

Understanding the Constitutional Courts

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INTRODUCTION AND LEARNING OUTCOMES

The role and significance of constitutional courts increased highly in the last few decades. To understand the idea behind the institution, to see the concept of the centralized and the diffused model of constitutional courts, one must examine the most important examples of the systems. Understanding the powers of constitutional courts and possible ways o turn to them for decisions, a pattaern could be found.

As one looks at the advantages and disadvantages of the institution, the concept can be analysed in detail, to understand the purpose and role of the constitutional courts.

Learning outcomes

1. Understanding the roles of constitutional courts
2. Understanding the advantages and disadvantages of having a constitutional court

Keywords: constitutional court, constitutional review, jurisdiction, judicial independence, constitutional interpretation, centralized system, diffused system, proactivity

Estimated time: app. 45 minutes

Recommended Reading

1. Sweet, A. S., 'Constitutional Courts', in M. Rosenfeld and A. Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford: Oxford University Press, 2012)
2. Ferreres Comella, V., Constitutional Courts and Democratic Values: A European Perspective (New Haven, CT: Yale University Press, 2009)
3. A. Harding and P. Leyland (eds), Constitutional Courts: A Comparative Study (London: Wildy, Simmonds and Hill, 2009)
4. Sadurski, W., Rights Before Courts: A Study of Constitutional Courts in

1. What are constitutional courts?

A written constitution is generally intended to have **specific and legally binding effects on citizens' rights and on political processes such as elections and legislative procedure**. This is not always true: in the People's Republic of China, for example, it is clear that constitutional rights may not be enforced in courts of law and the constitution has only aspirational, not juridical, effects.

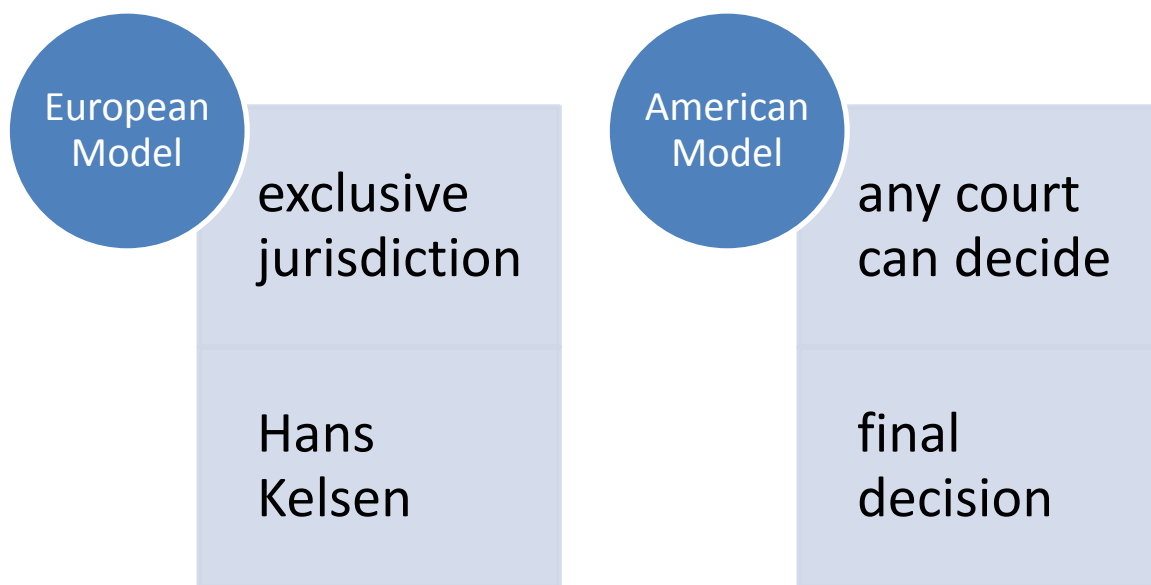
If a constitution is intended to be binding there must be some means of enforcing it by deciding when an act or decision is contrary to the constitution and providing some remedy where this occurs. We call this process 'constitutional review'. Constitutions across the world have devised broadly **two types of constitutional review**, carried out either **by a specialized constitutional court or by courts of general legal jurisdiction**. There are however many variations on each model, and some systems are even said to be 'hybrid'.

A constitutional court (sometimes called a 'constitutional tribunal' or 'constitutional council') is a special type of court that exercises only the power of constitutional review.

