143; BVerfGE 2, p. 79; BVerfGE 12, p. 205.

<sup>43</sup> Vanberg, *The Politics of Constitutional Review in Germany*, pp. 67–8.

<sup>44</sup> *Ibid.* pp. 67–70.

<sup>45</sup> *Ibid.* pp. 70–71; Kommers, *Judicial Politics in West Germany*, p. 283.

<sup>46</sup> Vanberg, *The Politics of Constitutional Review in Germany*, pp. 71–2; Kommers, *Judicial Politics in West Germany*, pp. 283–4.

<sup>47</sup> Vanberg, *The Politics of Constitutional Review in Germany*, pp. 71–3; Kommers, *Judicial Politics in West Germany*, p. 284.

<sup>48</sup> Vanberg, *The Politics of Constitutional Review in Germany*, pp. 73–6; Kommers, *Judicial Politics in West Germany*, p. 286.

<sup>49</sup> Kommers, 'Autonomy versus Accountability', p. 148; Kommers, *Judicial Politics in West Germany*, pp. 132–5, 157, note 22.

<sup>50</sup> Kommers, 'Autonomy versus Accountability', pp. 148–9; Kommers, *Judicial Politics in West Germany*, pp. 135–8, Lembcke, 'Das Bundesverfassungsgericht', pp. 158–9; Billing, *Das Problem*, pp. 195–206, 214.

<sup>51</sup> For examples of controversial individual rights cases, see the 'Sitzblockaden' case (BVerfGE 73, p. 206), in which the FCC ruled in favour of individuals' rights in sit-in demonstrations. In the 'Soldaten-sind-Mörder' case (BVerfGE 93, p. 266) the FCC upheld a constitutional complaint that challenged a law limiting the freedom of expression in criticizing soldiers. Similarly, in the 'Kruzifix' case (BVerfGE 93, p. 1) the FCC found that the attachment of a cross or crucifix in the classrooms of compulsory state schools violates the fundamental rights enumerated in Article 4, para. 1 of the

Basic Law. Benda and Klein, *Verfassungsprozessrecht*, p. 5; Voigt, 'Das Bundesverfassungsgericht', p. 71.

<sup>52</sup> Pieper, *Verfassungsrichterwahlen*, p. 13; Hönnige, *Verfassungsgericht*, p. 172. For a press review mentioning these two exceptional cases, see *Süddeutsche Zeitung*, 'CDU verhindert Wechsel am Bundesverfassungsgericht'.

<sup>53</sup> Kranenpohl, *Hinter dem Schleier*, p. 28.

<sup>54</sup> Landfried, 'Die Wahl der Bundesverfassungsrichter', p. 233; Benda and Klein, *Verfassungsprozessrecht*, pp. 57–8; BVerfG, 2 BvC 2/10, 19.6.2012.

<sup>55</sup> Seibert-Fohr, 'Judicial Independence in Germany', pp. 516–17.

<sup>56</sup> Garoupa and Ginsburg, 'Guarding the Guardians', p. 106.

<sup>57</sup> Wesson and du Plessis, 'The Transformation of the Judiciary', pp. 3–4; Corder, 'Appointment, Discipline and Removal', p. 98; Coniglio, 'Methods of Judicial Decision-Making', p. 504; Currie, 'The Judiciary and Freedom of Speech in South Africa', pp. 221–2; Constitution of South Africa, 1983, Article 34.

<sup>58</sup> Wesson and du Plessis, 'The Transformation of the Judiciary', pp. 4–5.

<sup>59</sup> Spitz and Chaskalson, *The Politics of Transition*, p. 191 [quoted in text].

<sup>60</sup> Andrews, 'The Judiciary in South Africa', p. 478 [quoted in text]; Spitz and Chaskalson, *The Politics of Transition*, pp. 201–9.

<sup>61</sup> Spitz and Chaskalson, *The Politics of Transition*, pp. 201–5.

<sup>62</sup> Gloppen, *South Africa: The Battle over the Constitution*, p. 229; Malleson, 'Assessing the Performance', p. 38; Spitz and Chaskalson, *The Politics of Transition*, pp. 201–7.

<sup>63</sup> Malleson, 'Assessing the Performance', pp. 38–9; Spitz and Chaskalson, *The Politics of Transition*, p. 208. Note that there have been some amendments to the appointment system, but by and large the process remains the same.

<sup>64</sup> Act 9 of 1994 (Judicial Service Commission); Judges' Remuneration and Conditions of Employment Act, Act No. 47 of 2001 (South Africa).

