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THE PALESTINIAN CONSTITUTIONAL COURT: A CRITICAL ASSESSMENT OF ITS INDEPENDENCE UNDER THE EMERGENCY REGIME OF THE WEST BANK

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Submitted in total fulfilment of the requirements of the degree of Doctor of Philosophy (PhD)

November 2019

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DECLARATION

This is to certify that:

- The thesis comprises only my original work towards the degree of Doctor of Philosophy.
- Due acknowledgement has been made in the text of this thesis to all other materials used.
- The thesis is fewer than 100,000 words in length, exclusive of bibliography.

Osayd Awawda

November 2019

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I INTRODUCTION

A *Context of the Thesis*

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

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

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

Following the election in 2006 of the Islamic party known as Hamas under the second President, Mahmoud Abbas, tension emerged between its newly-elected officials and the officials of the outgoing Fatah. The tension between both parties escalated, and a civil war started in Gaza Strip in 2007, resulting in a coup d'état in June of that year. Since then, the elected government of Hamas has governed the Gaza Strip, and Fatah has governed the West Bank under a state of emergency that has worsened the authoritarian characteristics of its regime. To consolidate power in its hands, the emergency Fatah government in the West Bank has formed legislative, executive and judicial institutions, including a high court, that are totally separate to those of the Gaza Strip. This study focuses only on the West Bank Fatah regime

because, after the coup, the elected government of Hamas has reconstituted the High Court in the Gaza Strip, resulting in a different high court with different judges to that in the West Bank.

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

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

In April 2016, President Abbas deprived the High Court of its constitutional capacity by single-handedly appointing new judges to the first separate court to exclusively hear constitutional cases (hereafter, the term 'Constitutional Court' is used to refer to both the High Court sitting as the Supreme Constitutional Court prior to April 2016 and the new, separate Supreme Constitutional Court from April 2016, except where otherwise indicated). The new Court was criticised by the elected government of Hamas and many human rights organisations in the West Bank. Sami Abu-Zuhri, Hamas's spokesman, claimed that it is a factional court, established to give President Abbas fake legitimacy, and a tool that assists him in entrenching the regime's authoritarian rule by sidestepping the elected parliament that the President has unconstitutionally suspended.[3] The Palestinian Human Rights Organisations Council, along with five other human rights organisations, sent a memorandum to President Abbas expressing shock at the swift and secretive formation of the Court, particularly because President Abbas did not abide by the Basic Law that obliges the President to receive nominations for the Court's

[1] See below Chapter Three (E)(2).
[2] See below Chapter Three (E).
[3] Nidal al–Mughrabi and Ali Sawafta, 'With New Decree, Palestinian Leader Tightens Grip', *Reuters* (online), 11 April 2016 <https://www.reuters.com/article/us–palestinians–abbas–court–idUSKCN0X816B>.

first bench from the High Judicial Council.[4] They urged the President 'not to make this Court a tool for political domination', and to focus on holding presidential and parliamentary elections to bring an end to emergency rule in the West Bank.[5]

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

B *Motivation for the Thesis*

Constitutional jurists from Palestine and other Arab countries have published many critiques of individual judgements issued by the High Court sitting as a constitutional court.[6] Most of these commentaries criticise the Court's application of constitutional and legislative provisions and highlight its incorrect interpretation of the Basic Law in the face of the constitutional challenges presented to it.

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

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

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

[5] Ibid.

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

[7] Ibid.

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

C *Aim and Scope*

This thesis aims to provide a comprehensive assessment of the Court's independence based on its governing law, known as the Law of the Supreme Constitutional Court No. 3 of 2006 ('LSCC'), and its judgments.[8] The LSCC is assessed against criteria of judicial independence taken from four global standards: Basic Principles on the Independence of the Judiciary by the UN,[9] Report of the Special Rapporteur on the Independence of Judges and Lawyers,[10] the Universal Charter of the Judges,[11] and International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.[12] These four standards offer comprehensive guidelines on what laws governing judicial institutions should stipulate to protect the independence of such institutions, including constitutional courts.

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

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[8] *The Law of the Supreme Constitutional Court No. 3 of 2006* (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2006&MID=15122>.
[9] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1.
[10] Leandro Despouy, Special Rapporteur, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009).
[11] *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 1.
[12] 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (International Commission of Jurists, 2007).

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

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

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

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

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

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

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

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

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

D *Significance of the Thesis*

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

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

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

E *Structure of the Thesis*

Chapter Two provides the theoretical framework of the analysis. It outlines the relevant literature about constitutional courts, their characteristics, functions, competencies, and interactions with political powers in both democratic and authoritarian regimes. This explication is then used to justify specific measures for assessing their independence because constitutional courts are unlike any other court; they have the exclusive competence to invalidate legislative actions (in addition to executive actions in some jurisdictions) that breach constitutional rules. In other words, they maintain the balance between state powers, and between the state and its people, as specified in the constitution.

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

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

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

To finalise assessment of the Court’s independence, Chapters Five and Six assess the *de facto* independence of the Court; that is, its independence in practice, based on an evaluation of the

validity of its reasoning in each judgment it has issued. Both Chapters conclude that the Court has incorrectly applied rules of constitutional adjudication in almost all cases of interest to the regime.

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

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

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

II CONSTITUTIONAL COURTS AND AUTHORITARIANISM

A *Introduction*

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

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

The second section explicates the concept of judicial independence, its definition and elements. It demonstrates the principles of judicial independence related to each element: personal, institutional, and procedural. These principles are helpful in assessing the *de jure* independence of constitutional courts. Additionally, this section highlights the difference between *de jure* and *de facto* independence.

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

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

B *The Characteristics of Constitutional Courts*

1 *Main Models of Constitutional Review*

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

In most (but not all) models, the core function of this review is to adjudicate on the constitutionality of legislation, declaring it invalid if found to be in conflict with the constitutional provision related to it, according to the interpretation of the adjudicator.[1] Some scholars also highlight the authority to interpret a constitutional text upon request as a fundamental element defining constitutional review.[2] However, this element is encompassed by the core function mentioned above, because deciding on the conformity of legislation with the constitution necessarily requires the court to interpret the related constitutional text. Before expanding on the characteristics of this review, it is important to explain to what judicial institution this review is assigned.

Globally, states that allow for constitutional review have two main approaches in deciding which judicial institution has the jurisdiction to perform such review. The first is allowing lower courts to perform constitutional review, under the oversight of the generalist high court, which acts as an appellate body for constitutional decisions made by such lower courts. This is

[1] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 816; Victor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, Inc., 2011) 267; Chen, Albert H Y and Miguel Pioares Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Taylor and Francis, 2013) 97.

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

known as the 'decentralised' or the American model, as it is predominant in North America and the Caribbean, and is a characteristic of many common-law states.[3]

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

The Austrian Constitution of 1920 first established the centralised model. Hans Kelsen was a drafter of that constitution and the inventor of this model of a separate, specialised constitutional court.[5] According to Kelsen, a centralised model consists of four foundational components:

A) A court with exclusive jurisdiction over deciding on the constitutionality of legislation.[6] In constitutional literature, courts that have this component are the standard meaning of the expression 'constitutional courts'.[7]

[3] Sweet, 'Constitutional Courts', above n 1, 820; Chen and Maduro, above n 1, 100.
[4] Sweet, 'Constitutional Courts', above n 1, 820.
[5] See below (A)(3). Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4(2) *Journal of Politics*; Chen and Maduro, above n 1, 98; Harding, Leyland and Groppi, above n 2, 3. This is the reason why some scholars call this model 'Kelsenian': Sweet, 'Constitutional Courts', above n 1, 818; Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 268.
[6] Chen and Maduro, above n 1, 99; Sweet, 'Constitutional Courts', above n 1, 818.
[7] See, eg, Alec Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2000); Herman Schwartz, *The Struggle for Constitutional Justice in Post–Communist Europe* (University of Chicago Press, 2000); Wojchiech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post–Communist Europe: A Comparative Perspective* (Kluwer Law International, 2002); Wojchiech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); Victor Ferreres Comella, 'Constitutional Courts and Democratic Values: A European Perspective' in (Yale University Press 2009); Kasia Lach and Wojchiech Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009).

B) A monopoly on constitutional interpretation, without presiding over the litigation process itself, as this court answers constitutional questions submitted to it.[8]

C) Conduct constitutional review of legislation in abstract, i.e. decide on the constitutionality of legislation before it is applied to an actual case, in contrast to concrete review, which requires having a litigated case with the challenged legislation being relevant to it.[9]

D) Conduct review *principaliter*, i.e. to answer requests of which the sole or only matter is the constitutionality of the legislation, as opposed to review *incidenter*, a review that is incidental to a case being heard before other courts, seeking to decide who wins it.[10]

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

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

[8] Chen and Maduro, above n 1, 99; Sweet, 'Constitutional Courts', above n 1, 818.
[9] Sweet, 'Constitutional Courts', above n 1, 818, 823; Chen and Maduro, above n 1, 99;
[10] Chen and Maduro, above n 1, 99.
[11] Ibid 102; Harding, Leyland and Groppi, above n 2, 20; See, Tania Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel' System of Constitutional Review' in in Andrew Harding and Peter Leyland (eds), Constitutional Courts: A Comparative Study, J.C.L. Studies in Comparative Law (1) (Wildy, Simmonds & Hill, 2009) 125.
[12] Comella, 'Constitutional Courts and Democratic Values', above n 7, 154; Harding, Leyland and Groppi, above n 2, 5; Sweet, 'Constitutional Courts', above n 1, 820 n 16.
[13] Harding, Leyland and Groppi, above n 2, 4; Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 273.
[14] See Vicki C. Jackson and Mark V. Tushnet, *Comparative Constitutional Law*, University Casebook Series (Foundation Press, 2nd ed, 2006) 466.

models from the decentralised model, in which lower courts can decide on the constitutionality of contested legislation.

2 *The Functions of Constitutional Courts*

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

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

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

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

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

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

constitutional court's oversight over proposed legislation by delegating authority it to the executive officials, because delegated legislation is overseen by administrative courts.[19]

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

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

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

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

On the other hand, experiences from other states suggest that judicial review of legislation is a core function of some constitutional courts. In Indonesia, one focus has been on disputes related to privatisation programs and the government has attempted to pass subsidiary legislation on the issue of privatisation to avoid the constitutional courts' jurisdiction.[22] Also, in Spain, disputes regarding legislation that delegates powers to regional entities have been a central focus of the constitutional court.[23] In South Africa, the constitutional court has increasingly focused on human rights cases, and reviewed the constitutionality of legislation related to them.[24] These examples, both underlining the relative insignificance of judicial review in some states in general and its centrality in others, show how constitutional review of legislation is not necessarily the central and most important function a constitutional court can perform. For each constitutional court, it is useful to carefully assess the significance of their various

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

functions by reference to the particularities of their respective political contexts, seeking to understand the preeminent role they play.

3 *The Preference for Specialist Constitutional Courts*

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

> In the case of countries undergoing a transition from authoritarianism to democracy, existing judges would be unlikely to have either the training or the independence from prior regimes to function with legitimacy as constitutional adjudicators; hence the more viable option is to establish a constitutional court staffed by a small number of respected and untainted jurists.[28]

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

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[25] Harding, Leyland and Groppi, above n 2, 12.
[26] Chen and Maduro, above n 1, 101; and Jackson and Tushnet, above n 14, 467–8.
[27] Harding, Leyland and Groppi, above n 2, 13–4.
[28] Chen and Maduro, above n 1, 101, citing Jackson and Tushnet, above n 14.
[29] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 269.
[30] Sweet, 'Constitutional Courts', above n 1, 818–9; Harding, Leyland and Groppi, above n 2, 14. See Lach and Sadurski, above n 7.

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

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

Fourth, constitutional courts have symbolic value as marks of a state's democratic character.[34] Besides having highly-qualified judges, constitutional courts have significant public credibility because in most centralised systems constitutional judges are selected through the participation of the executive and the legislative powers in addition, sometimes, to the judiciary. This engagement also provides these courts with a symbolic status as supervisors of legislative and executive powers.[35] This public credibility also promotes prioritising human rights protection as the primary purpose of constitutional courts, defending such rights against potential violation from the legislative or the executive power.[36]

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

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

Political elites in democratic regimes see constitutional courts as useful in maintaining a cohesive interpretation of the constitution and constraining those in power from exceeding their constitutional authority. This is different from what non-democratic regimes use constitutional

[31] Sweet, 'Constitutional Courts', above n 1, 818.
[32] Chen and Maduro, above n 1, 101.
[33] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 270.
[34] Harding, Leyland and Groppi, above n 2, 14 n 44.
[35] Chen and Maduro, above n 1, 101, Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 270.
[36] Sweet, 'Constitutional Courts', above n 1, 819.

courts for, which will be discussed later, after explaining the difference between both types of regimes.

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

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

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

In regimes undergoing a transition from authoritarianism to democracy, constitutional courts are major contributors in facilitating that process. This contribution occurs only if the leaders perceive the constitutional court as a trustworthy institution, because if they suspect it to be tainted by the earlier authoritarian regime, then those leaders will probably change the constitutional bench. They provide a platform for peaceful settlement of disputes that emerge during the transition, for removing the remaining authoritarian elements from the legal system,

[37] Ibid 822.
[38] Ibid 821.
[39] Ibid; Harding, Leyland and Groppi, above n 2, 4.

and for affirming the state's new legitimacy, which is based on constitutional values rather than previous authoritarian rule.[40]

5 *The Features of Specialist Constitutional Courts*

The above analysis of constitutional courts' functions indicates the central role those courts play in the political arena. There are two features that constitutional courts possess, which make them significantly different from other lower and higher courts. First, constitutional judgments are irreversibly final in the sense that it is not possible to change their effects through legislative avenues, although a few systems allow for legislative override through absolute majority. Legislators can change unfavourable interpretations of a certain legislation by ordinary courts through repealing or amending it.[41] However, this is impossible for constitutional provisions; what constitutional courts pronounce as a constitutional interpretation becomes the sole authoritative source to elucidate the related constitutional provision, unless the constitution is amended.[42]

The second feature is that their lawmaking discretion in the adjudication process is wider compared to other courts.[43] This discretion is mainly noticeable in judgments related to human rights provisions. Because constitutions are more generally-worded than statutes, this feature allows constitutional judges to exercise a significantly wider discretion in interpreting both the constitution and statutes. Since that interpretation is equivalent in its impact to substituting the interpreted provision itself, constitutional judges are, at least in some sense, lawmakers.[44]

Both features of adjudication in constitutional courts give rise to certain challenges. First, the executive power's awareness of this irreversible finality of constitutional judgments might raise the risk of executive interference to impinge on the constitutional judicial process, seeking to prevent rulings that run counter to the regime's interests.[45] Therefore, courts in such conditions are more susceptible to threats of political incursion than other courts.[46]

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[40] Kim Lane Scheppele, 'Constitutional Interpretation after Regimes of Horror' in Susanne Karstedt (ed), *Legal Institutions and Collective Memories* (Hart Publishing, 2009) 233.
[41] See Tarr, above n 37.
[42] See Alec Stone Sweet and Jud Mathews, '*Proportionality Balancing and Global Constitutionalism*', (2008) 47 *Columbia Journal of Transnational Law* 72, 73–76.
[43] See Sweet, 'Governing with Judges', above n 7.
[44] See, eg, Sweet, 'Constitutional Courts', above n 1, 819, 827; Harding, Leyland and Groppi, above n 2, 12.
[45] Ibid; See Roderick A. Macdonald and Hoi Kong, 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 832.
[46] See Jackson and Tushnet, above n 14.

Second, these courts play a crucial role of an umpire in partisan conflicts among political parties because of adjudicating on politically-pressing issues.[47] When such interests are more critical to maintain, the affected political parties become more impatient and more willing to interfere with the adjudication process. An example of such conflicts is the subject of individual rights, which is often an area of confrontation between constitutional courts and these parties.[48] In specific cases, when a constitutional court nullifies a statutory provision because it violates individual rights, the court may in fact be sending a critical message stating that the political parties elected by the people are failing to defend certain rights, and thus undermine their credibility.[49]

Before moving to the next section about judicial independence, it is important to note that the analysis of the characteristics of constitutional courts provided above is vital because it lays the theoretical foundations for assessing the Court's *de jure* and *de facto* independence in later Chapters.

C *Judicial Independence*

This section starts with defining the term 'judicial independence' in an abstract sense, then amplifies that definition by explaining the elements of judicial independence. These elements are synthesised from the four global standards mentioned in the previous Chapter. Assessing the Court's *de jure* independence in the next chapter will be done against the normative, evaluative criteria taken from those standards, not against the abstract term.

1 *Definition of Judicial Independence*

Christopher Larkins stipulates that '[d]espite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law'.[50] However, a clear characteristic of judicial independence as a concept is that it is relational, i.e. it describes the relationship between the judiciary vis-à-vis other institutions.[51] Dordrecht and Shetreet claimed persuasively that '[t]he increasing role which the judiciary has assumed warrants some re-examination of the conceptual framework

[47] See Harding, Leyland and Groppi, above n 2, 21.
[48] See generally Alexander M. Bickel, *The Supreme Court and The Idea of Progress* (Harper & Row, 1970).
[49] Martin Shapiro, 'Judicial Independence: New Challenges in Established Nations' (2013) 20(1) *Indiana Journal of Global Legal Studies* 272.
[50] Christopher Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, (The American Society of Comparative Law, 1996) 607.
[51] Owen Fiss, *The Law as it Could Be* (NewYork University Press, 2003) ch 3, 55.

and the theoretical rationales which define its position vis-à-vis the other branches of the government'.[52]

Judicial independence finds its roots in the principle of the separation of powers, which aims to establish a set of checks and balances between the three powers of the state: the legislative, the executive, and the judicial.[53] The role of judges, as holders of public posts, is to decide disputes between litigants in adjudicative procedures.[54] These procedures are affected by three actors: the decision-maker (the judge), the institution (the court rules), and the subject-matter of litigation (the case).[55]

Since judges in both lower and higher courts are obliged to decide on cases with strict adherence to the law, judges' independence from the undue interference of the other two powers is a prerequisite for a fair judgment.[56] A fair judgment is one which is based on discounting all that is irrelevant to applying the law on the facts presented to the court, which includes particular considerations to the parties, judges' self-interest, and the interests of those who appointed them to their judicial offices.[57] Therefore, judicial independence is a fundamental element of the judges' role, an element that enables the judiciary to exercise its functions by reviewing the actions of civilians and, more importantly, actions of the executive and the legislature, to ensure the protection of rights and the punishment of transgressors through fair trials.[58]

It is thus possible to define judicial independence as the ability of judges to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.[59] Without judicial independence, undue

[52] Ibid 590.
[53] Bernd Hayo and Stefan Voigt, 'Explaining De Facto Judicial Independence' (2007) 27(3) *International Review of Law and Economics* 267, 271–2.
[54] Macdonald and Kong, above n 45.
[55] See, eg, Steven B. Burbank and Barry Friedman, 'Reconsidering Judicial Independence' in Steven B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Inc., 2002) 12.
[56] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 *Annual Review of Political Science* 345, 349.
[57] Drew A. Linzer and Jeffrey K. Staton, 'A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence' *(*Paper presented at The Annual Meeting of the American Political Science Association*)* (Seattle, September 2011) 5.
[58] Julio Ríos–Figueroa and Jeffrey K. Staton, 'An Evaluation of Cross–National Measures of Judicial Independence' (2012) 30(1) *Journal of Law, Economics, and Organization* 104, 104.
[59] Richard Stacey and Sujit Choudhry, 'International Standards for the Independence of the Judiciary' (International IDEA, 2013) 2.

interference would impinge on judges' application of law, causing the courts to become unable to exercise their functions.[60]

Owen Fiss provides a practical explanation of judicial independence by arguing that is achieved when three conditions are fulfilled: 'party detachment', 'individual autonomy', and 'political insularity'. [61] Notably, these conditions are different from the elements of judicial independence, which as will be explained later, are the elements that regimes themselves should provide to the judicial power in order to fulfil these conditions.

Party detachment is the independence that judges have vis-à-vis the litigants who stand before the bench. This is the core of the judicial role, which is also referred to as the impartiality of judges. It requires judges to not unduly favour the interest of any party. This concept is also known as behavioural independence, which requires that judges be shielded from subordination to political pressure. To achieve it, judges must have security of occupation, by guaranteeing a fixed tenure,[62] transparent procedures of judicial inspection against 'retaliatory removal',[63] and financial security, through generous salaries and pensions.[64]

Next, individual autonomy is the independence of a judge vis-à-vis other judges in the same bench. This allows judges to make their own decisions and pronounce dissenting opinions.[65] To achieve it, the grounding of judicial recruitment on merit is necessary, by selecting judges according to their educational qualifications and expertise.[66] Equally important is a social culture that obliges the regime to show genuine commitment to the rule of law instead of disdain of courts' rulings and political meddling.[67]

Last, political insularity is the independence of the judiciary vis-à-vis other institutions in the state, particularly the executive. Courts, especially constitutional, administrative, and anti-corruption courts, are often targets of undue interference in authoritarian regimes, through

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[60] Brad Epperly, 'Political Competition and De Facto Judicial Independence in Non-Democracies' (2017) 56(2) *European Journal of Political Research* 279, 279; See generally Lewis A. Kornhauser, 'Is Judicial Independence a Useful Concept?' in Steven B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Inc., 2002) 48.
[61] Ibid 55.
[62] Gerard Brennan, *Judicial Independence* (2 November 1996) High Court of Australia <http://www.hcourt.gov.au/assets/publications/speeches/former–justices/brennanj/brennanj_ajc.htm>.
[63] Donald Jackson, 'Judicial Independence in Cross–National Perspective' in American Bar Association, *Judicial Independence: Essays, Bibliography, and Discussion Guide* (1999) 27.
[64] Martin L Friedland, Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council* (1995).
[65] Thomas E Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre–Soviet Russia' (1996) 5(1) *William & Mary Bill Rights Journal* 1.
[66] Jackson, above n 63.
[67] Martin L Friedland, Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council* (1995).

procedures that enable the sidelining of 'disloyal' judges. The last concept is also referred to as institutional independence, which requires clear rules of judicial function.[68] What is required to achieve this are reasonable methods for reprimanding personal or professional misdeeds and dismissal for official misbehaviour.[69]

2 *Elements of Judicial Independence*

Protecting judges as individuals and courts as institutions from undue interference requires a set of principles that can help in establishing the elements of judicial independence. These elements are: independent judges, also known as personal or professional independence; independent courts, also named operational or institutional independence; and independent procedures, also called procedural or decisional independence, which means that other state powers do not unduly interfere in the litigation process.[70]

There are preeminent international law texts that uphold judicial independence, and provide guidelines for establishing independent judiciaries. The International Covenant on the Civil and Political Rights ('ICCPR'), which is 'hard' international law that is legally binding on its signatories, asserts the critical importance of a fair trial, because it is the duty of the judiciary to act as the ultimate guarantor of human rights in the state.[71] Domestically, the judiciary acts as such by securing the rule of law to ensure that all legislative actions are consistent with the constitution, and that all executive actions are in conformity with enacted statutes.[72] This duty would not be adequately fulfilled without insulating the judiciary from undue interference. Article 14 of the ICCPR provides that:

> All persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law.[73]

The United Nations Human Rights Committee produced an influential document that provides an authoritative interpretation of this binding Article, known as General Comment No. 32.[74] It is a valuable explanation of the right of fair trial and how even non-signatories to the ICCPR

[68] Peter Russell and David O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Constitutionalism and Democracy (University Press of Virginia, 2001) 6.
[69] Martin L Friedland, Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council* (1995); Jackson, above n 63.
[70] Bernd Hayo and Stefan Voigt, 'Explaining Constitutional Change: The Case of Judicial Independence' (2016) 48(1) *International Review of Law and Economics* 1, 5.
[71] Ibid.
[72] See generally Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64(4) *World Politics* 587.
[73] UN Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [3].
[74] Ibid.

must fulfil it, since it is part of customary international law.[75] The General Comment provides a working definition for an independent judiciary in light of that Article: courts must be impartial, display no bias or favour, not pre-judge cases, be politically independent, and not be subject to or beholden to influence from the legislative or executive branches of government, in order to fulfil their functions without fear.[76]

Leading international organisations and judicial support networks held numerous discussions to define a set of ideal provisions of judicial independence to which states around the world should strive to adhere.[77] These organisations and networks described them as 'ideal' because, in reality, it is not possible to adhere to all of them.[78] Thus, judicial independence is a principle that requires substantial protection of the judiciary as a first step, then continues demanding constant improvement of states' adherence to those provisions. Accordingly, it is not expected of states that they fulfil all the obligations described in this set.[79] Rather, a progressive endeavour to provide the judiciary with essential protection from undue interference is what this set demands.[80] Considering the varying degrees of progressing in that endeavour, states around the world have shown various degrees of commitment to the provisions of this set, which means they fall on different points along the spectrum of judicial independence. Thus, it is incorrect to classify judiciaries around the world according to a simple dichotomy of 'independent' and 'not independent'.[81]

The global standards of judicial independence can be synthesised from four primary documents that were produced by international organisations to support judges worldwide: the Basic Principles on the Independence of the Judiciary by the UN ('Basic Principles');[82] the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers ('Special

[75] Katherine Glenn Bass and Sujit Choudhry, 'Constitutional Review in New Democracies' (International IDEA, 2013), 4.
[76] Ibid [15]–[29].
[77] James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (2014) 2(2) *Journal of Law and Courts* 187, 187–8.
[78] See also Charles M. Cameron, 'Judicial Independence: How Can You Tell It When You See It? And, Who Cares' in Steven B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Inc., 2002) 134.
[79] See especially Lydia Brashear Tiede,'Judicial Independence: Often Cited, Rarely Understood' (2006) 15 *Journal Contemporary Legal Issues* 129, 136.
[80] Ibid.
[81] Mathew D. McCubbins, Roger Noll and Barry R. Weingast, 'Conditions for Judicial Independence' (2006) 15 *Journal of Contemporary Legal Issues* 105, 123.
[82] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1 ('*Basic Principles of Judicial Independence*').

Rapporteur');[83] the Universal Charter of the Judges ('Universal Charter');[84] and the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors ('International Principles').[85]

The organisations that arranged conferences and discussions to prepare those documents are among the leading and most influential organisations in the field of judicial independence and the rule of law around the world.[86] These documents therefore offer an authoritative, comprehensive source for a set of principles that assists in assessing the independence of judicial institutions, bearing in mind that comparative differences do appear when the assessment is conducted.

These four international documents can be employed to pragmatically evaluate the degree of independence in both higher and lower courts.[87] In what follows, the elements of judicial independence — personal, institutional, and procedural — will be explained in turn, to show how the principles related to each element protect the independence of judges. These principles are set to eliminate, or at least reduce as much as possible, undue political interference of the non-judicial officials in judges' profession.[88]

(a) Personal Independence

The rules of judicial tenure are the major focus of most materials on judicial independence. Judicial tenure includes all aspects of judges' profession: appointment and selection, term of office, remuneration and salaries, promotion, resignation, discipline, and removal. For the aspect of selection, the Basic Principles declare that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'.[89] Also, the Universal Charter asserts that '[w]here this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, which includes substantial

[83] Leandro Despouy, Special Rapporteur, *Report of the Special Rapporteur on the independence of judges and lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009) ('*Special Rapporteur on the independence of judges*').
[84] *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 1.
[85] 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (International Commission of Jurists, 2007) ('*International Principles on Judicial Independence*').
[86] See, eg, International Association of Judges <http://www.iaj–uim.org/home/>; International Commission of Jurists <https://www.icj.org/>.
[87] See Robert M. Howard and Henry F. Carey, 'Is an Independent Judiciary Necessary for Democracy?' (2004) 87(6) *Judicature* 284; F. Andrew Hanssen, 'Is There a Politically Optimal Level of Judicial Independence?' (2004) 94(3) *American Economic Review* 712.
[88] Bass and Choudhry, above n 75.
[89] *Basic Principles of Judicial Independence*, above n 82, art 10.

judicial representation'.[90] One purpose of requiring this limited involvement is to avoid to judicial self-restraint, which might occur if the judiciary is the sole controller of judicial selection, leading to avoiding judicial review of critical matters that might trigger a response of irrepressible political incursion into courts' independence.[91] Both provisions avow the need to have a selection process that is transparent and objective, with limited involvement of non-judicial institutions that are unlikely to have common improper motives, to avoid the dominance of the executive power.

Regarding judicial appointments to constitutional courts, Choudhry and Bass convincingly argue, in a way similar to Kelsen's original vision, that different political actors have to participate in appointing constitutional judges, because that promotes the judges' accountability and 'creates a sense of political investment', urging those who might lose in litigation before a court to abide by its judgments rather than challenging its independence.[92] Both scholars support this argument by proposing a set of principles that 'must' guide the appointment procedures of constitutional judges: 'widespread participation from different political constituencies; division of the powers to appoint and remove justices; and establishing qualifications to ensure the selection of judges of high legal expertise'.[93] The critical impact of constitutional court's rulings makes it necessary to shield them from potential attempts to undermine their legitimacy, especially by losing parties.[94]

It is principally for this requirement that independently exercised constitutional review is vital for maintaining constitutional courts' image as umpires with integrity, because if such review seems to be lacking independence, then their judgments might be considered politically biased, which undermines their legitimacy.

There are five models of appointing constitutional judges that are relatively consistent with the principles mentioned above. The first is the legislative supermajority model, in which the parliament dominates the appointment procedure. The essence of this model requires a supermajority for candidates to be appointed, which might be two-thirds or three-fifths of the parliament, to prevent the ruling party from achieving a simple majority to appoint its

[90] *The Universal Charter of the Judge*, above n 84, art 9.
[91] See G. Alan Tarr, *Without Fear or Favour: Judicial Independence and Judicial Accountability in the States* (Stanford University Press, 2012).
[92] Sujit Choudhry and Katherine Glenn Bass, 'Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence' (Center for Constitutional Transitions at UNY Law and International Institute for Democracy and Electoral Assistance, 2014) 10.
[93] Ibid.
[94] See John A. Ferejohn and Larry D. Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77(4) *New York University Law Review* 962, 1002–3, 1007.

nominees.[95] In states that have two chambers system, both chambers may participate in electing candidates. Because of the supermajority requirement, this model promotes a process of compromise and negotiation between opposition and government party in the parliament. In Germany, this model was a factor in fostering a collective sense of political investment among parties when appointing judges to the Federal Constitutional Court.[96] Nevertheless, a compromise on a candidate may be difficult in states that have intense partisan conflicts. Another challenge to this model in states with highly-fragmented parties is that a deadlock could be encountered during the appointment if the parties come to reach the specified supermajority.[97]

The second model is the judiciary-executive model, in which both judicial and executive powers share the authority to appoint constitutional judges. Generally, senior judges from higher courts propose a list of candidates to the executive power, which must, in turn, formally appoint the candidates it selects from that list.[98] Other versions of this model have both roles exchanged between the executive and the senior judges, in which the latter appoint the selected candidates from a list that the executive power proposes. The reason behind excluding the parliament in this model is to shield the court from short-term political concerns.[99] Nonetheless, this sort of shielding might exclude the opposition in the parliament, which undermines the sense of political investment in the constitutional court, and might trigger accusations of political bias. The Egyptian Supreme Constitutional Court and the Iraqi Federal Supreme Court are appointed according to variations on this model.[100]

The third is the legislative-executive model, in which the task of appointing judges is divided between the executive power and the parliament. Commonly, the president, as the head of the executive authority, nominates a list of candidates to the parliament which in turn selects the judges. Similar to the previous model, the roles might be exchanged in a variation of this model, i.e. nomination comes from the parliament, while the president makes final selections. In the first variation, members of the parliament usually hold confirmation hearings and scrutinise the candidates by examining their ideological stances and personal suitability. Importantly, such hearings might become exceedingly politicised, especially in states where the president is

[95] Harding, Leyland and Groppi, above n 2, 15.
[96] Choudhry and Bass, above n 92, 9.
[97] Ibid 11–12.
[98] Harding, Leyland and Groppi, above n 2, 14.
[99] Bass and Choudhry, above n 75, 12.
[100] Ibid.

not from the majority party in the parliament, which could divert the hearings from their original goal of assessing the judicial qualifications of those candidates.[101]

The fourth model is the judicial council model, in which political parties participate in creating a council to insulate the appointment procedures from undue interference. Often, non-political actors take a role in this council, such as law scholars, bar associations, and human rights activists. The council supervises the appointment process by inviting eligible candidates to submit their applications, interviewing them, and either sending a short list of the most suitable candidates to the executive and legislative powers to appoint who they both agree on, or directly selecting the candidates in a determinative manner. South Africa is a prominent example of a state that applies in this model. Its Judicial Service Commission is composed of executive officials, members of both chambers of parliament, judges, lawyers, and law scholars, and this helped to establish a sense of political investment, with its judgments being widely respected.[102] Another iteration of this model is to require recommendations of candidates from the judicial council at the first formation of the court (i.e selecting the candidates for the first bench ever), while in following appointments, filling vacant chairs in the bench, the constitutional court itself, not the judicial council, nominates candidates to the president. A problem with this model is the ability to compose the council of qualified members, and how to reach an agreement about the criteria for membership, particularly in developing and transitional states.[103]

Last is the multi-constituency model. Mainly to avoid controversy over designing a selection committee, the three powers (with the participation of civic organisations in some variations of this model) engage in the appointment process by having a specified quota of the court's posts.[104] In contrast with the judicial council model, the participants have either direct or indirect authority to appoint their nominees to the court. If it is direct, participants can appoint their candidates without having to consult or gain the approval of other participants, which allows them to act independently. If it is indirect, participants can either nominate candidates or approve already-nominated ones. Notably, if parliament members do not reach an agreement on candidates, then appointments by them might be delayed. This model could theoretically create a divided panel, since judges might tend to show 'gratefulness' for the institutions that selected them by unjustifiably serving their interests. In Italy, this model has been applied since

[101] Harding, Leyland and Groppi, above n 2, 14.
[102] Choudhry and Bass, above n 92, 11.
[103] Harding, Leyland and Groppi, above n 2, 14.
[104] Ibid 14.

1953 and it endorsed a positive sense of political investment in the court's composition.[105] The Turkish Constitutional Court also adopted this model in the constitutional amendments of 2010.[106]

In all these models, judicial appointments must be based on objective criteria. The Special Rapporteur emphasises 'the importance of the establishment and application of objective criteria in the selection of judges, [which] should relate particularly to qualifications, integrity, ability and efficiency'.[107] The International Principles declare that 'selection criteria must not be discriminatory and must embody safeguards against appointments based on partiality or prejudice'.[108] Thus, a merit-based, and not partiality-based, selection process is a prerequisite for appointing qualified judges.

Furthermore, judges must have secure terms of office, which might take the form of long-fixed terms, retirement-age terms, or life-long terms. Most states prefer a long fixed-term of appointment for constitutional judges to ensure more frequent replacements compared to the other two forms, seeking a bench that represents prevailing moral values of the wider public.[109] Allowing renewable terms, especially when such renewals are dependent on legislative or executive approvals, might impinge on the personal independence of the judges. The reason is the possibility of judges' being under pressure to make decisions that unduly please those from whom they need renewal.[110] Germany, for instance, changed its Federal Constitutional Court's law in 1970, from allowing for renewal of terms by parliament members to non-renewable terms, to eliminate politically-driven approved or refused renewals.[111]

Additionally, promoting judges must be according to non-arbitrary processes, and accepting a judge's resignation must require the involvement of both judicial and executive (or legislative) officials to prevent any forced resignation.[112] Courts must not be abolished or restructured to terminate judicial tenures; and removal procedures, including those of disciplining judges, must be conditional upon the investigation of grave incapacity or misbehaviour under the supervision of judicial institutions. The Universal Charter affirms that '[a] judge must be

[105] Choudhry and Bass, above n 92, 12.
[106] Ibid.
[107] *Special Rapporteur on the independence of judges*, above n 83, [30].
[108] *International Principles on Judicial Independence,* above n 85, 72.
[109] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 270.
[110] Bass and Choudhry, above n 75.
[111] Donald Kommers, *Autonomy Versus Accountability: The German Judiciary, in Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001) 148–9.
[112] Ubaid ul–Haq, 'Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who Has the Right Idea?' (2010) 12, 41 <http://works.bepress.com/ubaid_ul_haq/3/>.

appointed for life or such other period and conditions, that the judicial independence is not endangered' and '[a] judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure'.[113] Also, the International Principles proclaim that '[t]he determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing'.[114]

(b) Institutional Independence

Because courts are institutions that serve the public in upholding the rule of law, their administration, operational processes, and managerial procedures must not allow the executive or legislative power to unduly interfere with them. Administering judicial affairs must be shielded from manipulation from the regime.

Additionally, judges must not be rewarded or punished for performing their judicial tasks. Thus, they must avoid any reward from the executive or legislative powers for a judgment they have made. Most importantly, they must enjoy immunity from punishment or revenge by litigants whose interests have been adversely affected by a judgment. This immunity must also take the form of physical security, through ensuring the safety of judges and their families, especially when threats have been made against them. The Universal Charter states that '[c]ivil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under specific circumstances ensuring that his or her independence cannot be influenced.'[115] Moreover, the International Principles assert that '[a]ll necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.'[116]

Furthermore, judges as public officials must refuse to fill roles that are likely to intrude into their performance of judicial duties, such as roles of policy advising for the government or statutory counselling for the Parliament. This issue entwines with judges' personal independence, as accepting such role might cause conflict of interest and lead to biased judgments. Nevertheless, in cases where there is no probability of contradiction between judges

[113] *The Universal Charter of the Judge*, above n 84, art 8.
[114] *International Principles on Judicial Independence,* above n 85, 56.
[115] *The Universal Charter of the Judge*, above n 84, art 7.
[116] *Special Rapporteur on the independence of judges*, above n 83, [160], citing *Specific standards on the independence of judges, lawyers and prosecutors*, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, Council of Europe.

duties and a particular role, being appointed to that role is acceptable, such as acting as a member of investigation commission after retirement, or holding an administrative position in the judiciary under the supervision of the judicial power. The Basic Principles confirm that 'judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.'[117] Moreover, the Special Rapporteur asserts 'the importance of the participation of judges in debates concerning their functions and status as well as general legal debates.'[118] Both provisions support that judges be involved in what might strengthen the rule of law and uphold justice in their states, as long as such involvement does not impinge on their independence.

Also, assigning cases to judges must not be in a way that allows the legislative or executive power to choose who should sit on the bench for a certain case. Thus, the docket control must be managed by courts alone to prevent capricious allocation of critical cases to specific judges.[119] Furthermore, transferring judges between courts, and forming judicial benches must be rigid and immune to discretionary control by the executive power. Such immunity might assist in preventing retaliation against judges who pronounce judgments unfavourable to the executive.[120] The Universal Charter declares that the administration of the judiciary 'must be organised in such a way, that it does not compromise the judges' genuine independence'.[121]

Importantly, it is not possible for courts to be completely independent from the legislature, because the latter's approval of the court's budget is required.[122] Thus, it is critical for the judiciary to participate in preparing its budget with the parliament. This participation helps to prevent any coercive financial restrictions against the judiciary and shield the judiciary from any external pressure. Moreover, funding and resourcing of courts must be adequate to facilitate the courts' work, without leaving the executive power to control the allocation of funds to the judiciary. The Special Rapporteur endorses that 'entrusting the administration of funds directly to the judiciary or an independent body responsible for the judiciary is much more likely to reinforce the independence of the judiciary'.[123]

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[117] *Basic Principles of Judicial Independence*, above n 82, art 8.
[118] *Special Rapporteur on the independence of judges*, above n 83, [45].
[119] See Jonathan P Kastellec, and Jeffrey R Lax, 'Case Selection and the Study of Judicial Politics' (2008) 5(3) *Journal of Empirical Legal Studies* 407.
[120] Tiede, above n 79.
[121] *The Universal Charter of the Judge*, above n 84, art 11.
[122] Daniel M Klerman, and Paul G Mahoney, 'The Value of Judicial Independence: Evidence from Eighteenth Century England' (2005) 7(1) *American Law and Economics Review* 1, 2–3.
[123] *Special Rapporteur on the independence of judges*, above n 83, [43].

(c) Procedural Independence

Judges, as umpires, must be authorised to oversee all matters related to the case before them and be free from influence that impinges on the decision-making processes that they conduct on a daily basis. This authorisation may afford them the acceptable amount of discretionary power they need to apply their understanding of the law to the facts.

Hence, courts must have autonomy to decide whether matters fall within their jurisdiction, in a manner that prevents executive or legislative impingement on the courts' role. By having such comprehensive jurisdiction, courts can obstruct legislative diminution of courts' jurisdiction that Ubaid ul-Haq correctly describes as 'the most effective means through which [executive and legislative] branches could invade the judiciary'.[124] Moreover, Lydia Tiede refers to expanding court's jurisdiction as a purpose of judicial reform:

> [J]udicial reform efforts have focused on providing judges with specific powers to decide certain types of cases which were previously out of the purview of the courts. For example, judicial reform in some former dictatorships, has focused on providing power to civil courts to hear cases once primarily reserved for military courts. Comparatively, the institutionalisation of power and authority of non-elected officials also may enhance independence.[125]

Additionally, the executive power must execute courts' judgments without any changes. Individuals, corporations, commissions, executive agencies, and local governments must comply with courts' judgments, because, in many legal systems, 'the judiciary … has neither the capacity to enforce its will nor the ability to oversee compliance with its instructions'.[126] The Basic Principles and the International Principles uphold that '[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.[127]

For constitutional courts, procedural independence means that the executive power executes the courts' judgments. This element of independence is related to the critical issue of these courts being effective. Admittedly, it is hard to provide a robust definition of an 'effective' constitutional court. As Harding rightly explains:

> Effectiveness has to be judged against original intentions [of establishing the constitutional court], and even here we are unsure whether to take ostensible *raison d'être* or [pragmatic]

[124] Ubaid ul–Haq, above n 112, 9.
[125] Tiede, above n 79, 134, citing Jodi Finkel, 'Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court' (2003) 35(4) *Journal of Latin American Studies* 777.
[126] McCubbins, Noll and Weingast, above n 81, 109.
[127] *Basic Principles of Judicial Independence*, above n 82, art 3; *International Principles on Judicial Independence*, above n 85, 22.

> reasons: if a constitutional court was set up to protect a party or policy that might or did lose political power and in fact did so, this might logically be counted an effective court.[128]

He argues against what might be considered a promising approach to solve this difficulty, which is 'to assume that the ostensible purpose is to deter constitutional actors from abusing their position or abusing individual human rights; if we find that in fact they were so deterred because of the prospect of a robust response from the court, we could perhaps conclude there is success'.[129] His counter-argument is that 'even here, how are we to judge the motivation or not of the actors and what standards are we to apply if not those laid down by the court itself?'[130]

This explanation demonstrates how difficult it is to build criteria for assessing a court's degree of effectiveness, as original intentions are hard to identify, and genuine motivations behind the political elites' complicity with a constitutional judgment are even harder to detect.[131] Both challenges impede determining the true impact of constitutional courts. Another incorrect approach is the statistical analysis of judgments, because significant cases for a certain regime could make only a small number of cases compared to the entire caseload of the court.[132] Additionally, significant cases may relate to separate subjects of the court's jurisdiction, and not all courts make their judgments available to the public.[133] Thus, it is incorrect to assess a court's effectiveness according to statistics, as Comella concurs:

> [S]ome laws are more important than others. A court would not be [effective] if it never deviated from the parliament with respect to the key issues, even if it overturned lots of legal provisions of marginal importance … [and] it may very well happen that a parliamentary majority abstains from enacting a particular law out of fear that the court will invalidate it. A strong judiciary may cause this sort of 'chilling effect' on the legislature.[134]

Nevertheless, in the normative sense, constitutional courts are established primarily to ensure adherence to the constitution, through holding the state powers accountable and upholding the constitution's supremacy over legislation, leading to 'effective implementation of constitutional rules'.[135] This is the normative purpose of establishing a constitutional court, and a court is considered effective to the extent it correctly performs that fundamental function and pronounces judgments that are 'consistent with the norms set out in the constitution'.[136] Therefore, for a constitutional court to be effective, it should make use of available

[128] Harding, Leyland and Groppi, above n 2, 23; Ginsburg, above n 7, 50–4.
[129] Harding, Leyland and Groppi, above n 2, 23.
[130] Ibid.
[131] Ibid 9.
[132] Ibid 8–9.
[133] See above n 47 and the text it cites; Sweet, 'Constitutional Courts', above n 1, 828.
[134] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 272.
[135] Chen and Maduro, above n 1, 97.
[136] See especially Harding, Leyland and Groppi, above n 2, 4–5, 24.

opportunities to fulfil 'the specific purpose of protecting the constitution', which may be facilitated by adopting a purposive rather than a literalist approach in adjudication.[137]

A suitable approach to assess a certain constitutional court's effectiveness might be that proposed by Sweet, because, as the following benchmarks suggest, effectiveness should be assessed on a case-by-case basis, taking into consideration the differences between cases' subjects and the political tensions present at submission time:[138]

First, critical constitutional objections should be regularly submitted to the constitutional court. This issue is mainly dependent on available avenues to access the court, which will be explained shortly.

Second, and the most important, constitutional judgments should be strongly-reasoned and logically-justified. A court that makes decisions that are criticised by constitutional jurists as being rationally absurd or lacking cogency would give rise to questions about its competence or motivation.[139] Assessing a court's arguments is subject to many factors such as: the record of the judgments it has issued, the constitutional heritage of its predecessor (if any), the purposes that the court was established to fulfil, the sort of the review conducted by the court (whether abstract or concrete), and more importantly the nature of the state's constitution itself, since the constitution is the core reference in the review process.[140]

Third, the court's decisions should be perceived as having binding effect on those subject to its jurisdiction. If a regime acts contrary to a court's decisions when its interests are at risk, then the binding effect of the court's judgments is undermined. For some regimes, maintaining control, punishing political enemies, and rewarding allies are far more important than showing obedience to the constitutional court's judgments.[141]

To elaborate on the first benchmark, and since most constitutional courts have filtering competence to choose what cases to be heard, i.e. who can submit a request to the court, the rules of access to such courts becomes a factor in assessing courts' effectiveness. Generally, there are four avenues to access constitutional courts.

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[137] Victor Ferreres, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2003) 82 *Texas Law Review* 1705, 1711.
[138] Sweet, 'Constitutional Courts', above n 1, 825.
[139] Harding, Leyland and Groppi, above n 2, 22.
[140] See Juliane Kokott, and Martin Kaspar, 'Ensuring Constitutional Efficacy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 805–11.
[141] Sweet, 'Constitutional Courts', above n 1, 825.

First, direct, original action (or petition). This action is submitted by a person (whether legal or natural) who might be aggrieved — or was in fact aggrieved as some legal systems require — by the application of a certain law, seeking direct challenge of its constitutionality. This action is distinguished for its independent feature, since the fact of being aggrieved by the application of the law suffices as an acceptable reason to submit this sort of action.[142] The constitutional court starts by examining whether the grievance, claimed by the submitter, is possible, or actual, and caused by the challenged law. If that is found true, then the submitter is considered as having an 'interest' in this action, and the constitutional court proceeds to assess the consistency between the constitution and the challenged law.

This avenue is different from that of limiting direct, original access to certain executive or legislative officials, who have standing without aggravation, such as the president, the prime minister, a specified number of parliament members, or a human rights agency.[143] This action is considered the most efficient avenue of constitutional review, since it has minimal procedures compared to the other three avenues, which assists the constitutional court to achieve prompt constitutional stability in the legal system.

This avenue of constitutional review is consistent with the positive constitutional right that some systems provide for every citizen, namely the right to have access to the specialised court and enjoy equality before the judiciary.[144] Nevertheless, some states do not allow for this action, for example, the Constitutional Council in France.[145] Additionally, many other constitutional courts confine this action only to individual rights violations, for example, the German and Spanish Constitutional Courts.[146]

The second avenue is subsidiary referral conducted by ordinary courts when judges perceive a serious possibility of unconstitutionality concerning a certain legislative provision.[147] Here, judges *sua sponte* (i.e. without the request of the parties) suspend the litigation and refer the issue of unconstitutionality to the constitutional court.[148] The importance of this avenue lies in enabling the judges themselves to refer legislative provisions that are potentially unconstitutional to the constitutional court without a request from a disputing party, allowing

[142] Harding, Leyland and Groppi, above n 2, 9.
[143] Andrew Harding, 'The Fundamentals of Constitutional Courts' (International IDEA, April 2017) 5
[144] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 267.
[145] Ibid; Harding, Leyland and Groppi, above n 2, 20.
[146] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 267; Sweet, 'Constitutional Courts', above n 1, 828.
[147] Andrew Harding, 'The Fundamentals of Constitutional Courts', above n 90.
[148] Harding, Leyland and Groppi, above n 2, 9.

ordinary judges to participate in maintaining the constitutional consistency of the legal system.[149]

The third avenue is the adversary's rebuttal. The rebuttal is conducted upon a request from a disputing party to the ordinary court, in which that party challenges the constitutionality of a certain legislative provision that the court expresses its intention to apply in the dispute. In contrast to the previous avenue, the rebuttal cannot be *sua sponte* initiated by the judge.[150] If the ordinary court found this rebuttal serious and worthy of constitutional assessment, then it is obliged to suspend the litigation, as it is the duty of the judge not to apply legislative provisions that appear to be unconstitutional.[151] Then, the judge allows the adversary to request, within a defined period, the constitutional court's assessment of the challenged law. If the period expires without the adversary submitting the request, then the ordinary court continues with the procedures of the original dispute and disregards any further objections from the same adversary regarding that legislative provision.[152]

The fourth avenue is confrontation by the constitutional court itself, which takes place while the constitutional court is adjudicating on a constitutional dispute presented to it through one of the three avenues mentioned above, or while anwering a request to interprete a constitutional or a legislative text. If the court realises that another legislative provision, relevant to the original dispute is unconstitutional, then it has the right to *sua sponte* review it.[153] The confrontation is a matter that asserts the comprehensive jurisdiction of the constitutional court on all laws even if they are not directly challenged by a certain person or entity.[154]

In conclusion, these four avenues provide constitutional courts with regular review of laws, but the vital benchmark of those explained above is to have strongly-reasoned and well-argued judgments. This benchmark will be taken into consideration when assessing the *de facto* independence of the Court in Chapters Five and Six.

[149] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 267.
[150] Andrew Harding, 'The Fundamentals of Constitutional Courts', above n 90.
[151] Harding, Leyland and Groppi, above n 2, 9.
[152] Comella, 'The Rise of Specialized Constitutional Courts', above n 1, 267.
[153] Ibid 268.
[154] Ibid.

3 *De Jure and De Facto Independence*

The importance of differentiating between *de jure* and *de facto* judicial independence arises from the fact that writing constitutional provisions and enacting laws to protect the judiciary do not necessarily result in a *de facto* independent judiciary.[155]

I begin with the definition of de *jure* independence. Rios-Figueroa and Staton define it as 'formal rules designed to insulate judges from undue pressure, either from outside the judiciary or from within'.[156] Examples of such rules are those related to judicial appointment and removal procedures, tenure, inspection, and budget. These rules may be contained in the constitution itself or in statutes (enacted under the authority of the constitution) that establish and regulate the courts. Similarly, Linzer and Staton define *de jure* independence as 'a set of formal institutions [reflected in law] —such as fixed budgets or cumbersome removal procedures— that are thought to provide incentives for independent judging'.[157]

The principles explained above in the previous chapter about the elements of judicial independence (personal, institutional, and procedural) seek to achieve *de jure* independence, in order to reach *de facto* independence, since the former is a necessary but not sufficient condition for the latter. These principles include the notions that judicial appointments must be based on qualification and merits; that judges must refuse to fill roles that may impinge on their judicial duties; and that courts must have autonomy to decide whether matters fall within their jurisdiction.[158]

[155] Bernd Hayo and Stefan Voigt, 'Explaining De Facto Judicial Independence' (2007) 27(3) *International Review of Law & Economics*; Abram Chayes and Antonia Handler Chayes, *On Compliance* (Massachusetts Institute of Technology Press, 1993). See Kosar David and Samuel Spac, 'Conceptualization(S) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back' (2018) (3) *International Journal for Court Administration* 37; Brad Epperly and Jacqueline Sievert, 'Conflict and Courts: Civil War and Judicial Independence across Democracies' (2019) 72(3) *Political Research Quarterly* 700; Louis Henkin, 'How Nations Behave: Law and Foreign Policy' (Columbia University Press, 2nd ed, 1979).

[156] Ríos–Figueroa and Staton, above n 58, 106–7. See, eg, Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).

[157] Drew A. Linzer and Jeffrey K. Staton 'A Global Measure of Judicial Independence, 1948–2012' (2015) 3(2) *Journal of Law and Courts* 223, 225.

[158] Charles D Crabtree and Christopher J Fariss, 'Uncovering patterns among latent variables: human rights and judicial independence' (2015) 2, Research & Politics 1, 2.

De facto independence can be measured by two distinct, yet related, criteria: autonomy and influence.[159] Autonomy means that 'judges be the authors of their own opinions',[160] and that they do 'not respond to undue pressures to resolve cases in particular ways'.[161] Stated otherwise, judges are independent in the sense of autonomy when their decisions reflect their own application of the law, and when what they think sincerely about the dispute before them determines their judgment.[162]

In comparison, influence means that a court's decisions are 'enforced in practice even when political actors would rather not comply', instead of being routinely ignored or poorly implemented.[163] Hamilton et al argue that courts depend on the assistance of other political authorities to enforce their decisions because they lack financial or physical means of coercion.[164] According to Cameron, judicial independence in this sense reflects a causal relationship between how judges 'think the underlying conflict they are adjudicating should be resolved and how it is resolved in practice'.[165]

The criterion that is most relevant to this thesis is autonomy, because in order to assess the court's *de facto* independence through the criterion of influence, a degree of discontent by the regime with what the court decides is required, in order to see whether the regime prioritises obeying the court over maintaining its authoritarian interests or not. This is not present in the case of the West Bank regime. As highlighted in the introduction, 27 out of 36 judgments were

[159] Clifford J. Carrubba and Christopher Zorn. '*Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*' (2010) 72(3) Journal of Politics 812, 822–3.
[160] Lewis A. Kornhauser, 'Is Judicial Independence a Useful Concept?' in Steven B. Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Inc., 2002) 45–55.
[161] Ibid 45–55. See Brad Epperly, 'Political Competition and De Facto Judicial Independence in Non–Democracies' (2017) 56(2) *European Journal of Political Research* 279; Ríos–Figueroa and Staton, above n 58, 107; Rosenn S. Keith, 'The Protection of Judicial Independence in Latin America' (1987) 19(1) *The University of Miami Inter–American Law Review* 1, 3–35.
[162] Ríos–Figueroa and Staton, above n 58, 107. See Frans Van Dijk, Frank van Tulder and Ymkje Lugten, 'Independence of Judges: Judicial Perceptions and Formal Safeguards' (2016) *Netherlands Council for the Judiciary* 4; Charles Crabtree and Michael J. Nelson, 'New Evidence for a Positive Relationship between De Facto Judicial Independence and State Respect for Empowerment Rights' (2017) 61(1) *International Studies Quarterly* 210.
[163] Ibid. See Daniel M Brinks, and Abby Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice' (2017) 15(2) *International Journal of Constitutional Law* 296, 304.
[164] Ibid; see Jeff Yates, Andrew B. Whitford and David Brown, 'Perceptions of the Rule of Law: Evidence on the Impact of Judicial Insulation' (2019) 100(1) *Social Science Quarterly (Wiley–Blackwell)* 198.
[165] Charles M Cameron, 'Judicial Independence: How Can You Tell It When You See It? And, Who Cares?' in Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage, 2002) 134–43.

in favour of the regime, and the rest were irrelevant to its interests. The introduction to Chapter Five will elaborate on this point.

Rios-Figueroa, Linzer, and Staton affirm that assessing *de facto* independence is a challenging task because of the difficulty of isolating lack of autonomy as the principal reason why a judge has acted in a particular way.[166] Other reasons for issuing judgments that are in favour of the regime include, but are not limited to, the relevant legal texts being unclear or not supporting decisions against the regime, poor quality argument before the Court due to the incompetence of counsel, or incompetence on the part of judges themselves.[167]

However, this thesis, through the methodology it adopts (which is explained in its introduction), provides compelling evidence that the problem with the Court's judgments lies in poor argumentation and ill justification of decisions. This is hard to accept from the judges of a constitutional court, particularly considering the high level of expertise and long years of experience that those judges supposedly have. The criticism of the 36 judgments of the Court is not targeted to what counsel argued, or how clear the relevant legal texts were. Rather, it is against the Court's arguments and justifications used to reach the conclusion in each judgment.

To elaborate, the analysis of cases in Chapters Five and Six shows that in 27 of these judgments the Court wrongly applied the relevant law; while in the remaining nine, the Court's correct application of law did not impinge on significant interests of the regime. Stated otherwise, when the regime's interests were at risk, the Court's judgments could be justly characterised as intentionally neglectful of constitutional procedural or substantive rules. Had these rules been correctly applied, the regime would have had its interests substantially 'harmed'. In a nutshell, what is argued to be a deliberate misapplication of the law in the vast majority of the Court judgments indicates that 'autonomy', rather than 'competence', is what the Court lacks. This explanation —along with the methodology of analysing the cases which is explained in

[166] Ibid 108; Linzer and Staton, above n 157, 229. See Kirk A Randazzo, Douglas M Gibler and Rebecca Reid, 'Examining the Development of Judicial Independence' (2016) 69(3) *Political Research Quarterly* 583, 587; Frans Van Dijk and Geoffrey Vos, 'A Method for Assessment of the Independence and Accountability of the Judiciary' (2017) 9(2) *International Journal for Court Administration* 1, 6.

[167] See Dijk van Frans and Langbroek Philip, 'Reaction on the Comments on the ENCJ Study on Method for Assessment of Judicial Independence and Accountability' (2018) (3) International Journal for Court Administration

76 Bernd Hayo and Stefan Voigt, 'The Long–Term Relationship between *De Jure* and *De Facto* Judicial Independence' (2019) 183 Economics Letters 1; Clifford J Carrubba et al, *The Comparative Law Project* (Emory University, 2015); Helmke, Gretchen, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2012).

the introductions to Chapters Five and Six— is what this thesis relies on in responding to the challenge of assessing the *de facto* independence of the Court.

States are obliged to guarantee a *de facto* independent judiciary because 'compliance [with judicial independence rules] is the normal organisational presumption'.[168] Also, Martha Finnemore and Kathryn Sikkink argue that the reason for that obligation is the basic rule *pacta sunt servanda*, i.e. the social contract between the people and their rulers. Therefore, they consider guaranteeing *de facto* independence as an integral element of the state's legitimacy.[169]

The emphasis on *de facto* independence comes from the observation that global norms are becoming more influential, and that it is only a matter of time before more states ostensibly adopt constitutional methods to protect the judiciary, even if not in the practical realm. In other words, because of the influence of these methods in distinguishing between democratic and authoritarian regimes; the latter are more likely to adopt these methods without having the capacity or readiness to truly implement them. As a result, such incapacity will cause 'decoupling between promise and practice.[170]

Tsutsui and Hafner-Burton emphasise that the adoption of those methods might regularly take the form of 'a symbolic gesture to signal that the government is not a deviant actor'.[171] Both authors contend that, in some international treaties of human rights, if 'the legitimacy of a treaty grows to the extent that non-ratifying states look like deviants, governments are more likely to ratify without willingness or capacity to comply with the provisions, thus increasing the likelihood of decoupling'.[172]

De facto independence of constitutional courts relates primarily to their legitimacy. Because constitutional review could result in nullifying legislation based on unconstitutionality, such nullification might be objected to as an undemocratic decision, because constitutional courts

[168] Beth A Simmons and Richard H Steinberg, *International Law and International Relations: An International Organization Reader* (Cambridge University Press, 2007).
[169] Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, (Massachusetts Institute of Technology Press, 1998) 903–4.
[170] Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* (Sage Publications, 1999) 145.
[171] Emilie M Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises* (University of Chicago Press, 2005).
[172] Keith, above n 161; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (Faculty Scholarship Series Paper No. 839, Yale Law School, January 2002); Todd Landman, *Protecting Human Rights: A Comparative Study* (Georgetown University Press, 2005).

consist of unelected judges, as opposed to the legislator who is an elected representative of the people.[173]

To face this objection, constitutional courts need to establish and maintain their own legitimacy. This can be achieved through demonstrating robust reasoning in their judgments and paying special attention to the interpretative method applied when dealing with constitutional texts. Most importantly, these decisions must be available to the public for reasons such as criticism, transparency, and legal education. Amongst the most used methods of interpretation are: contextual, textual, historical, intention-related, and purpose-related interpretations. Through these methods, constitutional courts substantiate arguments to justify their judgments.

To elaborate, if a court is demonstrating an illogical, unpersuasive interpretation of the constitution, then it is highly expected to be politically-biased and even arbitrary.[174] There is no 'perfect' interpretive mode that a constitutional court can consider; rather, the judicial review style and judicial tradition play a role in shaping a suitable interpretive model.[175] For example, constitutional courts in the common law system issue precedents that are binding upon all courts, with prospective (and sometimes retroactive) effects that make their legal impact at the same level as a law.

In civil law systems, courts sometimes provide basic, sparse reasoning in their judgments. Harding and Leyland affirm that judgments of civil law courts generally 'do not engage with the arguments presented or those referred to by other judges or in other cases dealing with similar issues, especially those with which the judge presumably disagrees; they fail in general terms to justify the decisions taken; holdings are binding but not the reasoning'.[176] Thus, a more explained reasoning of the conclusion they reach is required in every judgment to demonstrate a robust adjudication process.

D *Authoritarianism and the Judiciary*

1 *Democratic and Authoritarian Regimes*

Many constitutional law jurists and political scientists agree that, in principle, regimes that hold regular, transparent elections and transfer complete authority to the winners are considered

[173] Chen and Maduro, above n 1, 103.
[174] Harding Harding, Leyland and Groppi, above n 2, 22.
[175] Chen and Maduro, above n 1, 103.
[176] Harding and Leyland, 'Constitutional Courts of Thailand and Indonesia', above n 19, 333.

democratic.[177] On the contrary, regimes that do not hold regular elections, or do so but with fraud and manipulation, are considered authoritarian (or autocratic), and they have received more attention in recent decades.[178]

One way of classifying authoritarian regimes is based on how they retain power.[179] According to this taxonomy, there are three major types of authoritarian regimes. The first consists of monarchies, which rely on royal family relations to retain power, such as most Gulf countries.[180] Next, military regimes, in which military forces rely on the actual use of force — or the threat of its use — to remain the dominant political actor.[181] This includes the case where a former general abandons his title and adopts a civilian veneer, such as the leader of the National Conciliation Party in El Salvador.[182] It also includes the case where a military leader attains power and gradually consolidates it through state party structures but without abandoning the military title. General Suharto in Indonesia was an example.[183] Last, civilian-authoritarian regimes. This type includes one-party and limited-multiple party regimes, in which political parties are allowed to compete with the dominant party in elections, which operate unfairly in favour of the dominant party.[184] These regimes are also labelled competitive authoritarianism.[185]

Authoritarian regimes that have a constitution are studied as examples of a phenomenon called constitutional authoritarianism.[186] Konrad Lachmayer defines it as:

[177] See, eg, Varol, Ozan O, 'Stealth Authoritarianism' (2014) 100 *Iowa Law Review* 1673, 1681–3; José Antonio Cheibub, Jennifer Gandhi and James Raymond Vreeland, 'Democracy and Dictatorship Revisited' (2010) 143(1–2) *Public Choice* 67, 69; Mike Alvarez et al, 'Classifying Political Regimes' (1996) 31(2) *Studies in Comparative International Development* 3, 4–6.
[178] Steven Levitsky and Lucan Way, 'The Rise of Competitive Authoritarianism' [2002] (2) *Journal of Democracy* 51.
[179] Axel, *Authoritarian Regimes: Stability, Change, and Pathways to Democracy, 1972–2003* (Helen Kellogg Institute for International Studies Notre Dame, 2006) 5.
[180] *Contra* José Antonio Cheibub, Jennifer Gandhi and James Raymond Vreeland, 'Democracy and Dictatorship Revisited' (2010) 143(1) *Public Choice* 67, 21 n 26.
[181] Axel Hadenius and Jan Teorell, *Authoritarian Regimes: Stability, Change, and Pathways to Democracy, 1972–2003* (Helen Kellogg Institute for International Studies Notre Dame, 2006) 6.
[182] Diana Villiers Negroponte, *Seeking Peace in El Salvador: The Struggle to Reconstruct a Nation at the End of the Cold War* (Palgrave Macmillan, 2012).
[183] Paul Brooker, *Twentieth–Century Dictatorships: The Ideological One–Party States* (Macmillan, 1995).
[184] Hadenius and Jan Teorell, above n 175, 6–7.
[185] Levitsky and Way, above n 172, 52.
[186] Mark Tushnet, 'Authoritarian Constitutionalism' (2014) 100 *Cornell Law Review* 391, 391–2; Roberto Niembro Ortega, 'Conceptualizing Authoritarian Constitutionalism' (2017) 49(4) *VRÜ Verfassung und Recht in Übersee* 339, 340.

