

PART V

JURISDICTION AND VENUE OF THE COURT

CHAPTER 1

CONSTITUTIONAL ALLOCATIONS OF JUDICIAL AUTHORITY

*Scott Dodson**

cplj.org/publications/5-2-allocations-of-cases-based-on-geography

TABLE OF CONTENTS

1 Introduction	1
2 The Role of Constitutions in Case Allocation Generally.....	1
3 Major Forms of Constitutional Allocations	4
3.1 Introduction.....	4
3.2 Vertical Allocations.....	4
3.3 Horizontal Allocations	11
3.3.1 Geography.....	11
3.3.2 Federalism.....	13
3.3.3 Subject Matter	15
3.3.3.1 Substantive Specializations.....	16
3.3.3.2 Constitutional Courts.....	18
3.3.3.3 Religious and Indigenous Courts	29
3.3.4 Party Status	29
3.3.5 Relief Sought	31
4 Assessments and Conclusions.....	32
Abbreviations and Acronyms	35
Legislation	36
Basic Laws and Constitutions	36
Other	37

* Geoffrey C. Hazard Jr. Distinguished Professor of Law and James Edgar Hervey Chair in Litigation, UC Law – San Francisco. I am grateful to Isha Vazirani for excellent research assistance.

Governmental Sources.....	39
Cases	40
Bibliography	41

1 INTRODUCTION

- 1 All countries with judiciaries allocate judicial authority to various courts. Allocations can be vertical (eg, original or appellate) or horizontal (eg, by geography, subject-matter, party status, or relief sought). Typical values driving allocations include specialization, convenience, workability, and legitimacy. Allocations often appear in ordinary legislation, but some allocations are established in constitutions and fundamental laws.
- 2 This chapter will describe, analyze, and categorize how and why countries constitutionalize allocations of judicial authority. Because an in-depth study of every country is impractical, the chapter will focus attention on key illustrative countries (Australia, Brazil, Canada, China, Egypt, France, Germany, Israel, Italy, Japan, Russia, Peru, South Africa, UK, and US), with supplemental commentary on other countries that may provide either augmentation or interesting contrasts. The chapter will proceed thematically rather than by country or continent and will analyze constitutional allocations along a variety of different dimensions.
- 3 The chapter will make a descriptive contribution by documenting and organizing the different choices that countries have made in constitutionalizing aspects of judicial allocation. Of particular focus are the various constitutional courts, different vertical allocations (eg, the contrast between the detailed constitutional hierarchies in the South Africa Constitution and the less detailed vertical allocations in the US Constitution), and the range of constitutional horizontal allocations (eg, specialized jurisdiction, religious courts, and geographic parameters).
- 4 The chapter also makes an analytical contribution by positing that the choice to constitutionalize aspects of judicial allocation is influenced by three sets of factors: (1) underlying dimensions of the country's governmental character, such as commitments to the separation of powers or regional autonomy; (2) the country's territorial size, its variability of laws, and any demographic divisions within the populace; and (3) the history, tradition, and values of the country. A primary conclusion is that although countries differ widely in the details of their constitutional judicial allocations, they also exhibit, at higher levels of generality, broad similarities within groups.

2 THE ROLE OF CONSTITUTIONS IN CASE ALLOCATION GENERALLY

- 5 Case allocation within a system is structurally interconnected to other aspects of the system, including judicial design and court procedure.¹ Case allocation also is connected

¹ A F Lowenfeld, 'The Elements of Procedure: Are They Separately Portable?' (1997) 45(4) American Journal of Comparative Law 649, 652.

to economic, social, and political values and processes.² Cultural ideologies, philosophies, sociologies, and politics all play a role.³

- 6 Constitutional case allocation is inherently tied to other features of constitutionalism,⁴ including history, commitments to judicial independence, the type of government, the separation of powers, aspects of federalism and regional autonomy, and the like. The choice to constitutionalize certain case allocations reflects matters that are fundamental to the governmental system as a whole. Those choices can be the product of political compromise, political distrust, or political philosophy. This part sets out some of the themes of constitutional case allocation.
- 7 Legal systems necessarily must grapple with the hierarchy of laws and the structure of government by identifying which laws are supreme or fundamental. Constitutions can—but need not—play the role of setting out those hierarchies and structures.⁵ The UK, for example, lacks a single-document constitution and generally adheres to parliamentary sovereignty, so questions of the scope of parliamentary power generally fall outside the jurisdiction of the courts,⁶ though longstanding and fundamental traditions, laws, and supranational agreements do constrain governmental power.⁷ New Zealand and Sweden similarly have no single, written constitution but instead rely on parliamentary acts deemed to be fundamental.⁸
- 8 Countries with constitutions need not give constitutional law apex status. Some countries, such as Iran and Saudi Arabia, give religious law some supremacy over constitutional law.⁹ But for most countries, constitutions exist as statements of supreme or fundamental national law superior to ordinary legislation, and as checks on governmental power.

2 L P Feld and S Voight, 'Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators' (2003) 19(3) *European Journal of Political Economy* 497.

3 M Cappelletti, 'Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe' (1971) 69(5) *Michigan Law Review* 847, 882.

4 B Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard UP 2019).

5 J M Colomer, 'Comparative Constitutions' in R E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford UP 2011) 176.

6 A W Bradley and C Pinelli, 'Parliamentarism' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 650, 652.

7 Ibid. Several parliamentary acts have constitution-like force, including the Magna Carta, the Bill of Rights, the Act of Union, the Senior Courts Act, the Human Rights Act, and the Constitutional Reform Act. O G Chase, H Hershkoff, L J Silberman, J Sorabji, R Stürner, Y Taniguchi and V Varano (eds), *Civil Litigation in Comparative Context* (2nd edn, West Academic 2017) 162.

8 Learn about the Justice System (NZ) < <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/> > accessed 23 March 2023.

9 Constitution of Iran, Art 1; Constitution of Saudi Arabia, pt 1, Art 1, and pt 6, Art 46 (making the courts bound by Shari'a law).

- 9 The content of constitutional law, especially pertaining to judicial power, will necessarily vary depending upon the type of constitutional government at hand. Democratic governments dominate the world's countries, but some traditional monarchies persist. The Kingdom of Saudi Arabia, for example, is an Islamic state with a monarchical system of government, whose king is the ultimate source of the government's powers.¹⁰ Nevertheless, Saudi Arabia's Constitution declares the judicial system independent.¹¹ Denmark also has a constitutional monarchy, though its constitution divides sovereign power into the familiar tripartite divisions of legislative, judicial, and executive authorities.¹²
- 10 Constitutional democracies generally fall into presidential or parliamentary forms. Presidential systems, dominated by the United States, Latin America, and some East Asian countries, typically separate, and separately elect, the chief executive from the legislature.¹³ Presidentialism tends to consolidate and heighten executive power, which can lead to authoritarianism,¹⁴ and so requires stronger separation of powers, democratic accountability through regular elections and electoral integrity, and independent judicial review, each of which can be supplied and protected by a constitution.¹⁵
- 11 Parliamentary governments make the chief executive and ministers part of the legislature, elected from its members.¹⁶ Although parliamentarianism presents less risk of authoritarianism than presidentialism, many parliamentary governments nevertheless constitutionalize judicial independence, fundamental rights, and governmental controls. Continental Europe, for example, which is dominated by parliamentary systems with written constitutions,¹⁷ favors a model of constitutional parliamentarism, or 'constrained parliamentarism', with a parliament checked by a constitution, a charter of fundamental rights, and judicial review.¹⁸
- 12 Hybrid systems of government exist, especially in Russia, Eastern Europe, and some African countries, in which a separately elected president shares executive power with a legislatively elected prime minister in a 'governmental diarchy'.¹⁹ And many countries

¹⁰ Constitution of Saudi Arabia, pt 1, Arts 1, 5, and pt 6 Art 44.

¹¹ Ibid, pt 6, Art 46.

¹² Constitutional Act of Denmark, ch 01, Sec 03.

¹³ Bradley and Pinelli (n 6) 651; H Fix-Fierro and P Salazar-Ugarte, 'Presidentialism' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 628, 628–31.

¹⁴ Fix-Fierro and Salazar-Ugarte (n 13) 639.

¹⁵ Colomer (n 5).

¹⁶ Bradley and Pinelli (n 6) 651; Fix-Fierro and Salazar-Ugarte (n 13) 628–31.

¹⁷ Colomer (n 5).

¹⁸ B Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 685; M Shapiro and A Stone, 'The New Constitutional Politics of Europe' (1994) 26(4) *Comparative Political Studies* 397.

¹⁹ Colomer (n 5).

exhibit federalist structures, in which localities exercise significant slices of sovereign power independent from national bodies.

- 13 Despite these significant structural differences, the vast majority of constitutions commits independence to the judiciary. (A notable exception is China, which makes the Supreme People's Court accountable to the National People's Congress and the Standing Committee within it.²⁰) Of course, even within formal constitutional commitments of independence, nuance exists. And, judicial independence is just one feature of the judiciary. Other questions of judicial structure, including judicial role, case allocation, and court hierarchy, must be considered and can be established either by constitutional law or ordinary law.
- 14 Constitutions often create and establish certain courts of prime importance, like high courts and constitutional courts, and set out their constitutional functions. Constitutionalization can be seen as part of the erection of governmental structure and of the separation of powers. The creation of lower courts or specialized courts may either be set out in the constitution or left to ordinary legislation. Other jurisdictional divisions can also be constitutionalized, including vertical court structures, and horizontal divisions motivated by geography, federalism, subject-matter, party status, or relief sought. How much is constitutionalized depends upon the history, tradition, culture, politics, values, and physical landscape of the country at hand.

3 MAJOR FORMS OF CONSTITUTIONAL ALLOCATIONS

3.1 Introduction

- 15 This part considers how countries use constitutions to allocate cases. It begins with vertical allocations—the establishment of court hierarchies and the different roles for each level. The part continues with horizontal allocation of cases along different dimensions, including geographic, federalism, subject matter, party status, and relief sought. In the process, it draws insights along a range of vectors, including distinctions between common-law, civil-law, and other systems; federal and nonfederal systems; and secular and religious systems. This part also considers how unique histories influence counties' choices in constitutional case allocation.

3.2 Vertical Allocations

- 16 Constitutions often create and establish certain courts of fundamental importance, like high courts and constitutional courts, and set out their constitutional functions. Constitutionalization can be seen as part of the erection of governmental structure and of the separation of powers. The creation of lower courts or specialized courts may either be set out in the constitution or left to ordinary legislation. Other jurisdictional

²⁰ Constitution of the People's Republic of China, Sec 7 Arts 127–128.

divisions can also be constitutionalized, including vertical court structures, and horizontal divisions motivated by geography, federalism, subject-matter, party status, or relief sought. How much is constitutionalized depends upon the history, tradition, culture, politics, values, and physical landscape of the country at hand.

- 17 Constitutions can set out vertical court hierarchies in varying degrees of detail and with specific roles and scopes of review.²¹ Nearly all constitutions at least assume the existence of layers of courts exercising judicial power, but whether constitutions themselves detail those layers or leave those details to the legislature varies considerably. Further, influences of federalism and subject-matter specialization can affect the vertical strata of courts, especially at the level of the supreme court, which may be granted appellate jurisdiction over local or specialized high courts.
- 18 Putting aside specialized courts of constitutional review, which will be addressed in Section 3.3.3.2. below, nearly all constitutions establish at least one ordinary court as a way to constitutionally guarantee a judicial branch of government. Rare exceptions include Egypt and Lebanon, whose constitutions assume that a sovereign judicial power will be wielded by courts but leave all ordinary court creation and hierarchies to the legislature.²²
- 19 Some countries establish a high court but leave all lower courts to be created and organized by the legislature. This choice spans the differences in countries and includes geographically large and small nations, common-law and civil-law traditions, federal and non-federal traditions, presidential and parliamentary systems, and nearly every continent on Earth. Illustrative countries include Australia, China, France, Italy, Japan, Peru, and the US.²³ Other countries include Argentina, Colombia, Costa Rica, Croatia, Cuba, Norway, Singapore, and Venezuela.²⁴ Much of this grouping can be explained by

²¹ This section focuses on vertical court structures and vertical allocation of cases. For consideration of the *right* to appeal a civil case, see J Neiva-Fenoll, 'Constitutionalization and Fundamentalization of Procedural Guarantees and Principles' in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 4.

²² Constitution of the Arab Republic of Egypt, pt V, ch 3, Art 184; Constitution of Lebanon, pt II Art 20. Egypt and Lebanon both have constitutional courts established by their constitutions. Constitution of the Arab Republic of Egypt, pt V, ch 4, Art 191 (Supreme Constitutional Court); Constitution of Lebanon, pt II, ch 1, Art 19 (Constitutional Council).

²³ Constitution of Australia, pt V, ch III, Arts 71–76; Constitution of the People's Republic of China, Sec 7, Art 127–128; Constitution of the Italian Republic, pt II, tit IV, Sec I, Art 104; Constitution of France, tit VIII, Art 61-1; Constitution of Japan, ch 6, Art 77; Political Constitution of Peru, tit IV, ch VIII, Art 143; Constitution of the United States, Art III, Sec 1.