It is defined by Alec Stone Sweet as 'a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of constitutional law within the juridical order'. In other words, **its role is to review laws**, and usually also executive acts and decisions, to decide whether they are constitutionally valid and provide a remedy in cases where they are not. It exercises this power **exclusively**: no other court or body can engage in constitutional review. Bodies of this kind exist in about 85 countries around the world—that is, a majority of countries that have a system of constitutional review.

Since constitutional courts exercise exclusive jurisdiction over constitutional matters, this system is often called the **'centralized' system** of constitutional review. It also called the **'European' system** given that it was invented by the Austrian legal scholar Hans Kelsen and is found in European states such as Austria, Germany, Italy and Spain, and those influenced by them, such as Colombia, Russia, Republic of Korea, Turkey and Taiwan.

This centralized system contrasts with systems in which constitutional review is carried out by a **court with general jurisdiction** over all questions of civil, criminal and public law—not just constitutional questions. In such systems, any court can engage in constitutional review. Typically in this system the power to decide constitutional questions with finality lies with the highest (apex) court, usually the supreme court, indicating its primacy over other courts. Since this latter system is not centralized and was prominently developed in the United States, it is sometimes called the **'diffused' or 'American' system**. Examples may also be seen in Argentina, Australia, Canada, India, Japan and the Philippines.



Most countries that have a constitutional court also have a supreme court, but the latter does not have jurisdiction over constitutional questions. **Constitutional courts**, unlike courts of general jurisdiction, do not preside over civil or criminal litigation. Furthermore, unlike general courts they are often empowered to decide abstract questions that do not arise as a set of facts giving rise to a specific or 'concrete' legal dispute between parties.

Most states with a constitutional court have created it (or have dramatically reformed an existing institution, as in Taiwan) as part of a constitution-making or constitutional-reform exercise within the last 30 years. The constitutional court is usually seen as an **essential mechanism to achieve and entrench democratic reforms, such as instituting multiparty democracy**. States that have created constitutional courts have done so largely because they

see the court as a necessary guardian of democratic institutions, constitutionalism and fundamental rights following a period of military dictatorship or totalitarian government.

Accordingly, unlike the generality of courts in a diffused system, constitutional courts are specifically charged with deciding political questions—although, obviously, they have to do so with great care and judgement. In general, constitutional courts have decided cases in such a way as to encourage democratic politics and dialogue between different organs of the state. As multiparty democracy and constitutional government have diffused globally, most constitution-makers have preferred the centralized model to the diffused model of constitutional review. Consequently, in the 1990s the centralized model already well established in Western Europe spread rapidly across Eastern and Central Europe, West Africa, South America, East Asia and elsewhere.

Constitutional courts are more typical of civil law countries than common law countries. Most European and Asian countries use the civil law system. In the British Commonwealth, which consists almost entirely of common-law countries, the diffused model is almost universal (South Africa is a notable exception). Francophone West African and Middle Eastern countries invariably use the centralized model. Some civil law countries (e.g. Japan) use the diffused system, while some common law countries (e.g. Myanmar) use the centralized system.

Prominent and influential examples of the centralized system around the world include Colombia, France, Germany, Indonesia, Republic of Korea, Spain and Taiwan (all civil law countries), and South Africa (which displays a mix of common and civil law). However, not all civil law countries use the centralized system (Argentina, Japan and Sweden, for example, do not). Prominent examples of the diffused system include the Australia, Canada, India, Malaysia, Nigeria, the United Kingdom and the United States (all common law countries). The United Kingdom does not have a unified written constitution, but its high courts and newly reformed supreme court decide questions of constitutional significance.

Centralized System



- civil law states
- independent supreme court and constitutional court
- e.g. France, Germany, Indonesia

Diffused System



- common law states
- supreme court has this special function
- USA, Australia, Canada, Nigeria

The main motivation in establishing a constitutional court is to create a strong and specialized judicial-type body capable of enforcing a new constitution or a new constitutional deal. Reforming an existing apex court or giving it powers of constitutional review, as in the diffused system, has not generally been considered adequate to the task. A major and influential example is **Germany's Federal Constitutional Court**, established in 1949 under the post-war Basic Law. However, constitutional courts have also played an important part in encouraging elements of democratization, even under authoritarian regimes (e.g. in Egypt both before and after the Arab Spring).