> A conceptual category of authoritarianism, which uses constitutional law [not in the normative sense] to stabilize governments politically and which misuses and distorts certain constitutional institutions, without giving them full powers.[187]

Emergency regimes are typical examples of constitutional-authoritarian regimes. These are regimes that declare the state of emergency (also known as the state of exception or martial law) to face national threats, yet do not return to the normal state after the threat is terminated. Egypt under Mubarak and Palestine under Abbas are primary examples of these regimes; both regimes had constitutions that allowed for declaring the state of emergency, but they ruled under that state even when the claimed threats ceased to exist.[188]

In theory, national threats are 'extraordinary events which may put anomalous pressure on the ordinary functioning of a constitution' such as war, internal insurgency, and natural disaster.[189] The declaration activates certain provisions in the constitution that are only applicable during an emergency. Generally, these provisions make the constitutional framework 'subject to ad hoc, temporary derogations, aiming at coping with (and resolving) the emergency situation' through concentrating more power in the executive.[190]

2 *Judicial Independence under Authoritarian Regimes*

Judicial independence is considered a fundamental characteristic of democratic regimes because it maintains the separation of powers.[191] Regarding authoritarian regimes, there was a perception that they are ultimately unwilling to allow for such independence, because it presumably undermines their ability to maintain their interests, as Tate and Vallinder claim:

> It is hard to imagine a dictator, regardless of his uniform or ideological stripe, (1) inviting or allowing even nominally independent judges to increase their participation in the making of major public policies, or (2) tolerating decision-making that places adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes.[192]

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[187] Konrad Lachmayer, *Constitutional authoritarianism, not authoritarian constitutionalism! A Constitutionalist View* (31 August 2017) <https://voelkerrechtsblog.org/constitutional–authoritarianism–not–authoritarian–constitutionalism/>.
[188] Asem Khalil and Nora Taha, 'From Manshiya to Alexandria: Re–examining the Process of Constitutionalizing and Normalizing the Emergency Status in Egypt' (Paper presented at the IACL Congress, South Korea, 2018) 1–4, 10.
[189] Giacomo Delledonne, *History and Concepts of Emergency* (August 2016) Oxford Constitutional Law <shttp://oxcon.ouplaw.com/view/10.1093/law–mpeccol/law–mpeccol–e390>; see Scott P Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' *(2012)* 34 *Michigan Journal of International Law* 491, 499. Ergun Ozbudun and Mehmet Turhan, 'Emergency Powers' (European Commission for Democracy Through Law (Venice Commission), 1995) 3.
[190] Giacomo Delledonne, above n 189.
[191] Aziz Z Huq, 'Judicial Independence and the Rationing of Constitutional Remedies' (2015) 65 *Duke Law Journal* 1, 75.
[192] C Tate and T Vallinder, *Why the Expansion of Judicial Power?* (NewYork University Press, 1995) 28–9.

Tate contends that only democratic regimes have courts that decide on politically controversial issues. In other words, authoritarian regimes do not allow courts to even 'nominally' be independent. This indicates that according to Tate, wherever there is an authoritarian regime, courts of that regime do not engage in deciding on politically controversial issues.

However, recent studies of authoritarian regimes' attitudes toward courts indicate that Tate's claim is incorrect.[193] These studies show that authoritarian regimes partially support judicial independence with regards to limited aspects of courts' role, rather than allowing for complete, genuine independence, or even completely eliminating independent courts in some cases. This partial support aims to build a façade of independence because those regimes do not want courts to appear subservient to them, which is considered a violation of judicial independence.[194]

This façade helps authoritarian regimes to achieve many purposes. Primarily, establishing and maintaining such a façade assists in bolstering the legitimacy of those regimes, which is used in turn to justify regimes' practice, as will be explained in the next section about the functions of constitutional courts in authoritarian regimes, and to look more law-abiding before the public, in addition to maintaining relations with foreign, democratic allies.[195] In other words, to benefit from the legitimacy of having independent courts, many authoritarian regimes ensure that they establish a façade of judicial independence, and maintain this façade by complying with the judgments of those courts that only jeopardise the marginal interests of the regime.

(a) Establishing the Façade of Judicial Independence

Like all regimes, authoritarian regimes need to secure obedience from the people they rule. In his discussion of authoritarian regimes, Max Weber contends that they are fundamentally insecure, and that they consider legitimacy to be an effective way to secure people's obedience.[196] He presents three main ways in which regimes seek to establish their legitimacy, which can all be found in authoritarian regimes: traditional legitimacy, in which rulers justify their authority by claiming to be sacred and holy; charismatic legitimacy, which military regimes often rely on, showing the personal characteristics and heroic appearances of their leaders; and legal-rational legitimacy, in which regimes rely on their application of laws and

[193] See especially Tamir Moustafa, 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Tamir Moustafa and Tom Ginburg, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).
[194] John A Ferejohn and Larry D Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77(4) *New York University Law Review 962.*
[195] Christian von Soest and Julia Grauvogel, 'How Do Non–Democratic Regimes Claim Legitimacy? Comparative Insights from Post–Soviet Countries ' (GIGA German Institute of Global and Area Studies 2015).
[196] M Weber, H Gerth and C Mills, *Politics as a Vocation* (Fortress Press, 1965) 3.

procedures that are claimed to be fair and consented to by the people.[197] Since courts are, in theory, impartial arbiters; they are the main actors in showing how committed regimes are to laws and procedures, and that explains why authoritarian regimes attempt to establish at least the appearance of legal-rational legitimacy through courts that have the façade of independence.

Robert Dahl examines cases from higher courts of certain jurisdictions to explain the correlation between the prevailing political alliances in a regime and the provenance of legitimacy for political decisions related to these alliances by courts.[198] His work emphasises the importance of understanding courts' judgments as political outputs that can either undermine or reinforce the legitimacy of regimes' actions, rather than seeing those judgments as merely judges' opinions concerning what is presented to them.[199]

Dahl adds to Weber's discussion of legitimacy by arguing that it makes regimes' control more efficient, unfailing, robust, and above all, economical. He notes that '[t]he quest for legitimacy is the process by which elites strive for mass approval.'[200] Justice Arthur T. Vanderbilt affirms the central role of courts in legitimising governance, stating that:

> It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for the law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for the law and order will vanish with it to the detriment of society.[201]

Accordingly, both Dahl and Vanderbilt highlight the importance of courts as a source of legal-rational legitimacy. Therefore, establishing a façade of judicial independence is a prerequisite for making courts as a source of what the public perceive as legal-rational legitimacy, even in authoritarian regimes.

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[197] Ibid.
[198] Jonathan D Casper, *The Supreme Court and National Policy Making* (American Political Science Association, 1976) 50–63.
[199] Robert A Dahl, 'Decision–Making in a Democracy: The Supreme Court as a National Policy–Maker' (2001) 50(2) *Emory Law Journal* 613.
[200] Robert A Dahl, *Modern Political Analysis, Prentice–Hall Foundations of Modern Political Science* (Prentice Hall, 5th ed, 1991*)* 19.
[201] Gerald P Moran, 'A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law – the Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model' (1997) 30(3) *Akron Law Review* 393.

(b) Maintaining the Façade of Judicial Independence

Pilar Domingo argues that in the context of Latin America, similar to other regions, the extent to which courts are used to legitimise governmental decisions reflects the significance of both the rule of law and rights protection notions to the public.[202] She notes that:

> In appearing to bow before the court rulings, [power-holders] can stake a more credible claim to be observing the principles of rule of law and limited government. In times of regime or political crisis this may emerge as a useful strategy in terms of bolstering legitimacy. Where other branches of power are perceived as deficient or lacking in credibility, facilitating the [legitimation of governmental] politics can give credence to a public discourse of attachment to rule of law, acceptance of limited government, and commitment to strengthening rights protection mechanisms.[203]

Maintaining the façade of judicial independence depends on the regime's satisfaction with the courts' decisions, whether they support, ignore, or even confront the regime. Because the political process in most authoritarian regimes tends to be unstable and encounters multiple fluctuations, many authoritarian regimes maintain the façade of judicial independence so long as it is politically favourable, i.e. its benefits for the regime overweigh its costs.[204] For example, regimes with weak economies, and those in need of international aid, incline towards further maintenance of such a façade to encourage foreign donors to continue their support.[205]

(c) Regimes' Responses to Critical Judgments

Martin Shapiro argues that there are four different responses that authoritarian regimes typically show to the expansion of courts' political power, when costs of judicial independence outweigh its benefits for the regimes.[206] The first is that some regimes comply with courts' judgments, and in doing so these regimes 'become less centralised'. Second, regimes 'can systematically withdraw from the legally defined competence of the judiciary all matters of political interest to themselves'. Third, regimes 'may intervene at will to pull particular cases out of the courts and into their own hands'. Fourth, regimes 'can create systems of judicial recruitment, training, organisation, and promotion that ensure that the judge will be relatively neutral as between two purely private parties but will be the absolutely faithful servant of the regime on all legal matters touching its interests.'

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[202] Pilar Domingo, 'Judicialisation of Politics the Changing Political Role of the Judiciary in Mexico' in Alan Angell, Rachel Sieder and Line Schjolden (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan, 2009) 22.
[203] Ibid 22.
[204] See especially Macdonald and Kong, above n 45, 847–8.
[205] Ibid.
[206] Shapiro, above n 49, 32.

These responses indicate a variety of political calculations as those regimes incline to show the response that causes less harm and provide more protection for their primary interests. To elaborate, among the factors that affect an authoritarian regime's attitude towards courts is investment and economic growth.[207]

For example, regimes that want to attract more foreign investment tend to allow for more judicial independence in commercial disputes, making their courts trustworthy and reliable for future investors. Another factor is political persistence and intensity of political opposition.[208] Regimes with a long history of oppression, or that have strong oppositions, incline to allow for less judicial independence in disputes related to political rights.[209] Equally important is the plausibility of democratisation.[210] Regimes that have foreign democratic allies, or fear democratic transitions are likely to enhance judicial independence in order to establish courts that can help in maintaining such alliance, or prevent political retaliation towards the regimes' elite if a democratic successor attains power.[211]

E *Reasons that Authoritarian Regimes Establish Constitutional Courts*

The reasons for establishing constitutional courts explained before are not necessarily relevant in explaining why such courts continue to exist. With regards to their continuance, some regimes still perceive constitutional courts as trustworthy mainly because of their substantial sensitivity in dealing with political matters, and their highly-qualified judges; both reasons provide these courts with a visible, authoritative stand on equal terms vis-à-vis the political powers in the state.[212]

In authoritarian regimes, particularly those dominated by a single party, constitutional courts are established as a means of consolidating the regime, by protecting its interests, maintaining its rule, and marginalising the opposition, with a court design that allows for significant control

[207] Robin Wright, *Dreams and Shadows: The Future of the Middle East* (The Penguin Press, 2008).
[208] Mark Peceny, Caroline C Beer and Shannon Sanchez–Terry, *Dictatorial Peace* (American Political Science Association, 2002); Brian Lai and Dan Slater, *Institutions of the Offensive: Domestic Sources of Dispute Initiation in Authoritarian Regimes, 1950–1992* (Blackwell Publishing, 2006); Jessica L Weeks, *Autocratic Audience Costs: Regime Type and Signaling Resolve* (Cambridge University Press, 2008).
[209] Barbara Geddes, 'What Do We Know About Democratization after Twenty Years?' (1999) 2(1) *Annual Review of Political Science* 115.
[210] Juan J Linz and Alfred C Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post–Communist Europe* (Johns Hopkins University Press, 1996); Michael Bratton and Nicolas Van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective,* Cambridge Studies in Comparative Politics (Cambridge University Press, 1997); Axel Hadenius and Jan Teorell, 'Pathways from Authoritarianism' [2007] (1) *Journal of Democracy* 143.
[211] Milan Svolik, *Authoritarian Reversals and Democratic Consolidation,* (Cambridge University Press, 2008).
[212] Harding, Leyland and Groppi, above n 2, 14–15.

of the executive over appointments to the court.[213] The Egyptian Supreme Constitutional Court under Sadat and Mubarak's regimes and the Chilean *Tribunal Constitucional* under Pinochet's regime both exemplify this phenomenon.[214] Another incentive to form constitutional courts appears in the context of competitive party systems, which is principally due to the need of a robust umpire that might be a guarantor to protect the party's interests when it is out of power.[215]

The importance of this phenomenon lies in its contradiction of the assumption that establishing a constitutional court is necessarily a sign of departing from unobstructed authoritarian rule towards a progressive constitutional democracy and rule of law, and that constitutional courts would necessarily impose restrictions on unlimited, authoritarian governance.[216] Bearing this contradiction in mind enrich insights into constitutional courts in such regimes.

Moustafa and Ginsburg argue that there are five functions that courts perform in authoritarian regimes: social control; legitimation; controlling administrative agents as well as maintaining elite cohesion; providing credible commitments in the economic sphere; and delegation of controversial reforms to judicial institutions.[217] To some extent, all these functions are performed in most authoritarian regimes. However, it is noteworthy that not all of these functions are exclusive to courts in authoritarian regimes; the last two functions are performed by courts in democratic regimes as well.

Analysing these functions assists in understanding why authoritarian regimes opt to establish constitutional courts. This analysis is essential in assessing the judgments of these courts, especially when such judgments clearly serve the interests of the regime. Also, it highlights an important aspect of these courts: the declared reasons for establishing them are sometimes only ostensible, and as mentioned above, a façade.[218] Stated differently, a formal statement of a constitutional court's functions tells very little about its actual role in a certain regime, as authoritarian regimes use them for 'legitimately' enriching their power, rewarding allies, and punishing opponents.[219]

[213] Sweet, 'Constitutional Courts', above n 1, 825.
[214] Moustafa, above n 193.
[215] Sweet, 'Constitutional Courts', above n 1, 821.
[216] Mark Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2013) 39.
[217] Moustafa, above n 193.
[218] Harding, Leyland and Groppi, above n 2, 8–9.
[219] Sweet, 'Constitutional Courts', above n 1, 825.

1 *Social Control*

Before explaining the importance of this function, the distinction between legitimate and illegitimate social control must be made clear. Legitimate control, which does not fall under the function of social control that courts perform in authoritarian regimes, is practised by courts by enforcing criminal law related to crimes committed by citizens against other citizens, antitrust law between private companies, and other branches of law that recompense civilians for unfair dealings, with no political benefits to the regime. This type is theoretically the very function of courts in all regimes. The other type, illegitimate control, which courts practice in authoritarian regimes, includes what courts exercise over civilians to protect the regime's interests, in terms of authoritarian domination, and opposing — or even eliminating — social dissent against the regime's actions. Furthermore, it includes criminalising political opposition, imprisoning political rivals, and delegitimising judicial support networks.

To achieve illegitimate social control, regimes rely on a variety of tools, primarily military courts and criminal law for crimes against the 'state'.[220] Criminal law in this sense is that which courts can refer to for repressing and confronting legitimate opposition against the regime. Many military courts have their own procedural code that allows for arbitrary powers to be used against the regime's opponents. Another tool is the security apparatus, which includes paramilitary divisions, and security police.[221] According to Toharia, regimes with interests rejected by the society tend to rely on these tools more than regimes in societies familiar with corrupt courts and submissive judges, in which the majority of people are unlikely to be surprised by courts' unconditioned obedience to the regime.[222]

Anthony Pereira studied three Latin American concurrent military dictatorships that varied in their propensity to employ the regular judiciary to marginalise political rivals: Chile, Argentina, and Brazil.[223] He concluded that in Chile and Brazil, courts were submissive to the regime, therefore political disputes were transmitted through regular judiciary. As a result, the regime's repression was mainly domesticated and normalised. In contrast, Argentina had courts that maintained a greater amount of autonomy compared to Brazil and Chile, therefore the regime reduced their autonomy, and routed its violence through extrajudicial institutions. The

[220] Martin M Shapiro, *Courts: A Comparative and Political Analysis* (Univesity of Chicago Press, 1981).
[221] Amos Perlmutter, *Modern Authoritarianism: A Comparative Institutional Analysis* (Yale University Press, 1981).
[222] José J Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain' (1975) 9(3) *Law and Society Review* 475.
[223] Moustafa, above n 193.

dissimilarity between Argentinian and the other two countries highlights that regimes' usage of courts for this function depends on how submissive these courts are when asked to decide on critical matters for the regime.[224]

2 *Legitimation*

Many authoritarian regimes seek legitimation from courts to attain the third type of legitimacy explained above in reference to Weber: legal-rational legitimacy.[225] They consider legitimation as their ultimate goal, since if the public perceives them as illegitimate, then their continuance in power is threatened.[226]

Other authoritarian regimes may try to attain that same type of legitimacy but by announcing plans for substantive reforms, such as agricultural development, economic prosperity, and wealth redistribution.[227] Forms of legitimation that regimes seek include declaring the validity of controversial legislation for the regimes' benefit, involving judges in state rituals such as assigning new officials that are loyal to the regime, and affirming the legitimacy of the regime established after a coup, or after declaring state of emergency.[228]

For example, Mahmud explains that judges in Pakistan have reluctantly legitimised the rulings of militant chiefs after coups, time after time and as a result of threats.[229] These include the regime of Ghulam Muhammad in 1953, then Mohammad Ayub Khan's regime in 1958, and later Iskander Mirza's regime in 1959.[230] The Philippines had a similar experience. When Ferdinand Marcos in 1972, took control and declared martial law, he fiercely sidelined all his political opponents and confronted civil society, but kept courts open for litigants. He calmed the people by saying that 'the judiciary shall continue to function in accordance with its present organisation and personnel' with a modified structure of 'constitutional authoritarianism'.[231] Japan is another example of a country that used courts for legitimation, in order to gain Western states' approval, to escape the peril of being colonised by those states. Japan's nationalist

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[224] Anthony W. Pereira, 'Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile' in Moustafa and Ginsburg, above n 193, 23, 31–2.
[225] See above (C)(2)(a).
[226] Johannes Gerschewski, 'The Three Pillars of Stability: Legitimation, Repression, and Co–Optation in Autocratic Regimes' (2013) 20(1) *Democratization* 13, 18–21.
[227] Moustafa, above n 193.
[228] Ibid.
[229] Tayyab Mahmud, 'Praetorianism and Common Law in Post–Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan' (1993) *Utah Law Review* 1225.
[230] See Zoltan Barany, Authoritarianism in Pakistan (3 August 2009) Hoover Institution <http://www.hoover.org/research/authoritarianism–pakistan>.
[231] Rolando Del Carmen, 'Constitutionalism and the Supreme Court in a Changing Philippine Polity' (1973) 13(11) *Asian Survey* 1050.

leaders focused their development efforts on its legal system, as Western states perceived Japan as being 'barbaric'.[232]

3 *Controlling Administrative Agents and Maintaining Elite Cohesion*

This is the third function that constitutional courts perform in authoritarian regimes. It is claimed that most of the information about the regime's reputation and the response of social actors to it is generated in the lower levels of administration.[233] Thus, the officials of such levels are the main source for collecting data about the society to assist the regime in maintaining order and responding to threats.[234] Because authoritarian regimes, in general, do not allow for a free press that check regime's activities, courts are useful sources to collect social data and information about bureaucratic faults. Other sources include boards of control and inspection departments, but disciplining actions based on reports from these two sources are not as legitimate as disciplining actions based on courts' rulings.[235]

Jennifer Widner demonstrates how China and some East African regimes used courts for this function.[236] In China, the Chinese Communist Party relied on administrative law and its institutions when internal instruments of hierarchical discipline became weaker.[237] In East Africa, even after the democratic transitions in the region, courts in some regimes were utilised to ensure bureaucratic conformity with the regimes' policies. Widner asserts that empowering courts was a result of some East African regimes' dissatisfaction with arbitrary practices of lower administrators.[238]

Maintaining elite cohesion is challenging in authoritarian regimes because the fact of being authoritarian proves to elite members that undemocratic acquisition of power is feasible. Thus, there is usually a fear that some of those members may sideline and oppress other members when the regime's stability requires so, or that there is a hidden coalition among those members, attempting to overthrow their current ruler. In such a context, courts are utilised to

[232] J Mark Ramseyer and Eric B Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (University of Chicago Press, 2010).
[233] Tom Ginsburg, 'Administrative Law and the Judicial Control of Agents in Authoritarian Regimes' in Moustafa and Ginsburg, above n 193, 58.
[234] Ibid.
[235] Ibid.
[236] Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence* (Norton, 2001) ch 9.
[237] Peter H Solomon, *Judicial Power in Russia: Through the Prism of Administrative Justice* (Blackwell Publishing, 2004).
[238] Widner, above n 235, 363.

safeguard the elite from the dominance of any faction within and to lessen division within the regime.[239]

Chile's history, under Pinochet's rule, illustrates how agreements among elite-factions were formalised within the regime, and how courts balanced different interests of these factions.[240] Constitutions were the platform to enact rules that maintain balance between different political actors, and courts applied those rules as the regime wished.[241] As Robert Barros explains, the Chilean Constitution of 1980, applied by the *Tribunal Constitucional* of 1981, was regarded as a compromise among military branches that cohesively balanced their interests, and helped military superiors to settle their disputes peacefully, leading to a more consolidated authoritarian regime.[242]

4 *Credible Commitments in the Economic Sphere*

Many authoritarian regimes employ courts to serve as providers of credible commitments for local and foreign investors to attract commercial projects, even at the expense of the people.[243] Economic liberalisation has significant impacts on judicial institutions, particularly in developing countries. A notable impact is encouraging judicial reform as courts are viable avenues to counter state attempts of expropriating investors' property.[244]

Nevertheless, while doing so, a challenge that faces these regimes is that if courts are empowered enough to guarantee investors trustworthy protection of property rights from state officials,[245] courts might be encouraged to stand against the interests of the regime as well.[246]

The importance of these credible commitments varies according to the availability of resources under the regime's control.[247] For example, foreign investments have not been a major source

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[239] Guillermo A O'Donnell, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Johns Hopkins University Press, 1986); Stephan Haggard and Robert R Kaufman, *The Political Economy of Democratic Transitions* (Princeton University Press, 1995); Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991); Dankwart A Rustow, *Transitions to Democracy: Toward a Dynamic Model*, (University of Chicago Press, 1970).
[240] Lisa Hilbink, 'Agents of Anti–Politics: Courts in Pinochet's Chile' in Moustafa and Ginsburg, above n 193, 102.
[241] Ibid.
[242] Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution*, Cambridge Studies in the Theory of Democracy (Cambridge University Press, 2002).
[243] Hilton L. Root and Karen May, 'Judicial Systems and Economic Development' in Moustafa and Ginsburg, above n 193, 304.
[244] Root and May, above n 243, 307–9.
[245] Ibid.
[246] Barry R Weingast, *The Economic Role of Political Institutions: Market–Preserving Federalism and Economic Development* (Oxford University Press, 1995).
[247] Middle East Institute, Reforming the Judiciary in Saudi Arabia <http://www.mei.edu/publications/reforming–judiciary–saudi–arabia>.

of income for Saudi Arabia, which is a resource-rich country ruled by an authoritarian regime; thus, empowering courts is rarely, if ever, addressed.[248]

5 *The Delegation of Controversial Reforms*

Neal Tate describes the underlying idea of this function, which he calls 'delegation by majoritarian institutions', by affirming that both democratic and authoritarian regimes seek to avoid engaging in controversial reform that may cause public wrath.[249] In democratic regimes, this usually occurs when state officials cannot agree on how a certain substantive constitutional rule should be applied, such as in the cases of death penalty and land reform in South Africa. This type of delegation is legitimate and part of what constitutional courts are established for: resolving constitutional challenges.

Another form of this function that occurs in authoritarian regimes is when they delegate reforms to courts to appear to be abiding by the law and protecting the people's interests. This delegation may neutralise some opposition and, in any event, deflect it away from the regime itself. Thus, courts carry the burden of dealing with such reforms, while regimes evade responsibility for initiating costly change.[250] Once courts approve the reforms, then regimes can survive repercussions by applying the courts' judgments on the pretext of deference to judicial power.[251]

Mark Graber explains that this function is performed when a regime demands that courts 'make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy'.[252]

The Egyptian Supreme Constitutional Court performed such a function through judgments to abolish socialist policies, avoiding any clash with elites who feared economic liberalisation.[253] Performing this function was greatly beneficial to Sadat's regime because socialist policies were the core of Egypt's governing ideology under the preceding Nasser regime.[254] Also, eastern European countries, during the early years after economic transformation in 1990, faced

[248] Ibid.
[249] C Tate and T Vallinder (eds), 'Why the Expansion of Judicial Power?' in *The Global Expansion of Judicial Power* (New York University Press, 1995) 27, 32.
[250] Peter H Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 60(1) *World Politics* 122, 135.
[251] Ibid.
[252] Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7(1) *Studies in American Political Development* 35, 43.
[253] Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2007) 10.
[254] Ibid.

severe economic crises including poverty, unemployment, and inflation.[255] To a significant extent, new regimes in these countries established their legitimacy on the basis of their ability to implement effective economic reforms, and courts were used to restrain social opposition to these reforms during that process.[256]

F *Conclusion*

The purpose of this chapter was to set the theoretical framework for the analysis in the following chapters by explaining the nature of the of constitutional courts and their functions in authoritarian regimes. Explaining the characteristics of constitutional courts, their core function of judicial review and other functions, and reasons for establishing them assists in realising how critical is the role of these courts: they review legislation and decide on politically-sensitive cases to ensure that state powers adhere to the constitution. This will serve as the basis for assessing the *de facto* independence of the Court in later chapters, mainly as this assessment is done through analysing each judgment the Court pronounced between 2007 and 2017.

Next, synthesising the literature about the definition of judicial independence, its elements and principles serves as the foundation for assessing the *de jure* independence of the Court. The discussion of these principles demonstrated how personal, institutional, procedural independence for courts can be established and maintained. What these principles have in common is their attempt to shield judges from undue interference in the adjudication process, particularly from the executive. Independent judicial appointment procedures, through one of the five models explained before, and securing judges' tenure against retaliatory actions of the regime were found to be the most important principles.

The discussion of the characteristics of authoritarian regimes and how some of them establish and maintain a façade of judicial independence showed how they use that façade to bolster their claim of having rational-legal legitimacy, to appear as law-abiding regimes that execute judgments that their 'independent' courts pronounce. This façade is different from the genuine legitimacy that is derived from courts issuing well-reasoned judgments in democratic regimes; courts that correctly apply the law in upholding the regime's actions demonstrate rightful adherence to rational-legal legitimacy. This explication assists in understanding the context of the Court in the West Bank, as it has operated under an authoritarian, emergency regime since

[255] Elaine Fultz, *Pension Reform in Central and Eastern Europe* (International Labour Office, 2002) 1.
[256] H J M Fenger, 'Welfare Regimes in Central and Eastern Europe: Incorporating Post–Communist Countries in a Welfare Regime Typology' (2007) 3(2) *Contemporary Issues and Ideas in Social Sciences.*

2007. This explanation also shows how the Court has been an instrument that failed to provide effective ‘legitimation’ of the regime.

Last, clarifying the functions courts perform in authoritarian regimes was particularly helpful in demonstrating how these regimes ‘benefit’ from courts’ judgments. The importance of this demonstration lies in explaining what leads regimes to accept courts’ judgments that are unjustified and poorly-argued. More importantly, pronouncing poorly-argued judgments relates to the discussion about *de facto* independence. *De facto* independence greatly depends on court establishing their legitimacy by providing sufficient evidence for the conclusions they reach in their judgments.

III THE JUDICIARY IN PALESTINE

A *Introduction*

This chapter argues that since the establishment of the Palestinian Authority, the Palestinian-established judiciary in the West Bank has been placed in a political setting that obstructs genuine judicial independence, and the situation has increasingly worsened as the authoritarian nature of the regime has grown since the coup in 2007.

There are two main reasons for that lack of judicial independence: specific socio-political conditions that discredited courts and undermined their independence, and the authoritarianism of the Palestinian Authority, established by exploiting constitutional defects in the legal system. After providing some background to the relationship between a judiciary and authoritarianism from a global perspective in the previous chapter, this chapter focuses specifically on the Palestinian context, analysing factors affecting judicial independence, and the relationship between the judiciary and the regime in the West Bank.

This chapter aims to provide an outline of, first, the judiciary in the West Bank under the rule of the Palestinian Authority, its structure, and its changing status, and, second, the behaviour of the authoritarian regime and its attitude towards the courts after the establishment of the Palestinian Authority.

The first part analyses the history of the judiciary in Palestine, starting from the Ottoman empire and ending with the Israeli military governance of the West Bank and other Palestinian territories in 1994. Next, the establishment of the Palestinian Authority and the drafting of its basic laws are both analysed. It endeavours to explain the complicated relationship between the Executive Authority on the one side, and the legislature and judiciary on the other. Next it elucidates the current structure of the courts in the West Bank, their jurisdiction, and how they operate. Then, it explicates the socio-political conditions that contribute to facilitating the regime's undue interference in courts to achieve legitimation for its rule. Lastly it clarifies how the West Bank regime has changed its authoritarian nature, changing the status of its basic laws, and manipulating the defects in these laws to maintain the regime's state of emergency, which was declared after the coup, and is still effective today.[1]

[1] 29 March 2019.

B *The History of the Palestinian Judiciary*

The judicial system in Palestine is hybrid, distinctive, and affected by a complex legacy of laws and regulations.[2] These characteristics reflect the fact that six different entities have governed Palestinians during five eras over the last century. These entities were the Ottoman empire (1517-1917), the British Mandate (1917-1948), Egypt in the Gaza Strip and Jordan in the West Bank (1948-1967), the Israeli occupation forces (1967-1994), and the Palestinian Authority (1994-2007 and 2007-2017).[3]

Being informed about the footprints of previous entities that governed the Palestinian courts assists in understanding the reasons for some of the Palestinian presidential orders related to the judiciary, discussed later in section three. This section discusses the impact of the legislative and administrative activities of such entities, and the status of their independence under each entity. The following sections will describe the structure and functions of the judicial system during each era.

1 *The Ottoman Empire 1517-1917*

Under the Ottoman empire, Palestine was a part of an administrative unit, known as the Levant. Palestine was not an independent entity; it did not have a constitution or a representative political body.[4] Legal historians distinguish between two periods within this era: the period before the emperor made reforms through enacting laws to improve the legal and political systems of the empire (the pre-reform era between 1839 and 1876), and after that point (the post-reform era).[5] In the pre-reform era, the empire had no written constitution. The legal system consisted of the emperor's decrees, the jurisprudence of Islam and other religions, and courts based on the civil law model that resolved all sorts of civilian disputes between the Muslim people, including laws of personal status.[6] The reforms began in 1839 when the emperor Sultan Abd Al-Majeed issued an order that promised public and fair trials for all accused.[7] Additionally, he promulgated a constitution for the entire Ottoman empire, which

[2] See Anis F Kassim, 'Legal Systems and Developments in Palestine' (1984) 1(19) *Palestine Yearbook of International Law*.
[3] Alexander Abdel Gawad, 'E Pluribus Unum? Palestinian Authority and Statehood in an Environment of Legal Pluralism' (Institute for Peace Research and Security Policy at the University of Hamburg, 2013) 6.
[4] 'النظام القانوني والعملية التشريعية في فلسطين' [The Legal System and Legislative Process in Palestine] (Institute of Law, Birziet University, 2008) 2.
[5] Ibid.
[6] See Asem Khalil, *Which Constitution for the Palestinian Legal System* (Ph.D. Thesis, Pontificia Universita' Lateranense, 2003) 12.
[7] 'The Legal System and Legislative Process in Palestine', above n 4, 3.

conferred full citizenship on Palestinians and allowed them to have representatives in the Ottoman parliament.[8]

In 1879, the Ottoman empire established a regular court system for the first time which had jurisdiction over civil and commercial disputes, while limiting religious courts' jurisdiction to family law disputes and endowment matters.[9] The court system functioned on three levels. First, there were civil courts that heard a dispute for the first time if the matter involved a value of more than 150 Qurush (an Ottoman currency), and criminal courts that heard disputes about crimes classified by the Ottoman police as infractions or misdemeanours.[10] For disputes over matters that involve less than 150 Qurush, the local governance councils, headed by public officials, were assigned jurisdiction to resolve such disputes by incontestable orders. Second, there were courts of appeal that heard matters appealed from civil courts and criminal courts. Additionally, they heard criminal disputes classified as felonies. Third, a court of cassation in Istanbul, inspired by the French system, heard appeals against the orders of courts of appeal.[11] These courts were seen as independent by most people and judges' rulings were respected by the disputants in most cases.[12]

In parallel, chiefs of tribes formed traditional tribunals to resolve disputes presented to them by disputants who voluntarily chose not to submit them to the regular courts. [13] The orders of these tribunals had the effect of official adjudications. These tribunals were common among poor and illiterate civilians, who were the majority of the Palestinian community during the Ottoman era, since they could not afford the expenses or even understand the procedures of the regular court system.[14] People perceived this traditional method of dispute resolution as a legitimate avenue that operated in parallel with the judiciary, and was preferred over that system, as many saw courts as an unfavourable, last resort for disputants and a costly alternative

[8] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 6.
[9] See *قانون تشكيلات المحاكم النظامية* [Law of regular courts' formations] (Ottoman Empire) art 7 <http://muqtafi.birzeit.edu/Legislation/PDFPre.aspx?Y=1296&ID=11840>.
[10] Ibid art 11.
[11] Ibid art 1.
[12] See Hillel Frisch, 'Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority' (1997) 29(03) *International Journal of Middle East Studies* 345.
[13] See Viktoria Wagner, 'Palestinian Judiciary and the Rule of Law in the Autonomous Areas: An Introduction' (Palestinian Academic Society for the Study of International Affairs, 2000) 30–1.
[14] Asem Khalil, 'Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law' (2009) 184(2) *Etudes Rurales* 174.

to traditional tribunals.[15] Seeing courts in this way prevented courts, and subsequently their orders, from achieving a level of significant public appreciation.[16]

2 *The British Mandate 1917-1948*

After its defeat in WWI, the Ottoman empire was occupied by British and French forces. While the French forces occupied what is now Lebanon and Syria, the British forces occupied Palestine in 1917. Later, in 1922, the League of Nations assigned the Mandate over all Palestinian territories to the British forces.[17] In the same year, the British Crown issued the Palestine Order-in-Council, which established the position of High Commissioner for Palestine ('Commissioner'). The Commissioner, appointed by the British Crown, had the executive and legislative powers necessary to guarantee 'proper' governance of territories under British control.[18]

The Commissioner maintained civil, commercial, and personal status laws enacted during the Ottoman Era. However, he changed the legal institutions and established a new court system as part of the Mandate's constitution.[19] Under the constitution, the Commissioner was required to fix a date for establishing a Legislative Council of twenty-three officials: The Commissioner, ten officials appointed by the British Crown from the British Authorities in Palestine, and twelve members elected by Palestinians.[20] However, Palestinians rejected participation in that Council because the Commissioner and the ten non-elected members could, if they agreed, enact any law they deem appropriate without requiring the acceptance of the Palestinian members.[21] Because of this, the date for establishing the Legislative Council was never fixed. Therefore, the High Commissioner maintained exclusive legislative power during the Mandate.[22]

As noted above, the High Commissioner did not rescind the previous laws applied in Palestine or build a new legal system from scratch; rather, he enacted new legislation, rescinded some previous laws, and modified other regulations.[23] As a result, the Palestinian legal order after

[15] Robert Terris and Vera Inoue–Terris, 'A Case Study of Third World Jurisprudence–Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society' (2002) 20(2) *Berkeley Journal of International Law* 469.
[16] See Khalil, 'Formal and Informal Justice in Palestine', above n 14, 175.
[17] See Nathan J Brown, 'Drafting a Palestinian Constitution: Hope for Democratic Governance?' (Center for Policy Analysis on Palestine, 2001).
[18] See Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 13–7.
[19] Wagner, above n 13, 32.
[20] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 16.
[21] Ibid.
[22] Ibid.
[23] Wagner, above n 13, 32, 35–6.

the Mandate included a combination of Islamic law, civil law, and law statutes enacted by the Commissioner.

The British occupation also significantly changed the court system compared to how it was during the Ottoman era. As Khalil explains:

> The civil courts were to be Magistrate Courts, District Courts, Land Courts, Court of Criminal Assize for offences punishable by death, and Supreme Court. The Supreme Court played the role of: first, Court of Appeal from judgments rendered by District Courts, Land Courts and Court of Criminal Assize; second, High Court of Justice to hear and determine such matters as petitions or applications not within the jurisdiction of any other court and whose determination was necessary for the administration of justice. Besides, it decided usual cases concerning *Habeas Corpus* applications and petitions for the cancellation of an administrative decision. Religious Courts were to decide matters of personal status.[24]

During the Mandate, traditional tribunals of tribal justice continued to function as an alternative to the regular courts. Nevertheless, the Mandate authorities issued laws to regulate tribal justice, seeking co-operation with social elites to facilitate the Mandate's administrative processes.[25] The regulation aimed to restrict customs that the tribunals applied, disallowing them from applying what the High Commissioner considered inconsistent with natural justice and morality.[26]

Concerning judicial independence in this era, Palestinians viewed courts as enemy courts, since they were staffed by British officials, and because they applied laws that criminalised actions of Palestinian resistance against the Mandate.[27] Judicial independence was a myth to the Palestinian people, who considered them simply institutions to legitimate the British Mandate.[28]

3 *Egyptian and Jordanian Governance 1948-1967*

In 1948, the Israeli occupation forces illegitimately proclaimed the establishment of 'State of Israel' on all Palestinian territories they occupied, which covered all Palestine except the Gaza Strip and the West Bank. To support Palestinians and fight the new Israeli entity, Jordanian forces crossed the Jordan River and Egyptian forces crossed the Sinai Peninsula. Jordanian military forces declared their responsibility for the West Bank and the Egyptian forces did the

[24] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 17.
[25] Such as the Law on the Prohibition of Crimes No. 47 of 1935 (British Mandate for Palestine), the Law of Civil Contraventions No. 36 of 1944 (British Mandate for Palestine), and the Law of Procedure for Tribal Courts 1937 (British Mandate for Palestine); see Khalil, 'Formal and Informal Justice in Palestine', above n 14, 175.
[26] See ibid 175.
[27] Robert Terris and Vera Inoue–Terris, interview with Nazmi AI–Jubeh (Birzeit University, 20 February 2001).
[28] Ibid 469.

same for the Gaza Strip.[29] Then, the Jordanian commander issued an order to maintain all the laws and bylaws inherited from the Mandate era as long as they did not contradict with anything Jordanian authorities subsequently enacted. In 1949, the West Bank was annexed as well but not incorporated in the Jordanian kingdom under Jordanian civil administration.[30]

In 1952, the Jordanian Parliament issued a new constitution for all of Jordan including the West Bank, which replaced the constitution of the Mandate. The sixth chapter of the new constitution regulated the Judicial Authority. It asserted that judges are subject to the law only and confirmed judicial independence as a fundamental principle.[31] In 1955, the Jordanian government issued the Independence of the Judges Act, which established the Judicial Council to uphold the independence of courts. The Judicial Council consisted of seven members: the head of the Court of Cassation plus two judges from the same court, the General Prosecutor, the head of Amman's Court of Appeal, and the head of Jerusalem's Court of Appeal.[32] The Council had the authority to issue binding orders in matters related to the judiciary and deemed necessary by the majority of its members to upheld judicial independence, such as the accountability of judges, the judiciary's budget, and the application of judicial legislation.[33]

The new courts system was based on the civil law model.[34] Magistrates Courts and First Instance Courts formed the first level of the judicial organisation. Each court consisted of three judges. Courts of Appeal, which also consisted of three judges, formed the second level that heard appeals against judgments from courts of the first level. A High Court was established with the power to constitute itself in two capacities for discharging distinct functions: a High Court of Justice for administrative disputes that have a public official as a party, which consisted of five judges; and a Court of Cassation, which consisted of seven judges, for appeals against the application of law by the Courts of Appeal in criminal and civil disputes.[35] The Law on Regular Lawyers, issued in 1966, significantly changed the structure of the legal profession.[36] It introduced provisions for lawyers' training, their rights and duties, besides rules

[29] 'The Legal System and Legislative Process in Palestine', above n 4, 4.
[30] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 18.
[31] *الدستور الأردني 1955* [The Jordanian Constitution 1955] (Jordan) c 6 <http://muqtafi.birzeit.edu/Legislation/LegCard.aspx?id=1066>.
[32] *قانون استقلال القضاء رقم 19 لسنة 1955* [Law of the Independence of the Judiciary No. 19 of 1955] (Jordan) art 15 <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1955&MID=536>.
[33] See ibid art 18.
[34] For more details of the courts' structure, see Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 18–20.
[35] Ibid.
[36] See *قانون المحامين النظاميين رقم 11 لسنة 1966* [Law on Regular Lawyers No. 11 of 1966] (Jordan) <http://muqtafi.birzeit.edu/Legislation/PDFPre.aspx?Y=1966&ID=6109>.

for practising their profession. Additionally, it allowed for the establishment of a Bar and specific conditions for lawyers to become members of it.

Traditional tribunals also continued during this era. Egyptian and Jordanian authorities, in the Gaza Strip and the West Bank respectively, maintained Mandate laws that regulated tribunal justice.[37] However, the provision regarding the consistency between applied customs and natural and moral justice was repealed, removing the restrictions on traditional tribunals.[38]

The independence of courts in this era was evident, as they were staffed by Palestinians appointed by the Judicial Council, which continued to supervise the relationship between courts and other authorities.[39] Additionally, because they replaced 'British-staffed' courts, people saw courts during this era as allies' courts, i.e. Jordanian and Egyptian courts, as opposed to those administered by the enemy, i.e. the British forces.[40]

4 *The Israeli Occupation 1967-1994*

In 1967, the Israeli occupation extended to the Gaza Strip and the West Bank. The military authorities issued an order maintaining all inherited laws, while invalidating any legislation that contradicted any order issued by the military authorities.[41] Jordanian courts came under the authority of the Israeli occupation forces, with the Court of Cassation and Jerusalem's Court of Appeal abolished.[42] In 1981, the Israeli occupation forces abolished that court system in its entirety and replaced it with the Department of Civil Administration, to which the Israeli occupation forces assigned the jurisdiction of abolished courts.[43] As a result, this Department was responsible for resolving disputes of all kinds, with three exceptions remaining under the management of the military authorities: military, tax, and land disputes. The judicial system significantly changed in the next era, of Palestinian Authority rule.[44] As will be discussed, the structure established by the Palestinian Authority is similar to that of the Jordanian governance era.

Traditional tribunals' roles became significantly different during this era, due to the military orders issued by the Israeli occupation forces, which assigned the authority of administering the tribunals in central districts to the Israeli military commander in the West Bank, while

[37] Frisch, above n 12, 346.
[38] See Khalil, 'Formal and Informal Justice in Palestine', above n 14, 175.
[39] See generally ibid.
[40] Ibid.
[41] 'The Legal System and Legislative Process in Palestine', above n 4, 7.
[42] See Wagner, above n 13, 42.
[43] See Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 26–31.
[44] Ibid.

leaving other tribunals to operate according to the customary laws they had during the Jordanian era.[45] Being administered by an Israeli official, people started distrusting those tribunals, and as a result chose to either resolve disputes violently beyond the courts, or through private conciliation between families of the disputants, away from the tribunals.[46]

During this era, both the Department and the tribunals were distrusted by the Palestinian people.[47] Because the Department was staffed by Israeli officials, and the Israeli commander administered central tribunals, Palestinians deemed both institutions to be servants of the occupier, holding little no hope that they could support Palestinians' rights.[48]

This section has shown how the structure of courts significantly changed in each era. Additionally, it explained the status of traditional tribunals and their role in resolving disputes in parallel with the courts system. The next part discusses the establishment of the Palestinian Authority and how Arafat's order of mainaining the validity of applying some existing laws enacted in past eras resulted in the creation of a hybrid legal system in the West Bank.

C *Establishing the Judiciary under the Palestinian Authority*

Explaining the establishment of the Palestinian Authority and its judiciary is significant, as it assists in understanding the relationship between the social and political circumstances surrounding that establishment, as will be explained in the next section. It is important to note that discussion of matters related to the judiciary, such as appointment, training, promotion, dismissal, and resignation of judges, will be saved for the next chapter, since the aim of this chapter is to analyse how the circumstances, in which the Palestinian judiciary is located, obstruct judicial independence.

1 *Establishment of the Palestinian Authority*

In 1978, the USA President Jimmy Carter started an initiative to build a 'Framework for Peace in the Middle East'.[49] He invited representatives from Egypt, Jordan, and the Israeli occupation forces to meet at Camp David near Washington DC to start negotiating that Framework. He

[45] The Proclamation No. 2 of 1967 (Israeli Occupying Authorities), and Military Order No. 412 of 1970 (Israeli Occupying Authorities); see Khalil, 'Formal and Informal Justice in Palestine', above n 14, 175.
[46] Terris and Inoue–Terris, above n 15, 470.
[47] Ibid.
[48] See Salim Tamari, 'In League with Zion: Israel's Search for a Native Pillar' (1983) 12(4) *Journal of Palestine Studies*.
[49] *Framework for Peace in the Middle East and Framework for the Conclusion of a Peace Treaty between Egypt and Israel (Camp David Accords)* (1978) United Nations Peacemaker <http://peacemaker.un.org/egyptisrael–frameworkforpeace78> ('*CDA*').

excluded Palestinian Liberation Organisation ('PLO')[50] officials from the invitation because the Israeli occupation forces considered the PLO to be a terrorist organisation and refused to meet with any of its officials. One of the main objectives of the Framework was to establish an autonomous authority for Palestinians who live in the Gaza Strip and the West Bank.[51] The establishment of this entity was necessary because in 1967 the UN Security Council had issued Resolution 242, which required the '[w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict', that is, from the Gaza Strip and the West Bank.[52] Following the withdrawal, an autonomous authority was needed to take responsibility for governmental tasks in both regions.[53]

After the meetings, the participating parties agreed to sign the 'Camp David Accords', which stated '[t]he parties will negotiate an agreement which will define the powers and responsibilities of the self-governing authority to be exercised in the West Bank and Gaza.'[54]

In 1993, as a result of United Nations pressure, the PLO and the Israeli occupation forces agreed to accept the other as a negotiating party and to sign an agreement that would bring peace to the Gaza Strip and the West Bank. Both sides agreed that establishing a self-governing authority, which the Israeli occupation forces had agreed to in the Camp David Accords, would be a proper way to achieve that peace.[55]

In 1993, representatives from both sides frequently met in Norway, and then exchanged signatures on what became known as the Oslo Accords ('Accords') at a ceremony in Washington DC. The Accords established an 'autonomous' self-government authority in 1994 known as the Palestinian Authority, which consisted of institutions to exercise the three 'state' powers, to govern the Palestinians in the Gaza Strip, the West Bank, and East Jerusalem for an interim period of five years starting from 1994, during which the PLO and the Israeli occupation forces should reach a permanent settlement.[56]

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[50] The PLO is an organisation 'that was established in 1964 and has been the embodiment of the Palestinian national movement. It is a broad national front, or an umbrella organization, comprised of numerous organizations of the resistance movement, political parties, popular organizations, and independent personalities and figures from all sectors of life. The Arab Summit in 1974 recognised the PLO as the sole and legitimate representative of the Palestinian people'; see *Palestine Liberation Organization* (2016) Permanent Observer of the State of Palestine to the United Nations <http://palestineun.org/about–palestine/palestine–liberation–organization>.
[51] *CDA.*
[52] SC Res 242, UN SCOR, 22nd sess, 1382nd mtg, UN Doc S/RES/242 (22 November 1967) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>.
[53] See ibid.
[54] *CDA.*
[55] Nathan J Brown, 'Evaluating Palestinian Reform' (Carnegie Endowment for International Peace, 2005) 12.
[56] 'The Legal System and Legislative Process in Palestine', above n 4, 8.

There were many restrictions on the competencies of the Palestinian Authority. The territories in the West Bank, excluding East Jerusalem, were classified into three areas:[57]

- Area A, which covers Palestinian cities and large villages. Geographically, this area constitutes 3% of the West Bank.[58] The Palestinian Authority has primary control of this area. It was subject to the Israeli occupation forces' right to enter this area for security reasons without requiring Palestinian Authority approval.
- Area B, which covers remote lands and small villages. This area constitutes 31% of the West Bank. The Palestinian Authority has more restricted authority in this area, such as limited access to groundwater, and cooperative security administration between both parties is required.[59]
- Area C, which covers Israeli military camps and settlements, as well as the remaining of the West Bank.[60]

Part of the Accords was a document known as Oslo II, which aimed to 'expand' the geographical jurisdiction and competencies of the Palestinian Authority, particularly concerning civil affairs and security. However, that expansion did not include all territories of the Gaza Strip and the West Bank.[61] The Israeli occupation forces committed to withdrawing steadily from the last two areas to expand Area A as a fulfilment of their duties under Oslo II, but disagreement on both the scope and the definitions of the relevant provisions prevented that withdrawal.[62] Therefore, it became impossible for both sides to reach a permanent settlement concerning the existence of Israeli occupation forces military forces in Area A. A separate agreement between the PLO and the Israeli occupation forces gave the former, not the Palestinian Authority, the right to establish representative institutions in East Jerusalem, notwithstanding that it formed part of the West Bank.[63]

[57] Regarding Gaza Strip, a security fence was placed by the Israeli occupying authority around 21 Israeli settlements there. Areas outside this fence were under the limited control of the Palestinian because the Israeli occupying authority's could unilaterally enter these areas for security reasons; see Douglas Ierley, 'Law and Judicial Reform in Post–Conflict Situations: A Case Study of the West Bank Gaza' (Paper presented at the Empowerment, Security And Opportunity Through Law And Justice, Russia, 2001).
[58] The author could not find the population of Palestinians who live in area A, B, or C.
[59] Miriam R Lowi, 'Bridging the Divide: Transboundary Resource Disputes and the Case of West Bank Water' (1993) 18(1) *International Security* 136–7.
[60] Ibid.
[61] Ibid 838.
[62] Geoffrey R Watson, *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements* (Oxford University Press, 2000) 114–5.
[63] Inge Amundsen, George Giacaman and Mushtaq Husain Khan, *State Formation in Palestine: Viability and Governance During a Social Transformation* (Routledge, 2004) 51.

These restrictions on the Palestinian Authority competencies as explained above formed the basis of a malfunctioning 'autonomous' authority. The restrictions prevented the Palestinian Authority from fulfiling the needs of the Palestinian society as a self-government entity should, such as a good economy and social welfare.[64] As mentioned before, issues related to security, the most important need of Palestinians, were dominated by the Israeli occupation forces. The Palestinian Authority referred to those restrictions as what prevents it from meeting Palestinians' expectations of it as their 'government'. The Palestinian Authority justified some of its unlawful actions, such as expropriating private properties for undeclared reasons and extrajudicial arrest of political opponents, as necessary procedures to overcome the difficulties imposed by these restrictions, notwithstanding that such violations were reflected a regime inclined to authrotarianism.[65] Furthermore, the exclusive assignment of certain competencies to the PLO, rather than the Palestinian Authority, was a mark of the political, legal, and administrative complexity in the relationship between the Palestinian Authority and the PLO, and also between the PLO and the Israeli occupation forces. The Palestinian Authority officials manipulated this complexity to emphasise their claim of the need for 'unlawful' necessary actions, such as expanding the authority of the security apparatus, to overcome the difficulties established through restrictions imposed by the Accords.[66] The logic of their claim is that having unique challenges as an authority under occupation justifies unlawful actions that would be considered authoritarian actions in free countries.

In 1995, Arafat issued a presidential order maintaining all laws and orders that were in force as of 1967 and those issued by the PLO until 1994, and cancelling all applied Israeli orders that were issued after 1967, unless stated otherwise.[67] These laws were maintained to keep the institutions that they established. As a result, the Jordanian-established court system replaced the Department of Civil Administration. Other institutions were brought back to the state they were in during Jordanian era except those that Arafat did specifically change such as those of internal security and intelligence institutions.[68] Based on Arafat's order, courts in the West Bank returned to the structure that was set in pre-1967 Jordanian laws, and courts in Gaza Strip returned to those of the pre-1967 Egyptian laws.

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[64] *Palestine Report*, 7 February 1997.
[65] See Emilio Dabed, 'A Constitution for a Nonstate: The False Hopes of Palestinian Constitutionalism, 1988–2007' (2014) 43(2) *Journal of Palestine Studies* 49.
[66] Graham Usher, 'The Politics of Internal Security: The PA's New Intelligence Services' (1996) 25(2) *Journal of Palestine Studies* 22–3.
[67] *قرار رقم (1) لسنة 1994* [Order No. 1 of 1994] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1994&MID=9663>.
[68] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 53.

The security apparatus was the first institution to start functioning in the Palestinian Authority.[69] In the absence of other institutions, Arafat assigned several competencies to that apparatus that were in fact not related to security matters, such as tax collection and dispute resolution.[70] This action increased the ambiguity in the relationships between different institutions and the powers of the Palestinian Authority itself. Early observations of the Palestinian Authority's performance indicated that complex chains of administration and overlapping competencies were two of its key features.[71]

The background of security apparatus personnel was a significant cause of the Palestinian Authority malfunctioning. Many of them spent their careers as PLO members outside Palestine, mainly in Lebanon, Algeria, and Tunisia, where the PLO had central offices.[72] They lacked the knowledge necessary to administer an authority that was bound by the Accords and operated under occupying forces.[73] In particular, they neither appointed qualified officials nor established an efficient administrative hierarchy.[74] This is hardly surprising since the revolutionary, outlaw nature of the PLO did not consider educational qualification a criterion when recruiting and promoting its members.[75]

Islamic resistance movements in Palestine, particularly Hamas, which adopted military resistance against the occupation as a basic ideology, faced severe oppression from the security apparatus.[76] Because the apparatus saw its own role as a protector of the Palestinian Authority's existence and an assistant in fulfilling the Palestinian Authority's obligation of having a peaceful relationship with the Israeli occupation forces under the Accords, it prevented military resistance from Palestinians against Israelis in the Gaza Strip and the West Bank.[77] This assisted the Palestinian Authority in maintaining peaceful negotiations with the Israeli occupation forces, since the Palestinian Authority declared that negotiations were the only means to end the occupation, not military resistance.[78]

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[69] Usher, above n 66, 28–9.
[70] See Gal Luft, 'The Palestinian Security Services: Between Police and Army' (1999) 3(2) *Middle East*.
[71] See Jean–Francois Legrain, 'The Successions of Yasir Arafat' (1999) 28(4) *Journal of Palestine Studies* 5–20.
[72] Usher, above n 66, 28–29.
[73] Ibid.
[74] Inge Amundsen and Basem Ezbidi, 'Clientalist Politics: State Formation and Corruption in Palestine' (Chr. Michelson Institute, 2002) 16.
[75] See 'Annual Report' (Amnesty International, 2000) 186–7.
[76] Anne Le More, 'Killing with Kindness: Funding the Demise of a Palestinian State' (2005) 81(5) *International Affairs (Oxford)* 992.
[77] Ibid 986.
[78] Ibid.

Before the end of 1995, Fatah (the Palestinian Liberation Movement led by Yasser Arafat) and Hamas, the Islamic Resistance Movement led by Shaikh Ahmad Yassin, were the two main opposing streams in Palestinian society.[79] To solve the problems between Palestinian political parties, Arafat, in his capacity as the head of the Palestinian Authority, attempted to regulate administrative and logistic issues by presidential decree.[80] However, he could not solve fundamental problems of an institutional and constitutional nature, such as the lack of rules to manage the relationship between the executive and the legislative authorities, and the undefined discretionary powers that he had.[81] As a result, he issued a decree in 1995, calling for the first parliamentary and presidential elections.[82] A Parliament, known officially as the Palestinian Parliament, which would be elected for the first time, was to draft an interim constitution that would be applied in the five-year period specified in the Accords, that sets the structure of the three powers in the Palestinian Authority and regulates their relationships with each other.[83]

The 1995 decree caused a change in the type of legitimacy that Arafat was claiming. Prior to it, he had based his rule on charismatic legitimacy as the leader of a revolutionary regime.[84] He presented his regime as a heroic 'victory' of bringing a Palestinian government to the occupied territories, rather than the civil administration of the Israeli occupation forces that used to rule them before that.[85] After the Decree, he claimed a hybrid of both charismatic and legal legitimacies as the basis of his regime, since he presented himself as a reformer who would develop the Palestinian Authority and improve its constitutional foundations, and issued laws that refined the institutional structure of the Palestinian Authority before the elections, such as the Elections Law and the Public Supervisory Committee, which was responsible for ensuring the accountability of Palestinian public officials.[86]

The elections occurred in January 1996. The electorate consisted of Palestinians from Gaza Strip, the West Bank, and East Jerusalem. Yasser Arafat was re-elected as the head of the Palestinian Authority.[87] The ideology of the Hamas party and nationalists contradicted that of the Palestinian Authority; they considered holding the elections and forming a parliament that

[79] Asem Khalil, 'The Enactment of Constituent Power in the Arab World' (2006) 1 *Ancilla Iuris* 295.
[80] Nathan J Brown, 'The Palestinian Reform Agenda' (United States Institute of Peace, 2002) 13–4.
[81] Ibid.
[82] *قانون بشأن الانتخابات رقم 13 لسنة 1995* [Law concerning the Election No. 13 of 1995] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1995&MID=9671>.
[83] Brown, above n 80, 14.
[84] Usher, above n 66, 25.
[85] Iyad Saraj, 'Human Rights under the PA' (People's Rights, 1999) 23–5.
[86] See *قانون بشأن هيئة الرقابة العامة رقم 17 لسنة 1995* [Law concerning the Public Supervisory Committee No. 17 of 1995] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1995&MID=11270>.
[87] Brown, above n 80, 13.

will have mutual interactions with the Israeli occupation forces as a legitimation of the Israeli occupation by the elected representatives of the Palestinian people.[88] Moreover, Hamas took the view that there was no way to avoid such interactions since the Parliament cannot enact laws that contradict the Palestinian Authority obligations under the Accords, and among these obligations is the protection of Israelis in the Gaza Strip and the West Bank.[89] Additionally, the Parliament would be responsible for enacting laws that regulate the relationship between the Israeli occupation forces operating in the Gaza Strip and the West Bank, and Palestinians living therein, and would prohibit military resistance against the former. They perceived much laws would as an explicit acknowledgement of the authority of the Israeli occupation forces.[90]

Accordingly, they deemed participating in the elections, and being part of the Parliament, as a severe deviation from what they saw as the principal aim of all Palestinians: defeating the Israeli occupation forces and ending the occupation of Palestine.[91] Therefore, the Hamas party and nationalists boycotted the elections, which resulted in the Parliament being dominated by the prevailing political party, Fatah, led by Arafat himself.[92]

Nevertheless, independent nominees won 23 of 88 seats in the new unicameral chamber of deputies, while Fatah won 55 seats. The electoral system was based on multi-member constituencies and the population of each constituency determined the number of its representatives.[93] Party discipline in Fatah was fragile, as there were internal frictions and disunity between its members in the Parliament.[94] Separate coalitions aimed to protect their respective interests. As a result of this disunity, the Parliament could not agree on how to oversee the actions of the Executive Authority.[95]

2 *The Constitutional Foundations of the Palestinian Authority*

The Palestinian Authority has a history of inherent contradictions in its basic laws during its establishment.[96] Before drafting the first Basic Law after the elections of 1996, two previous

[88] Sanford R Silverburg and Shadi Alshdaifat, 'Islamic Hamas and Secular Fatah: How Does the Governing Process Work?' (2015) 601.
[89] Emilio Dabed, 'Constitutionalism in Colonial Context: The Palestinian Basic Law as a Metaphoric Representation of Palestinian Politics (1993–2007)' in Cédric Parizot and Stéphanie Latte Abdallah (eds), *Israelis and Palestinians in the Shadows of the Wall: Spaces of Separation and Occupation* (Ashgate, 2015) 3.
[90] See Silverburg and Alshdaifat, above n 88, 601.
[91] Ibid.
[92] Terris and Inoue–Terris, above n 15, 478.
[93] Lamis Andoni, 'The Palestinian Elections: Moving toward Democracy or One–Party Rule?' (1996) 25(3) *Journal of Palestine Studies* 9.
[94] See Amal Jamal, 'The Palestinian Media: An Obedient Servant or a Vanguard of Democracy?' (2000) 29(3) *Journal of Palestine Studies*.
[95] Amundsen and Ezbidi, above n 74, 12.
[96] Dabed, 'Constitutionalism in Colonial Context', above n 89, 2.

documents were considered superior legal texts by the PLO: The Palestinian National Charter ('Charter') which was drafted by the PLO and endorsed by its Council in 1964 as its establishing document,[97] and a draft of the 1988 Palestinian constitution announced in Algeria after the 'Palestinian Declaration of Independence'.[98] In fact, both documents were unilateral initiatives created without the agreement of the Israeli occupation forces, because at that time the PLO was engaged in military resistence against the former. They did not, therefore, have significant effects on the first Basic Law, since the Basic Law's provisions had to be consistent with the Accords, which superseded what contradicted them in what the PLO had issued before signing them.[99]

The legal committee of the Parliament aimed to draft a Basic Law, keeping in mind its interim nature under the Accords, which regulated the Palestinian Authority according to the Accords and other binding agreements with the Israeli occupation forces. In other words, the committee was required to make the Basic Law appropriate for the conditions of the Palestinian Authority, an authority that acts as a temporary entity with limited institutional competencies, to administer parts of the occupied territories during the five-year period specified in the Accords. In October 1997, the draft of the Basic Law was approved, almost unanimously, on its third reading.[100] However, the President of the Palestinian Authority, Arafat, refused to endorse it until 2002, while the Palestinian Authority continued to function according to its previous framework, pending the President's endorsement of the Basic Law.[101] He justified his refusal by claiming that Palestinians, in the occupied territories and those forced to migrate, should have the right to participate in deciding on the Basic Law, not only the members of the Parliament, which largely represents the views of Fatah.[102] However, Arafat did eventually endorse the Basic Law and it came into effect in 2002.[103] It stated that all prior presidential decrees, orders, and regulations issued should remain in force as long as they did not contradict it. Most importantly, Article 106 stated that the Basic Law is not permanent:

[97] The Charter was a documentation of the ideological framework of the PLO, and was mainly concerned with its aims. For the full text of the Charter, see *Palestinian National Charter* (2016) Encyclopaedia <http://www.encyclopedia.com/doc/1G2–3424602111.html>.
[98] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 114.
[99] See Dabed, 'Constitutionalism in Colonial Context', above n 89, 12.
[100] Ibid 7.
[101] Amundsen and Ezbidi, above n 74, 7.
[102] Emilio Dabed, interview with Milhem, Feras (Ramallah, 1 October 2007).
[103] Dabed, 'Constitutionalism in Colonial Context', above n 89, 8.

> The provisions of this Basic Law shall apply during the interim period, and can be extended until the implementation of the new constitution of the Palestinian State.[104]

During the interim period, the PLO established the Executive Committee to draft a permanent Palestinian constitution ('Draft').[105] At the end of the interim period in 1999, the Palestinian Authority and the Israeli occupation forces could not agree on a permanent solution to the Israeli occupation and negotiations between them reached a deadlock. After three revisions, the Committee prepared a final draft of the Constitution in 2003, which aimed to regulate a Palestinian State, not an authority in an interim period.[106] The Draft was prepared by the Executive Committee as building the 'Palestinian State' should, according to the PLO, be done by the trustworthy members of the organisation that represents all Palestinians, which, according to it, was only the PLO.[107]

Arafat refused to endorse the Draft when it was presented to him in 2003.[108] The Draft had five provisions that Arafat entirely disagreed with. The most significant reasons for this related to the complexity of the relationship between the PLO and the Palestinian Authority, and the authority of the Palestinian Authority's President.