²⁴ Constitution of the Argentine Nation, div 3, ch 2, Sec 117; Constitution of Colombia, Arts 234–235; Constitution of Costa Rica, Art 152; Constitution of Croatia, Sec IV, Art 119; Constitution of Cuba, Art 147; Constitution of Norway, Art 88; Constitution of Singapore, pt VIII, Sec 93; Constitution of Venezuela, Art 253. The Singapore Supreme Court 'consists' of the High Court and Court of Appeal, with jurisdiction of each determined by legislation. Constitution of Singapore, pt VIII, Sec 94(1).

the US influence in the common-law countries of Australia and Singapore, in neighbouring Latin America, and in postwar Japan.

- 20 The Russian constitution establishes two high courts. The Supreme Court of the Russian Federation is the highest judicial body for civil, criminal, administrative and other cases that fall within the jurisdiction of common courts, and the Higher Arbitration Court of the Russian Federation is the highest judicial body dedicated to economic disputes and other matters within the jurisdiction of Courts of Arbitration.²⁵ Poland is similar, with a Supreme Court and a Supreme Administrative Court.²⁶ The German constitution establishes several high courts with defined specializations, including the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Court, though the Federal Court of Justice has some appellate jurisdiction over the specialist high courts.²⁷
- 21 Within this group of high-court-only constitutions, the constitutions detail the jurisdiction of the constitutionally established high court in varying degrees. Some constitutions establish the court but leave its jurisdiction primarily or exclusively to the legislature. China establishes the Supreme People's Court as the highest judicial body in China and instructs higher courts to supervise lower courts but otherwise leaves the Supreme People's Court's jurisdiction undefined.²⁸ France and Italy recognize courts of cassation but otherwise leave their jurisdiction undefined.²⁹ Peru denotes the Supreme Court of Justice as the court of last resort with both appellate jurisdiction and, as allowed by law, original jurisdiction.³⁰ Others in this group include Costa Rica, Croatia, Cuba, and Norway.³¹
- 22 Other constitutions prescribe slightly more detail about the role and jurisdiction of the high court. Japan's Supreme Court is the court of last resort, and it has the power of constitutional review.³² The Colombia Supreme Court of Justice primarily acts as a court of cassation but also has the power to preside over investigations and trials of the president, senior officers, and members of the legislature.³³ The Singapore Supreme Court's jurisdiction is primarily determined by legislation, but the constitution does give it jurisdiction over matters pertaining to the election of the president.³⁴

²⁵ Constitution of the Russian Federation, Sec 1, ch 7, Arts 126–127.

²⁶ Constitution of Poland, ch VIII, Arts 183(1) and 184.

²⁷ Basic Law for the Federal Republic of Germany, Sec IX, Arts 95–96.

²⁸ Constitution of the People's Republic of China, Sec 7 Arts 127–128.

²⁹ Constitution of France, tit VIII, Art 61-1; Constitution of the Italian Republic, pt II, tit IV, Sec I, Art 104.

³⁰ Political Constitution of Peru, tit IV, ch VIII, Arts 141–143.

³¹ Constitution of Costa Rica, Art 152; Constitution of Croatia, Sec IV, Art 119; Constitution of Cuba, Art 147; Constitution of Norway, Art 88.

³² Constitution of Japan, ch 6, Art 81.

³³ Constitution of Colombia, Art 235.

³⁴ Constitution of Singapore, pt VIII, Sec 93A.

- 23 The remaining constitutions that identify only high courts specify high-court jurisdiction in greater detail. Australia, for example, grants its High Court appellate jurisdiction over any federal court, a state supreme court, and any other state court established to have the ability to have appeals heard by it, and questions of law from the Inter-State Commission. The Australia High Court has original jurisdiction in matters: arising under any treaty; affecting consuls or other representatives of other countries; in which Australia is a party; between states, or between residents of different states, or between a state and a resident of another state; and in which a writ of mandamus or prohibition or an injunction is sought against a federal officer. In addition, the Australian constitution grants parliament the power to confer original jurisdiction on the High Court in matters: arising under the Constitution or involving its interpretation; arising under any laws made by Parliament; of admiralty and maritime jurisdiction; relating to the same subject-matter claimed under the laws of different states.³⁵ And the US Supreme Court has original jurisdiction in cases pertaining to ambassadors, public ministers and consuls and in cases in which a US state is a party; and appellate jurisdiction, subject to exceptions imposed by the legislature, in other cases within the constitution's grants of judicial jurisdiction.³⁶ Similar jurisdictional detail is imposed on high courts by the constitutions of Argentina and Venezuela.³⁷
- 24 The constitutional detail of these grants of high-court jurisdiction might reflect, in the case of the United States and Australia, their large geographic areas and federalist structures. Restricting the high court's original jurisdiction to specified cases of national interest helps ease what otherwise would be an enormous workload, and giving the high court appellate jurisdiction over regional courts helps promote uniformity in a federalist structure. The constitutional detail of Brazil's high court, discussed below, follows a similar pattern, and the constitutional detail of Argentina and Venezuela high courts likely follow the influence of the US constitution.
- 25 A different group of constitutions establishes both high courts and lower courts, again in varying degrees of detail. Belgium's constitution establishes one supreme court and five appellate courts with regional territorial reaches.³⁸ Hong Kong's Basic Law establishes the Court of Final Appeal, the High Court, district courts, magistrates' courts, and other special courts, but it provides little detail about each level's jurisdiction.³⁹ Finland's constitution establishes the Supreme Court and the Supreme Administrative Court as the highest courts, and Courts of Appeal and District Courts as lower courts.⁴⁰ The Spanish Constitution establishes the Supreme Court as the highest judicial body, a High

³⁵ Constitution of Australia, pt V, ch III, Arts 73–76.

³⁶ Constitution of the United States, Art III, Sec 2.

³⁷ Constitution of the Argentine Nation, div 3, ch 2, Sec 117; Constitution of Venezuela, Art 266

³⁸ Constitution of Belgium, Arts 142 and 156.

³⁹ Basic Law, ch IV, Sec 4, Art 81 (Hong Kong).

⁴⁰ Constitution of Finland, ch 1, Sec 3 and ch 9, Sec 98.

Court of Justice as the highest court within the Autonomous Community, and territorial courts fashioned by law.⁴¹

- 26 Slightly more detail is provided in Estonia's constitution, which sets out district, city, and administrative courts as courts of first instance, with their decisions reviewed by circuit courts of appeal as courts of second instance, and with a Supreme Court that reviews decisions through cassation proceedings.⁴² Likewise, Ghana's judiciary consists of the Supreme Court, Court of Appeal, High Court, Regional Tribunals, and lower courts or tribunals as established by Parliament, with the Supreme Court as the final court of appeal hearing civil appeals from the Court of Appeal, which in turn hears appeals from the High Court or a Regional Tribunal.⁴³ The Indian Supreme Court has original jurisdiction over specified cases and appellate jurisdiction over civil appeals from High Courts, Federal Courts, and, when it grants special leave, from any other court or tribunal.⁴⁴ Tunisia's constitution creates three levels of ordinary courts (with the high court being the Court of Cassation) and three levels of administrative courts.⁴⁵ Turkey's High Court of Appeals reviews decisions made by civil courts that have not been referred to other judicial authorities.⁴⁶
- 27 Remaining constitutions establishing both high and lower courts offer significant detail about the vertical hierarchy. Brazil, for example, establishes the Federal Supreme Court; the National Council of Justice, the Superior Court of Justice, and the Superior Labor Court; the Federal Regional Courts (with Regional Judges), the Labor Courts (with judges), the Electoral Courts (with judges), and the Military Courts (with judges); and the Courts of the States and of the Federal District and Territories. The Federal Supreme Court has original jurisdiction over specified matters, limited ordinary appeal over certain habeas corpus, writs of mandamus, and writs of injunction denied by the Superior Courts, and extraordinary appeal over decisions that raise issues of unconstitutionality.⁴⁷ Federal regional courts hear appeals from federal and state judges exercising federal competence in the area of their jurisdiction.
- 28 Israel's Basic Laws vest judicial power in the Supreme Court, a District Court, a Magistrate's Court, a religious court, and other courts designated by law. The Supreme Court hears appeals from District Courts. Additionally, as a High Court of Justice, the Supreme Court hears cases in the interest of justice when the matter is not within the jurisdiction of another court. The Supreme Court, as a High Court of Justice, has the

⁴¹ Constitution of Spain, Art 123, Sec 1 and Art 152, Sec 1.

⁴² Constitution of the Republic of Estonia, ch XIII, Sec 148–149.

⁴³ Constitution of Ghana, ch 11, pt I, Secs 126–137.

⁴⁴ Constitution of India, Arts 131–136.

⁴⁵ Constitution of Tunisia, Arts 115–116.

⁴⁶ Constitution of the Republic of Turkey, Art 154.

⁴⁷ Constitution of the Federative Republic of Brazil, ch III, Sec I, Arts 92 and 102.

power of habeas corpus, of mandamus to nonjudicial officials, and of mandamus to judicial officials.⁴⁸

- 29 South Africa's constitution establishes the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, the Magistrates' Courts, and other courts established or recognized by Parliament. The Supreme Court of Appeal may decide appeals from the High Court or courts of a similar status except matters involving labor or competition, to an extent determined by Parliament. The Supreme Court of Appeal may only decide appeals, issues associated with appeals, and other issues referred to the court by Parliament.⁴⁹
- 30 The UK's Constitutional Reform Act ordains a Supreme Court of the United Kingdom that can hear civil appeals from the Court of Appeal in England and Wales, as well as from Scotland courts whose appeals would have gone to the House of Lords prior to 2005.⁵⁰ The UK's Senior Courts Act establishes, for England and Wales, the Court of Appeal, the High Court of Justice, and the Crown Court.⁵¹ The Supreme Court hears only questions of law. It has no power of judicial review but can, upon application by the Crown, determine whether laws passed by the devolved legislatures of Scotland, Wales, and Northern Ireland exceeded the scope of their delegations.⁵²
- 31 Jamaica's judiciary includes the Supreme Court and a Court of Appeal, and appeal from the Court of Appeal can be made to Her Majesty in Council as of right where the matter involves 500 pounds or more, in final decisions in proceedings for dissolution or nullity of marriage, in final decisions on questions of constitutional interpretation, and such other cases prescribed by Parliament, and discretionary appeal to Her Majesty in Council (with leave from the Court of Appeal) where the question has great general or public importance or other cases prescribed by Parliament.⁵³
- 32 Kenyan courts consist of the Supreme Court, the Court of Appeal, the High Court, and courts with the status of the High Court designated to address issues of employment/labour disputes and environment/land use. The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President and appellate jurisdiction to hear and determine appeals. The Court of Appeal hears appeals from the High Court and any other court or tribunal pursuant to Act of Parliament. Subordinate courts are the Magistrates Courts, the

⁴⁸ Basic Laws of Israel, The Judiciary, ch 1(1) and ch 1(15).

⁴⁹ Constitution of the Republic of South Africa, ch 8, Sec 166–168.

⁵⁰ Constitutional Reform Act 2005, Secs 23 and 40 (UK). The Supreme Court supplanted the House of Lords in this capacity to improve the separation of powers. Chase et al (n 7) 163.

⁵¹ Senior Courts Act, Sec 1(1) (UK).

⁵² Chase et al (n 7) 167.

⁵³ Constitution of Jamaica, ch VI, Art 76 and ch VII, Art 110.

Kadhis' Courts, the Courts Martial, and other courts or local tribunals established by Parliament.⁵⁴

- 33 Mexico's judicial power is vested in a Supreme Court of Justice, an Electoral Court, specialized circuit courts, unitary circuit courts, and district courts. The Electoral Court has a Superior Electoral Court and regional electoral courts. The Supreme Electoral Court can hear cases from regional electoral courts at their request. It can also send cases to the regional electoral courts for resolution. The Supreme Court of Justice hears appeals against rulings pronounced by district judges, provided that the Federal Government is an interested party in the case and such case is transcendental.⁵⁵
- 34 New Zealand courts include the Supreme Court, Courts of Appeal, High Courts, District Courts, and specialist courts. The Supreme Court may decide civil appeals from the Court of Appeal and the High Court, subject to exceptions from parliament or if the decision contains a 'refusal to give leave or special leave to appeal'.⁵⁶
- 35 The Supreme Court of Nigeria has exclusive original jurisdiction in a dispute between the Federation of Nigeria and a state or between states so long as the dispute involves a question regarding the existence of a legal right, original jurisdiction on matters designated as such by the National Assembly, and appellate jurisdiction over the Court of Appeal on questions of law, on the application of the Constitution, and on certain questions of election and office. The Court of Appeal hears appeals from the Federal High Court, the National Industrial Court, the High Court of the Federation Capital Territory, Abuja, High Court of a state, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a state, Customary Court of Appeal of a state and from decisions of a court-martial or other tribunals as may be prescribed by an Act of the National Assembly. The Court of Appeal has original jurisdiction over questions of certain elections and offices.⁵⁷
- 36 The UAE has a Supreme Court of the Union and Union Courts of the First Instance. The Supreme Court has jurisdiction over intergovernmental disputes, questions of constitutionality or constitutional interpretation, and conflicts of jurisdiction among Emirate courts or between union and Emirate courts. The Union Courts of the First Instance have jurisdiction over disputes between the Union and individuals, and over actions between individuals which arise in the permanent capital of the Union. Emirate courts have jurisdiction over all other matters, but upon Emirate request, jurisdiction granted to local judicial authorities can be transferred to the Union Courts of the First Instance.⁵⁸

⁵⁴ Constitution of Kenya, ch 10, Secs 162–169.