<sup>65</sup> There are permanent and special delegates to the National Council of Provinces (Constitution of South Africa, 1996, Articles 60–2). Andrews, 'The Judiciary in South Africa', p. 480 [quoted in text]; Corder, 'Judicial Authority in a Changing South Africa', p. 197. Attorneys are generalists; they provide legal advice to clients on a variety of issues and can appear in lower courts. Advocates are specialists who can appear in all courts and are usually hired by attorneys when their specialty (i.e. in tax litigation) is required.

<sup>66</sup> Andrews, 'The South African Judicial Appointments Process', p. 568 [quoted in text]; Andrews, 'The Judiciary in South Africa', p. 481.

<sup>67</sup> Andrews, 'The South African Judicial Appointments Process', pp. 567–8 [quoted in text].

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<sup>68</sup> Madhuku, 'Constitutional Protection of the Independence of the Judiciary', p. 236; Corder, 'Judicial Authority in a Changing South Africa', p. 198.

<sup>69</sup> Constitution of South Africa, 1996, Article 174; Corder, 'Judicial Authority in a Changing South Africa', p. 198.

<sup>70</sup> Andrews, 'The Judiciary in South Africa', pp. 483–5.

<sup>71</sup> *Minister of Health and Others v. Treatment Action Campaign and Others* (2002) CCT 8/02.

<sup>72</sup> *Ibid.*; McGreal, 'Mandela Attacks Mbeki's AIDS Policy'.

<sup>73</sup> *Hugh Glenister v. President of the Republic of South Africa and Others* (2011) CCT 48/10; Berning and Montesh, 'Countering Corruption in South Africa'; De Vos, 'On the Disbanding of the Scorpions'.

<sup>74</sup> *Hugh Glenister v. President of the Republic of South Africa and Others* (2011) CCT 48/10.

<sup>75</sup> See Corder, 'Appointment, Discipline and Removal', p. 116, on the role played by civil society and the media in protecting judicial independence; Malleon, 'Assessing the Performance', p. 39; African National Congress, 'Statement of the National Executive Committee'; Kruger, 'You Said it, Mantashe'; Quintal, 'Judges to be Given Chance to Discuss Reforms'; McKaiser, 'Democracy and its Malcontents'; Msomi, 'Battle of the Constitution'; Stone, 'ANC Still has Review of Judiciary's Powers in its Sights'.

<sup>76</sup> For more information on support for the Court within South Africa, and the Court's complex relationship with the political branches, see Roux, *The Politics of Principle*; Gibson and Caldeira, 'Defenders of Democracy'; Gibson, 'The Evolving Legitimacy of the South African Constitutional Court'.

<sup>77</sup> Parliament of the Republic of South Africa, 'State of Parties in the National Assembly', 'State of Parties in the National Council of Provinces'.

<sup>78</sup> Malleon, 'Assessing the Performance', pp. 38–9.

<sup>79</sup> Zille, 'Zille Disappointed over Zuma's Final JSC Choices'; De Vos, 'ANC Rrying to "load" the JSC'; Corder, 'Appointment, Discipline and Removal', p. 100, note 19.

<sup>80</sup> *Justice Alliance of South Africa v. President of Republic of South Africa* (2011) CCT 53/11.

<sup>81</sup> For other news articles referring to the Mogoeng controversy, see Rawoot, 'Mogoeng's Assault on Women's Rights'; Mofokeng, Matlala and Hawker, 'Moseneke in New Clash with Zuma'; Smith, 'Chief Justice: How Zuma Got it Wrong'; Klug, *The Constitution of South Africa*, pp. 248–9.

<sup>82</sup> Malleon, 'Assessing the Performance', pp. 40–1, 45.