First, the Draft did not refer to the PLO at all. Not regulating the relationship between the new 'State' and the PLO made it impossible for the officials and departments of the PLO, and other international organisations that have links with the latter, to understand the consequences of endorsing this Draft. Additionally, the PLO continued to function as the international representative of the Palestinians after the collapse of the negotiations between the PLO and the Israeli occupation forces, which resulted in the need for international support while seeking a permanent solution to the occupation.[109]

Second, the Draft provided for the possibility of public participation through a referendum in which only Palestinians who lived in the territories controlled by the Palestinian Authority could participate.[110] Arafat feared that such a provision would limit the definition of a Palestinian to those who live in such territories. This limitation would render the Palestinian

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[104] *القانون الأساسي لسنة 2002* [The Basic Law of 2002] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2002&MID=14094>.
[105] Dabed, 'A Constitution for a Nonstate', above n 65, 46.
[106] Asem Khalil, 'Constitution–Making and State–Building: Redefining the Palestinian Nation' in Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, 2012) 2.
[107] Khalil, *Which Constitution for the Palestinian Legal System*, above 6, 102.
[108] See ibid.
[109] See Khalil, 'Constitution–Making and State–Building', above n 106, 5.
[110] Art 63; see *2003 Permanent Constitution Draft* (2016) <http://www.palestinianbasiclaw.org/basic–law/2003–permanent–constitution–draft> ('*PCD*').

citizenship status of exiled Palestinians uncertain, since the Draft asserts that those who participate in a referendum are the Palestinian people, the ultimate source of the power in the state.[111]

Third, the Draft limited the executive authority of the president to those areas explicitly outlined in Article 112.[112] Since the early days of the Palestinian Authority, Arafat wanted to enjoy a broad range of discretionary powers, under the justification that the Palestinian Authority is restricted by many agreements and he needs such powers to act as he deems appropriate in difficult situations.[113]

Fourth, the Draft provided the Council of Ministers with exclusive power to enact decree-laws in a state of emergency. The role of the president is limited to endorsing them, without being able to propose any such laws.[114] Again, this is a significant restriction on the authority that Arafat desired. The problem that arises here is that because the Council of Ministers held authoritative power, the opportunity for them to overthrow Arafat during a state of emergency was created.[115]

Fifth, and most importantly, the Draft asserted that the political system of Palestine is parliamentary.[116] In such a system, the head of state is not the head of the government, as idea that Arafat entirely rejected. He wanted to have, and maintain, authority that allowed him to control all matters related to the Palestinian Authority.[117]

As a result of Arafat refusing to endorse the Draft, United Nations' pressure increased on the Palestinian Authority to restrict the excessive authority of the President.[118] The United Nations were inclined towards empowering the Palestinian Authority rather than the PLO, because the latter represented itself originally as a liberation movement, thus causing more conflicts with the Israeli occupation forces.[119] Some researchers viewed that inclination with distrust, because it meant that the Palestinian Authority would be more centralised, resulting in marginalising of the PLO.[120] In fact, their observation was correct, as marginalisation of the PLO became

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[111] Emilio Dabed, interview with Milhem, Feras (Ramallah, 20 October 2007).
[112] *PCD* art 112.
[113] Dabed, 'Constitutionalism in Colonial Context', above n 89, 8.
[114] *PCD* art 129.
[115] Dabed, 'Constitutionalism in Colonial Context', above n 89, 7.
[116] *PCD* art 8.
[117] Dabed, 'Constitutionalism in Colonial Context', above n 89, 8.
[118] See Emilio Dabed, 'Constitutional Making and Identity Construction in Occupied Palestine' (2013) 86 *Confluences Méditerranée* 7.
[119] See Khalil, 'Constitution–Making and State–Building', above n 106, 4.
[120] M Nawfal, 'نشوء وتطور إشكالية العلاقة بين السلطة والمنظمة' [The Emergence and Evolution of the Problem of the Relationship between the Authority and the Organisation] (1997) *السياسة الفلسطينية* [The Palestinian Politics]15–6,

irreversible and its primary role would never be regained.[121] The United Nations exerted serious pressure on the Palestinian Authority to limit the authority of the president, and provide for a proper separation of powers by amending the Basic Law in a way that Arafat might accept, rather than requiring him to endorse the Draft.[122] Arafat agreed, endorsing an amended Basic Law of 2003. This endorsement caused the second change in the type of legitimacy that Arafat claimed for his regime, which is legal-rational legitimacy, deriving its authority from the new Basic Law.[123]

This amendment was comprehensive. Two remarkable differences between the Basic Law of 2002 and that of 2003 are the creation of the position of the prime minister, and regulation of the state of emergency. Concerning the first difference, Article 45 states that:

> The President of the National Authority shall appoint the Prime Minister and authorise the latter to constitute his government. The President shall have the right to dismiss the Prime Minister or to accept his resignation and to request him to convene the Council of Ministers.[124]

The attempt to separate the executive powers between the president and the prime minister was aimed at decreasing the concentration of power in the hands of the former.[125] However, that separation was not complete, and the prime minister remained accountable to the president. Article 74(1) states that:

> The Prime Minister is accountable to the President of the National Authority for his actions and the actions of his government.[126]

On the relationship between the prime minister and the Legislative Council, the latter has the exclusive right to grant confidence to the new government in order to assume its duties. Article 79(4) states that:

> Neither the Prime Minister nor any of the Ministers shall assume their duties until they have obtained the confidence of the Legislative Council.[127]

These three Articles provide an abstract description of the relationship between the prime minister and both the president and the Parliament. Concerning the state of emergency,

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83; Khalil Shikaki, ' والسلطة الوطنية مستقبل الديمقراطية في فلسطين بالنظر إلى إشكالية العلاقة بين منظمة التحرير الفلسطينية ' [The Future of Democracy in Palestine from the Perspective of the Relationship between the Palestinian Liberation Movement and the National Authority] (1997) *السياسة الفلسطينية* [The Palestinian Politics]15–6, 60.

[121] Jamil Hilal, 'منظمة التحرير والسلطة الفلسطينية: المعادلة المقلوبة على رأسها' [The Liberation Organisation and the National Authority: The Upside–Down Equation] (1997) *السياسة الفلسطينية* [The Palestinian Politics] 15–6, 98.

[122] Dabed, 'A Constitution for a Nonstate', above n 65, 50.

[123] Dabed, 'Constitutionalism in Colonial Context', above n 89, 9.

[124] *The Amended Basic Law 2003* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138>] *('Basic Law').*

[125] Dabed, 'Constitutionalism in Colonial Context', above n 89, 9.

[126] *Basic Law.*

[127] Ibid.

Article 110(1) granted the right of declaration exclusively to the president. The role of the Parliament is limited to reviewing the procedures and measures, including the presidential decrees, adopted during that state of emergency. The Article states that:

> The President of the National Authority may declare a state of emergency by decree when there is a threat to national security caused by war, invasion, armed insurrection or in times of natural disaster, for a period not to exceed thirty (30) days.[128]

It might be asked: In this constitutional context, and according to the Basic Law of 2003, what is the form of the Palestinian political system? Is it semi-presidential, rationalised parliamentary, or an anomaly, since it is neither purely parliamentary nor presidential? Answering that question is not possible without contextualising the Basic Law in the actual practices of the Palestinian Authority, particularly in times of conflict between the president, the prime minister, and the Parliament. After concluding this section by elucidating the structure of the Palestinian judiciary, the last part of this chapter aims to answer that question through a contextual approach, while analysing constitutional effects of the coup that occurred in 2007.

3 *The Structure of the Palestinian Judiciary*

A significant change in the judicial structure occured when Arafat promulgated two judicial laws that the Parliament drafted: first, the Law of the Judicial Authority, which regulated basic matters related to the structure of courts, judges, the High Judicial Council ('Judicial Council'), public prosecution, and judicial auxiliaries; and second, the Law of Judicial Organisation, which regulated matters related to the jurisdiction and combination of regular courts.[129]

There are four Articles that protect the judiciary and assert its indepedence. Two Articles in the Basic Law and another two in the Law on Judicial Authority. Articles (97) and (98) of the Basic Law state respectivly that:

> The Judicial Authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.[130]

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[128] *Basic Law.*
[129] *قانون السلطة القضائية رقم 1 لسنة 2002* [Law of the Judicial Authority No. 1 of 2002] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2002&MID=14053>; *قانون تشكيل المحاكم النظامية رقم 5 لسنة 2001* [Regular Courts' Formation Law No. 5 of 2001] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13857> ('*RCFL*').
[130] *Basic Law*

> Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.[131]

Articles (1) and (2) of the Law on Judicial Authority state respectively that:

> The Judicial Authority is independent. No other authority shall interfere with the judiciary or with the affairs of justice.[132]
>
> Judges are independent and shall not be subject, in the exercise of their judicial function, to any authority other than the authority of the law.[133]

Concerning the judiciary's structure, Article (6) of the Law on Judicial Authority determines the basic structure of the courts.

> Courts in Palestine shall consist of the following:
> First: Shari'a and Religious Courts, [organised] by law.
> Second: A Supreme Constitutional Court, [organised] by law.
> Third: Regular courts, that consist of:
> 1. A High Court, which consists of:
> (a) The Court of Cassation; and
> (b) The High Court of Justice.
> 2. Courts of Appeal.
> 3. Courts of First Instance.
> 4. Conciliation Courts. [134]

Notably, the Article did not list the Constitutional Court as a regular court.

(a) Religious Courts

Muslims have Sharia Courts and Christians have Church Courts in Palestine. The jurisdiction of these courts is limited to family status matters, such as child custody, alimony payments, divorce, and marriage.[135]

(b) Regular Courts

Courts in Palestine have adopted a system of appeal that provides litigants the right to appeal against judgments made by courts of the first level to courts of the second level.[136] The first level includes Conciliation Courts that consist of one judge, and First Instance Courts that consist of three judges headed by the most senior. Orders of Conciliation Courts are legally

[131] Ibid.
[132] *RCFL*.
[133] Ibid.
[134] Ibid.
[135] 'Access to Justice in the Occupied Palestinian Territory' (United Nations Development Programme, 2009) 11.
[136] *Civil and Commercial Procedure Law No. 2 of 2001* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849>]

binding; they were named Conciliation Courts because litigants can request the judge of such courts to apply the conciliation system to their dispute, rather than regular procedures that resulted in obligatory judgments.[137] Cases appealed from those courts are heard by the second level courts, which include First Instance Courts in their Appellate Capacity that hear appeals from the Conciliation courts, and the Appellate Courts that hear appeals from the First Instance Courts.[138]

Regarding civil jurisdiction of courts in the West Bank and Gaza Strip, Conciliation Courts hear two types of civil dispute cases. First, cases with a value that is less than JOD20,000. Second, regardless of their value, cases that are related to the evacuation of leased premises, the partition of joint property, eviction, division of movable and immovable properties, and some other cases related to land and property.[139] The First Instance Courts hear cases that have a value exceeding JOD20,000 and are not part of the second group listed above. Concerning criminal jurisdiction, if the maximum punishment set by the law for the claimed violation does not exceed three years of imprisonment, then it falls under the jurisdiction of Conciliation Courts. The First Instance Courts hear all other violations.[140]

The Court of Cassation, the High Court of Justice, and the Constitutional Court are not considered third level courts, because they examine whether the relevant law in a dispute was applied correctly or not, without examining in detail the facts of the dispute as first and second level courts do.[141]

The Court of Cassation hears cases appealed from second level courts, which include civil and criminal cases, and appeals from religious courts, in addition to disputes that fall beyond other courts' jurisdictions.[142] The High Court of Justice has exclusive jurisdiction over disputes in which public officials are parties. Therefore, it has a significant impact on the core administrative functions of the regime. Article (33) of the Law of Regular Court's Formation provides that:

> The High Court of Justice exercises jurisdiction over:
>
> 1. Challenges related to elections.

[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid.

2. Requests presented by interested parties for the cancellation of final administrative regulations, regimes and decrees touching on persons or on the assets of public legal persons, including professional syndicates.
3. Applications in the nature of motions opposing imprisonment which entail the issuance of orders to release persons who are illegally detained.
4. Disputes related to public employees in respect of appointments, promotions, raises, salaries, transfers, retirement, disciplinary measures, layoffs, dismissal and all matters related to personnel affairs.
5. The refusal or abstention by the administrative authority to take any decision it is held to take pursuant to the provisions of laws or regulations in force.
6. All administrative disputes.
7. Matters which are not court cases or trials but merely injunctions or summons outside the jurisdiction of any court and which must be adjudicated in the interest of justice.
8. Any other matter raised to it pursuant to the provisions of law.[143]

Article (34) of the same law regulates the reasons for valid objections submitted to this Court. It states that:

> In the applications and challenges raised to the high court of justice by the persons or authorities mentioned in Article (33) above, the reason for the challenge must be related to one or more of the following:
>
> 1. Competence.
> 2. A defect in form.
> 3. Violation of laws or regulations or a mistake in their application or construction.
> 4. An arbitrary or abusive use of authority pursuant to law.[144]

(c) The Supreme Constitutional Court

The Basic Law stipulates the establishment of this Court. Article 103(1) says that:

> A Supreme Constitutional Court shall be established by law to consider: (a) The constitutionality of laws, regulations, and other enacted rules. (b) The interpretation of the Basic Law and legislation. (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.[145]

Similar to the High Court of Justice, this Court is a critical entity in the regime's eyes, since its actions might be considered unconstitutional, and therefore invalid by this Court. The law that specifies the structure and operating procedures of this court is LSCC.[146] Article 24 of this law regulates the jurisdiction of this Court. It affirms that:

> The Court shall exclusively have jurisdiction over the following:
>
> 1. Constitutional review of laws and regulations.

[143] *RCFL*.
[144] Ibid.
[145] *Basic Law*.
[146] *The Law of the Supreme Constitutional Court No. 3 of 2006* (Palestine) [Venice Commission's trans, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2009)009-e>].

2. Interpretation of the provisions of the Basic Law and laws in the event of conflict over the rights, obligations and capacities of the three authorities.
3. Adjudication of the conflict of jurisdiction between the judicial authorities and administrative authorities.
4. Adjudication of the conflict which arises in regard of the execution of two contradictory final judgments, one of which is issued by a Judicial Authority or an authority with a judicial jurisdiction and the other from another authority therefrom.
5. Adjudication of the challenge regarding the loss of legal capacity by the President of the Authority under Article (37) under the Amended Basic Law of 2003. Its decision shall be deemed to be effective starting from the date of the approval by the Legislative Council thereof by the majority of two thirds of the number of its members.[147]

Article (25) of the same law regulates the Court's capacity to rule any legislation or 'acts' as unconstitutional. It asserts that:

1. The Court shall, in the course of the performance of the jurisdictions provided for under Article (24), be entitled to exercise all the powers of hearing and pronouncing on the unconstitutionality of any piece of legislation or act contravening the Constitution (wholly or partially).
2. Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.
3. Upon the pronouncement on the unconstitutionality of any act, it shall be deemed to be unenforceable, and the authority which has performed it must rectify the situation in pursuance of the provisions of the Basic Law and the Law as well as redeem the right to grievant or compensate him or her for the damage or [perform] both together.[148]

Until 4 April 2016, the High Court exercised the Constitutional Court's functions. On that date, President Abbas issued a presidential decree establishing the Constitutional Court. The establishment of the Court itself is unproblematic since the LSCC provides for that. The decree only stated names of the permanent judges of this court, without changing the jurisdiction or the procedures related to this Court.[149] However, the establishment of this court attracted significant criticism from judges, lawyers, and law experts, because Abbas single-handedly selected this court's judges without any recommendations from the General Assembly of the Constitutional Court.[150] This method of selection violates Article 5(2) of the LSCC that states:

[147] Ibid.
[148] Ibid.
[149] Iyad Qatrawi, *Is Abbas Tightening His Grip on Power with New Constitutional Court?* (3 April 2016) The Pulse of the Middle East <http://www.al–monitor.com/pulse/originals/2016/04/palestine–abbas–decree–constitutional–court–legality.html>.
[150] Ibid.

> The President and judges of the Court shall be appointed by a decision from the President of the Palestinian Authority based upon a recommendation from the General Assembly of the Supreme Constitutional Court.[151]

(d) Military Courts

Two laws constitute the legislative basis for military courts in Palestine. The PLO Revolutionary Penal Code of 1979, and the PLO Revolutionary Penal Procedures Law 1979. Both laws were enacted during the Israeli civil administration of the Gaza Strip and the West Bank.[152] Article 101(2) of the Basic Law regulates the jurisdiction of those courts. It states that:

> Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.[153]

(e) Specialised Courts

There are four specialised courts in the Palestinian judicial system: Income Tax Appellate Court, Municipal Courts, Elections Appellate Court, and Customs Primary Court. It is noteworthy that municipal courts only have jurisdiction over violations by public officials who work in local governance councils.

This section has explained how the Palestinian Authority was established, and its unique nature as an autonomous entity with limited authority. Moreover, it outlined the constitutional foundations and structure of courts under the rule of the Palestinian Authority. As mentioned before, detailed discussion of judiciary itself will take place in the following chapters. The next part substantially contributes to the whole argument of this chapter. It explains the effects of certain socio-political conditions on courts, to show how, under the rule of the Palestinian Authority, these conditions have resulted in the discrediting of the courts and the undermining of judicial independence.

D *The Socio-Political Conditions Affecting Judicial Independence in the Palestinian Authority*

Many social, cultural, and political conditions have affected, and some still affect, judicial independence and the courts' credibility under the Palestinian Authority rule. This section explains how those conditions, prevalent between 1993 and 2003, prevented judicial institutions from operating independently and resulted in the loss of Palestinian people's trust in them. These conditions had long-lasting effects that contributed to the legal weaknesses of

[151] *LSCC.*
[152] 'What Future for the Palestinian Military Justice System?' (Palestinian Centre for Strategic Studies and Research and Geneva Centre for the Democratic Control of Armed Forces 2012) 2.
[153] *Basic Law.*

the Palestinian Authority after 2003, and continue to contribute to its current problems as it will be explained shortly.

This section starts with conditions related to the institutions of the Palestinian Authority, Palestinian society, Palestinian NGOs, and foreign donors; and concludes with those related to the Israeli occupation forces.

1 *The Institutions of the Palestinian Authority*

(a) The Mentality of Governmental Officials

After signing the Accords, many Palestinians were recruited to the Palestinian Authority as public officials. Officials from the PLO, returners from the neighbouring countries (such as Lebanon, Syria, Jordan and Egypt), human rights activists, Palestinian prisoners freed from Israeli jails, and members of NGOs were recruited to fill vacancies in governmental bodies.[154] Many members of those groups brought with them a culture that was inconsiderate of law-abiding practice, with indifference to principles such as the separation of powers or the rule of law.[155] Before recruitment, the culture that dominated the PLO members was excessive reliance on the Palestinian national identity vis-à-vis other nationalities, and feeling proud when surviving punishment or oppression initiated by the occupying authority.[156] In other words, feeling superior while violating laws was a source of pride in itself. Regarding the 'returners', their daily activities were to resist the Israeli occupation forces, attack its forces, and violate its laws. They even felt proud while doing so. Since people with this mentality became public employees between 1994 and 1995, the Palestinian Authority developed a culture of ill-discipline and its representatives/employees were careless in their adherence to stipulated laws.[157]

After 1995, the Palestinian Authority did not consider training its personnel to apply separation of powers or law-abiding practice, because the primary reason for establishing its governmental institutions was not to provide efficient civilian services.[158] Rather, it was a symbolic process to prove that it can survive as a functioning entity, aiming towards resolving the conflict in its

[154] Amundsen and Ezbidi, above n 74, 11–2.
[155] Glenn E Robinson, 'The Politics of Legal Reform in Palestine' (1997) 27 *Journal of Palestinian Studies* 59.
[156] Robert Terris and Vera Inoue–Terris, interview with Jamil Hillal (Ramallah, 22 March 2001).
[157] See Hillel Frisch, *Countdown to Statehood: Palestinian State Formation in the West Bank and Gaza* (SUNY Press, 2012).
[158] Amundsen and Ezbidi, above n 74, 14.

territories.[159] In such circumstances, having a proper separation of powers was not a priority, because what mattered was the ability to function as an authority in any way possible.

Patrimonial and personal relationships also affected the administration of those institutions.[160] For example, appointments to the judiciary were largely based on personal recommendations from officials of the executive authority instead of being based on fair competition between potential candidates.[161] This is problematic because it ensured the regime was entrenched with the judiciary and weakens appropriate regulatory systems. Similarly, other public institutions used personal recommendations as the basis for appointment.[162] Interference by the executive authority in judicial administration caused a deterioration in the relationship between the two, since it was proven to the Judicial Authority that it did not have effective control of courts and other judicial departments. [163] As a result, law activists who were worried about that interference saw it as hopeless to advocate for a separation of powers or call for a reduction of the effect of personal relationships in the administration of the Palestinian Authority institutions.[164]

(b) The Shortcomings in the Legislative Authority

The Parliament operated in a manner that created many contradictions within the legal framework of the Palestinian Authority. In early reform attempts, it issued fundamental laws without waiting for governmental proposals. Also, it called on Palestinian NGOs to participate in the process of drafting laws without having a coherent legislative policy.[165] Fatah won the largest number of seats in the first parliamentary elections, thus the laws were framed to protect the interests of Fatah and its leader, the president. The primary concern of Fatah members in the Parliament while voting for or against new legislation was the interests of their respective districts or political coalitions, not the needs of the Palestinian society as a whole.[166] Laws were partially borrowed from neighbouring countries without amending them to suit the conditions of the occupied Palestinian people, thereby producing ambiguous texts and contradictory court judgments.[167]

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[159] Le More, 'Killing with Kindness', above n 76, 985.
[160] Robinson, 'The Politics of Legal Reform in Palestine', above n 155, 59.
[161] See Amundsen and Ezbidi, above n 74, 16.
[162] Glenn E Robinson, 'The Growing Authoritarianism of the Arafat Regime' (1997) 39(2) *Survival* 43.
[163] Usher, above n 66, 25.
[164] See Kameal Mansour, 'استقلال القضاء في فلسطين [The Independence of the Judiciary in Palestine]' (Institute of Law, Birzeit University, 2011) 27.
[165] Robinson, 'The Growing Authoritarianism of the Arafat Regime', above n 162.
[166] See Mansour, above n 164, 27.
[167] Ibid.

(c) The Shortcomings in the Executive Authority

Structural and administrative weaknesses of the executive authority undermined its ability to empower or enhance aspects of judicial independence.[168] For example, divisions among political groups and lack of regulations to guarantee proper political interaction between them resulted in attempts by strong political groups to maintain influence over the Judicial Authority.[169] These attempts inclined many Palestinians to perceive courts as assets that political elites aim to exploit for their own interests. These weaknesses also discouraged social activists from advocating any reforms in the judiciary, because without mending political interactions, more reforms meant more empowered assets in the hands of political elites, which would make the latter more determined in attempting to exploit them.[170]

(d) The Executive Authority's Interference in Judicial Procedures

Executive institutions, particularly the president's office, the security apparatus, and mayors, frequently intervened in legal proceedings.[171] Interventions were not always direct and obvious. Direct interventions took place in criminal cases where the security apparatus imprisoned and freed suspects at will, with complete disregard for what courts decided in those cases.[172] Moreover, many administrative offences committed by public officials were treated in the same way, with ministries reacting towards courts' rulings by cancelling official decisions or amending them.[173]

Indirect interventions took the form of re-allocating (or referring) disputes away from regular courts to be decided by either traditional tribunals, especially in criminal disputes, or by new legal departments created in municipalities to adjudicate on civil and commercial disputes away from the authority of regular courts.[174] The significant impact of both direct and indirect interventions brought discredit upon judges and the entire court system; the public had almost no trust in judicial institutions.[175]

[168] Amundsen and Ezbidi, above n 74, 12.
[169] See Mansour, above n 164, 28.
[170] Ibid.
[171] 'Who Governs the West Bank? Palestinian Administration under Israeli Occupation ' (International Crisis Group, 2004) i.
[172] Robinson, 'The Growing Authoritarianism of the Arafat Regime', above n 162, 45.
[173] See William F Schulz, 'Palestinian Abuses: The Amnesty Report' (1997) 44(2) *New York Review* .
[174] Amundsen and Ezbidi, above n 74, 11.
[175] See William F Schulz, above n 173.

(e) The Shortcomings in the Judicial Authority

Many shortcomings caused by the practices of the Judicial Authority undermined its independence. In general, there was an absence of a firm will to strengthen judicial independence. First, the defective structure and insufficient human resources regarding the qualifications and number of personnel made it hard for the judiciary to be administratively efficient.[176] The Palestinian Authority leased residential houses and turned them into courts and judicial administration departments. Salaries of judges and other employees were low compared to what a lawyer or a business person could earn, therefore, successful attorneys and qualified individuals refrained from accepting offers to work as judges or public employees in the court system.[177] Additionally, many law school graduates preferred to work as lawyers and consultants for NGOs because of the higher salaries they paid. Generally, unskilled graduates who could not be lawyers or consultants were appointed to courts as judges, prosecutors, and administrative assistants.[178]

Second, the Judicial Council did not adopt objective measures for admitting new trainees to the Judicial Training Institute, and deciding who would later become judges. Moreover, personal ties overrode skills and qualifications in the admission process.[179] Additionally, the Judicial Council did not adopt a comprehensive plan to help judges apply what they learned during judicial training courses. In fact, these courses were poorly-organised and did not improve the quality of judgments.[180] Applying learned skills was not a criterion for promoting judges, which made experienced judges who did not have strong personal ties with judicial administrators consider the Judicial Authority corrupt, since they were not promoted to higher positions.[181]

Third, between 1999 and 2002, some officials of the Judicial Authority advocated for judicial independence that takes the form of complete, rigid separation between the judicial authority and other authorities, without any commitment to accountability, or transparency in performing their duties.[182] The reason for this advocacy was the judges' distrust in the executive authority and the Fatah-majority Parliament. It became common among judges to call for that sort of

[176] Amundsen and Ezbidi, above n 74, 10.
[177] Hiram E Chodosh and Stephen A Mayo, 'The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System' (1997) 38(2) *Harvard International Law Journal* 427.
[178] Ibid.
[179] See ibid 428.
[180] Mansour, above n 164, 33–4.
[181] Ibid.
[182] Ibid.

separation and refuse to tolerate relative independence from the Parliament and the executive.[183] This understanding made the practices of the Judicial Council, as the highest administrative body, less institutional and more discretionary, giving more weight for personal ties to influence judicial processes in regard to appointment, promotion, and inspection of judges, since accountability and transparency were largely absent and rejected by the Judicial Council.[184]

Fourth, the Law of the Judicial Authority, promulgated in 2002, contained vague and broad provisions in many important matters. For example, the relationship between the minister of justice and the Judicial Council was not explained to show where each has authority in making decisions when there is a disagreement between them.[185] Moreover, the Judicial Council directly dealt with the Ministry of Finance concerning its budget, marginalising the role of the Ministry of Justice. The General Prosecutor's office adopted the same attitude and became more independent from the Ministry of Justice, with less accountability and transparency as a result.[186] Additionally, the Judicial Council was subordinated to the Palestinian president, since the president had the power to enforce his orders over it, without room for the minister of justice to balance the relationship between them both.[187]

Finally, the judicial authority admitted its defects and shortcomings concerning the management of cases, such as late adjudication and the backlog of cases.[188] Those problems were not entirely caused by the occupation; low skill levels and insufficient training were also significant reasons. Nevertheless, the judicial authority's spokesmen tried to make it seem as if the occupation was the only cause of these problems. They shifted the blame for late adjudication and backlog of cases onto the Israeli occupation forces by noting that it was a product of its violations.[189]

(f) Palestinian Armed Individuals

In its beginning of 1995, the Palestinian Authority as a governing entity that has the exclusive right to exercise coercive measures, deprived civilians of the right to possess weapons. However, after the second Intifada, with military groups and civilians having easy access to

[183] Ibid.
[184] Ibid.
[185] Hiram E Chodosh and Stephen A Mayo, 'Palestinian Legal Study: Solutions to Contemporary Problems in the Palestinian Legal Systems' (Institute for the Study and Development of Legal Systems, 1996) 8.
[186] Ibid.
[187] Amundsen and Ezbidi, above n 74, 7.
[188] See Chodosh and Mayo, 'Palestinian Legal Study: Solutions to Contemporary Problems', above n 185, 12.
[189] Ibid 23.

weapons, the enforcement of court decisions was negatively affected between 2000 and 2007.[190] Judges were frequently threatened and targeted by violent actions; even the police were unable to protect them.[191]

By seeking to restrict the Palestinian people's access to weaponry, the Palestinian Authority protected its own interests as the regime with a monopoly on the use of coercive force, and a monopoly on shaping the relationship with the Israeli occupation forces by preventing military resistance against the latter. This resulted in a stalemate between the Palestinian Authority and the Palestinian people, whereby the latter refused to surrender their weapons.[192] Noteworthy is the Palestinians' consideration of arms as a means of security, as lack of safety played a role in justifying the possession of weapons. Civilians were reluctant to dispose of their weapons, claiming a sincere commitment to military resistance as the principal method of opposing the occupation.[193] Ironically, however, their weaponry was mainly used in civil and commercial disputes. Ultimately, the judiciary was unable to efficiently solve this problem between the Palestinian Authority and the people, causing the judiciary to be further discredited.[194]

2 *Palestinian Social Perceptions*

In Palestinian society, establishing a Palestinian judiciary became necessary for upholding public order. Nevertheless, traditional tribunals that reconcile disputes in parallel to regular courts were allowed to continue functioning.[195]

When the society's interests conflicted with those of the regime, judges became protectors of what the regime legislated to safeguard its interests, not the interests of the society.[196] In such cases, people perceived judges as public employees, which makes it difficult for the judges to prove their independence from the regime that appointed them.[197]

In 1999, the Israeli occupation forces and the Palestinian Authority deemed the Accords as *de facto* failed at the end of the interim period.[198] Due to this failure, Palestinians lost their faith in the possibility of a real state with centralised authorities; they became more convinced that the occupation would continue, and so the Palestinian Authority would not be able to stop the

[190] See Mansour, above n 164, 28.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Robert Terris and Vera Inoue–Terris, interview with Jonathan Kuttab (East Jerusalem, 28 January 2001).
[195] Amundsen and Ezbidi, above n 74, 22.
[196] *Palestine Report*, 3 January 1997.
[197] Amundsen and Ezbidi, above n 74, 11.
[198] Dabed, 'A Constitution for a Nonstate', above n 65, 46.

violations committed by Israeli occupation forces.[199] Moreover, the Palestinian Authority continued to disobey court rulings to cancel administrative decisions or amend them as the courts ordered.[200]

These perceptions alone did not substantially weaken the social foundation of judicial independence. Rather, they were additional factors that caused the reputation of the judiciary to deteriorate.

3 *Palestinian NGOs*

Palestinian NGOs played a fundamental role in providing civil services for the Palestinian community before the establishment of the Palestinian Authority, to the extent that they became quasi-governmental institutions and continued to do so throughout the rule of the Palestinian Authority.[201] Nevertheless, because of their significant reliance on funds from foreign donors, particularly those engaged in political activities, they were ultimately affected by the purposes and agendas of the donors, while seeking quick access to substantial funds.[202] As a result, many NGOs preferred foreign donors over Palestinian funders, because Palestinian funders were concerned about the financial independence of the Palestinian Authority, and hence had rigid criteria to provide funds for NGOs, which made such funding hard to secure.[203]

Additionally, the NGOs continuously criticised the performance of the Palestinian Authority in general, and particularly the judiciary, to prove the Palestinian Authority's deficiencies, and to justify seeking new funds for reform projects, despite some successful reform attempts.[204] Moreover, implementing civil projects was not performed in accordance with a comprehensive policy between all NGOs. These NGOs also sought to make their donors satisfied with their performance to in order to win more funds for prospective projects.[205] NGOs measured their projects' success according to consistency between what they have done and what they promised the donors to do before receiving the funds, not the actual reforms they delivered or whether they benefited Palestinian society.[206] NGOs stalked every defect in the Palestinian Authority structure and performance, because according to the donors, identifying more

[199] See Sarah Darley et al, 'Disengagement, the Palestinian Economy and the Settlements' (Report, World Bank, 2004) 3.
[200] See Mansour, above n 164, 29.
[201] Robinson, 'The Growing Authoritarianism of the Arafat Regime', above n 162.
[202] See Mansour, above n 164, 29–30.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.

shortcomings meant obtaining more funds.[207] All these practices by NGOs impinged on the popular trust in the judiciary because their reports described it as deficient and underdeveloped.

4 *The Donors*

After 1995, the Palestinian Authority and Palestinian NGOs received a large amount of foreign funds for projects related to the judiciary and public administration.[208] Foreign donors had an influence on Palestinian policies regarding the setting of priorities and conducting projects.[209] The claimed purpose of providing funds for judicial reform was building pillars of a well-functioning Palestinian authority and improving its application of good governance.[210] However, after the Accords failure, it became evident that the real purpose was covering the expenses of the occupation, and granting the Palestinian Authority inadequate resources to remedy the damages of that occupation without providing enough support to resist it effectively.[211] Indeed, if the Palestinian Authority were provided unrestricted competencies and complete territorial jurisdiction over the Gaza Strip and the West Bank, with no checkpoints and borders that prevent free transportation, then domestic investments could have covered all the expenses needed for reform projects to serve the Palestinian community,[212] freeing NGOs from the need to seek for foreign funding.

In addition to the claimed purpose mentioned above, and because they could not stop the Israeli occupation forces' unlawful actions under the Fourth Geneva Convention,[213] international supporters realised that the only way of fulfilling their duty towards the occupied Palestinians was to provide more funds for the Palestinian Authority and NGOs; they wanted to compensate for their weak opposition to Israeli violations.[214] To guarantee that fulfilment, they created an unfeasible list of objectives for reform that the Palestinian Authority should strive despite its underdeveloped constitutional and legal system, using vague criteria and broad definitions, such as 'sincere commitment' to the principles of good governance, the rule of law, separation of powers, anti-corruption policies, and genuine reform of the judiciary.[215] Therefore, donors'

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[207] Ibid.
[208] Sarah Darley et al, above n 199, ii.
[209] See Sara Roy, 'Us Economic Aid to the West Bank and Gaza Strip: The Politics of Peace' (1996) 4(4) *Middle East Policy* 50.
[210] Le More, 'Killing with Kindness', above n 76, 982.
[211] Robinson, 'The Growing Authoritarianism of the Arafat Regime', above n 162, 44.
[212] 'Closures and Palestinian Economic Crisis: An Assessment' (Report, World Bank, 2004) 52–4.
[213] See Mansour, above n 164, 30–1.
[214] See David Shearer and Anuschka Meyer, 'The Dilemma of Aid under Occupation' in Michael Keating, Anne Le More and Robert Lowe (eds), *Aid, Diplomacy and Facts on the Ground: The Case of Palestine* (Royal Institute of International Affairs, 2005) 165.
[215] Le More, 'Killing with Kindness', above n 76, 993.

measures of performance were not practical, and the Palestinian Authority remained unable to prove the reliability of its institutions. This inability caused donors to disregard Israeli violations, since addressing such violations was secondary, according to them, to establishing a reliable Palestinian authority.[216] Eventually, all these actions by donors played a role in rendering the judiciary weak and unresponsive to reform,

5 *The Israeli Occupation Forces*

The practices of the Israeli occupation forces, such as illegal possession of Palestinians' lands and administrative detention, violated many provisions of international humanitarian law.[217] Also, Israeli occupation forces violated the Accords in a manner that prevented the judiciary from performing its basic functions. For example, the systematic restriction of individuals' movement through checkpoints and borders inside Palestinian territories, and imposing frequent lockdowns on districts of the West Bank, made it hard for judges and litigants to travel freely and attend court sessions.[218] They needed a permit from the Israeli occupation forces to depart from their home to go to the court, and obtaining one would take a long time with complicated procedures.[219] These violations do not fall under the jurisdiction of the Palestinian judiciary according to the Accords, so the Palestinian Authority could not stop them, and they had a significant impact on the performance of the Judicial Authority.[220] First, the High Court (in its different capacities such as the Court of Cassation, the High Court of Justice, or the Constitutional Court) could not form its bench from Gaza Strip judges and West Bank judges in the time the law required; each region had to form its own separate bench and act independently from the other.[221] The inability to form one bench made it impossible to establish precedents in Palestinian case law that lower courts could then rely on, resulting in two incoherent legal cultures in the same judicial system.[222]

Second, members of the Judicial Council could not meet as required to adopt unitary policies and issue administrative decisions that could improve the efficiency of the judicial system.[223]

[216] See Mansour, above n 164, 30–1.
[217] Ibid 31–2.
[218] See Anne Le More, 'Are Realities on the Ground Compatible with the International State–Building and Development Agenda?' in Anne Le More and Robert Lowe (eds), above n 214.
[219] Ibid.
[220] Dabed, 'A Constitution for a Nonstate', above n 65, 47.
[221] See Mansour, above n 164, 31–2.
[222] See Raja Shehadeh, 'Occupier's Law and the Uprising' (1988) 17(3) *Journal of Palestine Studies* 24–37.
[223] See Mansour, above n 164, 31–2.

Similarly, the Palestinian Judges Association had difficulties holding its meetings or having its members able to attend its events.[224]

Finally, Palestinian judges were humiliated by Israeli soldiers at checkpoints and were required to endure the same insults and stripping of upper clothes that other litigants and civilians experienced during inspection procedures.[225] These actions affected the dignity and social value of judges and courts in general. Civilians saw judges as powerless and weak, and as a result did not see them as strong protectors of rights, which was reflected in the lack of credibility of judicial institutions.[226] Additionally, court hearings were frequently cancelled as litigants or judges could not come on time because of transportation restrictions.[227]All these violations played a role in discrediting the judiciary and damaging its reputation.

This section has argued that certain socio-political conditions related to the Palestinian Authority and the Palestinian society in general have discredited the courts, brought the judiciary into disrepute, and undermined judicial independence under the rule of the Palestinian Authority. It has showed how these conditions tarnished the reputation of the judicial authority in the eyes of Palestinian society. The next part discusses the correlation between the authoritarian nature of the West Bank regime and the changes in the status of the applied Basic Law.

E *The Correlation between the Authoritarian Growth of the Regime and the Change in its Basic Law's Status between 2007 and 2017*

Since 1994, the West Bank regime has not had a stable authoritarian nature. In fact, it has frequently changed, moving on the broad spectrum that ranges from authoritarianism to semi-democracy.[228] These changes were a result of the challenges the Regime faced from political opposition within Palestinian society. Notably, those changes affected the status of the Basic Law and the regime's nature, and resulted in highly troubling challenges to the effective operation of state functions, including the judiciary.

This section aims to show that the West Bank regime has had different authoritarian features since its establishment in 1994. It excludes detailed explanation of the ways in which the regime was more, or less, authoritarian during these various periods because that falls beyond the scope

[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Emilio Dabed, *Toward a Constitutional Dictatorship in the West Bank?* (9 June 2016) The Nakba Files <http://nakbafiles.org/2016/06/09/toward–a–constitutional–dictatorship–in–the–west–bank/>.

of this chapter. It does, however, seek to explain how certain defects in the Basic Law, and its silence regarding crucial matters in the relationship between 'state' powers, have contributed to maintaining the state of emergency after the coup, reinforcing the authoritarian nature of the current West Bank regime, and facilitated the dominance of the executive power headed by the president over the legislature and the judiciary. This is vital, as it makes the regime's authoritarian nature more robust and as a result obstructs the independence of the judiciary in the West Bank as long as the Basic Law remains unamended.

1 *Before 2007*

Four significant incidents took place between the establishment of the Palestinian Authority in 1994 and the coup in 2007, after which the regime had different features, and the Basic Law had different status as well. These incidents were the presidential and parliamentary elections in 1996, the endorsement of the Basic Law in 2002, the promulgation of the amended Basic Law in 2003, and the second presidential elections in 2005. The analysis of the regime's nature after each incident is important because it assists understanding the circumstances in which judiciary was operating.

(a) Between 1994 and 1996

To examine the authoritarian nature of the Palestinian Authority during this period, which started with the signing of the Accords, it is important to explain how power was distributed among the bodies of the Palestinian Authority. The president was appointed by the PLO, as the Accords required, with no participation from the Palestinian people. In regard to legislative power, the Accords obliged the PLO to form a Palestinian Council and appoint its members after being accepted by the Israeli occupation forces. The Council, headed by the president, exercised temporary legislative, executive, and judicial powers. Therefore, the president had control of all powers. Additionally, he issued a presidential decree in 1995 creating State Security Courts, which lacked all necessary protection for accused litigants. They operated for eight years until abolished in 2003.[229] In regard to the constitution, there was no such document at that time, and the exercise of powers was left to the Council to decide. Those characteristics meet the definition of authoritarian regimes, in which there are no public elections, and all powers are concentrated in the hands of the president.[230] It is noteworthy that, during this

[229] Roland Friedrich, Arnold Luethold and Firas Milhem, 'The Security Sector Legislation of the Palestinian National Authority' (Geneva Centre for the Democratic Control of Armed Forces, 2008) 19.
[230] Philip Mattar, *Encyclopedia of the Palestinians* (Infobase Publishing, 2005) 288–94.

period, the regime was temporarily functioning only until the end of the interim period in 1999, but as mentioned before, the negotiations reached a deadlock and the Accords failed.

(b) Between 1996 and 2002

The first Palestinian Parliament was created in 1996 after the first public parliamentary elections.[231] In fact, the Fatah party dominated the political sphere that year, and its political opposition did not have any real chance to compete against it, especially after the withdrawal of the Hamas party and nnationalists from participation in those elections.[232] As expected, the Fatah party won the majority of seats in the Parliament.

As an example of the Regime's authoritarian practices, it used its security apparatus to largely prohibit political opponents from exercising their rights of expression and organisation on a wide, public level.[233] All this took place without having a constitution that clearly arranges the relationship between various state powers, since the Accords provided the Palestinian president with discretionary powers to organise the interaction between them.[234]

Seen from this perspective, the regime could be considered a pseudo-democracy because it was unstable, slightly institutionalised, and markedly centralised on Arafat. For example, despite Fatah having the majority and supervising most of the laws drafted in this period, the president refused to endorse many of them. Significantly, he refused to endorse two fundamental laws: the Basic Law in 2003, and the Judiciary Law in 2002, which meant that the courts system that existed prior to 1994 continued to apply.[235] Moreover, the Executive Authority continued to issue decree-laws even after the formation of the Parliament, along with other presidential decisions that amended the content of enacted laws.[236] These practices reveal the entrenched authoritarian attitudes of the regime from its early days.

(c) Between 2002 and 2003

In May 2002, Arafat finally endorsed the Basic Law and the Judiciary Law.[237] The endorsement marked the first laws to regulate the relationship between the three powers. The aim of both laws was to limit the competencies of the executive authority. Since endorsing the

[231] Dabed, 'A Constitution for a Nonstate', above n 65, 46.
[232] Robinson, 'The Growing Authoritarianism of the Arafat Regime', above n 162, 44.
[233] See Emilia Dabed, 'Decrypting the Palestinian Political Crisis: Old Strategies against New Enemies: Chile 1970–73, Palestine 2006–09' (2010) 32(2) *Arab Studies Quarterly* 82.
[234] Amundsen and Ezbidi, above n 74, 8.
[235] See Dabed, 'A Constitution for a Nonstate', above n 65, 48–9.
[236] Ibid 47.
[237] Ibid 49.

constitution was supposedly a step towards reform, the Basic Law could be classified as a semantic constitution, a type of constitution that 'provides information about the political and legal systems, but is no more than an instrument of political control and the formalisation of the existing location of political power' because the regime did not attempt to act within the framework of the Basic Law regarding provisions that require effective separation of state powers.[238] For example, the president continued to issue presidential decrees in matters already regulated by laws that the Parliament enacted. Additionally, the ministry of interior and the security apparatus blatantly interfered in judicial and legislative procedures and formed extrajudicial tribunals.[239] The Basic Law contained some provisions to protect civil and political rights but there were no defined mechanisms or institutions to impose effective restrictions on the president, which allowed him to continue interfering in legislative and judicial processes.[240] Based on this account, the regime could be classified as a hegemonic party system, because the regime's elite preserved its control after becoming more institutionalised as a result of endorsing the Basic Law.

(d) Between 2003 and 2005

Amending the Basic Law in 2003 was an important event, because it created the position of the prime minister, extended the maximum number of ministers from 19 to 24, and allowed for the limiting of the powers of the president.[241] Nevertheless, the Regime continued to be a hegemonic party system under the rule of one man, and the amendment made it even more institutionalised, especially after Arafat's death in 2004, with Abbas succeeding him in 2005.[242]

Notwithstanding the regime being a hegemonic party system, by setting conditions for continued international support for the Palestinian Authority, the United Nations pressured it to apply what the amended Basic Law required in terms of separation of powers.[243] Accordingly, classifying the amended Basic Law as a nominal constitution might be accurate, it defined as a constitution that is not lived up to in practice because of, for example, unfavourable socioeconomic conditions, but which serves an educational purpose and function, with the goal, in the near or distant future, of becoming fully 'observed by all concerned'.[244]

[238] Albert Chen, 'Constitutions, Constitutional Practice and Constitutionalism in East Asia' in Christoph Antons (ed), *Routledge Handbook of Asian Law* (Routledge, 2017) 75, 78.
[239] Dabed, 'Constitutionalism in Colonial Context', above n 89, 8–9.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] Ibid 9.
[244] Chen, above n 238, 77.

The Basic Law in this period served as a guideline for restructuring the powers in the state, and the regime started preparing for public presidential and parliamentary elections.[245]

(e) Between 2005 and 2007

In 2005, there was a minor amendment to the Basic Law that changed the terms of the President and the Parliament from being limited to the interim period. The amended terms became four years for both. Also, an Article was amended to show that new elections should take place in accordance with the new Elections Law.[246]

In 2006, Hamas won 74 out of 132 seats in the Parliament.[247] Accordingly, President Abbas nominated its electoral leader Ismael Haneyyeh to form the government. Upon succession, the new Hamas government rejected the agreements signed between the Israeli occupation forces and the PLO, since Hamas was not a member of the latter.[248] As a result, the 'Quartet' (consisting of the United States of America, the United Nations, the European Union, and Russia) refused to recognise the Hamas government and terminated their financial and administrative support.[249] Since the Palestinian Authority's economy was very weak and greatly dependant on foreign aid to cover its expenditure, the Quartet's refusal to accept the Hamas government and termination of aid caused a major fiscal deficit. Moreover, the Israeli occupation forces imprisoned over forty Parliament deputies from Hamas, which rendered the Parliament unable to constitute the legal quorum required to sit.[250] In an attempt to rectify the situation, Abbas called for a public referendum in 2006, despite not having that right according to the Basic Law, which led to Hamas accusing him of acting unconstitutionally. The referendum was not held because Hamas and Fatah agreed to form a unity government in 2007 as a better solution to reconcile the relationship between them and bring peace in the political sphere.[251] Unfortunately, this government functioned for only four months, as a military coup occurred when Hamas military forces attacked the Fatah-controlled security apparatus in Gaza.[252]

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[245] Brown, 'Evaluating Palestinian Reform', above n 55, 11.
[246] Dabed, 'A Constitution for a Nonstate', above n 65, 51.
[247] Dabed, 'Constitutionalism in Colonial Context', above n 89, 11.
[248] Ibid 12.
[249] Ibid.
[250] Dabed, 'Constitutional Making and Identity Construction in Occupied Palestine', above n 118, 7.
[251] Dabed, 'Constitutionalism in Colonial Context', above n 89, 13.
[252] *Timeline: Hamas–Fatah Conflict* (4 May 2011) Aljazeera <http://www.aljazeera.com/news/middleeast/2011/05/2011549435141647.html>.

Based on the above, the proper classification of the regime during this period is as a semi-democracy, because despite holding fair elections for all parties that genuinely represented the preferences of the public, civil and political liberties were limited by the security apparatus' oppressive treatment of political opponents, with no room for Palestinian supporters of military resistance against the occupation to advocate their principles.[253] It is noteworthy that the Quartet's termination of its aid did not affect the nature of the regime since it was an external factor, albeit one that significantly weakened the newly elected government. Concerning the constitution type during this period, the Basic Law seemed to function as a nominal constitution, because Hamas adhered to the Basic Law while forming the government and agreed with Fatah on a unity government for the Palestinian people.

2 *Between 2007 and 2017: The Coup and the Divide between the West Bank and Gaza Strip*

The unity government did not agree on how to transfer control of the security forces from the previous government, Fatah government, to the unity government, led by Hamas leader Ismael Haneyyeh. Therefore, Hamas, as the winner of 2006 elections, considered it legitimate to force previous government officials, all from Fatah, to hand over control of all security infrastructure and ongoing matters to the new government officials, mainly from Hamas.[254] Because of the Fatah officials' refusal to do so, armed conflicts occurred between the military forces of both parties in the Gaza Strip. In June 2007, Hamas military forces, working under the command of Hamas officials from the unity government, defeated Fatah forces and took control of the security apparatus in the Gaza Strip.[255]

As a reaction to this defeat,[256] Abbas immediately used Article 110(1) of the Basic Law to declare a state of emergency for thirty days in all territories controlled by the Palestinian Authority, including the Gaza Strip, on the basis that there is 'a threat to national security caused by … armed insurrection'.[257] Additionally, he issued an order that extended the jurisdiction of military courts to cover violations of public safety.[258] Before this decree, such violations were considered to fall under the jurisdiction of civil courts. Extending the military

[253] See ibid.
[254] *Timeline: Key events since 2006 Hamas election victory* (20 June 2007) Reuters <http://www.reuters.com/article/us–palestinians–timeline–idUSL1752364420070620>.
[255] Dabed, 'Constitutionalism in Colonial Context', above n 89, 13.
[256] *Presidential Decrees Issued on June – July 2007* (2016) Internet Archive <https://web.archive.org/web/20071012102508/http://jmcc.org/goodgovern/07/eng/presidentdecrees07.htm>.
[257] See Adam Entous, *Framers of Palestinian constitution challenge Abbas* (8 July 2007) Reuters <http://www.reuters.com/article/us–palestinians–law–idUSL0824203920070708>.
[258] See above n 258.

courts' jurisdiction allowed the security apparatus to hold trials of civil litigants before these courts, which conduct closed sessions and have fewer guarantees of a fair trial compared to civil courts.[259]

Three significant presidential decrees followed Abbas's declaration. The first was a decree to suspend Articles (65-67) of the Basic Law.[260] These changes related to the formation of the government and obtaining confidence from the Parliament. The second was a decree to discharge Ismael Haneyyeh from his position as a prime minister.[261] The third was a decree to form a new government that would operate during the state of emergency.[262]

Hamas in the Gaza Strip and Fatah in the West Bank did not reach an agreement during the thirty days for which an emergency officially runs. The Quartet, along with the foreign donors, accepted Abbas' 'emergency government' and resumed the provision of aid, while the Gaza Strip was put under siege by the Israeli occupation forces.[263]

The turmoil established through Abbas' decrees, the state of emergency, and the inability of the Parliament to convene, created turmoil in the Palestinian legal system. In these circumstances, law experts, governmental officials, and Parliament deputies started debating to determine what the Basic Law orders the state powers to do in such a situation, and whether the president had acted in accordance with the Basic Law when he issued his three decrees.[264]

Asem Khalil, a Palestinian constitutional jurist who observed and participated in the debate, realised that the Basic Law 'contributed to the unsettling of the debate, abandoning the parties to blind combat.'[265] In other words, the Basic Law's silence on critical topics that needed to be clearly addressed for 'state' powers to function properly was a contributing factor in the political deadlock. This is correct; for example, the debate never addressed whether the President had the right to form an 'emergency government',[266] or call for anticipated elections when the Parliament cannot convene.[267] It also never addressed the legality of governmental actions undertaken by the Hamas government in the Gaza Strip that disregarded all presidential

[259] Naser Rayyes, 'عدم مشروعية محاكمة المدنيين الفلسطينيين أمام القضاء العسكري الفلسطيني' [Illegal Trial of Palestinian Civilian Persons before Palestinian Military Courts] (Al–Haq Organisation, 2011).
[260] See above n 258.
[261] See above n 258.
[262] See above n 258.
[263] Dabed, 'Constitutionalism in Colonial Context', above n 89, 13.
[264] Asem Khalil, 'Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law' (2013) 11(1) *International Journal of Constitutional Law* 42.
[265] Ibid 44.
[266] Ibid 54.
[267] Ibid.

decrees issued by Abbas after the coup. In other words, and as Khalil concludes, 'the Basic Law was a disappointment: it appeared unable to respond to the new circumstances and political needs.'[268]

In 2009, Abbas' term as president expired, and many constitutional jurists claimed that it was unconstitutional for him to stay in his position and that presidential elections should be held.[269] They referred to Article (36) of the 2005 amendment to the Basic Law which states that:

> The term of the Presidency of the National Authority shall be four years.[270]

However, Abbas rejected those claims, and continued to rule the West Bank through presidential decrees, on the pretext that the situation in that year did not allow for new elections since the state of emergency continued.[271]

The actions by the West Bank regime after the coup lead to it being classifyed as an authoritarian regime, in which there was no role for the Parliament, and all legislative powers were in the hands of the president, exercised through presidential decrees.[272] Because executive and legislative powers were in his control, he had the ability to issue presidential decrees on matters supposed to be regulated through laws that the Parliament was authorised to enact, such as amendment of the Elections Law and Social Insurance Law, among others.[273] He issued presidential decrees that he deemed appropriate for the regime's interests, since there was no supervision of these presidential decrees from the Parliament, such as the decree-by-laws providing confidence for all governments formed after the coup.[274] Additionally, the Basic Law became for the first time a façade constitution, which 'gives no reliable information about the real governmental process and is basically a disguise that takes the appearance of true constitutions' because the regime completely disregarded it, especially with regards to ending

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[268] Ibid 55.
[269] See Ahmad Abu Amer, *Poll: 65% of Palestinians want Abbas out* (6 January 2016) The Pulse of the Middle East <http://www.al–monitor.com/pulse/originals/2016/06/palestine–65–want–abbas–resign–president.html>.
[270] *القانون الأساسي لسنة 2005 بتعديل بعض أحكام القانون الأساسي المعدل لسنة 2003* [The Basic Law of 2005 Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2005&MID=14860>.
[271] See above n 268.
[272] Dabed, 'Constitutionalism in Colonial Context', above n 89, 13.
[273] *قرار بقانون بشأن الانتخابات العامة رقم 1 لسنة 2007* [A Decree Issued by Law No. 1 of 2007 Concerning the General Elections] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2007&MID=15763>; *قانون الضمان الاجتماعي رقم 11 لسنة 2016* [Social Insurance Law No. 11 of 2016] (Palestine) <http://muqtafi.birzeit.edu/Legislation/LegCard.aspx?id=16776>.
[274] *قرار بقانون بشأن منح الثقة للحكومة رقم 8 لسنة 2013* [A Decree by Law Concerning Providing Trust for the Government] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2013&MID=16507>.

the state of emergency after the thirty day period.[275] Moreover, the Basic Law did not contain rules to manage the Palestinian legal system after the coup.[276]

This section has argued that the authoritarian growth of the West Bank regime has negatively reflected on the status of the applied Basic Law, and that the silence of the Basic Law concerning crucial matters related to the state powers has assisted the West Bank regime in maintaining its authoritarian nature and making it more robust. In particular, Abbas' reactions to the activities of the new government in the Gaza Strip have transformed the Basic Law into a dead letter in terms of its ability to limit the authority that Abbas has been exercising under the declared state of emergency since 2007. All of these factors have affected the judicial independence of courts and facilitated the West Bank regime's use of them as institutions to marginalise political opponents, mainly from Hamas.

F *Conclusion*

This chapter has argued that the judiciary under the West Bank regime has lacked genuine independence since the establishment of the Palestinian Authority, mainly due to the executive's domination of the legislative and judicial authorities and governmental officials' indifference to judicial decisions.

After providing background about the judiciary in Palestine and the Palestinian Authority, this chapter provided support for the above argument by explaining the effects of the socio-political conditions under which the judiciary operated after 1994.

Moreover, this Chapter has explained how the regime exploited the Basic Law's defects to maintain its authoritarian nature and make it more robust by demonstrating the correlation between the authoritarian growth of the regime and the change in the Basic Law's status. This change has increasingly worsened since the declaration of a 'state of emergency' after the coup in 2007.

This chapter concludes that there are have been circumstances obstructing genuine judicial independence under the current regime of the West Bank since the establishment of the Palestinian Authority, and that it has worsened because of the 'state of emergency' since 2007.

[275] Chen, above n 238.
[276] Khalil, 'Constitution–Making and State–Building', above n 106, 1.

IV THE PALESTINIAN CONSTITUTIONAL COURT: ITS CONTEXT AND *DE JURE* INDEPENDENCE

A *Introduction*

This chapter argues that the LSCC that regulates the Court violates the global standards of judicial independence derived from the sources explained in Chapter Two: the Basic Principles on the Independence of the Judiciary by the UN, the Report of the Special Rapporteur on the Independence of Judges and Lawyers, the Universal Charter of the Judges, and the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Also, this chapter demonstrates how these violations provide multiple avenues for the regime, and other institutions controlled by the executive, to unduly intervene in the Court's matters and ultimately undermine its personal, institutional, and procedural independence.

Chapter Two analysed the global context of the relationship between authoritarian regimes and their respective judiciaries. It concluded with two observations that are vital for this chapter: first, courts can be practical tools that authoritarian regimes misuse to build a façade of judicial independence and legitimise their rule; second, regarding judicial independence, and most importantly for the purposes of this chapter, *de jure* independence is the single most important factor in achieving *de facto* independence. Both observations were elaborated in Chapter Three, which discussed the judiciary in Palestine, and demonstrated how susceptible Palestinian courts, especially high courts, have been to undue interference from the regime. In this chapter, further elaboration is provided on the *de jure* independence of the Court in the Arab context, while the following chapter will analyse its *de facto* independence.

This chapter starts with an analysis of the characteristics of Arab constitutionalism, and the rationales on which constitutional review arrangements were based. Analysing these topics aims to provide a foundation for understanding the implications of this constitutionalism and their rationales, as these implications help in answering the question: why does the LSCC violate significant principles of judicial independence?

The analysis uses Egypt as a comparator to enrich the assessment of the *de jure* independence of the Constitutional Court. The reason for choosing Egypt is the considerable similarity between its Constitutional Court and that of Palestine, compared to far less similar courts such as those of Jordan, Morocco, or many Gulf states.[1] More importantly, the basis for comparison

[1] See Omar Hamzah Al–Turkomaniy, *القضاء الدستوري في فلسطين وفقاً لقانون المحكمة الدستورية العليا رقم (3) لسنة 2006* [The Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006] (Masters of Public Law, Al–Azhar University in Gaza, 2010) d, 14–32.

is that many Palestinian jurists refer to the Egyptian Law of the Supreme Constitutional Court No. 48 of 1979 as the 'historical source' of the LSCC.[2]Abdul-Azeez Saliman, who is currently the Vice President of the Egyptian Supreme Constitutional Court, was a counsellor at the Commissioner's Body in the Egyptian Supreme Constitutional Court in 2005 and participated as a senior advisor in the drafting of the LSCC.[3] Moreover, along with other Egyptian constitutional jurists, he is frequently invited by Palestinian human rights organisations to comment on judgments of the Court.[4] Therefore, a comparison with Egypt seems the most suitable choice, especially since the Egyptian Law of the Supreme Constitutional Court was promulgated twenty-seven years before that of Palestine. This long history of application and the jurisprudence that was built on it by the Egyptian Supreme Constitutional Court enriches the analysis of the LSCC.[5] Using Egypt as a comparator is limited to the text of the law governing its court, and does not extend to a consideration of how that court applied its provisions because of differences between the Egyptian Court's law and the LSCC, which will be explained in due course.

It is important to highlight two limitations to this chapter's scope. First, it does not assess the *de facto* independence of the Constitutional Court; it does not analyse how the legal provisions related to the Constitutional Court are applied in practice even when such analysis might provide further details for the assessment. It also does not investigate the implications of the West Bank regime's attempts to issue decrees-by-law that would have amended the LSCC if they were promulgated, since *de facto* assessment will be the purpose of the next two chapters. Therefore, only the content of the Basic Law and LSCC, rather than their application in practice, is addressed in this chapter. Second, the constitutional reform that followed the 'Arab Spring', which led to certain improvements to the constitutional systems of certain Arab countries besides Egypt, will not be analysed, since these improvements are not closely related to Palestine, which has not experienced a popular uprising like that which took place in some

[2] Ashraf Siyam, 'قراءة قانونية في القرار بقانون بشأن تعديل قانون المحكمة الدستورية' [A Legal–Based Reading of the Decree–by–Law Pursuing Amending the Law of the Constitutional Court] (2012) Al–Watan Voice Agency <https://pulpit.alwatanvoice.com/articles/2012/12/07/279112.html>; Abeer Dirbas, 'الرقابة القضائية على الدستورية في فلسطين' [The Judicial Review of Constitutionality in Palestine] in الحالة التشريعية في فلسطين 2007–2012[The Legislative Status in Palestine 2007–2012] (Institute of Law – Birzeit University, 2012) 285, 301 n 27.
[3] Dirbas, above n 2, 301.
[4] 'Justice and Law' (The Palestinian Center for the Independence of the Judiciary and the Legal Profession "MUSAWA", November 2016) 25; 'Justice and Law' (The Palestinian Center for the Independence of the Judiciary and the Legal Profession "MUSAWA", February 2013) 97.
[5] Dirbas, above n 2, 308.

other nearby states, but rather expanded the troubling coup that resulted in bolstering the authoritarian characteristics of the West Bank Regime.[6]

This chapter starts by explaining the characteristics of Arab constitutionalism, then its rationale and impact on constitutional review in Arab states. Further analysis is then provided of the settings of constitutional review in Palestine and Egypt. Next, an assessment of the *de jure* independence of the Constitutional Court is undertaken. Lastly, this chapter synthesises the implications of this comparison, which are critical to connect it with the analysis of constitutional courts provided in the previous chapter.

B *The Characteristics of Arab Constitutionalism*

It is widely held that Arab constitutions generally authorise their respective regimes through providing the executive with dominance over other powers, rather than limiting it through a system of checks and balances.[7] Generally, most Arab constitutions were written after either declaring independence following the fall of the Ottoman empire, or after ousting former monarchies.[8] In both circumstances, the attainment of constitutional values was grossly hindered by a desire to establish robust authoritarian regimes, as the new rulers wanted.[9]

Constitutions in most Arab region states aimed to achieve three entangled goals. The first was a declaration of their independence through affirming national sovereignty.[10] The content and timing of most Arab constitutions suggest that they were adopted to affirm the sovereignty of a new regime after revolutionary change in Arab republics or, more often, following independence after the end of monarchical rule.[11] They were less concerned with seeking international approval for the legitimacy of their sovereignty, and placed greater emphasis on addressing their constituents, in the form of royal and presidential announcements, to establish

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[6] See Asad Taffal, 'The Impact of The Arab Spring on The Palestinian Question' (2015) 8 *PrzeglD Strategiczny* 135, 136.

[7] Eva Bellin, 'The Robustness of Authoritarianism in the Middle East' (2004) 36(2) *Comparative Politics* 139, 142; Eva Bellin, 'The Road to Rule of Law in the Arab World: Comparative Insights' (Crown Center for Middle East Studies, 2014) 6 ('*The Road to Rule of Law in the Arab World*'); See generally David Gardner, *The Last Chance: The Middle East in the Balance* (London, I.B. Tauris, 2009; 'Shifting Sands: Change Is Coming to the West's Arab Allies' (2010) 396(8691) (17 July) *The Economist*; 'Waking from Its Sleep' (2010) 396(8691) (25 July) *The Economist*.

[8] Noureddine Jebnoun, Mehrdad Kia and Mimi Kirk, *Modern Middle East Authoritarianism: Roots, Ramifications, and Crisis*, Routledge Studies in Middle Eastern Politics (Taylor and Francis, 2013) 200.

[9] Alfred Stephan and Graeme B. Robertson, 'An "Arab" More Than a "Muslim" Democracy Gap' (2003) 14(3) *Journal of Democracy* 30, 30–44; Bellin, '*The Road to Rule of Law in the Arab World*', above n 7, 6–7; Clark B. Lombardi, 'Constitutions of Arab Countries in Transition: Constitutional Review and Separation of Powers' (European Institute of the Mediterranean, 2014) 126.

[10] Jebnoun, Kia and Kirk, above n 9, 3.