⁵⁵ Constitution of Mexico, Arts 94–105.

⁵⁶ Supreme Court Act 2003, pt 1, Secs 4 and 7–8 (NZ); Senior Courts Act 2016 (NZ).

⁵⁷ Constitution of Nigeria, Secs 232–240.

⁵⁸ Constitution of the United Arab Emirates, Arts 95–104.

3.3 Horizontal Allocations

- 37 Horizontal case allocation takes place along different planes, including geography, federalism, subject matter, party status, and relief sought.

3.3.1 Geography

- 38 Geography can be a basis for horizontal allocation of judicial authority along several different dimensions. One dimension is the nature of the geographic anchor: is the geographic restriction based on the location of a party, of the claim, or of the court? Another dimension is the nature of the territorial restriction: is it explicit based on fixed borders, or are geographic restrictions implicit based on the circumstances and conveniences of the case?
- 39 Nearly all civil-law countries leave geographic allocations to their legislatures.⁵⁹ Brazil is the major exception, with constitutional geographic designations for regional courts. The Federal regional courts must conduct proceedings within the territorial limits of their respective jurisdiction. In addition, the constitution specifies that federal-court actions brought by the union against a private defendant must be filed where the defendant is domiciled; if the union is the defendant, a private plaintiff may file in the judicial section where the plaintiff is domiciled, where the action arose, or in the Federal District.⁶⁰ It is unsurprising that Brazil has geographic allocations because Brazil is a large, federal country, and constitutionalization helps protect regional autonomy from national domination, a feature of federalism explored in more detail below in Section 3.3.2.
- 40 A few other civil-law countries contain minor geographic allocations in their constitutions. Argentina constrains its federal and provincial courts by their 'respective jurisdiction of persons or things'.⁶¹ Belgium gives its five appellate courts regional allocations.⁶² The UAE constitution grants the Union Courts of First Instance jurisdiction when the action arises in the permanent capital of the union.⁶³ But, for the most part, civil-law countries relegate territorial jurisdiction and venue to statutes.
- 41 Among common-law and hybrid countries, some, like Israel and Japan, are small, with industrialized infrastructure that makes travel and communication easy and inexpensive, and with relatively few and homogenous political subdivisions. In such conditions, geography is unlikely to motivate the constitutionalization of geographic allocation.

⁵⁹ R Michaels, 'Two Paradigms of Jurisdiction' (2006) 27(4) Michigan Journal of International Law 1003, 1009 (stating that European allocations based on geography are mostly in statutes or multinational conventions).

⁶⁰ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 92 and Sec IV Arts 107–109.

⁶¹ Constitution of the Argentine Nation, pt 2, ch 4, Sec 75.

⁶² Constitution of Belgium, Art 156.

⁶³ Constitution of the United Arab Emirates, Art 102.

- 42 Three other common-law countries have more significant constitutional allocations based on geography. Fundamental laws in the UK establish separate judicial systems for England and Wales, Scotland, and Northern Ireland. Similarly, the Canadian Constitution sets geographic allocation of judicial authority based on provincial borders. These geographic allocations—based on the physical location of the court—reinforce the separate sovereignties, autonomies, and cultures of defined regions within those countries.
- 43 The United States is the real outlier. The US Constitution’s Fifth and Fourteenth Amendments require governmental power—including judicial power—to be exercised consistent with ‘due process’.⁶⁴ The US Supreme Court has interpreted that mandate to constrain the exercise of territorial jurisdiction of both state and federal courts.⁶⁵ Due-process limits on federal courts are not particularly stringent; most commentators reason that due process imposes few, if any, territorial limits on a federal court’s territorial authority when a party is served in, or a citizen of, the United States.⁶⁶ For any other party, territorial jurisdiction can be established in federal court, consistent with due process, if the party has sufficient minimum contacts with the United States.⁶⁷ This latter component of due process affords some protection to foreign defendants with only modest connections to the United States.⁶⁸
- 44 More constraining is the application of due process to US state courts. Those courts generally are restricted by their state borders to exercising jurisdiction over parties or property found or residing within those borders,⁶⁹ over parties who have consented to personal jurisdiction in the state,⁷⁰ or over parties having sufficient minimum contacts with the forum state itself.⁷¹ Thus, even U.S. citizens and businesses can avoid the personal jurisdiction of a US state court if they have insufficient connections to that

⁶⁴ Constitution of the United States, Amends V and XIV. This chapter focuses on the case-allocation features of due process. For the litigant-rights and access-to-justice features of due process, see S Arenhart and M Tulibacka, ‘Due Process’ in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 1; T Domej, ‘Access to Justice’ in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 2; G van Calster and F de Andrade, ‘Due Process’ in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg XV, ch 5.

⁶⁵ *International Shoe Co v Washington* (Supreme Court, US) [326 US 310 (1945)].

⁶⁶ S Dodson, ‘Personal Jurisdiction and Aggregation’ (2018) 113(1) *Northwestern University Law Review* 1, 40–42.

⁶⁷ W S Dodge and S Dodson, ‘Personal Jurisdiction and Aliens’ (2018) 116(7) *Michigan Law Review* 1205, 1236–37.

⁶⁸ *Ibid* 1237.

⁶⁹ *Pennoyer v Neff* (Supreme Court, US) [95 US 714 (1877)] 720.

⁷⁰ *Mallory v Norfolk Southern Railway Co*, No 21-1168 (Supreme Court, US) [600 US 122 (2023)].

⁷¹ *International Shoe Co v Washington*, No 1345 (Supreme Court, US) [326 US 310 (1945)].

particular state.⁷² Personal jurisdiction under the US constitution's Fourteenth Amendment thus powerfully allocates cases among the various states' courts.⁷³

- 45 Because the US constitution's geographic constraint of 'due process' is implicit and contextual, its contours have been developed primarily by the courts in common-law fashion, one that continues to evolve on an ad-hoc basis even today.⁷⁴ The US Supreme Court recently clarified that the US constitution disallows 'doing business' personal jurisdiction⁷⁵ but allows transient jurisdiction,⁷⁶ both of which most other countries consider exorbitant.⁷⁷ In addition, the US doctrine's focus on the defendant has led to a paradigm of US jurisdiction that frames the inquiry as 'here or not', in contrast with the European paradigm that frames the territorial inquiry as 'here or there'.⁷⁸ Those paradigms might help explain why the United States is more content than the EU to release a defendant from domestic jurisdiction without the certainty that the plaintiff may sue the defendant somewhere else.⁷⁹ Some commentators see this division between the US and the EU expanding in recent years.⁸⁰ Because the territorial restrictions on US state courts are so constitutionalized, there is little that the state or federal legislatures can do to expand it.

3.3.2 Federalism

- 46 Federal structures often use case allocation to balance regional autonomy with the needs of national uniformity and of resolving conflicts among regions. Federal countries can do so using ordinary courts or constitutional courts.
- 47 As for regional autonomy, some constitutions expressly set out divisions of original jurisdiction between federal and regional courts, and among regional courts. Brazil, for example, makes its states autonomous, and its constitution establishes state and territorial courts that are separate from federal courts. Each state may, through its own constitution, organize its own courts.⁸¹ Canada's constitution recognizes provincial

⁷² Eg, *Walden v. Fiore*, No 12-574 (Supreme Court, US) [571 US 277 (2014)]; *World-Wide Volkswagen Corp v Woodson*, No 78-1078 (Supreme Court, US) [444 US 286 (1980)].

⁷³ S Dodson, 'Personal Jurisdiction in Comparative Context' (2020) 68(4) *American Journal of Comparative Law* 701, 701 ('In a world of many sovereigns and many courts, personal jurisdiction helps determine *which* sovereign's courts can hear a case, and that determination is influenced by the nature of the parties and their connections to the forum').

⁷⁴ *Ibid* 720.

⁷⁵ *Daimler AG v. Bauman*, No 11-965 (Supreme Court, US) [571 US 117 (2014)].

⁷⁶ *Burnham v. Superior Court*, No 89-44 (Supreme Court, US) [495 US 604 (1990)].

⁷⁷ Dodson (n 73) 715.

⁷⁸ Michaels (n 59) 1027–1051.

⁷⁹ Eg, *Daimler AG v. Bauman*, No 11-965 (Supreme Court, US) [571 US 117 (2014)].

⁸⁰ G Berger-Walliser, 'Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts' (2018) 51(5) *Vanderbilt Journal of Transnational Law* 1243.

⁸¹ Constitution of the Federative Republic of Brazil, tit III, ch I, Art 18 and ch. III, Arts 92 and 125.

superior, district, probate, and county courts.⁸² In the United States, federal courts generally lack original jurisdiction over cases involving only state law except as prescribed by the federal constitution.⁸³ The UAE similarly gives each emirate's courts jurisdiction over matters not constitutionally assigned to the union judiciary.⁸⁴

- 48 Regional autonomy must be balanced against national interests. Federal countries thus often include in their constitutions grants of jurisdiction to national courts—as opposed to regional courts—to hear cases that implicate strong national interests or matters of foreign affairs. Australia, for example, grants the federal High Court jurisdiction in matters arising under any treaty, affecting consuls or other representatives of other countries, or in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Its constitution also allows parliament to confer original jurisdiction on the High Court in matters arising under federal, admiralty, and maritime jurisdiction.⁸⁵ The United States constitution gives federal courts jurisdiction over cases arising under federal law or treaties, cases affecting ambassadors or other public ministers, cases of admiralty and maritime jurisdiction, cases in which the United States is a party, and cases between a state, or the citizens thereof, and foreign states, citizens or subjects.⁸⁶ Other federal countries have similar constitutional provisions.⁸⁷
- 49 In most federal countries, the constitution secures national uniformity by providing that a federal high court will have appellate jurisdiction over the highest court of each region. Australia, for example, grants its federal supreme court (called the High Court of Australia) jurisdiction to hear appeals from decisions issued by a state supreme court, decisions issued by any other state court as allowed by parliament, and questions of law from the Inter-State Commission.⁸⁸ Brazil grants federal regional courts appellate jurisdiction over state judges adjudicating questions of federal law.⁸⁹ The U.S. Supreme Court has appellate jurisdiction over state courts when they adjudicate matters of federal law.⁹⁰ Mexico takes a different track—its constitution gives federal courts exclusive jurisdiction over disputes concerning federal law, unless the controversy affects only private interests, in which case jurisdiction is concurrent with state courts.⁹¹

⁸² Constitution of Canada, pt VII, Sec 96.

⁸³ Constitution of the United States, Art III, Sec 2.

⁸⁴ Constitution of the United Arab Emirates, Art 104.

⁸⁵ Constitution of Australia, pt V, ch III, Arts 75–76.

⁸⁶ Constitution of the United States, Art III, Sec 2.

⁸⁷ Constitution of Mexico, Art 104 (giving federal courts jurisdiction over disputes when the federal government is a party, between a Mexican state and one or more neighbouring states, and involving diplomats and consuls); Constitution of the United Arab Emirates, Art 99 (giving the Supreme Court jurisdiction over the constitutional legality of union laws and over the interpretation of the constitution).

⁸⁸ Constitution of Australia, pt V, ch III, Art 73.

⁸⁹ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 107.

⁹⁰ Constitution of the United States, Art III, Sec 2.

⁹¹ Constitution of Mexico, Arts 103–104.

- 50 Finally, federal counties must deal with the problem of conflicts among regions or between regional governments and the national government. Many federal constitutions grant federal courts jurisdiction over cases in which such conflicts are likely to arise. Australia, for example, grants the federal High Court jurisdiction in matters between states, or between residents of different states, or between a state and a resident of another state. Its constitution also allows parliament to confer original jurisdiction on the High Court in matters relating to the same subject-matter claimed under the laws of different States.⁹² Brazil's Federal Supreme Court has jurisdiction over the causes and conflicts between the union and the states, or between states.⁹³ The German Federal Constitutional Court has jurisdiction to decide disagreements concerning the rights and duties of the federation and the states, especially in the execution of federal law by the states; other disputes involving public law between the federation and the states or between different states; and on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government has been infringed.⁹⁴ The U.S. constitution grants federal courts jurisdiction over cases between a state and the federal government, between states, between a state and citizens of another state, between citizens of different states, and between citizens of the same state claiming lands under grants of different states.⁹⁵ Other federal constitutions have similar provisions.⁹⁶

3.3.3 Subject Matter

- 51 Constitutions allocate judicial authority horizontally by subject matter in several ways. Federalism influences, for example, can manifest themselves as subject-matter specifications, often with divisions in judicial authority between national law and regional law; those are detailed in Section 3.3.2 above. Aside from federalism, subject-matter allocation falls along three primary divisions. First, specialized areas of law can drive creation of specialist courts to address them, such as administrative courts or labor courts. Second, countries can lodge the quasi-political acts of judicial review and constitutional interpretation in a specialized constitutional court. Third, countries with

⁹² Constitution of Australia, pt V, ch III, Arts 75–76.