- <sup>83</sup> Wesson and du Plessis, 'The Transformation of the Judiciary', p. 7; Malleson, 'Assessing the Performance', pp. 44–7, referring to the 'Guidelines for Questioning Candidates for Nomination to the Constitutional Court' (1994).
- <sup>84</sup> Klug, 'South Africa's Constitutional Court', p. 285; Ramphele and Dawood, 'South African Courts at Risk'; Ferreira, 'South Africa: Minister Denies Manipulation of Judicial Service Commission'.
- <sup>85</sup> Hamad, 'The Politics of Judicial Selection in Egypt', p. 267 [quoting Moustafa in text]; Moustafa, 'Law versus the State', pp. 885–93.
- <sup>86</sup> Moustafa, 'Law versus the State', pp. 893–4.
- <sup>87</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 198–201; Hamad, 'The Politics of Judicial Selection in Egypt', pp. 271–4.
- <sup>88</sup> Brown, *Egypt's Judges in a Revolutionary Age*, p. 12.
- <sup>89</sup> *Associated Press*, 'Egyptian Judges Back Out of Reform Conference with Morsi'.
- <sup>90</sup> Brown, *Egypt's Judges in a Revolutionary Age*, p. 12; Brown, 'Quick Reactions'; Brown and Lombardi, 'The Supreme Constitutional Court', p. 441 note 7.
- <sup>91</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 140–2, 182–7; Hamad, 'The Politics of Judicial Selection in Egypt', p. 272.
- <sup>92</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 104–5 [quoted in text], p. 181.
- <sup>93</sup> Hamad, 'The Politics of Judicial Selection in Egypt', pp. 272–3 [quoted in text]; Moustafa, *The Struggle for Constitutional Power*, pp. 188–91.
- <sup>94</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 198–9.
- <sup>95</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 199–201.
- <sup>96</sup> Moustafa, *The Struggle for Constitutional Power*, p. 199; Hamad, 'The Politics of Judicial Selection in Egypt', p. 273.
- <sup>97</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 205–8.
- <sup>98</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 205–8.
- <sup>99</sup> Moustafa, *The Struggle for Constitutional Power*, pp. 210–13 [quoted in text]; Brown, 'Why Did the Egyptian Regime Appoint a New Chief Justice?'; Stilt, 'Islam is the Solution', p. 83.
- <sup>100</sup> Radwan, 'Egypt's Return of the Judiciary'; Brown, *Egypt's Judges in a Revolutionary Age*, p. 12.
- <sup>101</sup> Kirkpatrick, 'Blow to Transition'; *BBC News*, 'Egypt's Islamist Parties Win Elections to Parliament'.
- <sup>102</sup> Brown, 'Egypt's Judiciary'; El-Din, 'Egypt's Shura Council'; Brown, 'Cairo's Judicial Coup'.
- <sup>103</sup> Molloy, 'Why the Reduction in SCC Justices?'
- <sup>104</sup> Mahmoud, 'Judicial System in Iraq', pp. 10–11.

<sup>105</sup> Judicial Service Act 27/1945; Judicial Service Act No. 58/1956; Judicature Act No. 26/1963; Mahmoud, 'Judicial System in Iraq', pp. 18–21; Posner and McKay, 'The Iraqi Justice System', p. 14.

<sup>106</sup> Posner and McKay, 'The Iraqi Justice System', p. 15; Mahmoud, 'Judicial System in Iraq', pp. 21–2.

<sup>107</sup> Diamond, *Squandered Victory*, p. 149; Posner and McKay, 'The Iraqi Justice System', p. 15.

<sup>108</sup> Diamond, *Squandered Victory*, pp. 149–50; Roberts, 'Iraq's Burgeoning Judiciary', p. 3.

<sup>109</sup> Al-Ali, *The Struggle for Iraq's Future*; Diamond, *Squandered Victory*, pp. 142–3.

<sup>110</sup> Diamond, *Squandered Victory*, pp. 148–50; Feldman and Martinez, 'Constitutional Politics and Text in the New Iraq', p. 917.

<sup>111</sup> Feldman and Martinez, 'Constitutional Politics and Text in the New Iraq', 917; Al-Ali, *The Struggle for Iraq's Future*.

<sup>112</sup> Al-Ali, *The Struggle for Iraq's Future*.

<sup>113</sup> Ibid.

<sup>114</sup> Feldman and Martinez, 'Constitutional Politics and Text in the New Iraq', p. 918; Hamoudi, *Negotiating in Civil Conflict*, pp. 187–9; Al-Ali, *The Struggle for Iraq's Future*; Sadah, 'Iraqi Judicial Reforms'; Wing, 'Iraq's Federal Court'.

<sup>115</sup> Sadah, 'Iraqi Judicial Reforms'; Wing, 'Iraq's Federal Court'.

<sup>116</sup> Feldman and Martinez, 'Constitutional Politics and Text in the New Iraq', p. 917; Diamond, *Squandered Victory*, pp. 149–50.

<sup>117</sup> Hamoudi, *Negotiating in Civil Conflict*, p. 187; Visser, 'The Law on the Federal Supreme Court'.

<sup>118</sup> Hamoudi, 'The Will of the (Iraqi) People', pp. 46–51.

<sup>119</sup> FSC Decision No. 25/2010; Trumbull and Martin, 'Elections and Government Formation in Iraq', pp. 369–70.

<sup>120</sup> Trumbull and Martin, 'Elections and Government Formation in Iraq', pp. 370–1; Visser, 'Iraqiyya Challenges the Jurisdiction'; Hamoudi, 'The Will of the (Iraqi) People', pp. 48–50.