[11] Lisa Anderson, 'Democracy, Authoritarianism and Regime Change in the Arab World' (London School of Economics and Political Science – Middle East Centre, 2011) 3.

constitutional legitimacy for their rule.[12] This is critical, as the language of many Arab constitutions indicates that the internal audience are the target of such announcements, making the external audience secondary to it.[13] The language used to communicate with the people has laid the foundation for insignificant restraints on executive powers.[14]

The second aim was to represent political and ideological doctrines.[15] This can be observed in the content of many Arab constitutions, especially those that were adopted after reputedly revolutionary changes, such as Nasser's regime in Egypt.[16] Such constitutions contained long preambles filled with statements that uphold the regime's ideology, and uncertain provisions regarding the competences and relationships between state powers.[17] For example, early Arab constitutions following the fall of the Ottoman empire generally attempted to reassert existing ideologies and practices, while monarchical constitutions restated the legitimacy of the royal family while avoiding the upholding of societal and individual values.[18] Additionally, Arab republics usually have constitutions with garrulous assertions of unrealistic values, rendering it even harder to hold the executive power accountable to these values.[19] In short, reinforcing the legitimacy of the regimes' ideologies and political principles was sought by adopting constitutions that uphold such values.[20]

The third aim of many of these constitutions is augmenting executive authorities.[21] This is achieved by adopting constitutions that have significantly unrestricted executive competences, vague rights' protection, absence of rules to make the executive accountable to parliaments, and, most importantly, loopholes that allow rulers to escape their obligations under restrictive

[12] Stephen J. King, *The New Authoritarianism in the Middle East and North Africa, Indiana Series in Middle East Studies* (Indiana University Press, 2009) 31.
[13] Anderson, above n 12, 1, 4, 9.
[14] David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101(4) *California Law Review* 863, 925 n 179.
[15] Ibid 866 n 4.
[16] Alissa Emily Gordon, Collapse of the Arab Spring: Democratization and Regime Stability in Arab Authoritarian Regimes (Faculty of the Graduate School of Arts and Sciences, Gerogtwon University, 2010) 8–9.
[17] Mila Versteeg, 'Unpopular Constitutionalism' (2014) 89(3) *Indiana Law Journal* 1133, 1141 n 40, 1142.
[18] Jebnoun, Kia and Kirk, above n 9, 40.
[19] Mohamed Nour Farhat and Ali Sadek, 'Promoting the Rule of Law and Integrity in the Arab Countries' (The Arab Center for the Development of the Rule of law and Integrity ('ACRLI'), 2007) 7–10.
[20] Bellin, 'The Robustness of Authoritarianism in the Middle East', above n 7, 142.
[21] UNDP, *Toward Freedom in the Arab World: Arab Human Development Report 2004* (2005) 21 <http://www.arab–hdr.org/reports/2004/english/ahdr2004e.pdf?download>.

rules.[22] By adopting such constitutions, Arab regimes can legitimise their executive powers and organise them without imposing effective restriction on their practice of such powers.[23]

Those three aims represent the core characteristics of Arab constitutionalism. These constitutions display the will to establish legitimate, and mostly unrestricted executive powers as their purpose including by relying on the vagueness of constitutional provisions, especially those related to separation of powers and human rights.[24] This vagueness allowed regimes to establish rigid authoritarian systems that avoided limiting the authorities of the president and to restrict interpretations that might uphold individual rights against the regimes' interests.[25]

The importance of understanding these characteristics lies in their fundamental impact on the rationales underlying constitutional arrangements in the Arab region, particularly constitutional review and the role of constitutional courts.[26] The next section explicates these rationales and their implications.

C *The Rationales and Implications of Constitutional Review Arrangements*

As mentioned previously, the Arab region is certainly a dramatic field to study constitutional courts and their independence, because of the unprecedented, somewhat chaotic, constitutional changes since the fall of the Ottoman empire, which led to the emergence of many new Arab states.[27] The first movement of constitutional reform following the end of the Second World War mainly affected European states, and to a lesser extent, the Arab region.[28] Creating specialised constitutional courts that possess the power of judicial review to enforce the supremacy of the constitution became common features of these new states' commitment to democratic governance.[29] The first instance of constitutional reform in the Arab region occurred in Iraq in 1925, when Article 81 of the adopted constitution clearly allowed for

[22] See the examples provided by John Liolos, 'Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post–Arab Spring' (2013) 36(1) *Boston College International and Comparative Law Review* 219, 222, 223 n 22, 224 n 35, 225, 228 n 60.
[23] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) 115.
[24] Gordon, above n 16, 18.
[25] Bellin, '*The Road to Rule of Law in the Arab World*', above n 7, 6–7.
[26] Elkins, Ginsburg and Melton, above n 24, 108.
[27] Lombardi, above n 10 125; Sujit Choudhry and Katherine Glenn Bass, 'Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence' (Center for Constitutional Transitions at UNY Law and International Institute for Democracy and Electoral Assistance, 2014) 29–31.
[28] Rainer Grote, 'Constitutional Review in Arab Countries: Dawn of a New Era?' in Rainer Grote and Tilmann J. Röder (eds), *Constitutionalism, Human Rights, and Islam after the Arab Spring* (Oxford University Press, 2016) 221 ('*Constitutional Review in Arab Countries*').
[29] Ibid; Lombardi, above n 10, 125.

judicial review.[30] Two decades later, Egypt followed with a judgment of its Supreme Court that pronounced its power to perform judicial review of the constitutionality of laws, despite the Egyptian Constitution's silence on this practice, and in 1979, the first Egyptian Constitutional Court was established.[31] Nowadays, three different approaches are evolving in the Arab region: first, establishing new constitutional courts in countries that transitioned from authoritarian rule, such as Tunisia; second, restraining the competences of these courts to weaken their effect, such as in Egypt and Palestine; and third, expanding the competences of constitutional courts to meet public demands for reform and reinforce the regime's legitimacy, such as in Morocco and Jordan.[32]

Despite constitutional reform attempts in the Arab region, it is arguable that these reforms existed as mere theoretical principles, with significant lack of commitment in practice.[33] The executive powers of many states in the Arab region have been able to control their constitutional courts.[34] Frequently, they have dominated the process of appointing judges to the first bench, and changing the courts' composition in later benches by adding or removing judges as those rulers pleased, without involving any actors from the political opposition.[35] These political incursions resulted in a drastic influence on constitutional judgments, since these courts became largely dominated by the regime, and were perceived by most people as pawns of the ruling cliques.[36] Even during the Arab uprisings, some constitutional courts remained servants to the executive, by allowing political command over appointments to the bench, as in the case of Egypt.[37] In fact, what is remarkable about judicial review in Arab

[30] See Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, 2002) 148–9, 219 n 12; Grote, *'Models of Institutional Control'*, above n 32,221; Grote, '*Constitutional Review in Arab Countries*', above n 30, 677.
[31] Grote, *'Models of Institutional Control'*, above n 32, 222, 222 n 3; Grote, '*Constitutional Review in Arab Countries*', above n 30, 677; see especially Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2009) 57–89 ('*The Struggle for Constitutional Power*'); Lombardi, above n 10, 126.
[32] See Marina Ottaway, 'The New Moroccan Constitution: Real Change or More of the Same?' (Washington, D.C.: Carnegie Endowment for International Peace, 2011); Choudhry and Bass, above n 28, 15; Katerina Dalacoura, The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications (2012) 88(1*) International Affairs* 63, 66; Grote, '*Constitutional Review in Arab Countries*', above n 30, 679–80, 686–9; André Bank, 'Jordan and Morocco: Pacification through Constitutional Reform?' (German Institute for International and Security Affairs, February 2012) <https://www.swp–berlin.org/fileadmin/contents/products/research_papers/2012_RP06_ass.pdf> 31–3; Imen Gallala–Arndt, 'Constitutional Reforms in Tunisia, Egypt, Morocco and Jordan: A Comparative Assessment' (European Institute of the Mediterranean Observatory, 2012) 141; Lombardi, above n 10, 125.
[33] Grote, *Constitutional Review in Arab Countries*, above n 30, 678; Bellin, *The Road to Rule of Law in the Arab World*, above n 71; Lombardi, above n 10, 126.
[34] Grote, *Models of Institutional Control*, above n 32,226; see especially Grote, *Constitutional Review in Arab Countries*, above n 30, 678; Lombardi, above n 10, 126–7.
[35] Lombardi, above n 10, 127–9.
[36] Ibid 127, 132.
[37] See Grote, *Constitutional Review in Arab Countries*, above n 30, 690; Lombardi, above n 10, 131.

regimes is its inability to become a politically-critical practice, since in most regimes it has been restricted by certain rules, as its explained later.

The first section of this chapter showed how the adoption of constitutions in the Arab region was aimed at establishing authoritarian rule. In particular, the need to maintain authoritarian rule after creating constitutional courts was the fundamental rationale underlining the arrangements for constitutional review in countries in this region.[38] Stated otherwise, this review was regulated in a way that prevents courts from challenging the regimes' core interests.[39] The two main obstacles explained above were related to appointment of constitutional judges, and access to constitutional courts (i.e. who has standing before the court, and how a case can be brought before it).

1 *Dominance over Constitutional Appointments*

The characteristics of Arab constitutionalism explained above has resulted in significant challenges to judicial independence and accountability in the Arab region.[40] One of the two most significant challenges relates to the regime's dominance over constitutional appointments.[41] The exercise of sole control over the selection of judges to constitutional courts, excluding other actors from the political and civil society, means these courts are unlikely to act independently.[42] Relevantly, some democratic countries with constitutional courts that are relatively independent allow for significant control of the executive over constitutional appointments.[43] However, this is not the case in the Arab region because of the longstanding authoritarian characteristics of most Arab regimes, particularly in Palestine but also Egypt.[44] The absence of a significant political opposition that, if it existed, would have placed checks on the executive power, made such a dominant position easily exploitable by the regime and so undermined the independence of the courts.[45] In other words, the problem is not merely granting the executive power such authority. Rather, it is the executive's entrenched control over these courts, which is not subject to change since there are no fair, effective

[38] Lombardi, above n 10, 126–7, 132.
[39] Ibid.
[40] Bellin, '*The Road to Rule of Law in the Arab World*', above n 7, 4–5.
[41] See especially Nathalie Bernard–Maugiron, 'A Clash of Institutions: Judiciary Vs. Executive in Egypt' in Eva Bellin and Heidi E. Lane (eds), *Building Rule of Law in the Arab World: Tunisia, Egypt, and Beyond* (Lynne Rienner Publishers, 2016).
[42] See especially Grote, *'Models of Institutional Control'*, above n 32, 226; Lombardi, above n 10, 129.
[43] see Choudhry and Bass, above n 28, 56–7.
[44] Bellin, '*The Road to Rule of Law in the Arab World*', above n 71, 6–7; Gallala–Arndt, above n 34, 141; Katerina Dalacoura above n 35 63, 79; see especially Alfred Stephan and Graeme B. Robertson, above n 10, 30–44.
[45] Lombardi, above n 10, 125–7.

elections.[46] Therefore, it is critical to emphasise what was argued in Chapter Two about the range of appointment avenues that exist in many countries.[47] Any of these could plausibly be adopted in the Arab states to attenuate executive dominance in the context of authoritarian regimes.

As matters stand, ruling regimes make sure that those who are appointed as constitutional judges are allies of the regime, or at least sympathetic to their policies.[48] This has the effect of insulating the regime from any accountability to constitutional principles, since the interpretation and application of these principles is in the hands of those judges the regime appointed.[49] Second, when such judges are aware that they owe their tenure exclusively to the executive, then acting against the will of the executive becomes very risky, and inclines the judges to avoid issuing judgments that contradict the interests of the regime.[50] These two reasons show how such dominance has a significant effect in undermining the judges' independence and their willingness to oppose the regime.[51]

From a historical perspective, the Arab region has featured many applications of heavy dominance over the appointment of constitutional judges.[52] For example, Mubarak's regime in Egypt had the ability to subvert the independence of the constitutional court through presidential power over judicial appointments, particularly the appointment of the Chief Justice.[53] Another example is the judicial system of Kuwait, in which judges of the constitutional court are appointed by a High Judicial Council.[54] This council consists of members of the judiciary but, more importantly, the Minister of Justice.[55] In practice, the Minister's agreement to appoint a certain candidate is required for almost all senior judges, and since the Minister is appointed by the Emir himself, then this gives the Emir substantial influence over appointing constitutional judges.[56] The evidence of this impact can be seen in the Court's decisions: dismissing cases that are critical to the interests of the regime under the

[46] See especially Grote, *'Models of Institutional Control'*, above n 32, 226; Lombardi, above n 10, 129.
[47] See above Chapter Two (C)(2)(a).
[48] Grote, *'Models of Institutional Control'*, above n 32, 226; Lombardi, above n 10, 126–7.
[49] Hassan AbduRahim Alsayed, 'أثر تشكيل المحكمة الدستورية علي استقلال القضاء الدستوري' [The Effect of the Formation of the Constitutional Court on the Independence of the Judiciary: Study in Comparative Law and Qatari Law] (2017) 41(2) *Kuwait University Law Journal* 59, 60–1, 84 n 44.
[50] Ibid 60–1, 88 n 44.
[51] Bellin, '*The Road to Rule of Law in the Arab World*', above n 72.
[52] See especially Grote, *'Models of Institutional Control'*, above n 32, 226.
[53] Grote, '*Constitutional Review in Arab Countries*', above n 30 678; Lombardi, above n 10, 127.
[54] Alsayed, above n 51, 89.
[55] See Majid Salam Hussain, *A Critical Study of Constitutional and Judicial Development in Kuwait* (PhD Thesis, University of Newcastle, 2011).
[56] Ibid.

claim of lacking jurisdiction over such cases. Or, when dismissal is not plausible, accepting the case but ruling in favour of the regime.[57]

A more recent example is Morocco's judicial system; the 2011 Constitution, drafted by jurists that King Mohammad IV selected and subsequently had approved through a referendum, introduced a constitutional court of twelve judges.[58] Article 130 of the Constitution states that the king appoints six judges, and the parliament appoints the other six, with a two-thirds majority vote, for three judges selected by each house (i.e. Representatives and Councillors).[59] By securing control over half the bench, the king can be assured that no judgment will be made that he disagrees with.[60]

Moreover, in one of the Levant countries, Syria, judicial appointment represents the absolute executive control over the constitutional court; Articles 141 and 143 authorise the president to single-handedly appoint all judges for four year periods to the Court, renewable at the will of the president.[61] This appointment process emulates Articles 139 and 141 of the previous 1973 Syrian Constitution.[62] Similarly, in Jordan, the king appoints the entire constitutional bench.[63] This made constitutional judges in both countries entirely dependent on the President's will in order to continue their tenure, which makes it harder for them to decide independently on cases.[64]

In summary, across the Arab region, most regimes maintained a dominant position over appointments to constitutional courts, resulting in a significant obstacle to the independence of these courts or to duly rule against the favour of these regimes, since the appointment of judges, and often their renewal, are at the discretion of the regime.[65]

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[57] Ibid.
[58] Grote, '*Constitutional Review in Arab Countries*', above n 30 687; see Bank, above n 34, 32; Gallala–Arndt, above n 34, 142–3.
[59] Grote, '*Constitutional Review in Arab Countries*', above n 30 687; Gallala–Arndt, above n 34, 142–3; Lombardi, above n 10, 128.
[60] See Marina Ottaway, 'The New Moroccan Constitution: Real Change or More of the Same?' (Carnegie Endowment for International Peace, 20 June 2011) <http://carnegieendowment.org/2011/06/20/new–moroccan–constitution–real–change–or–more–of–same–pub–44731>; Gallala–Arndt, above n 34, 142–3; Lombardi, above n 10, 128.
[61] Alessandro Bacci, 'The System of Justice in Syria: Current Organization and Future Challenges', 5 <http://www.daoonline.info/public/foto/BACCI%20–%20The%20System%20Of%20Justice%20In%20Syria.pdf>.
[62] Ibid.
[63] Lombardi, above n 10, 128.
[64] Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, 2002)150; Lombardi, above n 10, 128.
[65] Choudhry and Bass, above n 28, 10.

2 *Manipulation of the Composition of the Courts*

This challenge differs from the challenge of dominance over constitutional appointments, as it is related to the composition of the bench after the first appointment. The impact of the first challenge can be observed largely in the first appointments and initial composition of the court, whereas the second mainly impacts later appointments and changes in the bench. Manipulation becomes increasingly likely in the absence of firm rules that set the number of judges, and also when the regime can easily amend such rules.[66] In both cases, regimes can change the court's composition more or less at will, appointing more loyal judges to the bench. By doing so, regimes can be assured that the majority of judges support their interests, and will also be confident that they can restrain any emerging independence of the judges.[67]

For example, under Mubarak's regime, the Egyptian Constitutional Court issued a judgment that declared the election law, which the regime drafted, unconstitutional.[68] As a reaction to this judgment, Mubarak exploited ambiguity in the rules of judicial appointment by assigning the position of Chief Justice to a loyal judge.[69] After his appointment, the Chief Justice appointed another five loyal judges to the constitutional bench, resulting in changing the composition of the court so to have nineteen judges on the bench.[70] The outcome of this change was that the Court was transformed from a relatively independent institution, that exercised real checks on the regime, to become one largely under the regime's control.[71]

Before concluding this section, it is important to distinguish between a regime's manipulation of the composition of the courts and altering that composition through constitutionally-legitimate avenues, because considering both cases to be similar leads to a false conclusion: considering legitimate constitutional amendments to be an act of manipulation.[72] The Constitution of 2012 is an example of a legitimate constitutional change in Egypt. It was approved by a constitutional referendum after the ousting of Mubarak, and it decreased the number of constitutional judges from nineteen to eleven.[73] The result of that decrease was to dismiss the youngest eight judges as they probably had the least experience. In this case, the dismissal was probably not targeted at dismissing 'disloyal' judges, but was the result of

[66] Al–Turkomaniy, above n 1, 62–5.
[67] Ibid 49.
[68] See Bellin, '*The Road to Rule of Law in the Arab World*', above n 75; Lombardi, above n 10, 128.
[69] See below (D)(2); Bellin, '*The Road to Rule of Law in the Arab World*', above n 7, 5.
[70] Choudhry and Bass, above n 28, 30; Moustafa, '*The Struggle for Constitutional Power*', above n 33, 198–9;
[71] Ibid 198–9.
[72] Grote, '*Constitutional Review in Arab Countries*', above n 30, 682; Grote, *'Models of Institutional Control'*, above n 32, 227.
[73] Choudhry and Bass, above n 28, 30.

amending the constitutional provisions related to the Court's composition in a legitimate manner.[74] The claim made by courts that the dismissal was to oust a junior judge who was a vociferous opponent of the regime is unconvincing.[75]

On the whole, these two challenges — the regime's dominance over constitutional appointments and manipulation of the composition of courts — are major implications of the underlying culture of authoritarianism in the Arab region. Additionally, both practices suggest that it is highly unlikely to find a collaborative process for appointing constitutional judges in these regimes, in which no single state power has dominance over the other.

3 *Restricting Access to Courts*

Since it was preferable for Arab states to establish centralised, rather than decentralised, constitutional review systems, cautious regulation of access and standing rules was necessary to prevent courts from challenging regimes' core interests.[76] The field for challenging legislative and executive actions on constitutional grounds is much wider in a decentralised review system than in a system with a specialised court. Where there is only one court that decides on constitutional matters, restricting access to it would be sufficient to guarantee that whoever brings a case against the regime has very little chance to win a decision that would significantly impinge on the regime's interests.[77]

Because of the authoritarian characteristics of most states in the Arab region, legislative powers have generally been weak and subordinate to the will of the regime, and it is improbable that parliaments would enact laws that restrict executive power, let alone bring a case to the court that would oppose the interests of the regime.[78] By confining access — that is, the right to submit constitutional questions to the constitutional court — to designated officials, such as the president, a certain number of parliamentarians, or specific ministers, most constitutional cases will have negligible impact on the regimes' interests.[79]

[74] Cf Grote, '*Constitutional Review in Arab Countries*', above n 30, 682; Cf Lombardi, above n 10, 131.
[75] Sarah El–Deeb, '*Former Judge Challenges Egypt's Constitution'* (2013) The Washington Times http://www.washingtontimes.com/news/2013/jan/8/former–judge–challenges–egypts–constitution/ ; Choudhry and Bass, above n 28, 30.
[76] Grote, *'Models of Institutional Control'*, above n 32, 237–8.
[77] Ibid.
[78] Grote, '*Constitutional Review in Arab Countries*', above n 30, 690; ibid.238; Lombardi, above n 10, 132.
[79] Grote, '*Constitutional Review in Arab Countries*', above n 30, 690; Lombardi, above n 10, 132; Grote, *'Models of Institutional Control'*, above n 32, 237–238.

Referral of concrete legal disputes from ordinary courts, whenever a constitutional violation is claimed, are not solely dependent on the will of the litigants.[80] Generally, a judge in an ordinary court is authorised to assess the seriousness of such a claim.[81] It is at his discretion to decide whether the matter is frivolous or worthy of being referred to the constitutional court.[82] With no robust criteria to determine what is frivolous and what is not, cases that are critical might never reach the court.[83] A different version of this referral procedure is found in Kuwait; if an ordinary judge declines a request to refer the dispute to the constitutional court, the plaintiff can appeal to a committee composed of constitutional judges who are authorised to examine such constitutional objections.[84] However, as could have been anticipated, the committee has never referred an appeal to the court.[85] This shows that sometimes the judiciary itself might play a role in obstructing access to the court.

D *Settings of Constitutional Review in Palestine and Egypt*

1 *Palestine's Distinctiveness*

Chapter Two provided a thorough analysis of the socio-political factors that have negatively affected the Palestinian judiciary since the establishment of the Palestinian Authority in 1993. These included the Palestinian Authority members' mentality, shortcomings in the legislative, executive, and judicial authorities, the executive authority's interference in judicial procedures, Palestinian military groups, the nature of Palestinian society, Palestinian NGOs, foreign donors, and lastly the Israeli occupation forces.[86] Collectively, these conditions have given rise to the unique authoritarian character of the West Bank regime. This has different implications on the status of the Basic Law and the political system. It is important to analyse the two main factors that still undermine the Court's independence.

(a)The Deficiency of the Basic Law

The Basic Law could not provide solutions for the chaotic situation after the coup of 2007. The Basic Law was adopted in 2003, only three years before the parliamentary elections that led to the coup. The content of Basic Law was mainly based on the basic aims of adopting a

[80] Grote, *'Models of Institutional Control'*, above n 32, 237–8; Grote, '*Constitutional Review in Arab Countries*', above n 30, 690.
[81] See especially ibid 226.
[82] Ibid 232.
[83] Grote, '*Constitutional Review in Arab Countries*', above n 30, 690.
[84] Choudhry and Bass, above n 28, 29; see Hussain, above n 57.
[85] Choudhry and Bass, above n 28, 29; see Hussain, above n 57.
[86] Gabriel J. Chin and Randy Wagner, 'The Tyranny of the Minority: Jim Crow and the Counter–Majoritarian Difficulty' (2008) 43(1) *Harvard Civil Rights–Civil Liberties Law Review* 65.

constitution in the Arab world, which, as mentioned, are declaring the sovereignty of the regime, legitimatising its ideological doctrine, and augmenting executive power. In the Palestinian context, the implications of the third basic aim were the most apparent. Abbas' decrees to suspend certain provisions in the Basic Law, declare a state of emergency, and appointing an emergency government, created a chaotic constitutional status for which that the Basic Law itself was unable to provide a solution. The Basic Law was empty of provisions that declared whether Abbas had the right to issue any of the mentioned decrees. Moreover, it neither addressed whether Abbas could call for anticipated elections when the Parliament could not convene, nor it did adress the legality of governmental actions undertaken by the Hamas government in the Gaza Strip that disregarded all presidential decrees issued by Abbas after the coup. Until now the Constitutional Court has not participated by providing any solutions, thus allowing the regime to continue its authoritarian practices from the time of the coup — in particular, by issuing decrees that affected the composition of the Constitutional Court as it will be shown below.

(b)The Political Context of Promulgating the Law of the Supreme Constitutional Court

The second factor that impinged on the functioning of the Constitutional Court is the political context in which the LSCC was promulgated. It is critical to understand the circumstances surrounding that process, particularly during the restlessness of the 2006 elections. Without this understanding, it would probably be hard to understand why certain significant disjunctions exist between the Basic Law and the LSCC, especially disjunctions that harden the authoritarian characteristics of the Palestinian Regime, as it will be shown later in the fourth section of this chapter.

After searching for a coherent account concerning the LSCC, its drafting, and readings in the Parliament, the author found the following events to be the most notable, which had their effect on the final version of the LSCC.[87] In December 2014, the Parliament, at that time dominated by the Fatah party, assembled to discuss the first draft of the LSCC.[88] On 23 January 2016, two days before the election, Abbas purported to approve the draft. However, the Parliament realised, by mistake, that what Abbas had received was not the draft sent to him; thus, the Parliament held a second reading on the next day, which resulted in referring a second draft of

[87] See Dirbas, above n 2, 301, 306, 321; Mahmoud Abu Sawi, 'الرقابة على دستورية القوانين في فلسطين [The Judicial Review of Laws' Constitutionality in Palestine]' (The Arab Association of Constitutional Law, 2009) 7 ('*The Judicial Review of Laws' Constitutionality in Palestine*').
[88] 'Parliament Legal Committee discusses High Court Law', *Maan News Agency (Palestine)* 5 December 2005.

the LSCC being sent to Abbas for comment.[89] After Hamas won the elections, Abbas secretly returned the amended second draft to former Parliament members to pass it. On 13 February 2016, the second draft was passed by 41 votes out of 44 with one abstention.[90] In that session, the 132 members of the newly-elected Parliament, with 74 representatives of the Hamas party, attended as observers and pledged to annul the LSCC.[91] Immediately in the following session, the first session for the newly-elected Parliament, 69 out of 120 attending members voted to annul the LSCC, arguing that the last session of the previous Parliament did not meet the required quorum, therefore the promulgation was illegal.[92] The newly-elected Parliament responded by submitting the merits of their last session, stating that the quorum was met. However, Hamas members claimed that footage of that session proves those claims incorrect, showing the number of attending members to be less than the quorum.[93]

The Palestinian Commission of Human Rights, along with other human rights organisations, criticised the promulgation of the LSCC on both constitutional and procedural grounds. Concerning the inconsistency between the LSCC and the Basic Law, the Commission argued that Article 5 of the LSCC authorised the president to appoint judges to the Constitutional Court after consulting the Judicial Council, which indicates that such consultancy is not binding. This Article contradicts the Basic Law, which asserts in Article 99 that the appointment of Constitutional Court judges must be in accordance with the Judicial Authority Law, which in turn obliges the president under Article 183 to fill judicial vacancies, including those created after separating previously-merged judicial departments, by a presidential order after the nomination of the Judicial Council. This indicates that the president is obliged to act upon the Judicial Council nomination in this case, as opposed simply requesting a consultation.[94]

Moreover, Article 24 of the LSCC, which was amended at the last minute by the president, narrowed the jurisdiction of the Constitutional Court by excluding presidential orders, ministerial decisions, and regulations from the jurisdiction of the Constitutional Court. This narrowing violates Article 103(1) of the Basic Law, which sets out those matters in the

[89] Arnon Regular, *[Palestinian Authority] Parliament Expands Powers of Abbas in Final Session* (2006) Daily Alert News <http://www.dailyalert.org/rss/Mainissues.php?id=21764>.
[90] 'The Status of Palestinian Citizens' Rights During 2006' (The Palestinian Independent Commission for Citizens' Rights, 2007) 84 n 106.
[91] *Hamas–Fatah Row Goes before Court* (2006) BBC News <http://news.bbc.co.uk/1/hi/world/middle_east/4781296.stm>.
[92] Tonje Viken, *Struggles for Power and Unity: Constitutional Designs in the Palestinian Authority* (Masters Degree in Middle Eastern and North–African Studies Thesis, University of Oslo, 2008) 85.
[93] Ibid.
[94] 'The Status of Palestinian Citizens' Rights During 2006', above n 92, 84 n 106.

jurisdiction of the Constitutional Court. Therefore, the last version of the LSCC, which was sent to the president after Hamas was declared the winner of the elections, contravenes the Basic Law. Lastly, concerning the procedural basis for promulgating the LSCC, the timing of the submission of the last draft to the President indicates an attempt to provide the president with substantial control over the Constitutional Court, before Hamas dominated the Parliament.[95]

Despite all this criticism, the former Parliament members refused to withdraw the LSCC. To resolve this conflict, Hamas members referred the matter to the High Court sitting as the Constitutional Court, which upheld the validity of the LSCC, pronouncing that the current Parliament has no authority to repeal resolutions of the previous Parliament.[96]

In summary, the deficiency of the Basic Law and the context in which the LSCC was promulgated have a fundamental impact on two issues: how to explain the diversion of the LSCC from the scope specified in the Basic Law, and what gave rise to the disharmony between the Basic Law and the LSCC? And why does the LSCC contains provisions that violate judicial independence principles?

2 *Constitutional Review in Egypt*

The first Constitutional Court in Egypt was created in 1971, with the adoption of the new constitution in that year. It started operation after the implementation of law No. 48 of 1979. The creation of this court was a response to external and internal pressure to establish a court to replace the Egyptian Supreme Court, since that court was established in 1969 by a presidential decree by President Nasser, who also solely appointed all of its judges, and accordingly, it seemed loyal to his regime. What made that loyalty more evident is the record of that Supreme Court; none of its 300 rulings ever significantly constrained Nasser's regime.[97] Thus, activists within civil society and the legal profession in Egypt called for reforms to promote judicial independence, particularly the establishment of a new constitutional court. Establishing the Court was also preferred by President Sadat's regime, because such a court would bolster the regime's claims that it provided credible commitments to the protection of

[95] Ibid.
[96] 'Palestinian court annuls Hamas–dominant parliament's decision to cancel previous legislation', *People's Daily* (online), 19 December 2006 <http://en.people.cn/200612/19/print20061219_334075.html>.
[97] Mahmoud Hamad, When the Gavel Speaks: Judicial Politics in Modern Egypt (University of Utah, 2008) 20; See Choudhry and Bass, above n 28, 57–9.

private property, a commitment undermined by communist practices, mainly expropriations, by Nasser's regime.[98]

Nevertheless, the court's law, drafted by party loyalists of Sadat's regime, did not deprive the then-president, Anwar Sadat, of control over appointment of judges. According to the 1971 Constitution, he has the authority to appoint the court's Chief Justice. Civil activists predicted this because the government at that time was autocratic, and thus there was little hope that various political actors would be able to participate in appointing judges to the Court.

However, Sadat informally allowed for a significant involvement of the judiciary in appointing the judges, to foster a sense of judicial investment in the court's bench, and responsibility to accept its decisions. For the first twelve years of the court's life, Sadat promoted the most senior judge on the court's bench to be Chief Justice. For other members of the Court, the Law stated that the president must choose one of two nominees: a nominee proposed by the Chief justice, and another by the General Assembly of the court (which consists of the court's members). However, the informal practice was to nominate the same person, and as a result guarantee that person's appointment by the President. The effect of this informal practice was to make the court more self-perpetuating, and as a result reduce executive control.

The rulings of the Egyptian Constitutional Court also indicated a significant degree of independence from the regime, as it issued many decisions restricting some of its more minor authoritarian practices and upholding individual rights and freedoms. However, the court never challenged the core interests of the regime, particularly its politically-oppressive and autocratic actions.[99]

In the late 1990s, the Mubarak regime terminated the informal practice of appointing the Chief Justice by promoting the most senior judge to fill that position. The reason behind this decision was rulings of the Court that curtailed the regime's powers over matters that Mubarak could not tolerate: operations of Egyptian NGOs, tax and electoral laws, and freedom of press. Instead, Mubarak appointed a loyal judge as the Chief Justice. Since this position is influential, as the Chief Justice supervises the decision-writing process and controls the Court's docket, appointing someone who is loyal to the regime was a significant infringement on the court's independence. An immediate decision by the newly-appointed Chief Justice was to increase

[98] Mahmoud M. Hamad, 'Politics of Judicial Selection in Egypt' in Peter H. Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 267 ('*Politics of Judicial Selection in Egypt*'); Tamir Moustafa, 'Law Versus the State: The Judicialization of Politics in Egypt' (2003) 28(4) *Law and Social Inquiry* 885–93 ('*Law Versus the State*').
[99] Moustafa, *Law Versus the State*, above n 100, 893–4.

the number of the court's judges by 50 per cent. This was possible, because the court's law does not set a fixed number of judges for the court. This increase allowed the Chief Justice to nominate judges who are also loyal to the regime, thus providing Mubarak with control over the appointment process so as to gradually create a court that would not challenge his regime's core interests.

Mubarak and the Chief Justice's behaviour provide evidence for the vulnerability of the Egyptian court to executive interference, as this interference is adherent to the legal provisions that regulate the Court's composition. Also, these practices show that what seems as independent practices of the Court in previous times were entirely reliant on the executive's disposition.[100]

After the overthrow of Mubarak in 2011, the Supreme Council of the Armed Forces took control of state organs, including the Constitutional Court.[101] Importantly, the court benefited from the political changes in the country and successfully pressured the Council to issue a decree to return to a system of appointing the most senior judge as chief justice.[102] During the Council's rule, it issued three pieces of legislation that maintained the Court's jurisdiction over constitutional disputes: the Constitutional Declaration of 30 March 2011, [103] the 2012 Constitution of Egypt,[104] and the Constitutional Declaration of 8 July 2013.[105]

After the election of President Morsi in 2012, the court continued to function under his rule, then under the Interim Authority appointed by the Supreme Council of Armed Forces following the ousting of Morsi in 2013.[106] Now, the court functions under President Sisi's rule and the 2014 Constitution refers to a forthcoming law for regulating procedures of appointment to the Constitutional Court. [107] Since this law has not yet been promulgated, the Law of the Constitutional Court No. 49 of 1979 is still applied, as amended, including by the Decree made by the Supreme Council of Armed Forces in July 2011, as will be discussed further below.

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[100] Moustafa, *The Struggle for Constitutional Power*, above n 33, 198–201; Mahmoud M. Hamad, '*Politics of Judicial Selection in Egypt*', above n 100, 271–4.
[101] Katerina Dalacoura above n 35, 64–5; see Gallala–Arndt, above n 34, 143–4.
[102] See Katerina Dalacoura above n 35 65; see Gallala–Arndt, above n 34, 143–4; Lombardi, above n 10, 130.
[103] The *Constitutional Declaration of 2011* (Egypt) art 49 [World Intellectual Property Organisation's trans, http://www.wipo.int/wipolex/en/text.jsp?file_id=297156].
[104] *The Constitution of 2012*, art 175 [World Intellectual Property Organisation's trans, <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg047en.pdf>.]
[105] *The Constitutional Declaration of 2013* (Egypt), art 18 [World Intellectual Property Organisation's trans, <http://www.wipo.int/wipolex/en/text.jsp?file_id=297858>.].
[106] Lombardi, above n 10, 128.
[107] Ibid 128.

E *Assessing the De Jure Independence of the Palestinian Constitutional Court*

After outlining the characteristics of Arab constitutionalism, and its impact on the rationales that underlined the settings of constitutional review in Arab countries, especially Palestine and Egypt, this section provides an appraisal of the consistency between the provisions of the LSCC and the principles of judicial independence outlined in the previous chapter, with comparison to relevant provisions in Egypt's legal system. To do so, this section is divided into parts that deal with separate aspects of the court's independence: its composition, judicial tenure, jurisdiction, access, effectiveness, and other administrative matters. To various degrees, all these aspects affect the independence of the Constitutional Court, whether personal, institutional, or procedural, as explained in the previous chapter. For each of these items the relevant provisions are stated, followed by an analysis of these provisions, which in turn includes a comparison of these provisions with similar provisions in the Egyptian legal system, and an assessment of the consistency between these relevant provisions and the principles of judicial independence explained before.

1 *Composition of the Constitutional Court*

Article 2 of the LSCC states that:

> The Court shall be comprised of a President and a deputy for him and seven judges. The Court shall convene before a panel of a president and six judges at least and shall issue it decisions with a majority vote.

This Article declares that the Constitutional Court consists of nine judges, which constitute the General Assembly of the Constitutional Court, and has a quorum of seven. The General Assembly acts as the administrative entity of this Court. Its competences are defined in Articles 8-10 of this law, and cover administrative matters related to the tenure of judges, especially detention for committing crimes and termination.[108]

This is a reasonable composition. A fixed number of judges supports the court's independence, as it prevents the regime from adding new, biased judges to the bench, making it easier to issue favourable rulings, as explained before.[109]

Compared to Egypt, the Palestinian Constitutional Court is more independent in this regard. Article 193 of the Egyptian Constitution of 2014 states that:

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[108] *LSCC*.
[109] Al–Turkomaniy, above n 1, 47; Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 10.

> The Court shall be composed of a President and a sufficient number of deputies to the President … The foregoing shall be regulated by Law.[110]

According to this Article, there is no specified number of judges for the Egyptian court, and the law that regulates this court's composition has not been issued yet. It is noteworthy that in the suspended constitution of 2012, the Court was composed of eleven judges, indicating that having a fixed number of judges was disagreeable to the Egyptian regime.[111] Leaving the number of judges open by using the term 'sufficient' provides the regime with significant control over the composition of the court, which in turn impinges on its independence.[112]

(a) Authority to Appoint Members to the Court

Article 5 of the LSCC states that:

> 1) The first formation of the Court shall be conducted by the appointment of the President of the Court and its judges by a decision from the President of the Palestinian National Authority, in consultation with the High Judicial Council and the Minister of Justice.
> 2) The President and judges of the Court shall be appointed by a decision from the President of the Palestinian National Authority based upon a recommendation from the General Assembly of the Supreme Constitutional Court.

Article 5 seems somewhat poorly-drafted, for three main reasons. First, there is an unjustified imbalance between the first and later appointment procedures, as the LSCC requires 'consultation' with the Judicial Council and the Minister of Justice for the first appointment, which the President of the Palestinian Authority is not obliged to consider.[113] In contrast, later appointments must be 'based upon a recommendation' from the General Assembly, which asserts the President's obligation to choose from potential judges of the Constitutional Court that the General Assembly has recommended. This undermines a legitimate, balanced, and independent Constitutional Court in the first composition of its General Assembly, because the President has complete authority to control the first composition of the Constitutional Court, with no limitations from other powers such as the Parliament or the Judicial Council.[114] This control, particularly in the context of authoritarian regimes, has been heavily criticised,[115] and

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[110] *The Constitution of 2014* (Egypt) [Constitute Projects' trans, https://www.constituteproject.org/constitution/Egypt_2014.pdf].
[111] See *The Constitution of 2012*, art 175 [World Intellectual Property Organisation's trans, <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg047en.pdf]>.
[112] Al–Turkomaniy, above n 1, 47.
[113] Dirbas, above n 2, 305; 'Opinion on the Law on the High Constitutional Court of the Palestinian National Authority' (European commission for democracy through law (Venice commission), 2009), 4 ('*Venice Commission*').
[114] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 11.
[115] Abeer Dirbas 'الرقابة القضائية على الدستورية في فلسطين [Judicial Review of Constitutionality in Palestine]' in الحالة التشريعية في فلسطين 2007–2012 [The Legislative Status in Palestine 2007–2012] (Institute of Law – Birzeit University, 2012) 285, 306.

there are almost no credible arguments that would support it.[116] Akkas is correct when he argues that:

> The principle of judicial independence requires that the power of appointment of judges should not be vested exclusively in the executive government. This is because if the executive government enjoys an exclusive privilege in selecting judges, a risk always exists of misuse of the power of appointment. Sometimes political or other considerations may prevail over the merit criteria for appointments. Thus, by facilitating nepotism and political favouritism, the quality of the judiciary might be weakened. Judges who obtain their position as a result of executive discretion or favour could be obligated to serve the interests of their appointing authority in a manner which might undermine judicial independence.[117]

Additionally, significant doubts can also be raised regarding the Judicial Council's involvement,[118] because all of its members are, by default, members of the Supreme Court, which is bound by Constitutional Court judgments.[119] The Judicial Council, as an administrative institution, lacks independence from the Constitutional Court itself.[120] In the Palestinian regime, this lack of independence is problematic, given the authoritarian characteristics of that regime, which can negatively influence the consultation of the Judicial Council.[121]

Article 5, which gives the president exclusive authority to appoint judges, patently violates almost all provisions related to the court's independence, as explained in the previous chapter in regard to appointments.[122] It violates the agreed-upon content of Article 10 of the Basic Principles of Judical Independence, which asserts that '[a]ny method of judicial selection shall safeguard against judicial appointments for unsuitable motives' and that '[i]n the selection of judges, there shall be no discrimination against a person on the grounds of … political or other opinion'.[123]

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[116] Venice Commission, above n 114, 4.
[117] Sarkar Ali Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) 16(2) *Bond Law Review* 200, 203.
[118] 'A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority' (The International Bar Association's Human Rights Institute, 2009), 8 ('*A Comparative Analysis of the LSCC*').
[119] Dirbas, above n 2, 296.
[120] See Yousef Shindi, 'استقلال القاضي: دراسة مقارنة [The Independence of the Judge: A Comparative Study]' (Institute of Law – Birzeit University, 2010), 22.
[121] Mahmoud Abu Sawi, *الفصل بين السلطات واستقلال القضاء في فلسطين: تنازع الصلاحيات في قطاع العدالة* [Separation of Powers and the Independence of the Judiciary in Palestine: Conflict of Competencies in the Justice Sector] (Masters of Public Law Thesis, Birzeit University, 2015), 136.
[122] See Chapter 3.
[123] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 10 ('Basic Principles of Judicial Independence').

Also, by making appointments not sufficiently balanced between state powers, Article 5 of the LSCC allows the President to single-handedly appoint judges who are loyal to the regime.[124] Loyalty to the regime undermines the independence of courts .[125] Furthermore, Article 5 allows the President to discriminate against judges with opposing political views, which, in turn, leads to a violation of Article 10 mentioned above.[126] In short, Article 5 is problematic, not least because of the authoritarian character of the regime that fails to commit to the rule-of-law principle.[127]

Notably, and a matter that should not be considered trivial in the Palestinian authoritarian context, the LSCC does not require the public to be informed of the outcome of consultations between the president, the Judicial Council, and the minister of justice.[128] Not informing the public highlights the non-transparent nature of communications between the state officials and the public, which also threatens the Constitutional Court's independence, because there is no way of verifying the president's claim that his appointment decisions were made according to such consultations.[129] Therefore, the president, who is not customarily restrained from authoritarian practices and does not fear attracting political dissent, may easily disregard such consultations and appoint judges who are loyal to the regime.[130]

The second reason, which builds on the previous reason, as an elaboration of it, is the unequal balance between the executive and judicial powers in appointing the first members of the Constitutional Court, as the president has the overwhelming power to choose them, while the Judicial Council's role is limited to provide a non-binding consultation with the President.[131] Notably, recommendations concerning first appointments are presented by the Judicial Council and the minister of justice. This unequal balance raises doubts regarding the suitability of involving the minister as a check on the president's power, since the president is the head of the entire executive authority.[132] In simple terms, the minister lacks independence from the president.

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[124] Dirbas, above n 2, 307.
[125] Katherine Glenn Bass and Sujit Choudhry, 'Constitutional Review in New Democracies' (International IDEA, 2013) 8.
[126] Shindi, above n 122, 11.
[127] Dirbas, above n 2, 307.
[128] Venice Commission, above n 114, 4.
[129] Shindi, above n 122, 19–20, 50.
[130] Shindi, above n 122, 18.
[131] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 11
[132] 'واقع الاستقلال المؤسسي للقضاء في القانون الفلسطيني والتشريعات الدولية' [The Status of Institutional Independence of the Judiciary in the Palestinian Law and International Legislation] (Al–Mezan Center for Human Rights, 2015), 10 ('The Status of Institutional Independence of the Palestinian Judiciary').

Lastly, and, again, as elaboration of the first reason, the LSCC is devoid of any requirements that guarantees a transparent, balanced process of appointing judges.[133] To elaborate, by examining the balance between state powers, the president of the Palestinian Authority is the sole controller of initial appointments, which is definitely a threat to the independence of the Constitutional Court.[134] Global and Arab practices of constitutional court appointments establish that the involvement of other state powers is critical to ensure the legitimacy of constitutional courts.[135]

Moreover, what makes the effective involvement of other state powers necessary is the fear of creating a self-perpetuating elite in the Constitutional Court if all subsequent appointments are controlled by the General Assembly, as Article 5(2) indicates.[136] The General Assembly might establish an exclusive clique, which would result in weakening public trust in the Constitutional Court.[137]

Compared to Egypt, the Palestinian Constitutional Court is less independent in regard to appointment procedures for the Constitutional Court. The Council of Armed Forces Decree of July 2011 states that the President of Egypt, after consulting the High Council of Judicial Commissions, appoints all the first members of the Court, including its Chief Justice. For later appointments, the General Assembly, which is also composed of all members of the Court, selects the Chief Justice from its three most senior members, then the president formally appoints him.[138] Concerning other appointments, the decree requires the president to give precedence to the Court's Commissioner's Body, to select between two nominees for each chair, one proposed by the Chief Justice, and the other proposed by the rest of the General Assembly.

According to this comparison, first appointments in both regimes violate principles of judicial independence, and as explained above, there are almost no good reasons that would justify adopting such avenues of appointment, particularly in authoritarian regimes such as Palestine and Egypt.[139] By contrast, the rules for later appointments appear to be consistent with rules

[133] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 11.
[134] Dirbas, above n 2, 305–7.
[135] See above Chapter Two (C)(2)(a).
[136] *A Comparative Analysis of the LSCC*, above n 120, 9
[137] See above Chapter Two (C)(2)(a).
[138] See Choudhry and Bass, above n 28.
[139] The Status of Institutional Independence of the Palestinian Judiciary, above n 134, 21.

that require the participation of non-executive powers, here the judiciary, in selecting candidates to the Constitutional Court.[140]

(b)The Provisional Committee of the Court

Another Committee that the LSCC establishes that has an impact on the independence of the Constitutional Court, is the Provisional Committee. Article 11(1) of the LSCC states that:

> By a decision issued by the General Assembly with the absolute majority, a provisional committee shall be established under the presidency of the President of the Court and membership of two or more members. It shall assume the powers of the General Assembly in the urgent matters during the judicial vacation at the Court as well as the other functions assigned to it by the General Assembly.

This Committee consists of 'two or more' judges, and it is supposed to deal with urgent matters, assuming all the powers of the General Assembly. It can exercise all the powers of the General Assembly during the judicial vacation and when the General Assembly is not in session. Considering the peculiar situation of the Palestinian Authority, and the fragmentation between the West Bank and Gaza Strip caused by Israeli control over borders of both regions, it is understandable that the LSCC would establish the Provisional Committee.

Importantly, however, the LSCC does not state how those 'two or more' members are selected, and the context does not provide any indication about that selection process. Rather, what is clear are the permanent characteristics of this Committee, along with all the powers it assumes. This situation could undermine the independence of the Constitutional Court, because this Committee might deliberately exclude other members of the Constitutional Court from the decision-making process and, more importantly, unfairly dismiss dissident judges while ordering disciplinary procedures against them.[141] This leads to the conclusion that establishing this Committee would be violating Article 8 of the Universal Charter of the Judges, which affirms that a judge cannot be 'suspended unless by a decision in the proper disciplinary procedure'.[142] Having a Committee with no clear selection criteria leaves room for the regime to select those who are more likely to issue a favourable ruling against the detained judge, which is an unsuitable displinary procedure.[143]

[140] Dirbas, above n 2, 305–7.
[141] See Al–Turkomaniy, above n 1, 60; Venice Commission, above n 114, 5.
[142] *The Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999 art 8.*
[143] See Venice Commission, above n 114, 5.

In Egypt, Article 10 of the 1979 Law also established a similar Committee, called the Committee of Provisional Affairs. It has an identical composition to that of the Palestinian Constitutional Court. Thus, the same criticims apply to the Egyptian Committee.

2 *Judicial Tenure of the Constitutional Court*

(a) Qualifications for Judges

Article 4 of the LSCC states that:

> Any person to be appointed as a member in the Court shall be required to meet the general conditions necessary to assume the judiciary in pursuance of the provisions of the Law of the Judicial Authority, provided that he is not less than 40 years of age and to be from among the following categories:
>
> 1. Present or former members of the Supreme Court who have spent in their functions at least five consecutive years.
>
> 2. Present Presidents of the Courts of Appeals who have spent in their functions seven consecutive years.
>
> 3. Present or former professors of law at the Palestinian universities or acknowledged universities in Palestine who have spent in the function of a professor at least five consecutive years, or an associate professor who has spent at least ten consecutive years.
>
> 4. Lawyers who have practiced the legal profession for at least fifteen consecutive years.

This Article lacks the balance needed to regulate some critical issues such as the qualifications for Constitutional Court judges. The qualifications, as listed, seem to be restrictive and arbitrary. An example of this is requiring fifteen years of expertise for a lawyer to be eligible for appointment as a constitutional judge. Since the Palestinian Authority was established in 1994, a lawyer must have been practising law before the establishment of the Palestinian Authority to be accepted as a candidate.[144] This seems problematic, because depriving lawyers of the right to be appointed, who can show sufficient understanding of constitutional litigation and its principles through their publications and comments on constitutional judgments, would undermine public perception of the Constitutional Court. It would present it as an out-dated institution that is managed by those unaware of the kind of social challenges, of which modern lawyers are generally mindful.[145] One of those challenges might be people's perception of lower and upper court reactions to constitutional judgments, since young lawyers, also mainly appear before lower courts, have constant interaction with the public.[146]

[144] Dirbas, above n 2, 305.
[145] See Shindi, above n 122, 33.
[146] Ibid 33.

Another example is the age limit for judges. Notably, the Constitutional Court operates in an undeveloped legal system, therefore it seems wrong to excluded young, yet talented, lawyers from the chance to apply their innovative understanding of constitutional protection as a Constitutional Court judge.

The arbitrariness of the Article is apparent through not listing 'acknowledged' Palestinian universities that the candidate should have graduated from, and not specifying whether the candidate should have practiced law only in Palestine or elsewhere such as Jordan or other neighbouring countries.[147] Both examples show how the President has an arbitrary power to appoint those known for their alliance to the regime, even if they did not have enough experience in the Palestinian judiciary, or had inadequate education.[148]

Moreover, and on a point related to the analysis of appointment provisions provided earlier, this Article has no provisions that allow for proportional representation on the Constitutional Court bench, which encourages all political parties to play a role in nominating candidates to the President.[149] Disallowing such representation undermines public trust in the Constitutional Court and obstructs a collective sense of political investment in the Constitutional Court as explained in Chapter Two.[150] Additionally, the Article prevents the appointment of foreign judges to the Constitutional Court. In the Palestinian context, foreign judges may bring new perspectives that are unfamiliar to Palestinian judges, and help enriching approaches of interpreting constitutional provisions.[151]

From the analysis above, it can be inferred that Article 4 violates the International Principles on Judicial Independence regarding selection criteria, as these Principles stipulate that such criteria 'must not be discriminatory and must embody safeguards against appointments based on partiality or prejudice'.[152]

In Egypt, the Constitutional Court has far less arbitrary criteria for the appointment of new judges. Article 194 states that the forthcoming law will set out the criteria for selecting constitutional judges. Thus, until that law is issued, Article 4 of the 1979 Law determines these criteria, requiring that:

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[147] *A Comparative Analysis of the LSCC*, above n 120, 7; Venice Commission, above n 114, 4.
[148] Dirbas, above n 2, 305.
[149] See 'The Status of Institutional Independence of the Palestinian Judiciary', above n 134, 21, Shindi, above n 122, 14.
[150] See above Chapter Two (C)(2)(a).
[151] 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (International Commission of Jurists, 2007) ('International Principles on Judicial Independence'). 72.
[152] Ibid.

> 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. They may be chosen from among the following groups:
>
> 1) Members of the Supreme Court.
> 2) Current or former members of the judicial bodies holding the rank of a counsellor or its equivalent for at least five consecutive years.
> 3) Current or former law professors who have held the position of a professor at an Egyptian university for at least eight consecutive years.
> 4) Attorneys-at-law who have practised before the court of cassation, or the high administrative court for at least ten consecutive years.[153]

By contrast with the Palestinian criteria, the Egyptian criteria is more fixed and non-arbitrary, leading to more protection of the independence of the Egyptian Court.

(b) Termination of Membership

The process for removal of constitutional judges is as critical as the process for their appointment, because relatively unprotected removals allow for the regime's interference in judges' tenure.[154]

Article 14 of the LSCC states that:

> 1) The service of the member shall terminate by default in case he completes seventy years of age.
> 2) The pension or remuneration of the member shall be settled in pursuance of the provisions of the Law of the Public Retirement.

Article 14(1) sets an age limit of seventy for judges appointed to the Constitutional Court, which is similar to the age limit for judges in other Palestinian courts. Thus, the Palestinian Authority has chosen the model of appointment based on a fixed retirement age, as opposed to the model of a fixed term of years.[155] It is likely problematic to have judges on this bench until they are seventy years old, because such long term tenure might lead to ossification of approaches and ideas applied in the Constitutional Court.[156] That ossification might be troubling because the Palestinian legal system is exposed to many threats, primarily the changing authoritarian characteristics of the regime explained earlier;[157] This threat requires flexible and evolving judicial approaches to the Basic Law and the LSCC, in a manner that

[153] Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt (Egypt) ['Awad al–Murr's trans, Kevin Boyle and Adel Omar Sherif, Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt (Kluwer Law International, 1996)] 275–6.
[154] Choudhry and Bass, above n 28, 30.
[155] Shindi, above n 122, 14.
[156] see McGarity, Thomas O., 'The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld' (1997) 75(3) *Texas Law Review* 525.
[157] See above Chapter Three (E).

helps to oppose authoritarian actions of the Regime, which regular renewal of judges may be better able to offer.

On a related matter, Article 21 of the LSCC declares that:

> The service of the member of the Court shall terminate in any of the following cases: His reaching seventy years of age, resignation, incapacitation, disability for any reason whatsoever to perform his function, death, retirement on pension, loss of nationality. The decision regarding the termination of service shall be issued by the Palestinian Authority's President based upon a request by the General Assembly of the Court.

The fact that the General Assembly, according to Article 10(2) of the LSCC, issues its decisions by a majority of the attendees' votes, who must not be less than five judges, means this procedure may be overly broad and easy to misuse, because it makes the majority of three judges, in a session attended by five, qualified to request the President of the Palestinian Authority to terminate a judge's term, without clear explanation of what is acceptable as a reason for such request.[158] Moreover, Article 21(1)(D) states that a disability, which can be 'for any reason whatsoever', is also a reason for requesting termination. This is vague and might be easily abused, especially if the General Assembly claims that a judge is 'mentally disabled', merely in order to expel him from the bench for political reasons.[159]

Therefore, it might be correct to consider Article 21 as putting the Court's independence at risk. The International Principles on Judicial Independence affirm that termination must be conducted by 'an independent and impartial body pursuant to a fair hearing'.[160] On this view, the procedures stated in Article 21 do not sufficiently protect judges from partial and biased decisions.[161]

Additionally, the differences between the procedures for deciding on the disability or incapacity of a judge on the one hand, and the procedures in cases of judicial misconduct on the other, raise critical doubts. Article 21(2), which regulates the incapacity procedures, requires the General Assembly to request such a decision from the President, whereas Article 16, which regulates misconduct, requires the decision of the provisional committee without a request from the General Assembly. This is problematic because it presents inconsistent avenues to decide on the same issue, namely the reliability of a certain judge. Such inconsistency might cause a shift towards implementing what guarantees a more favourable

[158] Venice Commission, above n 114, 5.
[159] '*The Status of Institutional Independence of the Palestinian Judiciary*', above n 134, 17.
[160] *'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (International Commission of Jurists, 2007)* 56. ('*International Principles on Judicial Independence*')
[161] *The Status of Institutional Independence of the Palestinian Judiciary*, above n 134, 17.

outcome for the regime when attempting to disqualify a judge for political reasons.[162] For example, the regime might prefer deciding on the incapacity of a judge, which requires the majority of any five judges from the General Assembly, when the provisional committee is formed by judges who disagree with the regime, and therefore would not accept initiating procedures of misconduct against that very judge.

In Egypt, Article 19 of the 1979 Law states that:

> Allegations that a member of the court has been untrustworthy or derelict in his duties shall be submitted to the committee on occasional affairs by the Chief Justice of the court. If this committee concludes, after summoning and hearing the concerned member, that furtherance investigation is warranted, it shall then delegate one of its members or a committee of three to conduct the investigation.[163]

If, after a hearing, the Committee considers the accusation to be valid, then it delegates the matter to a committee of three members to investigate it the matter further and issue a decision that either declares the accused innocent or terminates his tenure.[164] Due to their similarity with the Palestinian procedures, these procedures are subject to the same criticisms outlined above, and as a result they undermine judges' independence in case of such accusations.

(c)Deemed Resignation

Article 23(2) of the LSCC states that:

> The member shall be deemed to be resigning in case he discontinues his work for a period of fifteen consecutive days without an excuse to be admissible by the Chief Justice even if such [discontinuation] takes place following the lapse of the period of his leave or secondment.

Until now, this Article has never been applied. Arguably, the notion of deemed resignation is disturbing and inappropriate. In principle, as a way of judicial termination, this sort of resignation lacks precautions necessary to prevent its improper application to judges who are in disfavour with the regime, which in turn might undermine the independence of the Constitutional Court.[165] This Article therefore probably violates the Court's independence because it is inconsistent with Article 20 of the Basic Principles of Judicial Independence, which asserts that:

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[162] Shindi, above n 122, 43, '*The Status of Institutional Independence of the Palestinian Judiciary*', above n 134, 17.
[163] *Law 48 of 1979*, above n 153, 278-9.
[164] Ibid.
[165] *A Comparative Analysis of the LSCC*, above n 120, 11.

> Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.[166]

To elaborate with an example, a judge who is not wanted by the regime might be dismissed based on deemed resignation if, due to either explicit or implicit restrictions implemented by the regime, that judge cannot be present at the Court. It does not help a judge to provide a reasonable excuse in such a scenario because there is neither a check on the President's authority to refuse such excuse, nor a judge's right to appeal the refusal or even the deemed resignation itself, which makes this process an arbitrary tool in the hands of the President. The implementation of this Article could therefore create a serious threat to the independence of the Constitutional Court.[167]

(d)Immunities and Oversight of the Court Members

Article 16(1) of the LSCC states that:

> In the event a matter is imputed to a member of the Court that may infringe confidence or eligibility or violate intentionally or gravely the obligations and requirements of his function, the Chief Justice shall present the matter to the provisional committee in the Court.

Considering the rule-of-law principle, it is odd to provide constitutional judges with immunity from criminal prosecution, simply because it is always possible that a constitutional judge might commit a crime. Further, this Article does not provide clear criteria for acts that fall under its scope. It also confers considerable discretionary power on the Chief Justice. This discretionary power might undermine the Constitutional Court's independence, especially if the Chief Justice is loyal to the regime, as he could order security forces to arrest and publicly disgrace untainted, independent judges by direct means of apprehension, on the pretext of committing such acts.[168]

Nevertheless, there is no obvious violation of judicial independence principles in these two Articles. It might be argued, for example, that Article 17(1) is included to prevent vexatious, baseless criminal charges against constitutional judges, levelled by the regime to undermine their independence.[169] However, it seems rather wrong to give judges legal immunity, given

[166] Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 20 ('Basic Principles of Judicial Independence').
[167] Bass and Choudhry, above n 126, 8.
[168] Venice Commission, above n 114, 5.
[169] Al–Turkomaniy, above n 1, 62.

they are supposed to uphold the rule of law, and could well lead to diminishing of public confidence in the Constitutional Court.[170]

3 *Jurisdiction of the Constitutional Court*

(a) Conformity with the Basic Law

The jurisdiction of the Constitutional Court is regulated by three different Articles, one in the Basic Law and the other two in the LSCC. Article 103(1) of the Basic Law states that:

> A Supreme Constitutional Court shall be established by law to consider:
> 1. The constitutionality of laws, regulations, and other enacted rules.
> 2. The interpretation of the Basic Law and legislation.
> 3. Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.

Articles 24 and 25(1) respectively of the LSCC stipulate that:

> The Court shall exclusively have jurisdiction over the following:
> 1. Constitutional review of laws and regulations.
> 2. Interpretation of the provisions of the Basic Law and laws.
> 3. Adjudication of the conflict of jurisdiction between the judicial authorities and administrative authorities with judicial jurisdiction.
> 4. Adjudication of the conflict which arises in regard of the execution of two contradictory final judgments.
> 5. Adjudication of the challenge regarding the loss of legal capacity by the Palestinian Authority's President. Its decision shall be deemed to be effective starting from the date of the approval by the Legislative Council thereof by the majority of two thirds of the number of its members.
>
> 25(1). The Court shall, in the course of the performance of the jurisdictions provided for under Article (24), be entitled to exercise all the powers of hearing and pronouncing on the unconstitutionality of any piece of legislation or act contravening the Constitution (wholly or partially).

When Article 103 of the Basic Law with Article 24 of the LSCC are compared, significant differences become obvious, even though they should be in harmony as they discuss the same matter, namely the jurisdiction of the Constitutional Court. Notably, and as it will be explained shortly, the LSCC has failed to properly carry out the Basic Law's mandate to define the jurisdiction of the Constitutional Court, by deviating from the scope specified in the Basic Law, which leads to confusion and redundancy.

Starting with the first difference, in provision (1)(a) of the Basic Law Article, the jurisdiction of the Constitutional Court covers, besides laws and regulation, 'other enacted rules', while in the LSCC, there is no such jurisdiction in provision 24(1). The fact that these provisions are inconsistent raises two critical questions: what is meant by 'other enacted rules'? And what is

[170] 'The Status of Institutional Independence of the Palestinian Judiciary', above n 134, 17.

the key to resolve that inconsistency? To answer the first question, there is no explanatory note or opinion by any high judicial institution on this issue.[171] It is, therefore, necessary to refer to the opinions of constitutional jurists who have addressed the issue. For example, Mahmoud Abu Sawi defines 'other enacted rules' as materials that have legal authority but not a law or a regulation, which includes Decrees-by-law, Presidential Decrees, and Executive Orders.[172] Based on that definition, he argues that the jurisdiction of the Constitutional Court should also include those 'other enacted rules' because the Basic Law is superior to the LSCC.[173] This argument appears correct, because the superiority of the Basic Law obliges the Constitutional Court to apply the provisions of the Basic Law in cases of inconsistency between them and other laws' provisions.[174] This reasoning answers the second question, of how to resolve the inconsistency between both articles.[175]

Another inconsistency between the Basic Law and the LSCC is found between provision (1)(b) of Article 103(1) of the Basic Law and provision (2) of Article 24 of the LSCC. The former declares the jurisdiction of the Constitutional Court to interpret 'legislation', while the latter uses the term 'laws' instead. The difference in the definition is that in the first term, all bylaws, regulations, decrees, and legislative decisions are included as four types of legislation, whereas the second term, 'laws', excludes those four types.[176] As in the previous example, the superiority of the Basic Law must be applied in this case, so that the Constitutional Court has the jurisdiction to interpret the Basic Law and other 'legislation', not just 'laws'.[177]

The Constitutional Court therefore has the competence to interpret not only the Basic Law, but also ordinary laws. This is arguably advantageous because interpreting ordinary laws is necessary to determine their constitutionality, and Constitutional Court interpretations,

[171] Dirbas, above n 2, 285, 308, *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 74–5; Zeed Al–Kailany, *الطعن في دستورية القوانين: دراسة مقارنة* [Appealing the Constitutionality of the Laws: Comparative Study] (Masters of Public Law Thesis, An–Najah University, 2012) 29.
[172] Dirbas, above n 2, 308, *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 84–5; Al–Kailany, above n 172, 22 n 1, 29.
[173] Dirbas, above n 2, 309, *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 184–85; Al–Kailany, above n 172, 22 n 1, 29.
[174] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 13; see Dirbas, above n 2, 310, *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 84–5; Al–Kailany, above n 172, 22 n 1, 29.
[175] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 13; *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 84–5; Al–Kailany, above n 172, 22 n 1, 29.
[176] Dirbas, above n 2, 312–3; *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 94; Al–Kailany, above n 172, 22 n 1, 29.
[177] Dirbas, above n 2, 313, *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 94; Al–Kailany, above n 172, 22 n 1, 29.

according to the Basic Law, takes precedence over interpretations provided by the Court of Cassation and the High Court of Justice.[178]

In Egypt, Article 192 of the 2014 Constitution states that:

> The Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members, in disputes between judicial bodies and entities that have judicial mandate, in disputes pertaining to the implementation of two final contradictory rulings, one of which is issued by any judicial body or an agency with judicial mandate and the other issued by another body, and in disputes pertaining to the implementation of its rulings and decisions. The law defines the Court's other competencies and regulates the procedures that are to be followed before the Court.