2. What are the powers of constitutional courts?

Apart from exercising exclusive jurisdiction over constitutional questions, there are in fact virtually no powers that all constitutional courts have in common (apart from the **constitutional review of legislation**, and even this power is variable in its scope and effect). Nevertheless, contemporary constitutional courts possess the following four main types of power:

1. Constitution-drafting jurisdiction (controlling the constitution itself):

- adjudicating issues arising in the constitution-making process; and
- reviewing the constitutionality of constitutional amendments (e.g. as in Niger, Senegal and South Africa)

2. *Judicial review of legislative acts (controlling the legislature):*

- reviewing the constitutionality of laws in advance of legislation (ante factum);
- reviewing the constitutionality of laws after legislation (ex post facto);
- reviewing the constitutionality of decisions by the legislature; and
- initiating or requiring legislation

3. *Jurisdiction over officials and agencies (controlling the executive):*

- reviewing the constitutionality of executive actions and decisions;
- hearing impeachment proceedings against holders of public office;
- consideration of criminal or civil cases in respect of official corruption;
- consideration of qualifications of individuals to hold or continue to hold public office;
- adjudication of appointment of office-holders under the constitution;
- adjudication of disputes as to the competence of organs of state; and
- adjudication of disputes between organs of state

4. *Jurisdiction over political parties and elections (controlling elections):*

- adjudication of the dissolution or merger of political parties and control over constitutionality of their actions;
- examining the legality of elections and election results at any level; and
- hearing electoral petitions

No constitutional court possesses all four of these powers. The list simply denotes the range of possible choices constitutional designers may face. Note also that in some systems (e.g. in France, Germany and Indonesia) there are *separate, specialized administrative courts*, which exercise exclusive jurisdiction over the legality of administrative (executive) actions and decisions, including delegated (or subsidiary) legislation (i.e. regulations and orders). In these systems, the administrative court rather than the constitutional court usually determines the constitutionality of acts, decisions and laws made by executive powers. This may be

problematic, as an interpretation of the constitution by the constitutional court may not in practice enjoy finality: that is, the administrative court may disagree.

In exercising its jurisdiction, especially under the second power described above, an important aspect of the work of a constitutional court is to provide a remedy where a law or executive action violates fundamental or human rights.

(...).

4. Who can bring a case to a constitutional court?

Cases may come before a constitutional court in different ways. The rules of standing to refer a case vary across the various models of constitutional court. There are essentially four different types of reference to a constitutional court.

1. Official reference. Here, the constitutional court hears a case referred directly by a named official or agency such as the speaker, the ombudsman, the president, the corruption commission, the human rights commission, the election commission or other independent agency. In some cases, such a person or body may be able to bring a case on behalf of an individual or group of persons.

2. Legislative reference. Here, a member or stated number or proportion of members of the legislature, or of either house thereof, may bring a petition to the court.

3. Judicial reference. Here, a court hearing a civil or criminal case refers an issue of constitutional interpretation to the constitutional court, and is usually bound by the latter's opinion on that issue when the matter is referred back to the court (see Section 5).

4. Individual direct petition. In such a case every citizen (or possibly even every legal person, including foreigners, non-governmental organizations and companies) has standing to raise a constitutional question before the constitutional court (e.g. actual or potential violation of her/his or another's constitutional rights). This may include a civil society organization bringing a case as public interest litigation. Whether a constitutional court will allow standing to challenge a law will depend on whether individual petitions are allowed at all and sometimes the substance of the issue raised will be relevant.

Cases falling under categories 1, 2 and 4 might involve purely abstract review (see Section 1); but in cases falling under category 3 there will be a current concrete dispute between parties

that is before a court of law. In this latter type of case, questions of constitutional interpretation may arise incidentally in the course of criminal or civil proceedings.

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7. What are the advantages and disadvantages of having a constitutional court?

Advantages

A constitutional court is typically set up in order to provide a strong enforcer for a new constitution. A constitutional court provides the easiest way to achieve finality and uniformity in constitutional interpretation which may not be forthcoming in a diffused system, where different courts at the same or different levels may decide on a different interpretation of the constitution. In diffused systems, finality and uniformity are only achieved where the highest court hears an appeal and decides in a way that binds lower courts according to the doctrine of precedent (courts are bound by the decisions of higher courts, and even by their own previous decisions).