<sup>121</sup> Sly, 'Iraq's High Court'.

<sup>122</sup> FSC Decision No. 88/2010.

<sup>123</sup> Visser, 'The Law on the Federal Supreme Court'.

<sup>124</sup> Bâli, 'Courts and Constitutional Transition', p. 669; Shambayati and Kirdis, 'In Pursuit of "Contemporary Civilization"', pp. 771–3.

<sup>125</sup> Shambayati and Kirdis, 'In Pursuit of "Contemporary Civilization"', pp. 773–5; Bâli, 'Courts and Constitutional Transition', pp. 670–1. The actions of the Turkish military

align with the explanation offered by Ran Hirschl for the choice by elite actors to constitutionalize certain rights and political principles and establish judicial review, as a means of preserving their own power and values. See Hirschl, *Towards Juristocracy*.

<sup>126</sup> Bâli, 'Courts and Constitutional Transition', p. 694.

<sup>127</sup> Kogacioglu, 'Progress, Unity and Democracy', p. 440. See also Articles 68 and 69 of the 1982 Turkish Constitution:

Article 68, para. 4: 'The statutes and programs, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.'

Article 69, para. 4, 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 High Court of Appeals. The permanent dissolution of a political party shall be decided when it is established that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68.'

<sup>128</sup> Shambayati and Kirdis, 'In Pursuit of "Contemporary Civilization"', p. 776; Bâli, 'Courts and Constitutional Transition', p. 672.

<sup>129</sup> See Bâli, 'Courts and Constitutional Transition', pp. 674–7 for a full account of the TCC case and the Court's reasoning.

<sup>130</sup> Bâli, 'Perils of Judicial Independence', pp. 250–2.

<sup>131</sup> Özpek, 'Constitution-making in Turkey after the 2011 Elections', pp. 153–5.

<sup>132</sup> Bâli, 'Courts and Constitutional Transition', p. 694.

<sup>133</sup> Bâli, 'Perils of Judicial Independence', pp. 303–4.

<sup>134</sup> Arato and Goldfarb, 'Politically Weighted Courts in Turkey'; Arato, 'The Constitutional Reform Proposal of the Turkish Government'; Bâli, 'Perils of Judicial Independence', pp. 296–302; *The Economist*, 'Turkey's Constitutional Referendum: Erdogan Pulls it Off'.

<sup>135</sup> Bâli, 'Courts and Constitutional Transition', p. 694.

<sup>136</sup> *Hurriyet Daily News*, 'Court Clears Way for Gül to Re-run Top Post' [quoted in text]; Arato and Goldfarb, 'Politically Weighted Courts in Turkey'; Özpek, 'Constitution-making in Turkey after the 2011 Elections', p. 155.

<sup>137</sup> Volcansek, *Constitutional Politics*, pp. 14–15.

<sup>138</sup> Pasquino, 'The Debates of the Italian Constituent Assembly,' p. 109; Volcansek, *Constitutional Politics*, pp. 15–17; Volcansek, 'Bargaining Constitutional Design', p. 286.

<sup>139</sup> Volcansek, 'Bargaining Constitutional Design', p. 285; Mandel, 'Legal Politics Italian Style', p. 266.

<sup>140</sup> Volcansek, *Constitutional Politics*, pp. 17–18 [quoted in text]; Volcansek, 'Bargaining Constitutional Design', p. 288; Pasquino, 'The Debates of the Italian Constituent Assembly,' p. 111.

<sup>141</sup> The term limit was originally 12 years. When asked why they decreased the length of the term, former President of the Italian Constitutional Court Antonio Baldassarre replied, 'Ironically, I may say that many people have expectations of becoming justices in the Court so nine years is better than twelve years. I almost joke, but just almost.' See Baldassarre, 'Structure and Organization of the Constitutional Court of Italy', p. 658.

<sup>142</sup> Law No. 87, 11 March 1953; Constitutional Law No. 2, 22 Nov. 1967; Volcansek, *Constitutional Politics*, p. 21; Mandel, 'Legal Politics Italian Style', p. 266.

<sup>143</sup> Constitutional Law No. 2, 22 Nov. 1967; Volcansek, 'Bargaining Constitutional Design', pp. 291–2.

<sup>144</sup> Volcansek, *Constitutional Politics*, pp. 22–3; Volcansek, 'Bargaining Constitutional Design', p. 288.

<sup>145</sup> Volcansek, *Constitutional Politics*, pp. 21–3 [quoted in text]; Pasquino and Ferejohn, 'Constitutional Adjudication', pp. 1681–2.