According to this Article, the Egyptian Constitutional Court jurisdiction includes all those provided for that of Palestine, with three exceptions: the Egyptian Court's jurisdiction does not include acts of state authorities, presidential decrees, and decisions of administrative officials. That exception is a result of using the term 'regulation' rather than 'legislation', as explained before in the Palestinian case. Based on the above analysis, and by means of comparison, Egypt's Court has, in theory, a narrower jurisdiction than the Palestinian Constitutional Court. This leads to the conclusion that the latter would probably be under more executive pressure and subject to greater threats than the Egyptian Constitutional Court, because its Palestinian jurisdiction is greater.[179]

(b) Extent of Review

As explained in Chapter Two,[180] Article 25 of the LSCC articulates the model of constitutional review applied in Palestine. It is concrete, centralised, and both *principaliter* and *incidenter* (i.e. to hear cases in which the sole or only matter is the constitutionality of the legislation, or when the constitutionality is incidental to a litigation taking place before another court).[181]

In Egypt, the constitutional review powers of the Egyptian Court are concrete, centralised, and only *incidenter*, because the Egyptian law does not allow for original, direct action. Nevertheless, since Article 24 discusses the critical subject of constitutional review applied by the Constitutional Court, it is incongruously ambiguous. First, it signifies that the Constitutional Court oversees the constitutionally of any 'act' that raises reasonable doubt of

[178] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 14; *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 288; Al–Kailany, above n 172, 22 n 1, 29.
[179] *A Comparative Analysis of the LSCC*, above n 120, 16.
[180] See above Chapter Two (B)(1).
[181] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 13; *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Kailany, above n 172, 28.

inconsistency with the Basic Law. This opens the door for a fairly unrestricted jurisdiction of the Constitutional Court over every act of public officials, undermining the balance between the three powers by providing the Constitutional Court with this sort of discretionary power.[182] Again, this jurisdiction would probably increase incentives for the regime to unduly intervene in the Court's matters and put judges under more pressure and threats compared to the Egyptian Constitutional Court.[183]

Second, it is somewhat confusing to determine what should be considered 'legislation' as opposed to an 'act' in Article 25(3). To elaborate, Article 24(1) does not include the word 'act' in it, whereas Article 25(3) implies that 'acts' are included in the jurisdiction of the Constitutional Court, since Article 25(3) discusses the possibility of them being pronounced unconstitutional by the Constitutional Court. To clear that confusion, it is necessary to consult Article 103 of the Basic Law, which declares 'decisions' to be under the jurisdiction of the Constitutional Court, and since the definition of 'acts' is 'administrative decisions to do certain action',[184] then the Constitutional Court is authorised to oversee 'acts' of administrative officials.[185] Hence, it is probably correct to conclude that administrative decisions do fall under the jurisdiction of the Constitutional Court.[186] This is in contrast with the jurisdiction of the Egyptian Court, as Article 25(1) of the 1979 law clearly limits constitutional review to laws and regulations. This is another observation that supports the conclusion that the Palestinian Constitutional Court's wide jurisdiction, at least theoretically, causes more threat to the interests of the regime than does its Egyptian counterpart to the Egyptian regime.

Third, Article 25 does not clarify whether the Constitutional Court's jurisdiction over state authorities also includes issues resulting from inaction of public officials, which might leave a significant gap in overseeing the constitutionality of those officials, as negligence is a particularly common violation among officials of the West Bank Regime.[187] This gap weakens the effectiveness of the Constitutional Court.[188]

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[182] Al–Turkomaniy, above n 1, 203, 85; Dirbas, above n 2, 311; *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Kailany, above n 172, 28.
[183] *A Comparative Analysis of the LSCC*, above n 120, 17.
[184] Dirbas, above n 2, 310; Al–Turkomaniy, above n 1, 85; Al–Kailany, above n 172, 27–9.
[185] *A Comparative Analysis of the LSCC*, above n 120, 17; Al–Turkomaniy, above n 1, 185; Al–Kailany, above n 172, 27–9.
[186] *A Comparative Analysis of the LSCC*, above n 120, 17; Al–Turkomaniy, above n 185; Al–Kailany, above n 172, 27–9.
[187] Dirbas, above n 2, 318; Al–Turkomaniy, above n 1, 85; see Al–Kailany, above n 172, 27–9.
[188] *A Comparative Analysis of the LSCC*, above n 120, 17; Al–Turkomaniy, above n 1, 73, 95; see Al–Kailany, above n 172, 27–9.

(c) Settlement of Conflicts of Competence between the Three State Powers

A further point regarding the lack of clarity in the jurisdictions of the Palestinian Constitutional Court is what Article 24(2) provides about the settlement of conflicts of competence between the three state powers. The Article does not provide sufficient instructions regarding how to determine if the event is a 'conflict'.[189] It is true that such interpretive uncertainty is not unusual in constitutions and laws of constitutional courts; however, taking into account the authoritarian characteristics of the Regime, significant concerns do derive from the context in which such lack of clarity exists.[190] To elaborate, Article 24(2) entitles the Constitutional Court to significant discretionary power that might be misused, causing intervention that affects the balance between state powers in a way favourable to the Regime.[191] Another threat that arises is facilitating the establishment of a Court that exploits its jurisdiction to eliminate restrictions to its power in a way that supports the Regime's interests, particularly by threatening the competences of the Parliament.[192]

4 *Access to the Constitutional Court*

(a) Constitutional Objection

Article 27 of the LSCC states that:

> The Court shall assume the judicial oversight over constitutionality in the following manner:
>
> 1) By means of the direct, original action which the aggrieved person lodges before the Court with reference to the provisions of Article (24) above.
> 2) In case one of the courts or panels with judicial jurisdiction manifests during the hearing of an action the unconstitutionality of a provision in a law, bylaw, decree, bylaw, regulation or decision that is necessary for the adjudication of the dispute, it shall halt the action and refer the papers without fees to the Supreme Constitutional Court in order to adjudicate the constitutional issue.
> 3) In case the adversaries rebut, during the hearing of an action before a court or a panel with judicial jurisdiction, that a provision in a law, decree, bylaw, regulation or decision is unconstitutional, and the court or panel finds that the rebuttal is serious, it shall adjourn the hearing of the action and define for the person who aroused the rebuttal an appointment that does not exceed ninety days to lodge an action thereon before the Supreme Constitutional Court. In the event the action is not lodged on the appointment, the rebuttal shall be deemed to be as if it had never taken place.

[189] *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 73, 95; see Al–Kailany, above n 172, 34, 34 n 3.
[190] Dirbas, above n 2, 313; Al–Turkomaniy, above n 1, 73, 95; Al–Kailany, above n 172, 75–7.
[191] *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 73, 95; Al–Kailany, above n 172, 75–7.
[192] *A Comparative Analysis of the LSCC*, above n 120, 16; Al–Turkomaniy, above n 1, 73, 95; Al–Kailany, above n 172, 75–7.

4) In the event the Court discusses a dispute presented before it and during the proceeding in the dispute, it become manifested to the Court that an unconstitutional provision relating to the dispute exists, it shall spontaneously be entitled to confront by adjudicating its unconstitutionality, provided that such provision is in reality associated with the dispute presented before it in due form.

The opening sentence 'The Court shall assume…' indicates that the Constitutional Court is compelled to adjudicate on any application submitted to it. In the Palestinian context, there is no prospect of unmanageable caseload, because judicial reports assert that the number of cases filed to the Constitutional Court have been minimal; for example, in 2013, 2014, and 2015, the Constitutional Court received 2, 5, and 4 cases respectively in each year.[193] Therefore, an undue burden of constitutional cases is highly unlikely to occur.[194]

As mentioned in Article 27, there are four ways in which the Constitutional Court can apply its judicial oversight: direct, original action; subsidiary referral; adversary's rebuttal; and 'confrontation' by the Constitutional Court itself.[195]

In Egypt, Articles 27 and 29 of the 1979 Law state that the Court can apply its judicial oversight through an adversary's rebuttal or a 'confrontation', which means that direct, original action is not available as a means to submit a constitutional objection.[196] Therefore, the Palestinian Constitutional Court is significantly, in theory, more accessible than its Egyptian counterpart, since direct, original action opens the doors for all aggrieved citizens to appear before the court.[197] As was concluded before in the section on jurisdiction, the Palestinian Constitutional Court may be subject to greater pressure and threats of intervention from the executive than the Egyptian Constitutional Court, because it allows direct, original actions.[198]

[193] 'The Annual Report of 2015' (4, High Judicial Council of The Palestinian Authority, 2016).
[194] *See especially* Dirbas, above n 2, 315.
[195] See above Chapter Two (C)(2)(c).
[196] Article 27: The Supreme Constitutional Court may, in all cases, and after observing the procedural rules laid down for the preparation of constitutional cases, decide the unconstitutionality of any provision of a law, or regulation which it faces in the course of exercising its jurisdiction, provided that provision is linked to a dispute under its consideration. Article 29: The court shall exercise its power of judicial review of laws and regulations through the following channels: (a) Where in the course of deciding a case on the merits, a court, or any other judicial forum a prima facie views that a provision of a law, or regulation on which the settlement of the dispute depends is unconstitutional, the proceedings are suspended by the court of merits and the case is forward to the Supreme Constitutional Court without judicial fees for the adjudication of the constitutional issue. (b) Where the constitutionality of a provision in a law or regulation has been contested by a party to a meritorious case before a court or any other judicial forum, and the grounds are found to have been plausible by that court or forum, it shall ordain the postponement of the case and specify for that party a period not exceeding three months within which the constitutional issue is to be presented to the Supreme Constitutional Court. Failing this, the challenge will be regarded as void. *Law 48 of 1979*, above n 153, 281.
[197] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 18.
[198] *A Comparative Analysis of the LSCC*, above n 120, 18.

(b) Constitutional Interpretation Request

Requesting an interpretation is also a secondary avenue to access the constitutional court. It is considered secondary as it does not, in fact, initiate litigation before the Court. Rather, it requests an explanation of certain provisions. Article 30(1) of the LSCC states that:

> The request for interpretation shall be submitted by the Minister of Justice based upon a request from the President of the National Authority or the Chairman of the Council of Ministers or the Chairman of the Legislative Council or the President of the High Judicial Council or from a person whose constitutional rights have been violated.

Requests for interpretation are considered very important and useful avenues to secure prompt constitutional judgments, because they allow the government, and other eligible applicants, to submit doubtful legislation to the Constitutional Court that, in this view, has a high probability of being challenged,.[199] Moreover, interpretation can allow judicial assistance in assessing legislation that is of public interest and yet could hardly be litigated in other non-constitutional avenues.[200] For example, the legal provisions that regulate the relationship between the Judicial Council and the Ministry of Justice are hard to challenge through a constitutional objection. This is because Judicial Council members, who have an interest in submitting such a challenge, have close relationships with members of the Constitutional Court, and that might affect the impartiality of constitutional judges.[201]

However, the language of Article 30(1) is somewhat troubling, because it does not clarify whether the request can be submitted before or after the promulgation of the law that contains the article for which an interpretation is requested. Allowing requests before promulgation raises concerns about judicial intervention in the legislative process.[202] These concerns justify calling for a safeguarding provision, in the form of a bylaw, that is needed to provide the Constitutional Court with the right to refuse requests that lack reasonable factual basis or when there has not been a controversy about the contested article.[203]

Moreover, Article 24(4) requires the submitter of the request be a 'person whose constitutional rights have been violated', but without clarifying how to examine whether the submitter meets that criterion or not, and how this requirement corresponds with Article 27 that lists the four forms for initiating judicial oversight of the Constitutional Court. The absence of this clarification makes the Constitutional Court's litigation procedures less transparent, placing the

[199] Al–Kailany, above n 172, 31–3.
[200] See Al–Turkomaniy, above n 1, 91–3.
[201] Al–Kailany, above n 172, 31–33; cf Al–Turkomaniy, above n 1, 97.
[202] *A Comparative Analysis of the LSCC*, above n 120, 19.
[203] Al–Turkomaniy, above n 1, 96.

Constitutional Court under potentially undue interference from the executive to reject certain actions on the pretext that the submitter is not properly aggrieved.[204]

(c) Requirements for Lawyers Acting before the Court

Another matter that is closely linked to accessing the Constitutional Court are the requirements for lawyers appearing before it. Article 31 of the LSCC states that:

> Proceedings before the Court may not be commenced except through a representative of the entity of the issues of the State or through a lawyer whose period of experience in the legal profession is not less than ten consecutive years.

Arguably, it is undesirable to require ten 'consecutive' years of experience, because a lawyer might have more than ten years of experience in a non-consecutive manner, which is the case for many Palestinian judges who resigned from the judiciary and returned to their previous profession as lawyers.[205] Therefore, experience should not be consecutive. This would make more lawyers able to access the court, and thus allow it to have more opportunities to uphold constitutional principles.[206]

Furthermore, regarding oral hearings before the Court, the LSCC allows all those who are parties in the original dispute on which the referral decision or act is based to respond in a written note to the Constitutional Court. Nevertheless, it does not discuss whether the Constitutional Court can allow for, or request, oral hearings, when such a request is necessary. These hearings are benefit for the Court's independence and effectiveness, as sometimes oral hearings explain matters in much deeper detail than can written notes.[207]

More importantly, regarding publication of decisions of the Constitutional Court, Article 53 of the LSCC requires publication of all judgments of the Constitutional Court in the Palestinian Official Gazette. In Egypt, Article 195 of 2014 Constitution states that:

> The Official Gazette publishes the rulings and decisions issued by the Constitutional Court. They are binding to everyone and to all state authorities. They enjoy absolute authenticity in their regard. The effects of a decision that a legislative text is unconstitutional are organized by law.

This shows how important publication is in the Egyptian legal system, since it was clearly included in the constitution itself. Thus, Article 53 of the LSCC can be seen as supporting the Court's independence, and the development of constitutional jurisprudence, since publishing

[204] Dirbas, above n 2, 317.
[205] Al–Kailany, above n 172, 46; Al–Turkomaniy, above n 1, 230.
[206] *A Comparative Analysis of the LSCC*, above n 120, 22.
[207] Venice Commission, above n 114, 8.

judgments provides access to compulsory general guidelines for public officials, increases citizens' awareness of their rights and duties, and facilitates examining submitted constitutional applications to avoid issuing contradictory judgments about similar matters, all of which help to maintaining harmony between Constitutional Court opinions.[208]

5 *Effectiveness of the Constitutional Court's Decisions*

Article 25(2-3) is critical because it relates to the effectiveness of the Constitutional Court decisions. It states that:

> 2. Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.
> 3. Upon the pronouncement on the unconstitutionality of any act, it shall be deemed to be unenforceable, and the authority which has performed it must rectify the situation in pursuance of the provisions of the Basic Law and the Law as well as redeem the right to grievant or compensate him or her for the damage or [perform] both together.

The Article indicates that if the Constitutional Court decides that a certain provision is unconstitutional, then the Constitutional Court is only allowed to declare it 'unenforceable', after which it is the obligation of the legislature to amend the law and rectify the situation. Therefore, the Constitutional Court cannot annul unconstitutional provisions.[209]

Serious reservations may be raised about this Article. First, it should be noted that the aim of declaring the unconstitutionality of a certain law is either to prevent its application, provide compensation, or provide restitution for the aggrieved person when the subject of the constitutional objection is an act rather than a law.[210] On this view, it is probably incorrect to limit the effect of the Constitutional Court decision to deeming a law unenforceable.[211] Rather, the Constitutional Court should be allowed to annul that law and provide temporary provisions that should be applied until an amending law is enacted by the Parliament.[212] Such temporary provisions should not be considered a violation of the legislative power's competences, because cancellation is necessary to avoid any procrastination by that power in implementing the

[208] Al–Kailany, above n 172, 137–8.
[209] Venice Commission, above n 114, 7.
[210] Abu Sawi, *The Judicial Review of Laws' Constitutionality in Palestine*, above n 88, 21; Al–Turkomaniy, above n 1, 289.
[211] *A Comparative Analysis of the LSCC*, above n 120, 22.
[212] Aldis Laviņš, *Effects of the Judgments of the Constitutional Court of the Republic of Latvia* (2016) Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions <http://www.bbcj.eu/effects–judgments–constitutional–court–republic–latvia/> [35][3].

Constitutional Court decision, on the pretext of not having an amended law ready to apply after the pronouncement of the Constitutional Court decision.[213]

In Egypt, the same criticism is valid regarding Egypt's Law; Article 49 of the 1979 Law provides an identical result. It states that:

> A provision held as void, whether in a law or regulation, shall cease to apply as of the day following its publication. In cases where a provision of criminal nature has been struck down, convictions based on that provision shall be regarded as if they had never occurred.[214]

The proposition of providing temporary provisions also may help in dealing with the second reservation against the unenforceability effect. As it stands, Article 25(3) of the LSCC might expose the Constitutional Court to significant pressure caused by the fear to declare a certain law unenforceable, if such declaration would create a vacuum in the legal system, and accordingly result in chaos.[215] Since such a fear might compel the Constitutional Court to refuse to hold that a law is unconstitutional, the Article lacks a necessary provision that provides a proper solution for this scenario.[216] As a protection from such compulsion, some constitutional courts, such as that of Latvia, are authorised to issue temporary provisions after annulling the unconstitutional statute, to avoid having a legislative vacuum, which remains applicable until the legislature enacts a replacement law.[217]

In Egypt, Article 195 of the Constitution states that:

> The judgments and decisions issued by the Constitutional Court … shall be binding upon everyone and all of the State authorities. They shall have *Res judicata* vis-à-vis all of them.

Accordingly, this Article asserts that all state authorities must act according to the judgment of the Constitutional Court. In conclusion, Article 49 mentioned above is similar to that of the Palestinian LSCC, declaring that a law must be deemed unenforceable if the Court pronounces it unconstitutional.

Furthermore, Article 41(3) of the LSCC states that:

> In the event the pronouncement on the unconstitutionality is related to a penal provision, the judgments of conviction which have been issued with reference to such provision shall be unenforceable.

It seems somewhat unclear what Article 41(3) indicates because, in some criminal cases, some evidence might have been collected by reference to an unconstitutional provision, that was

[213] Al–Kailany, above n 172, 143; Grote, '*Constitutional Review in Arab Countries*', above n 30, 236–7.
[214] *Law 48 of 1979*, above n 153, 284–5.
[215] Al–Turkomaniy, above n 1, 281.
[216] *A Comparative Analysis of the LSCC*, above n 120, 22.
[217] Laviņš, above n 212.

declared unenforceable by the Constitutional Court. For example, this Article does not provide a clear ruling in the case that a conviction remains valid based on other penal provisions. This shows this Article is not sufficiently clear, making the LSCC more vulnerable to undue interpretations by judges loyal to the regime.

6 *Administrative Matters of the Constitutional Court*

The previous discussion assessed the *de jure* independence of the Constitutional Court. There are two other issues that relate to the institutional independence of the Constitutional Court: budget and administrative supervision.

(a) Budget

Article 48(2) of the LSCC states that:

> The President of the Court shall set forth the draft budget to be submitted to the competent authority after its being discussed and approved by the General Assembly of the Court with the absolute majority. The President of the Court shall be responsible for all of the issues related to the implementation of the budget in accordance with the bylaws promulgated as per this Law.

This Article commands the Chief Justice to participate in developing the Court's proposed budget, which must be ratified by the General Assembly.[218] In Egypt, identical requirements are found in Article 56 of the 1979 Law. According to judicial independence principles, both articles are consistent with rules that protect the institutional independence of these courts,[219] particularly the Special Rapporteur assertion that: 'entrusting the administration of funds directly to the judiciary or an independent body responsible for the judiciary is much more likely to reinforce the independence of the judiciary'.[220]

(b) Administrative Supervision and the Conflict between Powers

Article 49 of the LSCC states that:

> The Court shall have a Chief of Clerks and a sufficient number of working functionaries and administrative staff. The President of the Court and the Minister of Justice, each one within the limits of his legal jurisdiction, shall have the authority to supervise them in accordance with the Law of the Judicial Authority.

This Article is somewhat troubling, as it violates Article 11 of the Universal Charter, which affirms that 'administration of the judiciary … must be organized in such a way, that it does

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[218] See *A Comparative Analysis of the LSCC*, above n 120, 23.
[219] Al–Turkomaniy, above n 1, 70.
[220] Leandro Despouy, *Special Rapporteur, Report of the Special Rapporteur on the independence of judges and lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009) ('Special Rapporteur on the independence of judges') [43].

not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant.'[221] To elaborate, the Minister of Justice, as an official of the executive authority, must not intervene in procedures of administrative supervision of the Court, because that threatens the independence of the Court and undermines its legitimacy.[222] Rather, the Court must have comprehensive control over its administrative matters, including its personnel and financial affairs.[223]

In Egypt, Article 57 of the 1979 Law affirmed that the Chief Justice is the only supervisor of the Court's administrative matters.[224] This leads to the conclusion that the Egyptian Constitutional Court is more independent than that of Palestine in this aspect.

F *Conclusion*

It is important to link the conclusions derived from that assessment of the *de jure* independence of the Constitutional Court to the analysis of global constitutional courts in the context provided by the previous chapter. This linking is vital because it elucidates how the settings of constitutional courts were transformed, at least in significant aspects, before they were transplanted to the Arab region. In the previous chapter, four factors were identified as largely responsible for preferring specialised constitutional courts after the Second World War. These are: distrust towards ordinary judges; the lesser disturbance that specialist court system cause to the state structure as they are less costly to political powers compared to decentralised review systems; the need for legal certainty; and, lastly, its symbolic value.

According to the analysis provided in this chapter, it is probably correct to argue that these factors had relatively varied effects in the Arab region. Ordinary judges mainly feared opposing regimes' policies, and there was intended vagueness in provisions that regulate the separation of powers, which made it safe for these regimes to establish constitutional courts, as constitutions themselves did not restrict the powers of the executive. Legal certainty, in the sense of affirming the authorities of the executive, and the symbolic value of such courts, were minor concerns for authoritarian regimes in the Arab region, as both helped regimes in need of more legitimacy to justify their rule.

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[221] *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 11.
[222] Al–Turkomaniy, above n 1, 69.
[223] Ibid 67.
[224] The court shall have a secretary general and a sufficient number of employees. The Chief Justice will hold upon them the competencies of ministers and their under-secretaries as specified by laws and regulations. *Law 48 of 1979*, above n 153, 286.

This conclusion supports the claims in the previous chapter about the establishment of constitutional courts in authoritarian regimes: such regimes establish constitutional courts to consolidate their rule and marginalise the opposition. They also do so to fulfil their need for having the appearance of a robust, fair umpire to legitimise their actions and protect their interests. Further, support for those claims results in upholding the argument in the previous chapter about constitutional courts: a formal statement of a constitutional court's functions tells very little about its actual role.

According to the analysis provided in this chapter, in general, the LSCC is in violation of the judicial independence principles set out in the previous chapter. In particular, the provisions regulating first appointment to the Constitutional Court grossly violate those principles, by providing the president with almost full control over these appointments. Moreover, the LSCC is not well drafted, and many examples throughout this chapter were provided to support this claim. Additionally, the contradiction between certain provisions and the Basic Law, plus the lack of clarity in meaning, especially in the absence of an article that provides general definitions of the key terms used in the law, are two examples that affirm the fragility of this law.

More importantly, these observations are consistent with the analysis provided in the first three sections of this chapter, that the LSCC is significantly inconsistent with the principles of judicial independence explained in the previous chapter, which, *de jure*, allows the regime to consolidate its authoritarian characteristics. These reasons are similar to what brought constitutional courts in many states within the Arab region into existence, that is, current authoritarian regimes seeking constitutional legitimacy for their rule and consolidating their grip on power.

V ASSESSMENT OF THE CONSTITUTIONAL COURT'S *DE FACTO* INDEPENDENCE IN PROCEDURAL CASES

A *Introduction and Methodology*

After assessing the *de jure* independence of the Constitutional Court in Chapter Four, this chapter and the next assess its *de facto* independence; i.e. whether the judgments pronounced by the Constitutional Court indicate that it is independent of undue concern for the regime's interests. Assessing *de facto* independence is placed here in the larger context of assessing whether the Constitutional Court effectively performed its constitutional functions as an upholder of the Basic Law in its judgments since the coup in 2007 until October 2017.

During this period, the Constitutional Court decided 36 cases. Notably, 5 of them were constitutional interpretation requests, all of which were decided in favour of the regime. It also won in the remaining 31 dispute-cases, excluding one case where the plaintiff was a trainee lawyer who won against the Palestinian Bar Association, which was the defendant in that case, not the regime.[1] For the purposes of this thesis, these 36 cases are categorised into procedural and substantive cases; the procedural group comprises 17 cases, while the substantive group comprises 19 cases. This chapter analyses the cases in which procedural rules were the primary focus of the Court's reasoning, while Chapter Six analyses the cases in which the primary focus was on substantive rules. Accordingly, this Chapter includes three groups of cases, all related to procedural rules. The analysis of each of these groups starts with a brief introduction that sets out the arguments:

- Access to the Constitutional Court;
- Impleading the Government; i.e. including the Government as a defendant in constitutional disputes; and
- Abandonment of cases; i.e. the plaintiff's counsel requesting the Constitutional Court to abandon the case.

Assessing the *de facto* independence of the Constitutional Court draws on the reasoning of the judgments, including opinions made by dissenting judges (if any), and the impact of those judgments on the regime's interests. This assessment serves as a basis for the conclusions made about the Court's *de facto* independence, and ultimately assists in substantiating the central

[1] The regime won 7 of these cases because the Constitutional Court dismissed the case on merits, and won the remaining 25 because of dismissal on procedural grounds, i.e. on form

argument of both chapters, that the Constitutional Court lacks *de facto* independence because it has failed to perform its function of effectively uphold the Basic Law before regime's actions. Stated differently, the Constitutional Court has been ineffective in upholding the Basic Law, because in the vast majority of its judgments, it did not invalidate unconstitutional actions of the regime. To understand the methodology of both chapters, it is vital to emphasise the following five related points.

First, the analysis of these cases takes into consideration the fact that the Constitutional Court is placed in an authoritarian setting, as Chapter Three showed. Based on that, the analysis deems the Constitutional Court dismissal of a case, when having the discretionary competence to accept it, a form of failure to uphold the Basic Law even when that dismissal is a lawful option. Hence, if in any of the analysed cases in both Chapters the Constitutional Court chose to dismiss the case on form, while having the valid choice to utilise its discretionary competence and accept it, then that is considered a failure in upholding the Basic Law.

Chapter Two explained the justification for this normative approach:[2] for a constitutional court to be effective, it should make use of available opportunities to hold the regime accountable before the constitution, despite the fact that such usage might require a purposive rather than a literalist approach. A purposive approach is even more necessary when the regime is authoritarian, and that is the very obligation of this court as a constitutional court.

To elaborate, upholding the Basic Law before the regime's actions is the fundamental function of the Constitutional Court. This is evident from the fact that the purpose of establishing the Constitutional Court according to the LSCC is to perform constitutional review, which in turn aims to annul legislation and presidential orders that violate the Basic Law. This implies that no legislation or order is valid until it conforms to the Basic Law. Palestinian jurist Abeer Dirbas supports this claim, affirming that the Constitutional Court must ensure the state powers' compliance with the Basic Law, through its power to conducting constitutional reviews.[3] Mahmoud Abu Sawi, another Palestinian jurist agrees, arguing that the Constitutional Court must uphold the Basic Law to guarantee a lawful exercise of competences by state powers, in which no power violates the Basic Law by exceeding its defined limitations.[4]

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[2] See above Chapter Two (C)(2)(c).

[3] Abeer Dirbas, ' الرقابة القضائية على الدستورية في فلسطين [The Judicial Review of Constitutionality in Palestine]' in *الحالة التشريعية في فلسطين 2007–2012 [The Legislative Status in Palestine 2007–2012]* (Institute of Law – Birzeit University, 2012) 285, 287.

[4] Mahmoud Abu Sawi, *' الرقابة على دستورية القوانين في فلسطين [The Judicial Review of Laws' Constitutionality in Palestine]'* (The Arab Association of Constitutional Law, 2009) 2.

Importantly, both jurists highlight the authoritarian nature of the West Bank regime as a factor that must be taken into consideration when addressing the role of the Constitutional Court. The Palestinian Parliament has been suspended since the coup in 2007, and cannot exercise any of its functions, from enacting legislation to supervising the actions of the executive officials, as explained in Chapter Three.[5] This is vital to note because as a result of this suspension, legislative power is now practised solely by the president. In other words, there is no practice of checks and balances between the executive power and the legislative power, as both powers are vested in the president.

This leads to the conclusion that the last power, the judiciary — particularly the Constitutional Court — must fill the vacuum left by the absence of an independent legislative power, by being strict in reviewing legislation and presidential orders in cases submitted against the favour of the regime, and perform its duties in a manner that lessens the impact of that vacuum since the coup. By doing so, the Constitutional Court would be more adherent to the long-term goal of the Basic Law as explained in Chapter Three, which is to establish a constitutional democracy that has a balanced separation of powers.[6]

A counter-argument to this explanation of the Constitutional Court rule might be that constitutional courts in general tend to avoid catastrophic clashes with authoritarian regimes, and that such courts make use of opportunities to rule against the interests of the regime only when it is safe to do so. Thus, this counter-argument may claim that it is not realistic to ask the Constitutional Court to be strict because that might have devastating consequences.

In response to that, it is important to highlight that the scope of the analysis in this chapter and the next does not include evaluating how pragmatic the analysed judgments are. In other words, it is not the purpose of both chapters to examine whether a judgment pronounced by the Constitutional Court was the safest option to escape retaliation from the regime in a particular case, if such retaliation is expected. Rather, both chapters assess the *de facto* independence of the Constitutional Court, which requires assessing the validity of the arguments presented by the Constitutional Court judges to justify their decisions. If these arguments are found to be invalid, then that is an indication of the Constitutional Court not paying due attention to the Basic Law, and thus inferring that it lacks *de facto* independence.

[5] See above Chapter Three (E)(2).
[6] See above Chapter Three (E)(1)(c).

It is noteworthy that, as the analysis of the cases shows, the Court relied on the principle of *res judicata*,[7] even in relation to procedural rules,[8] to dismiss cases newly-submitted against the regime, by referring to previously dismissed cases. The Court referred to reasons for dismissal on form, as opposed to reasons for dismissal on merits, mentioned in previous judgments to dismiss cases submitted later as an application of that principle. This was the main factor in blocking further challenges of constitutionality against legal texts that were beneficial to the regime. Explaining why dismissal on form is incorrect in the majority of these cases substantiates the argument that *res judicata* was incorrectly applied to dismiss cases of critical importance against the regime.

Second, if there is sufficient evidence that the Court's application of law was incorrect in most cases, then such evidence indicates the Court is ineffective in upholding the Basic Law, because its judges are either incompetent or tainted; i.e. they unduly favour the regime's interests or are attempting to escape possible retaliation from the regime.

Importantly, since both chapters analyse all cases issued by the Court since the coup in 2007 until 2017, the insights thus gained can assist to build a comprehensive picture of the Court's *de facto* independence during the entire ten-year period. As the analysis shows, this picture would disprove the counter-argument that perceives such incorrect application of the law in some cases as common faults and merely unintended mistakes that must not be generalised or overblown. An exhaustive examination of all judgments is required to support the argument of the analysis in both chapters: incorrect application of the law in most cases strongly signifies that the Constitutional Court lacks *de facto* independence.

Third, the disproving of the counter-argument mentioned above is based on the conclusions of both chapters, in which 25 out of 36 judgments are argued to be incorrect applications of the law. This incorrect application constitutes a failure to uphold the Basic Law,[9] mainly because the other eleven cases were about matters insignificant to the regime, as the analysis illustrates.

The analysis links the outcome of incorrectly-decided judgments to the functions of courts in authoritarian regimes, explained in Chapter Two, to give an interpretation of how the regime benefited from these judgments. These functions are: social control, legitimation, controlling administrative agents, maintaining elite cohesion, and providing credible commitments for prospective investors in the economic sphere. Importantly, performing these functions does not

[7] As explained in cases 12–2016, 5–2013, and 3–2007 below.
[8] As explained in cases 2–2014 and 3–2010 below.
[9] 11 out of 36 cases.

mean that the Court is effective in upholding the Basic Law, because those judgments are argued to be incorrect. Admittedly, from the regime's point of view, the Court performing these functions makes it effective in protecting the regime's interests; however, what is meant by effectiveness, in the analysis of all these cases, is upholding the Basic Law, not benefitting the regime.

Notably, these functions may be performed even when the law is correctly applied; nevertheless, the author's analysis of cases demonstrates how incorrect application of law by the Constitutional Court also fulfils the five functions in favour of the regime. This relationship is vital as it clarifies how these judgments served the interests of the regime. Furthermore, for the eleven cases that were insignificant to the regime, correct application of the law in these cases does not challenge the conclusions made about the implications of incorrectly-decided cases. Moreover, the criticism of the Constitutional Court judgments takes into account the competence of counsels (the plaintiffs' lawyers) as a factor that impinged on effective constitutional litigation before the Constitutional Court. The incompetence of counsels, which is observed in many cases, has played a role in the Constitutional Court reaching poorly-argued judgments.

Another critical question is whether the regime attempted to unduly interfere in the Court's decision-making process in incorrectly decided judgments. As the analysis explains, there is no hard evidence to show that the regime has directly influenced the decisions of the Court in any of the criticised judgments. However, the fact that the President has significant control over the tenure of constitutional judges, as explained in Chapter Four, raises the possibility that the judges sought to secure their tenure by showing loyalty to the regime or at least to escape retaliation from the regime. This implication provides further support for the argument made in Chapter Four: lack of balance between state powers in managing constitutional judges' tenure opens room for such undue consideration of regime's interests by the Court.

Fourth, the critique of the reasoning in all these judgments is supported by the comments of prominent Arab and Palestinian constitutional jurists, including judges of other Arab constitutional courts who have criticised many judgments of the Palestinian Constitutional Court. Also, the principles established by the Egyptian Constitutional Court are referred to in this analysis since the law of the Egyptian Court is the primary historical source of the Palestinian LSCC, as Chapter Four explained.[10] To allow for proper comparison, referring to

[10] See above Chapter Four (D).

those principles takes into consideration the similarities and differences between the Palestinian and the Egyptian laws related to each constitutional case. In their comments, many of the jurists mentioned above referred to the differences between constitutional and civil cases in applying the same procedural rules. As the author's analysis shows, these rules require a particular understanding due to the unique nature of constitutional adjudication in specialist constitutional courts, an adjudication that prioritises serving the public interest by holding the regime accountable for its actions before the Basic Law, not the exclusive, personal interest of the plaintiffs before the Court.

Prioritising such public interest is related to a distinctive characteristic of constitutional cases that appears in the analysis of the Constitutional Court judgments: the impersonal nature of such cases. To explain, the Egyptian constitutional jurists AbdulAziz Saliman and Fat'hi Fikry both convincingly argue that constitutional cases are impersonal because their primary concern is not the personal interest of the plaintiff. Rather, it is the whole public legal interest of upholding the Basic Law and removing contradictions between laws, regulations, and presidential orders in reference to the Basic Law.[11] Palestinian constitutional jurists Al-Kailany and Al-Turkomaniy support that argument and assert that what takes priority in constitutional cases is the constitutionality of a certain legal text or action, without substantial consideration of the grievance caused by the application of such text over a particular person, who has an interest in removing that grievance.[12]

This impersonal nature has significant implications for the procedures of constitutional litigation. For example, the plaintiff who proves that he has an interest in challenging certain legislation or a presidential order is not required to maintain this interest until the end of the Court's proceedings, because the claims related to the plaintiff's personal interests are insignificant compared to the public interest in upholding the Basic Law.[13] This infers that the plaintiff is required to prove his interest in submitting a constitutional case only at the time of filing the case, as a precautionary measure to ensure that no vexatious litigation burdens the

[11] Abd Al–Aziz Saliman, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2/2010 [Comment on Constitutional Court Judgment in Case No. 2 of 2010]' (2012) 18 (February) *العدالة والقانون* [Justice and Law] 125, 137; Fat'hi Fikry, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2/2009 [Comment on the Constitutional Court Judgment in Case No. 2 of 2009]' (2009) 14 (December) *العدالة والقانون* [Justice and Law] 106, 106.

[12] Zeed Al–Kailany, *الطعن في دستورية القوانين: دراسة مقارنة [Appealing the Constitutionality of the Laws: Comparative Study]* (Master of Public Law Thesis, An–Najah University, 2012) 19; Omar Hamzah Al–Turkomaniy, *القضاء الدستوري في فلسطين وفقاً لقانون المحكمة الدستورية العليا رقم (3) لسنة 2006 [The Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006]* (Master of Public Law Thesis, Al–Azhar University, 2010) 116.

[13] Al–Kailany, above n 12; Al–Turkomaniy, above n 12.

Constitutional Court.[14] Once proven, the Constitutional Court must continue with reviewing the constitutionality of the challenged legislation or order until pronouncing its judgment, even if the interest of the plaintiff is no longer relevant.[15] The Jordanian constitutional jurists Fahid Nusur and Ali Dibs argue for a similar explanation and affirm that the impersonal nature of constitutional cases is consistent with the purpose of constitutional review, because assessing the constitutionality of certain legislation or an order is the substantive concern, with no significant regard to the personal interests related to that review.[16]

Fifth, as explained in Chapter Three, *de facto* judicial independence can be assessed through two criteria: autonomy and influence. The first means that judges be the sole authors of their decisions, and not subject to any undue pressure by the regime. Influence means that judgments are properly implemented, and the regime complies with what judges decide.

Autonomy, as a criterion, rather than influence, will be employed for examining whether judges independently decided on cases before the Court, eventually assessing its *de facto* independence. Excluding the criterion of influence is due to the fact that 27 out of 36 constitutional judgments were in favour of the regime, which indicates that compliance with the Court's judgment in the vast majority of cases was in the regime's favour. Thus, such 'compliance' does not signify a reluctant compliance with the Court's judgments because these very judgments were in line with the regime's interests. By the same token, the other nine judgments, as explained below, were not significant to the regime, hence compliance with these judgments may not be considered a sign of *de facto* judicial independence. Therefore, autonomy is the more appropriate criterion than influence in the context of the Palestinian Court to assess its *de facto* independence. The Palestinian case offers further insights into why it is hard to establish a case for lack of de facto independence. Here, the argument rests on the fact that an overwhelming preponderance of cases have been decided in favour of the regime, coupled with frequent weaknesses in the reasoning of the Court.

To explain, incorrect application of the law gives rise to critical questions about whether the judges' decisions truly reflected their own preferences, and whether it is plausible that what

[14] Saliman, *Judgment in Case 2–2010*, above n 11.
[15] Mohammad Abd Al–Lateef, *إجراءات القضاء الدستوري [The Procedures of Constitutional Adjudication]* (Dar Al–Nuhdah Al–Arabiyah, 1989).
[16] Fahid Abu al–Athm Nusur, *القضاء الدستوري بين النظرية والتطبيق [Constitutional Judiciary: Between Theory and Practice]* (Dar Al–Thaqafah, 2016) 238–9; 'Isam Ali Dibs, *القانون الدستوري والنظم السياسية [Constitutional Law and Political Systems]* (Dar Al–Thaqafah, 2011) 389.

they thought sincerely about the cases, particularly the ones which the regime won, controlled the outcomes of the Court's judgments.

If the criticism of the Court's reasoning in a particular case is valid, then were judges aware of the principles on which the criticism is based? If they were, then why did they not apply such principles in the criticised judgment, or at least address them? Not applying them could mean that judges were, in fact, inadvertently neglectful. However, this is unlikely because, as explained above in Chapter Three, the President single-handedly has appointed persons with a long history in the legal profession. Almost all of them worked for many years as judges and law teachers, which indicates that they do not lack capacity.

If the judges were aware of these principles but decided not to apply them, then the concern is even greater, because deliberate failure to apply, or at least address, such principles indicates either the ill intention of the Court or the fear of retaliation from the regime. Such fear may be present if correct application of the law would significantly impinge on the regime's interests, and justifies characterising the Court as lacking autonomy.

This characterisation is also based on what the case analysis in this chapter and the next establishes: the Court has failed to demonstrate a reasonable ability to issue well-argued, strongly-justified judgments. This failure, along with the fact that the Court has almost uniformly ruled in favour of the regime in most cases, enforces the reasonable suspicion that the Court lacks autonomy, thus lacking *de facto* independence. In conclusion, the overwhelming tendency of the Court to favour the regime, together with the recurring weaknesses in reasoning, is highly unlikely to be a coincidence. The analysis of cases therefore supports the view that these two observations together are evidence of lack of autonomy, constituting a lack of *de facto* independence.

This chapter is structured in the following way: in each group of cases, the analysis begins with an explanation of the principal rule that falls under the critical legal issue in the group. For example, the critical legal issue in the first group is access to the Constitutional Court, and the author's analysis begins by explaining legal interest in constitutional litigation as the principal rule in this group. Then, the case in which the Court applied that principal rule is analysed to identify possible errors in the Court's reasoning and application of legal texts relevant to that rule, for example, case 2-2010 in which the above-mentioned principal rule was applied. Next, the analysis is made comprehensive by explaining how the Court applied other rules related to that critical legal issue, for example, the rule of insufficient explanation of submissions to the

Constitutional Court related to the issue of access. This explanation helps to understand the Constitutional Court's behaviour regarding the critical legal issue in relation to other rules that fall under it. The analysis of each group contains three main parts. First, an explanation of the principal rule in the group, including the facts of the case in which the Court applied that rule. Second, an assessment of the Court's reasoning and evaluation of its arguments presented to justify its judgment in that case, in addition to dissenting opinions if available. Third, an examination of how the Court applied other rules related to the critical legal issue in the same group, while demonstrating how its application of those rules affected the interests of the regime. The assessment of the Court's judgments in each case is followed by an illustration of the regime's gains from these judgments.

B *Access to the Constitutional Court*

1 *Background*

The scope of analysis of the cases below is limited to five rules that fall under the category of 'Access to the Constitutional Court'. The term 'access' here refers to following the correct procedures for lodging a case to the Court, which results in the case being accepted on procedural grounds. In other words, if a plaintiff correctly follows the procedures specified in the LSCC and demonstrates his eligibility to stand before the Court, then he is granted access, which means that the Court will proceed to decide the substantive grounds of the case on their merits.

The principal rule related to the legal issue of access is legal interest in constitutional litigation. The other four rules that relate to the same legal issue are: insufficient explanation of submissions; overdue submissions; implicit approval of subsidiary rebuttals; and eligibility to submit interpretation requests. All these rules are explained below.

It is, however, vital to highlight that all these judgments were in favour of the regime. Thus, their common impact centred around leaving authoritarian practices of that regime unchecked, and ultimately maintaining its interests. The main criticism of how the Constitutional Court applied those rules relates to the Court's incomplete, literal understanding of Articles related to each of those rules. Additionally, another factor in the Constitutional Court's incorrect application of these rules was the counsels' failure to follow correct procedures in submitting cases to the Court that were critical to oppose the authoritarian practices of the regime. This Court used this failure to dismiss the counsels' cases on form when it had the chance to do so,

despite the fact that in many such cases the Court had the option of using its competence to continue hearing the case.

2 *Legal Interest in Constitutional Litigation: Case 2-2010*[17]

Generally defined, 'legal interest in litigation' means the potential benefit that the plaintiff seeks to gain from filing a case to the court, which can be the motivation behind or, the aim of, filing the case.[18] Accordingly, the legal interest is considered the focus of the action, and without such interest, there is no basis for filing a case.

Article (3) of the Civil and Commercial Procedure Law, which partially applies to constitutional litigations according to Article 26 of the LSCC mentioned below, considers the legal interest as a prerequisite to file a case:

> A case, claim, motion or challenge raised by a party devoid of existing legal interest therein shall not be admitted.[19]

According to litigation jurisprudence, legal interest is established when three conditions are met: having a legal right, encountering a violation of that right, and having the capacity to file a case.[20] A legal right can be material or moral, since violations may produce damages to both types, whether present or imminent. The LSCC did not stipulate the nature of that interest or its prerequisites, except implicitly meaning in Article 27(1), as indicated by use of the phrase 'aggrieved person'.[21] Since this Law did not provide details of the interest's definition or description, the source for such details is the Civil and Commercial Procedure Law, provided such details do not contradict the 'unique nature' of constitutional cases, as stated in Article 26 of LSCC:

> With the exception of what is provided for under this Chapter (Two), the provisions prescribed in the Law of the Civil and Commercial Procedure shall be applicable to the decisions of referral, actions and applications (which are submitted to the Court), in a manner that is not contradictory to the nature of the jurisdiction of the Court and the situations determined before it.[22]

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[17] In Palestinian courts' registrars, cases are coded by giving them two numbers separated by a dash. The first number represents the order of this case in the line of cases submitted since the beginning of a calendar year, while the second number is the year in which the case was submitted. Interpretation requests have their own line, thus the first interpretation request submitted at the beginning of a calendar year takes number 1 even if a previous litigation case was submitted in that year.

[18] Saliman, *Judgment in Case 2–2010*, above n 11, 127.

[19] *Civil and Commercial Procedure Law No. 2 of 2001* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849>] ('*Civil and Commercial Procedure Law*').

[20] Saliman, *Judgment in Case 2–2010*, above n 11, 127.

[21] *LSCC.*

[22] Ibid.

Moving to the jurisprudence of constitutional litigation about 'grievance' as a fundamental element of legal interest — similar to what the Egyptian Constitutional Court declared in its judgment of case 10–13 —, grievance in a direct constitutional case stresses further importance on both of the following conditions.[23] First, the plaintiff must prove that a direct and identifiable grievance, either material or moral, was created on him in violation of a constitutional text. Second, the plaintiff must prove that a causal relationship exists between the application of the challenged legislation and the claimed grievance. To elaborate, if the application of the challenged legislation has not affected the rights of the plaintiff, then the latter has no legal interest in challenging that legislation because declaring such legislation unconstitutional will not bring any benefit to the plaintiff. Based on these two requirements, the Court is exclusively authorised to decide whether a legal interest exists or not.[24]

AbdulAziz Saliman persuasively argues that, according to the LSCC, it is sufficient to have this interest at the time of submitting a constitutional case, and not necessarily over the period of the litigation. Hence, the plaintiff is not required to maintain this interest until the end of the court proceedings, because there are no substantive claims related to the plaintiff's personal interests.[25] Therefore, according to the LSCC, the plaintiff in a constitutional case is only obliged to prove that he was aggrieved by the application of the challenged legislation at the time of submitting the case, regardless of him becoming free of the grievance after that — as happened in this case, where the plaintiff was released before the first hearing.[26]

For the first time since its establishment, the Court referred to legal interest in this case by the term 'standing'. The plaintiff was a civilian, arrested under military prosecution procedures according to the Revolutionary Penal Code and Penal Procedure Code of 1979.[27] He submitted his constitutional application demanding declaration of both codes as unconstitutional, arguing that both violate Articles 11(2) and 101(2) of the Basic Law,[28] which respectively affirm that:

> 11(2): It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of pre-arrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organisation of prisons.

[23] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2015; See المحكمة المصرية الدستورية العليا [Egyptian Supreme Constitutional Court] No. 10–13, 7 May 1994.
[24] See المحكمة المصرية الدستورية العليا [Egyptian Supreme Constitutional Court] No. 10–13, 7 May 1994.
[25] Ibid.
[26] Abd Al–Lateef, above n 15.
[27] Ibid.
[28] Ibid.

> 101(2): Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.[29]

Before the first session of 28 December 2010, the military prosecutor released the plaintiff.[30] As a result, the Constitutional Court decided that since the plaintiff was no longer aggrieved from custody by the challenged legislation — the codes —he no longer had a legal interest in the case.[31] That is, he lacked standing before the Court. Thus, the Constitutional Court unanimously dismissed the case on form.[32]

(a) Assessment of the Court's Reasoning

As the judgment above shows, the Constitutional Court considered 'standing', (in this case, having a legal interest in seeking release from prison) to be a condition that the plaintiff must maintain over the period of litigation, not only at the time he first accesses the Court.[33] Thus, any discontinuity in that maintenance would result in violating the rules of access to the Constitutional Court.[34] The Constitutional Court's refusal to continue hearing the case after the plaintiff's release was an erroneous application of that rule, because proving that he has a legal interest is required only at the time of filing the case, which he did.[35] By that refusal, the Court failed to fulfil the aim it was prescribed for, namely reviewing the constitutionality of both challenged laws to uphold the Basic Law. This refusal left a considerable violation of the Basic Law unaddressed, i.e. prosecuting civilians under military prosecution procedures.

This erroneous application also occurred in a very similar case before the Court, case 2-2011, in which the plaintiff was a civilian whom the military prosecution released before the first hearing, after he challenged the same laws.[36] Because of this similarity, the same criticism applies to the Constitutional Court's judgment in this latter case. The Constitutional Court dismissed the case on the same grounds, claiming that he has no legal interest after release.[37]

(b) The Regime's Gains

By avoiding review of the both laws, the Constitutional Court has, in an indirect way, allowed the regime to continue practising social control by sidelining civilian opposition to the military

[29] Ibid, 2.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Saliman, *Judgment in Case 2–2010,* above n 11, 127.
[34] Ibid.
[35] Ibid 140–1.
[36] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 2–2011, 3.
[37] Ibid.

judiciary.[38] This form of sidelining was prevalent against civilian supporters of the Hamas party after the coup, because military prosecution procedures impose fewer constraints on interrogations procedures.[39] The Palestinian Independent Commission for Human Rights issued a report after the Constitutional Court pronounced the above judgment, based on personal interviews that cited more than forty cases of civilians arrested under military prosecution provisions, most of them members of the Hamas party.[40]

Moreover, Al-Haq (an independent human rights organisation) published a letter it sent to the prime minister regarding the prosecution of civilians affiliated with the Hamas Party in the military courts.[41] The letter declared that 'security agencies continue to detain civilians accused of affiliation with Hamas. Civilians are detained in line with arrest warrants issued by the Military Justice Authority under the 1979 Revolutionary Penal Law'.[42]

3 *The Court's Application of Other Rules of Access*

(a) Insufficient Explanation of Submissions to the Court: Cases 1-2013 and 2-2014

Insufficient explanation of submissions here refers to the submission pleadings to the Constitutional Court that lack clear identification of key matters in the dispute, such as the legal text that the plaintiff seeks to challenge. Article 28 of the LSCC states that:

> [T]he pleading filed to the Constitutional Court must include … the statement of the legislative provision, against the unconstitutionality of which a challenge is being submitted, as well as the constitutional provision whose contravention is claimed, and the aspects of contravention.[43]

This Article does not limit the power to delineating the challenged provision to the plaintiffs.[44] Article 36 of the LSCC provides the Constitutional Court with the power to order further clarification from the plaintiffs to overcome the shortcomings in their pleadings.[45] It affirms that:

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[38] See above Chapter Two (E)(1).

[39] Ghandy Raba'y, *' احتجاز المدنيين لدى الأجهزة الأمنية الفلسطينية بقرار من هيئة القضاء العسكري [Detention of Civilians by the Palestinian Security Services Following an Order from the Commission of Military Judiciary] '* (The Independent Commission for Human Rights, December 2008) 23–30.

[40] Ibid.

[41] Al–Haq letter to Prime Minister Dr. Salam Fayyad Regarding Human Rights Concerns in the West Bank (2010) *Al–Haq Organisation* <http://www.alhaq.org/advocacy/topics/palestinian–violations/281–al–haq–letter–to–prime–minister–dr–salam–fayyad–regarding–human–rights–concerns–in–the–west–bank>.

[42] Ibid, para 4.

[43] *LSCC*.

[44] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2013, 2–3 ('*Case 1–2013*'); المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 2–2014, 2–3 ('*Case 2–2014*').

[45] See especially Yahya Zakariya Al–Sharqawy, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2013 [Comment on Constitutional Court Judgment in Case No. 1 of 2013]' (2015) 26 (October) *العدالة والقانون* [Justice and Law] 374, 378–9; See Mohammad Ghazzawy, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2013

> The Court may order the needed data or papers and it may call on the concerned persons to inquire about the facts and merits and to charge them to present the documents and additional papers in addition to other procedures in the date it determines.[46]

As this Article demonstrates, the Constitutional Court can utilise that authority and require the plaintiffs to clarify their pleadings by delineating the challenged provision.

In cases 1-2013 and 2-2014, the plaintiffs did not include statements about the legislative provisions being challenged, which made their pleadings unclear.[47] The Constitutional Court declared that the plaintiffs had violated Article 28 of the LSCC and dismissed their cases on form.[48]

Based on Article 36 explained above, the Constitutional Court made a mistake in considering clarity a requirement that only the plaintiff can fulfil, without addressing its authority in that Article. The Constitutional Court treated the lack of clarity as a mistake that is irreparable once the pleading has been submitted.[49] In other words, the Constitutional Court refused to use the powers conferred on it by the LSCC, raising the concern that it did not want to review provisions that provide the regime with useful powers. For example, in one of these cases, the plaintiff challenged the constitutionality of the 1954 Crimes Prevention Law No. 7, enacted during the Jordanian era.[50] This Law authorises the mayor of a city to issue a detention order against a civilian who resides in its territorial jurisdiction, known as administrative detention. This violates Article 11(2) of the Basic Law, which affirms that:

> It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law.[51]

The regime used this Law widely after the coup, ordering mayors to detain civilians who opposed the regime's policies, and mostly those civilians did not submit any case to rechallenge the constitutionality of this Law.[52] By refraining from using its competence to modify the

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[Comment on Constitutional Court Judgment in Case No. 1 of 2013]' (2015) 26 (October) *العدالة والقانون* [Justice and Law] 345, 349; and Abd Al–Aziz Saliman, ' 1/2013 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 1 of 2013]' (2015) 26 (October) *العدالة والقانون* [Justice and Law] 351, 360.

[46] *LSCC*.

[47] *Case 1–2013*, 2–3; *Case 2–2014*, 2–3.

[48] *Case 1–2013*, 2–3; *Case 2–2014*, 2–3.

[49] *Case 1–2013*, 2–3; *Case 2–2014*, 2.

[50] *قانون منع الجرائم رقم 7 لعام 1954* [Crimes Prevention Law No. 7 of 1954] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1954&MID=6567#A06567_4>.

[51] *القانون الأساسي لسنة 2002* [The Basic Law of 2002] (Palestine) < http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2002&MID=14094>.

[52] التوقيف على ذمة المحافظ او السلطة التنفيذية: اجراء مخالف للقانون ويتجاوز الصلاحيات ' [Detaining Civilians by the Authority of the Mayor or the Executive Authority: An Illegal Procedure That Transgress Competencies]' (The Palestinian Centre for the Independence of the Judiciary and the Legal Profession (MUSAWA), 2014)

pleadings of the plaintiff in the case discussed above, the Constitutional Court failed to prevent the regime from exercising illegitimate social control through the 1954 Crimes Prevention Law.[53]

(b) Faulty Submission to the Court: Cases 3-2012, 1-2015, 2-2015, 3-2016, and 5-2016.

Article 27(3) of the LSCC sets out two rules regarding submissions of adversary rebuttals, which are rebuttals submitted by litigants before an ordinary court against the constitutionality of certain legislation that it is about to apply. It states that:

> In case the adversaries rebut, during the hearing of an action before a court or a panel with judicial jurisdiction, [by arguing] that a provision in a law, decree, bylaw, regulation or decision is unconstitutional, and the court or panel finds that the rebuttal is serious, it shall adjourn the hearing of the action and define for the person who raised the rebuttal a deadline that does not exceed ninety days to lodge an action thereon before the Supreme Constitutional Court. In the event the action is not lodged by the deadline, the rebuttal shall be deemed to be as if it had never taken place.

The first rule mentioned in this Article is about the approval of adversary rebuttals as 'serious' by the ordinary court, i.e. not ill-intended for wrong purposes. This means that if the ordinary court rejects the rebuttal, then the litigant who presented that rebuttal cannot submit a case to the Constitutional Court. According to Articles 201 and 226 of the Civil and Commercial Procedure Law, the court that has jurisdiction to review disapprovals of adversary rebuttals is the Court of Cassation if the court which issued the disapproval is a Court of Appeal, and the Court of Appeal if it was issued by the a Magistrate Court. Each Article respectively states that:

> Judgments and decisions rendered by the conciliation court shall be appealed before the court of first instance, within the circuit of which it lies, in its appellate capacity. Judgments and decisions rendered by the court of first instance sitting as the court of original jurisdiction shall be appealed before the court of appeals.
>
> Cassation is available against final judgments rendered by the court of appeals when such judgments are based on a violation of law or a mistake in its application or interpretation.[54]

The second rule is about time limits. The Article limits the time for submitting such rebuttals to ninety days. Accordingly, if the plaintiff submits his pleading to the Constitutional Court after the due date set by the ordinary court that approved the rebuttal, then that submission is invalid.

The Constitutional Court applied the first rule in cases 1-2015, 2-2015, and 5-2016. The plaintiffs in these three separate cases submitted adversary rebuttals to their respective ordinary

[53] Ibid.
[54] *Civil and Commercial Procedure Law.*

courts, and these courts disapproved the rebuttals as not sufficiently serious.[55] The plaintiffs neglected, or possibly deliberately disregarded, these disapprovals and submitted direct, original cases to the Constitutional Court.[56] All three cases were dismissed on form.[57] The Constitutional Court's reasoning was based on Article 27(3) mentioned above, which affirms that if considered not serious, the rebuttal must not be submitted to the Constitutional Court.[58] Thus, the Constitutional Court dismissal is correct in these cases.[59] Moreover, as explained above, the correct procedure in challenging the disapprovals in these three cases is to appeal to the Court of Cassation, not through a direct case to the Constitutional Court. As the analysis demonstrates in those three cases, the inadequacy of lawyers prevented many constitutional challenges from being decided on by the Court.[60]

Moving to the rule on time limits, the Court applied this rule in case 3-2012. On 21 November 2011, the ordinary court that heard the original dispute gave the plaintiff 30 days to submit his pleadings to the Constitutional Court, after it approved his adversary rebuttal.[61] The plaintiff's submission was overdue, as it was not received until 6 May 2012.[62] Therefore, the Constitutional Court dismissed his case on form pursuant to Article 27(3) mentioned above.

Excluding case 3-2016, as it differs from the other four cases analysed here, the Constitutional Court dismissal of these cases is correct, as the counsels did not submit their pleadings to the Constitutional Court by the due date.[63] This observation about the lawyers' negligence, or possibly deliberate disregard for unknown reasons, provides further support for the argument that the inadequacy of some lawyers is an obstacle that hinders having more effective constitutional litigation in the West Bank, undermining the overall performance of the Constitutional Court.[64]

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[55] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2015, 3 ('Case 1–2015'); المحكمة العليا الفلسطينية بصفتها محكمة دستورية[High Court of Palestine sitting as the Constitutional Court], No. 2–2015, 2 ('Case 2–2015'); المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 5–2016, 2 ('Case 5–2016').

[56] Case 1–2015, 3; Case 2–2015, 2; Case 5–2016, 2.

[57] Case 1–2015, 4; Case 2–2015, 2; Case 5–2016, 3.

[58] Case 1–2015, 4; Case 2–2015, 2; Case 5–2016, 3.

[59] Rami Al–Zawahrah, ' التعليق على قرار المحكمة الدستورية العليا رقم 1/2015 [Comment on Constitutional Court Judgment in Case No. 1 of 2015]' (2017) 31 (December) *العدالة والقانون [Justice and Law]* 355, 362.

[60] Ibid 361.

[61] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2012, 3.

[62] Ibid 4.

[63] Al–Kailany, above n 12, 57.

[64] Nusur, above n 16, 414–415.

In case 3-2016, the plaintiff submitted a case against a judgment issued by the Roman Orthodox Court in November 2014, which obliged the plaintiff to pay monthly alimony expenses to his former wife. The plaintiff presented an official document that proved his conversion to Islam in January 2015. Accordingly, he claimed that the Orthodox Court had no jurisdiction over him and requested the Constitutional Court to declare that judgment unconstitutional.

The Constitutional Court replied by asserting that the jurisdiction of its judicial review is exclusive to laws and regulations. Thus, court judgments, including those of religious courts, fall out of its jurisdiction. Based on that, it dismissed the case on form.

The Constitutional Court decision is correct. Nevertheless, this case raises concerns regarding the adequacy of the counsel who submitted this case to the Constitutional Court, as it is clear from this Article that the Constitutional Court has no jurisdiction over courts' judgments. As explained above in cases 1-2013 and 2-2014 above, this is a notable problem in constitutional litigation in Palestine, and an obstacle to a successful defence of constitutional rights.

(c) Implicit Approval of Subsidiary Rebuttals: Case 14-2016

The rule of implicit approval of subsidiary rebuttals case is derived from Article 27(3) quoted above.[65] As mentioned, this Article shows that the fundamental requirement for approving an adversary rebuttal is the ordinary court finding it serious.[66] If it does, then that court must set a time limit for lodging a constitutional action. The reason behind considering this finding of the ordinary court a fundamental requirement is it guaranting a good intent from the plaintiff in raising this rebuttal.[67]

This rule is related to case 14-2016 in the Constitutional Court. This was filed by a charitable association called Arab Medical Welfare, which was formed in 1982 in the West Bank, where it has been supportive in developing the health sector.[68] The original dispute started before the High Court of Justice on 13 January 2016, when the Association demanded it to annul a decision by the Minister of Interior Affairs to dissolve it.[69]

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[65] See Above (B)(3)(b); Kamil Sa'id, النظرية العامة للقضاء الدستوري [*The General Theory of Constitutional Adjudication*] (Dar Al–Thaqafah, 2017) 128–30.
[66] Nusur, above n 16, 188.
[67] *Al–Turkomaniy, above n 12, 212–3.*
[68] بيان هام صادر عن جمعية الرعاية الطبية العربية [Important Statement Issued by the Arab Medical Welfare Association], *Al–Hurriyah News Network* (Palestine) <http://www.hr.ps/news/page–100663.html>.
[69] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 14–2016, 2 ('*Case 14–2016*').

After the last hearing, and before judgment was pronounced in a later session of the High Court, the Association submitted a direct case to the Constitutional Court challenging Article 37(3) of the 2000 Charitable Associations and Civil Society Organisations Law No. 2, the Article upon which the Minister justified his authority to dissolve the Association.[70] This Article stipulates that:

> The Association or Organisation shall be dissolved [by a decision from the Minister of Interior Affairs] if it is proven that the Association or Organisation had substantially violated its Bylaws, and had not amended its status within a period not exceeding three months after the issuance of a written warning by the Minister.[71]

This Article allows the Minister to warn associations that violate their respective bylaws, requesting them to adjust their status according to such warnings. It is important to highlight that, according to this Article, the authority to assess whether an association's adjustment is adequate lies in the hands of the Minister, rather than a judicial institution. Furthermore, this Article allows the Minister to in fact restrict the freedom of assembly guaranteed in Article 26(2), without judicial supervision of that assessment. This Article therefore violates Article 11(2) of the Basic Law, which stipulates:

> It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law.[72]

Next, the Association submitted a request to the High Court of Justice for it to suspend pronouncing its judgment until the Constitutional Court had made its decision.[73] The High Court of Justice approved the request and affirmed that this case constituted a serious effort from the Association to rebut the constitutionality of Article 37(3) mentioned above.[74] On 5 January 2017, the Constitutional Court declared that the way the Association accessed the Constitutional Court was incompatible with Article 27, because it was neither a direct case, nor a subsidiary referral, nor an adversary rebuttal.[75]

To explain, the Constitutional Court held that, according to Article 27, minimum requirements must be fulfilled for access to the Constitutional Court via each of these three avenues to be valid.[76] For a direct case, it must be first heard by the Constitutional Court; i.e. the dispute

[70] Ibid 1.
[71] *Charitable Associations and Civil Society Organisations Law No. 1 of 2000* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2000&MID=13431>].
[72] *Basic Law of 2002.*
[73] *Case 14–2016*, 2.
[74] Ibid.
[75] Ibid 4.
[76] Ibid 2–4.

before the Constitutional Court must be original. As the facts above show, the dispute was first heard by the High Court of Justice, so describing the plaintiff's access to the Constitutional Court as inconsistent with this avenue is correct.

For a subsidiary referral, the court hearing the dispute must *sua sponte* refer the dispute to the Constitutional Court if there is legislation that seems unconstitutional to that court. According to the facts above, the plaintiff submitted its case to the Constitutional Court then asked the High Court of Justice to suspend pronouncing its judgment.[77] Thus, it is also correct to consider the plaintiff's access in this case incompatible with this avenue.

Lastly, for an adversary rebuttal, the Constitutional Court claimed that the ordinary court's approval of such a rebuttal is a prerequisite for allowing the plaintiff to lodge an action with the Constitutional Court. Since the plaintiff in this case submitted his case before the High Court of Justice approved his rebuttal, he violated the procedures required for this avenue as well, and therefore the Constitutional Court dismissed the case on form.[78]

However, an implicit approval of the adversary's rebuttal is present in this case. The High Court of Justice declared that filing the case demonstrates a serious attempt from the plaintiff to challenge the constitutionality of Article 37(3).[79] Thus, it suspended pronouncing its judgment.[80] Furthermore, there is no indication in Article 27(3) that issuing the approval must occur before lodging the constitutional action; i.e. the occurrence of this approval before lodgement is not an integral element for the validity of accessing the Constitutional Court through this rebuttal. It is mentioned as a clarification of what the ideal process is; although other variations of this process, as the one shown here, are also possible.[81] Importantly, what supports this understanding is requiring the Court to set a deadline for the plaintiff, which indicates that the purpose of these measures is to guarantee that the plaintiff's rebuttal is serious and not ill-intended.[82] Based on that, the Constitutional Court judgment in this case was incorrect, as it considered an approval a prerequisite for submitting the constitutional case. This consideration is misplaced because it neglects to deem seriousness as the important element in the rebuttal, not the process of access itself.[83]

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[77] Ibid 2.
[78] Ibid 5.
[79] Ibid 2.
[80] Ibid.
[81] Muhammad 'Abd Allah Shawabikah, *رقابة الإمتناع على دستورية القوانين: دراسة مقارنة [Abstention Control on the Constitutionality of Laws: A Comparative Study]* (Dar al–Thaqafah, 2012) 104.
[82] Al–Kailany, above n 12, 28.
[83] Al–Turkomaniy, above n 12, 214.