⁹³ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102.

⁹⁴ Basic Law for the Federal Republic of Germany, Sec IX, Art 93.

⁹⁵ Constitution of the United States, Art III, Sec 2.

⁹⁶ Constitution of India, Art 131 (giving the India Supreme Court original jurisdiction over cases between states and cases in which the government of India is a party adverse to one or more states); Constitution of Mexico, Art 105 (giving the Supreme Court of Justice of the Nation jurisdiction over constitutional disputes between the federal government and a state, between two states, between a state and the federal district, between municipal councils belonging to different states, and between a state and another state's municipal government); Constitution of the United Arab Emirates, Art 99 (giving the Supreme Court jurisdiction over disputes between member Emirates and between Emirates and the union); Constitution of Venezuela, Art 266 (giving the Supreme Tribunal of Justice jurisdiction over administrative controversies between states or between a state and the republic).

significant religious or indigenous communities may create special courts to address issues relevant to those communities. This section deals with each.

3.3.3.1 Substantive Specializations

- 52 The first major division of subject-matter jurisdiction is among specialized areas of substantive law. Case allocation to an appropriate specialized court is good for efficacy, efficiency, access to justice, and uniformity.⁹⁷ Most countries exhibit some kinds of specialized courts for various substantive subjects⁹⁸; the question for this chapter is whether those case allocations are constitutionalized.
- 53 Some constitutions contemplate generalist judiciaries and do not divide courts by substantive specialization. This group includes Australia, Algeria, Argentina, China, Egypt, France, Ghana, Israel, Japan, Lebanon, Peru, South Africa, Turkey, the United Kingdom, and the United States. That is not to say that these constitutions prevent legislatures from creating specialist courts or dividing judicial power along these subject-matter lines; to the contrary, many of these countries do establish specialized courts by legislation.⁹⁹ It is just to say that substantive-law divisions are not constitutionalized in this group of countries. Note, however, the prevalence of common-law countries in this list, which tend to rely on generalist judges.
- 54 Other constitutions, by contrast, divide judicial authority by prescribed areas of the substantive law. Typical specialized courts include administrative courts, electoral courts, finance courts, and labor courts, among others. These constitutions invariably establish a common court of generalized jurisdiction to hear non-specialized matters.
- 55 Brazil, for example, establishes sets of general courts, labor courts, and electoral courts. Labor courts have prescribed jurisdiction over labor relations, strikes, unions, and like matters. The electoral courts, though established by the constitution, have jurisdiction determined by statute.¹⁰⁰ Canada has general courts and probate courts.¹⁰¹ Germany has general courts, administrative courts, finance courts, labor courts, and social courts,¹⁰² with the Federal Court of Justice available as a generalist court to review the decisions of the specialized courts.¹⁰³ In Italy, the Council of State and other organs of

⁹⁷ A P Ragone, 'Case Management from a Comparative Perspective: Horizontal and Vertical Court Arrangements' (2021) 85(1) *IUS Gentium* 35, 36–37.

⁹⁸ See seg XIII for chapters on specialized courts and proceedings.

⁹⁹ The United States, for example, has established, by statute a specialized appellate court for hearing patent cases, specialized bankruptcy and tax courts, specialized courts for certain private claims against the federal government, and specialized tribunals within administrative agencies for resolving designated intra-agency civil disputes.

¹⁰⁰ Constitution of the Federative Republic of Brazil, ch III, Sec I, Arts 92, 114 and 120.

¹⁰¹ Constitution of Canada, Sec VII, Art 96.

¹⁰² Basic Law for the Federal Republic of Germany, Sec IX, Art 95; P Murray and R Stürner, *German Civil Justice* (Carolina Academic Press 2004), ch 4.

¹⁰³ Basic Law for the Federal Republic of Germany, Sec IX, Art 96.

judicial administration have jurisdiction over the protection of rights under public administration as well as subjective rights in some instances, while the Court of Auditors has jurisdiction over matters involving public accounts.¹⁰⁴ Russia has common courts and a set of arbitration courts dedicated to economic disputes.¹⁰⁵ Belgium recognizes general courts, commercial courts, and labor courts.¹⁰⁶ Finland has common courts and a set of administrative courts.¹⁰⁷ Mexico has common courts and a set of electoral courts specializing in elections.¹⁰⁸ New Zealand, though having no single-document written constitution, uses fundamental statutes to create common courts, admiralty courts, family courts, youth courts, employment courts, and environment courts.¹⁰⁹ Nigeria has common courts and industrial courts.¹¹⁰ Poland has common courts, which address all matters except those assigned by statute to other courts, and administrative courts, which have jurisdiction over matters pertaining to the performance of public administration.¹¹¹ Tunisia has common courts, administrative courts, and finance courts.¹¹² And Venezuela has The Supreme Tribunal of Justice has Constitutional, Political/Administrative, Electoral, Civil Appeal, Criminal Appeal, and Social Appeal divisions.¹¹³

- 56 Although the divide between generalist and specialist regimes does not cleanly track the divide between common-law and civil-law systems, the generalist group is heavily weighted by common-law countries, while the specialist group has mostly civil-law countries. One explanation along this dimension is the difference between common-law and civil-law traditions of legal education and training.¹¹⁴ Civil-law systems are structured around specialized legal practices, from judges to prosecutors to private advocates.¹¹⁵ Common-law systems, by contrast, feature generalist legal education for both lawyers and judges, and judges are appointed often for their ideology and prominence rather than their performance in discrete specializations.¹¹⁶ Civil-law systems thus lend themselves better to specialized courts, while common-law systems lend themselves better to generalized courts.

¹⁰⁴ Constitution of the Italian Republic, pt II, tit IV, Sec I, Art 103.

¹⁰⁵ Constitution of the Russian Federation, Sec 1, ch 7, Arts 126–127.

¹⁰⁶ Constitution of Belgium, Art 157.

¹⁰⁷ Constitution of Finland, ch 9, Sec 98.

¹⁰⁸ Constitution of Mexico, Art 99.

¹⁰⁹ Supreme Court Act 2003, pt 1, Sec 4 (NZ); Senior Courts Act 2016 (NZ); Constitution Act 1840, pt 4 Secs 23–24 (NZ).

¹¹⁰ Constitution of Nigeria, Sec 239–240.

¹¹¹ Constitution of Poland, ch VIII, Arts 177 and 184.

¹¹² Constitution of Tunisia, Arts 116–117.

¹¹³ Constitution of Venezuela, Art 262.

¹¹⁴ Eg, M Damaška, 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment' (1968) 116(8) *University of Pennsylvania Law Review* 1363.

¹¹⁵ J H Merryman, *The Civil Law Tradition* (3rd edn, Stanford UP 2007) 102–09.

¹¹⁶ S Dodson, 'Accountability and Transparency in U.S. Courts' in D Mitidiero (ed), *Accountability and Transparency in Civil Justice* (Thomson Reuters 2019) 273.

- 57 The constitutionalization of certain court specializations—as opposed to leaving specializations to ordinary legislation—might be explained by tradition, history, or politics of the particular country. It also might reflect a signal that the particular substantive areas singled out by the constitution are of special judicial attention.

3.3.3.2 Constitutional Courts

- 58 The second major division of subject-matter jurisdiction is also the most widespread type of specialist court: a constitutional court with jurisdiction over constitutional questions and, usually, the power of judicial review.¹¹⁷ The constitutional court is a relatively recent global norm, and so the history of its spread matters for comparative purposes.
- 59 Judicial power over executive and legislative powers is in tension with traditional notions of the hierarchy of governmental sovereignty. It was not, then, until the United States that the power of judicial review became possible. The founders of the US constitution lodged sovereignty in the people, and the constitution became the ultimate expression of that sovereignty. The government worked for the people, not the other way around, and could exercise only that power granted to the government by the people in the constitution. Governmental transgressions of constitutional limits were, therefore, transgressions of the sovereignty of the people.
- 60 Constitutional supremacy was written into the US constitution itself, but the identity of the organ to enforce that supremacy was not. In 1803, the US Supreme Court famously held, in *Marbury v Madison*, that it was the courts' duty and province to declare when a law was inconsistent with the constitution.¹¹⁸ Further, US judicial review could be exercised by all courts, not just the Supreme Court. Although the novelty of judicial review was immediately recognized by other countries,¹¹⁹ few countries immediately followed suit, because of the novelty of judicial review, because of the lingering traditions of absolute deference to parliamentary sovereignty, and because of lingering concerns about the appropriateness of lodging inherently political questions under the purview of an unelected judiciary.
- 61 Nevertheless, in the 1800s, the influence of US judicial review took hold in South America as those new nations obtained independence from Spain. Though inheriting Spanish

¹¹⁷ For discussion of how constitutional courts protect fundamental rights and due process, see Arenhart and Tulibacka (n 64); Neiva-Fenoll (n 21).

¹¹⁸ *Marbury v Madison*, (Supreme Court, US) [5 US 137 (1803)] 177.

¹¹⁹ A de Tocqueville, *De la démocratie en Amérique* vol 1 (R Heffner tr, Mentor Books 1956) 102–04.

civil-law traditions, these countries adopted the US style of decentralized judicial review exercised by generalist courts.¹²⁰

- 62 After World War I, many European countries, including Austria, Czechoslovakia, Lichtenstein, Greece, Spain, Ireland, and others, adopted judicial review under a centralized model developed by Austrian Hans Kelsen, which featured a constitutionally created special court created for the primary purpose of exercising judicial review.¹²¹ The theory behind a constitutional court fit the idea of parliamentary sovereignty better by limiting judicial review only to a court specially designed for that peculiar activity, sometimes with jurisdiction limited to ex ante or abstract review, almost as an assistance to parliament. Constitutional courts under the centralized model are thus somewhat separate from the rest of the judicial system and comprise a kind of 'fourth branch of government'.¹²²
- 63 Other European counties followed suit after World War II and in the postwar decolonization era, as the Kelsenian centralized model of judicial review was adapted and adopted in France, Germany, Italy, South Korea, India, Chad, Algeria, and others.¹²³ Japan, though at the time an adherent to German-style civil-law procedure and lower courts, adopted an American-style generalist Supreme Court equipped with the power of judicial review.¹²⁴
- 64 The fall of the Soviet Union in the 1990s led to a final wave of adoption of judicial review and constitutional courts in Russia, Uzbekistan, Slovenia, Bulgaria, Romania, and other former Soviet states.¹²⁵ Far away, South Africa, having dismantled apartheid, also established a constitutional court in its blended civilian and common-law tradition.¹²⁶ Constitutional courts continued to spread, with German influences in eastern Asia, and

¹²⁰ J O Frosini and L Pegoraro, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 345, 352; F R Romeu, 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2(1) *Review of Law and Economics* 103, 103–04.

¹²¹ A S Sweet, 'Constitutional Courts' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 816, 817–18.

¹²² A Harding, P Leyland and T Groppi, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 1, 4.

¹²³ T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asia* (Cambridge UP 2003) 90–105; Romeu (n 120) 103–04. The French Constitutional Council was not made an independent judicial body until 2008; prior, it was an agent of the executive branch to guard against parliamentary overreach. MC Ponthoreau and F Hourquebie, 'The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 81.

¹²⁴ Y Taniguchi, 'Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems' in N Trocker and V Varano (eds), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli 2005) 91, 93.

¹²⁵ Ginsburg (n 123) 90–105; Romeu (n 120) 103–04.

¹²⁶ Harding et al (n 122) 4 fn 11–12.

French influences in western Africa,¹²⁷ as new democracies replaced totalitarian regimes. By the early 2000s, around 85% of countries had some form of judicial review, and, of those, around half had a specialized constitutional court.¹²⁸

- 65 Scholars have offered explanations for the rise and spread of constitutional courts. Political upheaval—including postwar and postcolonial regime change and democratization—seems to be a primary driving force.¹²⁹ Tom Ginsburg has posited that countries are likely to create constitutional courts when political parties are fragmented and future political control is uncertain; constitutional courts give competing political powers a hedge against the risk of unfettered control over political power by the opposition.¹³⁰ Others have suggested that, when autocratic regimes give way to democracy, constitutional courts may be created to counter autocratic holdovers—including judges—that remain in the political machinery.¹³¹ Yet even persisting dictators have formed constitutional courts, most notably in Egypt but also in Algeria, Azerbaijan, Burundi, and Cambodia.¹³²
- 66 Another driving force is that constitutional courts can be valuable precisely for their antimajoritarian nature,¹³³ especially for upholding notions of fundamental rights against abridgment by a democratic majority.¹³⁴ Constitutional courts serve to check the power of democratically elected branches.¹³⁵ An ancillary incident of constitutional courts in this sphere is to provide a signal of a country's commitment to constitutionalism and progressive values of human rights.¹³⁶
- 67 Yet another set of driving forces is practical. A constitutional court with dispositive adjudicating authority can serve as a peaceful and final arbiter of intragovernmental disputes, a power especially beneficial for countries with federalist governments.¹³⁷ In civil-law traditions in which precedential power is weak and multiple specialized court

¹²⁷ Ibid 2.