A constitutional court allows for the selection of judges who are either specialized in constitutional law, or are thought to bring more general expertise or representative capacity to the bench. It is expected that such specialized judges will be both more independent than ordinary judges and exercise more wisdom or competence regarding the sensitive political questions that are involved in constitutional interpretation. This of course raises questions about the desired qualifications of constitutional court judges. It also raises a question whether, in terms of the separation of powers, a constitutional court is in essence a fourth branch of government distinct from the legislature, the executive and the ordinary judiciary. It can act as a powerful facilitator in maintaining, or transition to, democracy and constitutional government. The constitution, in this model, would not be exposed to the will of a parliamentary majority or a ruthless president.

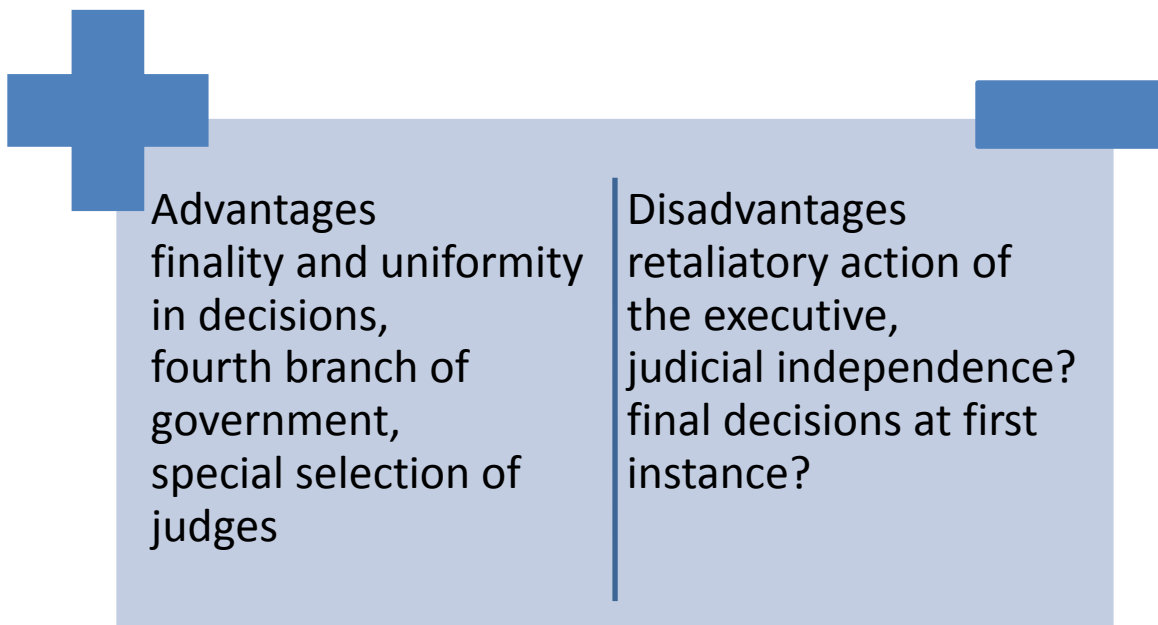
Disadvantages

Since a constitutional court exercises powers that are often crucial from a political perspective, there is a danger that it might be threatened with retaliatory action such as reduction or abolition of its powers or even dismissal (e.g. in Myanmar, Niger and Poland) or might be subject to its independence being compromised via the appointment process (see Section 3). Alternatively, the constitutional court may not appear to be impartial in its

decisions (e.g. as in Thailand). These eventualities are less of a danger, it is sometimes argued, with a **powerfully independent court** exercising general legal jurisdiction.

In common-law countries constitutional questions are seen as paradigmatically legal questions, and there is on this view no case for a specialized court or a specialized form of judiciary. **Judicial independence** in these systems is supported by the legal profession at large, from whose ranks judges are appointed. However, it is also argued that, even in diffused systems, judicial independence can be compromised and judicial appointments politicized. In centralized systems there is no court of first instance. Therefore there is only one chance to make the correct decision: in the constitutional court itself. In a diffused system, the highest court can potentially have the benefit of decisions by lower courts in the same case or different cases. This raises the question as to whether in either system a **'final' decision** that is inconvenient, or shown to be wrong in principle or effects, can be overruled. Practice on this matter varies across both types of system.

(...)



Questions for Self-Check

What is the role of a constitutional court?

What are the two most typical models of constitutional courts?

What is the difference between civil law and common law countries in this question?

What are the powers of constitutional courts generally?

What are the advantages of constitutional courts?

What are the disadvantages of constitutional courts?

Home Assignment

Choose a constitutional court of one specific state, and examine the powers and the selection of the judges.

Compare the results with at least 3 of your class members. Are there any similarities? What are the differences? Which model is the most general?



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