The result of this judgment that the regime would rely on Article 37(3) to dissolve the association through arbitrary assessments of the Associations' adjustments to its status after a warning by the Minister of Interior Affairs.[84] Similar assessments of other associations were claimed as justifications for dissolving them.[85] The judgment thus relates to social control, a function of the courts under authoritarian regimes, because it aims to prevent associations from forming any strong opposition against certain policies of the regime.[86]

(d) Eligibility to Submit Interpretation Requests to the Constitutional Court: Interpretation Request 2-2016

Article 30(1) of the LSCC regulates how interpretation requests must be submitted to the Constitutional Court:

> The request for interpretation shall be submitted by the Minister of Justice based upon a request from the President of the National Authority or the Chairman of the Council of Ministers or the Chairman of the Legislative Council or the President of the High Judicial Council or from a person whose constitutional rights have been violated.

According to this Article, any person who can prove that his constitutional rights were violated can submit an interpretation request to the Minister of Justice, not the Constitutional Court. Then, the Minister submits the request to the Court, that is, it is the Minister who initiates the procedures before the Constitutional Court, not the lawyer for the civilian who submitted the request to the Minister. The Article sets one requirement for civilians to be eligible for submitting such requests to the Minister: having a constitutional right violated. Thus, it is the exclusive competence of the Minister to submit an interpretation request to the Constitutional Court, a request that is independent from, but based on, the first request sent by the person whose rights were violated, not merely an endorsement of that first request. The civilian, or his counsel, only submits a request to the Minister, who in turn submits a request for interpretation to the Constitutional Court.[87]

In June 2016, the Constitutional Court received an interpretation request from the Minister of Justice to interpret Article 136 of the Penal Procedure Law No. 3 of 2001, which states:

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[84] *الانتهاكات الفلسطينية للحق في تكوين الجمعيات في السلطة الفلسطينية ' [The Palestinian Authority's Violations of the Right to Form Associations]'* (The Palestinian Centre for Human Rights, 2009) 11–4.

[85] Mahmood Dodeen, ' تقييم أثر قانون الجمعيات الخيرية والهيئات الأهلية رقم (١) لسنة ٢٠٠٠ ولائحته التنفيذية على أداء الجمعيات [The Impact of the Charitable Associations and Community Organizations Law No. (1) of 2000]' (Palestine Economic Policy Research Institute (MAS), 2016) 101–5.

[86] The Palestinian Authority's Violations of the Right to Form Associations, above n 84.

[87] Zaynab Al–Sa'idy, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 2/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 2 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 216, 217.

> An application may be submitted to the President of the High Court to review any order issued pursuant to the foregoing articles [related to release on bail].[88]

The reason for submitting this request was the frequent use of this Article by officials in the security apparatus, asking the High Court to review orders of release on bail.[89] The purpose of these detention orders was to rearrest detainees who were released on bail by magistrate courts or courts of appeal.[90] Additionally, this Article was used on some occasions to arrest detainees who were pronounced innocent by lower courts, including after decisions by courts of appeal that upheld the original ruling.[91]

Daoud Darawi, the counsel for the aggrieved plaintiff, submitted the request to the Minister of Justice pursuant to Article 31(1) of the LSCC mentioned above. In responding to the request, the Court wrongly assumed that Darawi was the person who has commenced the proceedings of interpretation, not the Minister, and therefore began by examining whether the lawyer meets the criteria mentioned in Article 31 of the LSCC, which states that:

> Proceedings before the Court may not be commenced except through a representative of the entity of the issues of the State or through a lawyer whose period of experience in the legal profession is not less than ten consecutive years. The President of the Court shall appoint a lawyer for the plaintiff who is proven to be insolvent.[92]

To calculate the period of experience for Darawi, the Constitutional Court affirmed that, according to the records of the Palestinian Bar, he started practising law in May 2000, and then became a judge in 2008.[93] He returned to legal practice in January 2011 and practising law until the present. The Constitutional Court inferred that he did not serve ten consecutive years as a legal practitioner and therefore dismissed the request.[94]

As explained above, the lawyer initiates the interpretation procedures by the submitting a request to the Minister, but it is the Minister who commences the proceedings before the Court, not the lawyer.[95] Therefore, deeming the lawyer to be the person commencing the proceedings

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[88] *Penal Procedure Law No. 3 of 2001 (Palestine)* [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13854>].
[89] Abd Al–Aziz Saliman, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 2/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 2 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 195, 196.
[90] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 2–2016, 5 (Judge Abbas).
[91] Ibid.
[92] *LSCC.*
[93] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 2–2016, 2
[94] Ibid.
[95] Mohammad Al–Dhaher, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 2/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 2 of 2016]' (2017) 29 (June) *العدالة والقانون[Justice and Law]* 219, 221.

before the Court is inconsistent with Article 31(1) since the Minister is exclusively authorised to submit interpretation requests directly to the Court.[96]

Judge Hatem Abbas dissented from the majority's opinion. He affirmed that not counting the years of experience as a judge for Darawi contradicts the purpose of this criterion.[97] To elaborate, the purpose of requiring ten consecutive years of practice was to guarantee that whoever pleads before the Constitutional Court has sufficient experience in law, and that experience is acquired by judges and lawyers alike, since they both perform fundamental tasks in the adjudication process. Article 40(2)(C) of the Law No. 3 of 1999 on Regulating Legal Practice supports this understanding, by counting the years of experience that a lawyer spends as a judge when a lawyer wishes to run for the Board of the Palestinian Bar Association:

> For purpose of candidacy to the Board, any working period in a judge position shall be considered a period of legal practice.[98]

Based on this criticism of the dismissal, the Constitutional Court decision in this case is incorrect. Because of this dismissal, the regime could continue relying on Article 136 to rearrest released detainees, especially those who oppose the regime.[99] Accordingly, the Constitutional Court failed to prevent the regime from illegally marginalising opposition members and their supporters, and this failure again relates to social control, a function of the courts in authoritarian regimes.[100]

4 *Summary*

It can be inferred that the Constitutional Court failed to uphold the Basic Law in the face of the violations of the regime in its applications of rules related to access to the Court. Certain practices of the regime continued unconstrained, such as: prosecuting civilians before military courts; referring to the Jordanian Crimes Prevention Law to arrest civilians without having a judicial order; and rearresting released detainees by an order from the High Court of Justice.

The analysis of the incorrect application of the five rules above that fall under the issue of access to the Court leads to an assessment of the Court's judges as either incompetent because of negligence, or tainted because of deliberate disregard of relevant principles.

[96] Saliman, *Judgment in Interpretation Case 2–2016*, above n 90, 197.
[97] Judge Abbas, above n 90, 1.
[98] *Law No. 3 of 1999 on Regulating Legal Practice* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=1999&MID=13210 >].
[99] Judge Abbas, above n 90, 4–5.
[100] See above Chapter Two (E)(1).

Additionally, in the correctly-decided cases regarding faulty submission by lawyers, the incompetence of those lawyers was a contributing factor in not holding the regime accountable for its violations of the Basic Law. Accordingly, the incompetence of lawyers appears to be another obstacle to effective constitutional adjudication in Palestine.

C *Impleading the Government*

1 *Background*

The analysis of this group decisions centres around the issue of 'impleading' the government. Impleading means to include the government as a defendant in the constitutional case, either at the time of submitting the case, or during the hearing of the case, based on a request from the plaintiff or the Court itself. This action of impleading the government falls under the principle of correct capacity, which requires the inclusion of all relevant plaintiffs and defendants in the litigation, as explained below.

As with the previous two groups, the judgment in this case about the military judiciary was in favour of the regime. The Court dismissed the case on form because the plaintiff did not implead the government at the time of submitting the case. As the analysis below reveals, this dismissal is incorrect because the LSCC allows the Court to *sua sponte* implead the government in the event the plaintiff did not do so.

Since the coup, the regime has used the judiciary to try civilians who were members of the Hamas Party. The dismissal allowed the regime to continue trying the plaintiffs despite the Basic Law's prohibition on trying civilians before military courts.

The second case is also related to impleading the government, but its subject was not of importance to the regime. It is about the validity of a marriage contract between a Muslim wife and her husband who converted from Islam. Despite the insignificance of this case, the Court applied the rules about impleading the government in the same incorrect way that it did in the first case.

The last two cases are about the constitutionality of a Jordanian law that is still applicable in the West Bank. According to the plaintiffs in both cases, this law prevents litigants from impleading the government in cases related to the latter's actions. The Court asserted in both judgments that the plaintiffs reading of the law was incorrect, and upheld the constitutionality of the law. The outcome of both judgments was neither in favour nor against the regime's interests. Nevertheless, both cases were included in this group to give a comprehensive picture of the Constitutional Court stance on the issue of impleading the government.

2 *The Constitutional Court's Sua Sponte Impleader: Case 1-2009*

Since constitutional adjudication engages with explaining fundamental rules of litigation and pronouncing judgments concerning essential aspects of the legal system, it is required to be free from procedures that might constrain its ability to engage in these tasks.[101] For example, public hearing is required in non-constitutional litigation, whereas it is not required in constitutional cases.[102] For this reason, the LSCC regulates explicitly important procedures in constitutional cases, and the Court itself directs most of these procedures. Article 36 of the LSCC states that:

> The Court shall rule in the actions and requests submitted before it in scrutiny without a pleading. In the event it deems that a verbal pleading is necessary, it may hear the litigants. In such case, the litigants shall not be permitted to appear before the Court without a lawyer with them. The Court shall be entitled to require necessary data or papers and to invite those concerned to interrogate them about the facts before it and assign them to submit complementary documents and notes and other procedures on the date which it sets forth.[103]

This power of the Court is not shared by other ordinary courts that hear civil and commercial actions, in which the judge is mostly directed by what the adversaries present.[104] Importantly, the unique characteristics of constitutional adjudication change the preconditions for accepting constitutional actions.[105] In analysing the Constitutional Court's *sua sponte* impleader, only what is known as 'capacity of adversaries' is significantly relevant and needs further explanation.

Correct capacity is a prerequisite for accepting constitutional cases. It is defined as the legal capability of the plaintiff to attribute positive outcomes of the case to himself, and negative outcomes to those involved in causing him the grief complained of, i.e. the defendants.[106] To explain, a plaintiff has correct capacity only if he has the legal right to challenge the legal text that directly aggrieves him.[107] In other words, if the plaintiff does not have the right to challenge

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[101] Nusur, above n 16, 237–41.
[102] Husayn Ahmad Mushaqi,*الوجيز في شرح قانون أصول المحاكمات المدنية والتجارية الفلسطيني [The Concise in Explaining the Principles of the Palestinian Commercial and Civil Procedure Law]* (Dar Al–Thaqafah, 2011) 212.
[103] *LSCC.*
[104] Abd Al–Aziz Saliman, 'التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2009 [Comment on Constitutional Court Judgment in Case No. 1 of 2009]' (2009) 14 (December) *العدالة والقانون [Justice and Law]* 81, 83.
[105] Ibid 82; Al–Kailany, above n 12, 19–21; Al–Turkomaniy, above n 12, 138.
[106] Al–Turkomaniy, above n 12, 103–5, 139; Al–Kailany, above n 12, 103–5; Al–Turkomaniy, above n 12.
[107] Mushaqi, above n 102, 106; Al–Kailany, above n 12, 103–5; Al–Turkomaniy, above n 12, 103.

a certain law, even if the law directly harms him, then he lacks the capacity to file a case.[108] Thus, correct capacity is related to the plaintiff's right to make a claim before the Court.[109]

According to Article 32 of the LSCC,[110] the government should be included as an adversary in every constitutional case a plaintiff files with the Constitutional Court, regardless of its subject, parties, or the potential legal interest of the government itself in such cases. This impleader is required in order to inform the government about such important matters, and allows it to present its pleadings concerning the case, either in support of the plaintiff or the defendant.[111]

The difference in adjudication rules explained before has an impact on the validity of impleading the Government during the Court's hearing of the case, if the plaintiff fails to do so when lodging his case. First, according to general rules, the plaintiff can implead any adversary during the hearing of the case, if that adversary has a legal interest in being included in the litigation.[112] However, constitutional disputes have a specific provision that prevents the plaintiff from submitting additional papers after lodging his case to the Court. That provision is stated in Article 34 of the LSCC,[113] which stipulates that:

1. Each person who receives an announcement of a decision of referral or of an action shall be entitled to commit to the clerk of the Court within fifteen days from the date of its being announced a note including his remarks enclosed with the documents.
2. The litigant may respond to that by a note and documents within the fifteen days following the expiration of the aforementioned appointment. In the event the litigant uses his right to respond, the first may comment by a note within the following fifteen days.
3. The clerk of the Court may not accept following the expiration of the appointments outlined in Paragraphs (1 and 2) above papers from litigants and he must draw up a protocol in which he states: the date of the submission of such papers and the name and capacity of the person who submitted them.

Based on this Article, the plaintiff is not allowed to submit any order to the Court once the hearing of the case begins, including any request to implead the government. Hence, the Court pronounced the plaintiff's failure to implead the government, and subsequently dismissed the case on form.[114]

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[108] Miflih 'Awwad Qudat, *أصول المحاكمات المدنية والتنظيم القضائي [The Principles of Civil Procedures and Judicial Organizing]* (Dar Al–Thaqafah, 2nd ed, 2013) 206–7; Nusur, above n 16, 402–3.
[109] *LSCC.*
[110] The last sentence of this Article reads that '[t]he Government shall be deemed to be from among those concerned in the constitutional actions".
[111] Saliman, *Judgment in Case 1–2009*, above n 104, 99; Al–Kailany, above n 12, 110.
[112] Mushaqi, above n 102, 199–201.
[113] *LSCC.*
[114] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2009, 5.

Nevertheless, it is incorrect to assume that the only avenue to implead the government is through a plaintiff's request.[115] Hence, a vital enquiry to evaluate this judgment is whether the Court can do so, which would fulfil the same objective of impleading the government explained above. In fact, Article 36 of the LSCC explicitly grants the Court the right to *sua sponte* include other persons, legal or natural, as an adversary. It affirms that:

> The Court shall be entitled to require necessary data or papers and to invite those concerned to interrogate them about the facts before it and assign them to submit complementary documents and notes and other procedures on the date which it sets forth.[116]

As this Article shows, the Court can *sua sponte* 'invite those concerned to interrogate them', the government included, and place them as an adversary of the plaintiff. Once placed as such, the plaintiff can start impleading to seek the government's responses.[117] Therefore, according to this Article, the Court can invite the government to 'submit complementary documents', particularly responses to the plaintiffs' pleadings in this case.[118]

In case 1-2009, two civilians submitted a direct action to the Constitutional Court on 16 February 2009 against the Head of the Military Judiciary Commission, the Special Military Court, and the Military Prosecution.[119] They demanded it pronounce the unconstitutionality of the Revolutionary Penal Law and the Revolutionary Criminal Procedure Law, both enacted by the PLO in 1979.[120] Both laws are the basis for establishing special military courts and military prosecutions. The plaintiffs, who were convicted before a special military court at the time of filing the action, asserted that detaining them according to military prosecution procedures before a military court violates Articles 101(2) of the Basic Law, which affirms that:

> Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.[121]

In the first session before the Court, the General Prosecutor submitted a rebuttal requiring the Constitutional Court to reject the action on form because it designated an incorrect adversary, since the plaintiffs did not include the government as an adversary in their pleadings.[122] He

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[115] Mushaqi, above n 102, 199–201.
[116] *LSCC.*
[117] Qudat, above n 108, 294–5.
[118] Ibid.
[119] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2009, 1.
[120] Ibid 2.
[121] *Basic Law.*
[122] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2009, 4 ('*Case 1–2009*').

claimed that including the government is a compulsory procedure pursuant to Article 32 of the LSCC, which asserts in its last sentence that:

> The Government shall be deemed to be from among those concerned in the constitutional actions.[123]

The Constitutional Court approved the General Prosecutor's request and dismissed the case since the LSCC made it compulsory to implead the government in order to accept the case on form, and this had not happened.[124]

(a) Assessment of the Court's Reasoning

The Court declared that both plaintiffs should have explicitly impleaded the government in a timely fashion to ensure that the government had notice of arguments against its legislation, and since they had not done so, the plaintiffs violated a rule of procedure and their action was dismissed on form.[125] At the core of the Court's reasoning is the assumption that as the LSCC does not contain a specific provision that explains the effect of not impleading the government, then the general rules contained in the Civil and Commercial Procedure Law should be followed.[126] According to those rules, if a procedural matter is related to fundamental rules, then the Court should *sua sponte* examine whether the adversaries took that matter into account.[127] If one of the adversaries has neglected to do so, then the adversary's request must be dismissed on form.[128] In this case, the Court considered the matter of impleading the government as a fundamental procedural rule.[129]

The reasoning explained above in support of the Court's judgment is incorrect. To demonstrate what its possible flaws are, it is important to summarise it, showing its main premises. First, from the Court's point of view, Article 34(2) of the LSCC obliges the plaintiff to explicitly include the Government as an adversary in a timely fashion. Second, it is not possible for the plaintiff to request such an impleader from the clerk within 15 days of receiving the comments from the defendant. If those 15 days pass without the plaintiff impleading the Government, then the case must be dismissed on form.[130]

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[123] *LSCC*.
[124] *Case 1–2009*, 5.
[125] Ibid.
[126] *Case 1–2009*, 4.
[127] *Civil and Commercial Procedure Law* art 82(1).
[128] Ibid art 92.
[129] *Case 1–2009*, 5.
[130] Ibid 4.

Arguing that the plaintiff is not permitted to request impleading the Government after the due date is sound. However, as explained above, Article 36 of the LSCC provides the Court with the competence to *sua sponte* implead the government in a timely fashion.[131] Based on this, the Court had the opportunity to invite the government to be a defendant, which would have overcome the consequences of the plaintiffs' failure to implead it. In other words, the Court did not utilise its power to include the government as an adversary, which would have allowed the plaintiffs to implead it. This power is also given to ordinary courts; Article 82 of the Civil and Commercial Procedure Law declares that:

> The Court may, even *sua sponte*, exclude any of the defendants in the case if there is no justification for their inclusion, and may, even *sua sponte*, introduce in the case any person whose joinder it deems will help reveal the truth or serve the interests of justice.[132]

Overall, it can be argued that Article 36 of the LSCC provides the Court with the competence of *sua sponte* introducing the government as a defendant in constitutional cases, if the plaintiff fails to do so at the time of submitting the case.

(b) Non-Published Dissenting Opinion

The final judgment was one made by a majority of the bench.[133] This means that some judges dissented from it. After searching through the Official Gazette of Palestine, which publishes the Constitutional Court decisions, the Muqtafi database, and law reports published by human rights organisations in Palestine, it has not been possible to find that dissenting opinion. Usually, when judges dissent, their opinions are published in the last section of the judgment in the Gazette. However, this was not the case with this judgment.

The failure to publish the dissenting opinion raises concerns about the transparency of the Constitutional Court.[134] What might increase those concerns is the fact that, in most other judgments, it did publish such opinions. It is hard to know what the implications of that judgment would be without knowing its content. By not publishing the dissenting opinion, the Court has prevented scholars, lawyers, and activists from gaining a comprehensive understanding of judges'.[135]

[131] *LSCC.*
[132] *Civil and Commercial Procedure Law.*
[133] *Case 1–2009*, 5.
[134] See Al–Turkomaniy, above n 12, 267.
[135] See Nusur, above n 16, 431.

(c) The Regime's Gains

By dismissing this case on form, the Court avoided addressing the constitutionality of trying civilians before military courts, escaping a possible retaliation from the regime, as the president can initiate procedures that may terminate the tenure of judicial officials.[136] It was beneficial to the Court to do so because if the case had been accepted on form, finding a justification for such trials would be burdensome, as Article 101(2) is explicit about prohibiting them.[137]

In this case, the Constitutional Court evaded assessing the legitimacy of trying the plaintiffs before the military court that was hearing their case. Thus, the regime continued trying them in this way on the pretext that both revolutionary laws had not been declared unlawful by the Constitutional Court.[138] This is a different performance of the function of legitimation since it occurred passively; rather than declaring such trials constitutional, the Court avoided assessing the issue at all.[139]

An official report in December 2008 by the Palestinian Independent Commission for Citizens' Rights (which later changed its name to become the Palestinian Independent Commission for Human Rights) provided detailed accounts of the arrest of civilians under military prosecution procedures and their trials before military courts.[140] It was published three months after the High Court of Justice judgment in case 156-2008. Pursuant to its jurisdiction under Article 33(1) of the Formation of Regular Courts Law, the High Court of Justice declared that:

> The decision made by the Head of the Military Judiciary Commission to detain the plaintiff, who is a civilian, constitutes a violation of Article 101(2) of the Basic Law and is a transgression against the competences of civil prosecution commission. Furthermore, it violates the right of freedom which Articles 11 and 12 of the Basic Law maintain. Thus, such decision is null and void, and detaining the plaintiff is illegal.[141]

The Military Judiciary Commission did not release the plaintiff. Moreover, the High Court of Justice pronounced nine judgments during those three months about the same matter, in which plaintiffs filed cases against the Military Judiciary Commission; none of those plaintiffs in the nine cases were released.[142]

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[136] See above Chapter Four (E)(2).
[137] *Basic Law.*
[138] See especially Raba'y, above n 39.
[139] See above Chapter Two (E)(2).
[140] Raba'y, above n 39.
[141] محكمة العدل العليا الفلسطينية [The Palestinian High Court of Justice], No. 156–2008, 2. Article 33(1) states that: 'the Court exercises jurisdiction over applications opposing imprisonment which entail the issuance of orders to release persons who are illegally detained.'
[142] Raba'y, above 39, 18.

The report states that more than one hundred civilians who showed political support for Hamas were arrested under military prosecution procedures.[143] Field researchers interviewed 30 of them. The interviewees asserted that they were kept in prison without being informed of the charges against them, allowing them to engage a lawyer, or contacting their families.[144]

The report further indicates that military courts and military prosecution were effective tools in sidelining political opponents and trying them without the restrictions that civil procedures require the regime to abide by.[145] These practices explain how it was a significant gain for the regime that the Court did not assess the constitutionality of these actions in this case.

3 *The Court's Application of Impleader Rules in Other Cases*

(a) Impleader in Cases Insignificant to the Regime: Case 3-2010

This case is about the marriage status between a man who was previously a Muslim and his Muslim wife. On 14 July 2010, Mohammad Alawnah and his wife, Samah Alawnah, filed a constitutional case against the decision made by a Palestinian court that has jurisdiction over matters of religion, which declared the marriage between them void and terminated their marriage contract.[146] The religious court affirmed that, because the husband changed his religion, he became an apostate and, according to the Law of Personal Status applied in Palestine, marriage between an apostate and a Muslim woman is void.[147]

The plaintiffs did not implead the government.[148] Thus, the Constitutional Court dismissed the case for the same reasons explained in the case previously discussed. The Constitutional Court could have *sua sponte* impleaded the government and included it in the litigation as a defendant. Although this case is not substantially related to the interests of the regime, the Constitutional Court did not implead the government in it, because the Court most likely wanted to maintain consistency with its previous decisions.[149]

(b) Filing Cases against the Governments' Actions: Cases 13-2016 and 3-2017

These two cases, 13-2016 and 3-2017, are slightly different from the previous cases in this group. They do not relate to dismissal on form as a result of not impleading the government.

[143] Ibid 24.
[144] Ibid 23.
[145] Ibid 17, 31.
[146] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2010, 1 ('*Case 3–2010*').
[147] Ibid 2.
[148] Ibid 3.
[149] See Nusur, above n 16, 270–1.

Rather, they are related to Article 5 of the Lawsuits against the Government Law No. 25 of 1958,[150] which stipulates that:

> The courts shall not hear any action against the Government, either original or non-original action, unless the purpose of the lawsuit is:
>
> (A) To obtain movable funds, or redeem the amount of their value.
>
> (B) To own, use, deprive from others' possession, or redeem immovable property, or compensate for its value or the value of renting it.
>
> (C) To receive funds or compensation arising out of a contract to which the Government is a party.
>
> (D) To demand 'prohibition of request' of certain funds on condition that the claimant pays the claimed amount of funds or provides a guarantor.

In both original disputes, from which constitutional disputes emerged, the plaintiffs sued the government, demanding work injury compensation.[151] The ordinary courts referred the matters to the Constitutional Court, demanding its assessment of the constitutionality of Article 5.[152] The referral was a result of the concern that this pension violated Article 30(2) of the Basic Law, which asserts that:

> Laws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review.[153]

The Constitutional Court pronounced its judgments for both cases on the same day and its reasoning was identical in both. The Constitutional Court affirmed that a correct reading of Article 5 leads to the conclusion that there is no such violation.[154] The Constitutional Court declared that:

> The Court considers that the text in Article 5 sets the purposes of impleading the Government, without specifying the nature nor the causes of such impleader. Thus, the purposes, according to this Article, are intended to achieve the financial interests of the plaintiffs. Hence, The Constitutional Court does not see any immunisation or restrictions imposed on the victims of work injuries to resort to an ordinary court in order to sue the Government. Such resort to an ordinary court is a procedural process in impleading the Government, to demand adequate and appropriate compensation in accordance with the purposes mentioned in this Article.[155]

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[150] *قانون دعاوى الحكومة رقم (25) لسنة 1958* [Lawsuits against the Government Law No. 25 of 1958] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1958&MID=980>.

[151] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 13–2016, 2 ('*Case 13–2016*'); المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2017, 4.

[152] *Case 13–2016*, 1; المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2017, 1 ('*Case 3–2017*').

[153] *Basic Law*.

[154] *Case 13–2016*, 4; *Case 3*–2017, 4.

[155] *Case 13–2016*, 3; *Case 3*–2017, 3.

In other words, the Constitutional Court avowed that Article 5 only mentioned the exclusive purposes of impleading the government, and that does not contradict Article 30 of the Basic Law.[156]

The Constitutional Court reasoning could be correct, as its interpretation of Article 30 is sound. According to this interpretation, all governmental actions can be challenged before an ordinary court, with the condition that any such challenge one for the purposes that Article 5 mentions. Exclusively listing the purposes of actions against the government does not result in immunising any of its actions against courts' review. Therefore, the Constitutional Court reasoning in both cases appears to be valid.

4 *Summary*

The analysis above explains the Constitutional Court's application of rules related to impleading the government in four different cases. In the first case of this group, the Constitutional Court dismissed the civilian plaintiffs' cases against the constitutionality of trial before military courts. The dismissal was on form because the plaintiffs did not implead the Government in the cases they filed. The author's analysis demonstrates that not impleading the government is a correctable error, since Article 32 of the LSCC entitles the Court to *sua sponte* implead the government, to make it a defendant in the case before it.

As a result of dismissing that principal case on form, the regime continued trying the plaintiffs before the military court, despite the Basic Law's prohibition of this. It can therefore be concluded that the Constitutional Court has failed to apply the LSCC correctly, which raises the possibility that the Constitutional Court is not as effective as it can be. In particular, it did not hold the regime accountable for its actions in relation to the military judiciary since the regime relied on it to try opposition members. In the remaining three cases, the Court preferred to take a neutral, rather than regime-biased, role since none of them were of importance to the regime, but the decisions it made in those cases were consistent with those in the cases that were important to the regime.

D *Abandonment of Cases*

1 *Background*

The following analysis covers three cases in which the Constitutional Court applied three different rules of 'abandonment' to dismiss them on form. The general principle of

[156] *Case 13–2016*, 3; *Case 3*–2017, 3.

abandonment relates to a plaintiff's request for terminating the procedures of the case he submitted, without waiving the rights he or she claimed in the case. Stated differently, it is a request by the plaintiff to the Court to discard his or her case, but reserving the right to submit his claims later. The principal rule of the first case discussed below is a request for abandonment based on the plaintiff's own wish. The other two cases were abandoned for faulty submission and for overlap with a current case, respectively.

Importantly, the case related to the first rule is more significant than the other two, because its subject is the independence of the judiciary from the executive, represented by the minister of justice. The other two cases' subjects are, respectively, abandoning a case for contesting already-annulled decrees, and abandoning a case for similarity with another case filed with the Court. Despite the relative insignificance of the second two cases, the conclusions derived from their judgments are still relevant to the analysis in this chapter, since they highlight the inadequacy of lawyers and judges of the Constitutional Court as a factor in preventing effective constitutional litigation in Palestine.

Similar to the previous group of cases relating to access to the Constitutional Court, the judgment in the principal case in this group was in favour of the regime. Its main effect was that articles that provide the minister of justice with substantial control over judicial administration affairs were not reviewed. In turn, the regime used this control to maintain its interests, as will be explicated below. As the analysis of the three cases will show, the main criticism of how the Constitutional Court applied those rules is its disregard of the unique nature of constitutional cases, which prevents applying rules of other non-constitutional cases to them. Demonstrating how such disregard impinged on the effectiveness of the Constitutional Court supports the argument of this chapter, that the Constitutional Court did not properly practice its role of upholding the Basic Law against the regime.

2 *Abandonment as a Result of the Plaintiff's Will: Case 2-2009*

There are various justifications for abandoning cases in ordinary courts, where by the plaintiff withdraws the action while maintaining the rights that he pleaded for.[157] Withdrawal of an action may happen when a plaintiff believes that he filed the case before preparing all the evidence necessary to support his claims, intending to refile it later after having enough evidence to argue his case more persuasively. Another reason for withdrawal is a plaintiff's belief that he violated specific procedural provisions of litigation; this allows him to refile the

[157] Mushāqī, above n 102, 223.

case in accordance with litigation procedures. A plaintiff may also find that he filed the case to a court that does not have jurisdiction over the case's subject-matter, which permits him to refile it to the suitable court.

However, such justifications are not necessarily acceptable in the context of constitutional cases. Constitutional cases have a comparatively impersonal nature, because they challenge the constitutionality of a specific provision itself, without significant regard to the grievance caused by the application of the challenged provision on the plaintiff.[158] For example, a plaintiff's request to abandon the case in a leasing dispute is justified, because such a case primarily concerns that litigant, and his or her interests can be waived at his will. In contrast, constitutional cases are not primarily related to the personal interests of the plaintiff; rather, they are related to the wider public's concern for upholding the Basic Law and resolving inconsistencies between laws, regulations, and 'others' in reference to the Basic Law.[159]

Based on the principle that constitutional cases are essentially a public concern, approval of abandonment requests in constitutional cases merely based on agreement between the litigants is mistaken.[160] The Court in such cases must refuse the abandonment request because the possibility of constitutional violations is a major public value that should be safeguarded by the Constitutional Court.

In the principal case in this group, the plaintiff requested to abandon his case. Importantly, this case is unique because the plaintiff was Isaa AbuSharar, the Head of the High Judicial Council and, at the same time, the Chief Justice of the High Court of Justice, which was authorised to sit as the Constitutional Court.[161] Stated differently, the Head of the Judicial Council was the plaintiff and, at the same time, according to the Law of Judicial Authority, should hold the position of the Chief Justice on the bench hearing this case.[162] However, to overcome this problem, the Chief Justice AbuSharar recused himself from reviewing the case, and thus the most senior judge of the High Court of Justice, Imad Sa'd, who was not a member of the Judicial Council, became the head of the bench.[163] This was in accordance with Article 141(D) of the Law of the Civil and Commercial Procedure, which stipulates:

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[158] Al–Kailany, above n 12, 19–20.
[159] Al–Turkomaniy, above n 12, 116–18.
[160] Fikry, above n 11, 112.
[161] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 2–2009, 1 ('*Case 2–2009*').
[162] *قانون السلطة القضائية رقم 1 لسنة 2002* [Law of the Judicial Authority No. 1 of 2002] art 37(2)(a) (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2002&MID=14053>
[163] See *Case 2–2009*, 1.

> The judge must decline to review a case, even if neither party moves for his recusal, in any of the following cases: … E. If he, his spouse, one of his relatives by blood or affinity up to the fourth degree or a person he legally represents has an existing interest in the case.[164]

The case demanded the Constitutional Court declare certain phrases contained in the following Articles of the Law on the Judicial Authority as unconstitutional and, as requested by the plaintiff, to 'annul them and strike them off'.[165] These Articles (with contested phrases underlined) are:

> Article 3(2): The High Judicial Council shall prepare the draft budget and transmit it to the Minister of Justice in order for the latter to fulfil the legal requirements according to the provisions of the Law on the Organization of the Budget and Public Finance.
>
> Article 37(2): The High Judicial Council shall be comprised of: (a) The President of the High Court, as President. (b) The most senior Vice-President of the High Court, as Vice-President. (c) The two most senior Judges of the High Court, selected by the High Court Assembly. (d) The Presiding Judges of the Courts of Appeal in Jerusalem, Gaza and Ramallah. (e) The Attorney General. (f) The Deputy Minister of Justice.
>
> Article 33(1): The resignation of a Judge shall be deemed accepted two weeks after its submission to the President of the High Judicial Council. A decree from the Minister of Justice shall be issued accepting the resignation effective as of that date.
>
> Article 23(3): [A] Judge may be temporarily seconded to perform judicial tasks other than the Judge's regular work, or in addition to it, or to perform other legal work if so required by the national interest, pursuant to a decision issued by the Minister of Justice and with the approval of the High Judicial Council.
>
> Article 40(2): The High Judicial Council shall meet whenever necessary, either upon an invitation from its President, upon the request of the Minister of Justice, or upon the request of three of its members.
>
> Article 49(1): A disciplinary claim shall be filed by the Attorney General based upon a request made by the Minister of Justice, by the President of the High Court or by the Presiding Judge of the Court to which the Judge in question belongs.
>
> Article 58: Detention of a Judge shall lead to an immediate suspension of that Judge's official duties during the period of detention. The High Judicial Council may, upon a request by the Minister of Justice or by a Judge seconded to the investigation, order the suspension of the Judge's official duties during the period of the investigation of the crime attributed to the latter. In such cases, the provisions of Article 50 of this law shall be applied.

The common feature of all these contested phrases is that they give power to the minister of justice in certain matters related to the judiciary; in particular, they treat the minister's requests and decisions as prerequisites for lawfully making certain actions.[166] These actions, however, are fundamentally of a judicial nature and can hardly be seen to affect the executive domain.[167]

[164] *Civil and Commercial Procedure Law.*
[165] *Case 2–2009*, 1.
[166] Fikry, above n 11, 106–7.
[167] Ibid.

The plaintiff, Chief Justice AbuSharar, justified his demands by claiming that the highlighted phrases violate the Basic Law's Articles that uphold the principle of judicial independence, particularly from the executive power represented by the minister of justice in these phrases.[168] These are Articles 97, 98, and 99 of the Basic Law, in addition to Article 23 of the Law on Judicial Authority.[169] Respectively, these Articles state that:

> 97 The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.
>
> 98 Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the Judiciary or in judicial affairs.
>
> 99 1. Appointment, transfer, secondment, delegation, promotion and questioning of judges shall be as prescribed in the Judicial Authority Law. 2. Judges may not be dismissed except in cases that are allowed in the Judicial Authority Law.
>
> 23 1. Judges may not be transferred or seconded to perform non-judicial tasks against their will. 2. Transfer or secondment of judges shall be carried out pursuant to a decision by the High Judicial Council. The effective date of transfer or secondment shall be the notification date of the decision. 3. As an exception to the preceding two paragraphs, a Judge may be temporarily seconded to perform judicial tasks other than the Judge's regular work, or in addition to it, or to perform other legal work if so required by the national interest, pursuant to a decision issued by the Minister of Justice and with the approval of the High Judicial Council.

The common feature of these Articles is that they highlight the independence of the judiciary, primarily the Judicial Council. This independence is, from the plaintiff's point of view, compromised by the procedures in the contested phrases. By submitting this case, the Judicial Council wanted to maintain judicial independence from the minister of justice regarding those matters.[170] This request from the Judicial Council is related to principles of judicial independence and having 'checks and balances' on the judiciary. In other words, the Judicial Council possibly intended to lessen any possible interference by the minister of justice in the administration of the judiciary by depriving the minister of the authorities mentioned above. As a result, this would limit the possibility of executive interference in judicial administration, allowing for a more balanced distribution of power between the government and the judiciary, as Chapter Four explained.[171]

[168] *Case 2–2009*, 1.
[169] *Basic Law.*
[170] *Case 2–2009*, 1.
[171] See above Chapter Four (E)(6)(b).

Less than two months after submitting the case, the plaintiff himself decided to retract his claims and requested the Constitutional Court to 'completely abandon the case at last resort',[172] pursuant to Article 138 of the Law of Civil and Commercial Procedure, which stipulates that:

> The plaintiff may, in the absence of the defendant, move to retract his claims at any stage of the proceedings. If the defendant is present, the plaintiff may not raise such motion except with the consent of the defendant.[173]

In the Court's session of 21 July 2009, the General Prosecutor did not object to the abandonment request, therefore, the Court unanimously decided to approve the plaintiff's request.[174]

On that basis, this case might look unimportant at first glance, as the plaintiff had decided to abandon it. However, other circumstances of the case reveal certain problems that should be addressed. Before assessing the Constitutional Court response to the abandonment request, it is important to discuss two concerns regarding the plaintiff's request.

(a) Assessment of the Plaintiff's Request

The first concern is the plaintiff's request to annul and strike-out the contested phrases because they violate the Basic Law. It is unreasonable that such a request by submitted by the Head of the Judicial Council. Annulling or striking-off a specific provision, which might lead to a legislative vacuum, does not fall under the competence of the Constitutional Court, because such an action would allow judges to exercise the legislative power, resulting in violation of the doctrine of separation of powers, and transgressing the Court's core competencies.[175] Therefore, annulling a specific provision does not fit with the rules of relative independence and collaborative interaction between state powers because, in the form explained in this case, the power to annul and strike-off provisions is exclusively reserved to the legislative body as one of its fundamental roles.[176]

Provisions related to the unconstitutionally of a specific provision show how the Court deals with unconstitutional provisions without such transgression. For example, Article 41(2) of the LSCC provides for an immediate *de facto* annulment of the unconstitutional provision,[177] which stipulates that:

[172] *Case 2–2009*, 1.
[173] *Civil and Commercial Procedure Law.*
[174] *Case 2–2009*, 1.
[175] Fikry, above n 11, 113.
[176] See specifically *Basic Law.*
[177] *LSCC.*

> In the event the Court decides that the provision under review is being impaired wholly or partially with the defect of unconstitutionality, it shall make it clear in a justified decision that determines the limits of the unconstitutionality. The provision which it decides to be unconstitutional shall be deemed within the limits of the decision of the Court to be unenforceable.

Another example is Article 25(2) of the same law, which represents another means for preventing application of an unconstitutional provision. It states that:

> Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.

Accordingly, the Judicial Council should have demanded the Constitutional Court pronounce the unconstitutionality of the challenged Articles, rather than making an ill-founded request to 'annul and strike them out'.[178] This mistake by Chief Justice Issa Abusharar indicates incompetence in understanding the role of the Constitutional Court.

The second concern is the plaintiff's reference to Article 27 of the Judicial Authority Law, and the argument that the contested phrases violate that Article.[179] This request is inconsistent with the LSCC, because the Constitutional Court's jurisdiction is to assess consistency between the Basic Law on one hand, and other laws, regulations, bylaws, decrees, or orders on the other.[180] Therefore, assessing consistency between the Articles of the Judicial Authority Law themselves is out of the jurisdiction of this Court. It falls under that of the High Court of Justice, as it is authorised to resolve contradictions between legislative materials using interpretation methods.[181]

Both concerns possibly raise doubts about the Head of the Judicial Council's understanding of the Constitutional Court rules It might be argued that such mistakes in submitting requests to courts are common. However, in this context, where the plaintiff is, in fact, the Chief Justice of the High Court of Justice, these mistakes have more significant implications; namely, inadequate understating of both the Constitutional Court's judgments and its jurisdiction, as the concerns indicate.[182] These implications support the main argument of this chapter, that

[178] See Fikry, above n 11, 113.
[179] *Case 2–2009*, 1.
[180] *LSCC* art 33.
[181] *قانون تشكيل المحاكم النظامية رقم 5 لسنة 2001* [Regular Courts' Formation Law No. 5 of 2001] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13857>.
[182] See Fikry, above n 11, 113.

some constitutional judges demonstrate noticeable inadequacy in understanding the role of the Constitutional Court and the legal texts related to it.

(b) Assessment of the Court's Reasoning

As explained in Chapter Four,[183] there are four ways to initiate a constitutional review by the Constitutional Court: a direct case, a subsidiary referral by the ordinary court, an adversary rebuttal by a litigant, and *sua sponte* review by the Constitutional Court itself. This case was presented through the first channel. Notably, and as mentioned, only the person, either natural or legal, aggrieved by the application of the contested provision can submit a case against that provisions' constitutionality. In this case, the contested phrases are from a law that was promulgated in 2002, and this case was submitted in 2009, which leads to the conclusion that for seven years those contested phrases were applied to, and aggrieved, the plaintiff, i.e. the Judicial Council.[184]

Moving to assess the Court's response to the abandonment request, the Court accepted this request after the General Prosecutor agreed with it.[185] In doing so, the Court applied the provisions prescribed in Article 139(2) of the Law of Civil and Commercial Procedure No. 2 of 2001, which, according to Article 26 of the LSCC, states that:

> With the exception of what is provided for under this Chapter, the provisions prescribed in the Law of the Civil and Commercial Procedure shall be applicable to the decisions of referral, actions and applications (which are submitted to the Court), in a manner that is not contradictory to the nature of the jurisdiction of the Court and the situations determined before it.[186]

As the LSCC has no specific references to requests of abandonment, the Court applied Article 138 of the Law of Civil and Commercial Procedure. However, three substantial reservations may be raised against this application, all of which are related to a vital phrase in Article 26: 'in a manner that is not contradictory to the nature of the jurisdiction of the Court and the situations determined before it'. The three reservations outlined below take into consideration what is distinctive about the nature of 'situations determined'; i.e. cases presented, before the Constitutional Court.

First, as explained above, this is a constitutional case. Thus, the primary interest is not the plaintiff's. Rather, it is the public interest of upholding the Basic Law before minister of justice to protect the independence of the judiciary. Therefore, the Constitutional Court approval of

[183] See above Chapter Four (E)(4).
[184] *Case 2–2009*, 1.
[185] Ibid 2.
[186] *LSCC* 33.

the plaintiff's request was incorrect.[187] Instead, the Constitutional Court should have rejected the plaintiff's request as the matter of judicial independence from executive interference affects the judicial power as a whole. In other words, maintaining a balanced interaction between both the judiciary and the minister of justice is not solely a matter in the interests of the Judicial Council, but is indeed a major public concern that the Constitutional Court must protect.

As explained in Chapter Four in reference to the contested phrases — related to the judiciary's budget and judicial tenure matters such as resignation, secondment, disciplinary measures, and detention — these phrases are problematic.[188] In summary, these phrases provide the minister of justice with considerable power in administering those matters. What might cause a greater concern is the fact that, in most of these phrases, there is no time limit for the minister to make a decision or perform the procedure.[189] As a result, the minister could claim specific excuses to postpone, or at least delay, the administrative process to achieve possible gains, which may impinge on the judiciary's budget, negatively influence disciplinary measures against a tainted judge, or suspend a judge who is being investigated, especially if such investigation is based on ill-intended requests against untainted judges.[190]

Based on the above analysis, the Constitutional Court must not allow the plaintiff to have sole control over abandoning or hearing such cases, because upholding the Basic Law is a matter of public order, which the legislative power itself must adhere to, and the Court should prevent personal decisions of litigants from undermining it.

Moving to the second reservation, abandoning a constitutional case leaves controversial provisions unreviewed. The Constitutional Court did not continue assessing the plaintiff's claims, and that allowed doubts surrounding the constitutional validity of contested phrases to persist.[191] To be effective, it is vital for the Constitutional Court to seek all possible means to assess such doubts and clarify the matter for the public, since leaving such doubts unchecked would weaken the Constitutional Court's role of upholding the Basic Law.[192]

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[187] Fikry, above n 11, 112.
[188] For judiciary's budget, see above Chapter Four (E)(6)(a); for resignation, secondment, disciplinary measures, and detention, see Chapter Four (E)(2)(b), (d).
[189] See '*Opinion on the Law on the High Constitutional Court of the Palestinian National Authority'* (European Commission for Democracy through Law (Venice Commission), 2009).
[190] See *'A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority'* (The International Bar Association's Human Rights Institute, 2009).
[191] *Case 2–2009*, 2.
[192] See especially Chapter Two (C)(3).

Moreover, according to administrative litigation jurisprudence, it is not permissible to abandon a request for annulment of an administrative action, as the primary concern about any such action is the authorities' compliance with the law, not the interests of the plaintiff.[193] This principle is *a fortiori* more sensible in constitutional cases, because they involve the same impersonal nature as explained above, as they aim to annul the violation regardless of plaintiff's interests, and uphold the Basic Law. Therefore, and as all constitutional provisions are related to public order, abandonment of constitutional actions is necessarily impermissible.[194]

The third reservation relates to Article 139(2) of the Law of Civil and Commercial Procedure, which the Court referred to in approving the plaintiff's request to 'completely abandon the case at last resort'.[195] The phrase 'at last resort' needs clarification, because it indicates that there is a difference between abandonment on the one hand, and abandonment at last resort on the other. In fact, this difference is implied in the Article, which stipulates that:

> Abandonment of the adversary proceeding shall not bar the plaintiff from filing a new case unless the abandonment involved a waiver of the right claimed.[196]

By means of syllogism, this Article demonstrates that an abandonment request bars the plaintiff from refiling his claims if such request involves a waiver of rights. This conforms with the second type of the second type of abandonment requests mentioned above: a request at last resort.[197] Thus, according to this Article, if the plaintiff asks for abandonment at last resort, then he is waiving the claimed rights, which is what the plaintiff requested in this case. As the analysis in this case concludes, the independence of the judiciary from the executive is not a personal right of the Head of the Judicial Council; rather, it is a matter of public interest and order. Therefore, the Head of the Judicial Council is mistaken in waiving the right to request constitutional review of the contested phrases that appear to violate that judicial independence.[198] Similarly, the Constitutional Court's approval of abandonment at last resort in this case is incorrect, as the claims relate to the independence of the judiciary.

In conclusion, the Constitutional Court's approval of the abandonment requests is incorrect. Contrary to civil cases, constitutional cases should not be dismissed because of abandonment

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[193] See especially Osamah Zidan, *الخصومة في دعوى الإلغاء [Adversary in Annulment Cases]* (Master in Law Thesis, Birzeit University, 2014) 83–85.
[194] See especially Al–Kailany, above n 12, 128.
[195] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 2–2009, 2.
[196] *Civil and Commercial Procedure Law.*
[197] Mushaqi, above n 102, 224.
[198] See Fikry, above n 11, 113.

requests, due to the significant public interest in these cases since they are related to upholding the Basic Law. Thus, based on the above analysis of Article 26 of the LSCC, the Court should reject abandonment requests in all cases.

(c) The Regime's Gains

Because this case was dismissed, the regime remained capable of influencing critical aspects of the judiciary's administration, as demonstrated earlier. This is related to function of controlling administrative agents, as a function that some courts perform in authoritarian regimes. In this case, the agents were the Judicial Council and other judges, as minister can continue to control their tenures through the powers mentioned in the contested Articles.[199] This control would be an avenue that the regime can use to impinge on the judiciary's budget and judicial tenure (resignation, secondment, disciplinary measures, and detention) as explained before.[200]

3 *The Court's Application of Other Rules of Abandonment*

(a) Abandonment for Faulty Submission: Case 1-2007

The plaintiff, who was a lawyer, submitted a constitutional case on 11 March 2007,[201] against four decrees-by-law:

1. No. 5 issued on 19 February 2006, Amending the Law on the Formation of Regular Courts.
2. No. 7 issued on 15 February 2006, Concerning the Law of the Grand Criminal Court.
3. No. 8 issued on 15 February 2006, Amending the Criminal Procedure Law.
4. No. 9 issued on 16 February 2006, Amending the Code of Civil Procedure.

On 24 April 2008, the Court held its first hearing.[202] The plaintiff requested the Court to abandon the case, because he has been unaware that these four Decrees had been annulled by Presidential Decree No. 20 issued on 11 June 2007.[203] The Presidential Decree annulled these

[199] See especially Mahmoud Abu Sawi, *تنازع الصلاحيات في قطاع إشكاليات الفصل بين السلطات واستقلال القضاء في فلسطين: العدالة (العلاقة بين مجلس القضاء الأعلى ووزارة العدل كحالة للدراسة)* [*Problems of the Separation of Powers and Independence of the Judiciary in Palestine: Conflict of Powers in the Justice Sector (The Relationship between the High Judicial Council and the Ministry of Justice as Case Study)"* (Master in Law Thesis, Birzeit University, 2013).
[200] Ibid.
[201] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2007, 1.
[202] Ibid.
[203] Ibid.

four decrees because they had not been approved by the Parliament before the coup, pursuant to Article 43 of the Basic Law, which stipulates that:

> If [decrees-by-law] are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.

Based on this Article, and since the plaintiff has made a mistake in challenging annulled decrees-by-law, the Court approved the abandonment request and dismissed the case.[204] The fact that a counsel before the Constitutional Court made such a mistake should not be underestimated; it indicates a lack of research in preparing pleadings for constitutional cases. This supports the argument made in Chapter Two, that for a court to pronounce effective judgments, it should receive well-argued cases since the Court cannot improve pleadings that are poorly-written.[205] This case and other similar cases analysed in this Chapter are examples of how mistakes that lawyers' make are used by the Court to escape deciding against the regime.[206] Admittedly, calling such mistakes reason for dismissal was not the case here, however, it is useful to raise this concern have as the analysis of other groups of cases points to the inadequacy of lawyers as a factor that prevents effective constitutional litigation in Palestine.

(b)Abandonment for Similarity: Case 2-2007

Article 80 of the Civil and Commercial Procedure Law states that:

> If more than one action is filed before one or more courts and such actions are united as to cause and subject-matter, the court may, on the basis of a request by one of the parties, combine the actions in one adversary proceeding.[207]

Based on this Article, when two actions are similar in cause and subject-matter they should be combined. Combination is different from abandonment, as the consequences are different for both actions.[208] Article 139(1) of the above Law states:

> Abandonment entails the annulment of all the procedures taken in the adversary proceeding, including the institution of the action, and costs shall be borne by the withdrawing party.[209]

In contrast, in combination there is no annulment of previous actions' procedures, and no costs have to be paid.

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[204] Ibid 2.
[205] Chapter Two (C)(3).
[206] See Al–Kailany, above n 12, 112.
[207] *Civil and Commercial Procedure Law.*
[208] Ra'id Zidat, *سلطة القاضي في إدارة الخصومة المدنية في قانون أصول المحاكمات المدنية والتجارية الفلسطيني[The Judge's Authority in Managing the Civil Litigation in Palestinian Law]* (Masters in Law Thesis, Birzeit University, 2012) 189–94.
[209] *Civil and Commercial Procedure Law.*

The plaintiff in this case was Lieutenant General Moustafa Bishtawy, the Commissioner General of the Military Office in the PLO.[210] He submitted a constitutional case on 16 October 2007 against the 2007 Decree-by-law No. 5, Amending the Law of Public Retirement.[211] On 13 December 2007, the National Committee of Retired Militants, of which Bishtawy was a member, submitted a case to the same Court against the same Decree-by-law.[212] Therefore, on 24 April 2008, Bishtawy submitted a request to abandon his case, and the Court approved.[213]

This approval might seem correct at first glance, because of the similarity between both cases. However, Article 80 mentioned above is what must be applied in this circumstance, leading to combining both cases, not abandoning Bishtawy's case. This mistake by the Court relates to what was said earlier about the inadequacy of lawyers. Moreover, the inadequacy of judges in responding to the counsel's request can be observed in this case too. Approving the abandonment of this constitutional case, rather than combining it with the other case, demonstrates how judges of the Constitutional Court frequently misapply rules of procedure. This conclusion further supports the argument made in this chapter, that the Constitutional Court is not performing its functions effectively as its judges show signs of being either inadequate or neglectful.

4 *Summary*

The Constitutional Court incorrectly applied the procedural rules regarding abandonment requests. In the principal case, instead of rejecting the abandonment requests that the Head of the Judicial Council submitted, the Court wrongly approved that request, failing to maintain that constitutional cases are related to public interest, and thus cannot simply be abandoned to suit the plaintiff's wishes, unless there is a clear and fundamental error in the claim. This approval of abandonment left unconstitutional competencies of the regime in judicial administration unaddressed. In the other two cases, the inadequacy of lawyers, and the judges as well, was apparent through the incorrect application of abandonment rules. Based on that, the Court's failure to establish its role as a protector of public interest, and to prioritise that interest over plaintiffs' personal interests, has resulted in leaving provisions that provide the Minister of Justice with significant control over the judiciary unchecked. These observations

[210] Zidat, above n 208.
[211] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 2–2007, 1.
[212] Ibid.
[213] Ibid.

lead to the conclusion that the Constitutional Court has failed to effectively review the regime's competences in judicial administration according to the Basic Law.

E *Conclusion*

The purpose of this Chapter was to assess the Constitutional Court's *de facto* independence, by analysing its judgments in three groups: access to the Constitutional Court; impleading the government; and abandonment of cases. The author's analysis of these groups has demonstrated many flaws in the reasoning of judgments in all principal cases. These relate to three main areas: the Constitutional Court's interpretation of the legal provisions in each of these groups; the Constitutional Court's perception of its limits; and its responses to lawyers requests.

In the first group, which relate to access to the Constitutional Court, the Court dismissed most cases after the release of the plaintiff, which contravenes the principle of impersonal interest in constitutional cases, a principle that obliges the Court to continue hearing the case as the public interest in upholding the Basic Law is greater than that of the private interests of the released plaintiff. In the second group, which relate to impleading the government, the Court unjustifiably refrained from using its competence to include the government as a defendant even if the plaintiff did not do so in his application. This resulted in dismissing many cases on form, preventing review of the constitutionality of the regime's actions in such cases. In the last group, which relate to abandonment of cases, the Court wrongly dealt with constitutional cases as if they were cases of personal interest, and approved lawyers' requests to abandon their cases. This abandonment also contravenes the principle of impersonal interest in constitutional cases.

The conclusions drawn from analysis of these groups support the main argument of this Chapter, that the Constitutional Court lacks *de facto* independence because it has failed to effectively uphold the Basic Law in relation to the regimes' actions. In all these groups, the majority of the Constitutional Court judgments were incorrectly reasoned, and resulted in the interests of the regime being served, by not obstructing the regime's practises of social control, legitimation, and control of administrative agents. In sum, there is sufficient evidence to claim that the Constitutional Court substantially lacks *de facto* independence in procedural cases.

VI Assessment of the Constitutional Court's *De Facto* Independence in Substantive Cases

A *Introduction and Methodology*

After assessing the *de facto* independence of the Constitutional Court in procedural cases in Chapter Five, this chapter assesses its *de facto* independence in substantive cases. As in the previous chapter, this chapter analyses substantive cases in accordance with the four interrelated points: the Court is required to use its discretionary competence to proceed with reviewing the constitutionality of the regime's actions; the Court's incorrect application of law is not a common, unintended mistake; the incorrect application of law strongly suggests that the Court lacks *de facto* independence; and the author's critique of the Court's judgments is based on writings of prominent constitutional jurists from Palestine, Egypt, and other Arab countries.

Of the 19 cases analysed in this chapter, the regime won 18. In the remaining case, the defendant was not the regime but the Palestinian Bar Association, and the plaintiff, who was a trainee lawyer, won against the Bar. Notably, that is the only judgment in which the Constitutional Court declared the unconstitutionality of a disputed Article. Out of the 18 judgments that the Court pronounced in favour of the regime, only 3 of them are, in the author's view, a correct application of law, while for the remaining 15 judgments, significant concerns are raised and it is concluded that they were incorrect applications of the Basic Law and the law being challenged. To pursue the line of argument developed in the previous chapter, this chapter argues that the Constitutional Court has failed to effectively uphold the Basic Law over the regime's actions in these substantive cases as well. In other words, the Constitutional Court was ineffective in upholding the Basic Law, as it did not invalidate the illegitimate actions of the regime that violated it.

Like the structure of the previous chapter, these cases are categorised below into five groups, the title of each representing the critical legal issue found in all judgments of cases included within that group. In order, these five groups are:

- Jurisdiction over presidential decrees.
- Jurisdiction over previous legal systems.
- Necessity of decrees-by-law.
- Separation of powers.
- Protection of civil liberties.

For each group, the analysis starts with the Court's reasoning and application of relevant legal texts in a principal case, demonstrating its key facts and assessing the Court's judgment. Then, the analysis contextualises the conclusion about the principal case by considering the Court's judgments in other additional cases from the same group, focusing on facts and rules that are directly relevant to the critical legal issue of the group. This is important, because the purpose of including such cases is to comprehensively understand the common practice of the Court in applying rules related to that issue. Lastly, to link this chapter to Chapter One, the author's assessment is followed by an illustration of what function the court has performed to serve the regime in the judgment in the principal other cases in the same group.

Before starting with the first group, it is important, for understanding the author's analysis of these cases, that substantive cases include those in which substantive rules were the focus of the Court's reasoning in their judgments, even if some of these cases were dismissed on form. This is particularly relevant to the first two groups of cases mentioned above (jurisdiction over presidential decrees and jurisdiction over previous legal systems). As they relate to jurisdiction, they might be perceived to belong to the groups discussed in the previous chapter in relation to procedural cases, however, since the Court engaged thoroughly with the substance of the disputed articles in these cases, the judgments that it pronounced were different from those made in the procedural cases, and so analysis of these two groups is done in this chapter.

B *Jurisdiction over Presidential Decrees*

1 *Background*

The critical legal issue in the analysis of the two cases below is the Constitutional Court's jurisdiction over Presidential Decrees. The first case is about a presidential decree that removed the parliamentary immunity of a member of Parliament. The other is about a decree that expropriated private lands for commercial purposes.

Importantly, the judgments of those two cases were in favour of the regime. Their main impact was to limit the Constitutional Court's jurisdiction to laws and regulations, ultimately excluding presidential decrees and orders and, as a result, allowing them to be implemented without having their constitutionality checked. As explained below, the author's primary criticism of how the Constitutional Court applied those rules is based on its disregard of Article 103(1) of the Basic Law, which extends the Constitutional Court jurisdiction to include such decrees and orders.

2 *Jurisdiction over Lifting Parliamentary Immunity: Case 6-2012*

In 2011, the president ordered the General Prosecutor of the Palestinian Authority to file a case in the Court of Corruption Crimes against Mohammad Dahlan,[1] a Palestinian Member of Parliament and the main rival of the president in the Fatah party. He was charged with embezzlement and illegal gain.[2] The president believed that Dahlan was forming a coalition against him within that party, so wanted to prevent that.[3] The Court refused to try Dahlan on the basis that he enjoyed parliamentary immunity under Article 53(1) of the Basic Law.[4] This Article states that:

> [Legislative] Council Members may not be questioned in civil or criminal proceedings due to opinions they express, facts they mention, their voting in Council sessions or committee meetings, or because of any action they undertake outside the Council in the course of performing their parliamentary duties.

To deprive Dahlan of his immunity, the president issued a Decree-by-Law No. 4 of 2012 on 2 January 2012 ('the Decree'), to the parliamentary immunity from him,[5] claiming that this lifting was necessary pursuant to Article 43 of the Basic Law:

> The President of the [Palestinian Authority] shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law.

In response, Dahlan filed a case which the Constitutional Court in 18 December 2012, objecting to the Decree and demanding the Court declare it unconstitutional as in violation of Article 53(1) of the Basic Law mentioned above. The case was filed as a direct, original action, because the Decree seemed to aggrieve Dahlan.[6] The General Prosecutor responded to the case, claiming that the Court lacked jurisdiction over this Decree.[7] The Court agreed and dismissed the case, declaring that it lacked jurisdiction over that Decree.[8]

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[1] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22–2014.
[2] He is still a member as there have been no parliamentary elections in the West Bank since the coup.
[3] Dahlan's attempt to form a coalition.
[4] 'Exiled Abbas rival sentenced to three years in absentia over corruption' (2016) *Middle East Eye* <http://www.middleeasteye.net/news/exiled–abbas–rival–sentenced–three–years–absentia–over–corruption–1844523482>.
[5] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 6–2012, 2 ('*Case 6–2012*').
[6] Fat'hi Fikry, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 6/2012 [Comment on Constitutional Court Judgment in Case No. 6 of 2012]' (2013) 20 (July) *العدالة والقانون [Justice and Law]* 171, 172.
[7] See *Case 6–2012*, 6.
[8] See *Case 6–2012*, 10.

Importantly, Dahlan also argued that lifting his immunity through a decree-by-law violates Article 96 of the Parliament's Rules of Procedure, which sets out the legal steps to lift the parliamentary immunity of Parliament members.[9] It stipulates that:

> 1. A request for waiver of immunity shall be submitted in writing by the General Prosecutor to the President, accompanied by a memorandum containing the type, place, time and evidence necessary to take legal action. 2. The President shall transfer the request for lifting immunity to the Legal Committee and inform the Parliament accordingly. 3. The Committee shall examine the request and submit its report to the Parliament. The Parliament shall take its decision to lift the immunity by a minimum two-thirds majority vote. 4. A member whose immunity has been lifted and has not been suspended shall have the right to attend meetings and committee meetings and to participate in the debate and vote.[10]

It is important to note that a breach of this Article does not make that Decree unconstitutional, since unconstitutionality is a result of a law breaching the constitution — the Basic Law, in the case of Palestine. Reference to this Article in Dahlan's pleading was unproductive, since the Court did not discuss this issue at all, as it considered the issue of jurisdiction to be primary importance.

Nevertheless, Article 96 of the Parliament's Rules of Procedure clearly states that a request to lift immunity must be submitted by the Parliament's Legal Committee, and two-thirds of the Parliament members must approve for it to become valid. This Article implies that the president does not have the competence to lift Dahlan's immunity; rather, it is the exclusive, non-delegable competence of the Parliament.[11] This is important to note, because Article 43, according to many Palestinian jurists, does not allow the president to violate already-set rules;[12] rather, it only allows him to enact new rules that would be necessary to fill a legislative vacuum to face an imminent danger that threatens Palestine, without violating what has already been regulated by the Parliament.[13]

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[9] See *Case 6–2012*, 3.

[10] *المجلس التشريعي الفلسطيني: النظام الداخلي* [The Palestinian Legislative Council: Rules of Procedure] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2000&MID=14227> ('*The Palestinian Legislative Council: Rules of Procedure*').

[11] Abd Al–Aziz Saliman, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 6/2012 [Comment on Constitutional Court Judgment in Case No. 6 of 2012]' (2013) 20 (July) *العدالة والقانون[Justice and Law]* 181, 184.

[12] Newar Bdair and Asem Khalil, *'حالة الضرورة' [State of Necessity]* (Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018) 6; Mohammad Al–Laham, *القرارات بقوانين الصادرة عن رئيس السلطة الوطنية الفلسطينية والآثار القانونية المترتبة عليها [Decrees–by–Law Issued by the President and Their Legal Impact]* (Masters in Law Thesis, The Islamic University – Gaza, 2015) 42; Hussain Abu–Hanood, Sami Jabarin and Tariq Toukan, ' قراءات قانونية في القرارات بقوانين الصادرة عن الرئيس وفقاً لحالات الضرورة [Legal Readings in Decrees–by–Law Issued by the President in States of Necessity]' (The Palestinian Initiative For The Promotion Of Global Dialogue and Democracy – MIFTAH, 2008) 39.

[13] Bdair and Khalil, above n 12; Al–Laham, above n 12; Abu–Hanood, Jabarin and Toukan, above n 12.

(a) Assessment of the Court's Reasoning

The Court began its reasoning by acknowledging that Dahlan has access to the Constitutional Court, since in the direct action any person aggrieved by the application of a specific legislative provision that seems inconsistent with the Basic Law has the right to file a direct case.[14] As that Decree certainly aggrieved Dahlan, filing such a case was lawful under Article 27(1) of the LSCC.

After confirming Dahlan's lawful access, the Court moved to Article 24(1) of the LSCC, which stipulates in its first paragraph the legislative matters the Court has jurisdiction over:

> The Court shall have exclusive jurisdiction over constitutional review of laws and regulations.

The Court began applying the above Article by first classifying the Decree, i.e. identifying its legal nature, whether it does, in fact, have the elements of a decree-by-law, and thus should be dealt with as a 'law' for the purposes of this Article, or if it lacks the elements that make it *de facto* not a law.[15] Importantly, as the analysis below shows, the Court correctly understood this specific Article to mean that only laws and regulations fall under the jurisdiction of the Court, and that presidential decrees, decrees-by-law, and presidential administrative orders are excluded.