¹²⁸ Romeu (n 120) 103. As of the mid-2000s, there was no judicial review in Afghanistan, Bahrain, Bhutan, Brunei, China, Ethiopia, Guinea-Bissau, Indonesia, Iran, Iraq, Kuwait, Laos, Libya, Netherlands, New Zealand, North Korea, Oman, Qatar, Sao Tome and Principe, Saudi Arabia, Tunisia, Turkmenistan, Vatican, Vietnam, or the UK. Ibid 112.

¹²⁹ Harding et al (n 122) 5.

¹³⁰ Ginsburg (n 123).

¹³¹ J E Ferejohn, 'Constitutional Review in the Global Context' (2003) 6(1) NYU Journal of Legislation and Public Policy 49; Romeu (n 120) 105.

¹³² Romeu (n 120) 107 fn 24.

¹³³ A C Hutchinson, 'Judges and Politics: An Essay from Canada' (2004) 24(1–2) Legal Studies 275; P W Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (Yale UP 1997) 215. This countermajoritarian difficulty is classically stated in A M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (2nd edn, Yale UP 1986).

¹³⁴ A Harding and P Leyland, 'Preface' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009).

¹³⁵ Harding and Leyland (n 134).

¹³⁶ Harding et al (n 122) 5.

¹³⁷ H Kelsen, 'La Garantie Juridictionnelle de la Constitution (la Justice Constitutionnelle)' (1928) 45 Revue de Droit Public et de Science Politique 197. Cf Harding and Leyland (n 134).

systems exist, a constitutional court can provide legal certainty and uniformity.¹³⁸ Relatedly, specialized constitutional courts can be designed especially for the quasi-political act of judicial review, while simultaneously insulating the ordinary, more bureaucratic judiciary from charges of political activism.¹³⁹ For example, France and Italy appoint ordinary judges for life but appoint judges on their constitutional courts to limited terms to preserve more democratic accountability.¹⁴⁰ Finally, scholars have posited that geographic proximity has contributed to the spread of constitutional courts.¹⁴¹

- 68 The staged spread of constitutional courts and the differing traditions in which they have sprung has led to great variation among both judicial review and constitutional courts. Some countries—including Australia, Canada, Denmark, India, Norway, Singapore, Sweden, and Switzerland—have not established constitutional courts but rather follow the U.S. style of decentralized judicial review dispersed among generalist courts. Australia, Canada, India, and Singapore are common-law countries, which are far less likely to set up constitutional courts,¹⁴² and Denmark, Norway, and Sweden follow the Scandinavian tradition of such strong constitutional deference to the legislature that there would be little for a constitutional court to do.¹⁴³ Swiss courts, fairly unique in Europe, have the power of constitutional review but no power to invalidate an unconstitutional federal law.¹⁴⁴ Other countries without specialist constitutional courts exhibit varying levels of diffusion of the power of judicial review. Some, like Estonia, Japan, and the UAE, centralize the exclusive power of judicial review in a generalist supreme court.¹⁴⁵ Still others, like Ghana, Kenya, and Nigeria, assign different powers of judicial review among different levels of ordinary courts.¹⁴⁶

¹³⁸ M Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford UP 1989) 135–149; Chase et al (n 7) 7; V F Comella, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82(7) *Texas Law Review* 1705, 1705.

¹³⁹ Cappelletti (n 138) 135–149; Comella, (n 138) 1706–1707; Harding et al (n 122) 13–14.

¹⁴⁰ Eg, Constitution of France, tit VII, Art 56 and tit VIII, Art 64; Constitution of the Italian Republic, pt II, tit IV, Art 104 and tit VI, Art 135. For more on the differences in judicial appointment in various countries and contexts, see C Guarnieri and P Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford UP 2002).

¹⁴¹ T Ginsburg, 'Constitutional Courts in East Asia: Understanding Variation' (2008) 3(2) *Journal of Comparative Law* 80; Romeu (n 120) 105.

¹⁴² Romeu (n 120) 118.

¹⁴³ J Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48(3) *American Journal of Comparative Law* 345, 361–370.

¹⁴⁴ Constitution of Switzerland, Art 190; P Mahon, 'Judicial Federalism and Constitutional Review in the Swiss Judiciary' in A Ladner, N Soguel, Y Emery, S Weerts and S Nahrath (eds), *Swiss Public Administration* (Springer 2018) 137.

¹⁴⁵ Constitution of the Republic of Estonia, ch XIII, Art 149; Constitution of Japan, ch 6, Art 81; Constitution of the United Arab Emirates, Art 99.

¹⁴⁶ Constitution of Ghana, ch 11, pt I, Secs 130, 140; Constitution of Kenya, ch 10, pt 2, Secs 163, 165; Constitution of Nigeria, Secs 233(2), 239–240.

- 69 Countries with specialist constitutional courts also exhibit variation.¹⁴⁷ Some have exclusive jurisdiction over constitutional questions, while other countries give their constitutional courts jurisdiction over constitutional questions that is concurrent with ordinary courts.¹⁴⁸ Further variation exists along two axes: what questions the constitutional court can hear, and how the constitutional court obtains jurisdiction.
- 70 The questions constitutional courts can hear have both common and uncommon features. Nearly all constitutional courts can exercise judicial review by providing an authoritative decision on whether a law or act is unconstitutional.¹⁴⁹ But constitutions grant their constitutional courts various authority to perform other constitutional functions, including resolving intragovernmental conflicts;¹⁵⁰ trying impeachments or other special cases against officials;¹⁵¹ habeas corpus and writs of mandamus to certain high-ranking officials;¹⁵² interpretation of treaties;¹⁵³ and overseeing democracy-related issues, such as regulating political parties,¹⁵⁴ adjudicating the propriety of constitutional

¹⁴⁷ I include Brazil's Federal Supreme Court in the category of constitutional courts. Although the Federal Supreme Court has some nonconstitutional jurisdiction, the bulk of its jurisdiction is akin to the kinds of cases allocated to constitutional courts. Frosini and Pegoraro (n 120) 353.

¹⁴⁸ A Mavčič, *A Tabular Presentation of Constitutional / Judicial Review Round the World* (2004) <<https://www.concourts.net/The%20Constitutional%20Review%20sample.pdf>> accessed December 15, 2022.

¹⁴⁹ Constitution of the Federative Republic of Brazil, ch III, Sec 1, Art 102; Constitution of the Arab Republic of Egypt, pt V, ch 4, Art 191; Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of the Italian Republic, pt II, tit VI, Sec I, Art 134; Political Constitution of Peru, tit V, Art 202; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(4); Constitution of the Republic of South Africa, ch 8, Sec 167(4); Constitution of Algeria, Art 186; Constitution of Austria, ch 6, Art 140(1); Constitution of Belgium, Art 142; Constitution of Chile, Art 93; Constitution of Colombia, Art 241; Constitution of Croatia, Sec IV, Art 129; Constitution of Lebanon, pt II, ch 1, Art 19; Constitution of Mexico, Art 105; Constitution of Poland, ch VIII, Art 188; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of Spain, Art 161, Sec 1; Constitution of Tunisia, Art 120; Constitution of the Republic of Turkey, Art 147; Constitution of Sudan, ch 8, Sec 31(1).

¹⁵⁰ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of the Italian Republic, pt II, tit VI, Sec I, Art 134; Political Constitution of Peru, tit V, Art 202; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(3); Constitution of the Republic of South Africa, ch 8, Sec 167(3); Constitution of Chile, Art 93; Constitution of Colombia, Art 241; Constitution of Croatia, Sec IV, Art 129; Constitution of Mexico, Art 105; Constitution of Poland, ch VIII, Art 189; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of Spain, Art 161, Sec 1; Constitution of Sudan, ch 16, Sec 75.

¹⁵¹ Constitution of the Italian Republic, pt II, tit VI, Sec I, Art 134; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(7); Constitution of Croatia, Sec IV, Art 129; Constitution of Poland, ch VIII, Art 198; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of the Republic of Turkey, Art 148.

¹⁵² Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Political Constitution of Peru, tit V, Art 202.

¹⁵³ Constitution of the Russian Federation, Sec 1, ch 7, Art 125(2); Constitution of Colombia, Art 241; Constitution of Poland, ch VIII, Art 188; Constitution of Tunisia, Art 120.

¹⁵⁴ Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of Chile, Art 93; Constitution of Croatia, Sec IV, Art 129; Constitution of Poland, ch VIII, Art 188; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of the Republic of Turkey, Art 149.

amendments and referenda,¹⁵⁵ approving the qualifications of electoral or appointment candidates,¹⁵⁶ and reviewing election legalities and results.¹⁵⁷

- 71 How a constitutional court obtains jurisdiction over these questions varies considerably.¹⁵⁸ Some constitutional courts can exercise *ex ante*, abstract review of constitutionality prior to a law being passed or an action being taken.¹⁵⁹ Some constitutional courts can exercise *ex post*, concrete review of constitutional questions arising as original actions in the constitutional court¹⁶⁰ or arising in ordinary courts. The latter kind of review is akin to an appeal if the ordinary courts can answer the constitutional question in the first instance,¹⁶¹ or to a certified question if the ordinary courts must refer the question to the constitutional court in the first instance.¹⁶² Some constitutional courts have discretion to accept or decline to hear petitions for constitutional review.¹⁶³ Finally, variation also exists as to who can invoke the constitutional court's jurisdiction, with constitutions specifying certain governmental

¹⁵⁵ Constitution of France, tit VII, Arts 58–60; Constitution of Belgium, Art 142; Constitution of Colombia, Art 241; Constitution of Croatia, Sec IV, Art 129; Constitution of Tunisia, Art 120.

¹⁵⁶ Constitution of Chile, Art 93.

¹⁵⁷ Constitution of France, tit VII, Arts 58–60; Constitution of Algeria, Art 182; Constitution of Croatia, Sec IV, Art 129; Constitution of Lebanon, pt II, ch 1, Art 19.

¹⁵⁸ Harding et al (n 122) 9; Sweet (n 121) 823.

¹⁵⁹ Constitution of France, tit VII, Art 61; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(2); Constitution of Algeria, Art 182 (for overseeing election matters); Constitution of Belgium, Art 142; Constitution of Chile, Art 93; Constitution of Colombia, Art 241 (for measures proposing constitutional amendments); Constitution of Croatia, Sec IV, Art 129; Constitution of Spain, tit IX, Art 162(1); Constitution of Tunisia, Art 120.

¹⁶⁰ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(4); Constitution of Algeria, Art 186; Constitution of Austria, ch 6, Art 140(1); Constitution of Chile, Art 93; Constitution of Colombia, Art 241; Constitution of Croatia, Sec IV, Art 129; Constitution of Lebanon, pt II, ch 1, Art 19; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of the Republic of Turkey, Art 148–150.

¹⁶¹ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Political Constitution of Peru, tit V, Art 202; Constitution of the Republic of South Africa, ch 8, Sec 167(3); Constitution of Chile, Art 93; Constitution of Spain, Art 161, Sec 1; Constitution of the Republic of Turkey, Art 152.

¹⁶² Constitution of France, tit VII Art 61; Basic Law for the Federal Republic of Germany, Sec IX, Art 100(1); Constitution of Algeria, Art 188; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of Tunisia, Art 120.

¹⁶³ Constitution of the Republic of South Africa, ch 8, Sec 167(3).

officials or entities,¹⁶⁴ ordinary courts,¹⁶⁵ private parties,¹⁶⁶ or the constitutional court itself.¹⁶⁷

- 72 A final matter of constitutional courts is how they have fared in their respective countries. As a general matter, the perceived reputational fragility of constitutional courts—because they cannot rely on the neutrality and judicial legitimacy that typically comes from expert bureaucracy¹⁶⁸—has led, paradoxically, to robust assertions of authority by those courts in an effort to bolster their relevance and power.¹⁶⁹ Compared to generalist courts, constitutional courts are less likely to avoid constitutional issues and more likely to declare legislation unconstitutional.¹⁷⁰ They are less likely to avoid constitutional issues because they are specifically chartered to decide them.¹⁷¹ They are more likely to declare issues unconstitutional because it must exercise its power for it to be taken seriously.¹⁷² The French constitutional court, for example, has exhibited a high rate of declarations of unconstitutionality.¹⁷³ Many other constitutional courts boldly decided high-profile issues soon after their creation.¹⁷⁴

¹⁶⁴ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Constitution of France, tit VII Art 61; Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of the Italian Republic, pt II, tit V, Sec I, Art 127; Political Constitution of Peru, tit V, Art 203; Constitution of the Russian Federation, Sec 1, ch 7, Art 125(2); Constitution of Algeria, Arts 186–187; Constitution of Austria, ch 6, Art 140(1); Constitution of Belgium, Art 142; Constitution of Colombia, Art 241 (for treaties); Constitution of Lebanon, pt II, ch 1, Art 19; Constitution of Spain, Art 162; Constitution of Tunisia, Art 120; Constitution of the Republic of Turkey, Arts 148–150.

¹⁶⁵ Constitution of France, tit VII Art 61; Basic Law for the Federal Republic of Germany, Sec IX, Art 100(1); Constitution of Algeria, Art 188; Constitution of Belgium, Art 142; Constitution of the Republic of Korea, ch VI, Art 111(1); Constitution of Spain, Art 163; Constitution of Tunisia, Art 120.