<sup>146</sup> Pasquino and Ferejohn, 'Constitutional Adjudication', p. 1682; Volcansek, *Constitutional Politics*, p. 23; Pellegrina and Garoupa, 'Choosing Between the Government and the Regions', pp. 3–4.

<sup>147</sup> Mandel, 'Legal Politics Italian Style', p. 267; Volcansek, 'Political Power', pp. 499–505.

<sup>148</sup> Judgement No. 1/1956 (Constitutional Court of Italy); Volcansek, *Constitutional Politics*, p. 19 [quoted in text]; Volcansek, 'Political Power', p. 495; Mandel, 'Legal Politics Italian Style', p. 267.

<sup>149</sup> Volcansek, 'Political Power', p. 507.

<sup>150</sup> Peri, 'Judicial Independence v. Judicial Accountability', pp. 17–18.

<sup>151</sup> The first Constitutional Court ruling was No. 24/2004, which struck down Law No. 140 of 20 June 2003. The second was ruling No. 262/2009, which struck down Law No. 124 of 23 July 2008. Hooper, 'Italian Court Waters down Berlusconi Immunity Law'; Squires, 'Silvio Berlusconi to Reform Italian Courts to Stop "witch Hunt"'; *The Economist*, 'Injudicious'; Zebley, 'Italy PM Berlusconi Pledges Judicial Reform while Awaiting Trial'.



<sup>152</sup> Sadurski, 'Twenty Years After the Transition', p. 4; Volcansek, *Constitutional Politics*, p. 24: 'The pluralistic composition of the Court resulting from the party formulas has likely moderated some individual inclinations, and shared interests in maintaining intra-court harmony and limiting workloads emerge as goals that can transcend ideological divisions.'

<sup>153</sup> Băli, 'Perils of Judicial Independence', pp. 301–3; European Commission, 'Turkey 2010 Progress Report', p. 75.

<sup>154</sup> Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt (SCC Law); *Associated Press*, 'Egyptian Judges Back Out of Reform Conference with Morsi'.

<sup>155</sup> 'Members of the Supreme Court' refers to members of the judicial body created in 1969, which the Supreme Constitutional Court replaced in 1979. See Moustafa, *The Struggle for Constitutional Power*, pp. 65–78.

<sup>156</sup> Federal Constitutional Court Act (1951) (Germany) § 2–4.

<sup>157</sup> Iraq has not yet specified the qualifications for judges serving on the FSC. The data in this table is taken from Iraq's Judicial Organization Law (Law No. 160 of 1979), Article 36, which sets out the requirements for judges throughout the judiciary, and from al-Saedi, 'Regime Change', pp. 6–7.

<sup>158</sup> Constitution of Italy, 1948, Article 135.

<sup>159</sup> Constitution of South Africa, 1996, Articles 174, 176.

<sup>160</sup> Judges' Remuneration and Conditions of Employment Act, Act No. 47 of 2001 (South Africa).

<sup>161</sup> Constitution of Turkey (amended 2010), Articles 146–7.

<sup>162</sup> Law 48/1979, Article 19.

<sup>163</sup> Seibert-Fohr, 'Judicial Independence in Germany', p. 513.

<sup>164</sup> Constitutional Law No. 1 § 7, 11 March 1953; Constitutional Law No. 1 § 3, 9 February 1948.

<sup>165</sup> Translation available online:

<http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=208>.

<sup>166</sup> Translation available at <<http://www.constitutionnet.org/vl/item/new-constitution-arab-republic-egypt-approved-30-nov-2012>>.


<sup>167</sup> Translation by Awad al-Murr, reprinted in Boyle and Sherif, *Human Rights and Democracy*.

<sup>168</sup> Translation available at <[http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/)>.

<sup>169</sup> Translation available at <<http://www.iuscomp.org/gla/statutes/BVerfGG.htm#2>>.

<sup>170</sup> Available at <<http://www.refworld.org/docid/45263d612.html>>

<sup>171</sup> Translation available at <<http://www.refworld.org/docid/454f50804.html>>



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<sup>172</sup> Translation available at

<[http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)>

<sup>173</sup> The three pieces of supplemental legislation listed here are available at

<[http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm$f=templates$3.0)>.

<sup>174</sup> Available at <<http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf>>.

<sup>175</sup> Translation available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/--protrav/---ilo\\_aids/documents/legaldocument/wcms\\_127495.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/--protrav/---ilo_aids/documents/legaldocument/wcms_127495.pdf)>.

<sup>176</sup> Translation available at <[http://global.tbmm.gov.tr/docs/constitution\\_en.pdf](http://global.tbmm.gov.tr/docs/constitution_en.pdf)>.