The Court explained that, according to legal scholarship and judicial principles, to be considered a law, a legislative text (the contested Decree in this case) must be 'general and abstract'. That is, it must not address its subjects by their names, or other distinctive personal characteristics;[16] rather, they must be addressed according to the legal description of these subjects.[17] For example, if the president issues a decree-by-law, and it addresses a minister in the government by his name, not by the legal description of 'minister', then that decree-by-law lacks the element of being 'general and abstract', which leads it to be considered *de facto* not a decree-by-law, but an administrative decree, even if the president gives it the former title.[18] The same also applies in the case of laws that the Parliament enacts. If they lack that element, then they are *de facto* parliamentary orders, not laws.[19]

Fathi Fikry, a professor of Constitutional law in Egypt, provides a similar explanation in his commentary on this case:

[14] Fat'hi, *Judgment in Case 6–2012*, above n 6.
[15] See *Case 6–2012*, 9.
[16] See *Case 6–2012*, 9–10.
[17] Al–Murr, above n 191, 307.
[18] See *Case 6–2012*, 9.
[19] Saliman, *Judgment in Case 6–2012*, above n 11, 186–8.

> It is important to highlight that all general legal rules are subject to judicial oversight by the Constitutional Court, whether it is a law issued by the Parliament, a decree-by-law issued by the executive authority officials in events stipulated in the constitution, or regulation issued by executive officials. The common element between all these legal sources is the characteristic of being general and abstract, which means that they must not address individuals by their names.[20]

According to its explanation, the Court asserted that the legal nature of this Decree is not a law and that it is *de facto* a presidential, administrative decree, since it addresses Dahlan personally as a distinctive individual, not by referring to his legal description.[21] From this, the Court concluded that this Decree is in fact not a law, and thus it does not fall under the categories of 'laws and regulations' that the above Article mentions.[22] Therefore, the Court lacks jurisdiction over this Decree, because its legal nature is, in fact, an administrative decree, and as a result falls under the jurisdiction of the High Court of Justice.[23]

Accordingly, the Court dismissed the case on form.[24] It is noteworthy that, after the dismissal, Dahlan's counsel challenged the Decree in the High Court of Justice, two years after its date of issue.[25] As might be expected, the High Court of Justice dismissed the case on form pursuant to Article 284 of the Civil and Commercial Procedure Law, which stipulates that:

> The time-limit for presenting a summons to the High Court of Justice is sixty days from the date the contested administrative decision is published or notified to the interested party.[26]

To begin with, the bottom line of the Court's argument consists of two propositions: first, this Decree is *de facto* a presidential decree, and presidential decrees are neither laws nor regulations; second, according to Article 24(1) of the LSCC, the Court has jurisdiction only over laws, which decrees-by-law are part of, and regulations. Therefore, it lacks jurisdiction over presidential decrees, and subsequently this Decree.

To analyse this judgment, it is critical to highlight that the first proposition is correct; Dahlan was addressed by his name, and hence the Decree lacks the element of being 'general and abstract', therefore it is not a valid law.[27]

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[20] Fikry, *Judgment in Case 6–2012*, above n 6, 173.
[21] See *Case 6–2012*, 10.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] See محكمة العدل العليا الفلسطينية [The Palestinian High Court of Justice], No. 230–2014, 4.
[26] *Civil and Commercial Procedure Law No. 2 of 2001* (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849>.
[27] Saliman, *Judgment in Case 6–2012*, above n 11, 188.

However, it is vital to assert that a serious reservation can be raised in respect of the second proposition. The Court referred to Article 24 of the LSCC to highlight the boundaries of its jurisdiction, and disregarded Article 103(1)(a) of the Basic Law. The latter Article, according to usual English translation, states that:

> The Supreme Constitutional Court shall be established by law to consider the constitutionality of laws, regulations, and *other enacted rules*.[28]

As the author argued in Chapter Four, the better understanding of the phrase 'other enacted rules' is that it encompasses presidential decrees, and thus Article 24 must be read as consistent with Article 103(1), leading to accepting the Court's jurisdiction over Dahlan's complaint.[29] As this phrase is fundamentally relevant to this case, it is vital to analyse it further.

The Arabic text of the Article may have a more plausible interpretation. If translated literally, paragraph (a) says: The constitutionality of laws, bylaws or regulations, and *others*. The reader of this Article would be confused by the meaning of the word 'others', because there are no legal rules in the Palestinian legal system other than 'laws, bylaws, or regulations'.[30] Stated differently, including the word 'others' at the end of the Article demonstrates that the Basic Law extends the jurisdiction of the Constitutional Court beyond what is stated before that word. Hence, the critical question is what constitutes 'others'?

To answer this question, it is necessary to look for guidance from other articles that discuss the same matter in the Palestinian legal system, which also helps to maintain coherence and cohesion between legal texts.[31] In the Basic Law, there are no such articles, as this matter is mentioned only once, in Article 103, which makes it necessary to refer to other laws to find a proper explanation for that word.[32] Such reference will be to the LSCC, because it is the only law that contains articles about the jurisdiction of the Constitutional Court, which makes it necessary to bring their meanings into harmony. Thus, considering the Articles of the Basic

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[28] Italicised by the author.
[29] (E)(3)(a)–(b).
[30] Omar Hamzah Al–Turkomaniy, *القضاء الدستوري في فلسطين وفقاً لقانون المحكمة الدستورية العليا رقم (3) لسنة 2006 [The Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006]* (Master of Public Law Thesis, Al–Azhar University, 2010) 84–5.
[31] Mahmoud Abu Sawi, *' الرقابة على دستورية القوانين في فلسطين [The Judicial Review of Laws' Constitutionality in Palestine]'* (The Arab Association of Constitutional Law, 2009) 13.
[32] *'A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority'* (The International Bar Association's Human Rights Institute, 2009) 16.

Law and the LSCC together helps to reach the most plausible interpretation of Article 103(1)(a).[33]

Article 25(2) of the LSCC states that:

> Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, *decree*, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.

According to this Article, a *decree*, in its original meaning as not having the element of being 'general and abstract', might be pronounced unconstitutional, which affirms that it, *a fortiori*, does fall under the jurisdiction of the Court. Since a *decree* is neither a law, bylaw, nor a regulation, and yet falls under the Constitutional Court's jurisdiction, it is part of what the word 'others' refers to.

It is vital to emphasise that Article 25(2) provides evidence of the largely-accepted meaning of the word 'others' mentioned above. Thus, this Article indicates what was intended by the authors of the Basic Law. This conclusion is necessary because it maintains coherence between this Article and that of the Basic Law. Thus, using this Article of the LSCC does lead to the most coherent understanding of both articles, and the least degree of inconsistency between both laws.[34]

Abeer Dirbas, a researcher at the Palestinian Institution of Law, reaches the same conclusion. She argues that a reading the Basic Law articles and the LSCC, makes it clear that the Basic Law expands the jurisdiction of the Constitutional Court to include laws, bylaws, regulations, presidential decrees, decrees-by-law, and executive orders.[35] Mahmoud Abu Sawi, a Palestinian constitutional jurist, also confirms this conclusion, asserting that the Basic Law includes presidential decrees, decrees-by-law, and executive orders in the Court's jurisdiction, contrary to the LSCC which is lower than the Basic Law in the hierarchy of Palestinian legislation.[36] Thus, since the Basic Law is superior to the LSCC, a contradiction between both laws must results in the Basic Law's Articles prevailing, thus expanding the Court's jurisdiction to include what Article 103(1) of the Basic Law mentioned.

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[33] Abeer Dirbas, ' الرقابة القضائية على الدستورية في فلسطين [The Judicial Review of Constitutionality in Palestine]' in *الحالة التشريعية في فلسطين 2007–2012 [The Legislative Status in Palestine 2007–2012]* (Institute of Law – Birzeit University, 2012) 285, 310.

[34] Al–Kailany, Zeed *الطعن في دستورية القوانين: دراسة مقارنة [Appealing the Constitutionality of the Laws: Comparative Study]* (Master of Public Law Thesis, An–Najah University, 2012)27–9.

[35] Dirbas, above n 33, 309.

[36] Abu Sawi, *Judicial Review in Palestine*, above n 31.

Additionally, the International Bar Association, in its commentary on the LSCC, affirmed that:

> The experts overwhelmingly agree that the LSCC provisions on jurisdiction … must be harmonised with Article 103 of the Basic Law to ensure consistency and to avoid redundancy and confusion. Some experts mention that it would be particularly helpful in Article 24, subparagraphs 1 and 2, to quote directly from the Basic Law.[37]

Moreover, one of the key indicators that the word 'others' encompasses presidential decrees is Constitutional Court judgment in case 1-2006. In this case, Parliamentary members from the Fatah party submitted a case against the constitutionality of the newly-elected Parliament's decisions.[38] The contested decisions were made in the first session by the Hamas majority to annul the decisions that the previous Parliament had made in its last session.[39] The defendant, who represented the Hamas Parliament members, argued that the Constitutional Court lacks jurisdiction over decisions made by the Parliament, because those decisions are neither laws nor regulations.[40] In response, the Constitutional Court referred to Article 103 of the Basic Law, declaring that the word 'others' includes all actions that directly relate to the provisions of the Basic Law and might directly contravene it.[41] This declaration was a consensus decision among the judges, even those who dissented in the final judgment.[42] Importantly, in his final written pleading, Dahlan's counsel referred to the Court's judgment in case 1-2006, and relied on its definition of the word 'others' to assert the Court's jurisdiction over Dahlan's complaint.

On this analysis, it can be concluded that, according to Article 103 of the Basic Law, which overrules Article 24(1) of the LSCC, and in light of Articles 25(1) and 25(2) of the LSCC, the Court does have jurisdiction over presidential decrees, which are not required to have the element of being general and abstract, such as this Decree. Therefore, the Decree of lifting Dahlan's immunity falls under the Court's jurisdiction. Hence, the Constitutional Court has failed in applying the legal texts related to its jurisdiction, particularly that of the Basic Law. Importantly, Chapter Three discussed the jurisdiction of constitutional courts in authoritarian regimes, and highlighted that it should include executive actions if these courts are to be effective in countering authoritarianism, because other courts might dismiss critical cases on

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[37] *A Comparative Analysis of the Law on the Supreme Constitutional Court*, above n 32, 16.
[38] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2006, 1. A full translation of the Court's judgment in this case is available at: <http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112>.
[39] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2006, 6 ('*Case 1–2006*').
[40] See *Case 1–2006*, 3.
[41] See *Case 1–2006*, 5.
[42] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2006, 8 (Chief Justice Hammad, and Judges Gizlan, Nasirudeen, Takrory, and Tanjeer).

the pretext of them being 'political questions' or 'acts of sovereignty' to avoid potential clashes with the regime.[43]

Such a failure leads to an inference that the Court's reasoning was erroneous and that it disregarded Article 103 of the Basic Law and other Articles of the LSCC. That disregard left the inconsistency between the Basic Law and the LSCC unaddressed by the Court, which should have upheld the Basic Law over LSCC. In his commentary on this case, Fathi Fikry avows that 'the Court did incorrectly decide on the issue of lacking subject-matter in this case'.[44]

This failure to consider Article 103 by the Constitutional Court raises the vital question of whether it was unintentional? If yes, then this should be a major concern regarding the bench's adequacy; a judge failing to apply the Basic Law rules when addressing the Constitutional Court jurisdiction indicates substantial incompetence on the part of that judge.[45] If the answer is no, then the concern is even greater, because it reflects a decision made in bad faith by the bench, and would justify characterising its judges as lacking integrity.[46]

To summarise the majority's opinion, the Court justified its lack of jurisdiction by referring to Article 24 of the LSCC, while disregarding Article 103 of the Basic Law. The loophole in Article 24(1) of the LSCC was a result of the last-minute changes to the Article by the previous Fatah Parliament, as explained in Chapter Four.[47] This loophole has created a contradiction between this Article and that of the Basic Law, and another contradiction between Article 24 and 25 of the LSCC itself, as shown above.[48]

(b) The Dissenting Opinion and its Implications

Judge Gizlan dissented from the majority view in this judgment. He dissented on the grounds that the bench must have been formed according to the articles related to the High Court of Justice in the Judicial Organisation Law, not those related to the Constitutional Court in the LSCC.[49] He based his opinion on the fact that this Court is the High Court of Justice setting as the Constitutional Court, a legal condition that was addressed in Chapter Two.[50] Therefore, he

[43] (B)(6)(c).
[44] Fikry, *Judgment in Case 6–2012*, above n 6, 175.
[45] See generally Fahid Abu al–Athm Nusur, *القضاء الدستوري بين النظرية والتطبيق [Constitutional Judiciary: Between Theory and Practice]* (Dar Al–Thaqafah, 2016) 419, 431.
[46] Ibid.
[47] (D)(1)(b).
[48] See especially Chapter Four (E)(3).
[49] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 6–2012, 1–2 (Judge Gizlan).
[50] (C)(3)(c).

claimed that having only seven judges on the bench violates Article 25 of the Judicial Organisation Law, which stipulates that:

> The High Court of Justice convenes with the attendance of at least two-thirds of its members [i. e. nine judges], on the basis of a request by its Chief Justice or one of its circuits in the following cases: 1. To reverse a legal principle previously established by the court or to remove a contradiction between previous principles. 2. If the case brought before it revolves around a new or complex legal point or involves a point of particular importance.[51]

Therefore, he concluded that since there were seven rather than nine judges on the bench, then the bench's formation was unlawful, and thus all its decisions were void.[52] The consequence of this opinion is to deem the Constitutional Court's judgment as invalid in this case, which as a result, necessitates a retrial of Dahlan before a bench formed lawfully according to the Judicial Organisation law.

However, this dissenting opinion is mistaken. Article 25 of the Judicial Organisation Law is related to the High Court of Justice sitting as a court that hears administrative cases, not as a constitutional court that hears constitutional claims.[53] Therefore, to assess whether the bench was formed lawfully or not, the LSCC is the law that should be referred to, not the Judicial Organisation Law. Article 2 of the LSCC establishes the basis for the valid formation of this bench:

> The Court shall be comprised of a President and a deputy for him and seven judges. The Court shall convene before a panel of a president and six judges at least and shall issue it decisions with a majority vote.

It is difficult to determine Gizlan's motivation for his dissenting opinion. Nevertheless, believing that the current case before the Court falls under the second paragraph of Article 25 mentioned above, he perhaps wanted more judges to sit on the bench for such politically-sensitive cases, to increase judicial oversight and engagement with such cases, which might reduce the impact of tainted judges on the Court's decisions.[54] However, the fact remains that Article 2 of the LSCC makes valid any decision issued by a bench of minimum seven judges.

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[51] *قانون تشكيل المحاكم النظامية رقم 5 لسنة 2001* [Regular Courts' Formation Law No. 5 of 2001] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13857> ('*Regular Courts' Formation Law*').

[52] Judge Gizlan, above n 49, 3.

[53] *Regular Courts' Formation Law.*

[54] See Kamil Sa'id, *النظرية العامة للقضاء الدستوري[The General Theory of Constitutional Adjudication]* (Dar Al–Thaqafah, 2017) 256–8.

(c) The Regime's Gains

The regime made significant political gains through the Court's judgment in this case. After the dismissal, the Court of Anti-Corruption accepted the General Prosecutor's case against Dahlan, and pronounced him guilty of corruption, sentencing him to three years in prison and a fine of USD15 million.[55]

This outcome of the Court's judgment relates to the function of controlling administrative agents and maintaining elite cohesion,[56] as reports show that Dahlan made considerable efforts to form his own coalition within the Fatah party and subsequently become president. A recent report claimed that the President Abbas has been seeking Interpol's help to arrest Dahlan as 'a fugitive from justice',[57] as Dahlan currently resides in the United Arab Emirates.[58] Labelling Dahlan as a fugitive allowed the president to prevent him from holding a legitimate position inside the Fatah party, and facilitated dismissing Dahlan's allies from the Palestinian Authority on the pretext of 'terminating disloyal, misdemeaning Fatah members'.[59]

Based on this analysis, the Constitutional Court's declaration that it lacked jurisdiction over *de facto* presidential decrees, which include Decrees-by-law that lack the element of being 'general and abstract', allowed the president to use the Court to maintain elite cohesion within the Fatah party. Importantly, the Constitutional Court upheld this declaration in another case, and performed other functions in favour of the regime, as the following part explains.

3 *Jurisdiction over Expropriating of Private Lands: Case 12-2016*

The subject of case 12-2016 was expropriation of land for the benefit of private investors. The owners of the expropriated land filed a direct case challenging presidential decree of expropriating 1525 Km^2 of land in the West Bank.[60] They claimed that according to Article 21(2) of the Basic Law, expropriation is only permissible when it serves the public interest. The Article declares that:

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[55] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22–2014.
[56] (C)(3)
[57] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22–2014, 3.
[58] 'Palestine to Seek Dahlan's Arrest Through Interpol, Officials Say' (2017) *Middle East Eye* <http://www.middleeasteye.net/news/palestine–seek–dahlans–arrest–through–interpol–officials–say–23623380>.
[59] See especially Adnan Abu Amer, 'Dahlan Encouraged to Form Palestinian Party Outside Fatah' (2018) *Al–Monitor* <https://www.al–monitor.com/pulse/originals/2018/03/uae–request–dahlan–form–new–party–dissociated–from–fatah.html>.
[60] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 12–2016, 2 ('*Case 12–2006*').

> Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial ruling.

The plaintiffs highlighted the fact that, in this decree, the ownership of this land was transmitted to a private company called the 'Bayti Real Estate Investment Company', which is jointly owned by the Qatari Diar Real Estate Investment Company and Massar International, to build the first Palestinian master planned-city project, known as 'Rawabi City'.[61] According to *Al-Monitor*, the city is 'designed to include 6000 housing units and accommodate a population of up to 25 000. The prices of the units range from USD65 000 to 110 000'.[62] The plaintiffs argued that there is no public interest in expropriating these lands, which means that the Basic Law Article mentioned above does not justify the expropriation.[63]

In response to this case, the Constitutional Court — which in 2016 consisted of twelve judges that the President single-handedly appointed as an independent Constitutional Court from the High Court of Justice, with Alhaj-Qasim as its Chief Justice — dismissed the case on the grounds of the Court lacking jurisdiction over the presidential decree of expropriation. The Constitutional Court also asserted that such a decree falls under the jurisdiction of the High Court of Justice.[64] Like the previous bench, this new bench disregarded Article 103 of the Basic Law that highlights the Court's jurisdiction over '*others*' according to the meaning explained above. This failure to consider Article 103 raises the same concerns about the judges: was it unintentional or, more worrying, in bad faith? As opposed to Dahlan's case, the counsel in this case did not challenge the decree in the High Court of Justice, perhaps because he was aware that the time-limit to do so had already expired, and that any challenge to the decree would face the same outcome as Dahlan's case in the High Court of Justice.

On a related point, dismissing this case relates to the function of providing credible commitments in the economic sphere. It may be argued that to fully perform this function, the Court should show a constant practice of 'protecting' private investments.[65] However, in the

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[61] 'About Bayti' (2008) <http://www.rawabi.ps/bayti/about_bayti.php>.
[62] Ramy Jabbar, 'Qatar Funds Rawabi, New–Look Palestinian City' (2015) Al–Monitor <http://www.al–monitor.com/pulse/culture/2014/02/rawabi–revolution–palestine–clans–family–units.html#ixzz4wgLRkpvw>. The US$850 million investment project is largely being financed by Qatar. It is estimated that the city will provide 3,000 to 10,000 permanent jobs, and accommodate a population of 40,000 residents.
[63] See *Case 12–2006*, 3.
[64] See *Case 12–2006*, 4.
[65] See especially Hilton L. Root and Karen May, 'Judicial Systems and Economic Development' in Tamir Moustafa and Tom Ginsburg (eds), Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, 2008) 304, 307–9. See Hongyi Chen and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press, 2018) 120.

context of the West Bank regime, this is the only case so far in which the Court was asked to decide on the constitutionality of expropriating private properties, and, as shown above, it has chosen to perform that function in this specific case.[66] It is true that only one investor has benefited from this particular decision, Bayti Company.

Nevertheless, it is possible that this decision would increase the confidence of other potential investors in the regime's ability to provide credible commitments to 'protect' their investments, as well.[67] This case signalled to such investors that, according to the Court's judgment in this case, and if they act in a way that attracts the President's approval to exercise his power in their favour, a presidential decree to expropriate privately-owned lands for their projects would be considered lawful.[68] In summary, Bayti, as a current investor, along with other prospective investors, have found the regime's commitment to protect their economic interests credible.[69]

4 *Summary*

The analysis of both cases, Dahlan's and the Rawabi city case, presents evidence that the Constitutional Court's claim of lacking jurisdiction over presidential decrees is incorrect, and affirms that, according to a correct reading of Article 103(1) of the Basic Law, the phrase 'other enacted rules' includes presidential decrees and orders. This Article overrules Article 24(1) of the LSCC, which limits the Constitutional Court judication to laws and regulations.

The judgments in both cases had a substantial impact on the regime's interests. As a result of Dahlan's case, the regime maintained its elite cohesion by convicting Dahlan of corruption crimes after lifting his parliamentary immunity. As a result of the Rawabi case, the regime could provide a credible commitment to private investors that any expropriation of private land would not be reviewed by the Constitutional Court.

This analysis leads to a view of the Court's judges as either incompetent because they did not refer to Article 103(1) of the Basic Law, or tainted if the failure to consider the Article was intentional.

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[66] See especially Jedidiah J Kroncke, 'Property Rights, Labor Rights and Democratization: Lessons from China and Experimental Authoritarians' (2013) 46 *NYU Journal of International Law and Politics* 115, 126–33; Tom Ginsburg, and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018) 119.
[67] See Randall Peerenboom and Tom Ginsburg, *Law and Development of Middle–Income Countries: Avoiding the Middle–Income Trap* (Cambridge University Press, 2014) 25.
[68] See Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 55.
[69] See Hilton L. Root and Karen May, 'Judicial Systems and Economic Development' in Tamir Moustafa and Tom Ginsburg (eds), Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, 2008) 304.

C *Jurisdiction over Previous Legal Systems*

1 *Background*

The critical legal issue in these cases is the Constitutional Court's jurisdiction over laws inherited from previous legal systems in the West Bank; i.e. laws that were applied before the Palestinian Authority began its limited governance of the West Bank in 1994. The two cases analysed below are about the Constitutional Court judication over laws enacted by the Jordanian authorities during their rule over the West Bank.

The principal rule is identical in both cases: Constitutional Court jurisdiction over Jordanian laws. In the first case, the law in question was the Customs and Excise Law of 1962, while in the other case it is the Law of Preserving State Properties of 1961. Both laws are important for the regime because they provide avenues for serving its economic and financial interests, as explained below.

Like the previous group, both judgments in this group were in favour of the regime, as the Constitutional Court declared that it lacks the jurisdiction to review the constitutionality of laws enacted during previous eras, particularly the era of Jordanian rule. The Constitutional Court's argument was that such laws must be reviewed according to the constitution of the government that enacted them, not the current Basic Law of the Palestinian Authority. This argument is assessed in the analysis below and subjected to criticism, as it contradicts fundamental constitutional principles.

2 *Jurisdiction over the Customs and Excise Law: Case 1-2014*

In case 29-2012 before the Customs and Excise Court, Nidal AbuRa'd was on trial for unlawfully changing financial documents, presenting fraud reports to taxation authorities, and tax evasion.[70] During the hearing, his counsel submitted a request for adversary rebuttal, challenging the constitutionality of Articles 167 and 168(3) of the Customs and Excise Law No. 1 of 1962, which were enacted during Jordanian rule over the West Bank,[71] and their amendment in Article 3 of the Law No. 10 of 1964.[72] Both Articles and their amendments regulate the formation and competences of the Customs Court. In response, the Customs Court

[70] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2014, 2 ('*Case 1–2014*').
[71] Ibid.
[72] Ibid.

refused his request, which led the counsel to submit a direct, original case to the Constitutional Court for the same purpose, and the latter accepted it as case 1-2014.[73]

It is noteworthy that this case did not reach the Constitutional Court according to the adversary rebuttal avenue, since the rebuttal was rejected by the ordinary court.[74] Rather, the case proceeded to the Constitutional Court through the avenue of direct, original action.[75] This is vital because it demonstrates how the Constitutional Court accepted a direct action after an adversary rebuttal was rejected by the ordinary court.[76] In cases 1-2015, 2-2015, and 5-2016 analysed in Chapter Five,[77] the newly-established Constitutional took the contrary view that once the rebuttal is rejected, the requester of that rebuttal cannot file a direct action to the Constitutional Court, without commenting on the Court's acceptance of this very case. This different practice is another example of unjustified inconsistency between the practices of this newly-established Constitutional Court and that of the previous High Court sitting as the Constitutional Court.

Article 167 states that:

> A special court, named the Customs Appellate Court, shall be formed, and it consists of:
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> 1. A judge as a chief (appointed by the judicial council in the same manner of appointing regular judges), and until the appointment of this judge, and during the time of his absence, the Minister of Justice can delegate the chief of Amman appellate court to perform the judge's duties.[78]
> 2. Two members appointed by the Council of Ministers, based upon a nomination of the minister of finance, from senior customs employees who hold a degree in law (if possible), whose both ranks [in the public employment system] are not less than six. The council of ministers has the right to substitute them if there is a need for that based upon a nomination by the minister of finance.
> 3. The council of ministers has the right to, based upon a nomination from the minister of finance, appoint an employee from among customs employees, whose rank [in the public employment system] is not less than six, to join this court and complete its quorum if one of the two members, mentioned in the previous paragraph, is absent.

Additionally, Article 168(3) declares that:

> This Court can render its judgments by unanimous or majority opinion.[79]

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[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] See above Chapter Five (A)(3).
[78] *قانون الضرائب والمكوس رقم (1) لسنة 1962* [Customs and Excise Law No. 1 of 1962] (Palestine) <http://muqtafi.birzeit.edu/Legislation/PDFPre.aspx?Y=1962&ID=4383>.
[79] Ibid.

The amending Article in Law No. 10 of 1964 annulled paragraph (3), and replaced paragraph (1) with the following:

> [The Customs Appellate Court shall consist of] a judge as a chief (appointed by the judicial council in the same manner of appointing regular judges), and if his office becomes vacant, or he became incapable of performing his duties because of being absent or any other legal reason, then the minister of justice is entitled to delegate any judge from appellate courts, whose rank [in the judicial employment system] is not less than four, to fill that office.[80]

The plaintiff contended that both Articles and their amendments violate the following Articles 97, 98, and 2 of the Basic Law.[81] Article 97 affirms that:

> The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.[82]

According to the plaintiff, this Article of the Basic Law preserves the independence of all courts by preventing other authorities from taking part in judicial processes; therefore, entitling the Minister of Justice to appoint members in this customs court is a violation of this Article.[83]

Article 98 of the Basic Law proclaims that:

> Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.[84]

The plaintiff maintained that this Article implies prohibiting the intervention of customs employees in the adjudication process of the customs court.[85]

Article 2 of the Basic Law asserts that:

> The people are the source of power, which shall be exercised through the legislative, executive and judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law.[86]

The plaintiff argued that appointing employees from the executive authority as members of the customs court grossly violated the separation of powers principle, as it allowed those

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[80] Ibid.
[81] Ibid 2–4.
[82] *القانون الأساسي لسنة 2002* [The Basic Law of 2002] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2002&MID=14094> (‘*Basic Law of 2002*’).
[83] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2014, 2–4 (‘*Case 1–2014*’).
[84] *Basic Law of 2002.*
[85] *Case 1–2014*, 2–4.
[86] *Basic Law of 2002.*

employees who sit as judges to override the decision of the original judge if they become a majority.[87]

In May 2015, the majority of the Constitutional Court decided that the Court lacks jurisdiction over the Customs and Excise Law because it is a Jordanian law, and therefore dismissed the case on form.[88] The majority based this decision on two claims. First, the laws that were enacted before the 4th of June 1967, i.e. during the Jordanian governance of the West Bank, are not subject to its constitutional jurisdiction, since they should be assessed according to their consistency with the Jordanian Constitution, not the Palestinian Basic Law.[89] Second, even if a constitutional case against those laws was filed, it should also challenge Presidential Decree No. 1 of 1994.[90] This Decree pronounced that all laws and regulations which were valid at 4th of June, 1967 are to be enforced and applied again in the West Bank and Gaza Strip until they are modified by the Palestinian Parliament.[91] This claim refers to the source of enforcement for Jordanian laws, which is that Presidential Decree. As this description of the facts shows, the importance of this case arises from its subject, which is the constitutionality of laws enacted during previous eras, the Jordanian era in this case, and relates to an economically critical issue, namely customs and excise.

(a) Assessment of the Court's Reasoning

Starting with the first claim of the Court, major criticisms can be made of it. First, how should legislation should be reviewed if it was enacted under a particular constitution but then it was included in the legal system of a different constitution. This is the exact scenario in this case: the challenged Articles were a part of legislation that was enacted under the Jordanian constitution, but based on the Presidential Decree of 1994, both Articles were reapplied in the Palestinian system.[92] Thus, both became part of the Palestinian legal system of which the Palestinian Basic Law is a superior text. Upholding the Basic Law is vital in this context, and it is applied to all parts ofthat legal system, regardless of the historical origin of specific

[87] *Case 1–2014*, 2–4.
[88] *Case 1–2014*, 5.
[89] Ibid.
[90] Ibid.
[91] *قرار رقم (1) لسنة 1994* [Order No. 1 of 1994] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1994&MID=9663>.
[92] See especially Mohammad Ghazzawy, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2014 [Comment on Constitutional Court Judgment in Case No. 1 of 2014]' (2015) 25 (October) *العدالة والقانون [Justice and Law]* 326, 331.

legislation.[93] This comprehensive superiority is explicitly stated in Article 119 of the Basic Law:

> All legal provisions that contradict the provisions of this Basic Law are repealed.[94]

As this Article affirms, all provisions that contradict the Basic Law, regardless of their origin, are null and void. Since Jordanian laws are part of the Palestinian legal system, then they are subject to this Article, and it is the duty of the Constitutional Court to review the constitutionality of laws, and if it declares it has a lack of jurisdiction over certain laws within that system, then that renders this Article ineffective.[95] Moreover, declaring jurisdiction over Jordanian laws brings more harmony and consistency to the Palestinian legal system, since they constitute a large portion of it, and can have their constitutionality assessed by the Court through regular review requests.[96] Otherwise, the inconsistency between these laws will continue to prevent the Constitutional Court from comprehensively upholding the Basic Law, a purpose that the Basic Law was theoretically intended to fulfil.

Therefore, the majority's opinion in this case seems incorrect, principally because the challenged Articles are part of the Palestinian legal system and are applied in establishing customs courts. Additionally, the continuous application of these Articles after the Presidential Decree, which was followed by an intense legislative process to unify the laws applied in the West Bank and Gaza Strip, demonstrates the parliament's acceptance of those challenged Articles as part of customs and excise regulation in Palestine.[97] Therefore acceptance of these laws must be reviewed in light of the Basic Law, to assess whether these laws are consistent with it, or not.

Second, importing laws from different jurisdictions, and reinforcing a law that was applied earlier in a certain jurisdiction, are ways of reforming current laws and developing the legal system.[98] Both ways help legislators to benefit from the legislative expertise of others. Jurists also participate in that reform by conducting comparative studies between various legal

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[93] See especially Wael Fathullah, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2014 [Comment on Constitutional Court Judgment in Case No. 1 of 2014]' (2015) 25 (October) *العدالة والقانون [Justice and Law]* 346, 350–2.

[94] *Basic Law*.

[95] See especially Mohammad Al–Najjar, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2014 [Comment on Constitutional Court Judgment in Case No. 1 of 2014]' (2015) 25 (October) *العدالة والقانون [Justice and Law]* 334, 339.

[96] See Husayn Ahmad Mushaqi, *الوجيز في شرح قانون أصول المحاكمات المدنية والتجارية الفلسطيني [The Concise in Explaining the Principles of the Palestinian Commercial and Civil Procedure Law]* (Dar Al–Thaqafah, 2011) 20.

[97] Ghazzawy, *Judgment in Case 1–2014*, above n 92, 332.

[98] See for the case of Palestine: Al–Najjar, *Judgment in Case 1–2014*, above n 95, 337.

systems to provide proposals for further reforms, in parallel with what judges present as an appraisal of certain legislation while interpreting and applying it to disputes before them.[99] On this basis, the process of law reform should be reviewed by constitutional courts to uphold the constitution, rather than claiming that such laws that might violate the constitution fall beyond the jurisdiction of that Court.[100]

Moving to the second claim of the Court, it is incorrect to require a challenge to the Presidential Decree of 1994. The Decree was lawful because in 1994 there were no basic laws for the Palestinian Authority, and the powers of the Head of the Palestinian Authority, Arafat at that time, were regulated by the Accords, as explained in Chapter Three.[101] Arafat had the authority to establish institutions for executive, legislative, and judicial powers before the first parliamentary elections in 1996. On this basis, his Decree was consistent with the only superior text at that time, namely the Accords. Additionally, and by means of syllogism, requiring the plaintiff to challenge that Decree as the source of validity for Jordanian laws, is equivalent to requiring plaintiffs in constitutional cases to challenge the Presidential Decrees promulgating the laws that plaintiffs challenge. Since 2007, the Constitutional Court has never made such a request in this scenario. This leads to the conclusion that the second claim of the Court in this case is also mistaken.

Lastly, on a point related to the judgment content, the Court maintained that:

> [It] acknowledges the importance of the legislative wisdom behind involving two senior customs employees in the court that hears customs cases, considering the special nature of this sort of cases, namely the need for professional and technical knowledge about rules and procedures related to customs, which such employees have, along with the judge's knowledge of the law [related to customs].[102]

Constitutional jurists have expressed negative views regarding this acknowledgement, arguing that it is not part of the court's task to discuss legislative policies.[103] Constitutional review allows the Court to assess the constitutionality of all legislation in reference to the Basic Law only, without anticipating the motivations behind their enactment or how it is being applied, as it is only required to decide whether the contested Articles are consistent with the Basic Law or not.[104] Based on that, the Constitutional Court should have not discussed the legislative

[99] Fathullah, above n 93, 349.
[100] Ibid.
[101] See above (C).
[102] *Case 1–2014*, 4.
[103] Sa'id, above n 54, 197–8.
[104] Nusur, above n 45, 215–6.

policy, necessity, or proportionality of that legislation.[105] Rather, it should have upheld the Basic Law provisions over the contested Articles.[106]

(b) The Dissenting Opinion and its Implications

The dissenting opinion of the minority supports the analysis presented above, which asserted that:

> The challenged Articles are applied in Palestine similar to other articles of laws enacted by the Parliament. Accordingly, all of them are equal in terms of their legal status, which concludes that its compulsory on them to be consistent with the Basic Law. Particularly, in case of challenging laws of Jordanian origins, these laws should be assessed according to the Basic Law, since Article 24(1) of the LSCC clearly provides this Court with unlimited jurisdiction over laws and regulations *applied* in Palestine.[107]

The minority's opinion demonstrates another criticism of the majority's decision, as Article 24(1) declares the Constitutional Court to have jurisdiction over all laws *applied* in Palestine.

(c) The Regime's Gains

Admittedly, the immediate result of this judgment, which upholds the validity of customs courts, was not of major benefit to the regime. According to official statements published by the Palestinian Monetary Authority, customs and excises revenue made a minor contribution to the Palestinian Authority's funds.[108] However, it is still a source of income that the Palestinian Authority needs, in order to pay the debts that are accumulated on a regular basis, as the annual reports of the Palestinian Ministry of Finance demonstrate.[109]

The result of the Constitutional Court refusal to review the constitutionality of Jordanian laws legitimates the customs courts, and thus gives validity to their judgments.[110] In this case, the regime sought to legitimate the use of customs courts, which are subject to significant interference by the executive in their composition. That interference allows for less constraints on the regime.

More importantly, the overarching effect of the judgment is to block any future challenges of laws originally enacted before 2003 — the year in which the current Basic Law came into effect

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[105] Muhammad 'Abd Allah Shawabikah, *رقابة الإمتناع على دستورية القوانين: دراسة مقارنة [Abstention Control on the Constitutionality of Laws: A Comparative Study]* (Dar al–Thaqafah, 2012) 79.
[106] Isam Ali Dibs, *القانون الدستوري والنظم السياسية [Constitutional Law and Political Systems]* (Dar Al–Thaqafah, 2011) 373–5.
[107] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2014, 6–7 (Judges Dwaik and Al–Shu'aiby).
[108] Palestinian Monetary Authority, Annual Report 2015 (Ramallah, October 2016) iv.
[109] Palestinian Ministry of Finance, Annual Reports <http://www.pmof.ps/en/43>.
[110] (C)(2)

— based on the principle of *res judicata*. As explained in Chapter Two,[111] such laws also include the PLO Revolutionary Penal laws that do the regime a remarkable favour: they allow the regime to establish military courts that follow special procedures, as explained in Chapter Five.[112] Thus, these laws provide the regime with a parallel judicial system to try political opponents, away from ordinary courts that give the opponents the rights of defendants, which does not occur in military courts.[113] The last group of cases in this chapter analyses the Court's response to constitutional challenges to both laws.

3 *Jurisdiction over Preserving State Properties Law: Case 5-2013*

In another case before the Constitutional Court, case 5-2013, when Mhanna was still Chief Justice, the majority held the Constitutional Court's earlier decision to reject jurisdiction Jordanian laws.[114] The dispute in this case started in the Special Court of State Properties, formed by the Jordanian Law of Preserving State Properties No. 14 of 1961 (a Jordanian law).[115] The Department of State Properties in the Ministry of Finance submitted a case to that Special Court against the possessors of two estates, claiming these estates belong to the Palestinian State.[116] Therefore, the current owners had no right to them. The defendants appealed the judgment of the Special Court to the Court of Appeal and requested the latter to accept their adversary rebuttal.[117] In that rebuttal, they challenged the constitutionality of Article 5 of the Jordanian law, which states that:

> The Court has the competence to: (A) Impose a prison sentence of not less than one week and not exceeding one month, a fine not less than five dinars and not more than 50 dinars, or both penalties, for anyone who commits an act of aggression against State lands and properties. (B) Immediately deprive the aggressor of possession over the land or the property after filing the suit, against him without paying any attention to actions of possession that he claims. (C) Removal of all acts committed by the aggressor against the State's land at the expense of the aggressor, and the restoration of the situation to the extent that existed prior to the aggression.[118]

The defendants argued that this Article is in breach of Article 14 of the Basic Law, which asserts that:

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[111] (B)(3).
[112] (A)(2)(a).
[113] See especially Naser Rayyes, *Illegal Trial of Palestinian Civilian Persons before Palestinian Military Courts* (2011) *Alhaq Organisation* <http://www.alhaq.org/publications/publications–index/item/illegal–trial–of–palestinian–civilian–persons–before–palestinian–military–courts>.
[114] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 5–2013, 4 ('*Case 5–2013*').
[115] Ibid 2–3.
[116] Ibid 2.
[117] Ibid 3.
[118] *قانون المحافظة على أراضي وأملاك الدولة 14 لسنة 1961* [Jordanian Law of Preserving State Properties No. 14 of 1961] (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?lnk=2&LegPath=1961&MID=7244>.

> An accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defence. Any person accused in a criminal case shall be represented by a lawyer.[119]

The defendants argued that immediate deprivation, under Article(5)(B) violates the above provisions that considers the accused innocent until proven guilty.[120] In other words, Article(5)(B) provides the Special Court with the competence to treat the accused possessor as guilty before giving him the right to defend himself in a court, since it allows the Special Court to issue an immediate order of deprivation in favour of the State.

In response to this, the Constitutional Court insisted that it lacks jurisdiction over the constitutionality of Jordanian laws, and thus the rebuttal was dismissed.[121] The result of this judgment was to legitimate the regime's immediate deprivation of possession of privately-owned lands. In similar cases, the regime benefits through guaranteeing an immediate order that deprives the accused of his possession over land or property, allowing the regime to start using the land or property to serve its own economic interests, in a way that is declared legitimate by the Special Court. Moreover, in theory, this practice can also assist the regime in weakening the economic power of its rivals; by filing a case against an opponent of the regime, the Special Court can issue an order of deprivation and authorise the regime to maintain control over the opponent's land or property throughout litigation procedures, which can take an extremely long period of time as official reports show.[122] This is a different function that this Court might perform if the regime requires it to, namely, to maintain elite cohesion and sidelining the regime's rivals.[123]

4 *Summary*

By rejecting jurisdiction over pre-1994 laws, the Customs and Excise Law and the Preserving State Properties Law, the Constitutional Court violated the constitutional principle of upholding the Basic Law over all laws and regulations that are applied in Palestine, irrespective of their origin or the era in which they were enacted.

As a result of the court declaring its lack of jurisdiction over both laws, the regime was able to continue applying both laws to serve its economic interests, despite the fact that both laws

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[119] *Basic Law of 2002.*
[120] *Case 5*–2013, 2.
[121] *Case 5–2013*, 5.
[122] Ahmad Al–Ahmad, *قطاع الاراضي ما بين رؤية دولته وواقع الدولة* [Lands' Sector: Between the Vision of Its Country and the Country's Reality] (5 October 2017) *Alhaya Press* <http://www.alhaya.ps/ar_page.php?id=3269d4ey52862286Y3269d4e>.
[123] (C)(3)

violate articles of the Basic Law. The Constitutional Court has thus failed to uphold the Basic Law against the regime's actions, particularly when such actions are based on Jordanian laws, and it can thus be inferred that the Court lacks *de facto* independence.

D *Necessity of Decrees-by-Law*

1 *Background*

The author's analysis of these cases centres around the critical legal issue of necessity of issuing decrees-by-law. As it will be shown, according to the Basic Law, for the president to issue a decree-by-law, there must be a necessity to do so, i.e. there must be an immense and imminent danger that the decree-by-law can prevent.

The principal case is about the necessity of issuing a decree-by-law concerning exchange of foreign stocks, while the other two additional cases are about the necessity of lifting parliamentary immunity and the necessity of amending veterans law.

In all three cases, the judgments were in favour of the regime, as the Constitutional Court did not declare any of the issued decrees-by-law unconstitutional. Through these decrees, the regime maintained its interests in the economic and political sphere. The main criticism of the three judgments is that the Constitutional Court failed to assess the actual necessity of issuing those decrees because it did not apply the criterion of immense and imminent danger.

2 *Necessity of Decree-by-Law concerning Exchange with Foreign Stocks: Case 3-2009*

The plaintiff in this case was Pal Invest Management Company, a Palestinian company engaged in brokerage activities and similar financial services.[124] It challenged the Decree-by-law Concerning Exchange with Foreign Stocks No. 17 of 2009, on the constitutionality of Articles 2(1) and 3(2) of that Decree,[125] which stipulate that:

> 2(1) It is prohibited for any person residing in Palestine, to do any of the following actions and activities:
>
> a) Directly or indirectly perform any action of brokerage to buy or sell currencies, securities, derivatives, gold, silver, or oil, including indices, commodities, and other operations on foreign exchanges.
> b) Collect or receive any money from any person for the purpose of mediating him in any foreign exchange, or any other person under his management.
> c) Directly or indirectly perform any deal with any person in any foreign Stock for any of the acts or activities set forth in this Article.

[124] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2009, 1 ('*Case 3–2009*').
[125] Ibid 3.

> d) Directly or indirectly advertising that he was performing or mediating transactions or contracts for any person on foreign exchanges concerning actions and activities mentioned in this article, or to show his willingness to make this deal or mediate it.[126]
>
> 3(2) Stock companies, licensed by the Capital Market Authority, are exempted from the provisions of Article 2 and are allowed to engage in activities and brokerage business in foreign stock exchanges in accordance with the provisions of the Capital Market Authority Law and the Securities Law.[127]

Since the company did not hold a license from the Capital Market Authority at the time of submitting the case, it was aggrieved by the application of Article 2(1).[128] The company claimed that both Articles violate the principles of free market economy and freedom of economic activity established in Article 21 of the Basic Law, which affirms that:

> 1. The economic system in Palestine shall be based on the principles of a free market economy. The executive branch may establish public companies that shall be regulated by a law.
> 2. Freedom of economic activity is guaranteed. The law shall define the rules governing its supervision and their limits.[129]

Like all decrees-by-law in the Palestinian legal system, the president relied on Article 43 of the Basic Law to issue it, which states that:

> The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.[130]

To support its case, the company provided a detailed explanation of how economic indicators of the Palestinian market show that it is not necessary to issue the decree.[131] Hence, the company argued that issuing the decree was not justified under Article 43 of the Basic Law.[132]

Before examining these two claims, the Constitutional Court responded to a pleading from the General Prosecutor, in which he claimed that decrees-by-laws do not fall under Constitutional Court jurisdiction, since Article 24(1) of LSCC restricts its jurisdiction to laws and regulations.[133]

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[126] *2009 لعام* 17 القرار بقانون بشأن التعامل في البورصات الأجنبية رقم [Decree–by–law Concerning Exchange with Foreign Stocks No. 17 of 2009] <http://muqtafi.birzeit.edu/Legislation/fullTextNew/GetLegConsFT.aspx?LegPath=16050>.
[127] Ibid.
[128] *Case 3–2009*, 3.
[129] *Basic Law of 2002.*
[130] Ibid.
[131] See *Case 3–2009*, 4.
[132] Ibid 3.
[133] Ibid.

The Constitutional Court rejected the General Prosecutor's claim, asserting that all forms of legislation fall under its jurisdiction. Furthermore, the Constitutional Court affirmed that all decrees-by-law issued in a state of necessity must be subject to constitutional review since the Constitutional Court is obliged to uphold the Basic Law over all legislation, and to assure the legitimacy of decrees-by-laws issued by the president.[134]

Next, the Constitutional Court moved to examine the company's claim that the Decree-by-law was not issued in a state of necessity and thus violates Article 43 of the Basic Law. The Constitutional Court upheld that:

> Article 47 provides that issuing decrees-by-law is only permissible when the Parliament is not in session and when there is a state of necessity, i.e. a state that must be dealt with urgently. Based on that, and since the Parliament was suspended after the coup in 2007, the President has the authority to issue decrees-by-law that provide solutions for urgent problems. Accordingly, this decree-by-law, which was issued considering advice from the Monetary Authority and the Capital Market Authority, deals with an urgent economic necessity, which is protecting natural and legal persons from fraud and illegal leaks of assets outside the Palestinian stock as a result of the defect in the financial supervision over the stock's activities.[135]

Moving to the claim that the decree-by-law violates Article 21 of the Basic Law, the Constitutional Court asserted that the decree has shielded the Palestinian economy from potential crises, national and international alike. It stated that:

> Taking precarious actions and applying necessary regulations in a state of necessity does not contradict with the concept of free market and its principles, which the Palestinian economy is established on. Rather, such actions and regulations enhance, support, and protect the Palestinian economy.[136]

Based on this analysis, the Constitutional Court dismissed the case on its merits, and affirmed that issuing that decree was in accordance with the Basic Law.

(a) Assessment of the Court's Reasoning

It is remarkable that the Constitutional Court did not explain what constitutes a state of necessity and what the criteria are for its existence. Thus, there was no thorough assessment of whether the state has, in fact, met the criteria for a decree-by-law to be issued.

Two conditions must be met in order to have a state of necessity that justifies issuing a decree-by-law.[137] First, the danger must be immense. An 'immense danger' is that which threatens a

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[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Ahmad Ashqar, *دور القضائين الدستوري والإداري في حماية الحقوق والحريات العامة في فلسطين [The Role of Constitutional and Administrative Judiciaries in Protecting Civil Rights and Public Liberties in Palestine]* (Masters in Law

substantial constitutional right, and at the same time cannot be predicted.[138] More specifically, the danger must be substantially damaging to interests protected by the constitution, whether these are interests of natural persons, legal persons from the private sector, or state institutions.[139] For example, if the danger is limited in effect to a personal relationship between citizens, then it is not immense.[140] Furthermore, the danger must be unforeseen or unexpected, because if it is not, then executive orders can be used to address any such danger.[141]

Second, the danger must be imminent. 'Imminence' means that the danger will most probably happen, and that there are no other means to effectively address it except by urgently issuing a decree-by-law.[142] To explain, if the occurrence of such danger is doubtful, or it has already occurred, then it is not imminent.[143] Further, if there are other means to address this danger and issuing such a decree-by-law can be postponed, or if issuing the decree-by-law will not effectively prevent it, then issuing a decree-by-law is not justified.[144]

In conclusion, a decree-by-law must be issued only to address an immense, imminent danger. Importantly, even if the danger meets those descriptions, the authority to issue a decree-by-law is not absolute; rather, it is subject to two restrictions.[145] First, the decree-by-law is subject to constitutional review by the Constitutional Court, to assess whether it is consistent with the conditions of state necessity, and other articles in the Basic Law, since it is unconstitutional for a decree-by-law to contravene the Basic Law.[146] Second, an explanatory memorandum must be published with any such decree-by-law to justify its effectiveness in preventing the immense, imminent danger.[147] Both restrictions aim to guarantee that using such exceptional authority would not turn the executive power into an unconstrained intervenor in the authority of the legislative power.

The Constitutional Court did not evaluate the claimed danger for issuing that Decree in this case. In particular, it did not examine whether the potential danger to the Palestinian stock

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Thesis, Birzeit University, 2013) 108–9; Al–Laham, above n 12, 59. For more jurists' opinions regarding these conditions, see Bdair and Khalil, above n 12.

138 2012–2007 الحالة التشريعية في فلسطين[The Legislative Status in Palestine 2007–2012] (Institute of Law – Birzeit University, 2012) 128.

139 Ibid 67–70.

140 Ashqar, above n 137, 109.

141 Haneen Hijab, *دور الرئيس التشريعي في النظام السياسي الفلسطيني [The Legislative Role of the President in the Palestinian Political System]* (Masters in Law Thesis, Birzeit University, 2011) 146.

142 108.

143 *The Legislative Status in Palestine 2007–2012*, above n 136, 128.

144 Hijab, above n 141.

145 See Sa'id, above n 54, 143–50.

146 See Sa'id, above n 54, 195–8.

147 See Nusur, above n 45, 210–5.

exchange was an immense, imminent threat. Moreover, it did not examine whether the president had issued an explanatory memorandum with this decree-by-law. This leads to the conclusion that the Constitutional Court failed to apply the correct procedures in assessing the constitutionality of this Decree-by-law.

(b) The Dissenting Opinion and its Implications

Judge Farid Musleh dissented in this case, arguing that the High Court sitting as the Constitutional Court does not exist after the enactment of the LSCC in 2006. He argued that after the LSCC became effective in 2006, the High Court of Justice no longer has competence to sit as the Constitutional Court, as the Basic Law affirms that the High Court of Justice has that competence *until* the establishment of the Constitutional Court. This dissenting opinion is somewhat erroneous, because what the Basic Law refers to is the actual establishment of the Constitutional Court, not the mere enactment of provisions that regulate its structure and procedures in the LSCC.[148] Otherwise, there would be no court to accept constitutional cases until that Constitutional Court is established. It is an inadequate understanding of the purpose of the LSCC to argue that the High Court of Justice has no jurisdiction to hear the cases until the Constitutional Court is actually established. This supports the claim that the competence of some constitutional judges is doubtful, based on certain opinions that they express.

An important concern about this dissenting opinion can be found by comparing it with a constitutional case (case 2-2009) in which Farid Musleh was a sitting judge.[149] The bench that heard that case made its judgment seven months before deciding the case dimissed above. Despite the fact that case 2-2009 was presented to the High Court sitting as the Constitutional Court, Farid Musleh did not dissent in the final judgment; i.e. he accepted the jurisdiction of the High Court of Justice.[150] Stated differently, he did not dissent from a previous case, even though, on the facts, the same claimed reason for dissenting in the principal case above existed in it.

A possible interpretation of Musleh's behaviour might be the judge's belated notice of the claimed reason after pronouncing the judgment in the case 2-2009. This is another indication that some judges of the Constitutional Court lack adequate skills, since failure to notice such a

[148] *Basic Law of 2002.*
[149] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No 2–2009, 1.
[150] Ibid 2.

significant matter means that Judge Musleh did not properly assess the jurisdiction of the Court in case 2-2009.

(c) The Regime's Gains

The Constitutional Court performance in this case, relates to the function of legitimation.[151] The Constitutional Court's approval for issuing the decree-by-law according to Article 43 of the Basic Law has a significant, overarching effect, that is, not only legitimating the president's control over the stock exchange but, more importantly, legitimating all the decrees-by-law that the president has issued since the coup in 2007. As Chapter Two explained, since the suspension of Parliament after the coup, the legislative power became vested in the president. Through decrees-by-law, the president has been able to legislate whatever he deemes appropriate to serve the regime's interests. Therefore, approving the stock exchange decree-by-law, on the pretext that the president called it necessary legislation to serve an urgent need, infers that other previous decrees-by-law are constitutionally legitimate, as the president has used that claim in all of them.[152]

Decrees-by-law issued after the coup regulated critical aspects of the Palestinian legal system, such as tax, commercial transactions, budget, security forces, penal and criminal actions, real estate, elections, and the judiciary.[153] These are all in need of careful and well-planned legislative processes, which the president has provided in his many decrees-by-law, as numerous Palestinian scholars contend.[154]

In short, legitimating this decree-by-law resulted in *ipso facto* legitimation of the previous decrees-by-law that the President had issued. Additionally, the judgment would also serve as a justification for legitimating decrees-by-law issued after it.

3 *The Court's Application of Necessity Rules in other Cases*

(a) Necessity of Lifting Parliamentary Immunity: Interpretation Request 3-2016

The Minister of Justice submitted this request to the newly-established Constitutional Court after a request from Sami Sarsour, then-President of the Judicial Council. The factual context of this request is unknown, and the interpretation pronounced by the Constitutional Court only

[151] See above Chapter One (C)(2).
[152] *The Legislative Status in Palestine 2007–2012*, above n 138, 74–81.
[153] See above Chapter Two (E).
[154] Mohammad Al–Najjar, ' 3/2016 رقم العليا الدستورية للمحكمة التفسيري القرار على التعليق' [Comment on Constitutional Court Judgment in Interpretation Case No. 3 of 2016] (2017) 29 (June) *العدالة والقانون [Justice and Law]* 230.

mentions that the submission was on behalf of Sarsour.[155] This lack of detail is unusual, as in other interpretation requests the Court provided a factual background for the request.

The request was about many Articles of the Basic Law relating to the legislative power, and Article 97 of the Parliament's Rules of Procedure, which stipulates that:

> Any request to deprive a Member of immunity shall be submitted in writing to the Speaker by the President of the Supreme Court of Justice, accompanied by a memorandum including the detail of the alleged crime, its place and date, and the requisite proof for criminal proceedings to be entered … The Legal Committee shall study the request and shall submit a report to the Council within fifteen days. The Council shall decide to deprive a Member of immunity only on a vote of two-thirds of its members.[156]

The Constitutional Court did not provide an interpretation of that Article as required for such a request; rather, it hastened to assert that the president has the right, in states of necessity, to lift parliamentary immunity from any member.[157] Further, it followed that assertion by affirming that the President's Decree-by-law to lift Dahlan's parliamentary immunity is consistent with Article 43 of the Basic Law, mentioned earlier, despite the fact that the interpretation request did not refer to that specific action.[158]

Two concerns can be highlighted about this response of the Constitutional Court to the request. First, as in the principal case analysed above, the Constitutional Court did not provide an assessment of the necessity the President claimed, and neither did it evaluate the danger to which the decree-by-law was directed. Accordingly, by disregarding the criteria of immense and imminent danger, the Constitutional Court accepted the president's claim of necessity as a sufficient reason to issue that Decree-by-law.[159]

The second concern relates to the analysis of group A cases at the beginning of this chapter, dealing with the Constitutional Court's jurisdiction over presidential decrees. In Dahlan's case, the High Court sitting as the Constitutional Court, declared that the president's decree-by-law to lift Dahlan's parliamentary immunity was *de facto* a presidential decree, which falls beyond the jurisdiction of the Constitutional Court according to Article 24 of the LSCC.[160] However, in this case, the newly-established Constitutional Court did not describe the decree as a *de facto* presidential decree. Rather, it referred to it as a decree-by-law and highlighted Article 43 of the

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[155] المحكمة الدستورية العليا الفلسطينية [Palestinian Supreme Constitutional Court], Interpretation Request No 3–2016, 1 ('*Interpretation Request 3–2016*').
[156] *The Palestinian Legislative Council: Rules of Procedure.*
[157] *Interpretation Request 3–2016,* 5.
[158] Ibid 5–6.
[159] Ibid 2.
[160] See above (A)(2)(a).

Basic Law as its legal basis.[161] In other words, the newly-established Constitutional Court sought, through this judgment, further legitimation for lifting Dahlan's immunity by reference to the Basic Law. Since all the judges in the new Court were single-handedly appointed by the president, there is more reason to consider them biased in favour of the regime.[162]

The new Court's characterisation of the Decree as a decree-by-law is incorrect. The analysis provided in Dahlan's case demonstrated why that decree is *de facto* a presidential decree.[163] Nevertheless, it is important to highlight this new characterisation as an example of the Constitutional Court attempts to legitimise the President's actions in a manner that caused unjustifiable inconsistency between both judgments.

In short, the Constitutional Court in this interpretation request has served as a legitimation tool, to provide further legitimacy for the president's sidelining of Dahlan, allowing the Court to be used as an avenue for maintaining elite cohesion and marginalising their opponents.[164]

(b) Necessity of Amending Veterans Law: Case 3-2007

This case was submitted by the National Association for Retired Veterans against a decree-by-law to decrease the pension of these veterans.[165] The Association argued that issuing this decree-by-law was not a necessity, because the economic consequences of spending on veterans' pensions does not constitute an immense, imminent danger.[166] As in the principal case discussed above, the Constitutional Court asserted that it is the president who decides whether it is necessary to issue that decree-by-law or not, without assessing the president's claim of necessity according to the criteria mentioned earlier in the principal case.[167] By taking this position, the Constitutional Court legitimated the president's action, which would help the regime in using the funds saved after that cut for reinforcing current security forces and boosting commercial projects.[168]

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[161] *Interpretation Request 3–2016*, 5.
[162] See above Chapter Two (C)(3)(c).
[163] See above (A)(2)(a); Yahyawy, Aminah, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 3/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 3 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 239, 239.
[164] See above Chapter One (C)(1).
[165] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No 3–2007, 1–2 ('*Case 3–2007*').
[166] *Case 3–2007*, 2.
[167] Ibid 3–4.
[168] See Ibrahim 'Aliyan, 'صناديق التقاعد: واقع ومشكلات ومقترحات في فلسطين والعالم العربي' [Pension Funds: The Reality, Problems, and Proposals related to Palestine and the Arab World] (Paper presented at the Third International Conference, An–Najah University, 2013).

4 *Summary*

The author's analysis has demonstrated how the Constitutional Court did not apply the correct criteria to assess whether the decrees-by-law in all three cases were, in fact, necessary to enact. These criteria are required by the Basic Law, as Article 43 states.

Importantly, in the second case, the analysis explained how the Constitutional Court did not apply the correct criteria for accepting the interpretation request submitted by the prime minister. Rather, the Constitutional Court unjustifiably moved to affirm the legality of lifting Dahlan's parliamentary immunity, which contradicts the purpose of interpretation requests, as explained above.

As a result of these judgments, the regime's interests were served by legitimating the president's actions and maintaining elite cohesion by affirming the constitutionality of Dahlan's loss of parliamentary immunity. Thus, the Constitutional Court has failed to uphold the Basic Law and prevent the regime from misusing Article 43, which allows the President to issue decree-by-law in states of necessity.

E *Separation of Powers*

1 *Background*

The author's analysis of the next set of cases focuses on the critical legal issue of separation of powers, as regulated in the Basic Law. The principal rule is the president's executive limitations, particularly the prohibition of combining his post as the president with that of the prime minister. The other four rules are: the delegation of legislative authorities; contradiction between final judgments; the president's competence in judicial appointments; and classification of police force.

As in the previous groups of cases, all the judgments of cases analysed in this Group were in favour of the regime. The principal case here is of remarkable significance, as its subject is an agreement that was signed between the parties of Fatah and Hamas, which dictated that the president would combine his post with that of the prime minister.

2 *Combining the President and Prime Minister's Roles: Case 1-2012*

In 15 February 2012, a member of the PLO's Central Council filed a direct case to the Constitutional Court against the second provision of the Doha Agreement between the president, as the head of the Palestinian Authority, and the head of Hamas's Political Office,

Khalid Mish'al.[169] The challenged provision obliges both parties to form a unity government in which the President, Mahmoud Abbas, is also to serve as the prime minister.[170] The plaintiff argued that it is unconstitutional for the president to combine both roles.[171] The plaintiff claimed that this violates Articles 68 and 74(1) of the Basic Law, which explicitly regulates both roles as separate, and respectively state that:

> 68 The President of the National Authority shall appoint the Prime Minister and authorize the latter to constitute his government; The President shall have the right to dismiss the Prime Minister or to accept his resignation and to request him to convene the Council of Ministers.
>
> 74(1) The Prime Minister is accountable to the President of the National Authority for his actions and the actions of his government.[172]

The plaintiff referred to Article 25(1) of the LSCC to justify the Constitutional Court's jurisdiction over the Agreement, which states that:

> The Court shall, in the course of the performance of the jurisdictions provided for under Article (24), be entitled to exercise all the powers of hearing and pronouncing on the unconstitutionality of any piece of legislation or act contravening the Constitution (wholly or partially).[173]

The plaintiff pleaded that the term 'act' should be interpreted as any act that violates the Basic Law performed by one of the three powers, including the president as the head of the executive.[174] Notably, the plaintiff did not specify whether the action in question is a presidential decree, a decree-by-law, or a decision, since it is not a 'piece of legislation'. He asserted that it is incorrect to limit the jurisdiction of the Constitutional Court to review the constitutionality of laws, bylaws, and regulations, as the Article affirms that acts also fall under that jurisdiction, and ultimately requesting a finding that the challenged provision is unconstitutional.[175]

The Attorney General, as a defendant, replied with two main arguments: first, the Constitutional Court lacks jurisdiction over this Agreement, because such an act does not fall under the scope of Article 24(1) of the LSCC, which limits its jurisdiction to laws and

[169] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2012, 1 ('*Case 1–2012*').
[170] Ibid 3.
[171] Ibid 4.
[172] *Basic Law.*
[173] *LSCC.*
[174] *Case 1–2012*, 3.
[175] Ibid 4.

regulations;[176] Second, in case the first argument was rejected, that the Constitutional Court lacks jurisdiction over the subject matter because it is an act of sovereignty.[177]

In response to the plaintiff's pleadings, the Constitutional Court agreed with the defendant and declared that only legislation, as in laws and regulations, are subject to its jurisdiction.[178] Accordingly, the Constitutional Court pronounced that "the challenged Agreement is not a law, bylaw, or regulation in the intended meaning [of Article 24(1)]; rather, it is an agreement between two political parties, and this Court lacks jurisdiction over it".[179]

Furthermore, in its response to the plaintiff's referral to Article 25(1), the Constitutional Court declared that "what is stated by that Article is irrelevant to jurisdiction, as that Article sets the rules that should be followed if a legislation is pronounced unconstitutional, and what is set in Article 25 does not broaden the limits of jurisdiction mentioned in Article 24."[180] Thus, it dismissed the case on form.[181]

(a) Assessment of the Court's Reasoning

There are two critical issues in this case: the correct characterisation of the Agreement to determine whether the Constitutional Court has jurisdiction over it, and the validity of the second rebuttal that considers the Agreement an action of sovereignty.

Starting with the first, the title of a legislative or an executive action does not necessarily match its *de facto* nature, as explained in Dahlan's case.[182] Even if both parties called it a political agreement, the correct characterisation of the challenged provision is in fact a presidential decree.[183] To explain, the integral elements of a presidential decree are: issued by the president, not for executing legislation, related to what falls beyond the competence of the Council of Ministers and its members, and not requiring approval from another state, legislative or judicial power.[184]

By comparing the challenged provision in the Agreement with these elements, it can be seen that it possesses all of them: it was not issued as an execution of legislation; issuing it falls

[176] Ibid 6.
[177] Ibid 6.
[178] Ibid 11.
[179] Ibid 13.
[180] Ibid 11–2.
[181] Ibid 13.
[182] See above Dahlan's Case (A)(2)(a).
[183] Abd Al–Kareem Far'on, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2012 [Comment on Constitutional Court Judgment in Case No. 1 of 2012]' (2013) 20 (July) *العدالة والقانون [Justice and Law]* 117, 124.
[184] See Nusur, above n 45, 227–8.

beyond the competence of that Council; and it does not require approval from the Parliament or the judiciary.[185] Thus, it is a presidential decree.

According to the Constitutional Court reasoning in this case, even if it is a presidential decree, it still falls beyond the jurisdiction of the Court according to Article 24 of the LSCC. Again, by reference to the analysis in Dahlan's case, the Basic Law strongly indicates that presidential decrees fall under the Constitutional Court's jurisdiction.[186] Briefly summarised, the analysis demonstrated how the phrase 'and others' in Article 103 of the Basic Law includes presidential decrees and decisions.[187] Moreover, it showed how the Basic Law must be taken as superior to Article 24 of the LSCC in case of contradiction.[188] Thus, the Basic Law provides the Constitutional Court with jurisdiction to review presidential decrees, and that leads to confirm its jurisdiction over the challenged provision in this Agreement.