¹⁶⁶ Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Political Constitution of Peru, tit V, Art 203 (giving professional associations and groups of at least 5,000 citizen petitioners the right to bring actions for a writ of unconstitutionality); Constitution of the Republic of South Africa, ch 8, Sec 167(6); Constitution of Belgium, Art 142; Constitution of Colombia, Art 241; Constitution of Spain, Art 162; Constitution of the Republic of Turkey, Article 148.

¹⁶⁷ Constitution of Algeria, Art 182 (specifying that the Constitutional Council independently monitors adherence to the constitution); Constitution of Croatia, Sec IV, Art 129 (directing the constitutional court to notify the parliament of any unconstitutionality it observes and to supervise elections and political parties).

¹⁶⁸ Comella (n 138) 1728–1729.

¹⁶⁹ Harding et al (n 122) 5.

¹⁷⁰ Comella (n 138) 1706.

¹⁷¹ Ibid 1712–1722; Sweet (n 121) 823.

¹⁷² Comella (n 138) 1730–1732.

¹⁷³ J Bell, *French Constitutional Law* (Oxford UP 1992) 32–33.

¹⁷⁴ The German constitutional court, for example, decided *Southwest State Case* in 1951, described as Germany's *Marbury v Madison*. D P Kommers and R A Miller, 'Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 102–103; D P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke UP 1997) 66. The South African constitutional court struck down the death penalty in 1995. *S v Makwanyane*, CCT 3/94 (CC, South Africa) 6 June 1995 [3 SA 391]. The Italian constitutional court was

- 73 Constitutional courts with discretionary authority over their dockets have tended to focus on certain kinds of cases depending upon the political climate of their local country. Thus, in years preceding 2009, the Spanish constitutional court focused on delegations of power to regional governments; constitutional courts in West Africa focused on election disputes; and constitutional courts in South Africa and Russia focused on human rights.¹⁷⁵
- 74 Public perception of constitutional courts in stable democracies is generally high.¹⁷⁶ In Germany, citizens support decisions by the constitutional court, even those that might be considered controversial,¹⁷⁷ because it has ‘accumulated a considerable store of moral authority and public approval’,¹⁷⁸ making it one of the most respected institutions in the country.¹⁷⁹ The constitutional court is active: it routinely receives more than 8,000 cases a year.¹⁸⁰ It has banned political parties, stricken popular referendums, monitored elections, overseen the dissolution of governments, and defined and enforced individual rights.¹⁸¹ But it has primarily operated reactively, with restraint, and in ways designed to mediate disputes between government and society.¹⁸² This strategy has no doubt contributed to its popularity and made it ‘a self-confident tribunal deeply engaged in Germans’ lives and politics’.¹⁸³
- 75 In South Africa, the constitutional court was created in the wake of the fall of apartheid in the 1990s as a compromise between strongly voiced minority powers and the need to protect fundamental rights.¹⁸⁴ The very founding itself, in a rejection of authoritarianism and embrace of citizen rights, meant that the court began with a high degree of legitimacy.¹⁸⁵ Its first function was to ensure that the new constitution conformed to the principles of the democratic founding.¹⁸⁶ The court rejected the first draft as insufficiently attentive to certain rights but then certified the second draft as

active and prominent immediately after formation, with its first decision being seminal. T Groppi, ‘The Italian Constitutional Court: Towards a “Multilevel System” of Constitutional Review?’ in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 138–39.

¹⁷⁵ Harding et al (n 122) 8.

¹⁷⁶ The Italian constitutional court, for example, fills an important “role as an arbiter in political and constitutional conflict” and is ‘well accepted by public opinion and respected by the political system’. Groppi (n 174) 145.

¹⁷⁷ R Stürner, ‘The New Role of Supreme Courts in a Political and Institutional Context from a German Point of View’ in *Annuario di Diritto Comparato e di Studi Legislativi* (Edizioni Scientifiche Italiane 2011) 335.

¹⁷⁸ Kommers and Miller (n 174) 118.

¹⁷⁹ D P Conradt, *The German Polity* 254 (8th edn, Houghton Mifflin 2005).

¹⁸⁰ Kommers and Miller (n 174) 116.

¹⁸¹ Ibid 104.

¹⁸² Ibid 119–120; Stürner (n 177).

¹⁸³ Kommers and Miller (n 174) 120.

¹⁸⁴ Ginsburg (n 123); H Klug, ‘South Africa’s Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid’ in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 263, 263.

¹⁸⁵ Klug (n 184) 265.

¹⁸⁶ Ibid 263.

compliant.¹⁸⁷ In its first major decision, the CC struck down the death penalty,¹⁸⁸ which immediately generated goodwill ‘as a shining model, a new and progressive institution arising out of the ashes of apartheid’.¹⁸⁹ In its first decade, the court decided around 25 cases per year, ruled against the government in 40% of those cases, and had unanimous decisions about 78% of the time.¹⁹⁰ Early years were marked by protection of fundamental rights, and these decisions solidified its popular legitimacy.¹⁹¹ The court also maintained a good relationship with the other branches, with President Nelson Mandela even praising the court for doing its duty when it struck down one of his actions.¹⁹² In 2012, Parliament amended the constitution to make the Constitutional Court the highest court “in all matters,”¹⁹³ an important clarification, since the 1996 Final Constitution did not specify which court held the highest position. Since then, the extent of the court’s jurisdiction has been contested both inside and outside the court.¹⁹⁴ Recently, the relationship between the Constitutional Court and elected officials has soured, especially in the wake of the Hlophe controversy, which involved charges that the Judge President of the Western Cape High Court tried to influence two justices of the Constitutional Court in a matter involving former President Jacob Zuma. Politicians’ rhetorical attacks on the Constitutional Court may be having some effect on the stability and reputation of the court.¹⁹⁵

- 76 Other constitutional courts have had a rocky relationship to their sister political organs, especially executives with authoritarian inclinations. In postcommunist Russia, the ruling party curbed the constitutional court as it was establishing some effectiveness.¹⁹⁶ The first constitutional court was ordained in 1991 and became, almost immediately, a fairly active court.¹⁹⁷ However, when it issued a number of defeats to President Boris Yeltsin, Yeltsin granted himself emergency powers (ignoring a Constitutional Court decision declaring that action unconstitutional), dissolved Parliament, and suspended the court in 1993. The court was reconstituted a year later, with reduced powers and judicial term limits.¹⁹⁸

¹⁸⁷ Ibid 265–276.

¹⁸⁸ *S v Makwanyane*, CCT 3/94 (CC, South Africa) 6 June 1995 [3 SA 391].

¹⁸⁹ Klug (n 184) 271.

¹⁹⁰ Ibid 264.

¹⁹¹ Ibid.

¹⁹² Ibid 271.

¹⁹³ Constitution Seventeenth Amendment Act of 2012, preamble.

¹⁹⁴ E Cohen, ‘The Jurisdiction of the Constitutional Court’ (2021) 11(1) Constitutional Court Review 433.

¹⁹⁵ Eg, P Balthazar, ‘South Africa cannot afford another Chief Justice mistake’ (25 October 2021) *Daily Maverick* <<https://www.dailymaverick.co.za/opinionista/2021-10-25-south-africa-cannot-afford-another-chief-justice-mistake/>> accessed 15 December 2022.

¹⁹⁶ K L Scheppele, ‘Guardians of the Constitution: Constitutional Court Presidents and the Struggle for Rule of Law in Post-Soviet Europe’ (2006) 154(1) University of Pennsylvania Law Review 157.

¹⁹⁷ W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer 2014) 6.

¹⁹⁸ R Ahdieh, *Russia’s Constitutional Revolution* (Penn State UP 1997); W E Butler (ed/tr), *Russian Public Law* (3rd edn, Wildy, Simmonds & Hill Publishing 2005) 454.

- 77 In 1995, perhaps sensing the constitutional court's weakened state, the Russian Supreme Court issued a clarification that ordinary courts could exercise judicial review too, and that referral to the Constitutional Court was appropriate only when the conflict was unclear.¹⁹⁹ In 1998, the Constitutional Court responded by issuing a binding constitutional interpretation holding that it was the only body with the power to exercise judicial review, either in the abstract or in the context of a particular case, and that ordinary courts had no power to disregard acts on their own but instead had a duty to refer the matter to the Constitutional Court.²⁰⁰ Despite that rocky beginning, the constitutional court was influential in Russia's transition from communism to republic,²⁰¹ and its docket included sizeable percentages of questions involving governmental structure and individual rights.²⁰²
- 78 In the 2010s and beyond, Vladimir Putin attempted to exert more control over the Constitutional Court,²⁰³ and with that control came a diminishment in public perception of judicial independence.²⁰⁴ Under Putin, the constitutional court has heard fewer constitutional challenges, and those that it hears tend to be decided in favor of Putin's regime.²⁰⁵
- 79 Another example of a constitutional court with a turbulent history and mixed record is the Supreme Constitutional Court of Egypt. In 1948, in midst of the post-WWII spread of judicial review in Europe and Africa, the High Administrative Court claimed limited judicial review for the judiciary,²⁰⁶ but, for fear of retaliation by the authoritarian regime, the courts rarely exercised it.²⁰⁷ Nevertheless worried, in 1969 and 1970, President Gamal Nasser placed the right of judicial review exclusively in a new constitutional court

¹⁹⁹ A Di Gregorio, 'The Evolution of Constitutional Justice in Russia: Normative Imprecision and the Conflicting Positions of Legal Doctrine and Case-Law in Light of the Constitutional Court Decision of 16 June 1998' (1998) 24(5/6) *Review of Central and East European Law* 387, 389–396.

²⁰⁰ For coverage and analysis of the decision, see Di Gregorio (n 199) 398–401; P Solomon, 'Judicial Power in Russia: Through the Prism of Administrative Justice' (2004) 38(3) *Law and Society Review* 549.

²⁰¹ J Henderson, 'The Constitutional Court of the Russian Federation: the Establishment and Evolution of Constitutional Supervision in Russia' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 148, 148–149. For a thorough treatment, see A Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (Cambridge UP 2008).

²⁰² Henderson (n 201) 164–165.

²⁰³ A Trochev and P H Solomon Jr., 'Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State' (2018) 51(1) *Communist & Post-Communist Studies* 201, 204.

²⁰⁴ *Russian Public Opinion, 2012–2013* (Levada Analytical Center 2013) 98 <https://www.levada.ru/sites/default/files/2012_eng.pdf> accessed 15 December 2022; K Hendley, 'Justice in Moscow?' (2016) 32(6) *Post-Soviet Affairs* 491, 492; K Hendley, "'Telephone Law" and the "Rule of Law": The Russian Case' (2009) 1(2) *Hague Journal of the Rule of Law* 241, 242.

²⁰⁵ K Hendley, 'Assessing the Rule of Law in Russia' (2006) 14(2) *Cardozo Journal of International and Comparative Law* 347, 359.

²⁰⁶ Case 65, Judicial Year 1 (High Administrative Court, Egypt) Judgment 10 February 1948.

²⁰⁷ N J Brown, *The Rule of Law in the Arab World* (Cambridge UP 1997) 91–92.

more subservient to him.²⁰⁸ Thus, the constitutional court was, ironically, “established to ensure that no meaningful constitutional review took place.”²⁰⁹

- 80 In 1970, however, Nasser died, leaving a depressed economic state founded on Arab socialism. Anwar Sadat took over and began a series of Islamicizations and liberalizations, including a new constitution²¹⁰ that provided for an independent Supreme Constitutional Court.²¹¹ Sadat hoped the constitutional court would support—despite unpopularity with the Islamic public—private investment in Egypt through protection of expansive property rights,²¹² but to give the court an opportunity to bolster its legitimacy, the constitution gave the court power in more popular areas, including political and Islamic rights.²¹³
- 81 After a relatively passive first decade marked by deference to the president, the constitutional court embarked, in the late 1980s, in a more active attempt to liberalize and reform the Egyptian system, an effort that put the constitutional court in conflict with the president.²¹⁴ The constitutional court interpreted Islamic law—to which legislation must conform under the Egypt Constitution²¹⁵—liberally to promote economic, civil, political, and human rights, and in an effort to ‘bring Egyptian law into line with emerging human rights norms’.²¹⁶
- 82 This effort irked the president, who was attempting to scale back such rights at the time.²¹⁷ By 2001, the regime had had enough. Using his control over the legislature and executive apparatus, the president appointed to the constitutional court a new chief justice and five other justices, all from the ranks of his political allies.²¹⁸ Almost overnight, the constitutional court became a new institution, deferring to the president and curtailing rights.²¹⁹ Since then, the constitutional court ‘has arguably ceased to exercise any meaningful check on the executive’.²²⁰

²⁰⁸ Law No 66 (1970) (Egypt); Law No 81 (1969) (Egypt).

²⁰⁹ C B Lombardi, ‘Egypt’s Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally “Islamic” State’ in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009) 217, 219.

²¹⁰ Ibid 220. See also K J Beattie, *Egypt During the Sadat Years* (Palgrave Macmillan 2000).

²¹¹ Constitution of the Arab Republic of Egypt, Arts 174–178.

²¹² T Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge UP 2007).

²¹³ Lombardi (n 209) 223. This history of Egypt’s constitutional court thus lends credence to the theory that governments may create constitutional courts to perpetuate elite policies unlikely to be broadly popular. R Hirschl, ‘The Political Origins of the New Constitutionalism’ (2004) 11(1) *India Journal of Global Legal Studies* 71, 90–105.