Moving to the second issue, which is the validity of considering the Agreement an action of sovereignty, and, as a result, excluded from judicial review. According to the Attorney General, the reason behind this consideration is the political motivation behind the Agreement: bringing stability to the political situation in Palestine.[189]

However, there are many reasons to disagree with this consideration. First, the theory of 'political motivation', which had been be accepted in earlier times to distinguish between acts of administration and acts of sovereignty, is no longer valid in Arab jurisprudence according to many scholars, as it allows the executive power to escape judicial review by claiming political motivation.[190] Stated otherwise, this theory provides the executive with the arbitrary competence to characterise its actions at will, and that was the reason behind rejecting it.[191] Secondly, courts are exclusively entitled to assess whether an action performed by the executive is political or administrative, regardless of how the latter might characterise that

[185] See Umar Muhammad Shubaki, *القضاء الإداري: دراسة مقارنة [Administrative Adjudication: A Comparative Study]* (Dar Al–Thaqafah, 2016) 192–4; Fat'hi Fikry, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2012 [Comment on Constitutional Court Judgment in Case No. 1 of 2012]' (2013) 20 (July) *العدالة والقانون [Justice and Law]* 107, 110–1.
[186] See above Dahlan's Case (A)(2)(a).
[187] See above Dahlan's Case (A)(2)(a).
[188] See above Dahlan's Case (A)(2)(a).
[189] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2012, 6–7.
[190] See especially Nusur, above n 45, 195, 203–4; Ashqar, above n 137, 115–6; Far'on, above n 183, 121; Al–Turkomaniy, above n 30, 89–90, 201; Al–Kailany, above n 34, 15; Rifat Sayyid, *الوجيز في الدعوى الدستورية [The Brief on the Constitutional Lawsuit]* (Dar An–Nahdah Al–Arabiyah, 2009) 174, 239; Fikry, *Judgment in Case 1–2012*, above n 185, 111.
[191] See especially Shubaki, above n 185, 89.

action.[192] On this view, the Attorney General has no authority to characterise the Agreement as a political action.[193]

Hence, the Attorney General's rebuttal is incorrect. The Agreement is a presidential decree that regulates a governmental matter: the appointment of the president to the prime minister's office. This appointment, as the plaintiff has rightly argued, contradicts Articles 68 and 74(1) of the Basic Law, and violates the separation of competences between both executive roles.[194] Therefore, the Constitutional Court's judgment is incorrect.

(b) The Regime's Gains

The judgment was in favour of the regime as it indirectly legitimised the president's holding of the other influential, executive role.[195] This relates to the function of legitimation.[196]

3 *The Court's Application of Separation of Powers Rules in other Cases*

(a) Delegation of Legislative Authorities: Case 1-2010

The plaintiffs in this case, who are representatives of private transport companies, submitted this case on 18 January 2018, challenging the constitutionality of Bylaw No. 2 of 1998 related to Vehicles' Parking in Local Governorates, issued by the Minister of Local Governance on 1 July 1998.[197] The challenged Articles in the Bylaw were 5(2)(B) and 6(1), which impose parking fees, based on Articles 2(3) and 15(A) of the Law of Local Governorates No. 1 of 1997.[198] Both Articles of the Bylaw respectively state that:

> 5(2)(B) Parking fees for public transport vehicles in transport complexes or private sites shall not exceed 70 Jordanian Dinars on each bus that parks in a complex or a site if that complex or site is a property of the local governorate.
>
> 6(1) No person may park his vehicle in the area of local governorate except in parking-lots regulated according to this Bylaw.[199]

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[192] 190–204.
[193] See Shawabikah, above n 105, 308–18; Awad Al–Murr, *الرقابة على دستورية القوانين في ملامحها الرئيسية [Constitutional Review of Laws in Its Main Features]* (René–Jean Dubois Centre for Law and Development, 2003) 781–2.
[194] Far'on, above n 183, 124–6.
[195] See above Chapter One (C)(2).
[196] Chapter One (C)(2).
[197] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2010, 2.
[198] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2010, 3.
[199] *قانون الهيئات المحلية رقم (1) لعام 1997* [Law on Palestinian Local Governorates No. 1 of 1997] (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=1997&MID=12358> ('*Local Governorates Law*').

The plaintiffs claimed that both Articles violate Article 88 of the Basic Law, which stipulates that:

> Public taxes and duties shall be imposed, amended and repealed only by law. No one may be totally or partially exempted, except in circumstances prescribed by law.[200]

This Article, according to the plaintiffs, concludes that only laws can introduce any kinds of taxes and duties. Stated differently, the Article prevents any sort of legislation less than a law — such as bylaws, decrees, regulations, and governmental decisions — from imposing any form of taxes or duties, such as fees and public services costs.[201] Both challenged Articles were enacted by the Ministry of Local Governance, which leads to the conclusion that they are not laws enacted by the Parliament.[202] Therefore, as the plaintiffs argue, both Articles impose fees using legislation that is not a law, which is contradictory to Article 88 mentioned above.

As a response to a potential counter-argument, the plaintiffs challenged the constitutionality of Articles 2(3) and 15(A) of the Local Governorates Law, since both are the source of competences delegated to the Ministry in enacting that Bylaw. The Articles respectively declare that:

> 2(3) In terms of the provisions of this law, the Ministry shall perform the following: … 3. Set any regulations or rulings deemed necessary for the performance of its duties set forth in the above-stated paragraphs or in agreement with the provisions of the law.
>
> 15(A) Taking into account the provisions of this law or any other law or legislation, the local [governorates] council shall be entrusted with the functions, powers and mandate explicated in the following paragraphs within the boundary of jurisdiction of the local authority. Any council may exercise such powers directly via its employees and staff or may delegate all or part of such powers to contractors or bidders; it may also delegate all or part thereof via privileges to persons or firms for a period not exceeding three years.[203]

The plaintiffs claimed that allowing the Ministry to design outline policies of financial matters, such as the fees in question does not, according to these Articles, render the imposition of fees constitutional. This is because Article 88 requires such imposition to be done only through a law, which necessarily implies preventing delegation of power to impose taxes and duties by governmental bodies.[204]

The Constitutional Court responded to the plaintiffs by declaring that the Law of Local Governance has provided councils with the competence to delegate their administrative powers

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[200] *Basic Law.*
[201] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2010, 4 (‘*Case 1–2010*’).
[202] Ibid.
[203] *Local Governorates Law.*
[204] See *Case 1*–2010, 3–4.

to private companies, which this Bylaw regulates.[205] Thus, the Constitutional Court rejected the plaintiffs' response to the counter-argument they expected, but neglecting the point the plaintiffs raised regarding Article 88 of the Basic Law.[206] In short, the Constitutional Court affirmed that since the delegation of authority is permitted in the Law of Local Governance, then the Bylaw is consistent with it, and it is constitutional.

The Constitutional Court judgment is incorrect. As shown above, Article 88 has limited the imposition of taxes and duties, of which fees in this case are an example, to laws only, excluding bylaws and governmental regulations.[207] Accordingly, only the Parliament is authorised to impose fees through enacting laws that regulate how such fees should be collected. Importantly, Article 88 did not differentiate between types of taxes and duties, such as national and local taxes, which indicates that even imposing fees in certain local governorates should be regulated by a law.[208] Therefore, the executive power, the Minister of Local Governance in this case, has no competence to enact legislation related to taxes and duties.

The plaintiffs' response to the potential counter-argument is valid. It is true that in Articles 5(2)(B) and 6(1) the Law of Local Governorates delegates the matter of imposing parking fees to the Minister of Local Governance. However, this delegation is in itself unconstitutional; Article 88 of the Basic Law does not contain an authorisation to delegate imposition of taxes and duties to the government, which illustrates that the act of delegating the competence for imposing parking fees to the Minister is itself unconstitutional, since it exceeds the limits set by the Basic Law.[209] On this reasoning, Articles 2(3) and 15(B), which allow for the act of delegation, violate Article 88.

In summary, according to Article 88, the Parliament is exclusively entitled to enact, directly and with no delegation, laws that regulate the imposition of taxes and duties.[210] Consequently, determining who should pay what sort of tax and for what reason is an exclusive competence

[205] Ibid.
[206] Ibid 4.
[207] Abd Al–Aziz Saliman, ' 1/2010 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 1 of 2010]' (2011) 16 (August) *العدالة والقانون[Justice and Law]* 127, 146.
[208] Mohammad Abu–Bakr, ' 1/2010 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 1 of 2010]' (2011) 16 (August) *العدالة والقانون[Justice and Law]* 151,154.
[209] Sa'id, above n 54, 128; see Shawabikah, above n 105, 68–70.
[210] Nusur, above n 45, 219–20; see Sayyid, above n 190, 415.

that is unconstitutional to delegate to the government; in this case, the Minister of Local Governance.[211]

By rejecting this case, the Constitutional Court has indirectly allowed councils to collect parking fees from private transport companies. This is related to the function of providing credible commitments in the economic sphere.[212] In this case, the commitments are presented to the councils, which eventually benefit the regime itself, by helping the regime to reduce its expenditure on these councils.

(b) Contradiction between Final Judgments: Case 4-2012

In 30 August 2012, Abdulfattah Alhasan, filed this case with the Constitutional Court pursuant to Article 24(4) of the LSCC, which states that:

> [The Constitutional Court has jurisdiction over] adjudication of the conflict which arises in regard of the execution of two contradictory final judgments, one of which is issued by a judicial authority or an authority with a judicial jurisdiction and the other from another authority therefrom.[213]

The first judgment was of the Special Military Court in case 29-2010, in which the plaintiff was found guilty of military crimes, and sentenced to twelve years in prison with hard labour.[214] The second was of the High Court of Justice in case 853-2009, in which the detention order issued by the Military Prosecution against Alhasan, prior to his conviction, was declared null and void, because he was a citizen, not a member of the military.[215] Hence, the High Court of Justice ordered his release. Alhassan asked that the Constitutional Court order that the judgment of the High Court of Justice be executed, and that of the Special Military Court be annulled.[216]

In response to this case, the Constitutional Court affirmed that to consider two final judgments contradictory, both must be addressing the same subject, and must be definite in a manner that makes it impossible to implement both of them.[217] The Constitutional Court continued by declaring that the High Court of Justice judgment was limited to adjudicating on the unlawfulness of the military prosecution issuing detention orders against civilians.[218] The

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[211] See Shubaki, above n 185, 285–6; Ghalib Ali Dawudi, *المدخل الى علم القانون: نظرية القانون – نظرية الحق [Introduction to the Science of Law: Law Theory – Theory of Rights]* (Dar Al–Thakafah, 2016) 123.
[212] See above Chapter One (C)(4).
[213] *LSCC.*
[214] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 4–2012, 2 (*Case 4–2012*).
[215] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2012, 3.
[216] Ibid.
[217] Ibid 5.
[218] Ibid.

Constitutional Court proceeded by claiming that the judgment of the High Court of Justice does not declare Alhasan innocent of the claimed charges, and as a result there is no contradiction in the meaning provided by Article 24(4).[219] Based on the non-existence of any contradiction between both decisions, the Constitutional Court dismissed the case on form.[220]

The Constitutional Court judgment is incorrect and fails to adequately assess the claim of contradiction.[221] To consider two judgments contradictory for the purposes of Article 24(4), four conditions must be met. First, both judgments must address the same matter; i.e. there must be a unity of subject.[222] Contrary to what the Constitutional Court claimed, this condition is met in this case, as the subject of both judgments is Alhasan.[223] The Special Military Court accepted this and proceeded with the trial and declared him guilty.[224] The High Court of Justice rejected the trial and declared the detention order, which was the first procedure in that trial, null and void.[225] Therefore, the High Court of Justice's judgment necessarily concludes that what follows the detention order is also invalid, since it is based on an unlawful order. Accordingly, the Constitutional Court is mistaken in claiming that the subjects of both judgments are different. It is true that the High Court of Justice did not declare Alhasan innocent; however, pronouncing the detention order unlawful infers that whatever follows that detention is also unlawful, including declaring him guilty.[226] In conclusion, both judgments address the same subject.

The second condition is that judgments must be final.[227] This is satisfied in this case, as the first judgment was from the highest military court, and the second from the High Court of Justice. Moreover, none of the contradictory judgments should have been executed at the time of filing the constitutional case.[228] This condition is also fulfilled, as the case was filed shortly after pronouncing the Special Military Court's judgment, while Alhasan was still in jail. It must be

[219] Ibid.
[220] Ibid 6.
[221] Abd Al–Aziz Saliman, ' 4/2012 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 4 of 2012]' (2013) 20 (July) *العدالة والقانون [Justice and Law]* 135, 135.
[222] Al–Turkomaniy, above n 30, 107; Al–Kailany, above n 34, 45; Sayyid, above n 190, 327.
[223] See Yaseen, Nabeel, ' 4/2012 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 4 of 2012]' (2013) 20 (July) *العدالة والقانون [Justice and Law]* 153, 154; Saliman, *Judgment in Case 4–2012,* above n 221.
[224] *Case 4*–2012, 2.
[225] Ibid 4.
[226] See Yaseen, above n 223; Saliman, *Judgment in Case 4–2012,* above n 221.
[227] Al–Turkomaniy, above n 30, 109; Al–Kailany, above n 34, 46; Zuhayr Shukr, *النظرية العامة للقضاء الدستوري [The General Theory of Constitutional Adjudication]* (Dar Bilal, 2014) 1050; Sayyid, above n 190, 327.
[228] Al–Turkomaniy, above n 30, 109; Al–Kailany, above n 34, 45; Shukr, above n 227; Sayyid, above n 190, 327.

impossible to simultaneously execute both judgments.[229] This condition is met as well, since imprisoning Alhasan according to the first judgment and releasing him according to the second are impossible at the same time. In summary, all the four conditions of contradiction between judgments for the purpose of Article 24(4) are met in this case. Therefore, and based on Article of the Basic Law that prohibits trying civilians before military courts, the Constitutional Court should have ordered the execution of the High Court of Justice judgment to release Alhasan.

The Constitutional Court judgment in this case related to the functions of legitimation and marginalising opposition. This occurred by not declaring the unconstitutionality of trying civilians before military courts, and not prioritising the execution of High Court of Justice judgments when they rightly overrule judgments of military courts in such cases.

(c) The President's Competences in Judicial Appointments: Interpretation Request 1-2016

The first case in this group deals with Articles 18(1) and 20(2) of the Judicial Authority Law No. 1 of 2001, which state that:

> 18(1) Judicial positions shall be filled pursuant to a decision by the President of the [Palestinian Authority], based upon a nomination from the [Judicial Council] and in the following manner: A. Initially, by appointment; B. By promotion based upon seniority while taking competence into consideration; C. By appointment through transfer from Public Prosecution; D. By secondment from a neighbour country.
>
> 20(2) To be appointed as President or Vice-President of the High Court, one must have sat and worked for no less than three years on chambers of the High Court, or worked as a lawyer for no less than fifteen years.[230]

The prime minister submitted this interpretation request, asking the Constitutional Court to clarify whether the president has the right to appoint a vice-president to both the Judicial Council and the High Court of Justice.[231] The reason behind the request was the president's appointment of Imad Sa'ad as vice-president of the Judicial Council.[232] Abdullah Gizlan, was among the judges who believed that appointing Sa'ad to the post of vice-president was a violation of judges' nomination and promotion rules, because Gizlan was senior to Sa'ad, and therefore has more right to be in such position according to the promotion rules in Article 18(1), mentioned above.[233] Thus, three months before the Prime Minister submitted this request,

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[229] Al–Turkomaniy, above n 30, 109; Al–Kailany, above n 34, 45.
[230] *قانون السلطة القضائية رقم 1 لسنة 2002* [Law of the Judicial Authority No 1 of 2002] art 37(2)(a) (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2002&MID=14053>.
[231] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 1–2016, 1–2.
[232] Ibid 2.
[233] محكمة العدل العليا الفلسطينية [The Palestinian High Court of Justice], No. 4–2016, 4 ('*Case 4–2016*').

Gizlan filed a case with the High Court of Justice, demanding it annul the President's order to appoint Sa'ad as Vice-President, since it has exclusive jurisdiction over administrative orders.[234]

The Constitutional Court pronounced its interpretation a few hours after the High Court of Justice handed down its judgment.[235] The High Court of Justice accepted the plaintiff's demands and annulled the appointment of Sa'ad because he was not nominated to the position of vice-president by the Judicial Council.[236] The Constitutional Court, in contrast, affirmed in its interpretation that appointing Sa'ad was lawful because the president has the right to appoint a Vice-President to the High Court, and that the Vice-President of the High Court is necessarily the Vice-President of the Judicial Council.[237] In other words, the Constitutional Court indirectly invalidated the High Court of Justice's judgment, in a manner that violates the rules of jurisdiction, as will be explained below.[238]

There are significant reservations about the Constitutional Court interpretation. First, regarding access to the Constitutional Court for interpretation requests, Article 24(2) of the LSCC stipulates that:

> [The Court shall have exclusive jurisdiction over] interpretation of the provisions of the Basic Law and laws in the event of conflict over the rights, obligations and capacities of the three authorities.

Based on this Article, to accept an interpretation request there must be a conflict between state powers over the meaning of a certain provision in the Basic Law, or other legislation related to such provisions.[239] Moreover, the request must be submitted by a representative of one of the state powers involved such conflict.[240] However, the interpretation request in this case meets neither of these requirements. In the first place, there was no conflict between state powers regarding the meaning of the two Articles mentioned above: the president appointed Sa'ad, and

[234] Ibid 1–2.
[235] Mohammad Khadr, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 1/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 1 of 2016]' (2016) 27 (October) *العدالة والقانون [Justice and Law]* 57, 57.
[236] *Case 4–2016*, 7.
[237] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 1–2016, 4–5.
[238] Ibid 5.
[239] See especially Abd Al–Aziz Saliman, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 1/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 1 of 2016]' (2016) 27 (October) *العدالة والقانون[Justice and Law]* 25, 51; Khadr, above n 235, 61–3.
[240] Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52; Khadr, above n 235, 63.

Gizlan filed a case against that appointment to the High Court of Justice.[241] This is not a conflict, but a demand from the High Court of Justice to assess the legality of the president's order.[242] Additionally, the request was not submitted by Sa'ad, or the Judicial Council, but by the prime minister, who has no capacity in a dispute between the judicial officials.[243] Based on this assessment, the prime minister had no grounds to submit such an interpretation request to the Constitutional Court.[244]

Second, according to the circumstances explained above, the interpretation request was in fact "an unconstitutional invalidation of the High Court of Justice judgment", as described by Mahmoud Khader, a prominent Palestinian constitutional jurist.[245] He is correct; instead of interpreting the two Articles, the Constitutional Court quoted the exact wording of the High Court of Justice judgment, and shaped its interpretation as a refutation of that judgment.[246] This exceeds the competence of the Constitutional Court in interpretation requests, because it renders the Constitutional Court a court of appeal for High Court of Justice judgments, rather than adhering to the role provided to the Constitutional Court by the LSCC, which is to interpret contested provisions of law.[247] This leads to the conclusion that the Constitutional Court, in fact, violated its jurisdiction in this interpretation request, and behaved as a tool to nullify a judgment of the High Court of Justice.[248] This violation of the LSCC leads to the conclusion that the High Court of Justice judgment was valid, and renders the appointment of Sa'ad void.[249]

Third, this interpretation request, which was, in fact, an incorrect refutation of the High Court of Justice judgment, deprived Gizlan of the constitutional right of defence before the Constitutional Court, since he was harmed by the appointment of Sa'ad.[250] A potential counterargument to this reservation is that there is neither pleading nor defence in interpretation

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[241] Mohammad Al–Hammory, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 1/2016 [Comment on Constitutional Court Judgment in Interpretation Case No. 1 of 2016]' (2016) 27 (October) *العدالة والقانون [Justice and Law]* 77, 78; Khadr, above n 235, 69–70; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52–3.
[242] Al–Hammory, above n 241; Khadr, above n 235, 69–70; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52–3.
[243] Al–Hammory, above n 241, 79; Khadr, above n 235, 63; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52–3.
[244] Al–Hammory, above n 241, 83; Khadr, above n 235, 63; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52–3.
[245] Khadr, above n 235, 61.
[246] Al–Hammory, above n 241, 82; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52; Khadr, above n 235, 71–2.
[247] See especially Al–Hammory, above n 241, 81; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 48; Khadr, above n 235, 67.
[248] See especially Al–Hammory, above n 241, 82–3; Khadr, above n 235, 72; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 52.
[249] Al–Hammory, above n 241, 84.
[250] see especially Khadr, above n 235, 67; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 53.

requests. However, the impact of this request shows that it was not a normal interpretation, but an actual judgment that invalidated the judgment of High Court of Justice and accordingly dismissed Gizlan's claims.[251]

In summary of this case, the Constitutional Court has illegitimately nullified a judgment of the High Court of Justice and acted as a legitimation avenue for the regime.[252]

(d) The Classification of Police Force: Interpretation Request 1-2017

This request was submitted by the prime minister about Article 84 of the Basic Law, which stipulates that:

> The Security Forces and the Police are regular forces. They are the armed forces in the country. Their functions are limited to defending the country, serving the people, protecting society and maintaining public order, security and public morals. They shall perform their duties within the limits prescribed by law, with complete respect for rights and freedoms. The law shall regulate the Security Forces and the Police.[253]

The reason behind the request was to determine whether the police is a civil or military force, as the President was preparing a decree-by-law to regulate police force affairs.[254] The Constitutional Court provided an interpretation affirming that the police is a military force, but with a 'unique nature' that makes it distinctive from other security forces.[255] The Court did not explain what it meant by 'unique nature', nor the implications of that characterisation of police, which is considered by some scholars to be a defect in constitutional reasoning.[256]

Moreover, similar to the interpretation request analysed in the previously discussed case, the Constitutional Court did not assess whether there was a conflict between state powers regarding the meaning of that Article — another defect in the Court's interpretation.[257] In fact, there was not, which raises concern that the president ordered the prime minister to submit that request to legitimate his regulation of police force affairs.[258] In other words, the president wanted to

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[251] Al–Hammory, above n 241, 85; Khadr, above n 235, 70–1; Saliman, *Interpretation Case No. 1 of 2016*, above n 239, 54.
[252] See above Chapter One (C)(2),
[253] *Basic Law.*
[254] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 1–2017, 2.
[255] Ibid 3.
[256] Al–Turkomaniy, above n 30, 49; Al–Kailany, above n 34, 33.
[257] See specially Sayyid, above n 190, 329–30.
[258] Mohammad Al–Dhaher, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 1/2017 [Comment on Constitutional Court Judgment in Interpretation Case No. 1 of 2017]' (2017) 31 (December) *العدالة والقانون [Justice and Law]* 326, 327; see Mohammad Al–Najjar, ' التعليق على القرار التفسيري للمحكمة الدستورية العليا رقم 1/2017 [Comment on Constitutional Court Judgment in Interpretation Case No. 1 of 2017]' (2017) 31 (December) *العدالة والقانون [Justice and Law]* 320, 324.

guarantee that the legislation would not be contested in light of the Article mentioned above.[259] The Constitutional Court provided the president with what he needed, and as a result again acted as a legitimation tool for the regime, similar to the request previously analysed.[260] The Constitutional Court interpretation was beneficial to the regime since characterising the police force as a military force means that it falls under the jurisdiction of the military judiciary, which has significantly less restrictions than the civil judiciary.[261]

4 *Summary*

There is evidence that the Constitutional Court's application of rules related to separation of powers is incorrect. The Constitutional Court has failed to uphold the Basic Law's provisions that seek to maintain a distinct separation between the three powers, and the internal balance of competencies within the judiciary.

In the principal case regarding the Doha agreement, the author's analysis showed how the theory of 'actions of sovereignty' was used by the Constitutional Court in a way that undermined Basic Law Articles relating to the separation of powers between the president and the government. Moreover, in the other four cases, the author's analysis demonstrated how the Constitutional Court incorrectly applied the laws related to other aspects of separation of powers, such as delegation of legislative authority to the executive, and contradiction between final judgments.

F *Protection of Civil Liberties*

1 *Background*

The analysis focuses on cases that dealt with civil liberties. The subject of the principal case in this Group is the right to be tried before a natural judge; i.e. trying civilians before civil courts and military staff before military courts. In the principal case, the constitutionality of Revolutionary Penal Law and Revolutionary Penal Procedures was challenged, a challenge also presented to the Constitutional Court in previous cases. Nevertheless, in this case the Constitutional Court did not dismiss the case on form; rather, it ruled that both laws were promulgated legally, and were thus constitutionally valid. In the other six cases, the Constitutional Court was requested to rule on matters related to various issues of civil liberties,

[259] Al–Dhaher, *Interpretation Case No. 1 of 2017*, above n 258; see Al–Najjar, *Interpretation Case No. 1 of 2017*, above n 258.
[260] See above Chapter One (C)(2).
[261] Al–Najjar, *Interpretation Case No. 1 of 2017*, above n 258, 324–5; See Al–Dhaher, *Interpretation Case No. 1 of 2017*, above n 258, 329.

such as marital disputes between spouses, registration of trainee lawyers, the receiving of more than one salary from the government, and the constitutionality of certain criminal law provisions.

The Constitutional Court correctly applied the law in three of these cases. However, none of them were of significance to the regime, as explained below. Moreover, in one of them, the Constitutional Court departed from its previous practices without due justification.

2 *Promulgation of Revolutionary Military Laws: Case 1-2011*

The plaintiff in this case was a civilian detainee before a military court.[262] On 30 June 2011, he submitted this case to challenge the constitutionality of both the Revolutionary Penal Law and Revolutionary Penal Procedure of 1979.[263] He justified his request using two arguments: first, both laws are unenforceable since they were enacted in 1979, and are therefore not included in Presidential Order No. 1 of 1994, which declared all laws that were applied before 1967 to be valid and applied again.[264] Hence, the plaintiff concluded that this is an implicit annulment of laws and regulations that were enacted after 1967.[265] Second, if the Constitutional Court rejected the first argument, the plaintiff argued that either laws was ratified by the Parliament established after 1994, nor by the president, which violates Articles 41(1) and 47(2) of the Basic Law.[266] These Articles respectively stipulate that:

> The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him.
>
> The Legislative Council shall assume its legislative and oversight duties as prescribed in its Rules of Procedure [through discussing draft laws in at least two separate readings], insofar as they do not contradict the provisions of this law.[267]

The Constitutional Court replied to the first argument by asserting that there is no such implicit annulment of laws and regulations enacted before 1994.[268] To support this, the Constitutional Court cited the Presidential Order No. 5 of 1995, which declares that:

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[262] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 1–2011, 2 (‘*Case 1–2011*’).
[263] Ibid 3. See *قانون أصول المحاكمات الجزائية الثوري لمنظمة التحرير الفلسطينية لعام 1979 [The Revolutionary Penal Procedure of the Palestinian Liberation Organisation of 1979*] (Palestine) <http://info.wafa.ps/atemplate.aspx?id=9283>; *قانون العقوبات الثوري لمنظمة التحرير الفلسطينية لعام 1979 [The Revolutionary Penal Law of the Palestinian Liberation Organisation of 1979*] (Palestine) <http://info.wafa.ps/pdf/Code_of_Criminal_Procedure_1979.pdf> (‘*Revolutionary Penal Law*’).
[264] *Case 1–2011*, 3.
[265] Ibid 3–4.
[266] Ibid 3.
[267] *Basic Law*.
[268] *Case 1–2011*, 9.

> All authorities and competences set out in the legislation, laws, decrees, publications and orders that were in effect before 19 May 1994 in the West Bank and the Gaza Strip shall be transferred to the Palestinian Authority.[269]

The Constitutional Court concluded that there are two sources of legitimacy for competences conferred upon the Palestinian Authority: for competences found in legislation applied before 5 June 1967, their source is the Order of 1994; for competences found in those applied after that date and before 16 May 1994, the Order of 1995 applies.[270]

The Constitutional Court then moved to assess the legitimacy of the challenged Revolutionary Laws, affirming that both were promulgated lawfully according to the legal principles of the PLO in 1979, by Yasser Arafat who was then head of the PLO Executive Committee.[271] Moreover, it affirmed that the competences in both laws are also lawfully conferred upon the Palestinian Authority by the 1995 Order mentioned above.[272]

To conclude, the Constitutional Court highlighted that a distinction must be clearly made between the constitutionality of Revolutionary Laws and the lawfulness of arresting the plaintiff as a civilian under to their provisions. The Constitutional Court attested to the constitutionality of both Laws by claiming that "it is evident from the meanings of the articles of both laws that they are exclusively applicable to military personnel", and contended that applying these provisions to civilians is unlawful and, in fact, impermissible according to those very laws.[273] In other words, according to the Constitutional Court, it is an incorrect application of both Laws to detain civilians because they do not allow for such detention.

Accordingly, the Constitutional Court rejected the first argument, and replied to the second by highlighting that both Articles of the Basic Law are exclusively related to legislation enacted after establishing the Parliament in 1995, not before that. As a result, the Constitutional Court dismissed the case on merits, upholding the constitutionality of the Revolutionary Laws, and asserting that it is an incorrect application of both laws to apply them to the plaintiff as he is a civilian.[274]

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[269] *قانون بشأن نقل السلطات والصلاحيات رقم (5) لسنة 1995* [The Law pertaining to Transition of Authorities and Competencies No. 5 of 1995] <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1995&MID=1271>.
[270] *Case 1–2011*, 8–9.
[271] Ibid 8.
[272] Ibid 8.
[273] Ibid 9.
[274] Ibid 10.

(a) Assessment of the Court's Reasoning

The response of the Constitutional Court consists of two claims: the procedure for enacting both Revolutionary laws in 1979 was consistent with the PLO legal principles; and both laws exclusively regulate criminal acts committed by military personnel, not civilians. However, there are substantial problems with both positions.[275]

Starting with the first, according to many Palestinian scholars, the promulgation of both Laws was inconsistent with the rules of the PLO; particularly as, after enactment, both laws were not published in an official magazine.[276] Thus, they do not constitute a basis for a citizen pleading ignorance of both laws.[277] To explain, the presumed knowledge of law by virtue of the law's publication in an official magazine is principle that judges rely upon to reject any claim from defendants that they are ignorant of legal provisions that are not in their favour.[278] Accordingly, once the plea is established, any claim of being ignorant of the law is rejected.[279] In contrast, if a law is not published in an official magazine, then all people subject to its provisions have the right to be exempted from its application, as they are rightfully ignorant of that law.[280] Article 93(2) of the Revolutionary Penal Law of 1979 highlights that possibility but with a time-limit, as it states that:

> It is considered as a valid reason for exemption from punishment if the criminal act is committed within the first three days following the law's ratification and publication.[281]

Based on this analysis, and since both laws have not been published in any official magazine, then theoretically all Palestinians can request exemption from the application of this law, until the Palestinian Authority publishes it in the Official Gazette.[282] Therefore, it is incorrect to claim that promulgating both Laws was constitutionally complete.

Moving to the next claim, it is also incorrect to argue that the exclusive application of these laws to military personnel is evident from the meaning in their articles. Notably, Article 3(1) of the Revolutionary Penal Law declares that:

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[275] See Mohammad Al–Dhaher, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2011 [Comment on Constitutional Court Judgment in Case No. 1 of 2011]' (2013) 19 (February) *العدالة والقانون [Justice and Law]* 116; Abd Al–Aziz Saliman,' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 1/2011 [Comment on Constitutional Court Judgment in Case No. 1 of 2011]' (2013) 19 (February) *العدالة والقانون [Justice and Law]* 97.
[276] See especially Nasir Al–Ruyyis, *'عدم مشروعية محاكمة المدنيين الفلسطينيين أمام القضاء العسكري الفلسطيني [The Illegality of Trying Palestinian Civilians before Palestinian Military Judiciary]'* (Al–Haq Organisation 2011) 110;
[277] Ibid 108–9; Dawudi, above n 211, 131–3.
[278] Dawudi, above n 211, 131–3; Al–Ruyyis, above n 276, 108–9.
[279] Dawudi, above n 211, 131–3; Al–Ruyyis, above n 276, 108–9.
[280] Dawudi, above n 211, 131–3; Al–Ruyyis, above n 276, 108–9.
[281] *Revolutionary Penal Law.*
[282] Al–Ruyyis, above n 276, 131–3.

> The word 'whoever', where it is used (in articles that define punishments), means any Palestinian who commits one of the criminal acts mentioned in this law. Moreover, they should be annexed to this meaning, for the purposes of applying this law, those who are non-Palestinians and commit one of these acts against the Palestinian Revolution [Personnel].[283]

This Article extends the application of this law to include any Palestinian, without differentiating between military personnel and civilians. Additionally, Article 9 affirms that:

> The provisions of this law are applied to every Palestinian, whether a principal actor, a participant, or an abettor.[284]

This Article is even more explicit in affirming that these laws apply to civilians and military personnel alike.[285] Therefore, the Constitutional Court's claim regarding the exclusive application of these laws to military personnel contradicts the clear wording of the two Articles mentioned above, which renders the Court's 'stand' against the regime's detention of this civilian baseless. This contradiction makes it implausible to provide a narrow interpretation of the revolutionary laws that would limit their jurisdiction to military personnel. Importantly, after the dismissal, the plaintiff did not appeal the Military Court's judgment to the Military Judiciary Commission, since the Revolutionary Laws assert the jurisdiction of military courts over civilians, as both Articles above show.

(b) The Regime's Gains

The Constitutional Court judgment in this case relates to the function of legitimation.[286] By dismissing this case, the Constitutional Court has failed to highlight the unconstitutional promulgation of both Laws.

Additionally, it is important to highlight that the distinction made by the Constitutional Court between constitutionality of both laws, and their correct application, is in fact incorrect. The judgments of the High Court of Justice, which has the jurisdiction to review the correct application of both laws, were neglected and not executed by the security apparatus, as many reports from Palestinian Human Rights organisations avow.[287]

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[283] *Revolutionary Penal Law.*
[284] Ibid.
[285] Al–Ruyyis, above n 276, 125; See Ghandy Raba'y, *'احتجاز المدنيين لدى الأجهزة الأمنية الفلسطينية بقرار من هيئة القضاء العسكري [Detention of Civilians by the Palestinian Security Services Following an Order from the Commission of Military Judiciary]'* (The Independent Commission for Human Rights, December 2008) 7.
[286] See above Chapter One (C)(2).
[287] See especially Al–Ruyyis, above n 276, 117–8; Raba'y, above n 285, 23–4.

Furthermore, this judgment relates to the function of social control.[288] Trying political opponents assists the regime to marginalise them, and even in certain cases, kill them, as happened with Haitham Amer and Hazem Attar,[289] two detainees who lost their lives under torture while detained under military prosecution procedures. In other words, as the author argued in Chapter Two, criminalising political opposition, imprisoning political rivals, and dissolving collaborations between legal activists against the regime, are all interests that military courts help the regime maintain.[290]

3 *The Court's Application of Civil Liberties Rules in other Cases*

(a) Assessment of Disputes between Spouses: Case 7-2014

The plaintiff submitted this case to challenge the constitutionality of an Order issued by the High Council of Religious Judiciary in August 2012, which expanded the powers of religious courts' judges to assess certain factual matters in divorce cases.[291] Pursuant to this order, the judges do not have to cite testimonies from witnesses to declare that a real dispute between two spouses is certain and not doubtful, which is required by law to approve a divorce request.[292] Rather, it would suffice as a justification that a judge considers it certain according to his own evaluation.[293] The plaintiff argued that this Order amounted to legislation,[294] and in issuing it the High Council of Religious Judiciary violated Article 47(1) of the Basic Law, which stipulates that:

> The Parliament is the elected legislative authority.[295]

The plaintiff contended that, based on this Article, the Parliament has the exclusive authority to issue legislation, and therefore it is a violation for the High Council of Religious Judiciary to issue this *de facto* legislation.[296]

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[288] See above Chapter One (C)(1).
[289] See especially *Palestinian Authority: No Justice for Torture Death in Custody*, (16 February 2011) *Human Rights Watch* <https://www.hrw.org/news/2011/02/16/palestinian–authority–no–justice–torture–death–custody>.
[290] See above (E)(1).
[291] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 7–2014, 1 ('*Case 7–2014*').
[292] See generally Fat'hi Fikry, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 7/2014 [Comment on Constitutional Court Judgment in Case No. 7 of 2014]' (2015) 26 (October) *العدالة والقانون [Justice and Law]* 319, 325.
[293] Ibid.
[294] See *Case 7–2014*, 1–2.
[295] *Basic Law*.
[296] *Case 7–2014*, 3.

The Constitutional Court replied by rejecting the plaintiff's argument, and asserting that the Order was issued by an administrative institution, and thus what it issued was an administrative order.[297] Accordingly, it dismissed the case on form, claiming that it lacks jurisdiction over administrative orders.[298]

The Constitutional Court's position is erroneous. Administrative orders must abide by two restrictions: first, they must not add new rules to rules that already regulate the subject matter of the order.[299] Second, they must not affect anyone other than the administrative officials to whom these orders are addressed; i.e. the orders must have no impact on the legal rights and obligations of those who interact with such administrative officials.[300] This order fails to abide by these restrictions, because it included another reason for accepting divorce requests, which is the judge's opinion, without regard to the testimony of witnesses.[301] This inclusion is a significant change in the rules that regulate divorce. Additionally, it also affects those who seek approval or rejection of such requests.[302] Hence, it has an effect on those who interact with those judges.[303] In conclusion, it is correct to characterise this Order as a *de facto* bylaw.[304] Bylaws, in turn, are regulations that must be issued by the Council of Ministers according to Article 70 of the Basic Law, which states that:

> The Council of Ministers shall have the right to transmit draft laws to the Legislative Council, to issue regulations and to take necessary actions to implement laws.[305]

To summarise, the Order is a *de facto* bylaw, and since bylaws must be issued by the Council of Ministers, then the Order in this case was issued by an institution that lacks the competence to issue it. Therefore, the Order is unconstitutional.

The Constitutional Court's dismissal of this case does not seem to maintain any specific interests of the regime. Nevertheless, the adequacy of the bench is questionable in light of the above analysis.

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[297] Ibid.
[298] Ibid.
[299] Fikry, *Judgment in Case 7–2014*, above n 291, 324.
[300] Ibid.
[301] Ibid 325; See Mohammad Ghazzawy, '7/2014 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 7 of 2014]' (2015) 26 (October) *العدالة والقانون [Justice and Law]* 312, 317.
[302] Yahya Zakariya Al–Sharqawy, ' 7/2014 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on Constitutional Court Judgment in Case No. 7 of 2014]' (2015) 26 (October) *العدالة والقانون [Justice and Law]* 333, 336; Ghazzawy, *Judgment in Case 7–2014*, above n 300.
[303] Ghazzawy, *Judgment in Case 7–2014*, above n 300.
[304] Fikry, *Judgment in Case 7–2014*, above n 298, 325. See Al–Sharqawy, above n 231.
[305] *Basic Law.*

(b) Registration of Trainee Lawyers: Case 8-2016

In case 8-2016, the plaintiff was a law graduate who could not immediately register as a trainee lawyer with the Palestinian Bar after receiving the graduation certificate in September 2016,[306] because of Article 10(1) of the Lawyer's Training Regulation No. 1 of 2004, which stipulates that:

> Applications for enrolment in the registry of trainee lawyers who meet the legal requirements shall be submitted to the Bar Council within two periods in the year. The first is from the first of January to the end of March; such applications will be seen by the Bar Council during April. The second is the from the first of July to the end of August, which will be seen during September.[307]

The Council referred to this Article in refusing to register the plaintiff since he could not submit his certificate before the end of August.[308] In his case, the plaintiff argued that this Article violates Article 9 of the Basic Law, which affirms that:

> Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, colour, religion, political views or disability.[309]

The plaintiff contended that, according to Article 10(1), law students who graduate in September can theoretically start training in April, which is seven months after graduation, while those who graduate in April can start in September, which is five months after graduation.[310] Accordingly, his contention was that such a difference in waiting periods before commencing training violates the concept of equality enshrined in the Basic Law.[311] The Constitutional Court responded by agreeing with the plaintiff's contention, and affirming that unequal waiting times contravenes the Basic Law.[312] Thus, it pronounced Article 10(1) unconstitutional.[313]

The Constitutional Court ruling is correct, as it is hard to find an acceptable justification for such unequal treatment of law graduates.[314] Nevertheless, it is vital to understand that the

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[306] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 8–2016, 1–2 ('*Case 8–2016*').

[307] *نظام تدريب المحامين رقم 1 لعام 2004 [Lawyer's Training Regulation No. 1 of 2004]* (Palestine) <http://www.palestinebar.ps/documents/10180/645316/training+reg+edited.pdf/cfbe0ea2–d9ed–4b8a–8e88–caa413cfe8cf>.

[308] *Case 8*–2016, 2.

[309] *Basic Law.*

[310] *Case 8–2016*, 1

[311] Ibid.

[312] Ibid 3–4.

[313] Ibid 4.

[314] Fatimah Al–Lafy, ' التعليق على قرار المحكمة الدستورية العليا رقم 8/2016 [Comment on Constitutional Court Judgment in Case No. 8 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 142, 147. See generally Mohammad Istanbuly,' التعليق على قرار المحكمة الدستورية العليا رقم 8/2016 [Comment on Constitutional Court Judgment in Case

Constitutional Court did not respond to a critical claim by the Bar, in which it requested the case be dismissed on form because the plaintiff did not implead the government.[315] As explained in the previous chapter, the Court dismissed cases 1-2009 and 3-2010 because the plaintiffs did not implead the government .[316] The newly-established Constitutional Court in this very case did not comment on the application of rules related to impleading the government in those previous cases, which caused further unjustified inconsistency between its practice and that of the High Court sitting as the Constitutional Court.

This disregard of the Bar's request raises concerns about the Court, particularly Judge Fat'hi Abu Sorour, who was a member of the benches that heard both this case and the previous cases. Was the Court convinced that not impleading the government in this case, according to its own logic in previous judgments, must result in dismissing the case on form? If yes, then why did it not dismiss it? If no, then why did it dismiss the previous cases mentioned above? Such concerns may lead to the conclusion that the Constitutional Court behaviour is sometimes arbitrary and not following firm rules, and supports the claim that the Constitutional Court is biased in disregarding certain procedural mistakes when the case is not related to the interests of the regime, while highlighting these mistakes to dismiss cases that do relate to such interests.[317]

(c) Legality of Receiving Two Salaries: Interpretation Request 5-2016

This request in this case was about whether it is legal for the Head of the National Audit Office ('NAO'), which is considered a ministerial position according to Palestinian law, to receive two salaries at the same time: a normal salary from the General Treasury, and a pension from the Retirement Commission since he was previously employed in another governmental role.[318] The Constitutional Court responded to the request by referring to Article 80(2) of the Basic Law:

No. 8 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 124, 130; Anwar Sh'aban, ' التعليق على قرار المحكمة الدستورية العليا رقم 8/2016 [Comment on Constitutional Court Judgment in Case No. 8 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 148, 152–3.

[315] *Case 8–2016*, 2.

[316] See above Chapter Five (B)(2)–(3).

[317] See especially Fat'hi Fikry, '8/2016 التعليق على قرار المحكمة الدستورية العليا رقم [Comment on Constitutional Court Judgment in Case No. 8 of 2016]' (2017) 29 (June) *العدالة والقانون [Justice and Law]* 131, 132–5.

[318] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], Interpretation Request No. 5–2016, 2 ('*Interpretation Request 5–2016*').

> Neither the Prime Minister nor any Minister may … receive a salary or any other financial reward or remuneration from any person in any capacity whatsoever, other than the single salary determined for Ministers and the relevant allowances.[319]

Based on this Article, the Constitutional Court affirmed that it is illegal to receive both salaries, and declared the unconstitutionality of Articles 2 and 3 of Decree-by-Law No. 61 of 2010 that entitled him to receive a retirement salary.[320] Both respectively stipulate that:

> The Head of the NAO or his successor shall be entitled to a pension equivalent to 20% of the base salary for each year spent in Presidency, up to a maximum of 80% of the monthly total salary.
>
> The Head of the NAO's pension shall not be less than 50% of the monthly total salary, whatever the length of his term in office was.[321]

The Court's ruling is correct, as the Basic Law is explicit in prohibiting ministers from receiving two salaries. Nevertheless, as explained before, according to the LSCC, an interpretation request must not be an avenue to review the constitutionality of legislation.[322]

(d) Constitutionality of Various Criminal Law Articles

(i) Case 4-2014

In this case, a Magistrates Court submitted a subsidiary referral challenging the constitutionality of Article 389(5) of the Penal Law No. 16 of 1960, which stipulates that:

> A prison sentence for a period up to three months shall be imposed upon any person who is found in … a public place at a time and circumstances which necessitate that he is there for an unlawful or indecent purpose.[323]

The ordinary court that submitted this subsidiary referral to the Constitutional Court argued that this Article contradicts Article 20 of the Basic Law, which affirms that:

> Freedom of residence and movement shall be guaranteed within the limits of the law.[324]

The Constitutional Court responded by declaring that the ordinary court's interpretation of the challenged Article was incorrect.[325] The Constitutional Court asserted that the Article is

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[319] *Basic Law.*
[320] *Interpretation Request 5–2016*, 5, 7, 9–10.
[321] *قرار رقم 61 لسنة 2010 بشأن تحديد الراتب والحقوق المالية لرئيس ديوان الرقابة المالية والإدارية [Decree–by–Law No. 61 of 2010 related to Setting the Salary and Financial Rights of the Head of the National Audit Office]* (Palestine) <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2010&MID=16108>.
[322] See above (D)(3)(a).
[323] *قانون العقوبات رقم 16 لسنة 1960 [Penal Law No. 16 of 1960]* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=1960&MID=6581>].
[324] *Basic Law.*
[325] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 4–2014, 2–3.

exclusively related to beggars and that is apparent from the Article's title: Crimes of Begging. Accordingly, the Constitutional Court upheld the constitutionality of that Article.[326]

In this case, the Constitutional Court judgment is correct, as the challenged Article applies only to beggars.[327]

(ii) Case 3-2014

A plaintiff, who was found guilty of illegal gain, challenged the constitutionality of Article 1 of the Illegal Gains Law No. 1 of 2005,[328] which defines 'illegal gain' as:

> Each fund which one of the persons, who are subjects to the provisions of this Law, gains for himself or herself or for others by virtue of the exploitation of the position or capacity, or as a result of a conduct which violates a legal provision or public manners, or through any other illegal manner, even though it does not constitute a crime.[329]

The plaintiff argued that this definition violates the principle of legality, which requires crimes to be defined in a manner that removes all vagueness in their terms, and thus prevents arbitrary application of criminal law articles against opponents of the regime.[330] In particular, he challenged the last part of this Article, which makes even non-criminal actions of gaining funds illegal.[331] This definition violates Article 15 of the Basic Law, which affirms that:

> Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.[332]

The Constitutional Court replied by declaring that the definition of illegal gain is clear, without justifying its judgment by explaining how the terms used are not arbitrary, or how the last part of the Article is not vague.[333]

The Constitutional Court judgment is wrong. The last part of the Article violates Article 15, mentioned above, and thus the principle of legality, since non-criminal actions are included in the definition of what constitutes a crime of illegal gains.[334] Lack of clarity in defining those

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[326] Ibid.
[327] For rules of interpretation in the Palestinian legal system, see Dawudi, above n 211, 235.
[328] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 3–2014, 1 ('*Case 3–2014*').
[329] *The Law of Illegal Gains No. 1 of 2005* (Palestine) [Muqtafi trans, <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2005&MID=14745>].
[330] *Case 3–2014*, 7.
[331] Ibid 7–8.
[332] *Basic Law*.
[333] *Case 3–2014*, 12.
[334] See especially Moustafa Qasim, ' التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 3/2014 [Comment on Constitutional Court Judgment in Case No. 3 of 2014]' (2016) 28 (November) *العدالة والقانون [Justice and Law]* 312, 315, 319, 321–2.

actions may allow the regime to arrest opponents arbitrarily, relying on that very part, by claiming that funds were obtained illegally despite the non-criminal nature of the means used to obtain them.[335] Moreover, the Constitutional Court accepted this case, which was filed as a direct action, after the Court of Corruption had rejected the adversary rebuttal submitted by the plaintiff against the constitutionality of this Article. This is another example of unjustified inconsistency in the practice of the newly-established Constitutional Court itself, not between it and the High Court sitting as the Constitutional Court, as explained in the case about jurisdiction over Customs and Excise Law.[336]

By pronouncing this judgment, the Constitutional Court performed the function of maintaining elite cohesion for the regime,[337] because this judgment indirectly permits the regime to continue using the pretext of illegal gain to imprison 'disloyal' public officials, as many reports show happens frequently.[338]

(iii) Case 6-2014

The Court of Cassation submitted this case to the Constitutional Court through a subsidiary referral, requesting it review the constitutionality of Article 16(1) of the Juveniles' Rehabilitation Law No. 16 of 1954, enacted during the Jordanian era,[339] which stipulates that:

> Any person entitled to appeal the judgments of the first-level courts may appeal any judgment of the Magistrate's Court or the Court of First Instance, sitting as a Juvenile Court, to the Court of Appeal. Decisions issued by the Court of Appeal may not be challenged by any means.[340]

The Court of Cassation claimed that this Article may be in contradiction with Article 30(2) of the Basic Law, which states that:

> Laws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review.[341]

The Court of Cassation maintained that prohibiting litigants from challenging the decisions of the Court of Appeal in juvenile cases means that such decisions are immune from judicial review by the Court of Cassation.[342]

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[335] Ibid 316, 322.
[336] See above (A)(2)(a).
[337] (C)(3).
[338] Qasim, above n 334, *29*9.
[339] المحكمة العليا الفلسطينية بصفتها محكمة دستورية [High Court of Palestine sitting as the Constitutional Court], No. 6–2014, 3 ('*Case 6–2014*').
[340] *قانون إصلاح الأحداث رقم 16 لعام 1954 [Juveniles' Rehabilitation Law No. 16 of 1954]* (Jordan) <http://muqtafi.birzeit.edu/Legislation/PDFPre.aspx?Y=1954&ID=6463>. This law was enacted during the Jordanian rule of the West Bank.
[341] *Basic Law*.
[342] *Case 6–2014*, 2–3.

The Constitutional Court responded by stating that the challenged law has set specific rules that apply to juveniles.[343] Amongst these rules is a 'positive discrimination' for the benefit of such juveniles that makes the decision of the Court of Appeal final.[344]

A serious criticism can be made of this statement. According to the challenged Article, juveniles have only one chance to appeal judicial decisions; that is, appealing the first-level courts' decisions to the Court of Appeal. However, non-juvenile defendants in criminal cases have another chance in addition to juveniles, which is appeal second-level court decisions to the Court of Cassation.[345] Therefore, non-juveniles have two attempts to reduce their sentence, while juveniles have only one. This is a negative discrimination against juveniles that also violates Article 9 of the Basic Law, which affirms that:

> Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, colour, religion, political views or disability.[346]

As it appears from the judgments in the cases about various criminal law articles, the Constitutional Court has demonstrated certain instances of incorrect reasoning and application of relevant law, which raises questions about the suitability of the Court as a protector of Palestinians' civil liberties.

4 *Summary*

The analysis has demonstrated how the Constitutional Court incorrectly applied the law in the principal case and many cases related to civil liberties, particularly in regard to trying civilians before military courts according to Revolutionary Laws, regulating marital disputes between spouses, and lack of clarity of illegal gain law provisions. In the principal case about trying civilians, the analysis explicated how the promulgation of Revolutionary Laws was unconstitutional, since they were not published in the Gazette; thus, people who were subject to their provisions were not informed of their content.

Furthermore, the analysis demonstrated how in the case of trainee lawyers, the Constitutional Court departed from its previous practice, which is to reject cases in which the plaintiff did not

[343] Ibid 5.
[344] Ibid 7.
[345] See Mutaz M Qafisheh, 'Juvenile Justice System in Palestine: Current Situation and Reform Prospects' (2011) 25(3) *International Journal of Law, Policy and the Family* 365, 377–8; Mutaz M Qafisheh, 'The 2006 Palestinian Juvenile Protection Law: A Quest for Further Reform' (2016) 5 *International Journal of Legislative Drafting and Law Reform* 59, 77–79.
[346] *Basic Law.*

implead the government. By accepting the case despite the plaintiff not impleading the government, the Court was inconsistency in its practice.

G *Conclusion*

The purpose of this chapter was to assess the Constitutional Court's *de facto* independence in substantive cases, by analysing its judgments in five groups of cases: jurisdiction over presidential decrees; jurisdiction over previous legal systems; necessity of decrees-by-law; separation of powers; and protection of civil liberties. The analysis of cases in these groups identified many errors in the reasoning of the Constitutional Court in all principal cases. Like the conclusions of the previous chapter, those errors are related to three main areas: the Constitutional Court's interpretation of the legal provisions in each of these groups; the Constitutional Court's perception of its jurisdiction; and its responses to lawyers' requests.

In the first group of cases, relating to jurisdiction over presidential decrees, the Constitutional Court dismissed the case against the decree which deprived Dahlan of his parliamentary immunity. The Court claimed that it has no jurisdiction over presidential decrees in light of the LSCC, but the author's analysis explained how a careful reading of the Basic Law indicates that such decrees do fall within its jurisdiction.

In the second group of cases, relating to jurisdiction over previous legal systems, the Constitutional Court claimed that it has no jurisdiction over Jordanian laws, despite the fact that the Basic Law clearly affirms its superiority over all laws applied in the Palestinian legal system, and provides the Constitutional Court with unrestricted jurisdiction to review all laws, regardless of their origin.

In the third group of cases, relating to the necessity of decrees-by-laws, the Constitutional Court dismissed challenges against the necessity of decrees-by-laws issued by the president, claiming that what the president deems necessary shall be considered necessary for all such decrees. The analysis demonstrated how this is an incorrect claim, and how it is crucial to evaluate the immensity and imminence of the danger that the decrees-by-law claim to counter in order to determine whether it is necessary or not to issue the decree.

In the fourth group of cases, relating to separation of powers, the analysis demonstrated how the Constitutional Court incorrectly upheld the constitutionality of executive actions that caused a negative imbalance between the executive power on the one hand, and both the judiciary and the legislature on the other.

In the last group of cases, relating to protection of civil liberties, the analysis demonstrated why the Constitutional Court's reasoning was incorrect in four cases out of seven, and how the judgments in two of the remaining three correct decisions were unrelated to the interests of the regime. The Court failed to protect the civil liberties of Palestinians, especially the right of civilians not to be tried before military courts.

Furthermore, this chapter explained how the Constitutional Court contradicted its previous practices in three cases, without justifying the reason behind such inconsistencies. The contradictory practices that the Court performed were: characterising the presidential decree that lifted Dahlan's immunity as a decree-by-law; accepting a case in which the plaintiff did not implead the government; and accepting a case as a direct action after an ordinary court rejected it for being a non-serious adversary rebuttal.

The conclusions drawn from each of the groups' analysis provide evidence to support the key argument of this chapter: that the Constitutional Court has failed to effectively uphold the Basic Law in face of the regime's actions. Many of the judgments of the Constitutional Court were found to be based on incorrect reasoning, and served the interests of the regime by not obstructing its practises of social control, legitimation, maintaining elite cohesion, and providing credible commitments in the economic sphere. In sum, there is sufficient evidence to claim that the Constitutional Court substantially lacks *de facto* independence in substantive cases.

VII CONCLUSION

This thesis has examined the performance of the Palestinian Constitutional Court in the West Bank, which has been under a state of emergency since the coup of 2007. Palestinian and other Arab scholars have published many critiques on the individual judgments of the Court in Arabic. These comments address individual judgments, with no attempt to address all the judgments in a particular period or on a particular topic. This thesis is the first comprehensive study of the Law governing the Supreme Constitutional Court ('LSCC') and all the judgments the Court has issued between the coup of 2007 and October 2017.

The aim of this thesis was to assess both the *de jure* and *de facto* independence of the Court. It concluded that the Court lacks independence in both respects. It lacks *de jure* independence because of inconsistency between the LSCC and international principles of judicial independence, and it lacks *de facto* independence because of its incorrect application of constitutional and legislative provisions in almost all cases that affect the regime's interests.

Chapter Two explained why constitutional courts in authoritarian regimes require specific methods to assess their independence, arguing that in order for these courts to be independent, the laws that govern them should be consistent with global standards of judicial independence, and their judgments should be well-argued and strongly-justified. This theoretical framework was employed to assess the Court's independence in Chapters Four, Five, and Six, as recapitulated below.

Also, Chapter Two demonstrated the reasons authoritarian regimes choose to establish constitutional courts by explaining the five functions that these courts are likely to perform under such regimes: social control, legitimation, maintenance of elite cohesion, providing credible economic commitments for investors, and delegation of controversial reforms to these courts. Chapters Five and Six demonstrated how the 27 judgments that the Court has decided in favour of the Fatah regime exemplify the performance of these functions.

Chapter Three provided the historical context of the Palestinian judiciary, and the Constitutional Court in particular. During the eras of British colonisation and Israeli occupation, courts in Palestine were not perceived as independent institutions as they were administered by the colonising and occupying forces. Even after the establishment of the Palestinian Authority, the regime's control over judicial appointments and its refusal to implement significant judgments have reinforced that perception, and prevented the development of a strong legal commitment to uphold the Basic Law and other relevant

legislation in the face of regime's actions. These problems have facilitated the regime's undue interference in judicial tenure and court procedures, and this has made higher courts, especially the Constitutional Court, more willing to issue incorrect judgments that serve the interests of the regime.

After providing a theoretical framework and historical background, Chapter Four assessed the *de jure* independence of the Court by analysing the LSCC and comparing its provisions to global standards derived from primary internationally-accredited sources that aim to shield judicial independence against undue interference of the regime.

This chapter demonstrated how the LSCC violates those global standards. Examples of these violations include allowing the president to have significant control over the initial and subsequent appointments to the Court, authorising the minister of justice to interfere in matters that should be under the sole control of courts, and setting vague provisions related to judicial removal, leaving the LSCC susceptible to the regime's misuse. While this possibility has not yet been used, the potential for it to be put to use has implications for judicial independence.

Also, Chapter Four assessed the consistency between the articles that regulate the jurisdiction of the Court those dealing with the same subject in the Basic Law. It is evident that there is remarkable incoherence between the two sets of articles: the Basic Law authorises the Court to review the constitutionality of laws, regulations, decrees-by-law, presidential orders, executive actions, and administrative decisions, while the LSCC confines the Court's jurisdiction to reviewing the constitutionality of laws and regulations. These violations, along with the inconsistency between the Basic Law and the LSCC, indicate that the Court lacks *de jure* independence and that it is vulnerable to significant undue interference in its composition and litigation procedures by the regime.

After assessing the *de jure* independence, Chapters Five and Six assessed the *de facto* independence of the Court. Chapter Five analysed cases decided on procedural grounds. It found that the Court has breached many principles of constitutional adjudication. First, it breached the principle of public interest in constitutional cases, by dismissing a case because the grievance of the plaintiff was removed before the first hearing, while it should have continued hearing the case because public interest, not private interest, takes priority in constitutional challenges. As a result of this breach, the Court performed the function of social control; the case that was dismissed has challenged the constitutionality of the Revolutionary Laws that allow for trying civilians before military courts.

Second, it breached the principle of joining the government as a defendant when the plaintiff did not implead the government in the case he submitted. It dismissed cases in which the government was not impleaded, while it could have impleaded the government by itself. As with the previous breach, in dismissing this case, the Court performed the function of social control by avoiding review of the Revolutionary Laws, as the Plaintiff was a civilian undergoing trial before a military court.

Third, it breached the principle of public interest in constitutional cases by approving some plaintiffs' requests to abandon their cases, when it should have rejected these requests because, as mentioned, constitutional challenges are matters of public interest that should not be abandoned at the plaintiffs' will. The main function that the Court performed in this case was to indirectly allow the minister of justice to maintain control over the judiciary's administration.

The result of these breaches prevented review of many unconstitutional actions of the regime, resulting in the Court's failure to uphold the Basic Law in cases it dismissed on procedural grounds. Based on these findings, the Court has failed to demonstrate a reasonable ability to issue well-argued and strongly-justified judgments, which undermines the ostensible legitimacy of the Court. This failure, along with the fact that the Court has almost uniformly ruled in favour of the regime in most cases, gives rise to reasonable suspicion that the Court lacks *de facto* independence.

Chapter Six continued assessing the *de facto* independence of the Court by analysing cases decided on substantive, not procedural, grounds. Like the findings in Chapter Five, the analysis in this chapter concludes that the Court breached many provisions of the Basic Law and incorrectly applied rules of constitutional adjudication. First, it confined its jurisdiction to that established in the LSCC and dismissed a case seeking review of a presidential decree, even though the Basic Law and many articles of the LSCC strongly indicate that the Court does have jurisdiction over presidential orders. This incorrect dismissal relates to the function of mainlining elite cohesion, as the plaintiff, Dahlan, has failed to regain his parliamentary immunity. He was later on charged with corruption and eventually expelled from the Fatah regime.

Second, the Court dismissed a case seeking review of a law enacted during the Jordanian era, claiming that the Court lacks jurisdiction over laws enacted by governments prior to the Palestinian Authority; however, the Basic Law clearly states the Court's authority to review all

laws applied in Palestine regardless of their origin. In this case, the Court performed the function of legitimation: the regime was able to continue holding trials before customs courts established by a Jordanian law that allows for significant interference by the executive in their composition.

Third, the Court did not fulfil its obligation to evaluate the necessity of decrees-by-law that the president enacted, when it should have assessed the immensity and the imminence of the danger that these decrees claim to counter, since both features are required for the enactment of a decree-by-law to be constitutionally valid. By not fulfilling this obligation, the Court performed the function of legitimation; it implied the legitimacy of all the decrees-by-law that the president has issued since the coup in 2007.

Fourth, the Court did not uphold the rules that maintain a separation of powers because it dismissed a case against the president appointing himself as the prime minister, and a case against the interference of the minister of justice in matters reserved for the judicial authority. The dismissal of both cases increased the regime's dominance over state institutions, which are already under a state of emergency rule, with the Parliament suspended since 2007.

Last, the Court has failed to protect civil liberties by dismissing a case against trying civilians in military courts, when it should have declared that the law permitting such trials was unconstitutionally enacted. This failure to protect civilians relates to the functions of social control and legitimation: the regime benefitted from being able to use military courts to try civilians and marginalise opposition in a manner that appears to be legitimate and consistent with Revolutionary Laws.

These findings highlight the Court's failure to correctly apply the provisions of the Basic Law and other constitutional rules. Its failure, in addition to the observations about the benefits the regime obtains from the wrongly decided judgments, supports the claim that its lack *de facto* independence, and further undermines its legitimacy.

Further, Chapter Six demonstrated how the Court has unjustifiably contradicted its previous judgments on many occasions. First, it characterised a presidential order as a decree-by-law, even though it had dismissed so characterising that order in a previous case. Second, it did not dismiss a case in which the plaintiff did not implead the government, without explaining why its previous dismissal of cases for failure to so implead was wrong. Third, it accepted a case submitted as a direct action, although the ordinary court that received an adversary rebuttal (in which the plaintiff requested to refer the same case to the Constitutional Court) had rejected it.

Previously, the Court considered such a rejection a reason for dismissing cases submitted as direct actions if the rejection by the ordinary court took place prior to submission of the direct action to the Constitutional Court.

These unjustified contradictions emphasise the claim that the Court's application of constitutional rules is arbitrary and changes according to the expected outcome of such application, that is, whether it will be in favour, or against, the interests of the regime. This arbitrary and subjective approach by the Court raises still more concerns about its independence.

In summary, this thesis has argued that the Court lacks both *de jure* and *de facto* independence, and it has failed to perform its fundamental function of upholding the superiority of the Basic Law. It has been demonstrated that the Court lacks *de jure* independence because the LSCC is largely inconsistent with principles of judicial independence and, in some respects, with the Basic Law itself. The significant control of the regime over the procedures for appointment of judges to the Court and, more importantly, the fact that the president single-handedly appointed all the judges of the newly-established Court of 2016, are primary reasons for that lack of *de jure* independence. The thesis also demonstrated that the Court lacks *de facto* independence because of the incorrect application of constitutional principles and rules of adjudication in cases that challenged the interests of the regime. This wrong application resulted in incorrect, ill-reasoned judgments that have significantly maintained the interests of the regime at the expense of upholding the Basic Law, ultimately leading to the Court becoming a major obstacle to constitutional and judicial reform in Palestine, rather than facilitating it. The Court under the authoritarian regime of the West Bank is an example of a Court that has failed to fulfil, and has even obstructed, the promises of rights protections contained in the Basic Law. Thus, there is little hope of this Court becoming independent while authoritarianism under the state of emergency continues in the West Bank.

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