²¹⁴ Lombardi (n 209) 218, 227.

²¹⁵ Constitution of the Arab Republic of Egypt, Art 2.

²¹⁶ Lombardi (n 209) 231.

²¹⁷ Ibid 232.

²¹⁸ Ibid 239.

²¹⁹ Ibid 239.

²²⁰ Ibid 218.

3.3.3.3 Religious and Indigenous Courts

- 83 Some countries with significant religious or indigenous communities have constitutionally established specialized courts to address cases affecting those communities. On religious communities, several African nations with Islamic majorities have established, though their constitutions, courts specializing and applying Sharia law. The Kenya constitution recognizes Khadis' courts with jurisdiction limited to questions of Islamic law regarding personal status, marriage, divorce, or inheritance.²²¹ The Nigerian constitution recognizes Sharia courts at both the national and state levels but does not delineate the scope of their authority.²²² And Egypt's constitution proclaims Islamic law '[t]he principal source of legislation' and authorizes its constitutional court to review legislation's compatibility with Islamic law.²²³ In Israel, the constitution recognizes the existence of a separate system of religious courts but gives the secular Supreme Court supervisory power, as a High Court of Justice, to police their jurisdiction.²²⁴
- 84 As for indigenous communities, Peru's constitution gives indigenous communities authority to create peasant patrols to exercise judicial functions compatible with national law and fundamental individual rights.²²⁵ Colombia's constitution recognizes the jurisdiction of indigenous judicial authorities over their own laws and procedures.²²⁶ New Zealand's unwritten constitution recognizes specialist tribunals to address matters pertaining to Māori lands.²²⁷ And Samoa's constitution recognizes a specialist Land and Titles Court of Samoa to adjudicate matters of matai lands.²²⁸

3.3.4 Party Status

- 85 Judicial allocations of cases can be based on party status. Many constitutional grants of authority to constitutional courts have some provisions based on party status, but those grants are integral to the nature and form of invoking that body's power of judicial review, and so such party-based allocations ought not to be seen as allocations separate from the allocation of the power of judicial review to specialized constitutional courts. Similarly, allocation of cases to religious or indigenous courts often require parties to be members of that affiliation,²²⁹ but it is the subject of the case, rather than the affiliation

²²¹ Constitution of Kenya, ch 10, pt 2, Sec 170.

²²² Constitution of Nigeria, Secs 239–240.

²²³ C Mallat, 'Islam and the Constitutional Order' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 1287, 1299.

²²⁴ Basic Laws of Israel, The Judiciary, ch 1(15d).

²²⁵ Political Constitution of Peru, tit IV, ch VIII, Art 149.

²²⁶ Constitution of Colombia, Art 246.

²²⁷ Senior Courts Act 2003, pt 4, Sec 65 (NZ); Supreme Court Act 2016, pt 1, Sec 4 (NZ); Treaty of Waitangi Act 1975 (NZ).

²²⁸ Constitution of Samoa, pt IX.

²²⁹ Constitution of Kenya, ch 10, pt 2, Sec 170 (requiring parties in a Khadis' court proceeding to be Muslim).

of the party, that drives the allocation. Likewise, horizontal allocations based on federalism often include party-status requirements, especially based on affiliations as political subdivisions or officials, but, again, party status is derivative of the primary motivation of the case allocation—here, federalism. Each of these types of case allocation is addressed in previous sections.

- 86 Judicial systems do allocate cases based primarily on party status, like the status of a party as a citizen or a noncitizen, as a minor or an adult, as a private party or a government official, or as an individual or an artificial legal entity. But most countries leave such allocations to their legislatures in the first instance.
- 87 A few exceptions are noteworthy. The United States constitution grants its federal courts jurisdiction over controversies between citizens of different states.²³⁰ The traditional rationale is that the federal courts might provide a more neutral forum than state courts when the dispute involves citizens of different states.²³¹ The constitutions of Australia and Argentina, countries heavily influenced by U.S. judicial structure, have similar allocations.²³²
- 88 A related allocation based on party status is the presence of a foreign party. The United States is the exemplar here, too, granting federal jurisdiction over controversies between a U.S. state or citizen and a foreign state or citizen.²³³ The typical rationale for this constitutional provision is that federal courts are more likely to give the foreign party neutral adjudication, and the national state of a federal court is more appropriate for the international implications of a case involving a foreign party.²³⁴ Argentina's constitution mimics the U.S. constitution on this score, and Brazil's constitution has a similar provision.²³⁵
- 89 Finally, the Nigerian constitution gives its Court of Appeal jurisdiction over appeals as of right from decisions where the custody of an infant is concerned or in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise.²³⁶ This level of constitutional specificity of party-based allocations is

²³⁰ Constitution of the United States, Art III, Sec 2.

²³¹ S Dodson, 'Beyond Bias in Diversity Jurisdiction' (2019) 69(2) *Duke Law Journal* 267, 271–279.

²³² Constitution of Australia, pt V, ch III, Art 75 (giving the High Court original jurisdiction in matters between residents of different states); Constitution of the Argentine Nation, div 3, ch 2, Sec 116 (giving the courts jurisdiction over actions between inhabitants of different provinces).

²³³ Constitution of the United States, Art III, Sec 2.

²³⁴ K R Johnson, 'Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens' (1996) 21 *Yale Journal of International Law* 1, 4–9.

²³⁵ Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 105 (granting the Superior Court of Justice jurisdiction over causes between a foreign State or international organisation and a Municipality or a person residing or domiciled in Brazil).

²³⁶ Constitution of Nigeria, Sec 241.

extremely anomalous; countries overwhelmingly leave such specifics to ordinary legislation.

3.3.5 Relief Sought

- 90 A common division for judicial allocation is the nature of the relief sought or at stake in a controversy. Specialized small-claims courts can hear cases only under a certain amount, while other courts may be devoted to minimum amounts in controversy. Another possible allocation based on relief is the nature of the relief as equitable or monetary. A related allocation is based on the urgency of the relief; specialized courts may be tasked with hearing requests for emergency relief. And, finally, in counties whose law has a significant religious dimension, the nature of the relief as religious or secular may also demand consideration of allocation to an appropriate court.
- 91 These allocations generally do not appear in constitutions, and, where they do appear, they are largely derivative of other driving forces. Some constitutions, for example, specifically mention the power of specialized courts to issue declarations of unconstitutionality or impeachment or writs of habeas corpus, but those provisions are better seen as allocations based on the subject-matter allocation of constitutional review (see constitutional courts, above), rather than on the nature of the relief.
- 92 The relative paucity of constitutionalized allocations based on civil relief makes some sense. Relief is a critical feature of judicial adjudication and substantive law, and thus any allocations among courts based on relief are lodged in the first instance in the legislature, which is primarily responsible both for the terms and parameters of the substantive law and for regulating courts' adjudicative power. Additionally, divisions of civil relief have little to do with questions of constitutional dimension, such as the structure of government or the nature of the judiciary as a sovereign actor. Constitutionalization of allocations based on relief may have more purchase in criminal cases, especially in prosecutions against government officials,²³⁷ or in cases of impeachment, which necessarily implicates questions of the separation of governmental powers, or in quasi-criminal proceedings such as habeas corpus, which also pits the judiciary against the executive.²³⁸ But allocations of judicial authority in ordinary civil cases based on the nature of the relief tend to be subconstitutional.
- 93 Exceptions are rare. Jamaica's constitution exhibits one exception, by allowing appeals as of right from its Court of Appeal to Her Majesty in Council where the matter in dispute is of the value of five hundred pounds or more, and over final decisions in proceedings for dissolution or nullity of marriage.²³⁹ Nigeria's constitution exhibits another, by giving

²³⁷ Eg, Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102 (giving the Federal Supreme Court ordinary appellate jurisdiction over political crimes).

²³⁸ Eg, *ibid*, Art 102(d) (giving the Supreme Court jurisdiction over certain habeas corpus proceedings).

²³⁹ Constitution of Jamaica, ch VII, pt 3, Art 110(2).

its Court of Appeal jurisdiction over decisions involving the case of a decree nisi in a matrimonial cause.²⁴⁰ Even these examples are hard to separate as allocations based on relief from allocations based on vertical structure or substantive subject matter.

4 ASSESSMENTS AND CONCLUSIONS

- 94 This chapter addresses the ways countries choose to use their constitutions to allocate cases. The choice to constitutionalize case allocation has two related implications.
- 95 First, because constitutions are more difficult to alter or amend than ordinary legislation, constitutional case allocations are likely to be more static than case allocations directed by ordinary legislation. Most case allocations in the US constitution, for example, have persisted unchanged for more than 200 years, except as modified through constitutional interpretation by the courts.²⁴¹
- 96 Second, and as a necessary corollary to constitutional stasis, constitutional case allocations are usually less detailed and less directive than statutory case allocations. Many countries, for example, constitutionally establish only a high court or a set of high courts and leave the creation of all other courts to the legislature to develop to serve the best needs of the country at the time. Further, constitutions tend to be less detailed about the case allocations to the various courts, again leaving those decisions to be made by the legislatures.
- 97 These two implications coupled together mean that trends and multinational convergences in case allocation, jurisdiction, and venue take place primarily through ordinary legislation and supranational law like treaties or conventions, which can operate in the space created by individual constitutions. Other chapters in this segment will address those trends and details.
- 98 Nevertheless, a study of constitutional case allocation itself does reveal insights about the world's judicial systems. One of the insights is the level of similarity that pervades the constitutional allocation of cases around the globe. Nearly all constitutions, for example, establish at least one ordinary court as a way to guarantee a judicial branch of government providing a public dispute-resolution function. Without the constitutional establishment of a court, the judicial power could be exercised by the political branches. Further, constitutions typically establish, either explicitly or implicitly, a vertical system of courts structured to exercise levels of review. Vertical structure gives the judicial branch form, mass, and legitimacy, while at the same time providing a triage system for improving the efficiency of the higher courts. Another commonality—with only a few

²⁴⁰ Constitution of Nigeria, Sec 241.

²⁴¹ For a notable court modification, see *International Shoe Co v Washington* (Supreme Court, US) [326 US 310 (1945)].

exceptions—is the general lack of constitutional case allocation based on party status or relief sought; those kinds of case allocations tend to be subconstitutional.

- 99 These similarities are at a certain level of generality. Further, although countries tend to share the goal of establishing a judicial system that resolves disputes with efficiency, fairness, and justice, differences remain in the constitutional design of implementing those goals through the judicial system. Those differences also reveal insights about case allocation in the various countries.
- 100 Some differences are motivated by the country's governmental character, including its level of commitment to constitutionalism and the separation of powers, to federalism or local autonomy, and to separate religious or indigenous traditions.
- 101 The commitment to constitutionalism and the separation of powers is reflected in how constitutions protect themselves from tyrannical political organs. One way is for the constitution to give to the courts—or a specialized court—the power to resolve constitutional disputes and to exercise the power of constitutional review. Countries whose courts lack this authority must rely on the political process to check governmental overreach. The commitment to the separation of powers is also reflected in the varying scopes of constitutional grants of jurisdiction: more constitutionally guaranteed judicial authority means less power for other organs of government. At one end of the spectrum, India's constitution gives its courts both judicial independence and the authority to decide many political matters, resulting in a strong judicial branch.²⁴² At the other end of the spectrum, China leaves the scope of the courts' jurisdiction entirely to the discretion of the National People's Congress,²⁴³ a choice consistent with a governmental structure dominated by the political powers.
- 102 Federalist governmental structure and commitments to local autonomy also influence constitutional case allocation. Federal countries like Australia, Brazil, Canada, Germany, and the United States use constitutional case allocation to balance the need for uniformity and supremacy of federal law against the need to retain a prominent role for local judicial systems. Such constitutions often grant jurisdiction over cases with national implications to federal courts and appellate jurisdiction over cases in local judicial systems to the highest federal court.²⁴⁴
- 103 Other differences are driven by variations in countries' sizes or population demographics. Countries of large size—especially large countries with federal structures—are more likely to have constitutional case allocations based on geography; Brazil, Canada, and the United States are prime examples. Some countries with religious

²⁴² Constitution of India, Arts 131–136.

²⁴³ Constitution of the People's Republic of China, Sec 7, Arts 127–128.

²⁴⁴ Constitution of Australia, pt V, ch III, Arts 73–76; Constitution of the Federative Republic of Brazil, ch III, Sec I, Art 102; Constitution of Canada, pt VII, Sec 96; Basic Law for the Federal Republic of Germany, Sec IX, Art 93; Constitution of the United States, Art III, Sec 2.

or indigenous populations have constitutionalized special courts to address issues arising from or important to those communities.²⁴⁵

- 104 Finally, constitutional differences can also be explained by history, culture, and tradition. The development of constitutional courts, in particular, reflects highly individualized stories about history, geopolitical power, and internal politics. Meanwhile, mimicry in other constitutional designs often follows shared common-law or civil-law traditions or geographic proximity. The common-law/civil-law divide helps explain some general divisions among constitutional case-allocation choices, such as whether case allocations based on geography should be constitutionalized or left to legislatures, whether judicial review is diffuse throughout the ordinary courts or is concentrated in a constitutional court, and whether subject-matter specialized courts are left to legislatures or are constitutionalized.
- 105 Comparative analysis of constitutional case allocation thus reveals similarities and differences among nations, along with a framework for understanding both.

²⁴⁵ Above para 83–84.

ABBREVIATIONS AND ACRONYMS

Amend	Amendment
Art	Article/Articles
CC	Constitutional Court
cf	<i>confer</i> (compare)
ch	chapter
Co	Company
Corp	Corporation
div	division
edn	edition/editions
ed	editor/editors
etc	et cetera
eg	<i>exempli gratia</i> (for example)
EU	European Union
fn	footnote (external, ie, in other chapters or in citations)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph
pt	part
Sec	Section/Sections
seg	segment
trans/tr	translated, translation/translator
tit	title
UK	United Kingdom
UP	University Press
UAE	United Arab Emirates
US/USA	United States of America
v	versus
vol	volume/volumes

LEGISLATION

Basic Laws and Constitutions

Basic Law 1990 (Hong Kong).

Basic Law for the Federal Republic of Germany 1949 (Germany).

Basic Laws of Israel 1958 (Israel).

Constitution of the Arab Republic of Egypt 2014 (Egypt).

Constitution of Algeria 1989 (Algeria).

Constitution of the Argentine Nation 1994 (Argentina).

Constitution of Australia 1901 (Australia).

Constitution of Austria 1945 (Austria).

Constitution of Belgium 1831 (Belgium).

Constitution of Canada 1867 (Canada).

Constitution of Chile 1980 (Chile).

Constitution of Colombia 1991 (Colombia).

Constitution of Costa Rica 1949 (Costa Rica).

Constitution of Croatia 1991 (Croatia).

Constitution of Cuba 1976 (Cuba).

Constitution of the Federative Republic of Brazil 1988 (Brazil).

Constitution of Finland 1999 (Finland).

Constitution of France 1958 (France).

Constitution of Ghana 1992 (Ghana).

Constitution of India 1949 (India).

Constitution of Iran 1979 (Iran).

Constitution of the Italian Republic 1947 (Italy).

Constitution of Jamaica 1962 (Jamaica).

Constitution of Japan 1946 (Japan).

Constitution of Kenya 2010 (Kenya).

Constitution of Lebanon 1926 (Lebanon).

Constitution of Mexico 1917 (Mexico).

Constitution of Nigeria 1999 (Nigeria).
Constitution of Norway 1814 (Norway).
Constitution of the People's Republic of China 1954 (China).
Constitution of Poland 1997 (Poland).
Constitution of the Republic of Estonia 1992 (Estonia).
Constitution of the Republic of Korea 1988 (South Korea).
Constitution of the Republic of South Africa 1996 (South Africa).
Constitution of the Republic of Turkey 1982 (Turkey).
Constitution of the Russian Federation 1993 (Russia).
Constitution of Samoa 1962 (Samoa).
Constitution of Saudi Arabia 1992 (Saudi Arabia).
Constitution of Singapore 1963 (Singapore).
Constitution of Spain 1978 (Spain).
Constitution of Sudan 2019 (Sudan).
Constitution of Switzerland 1999 (Switzerland).
Constitution of Tunisia 2014 (Tunisia).
Constitution of the United Arab Emirates 1971 (UAE).
Constitution of the United States 1787 (US).
Constitution of Venezuela 1999 (Venezuela).
Constitutional Act of Denmark 1953 (Denmark).
Political Constitution of Peru 1993 (Peru).

Other

Act of Union 1708 (UK).
Bill of Rights 1689 (Eng).
Constitution Act of 1840 (NZ).
Constitutional Reform Act 2005 (UK).
Human Rights Act 1999 (UK).
Law No 66 (1970) (Egypt).

Law No 81 (1969) (Egypt).

Magna Carta 1297 (Eng).

Senior Courts Act 2016 (NZ).

Senior Courts Act 1981 (UK).

Supreme Court Act 2003 (NZ).

Treaty of Waitangi Act of 1975 (NZ).

GOVERNMENTAL SOURCES

Learn About the Justice System (NZ) < <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/>> accessed 23 March 2023.

CASES

Burnham v. Superior Court, No 89-44 (Supreme Court, US) 29 May 1990 [495 US 604].

Case 65, Judicial Year 1 (High Administrative Court, Egypt) 10 February 1948.

Daimler AG v. Bauman, No 11-965 (Supreme Court, US) 14 January 2014 [571 US 117].

International Shoe Co v Washington, No 1345 (Supreme Court, US) 3 December 1945 [326 US 310].

Mallory v Norfolk Southern Railway Co, No 21-1168 (Supreme Court, US) 27 June 2023 [600 US 122].

Marbury v Madison (Supreme Court, US) 26 February 1803 [5 US 137].

Pennoyer v Neff (Supreme Court, US) 1 October 1877 [95 US 714].

S v Makwanyane, CCT 3/94 (CC, South Africa) 6 June 1995 [3 SA 391].

Walden v. Fiore, No 12-574 (Supreme Court, US) 25 February 2014 [571 US 277].

World-Wide Volkswagen Corp v Woodson, No 78-1078 (Supreme Court, US) 21 January 1980 [444 US 286].

BIBLIOGRAPHY

- Ackerman B, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 685.
- , *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard UP 2019).
- Ahdieh R, *Russia's Constitutional Revolution* (Penn State UP 1997).
- Arenhart S and Tulibacka M, 'Due Process' in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 1.
- Balthazar P, 'South Africa cannot afford another Chief Justice mistake' (25 October 2021) *Daily Maverick* <<https://www.dailymaverick.co.za/opinionista/2021-10-25-south-africa-cannot-afford-another-chief-justice-mistake/>> accessed 15 December 2022.
- Beattie K J, *Egypt During the Sadat Years* (Palgrave Macmillan 2000).
- Bell J, *French Constitutional Law* (Oxford UP 1992).
- Berger-Walliser G, 'Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts' (2018) 51(5) *Vanderbilt Journal of Transnational Law* 1243.
- Bickel A, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (2nd edn, Yale UP 1986).
- Bradley A W and Pinelli C, 'Parliamentarism' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 650.
- Brown N J, *The Rule of Law in the Arab World* (Cambridge UP 1997).
- Cappelletti M, 'Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe' (1971) 69(5) *Michigan Law Review* 847.
- , *The Judicial Process in Comparative Perspective* (Oxford UP 1989).
- Chase O G, Hershkoff H, Silberman L J, Sorabji J, Stürner R, Taniguchi Y and Varano V (eds), *Civil Litigation in Comparative Context* (2nd edn, West Academic 2017).
- Cohen E, 'The Jurisdiction of the Constitutional Court' (2021) 11(1) *Constitutional Court Review* 433.
- Colomer J M, 'Comparative Constitutions' in R E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford UP 2011) 176.
- Comelia V F, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82(7) *Texas Law Review* 1705.
- Conradt D P, *The German Polity* 254 (8th edn, Houghton Mifflin 2005).

Damaška M, 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment' (1968) 116(8) *University of Pennsylvania Law Review* 1363.

Dodge W S and Dodson S, 'Personal Jurisdiction and Aliens' (2018) 116(7) *Michigan Law Review* 1205.

Dodson S, 'Personal Jurisdiction and Aggregation' (2018) 113(1) *Northwestern University Law Review* 1.

—, 'Accountability and Transparency in U.S. Courts' in D Mitidiero (ed), *Accountability and Transparency in Civil Justice* (Thomson Reuters 2019) 273.

—, 'Beyond Bias in Diversity Jurisdiction' (2019) 69(2) *Duke Law Journal* 267.

—, 'Personal Jurisdiction in Comparative Context' (2020) 68(4) *American Journal of Comparative Law* 701.

Domej T, 'Access to Justice' in B Hess, M Woo, L Cadet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 2.

Feld L P and Voight S, 'Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators' (2003) 19(3) *European Journal of Political Economy* 497.

Ferejohn J E, 'Constitutional Review in the Global Context' (2003) 6(1) *NYU Journal of Legislation and Public Policy* 49.

Fix-Fierro H and Salazar-Ugarte P, 'Presidentialism' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 628.

Frosini J O and Pegoraro L, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 345.

Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asia* (Cambridge UP 2003).

—, 'Constitutional Courts in East Asia: Understanding Variation' (2008) 3(2) *Journal of Comparative Law* 80.

Di Gregorio A, 'The Evolution of Constitutional Justice in Russia: Normative Imprecision and the Conflicting Positions of Legal Doctrine and Case-Law in Light of the Constitutional Court Decision of 16 June 1998' (1998) 24(5/6) *Review of Central and East European Law* 387.

Groppi T, 'The Italian Constitutional Court: Towards a "Multilevel System" of Constitutional Review?' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 125.

Guarnierí C and Pederzoli P, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford UP 2002).

Harding A and Leyland P, 'Preface' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009).

Harding A, Leyland P and Groppi T, 'Constitutional Courts: Forms, Functions and Practice in Comparative Perspective' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 1.

Henderson J, 'The Constitutional Court of the Russian Federation: the Establishment and Evolution of Constitutional Supervision in Russia' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 148.

Hendley K, 'Assessing the Rule of Law in Russia' (2006) 14(2) *Cardozo Journal of International and Comparative Law* 347.

—, "'Telephone Law" and the "Rule of Law": The Russian Case' (2009) 1(2) *Hague Journal of the Rule of Law* 241.

—, 'Justice in Moscow?' (2016) 32(6) *Post-Soviet Affairs* 491.

Hirschl R, 'The Political Origins of the New Constitutionalism' (2004) 11(1) *India Journal of Global Legal Studies* 71.

Husa J, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' (2000) 48(3) *American Journal of Comparative Law* 345.

Hutchinson A C, 'Judges and Politics: An Essay from Canada' (2004) 24(1–2) *Legal Studies* 275.

Johnson K R, 'Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens' (1996) 21 *Yale Journal of International Law* 1.

Kahn P W, *The Reign of Law: Marbury v. Madison and the Construction of America* (Yale UP 1997).

Kelsen H, 'La Garantie Juridictionnelle de la Constitution (la Justice Constitutionnelle)' (1928) 45 *Revue de Droit Public et de Science Politique* 197.

Klug H, 'South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 263.

D P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke UP 1997).

Kommers D P and Miller R A, 'Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 102.

Lombardi C B, 'Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally "Islamic" State' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 217.

Lowenfeld A F, 'The Elements of Procedure: Are They Separately Portable?' (1997) 45(4) *American Journal of Comparative Law* 649.

Mahon P, 'Judicial Federalism and Constitutional Review in the Swiss Judiciary' in A Ladner, N Soguel, Y Emery, S Weerts and S Nahrath (eds), *Swiss Public Administration* (Springer 2018) 137.

Mallat C, 'Islam and the Constitutional Order' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 1287.

Mavčič A, *A Tabular Presentation of Constitutional / Judicial Review Round the World* (2004)

<<https://www.concourts.net/The%20Constitutional%20Review%20sample.pdf>> accessed December 15, 2022.

Merryman J H, *The Civil Law Tradition* (3rd edn, Stanford UP 2007).

Michaels R, 'Two Paradigms of Jurisdiction' (2006) 27(4) *Michigan Journal of International Law* 1003.

Moustafa T, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge UP 2007).

Murray P and Stürner R, *German Civil Justice* (Carolina Academic Press 2004).

Neiva-Fenoll J, 'Constitutionalisation and Fundamentalisation of the Review of Court Decisions' in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg V, ch 4.

Ponthoreau MC and Hourquebie F, 'The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice' in A Harding and P Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill 2009) 81.

Ragone A P, 'Case Management from a Comparative Perspective: Horizontal and Vertical Court Arrangements' (2021) 85(1) *IUS Gentium* 35.

Romeu F R, 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2(1) *Review of Law and Economics* 103.

Russian Public Opinion, 2012–2013 (Levada Analytical Center 2013)
<https://www.levada.ru/sites/default/files/2012_eng.pdf> accessed 15 December 2022.

Sadurski W, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer 2014).

Scheppele K L, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for Rule of Law in Post-Soviet Europe' (2006) 154(1) *University of Pennsylvania Law Review* 157.

Shapiro M and Stone A, 'The New Constitutional Politics of Europe' (1994) 26(4) *Comparative Political Studies* 397.

Solomon P, 'Judicial Power in Russia: Through the Prism of Administrative Justice' (2004) 38(3) *Law and Society Review* 549.

Stürner R, 'The New Role of Supreme Courts in a Political and Institutional Context from a German Point of View' in *Annuario di Diritto Comparato e di Studi Legislativi* (Edizioni Scientifiche Italiane 2011) 335.

Sweet A S, 'Constitutional Courts' in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford UP 2012) 816.

Taniguchi Y, 'Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems' in N Trocker and V Varano (eds), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli 2005) 91.

de Tocqueville A, *De la démocratie en Amérique* vol 1 (R Heffner tr, Mentor Books 1956).

Trochev A, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (Cambridge UP 2008).

Trochev A and P H Solomon Jr. P H, 'Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State' (2018) 51(1) *Communist & Post-Communist Studies* 201.

van Calster G and de Andrade F, 'Due Process' in B Hess, M Woo, L Cadiet, and E Vallines (eds), *Comparative Procedural Law and Justice* (IAPL 2025) seg XV, ch 5.