

ASSESSMENT OF DE JURE JUDICIAL INDEPENDENCE OF CONSTITUTIONAL COURTS ACCORDING TO INTERNATIONAL GUIDELINES

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Abstract

Judicial independence of constitutional courts is of paramount importance because it upholds the rule of law, protects individual rights, and maintains checks and balances in a democracy. Moreover, it ensures impartiality, prevents the abuse of power, and fosters public trust in the legal system. By interpreting and applying the law without external influence, an independent judiciary safeguards the principles of justice and democratic governance. This Article provides criteria for assessing *de jure* judicial independence of constitutional courts according to four renowned international documents that set normative standards for protecting judicial independence. These four documents are synthesises the literature about the definition of judicial independence, particularly in the context of constitutional courts, and analyses four international guidelines that set essential standards for protecting the independence of the judiciary. These four guidelines are: Basic Principles on the Independence of the Judiciary by the UN,¹ Report of the Special Rapporteur on the Independence of Judges and

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

Lawyers,² the Universal Charter of the Judges,³ and International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.⁴ Using conceptual and doctrinal analysis, this Article identifies three key elements of *de jure* judicial independence: personal, institutional, and procedural. It also establishes practical criteria to evaluate whether the laws governing a specific constitutional court uphold or undermine its *de jure* judicial independence. Importantly, it is crucial to distinguish between *de jure* and *de facto* judicial independence because merely enacting constitutional provisions and laws to safeguard the judiciary does not automatically guarantee an independent judiciary in practice. The discussion of these principles highlights how personal, institutional, and procedural independence can be established and preserved within the courts. This Article concludes that the common purpose of these principles is to protect judges from unwarranted interference, especially from the executive branch. Among the various principles, the most crucial ones were found to be independent judicial appointment procedures and ensuring judges' tenure is protected against retaliatory actions by the governing regime.

Keywords: De Jure and De Facto Judicial Independence; Personal Independence; Institutional Independence; Procedural Independence

I. INTRODUCTION

Christopher Larkins stipulates that '[d]espite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law'.⁵ However, a clear characteristic of judicial independence as a concept is that it is relational, i.e. it describes the relationship between the judiciary vis-à-vis other institutions.⁶ Dordrecht and Shetreet claimed persuasively that '[t]he increasing role which the judiciary has assumed warrants some re-examination of the conceptual framework and the theoretical rationales which define its position vis-à-vis the other branches of the government'.⁷

² Leandro Despouy, "Special Rapporteur," (Report of the Special Rapporteur on the Independence of Judges and Lawyers, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41, 24 March 2009).

³ *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 1.

⁴ "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors" (International Commission of Jurists, 2007).

⁵ Christopher Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis* (The American Society of Comparative Law, 1996), 607.

⁶ Owen Fiss, *The Law as it Could Be* (New York University Press, 2003), 55.

⁷ *Ibid.*, 590.

Judicial independence finds its roots in the principle of the separation of powers, which aims to establish a set of checks and balances between the three powers of the state: the legislative, the executive, and the judicial.⁸ The role of judges, as holders of public posts, is to decide disputes between litigants in adjudicative procedures.⁹ These procedures are affected by three actors: the decision-maker (the judge), the institution (the court rules), and the subject-matter of litigation (the case).¹⁰

Since judges in both lower and higher courts are obliged to decide on cases with strict adherence to the law, judges' independence from the undue interference of the other two powers is a prerequisite for a fair judgment.¹¹ A fair judgment is one which is based on discounting all that is irrelevant to applying the law on the facts presented to the court, which includes particular considerations to the parties, judges' self-interest, and the interests of those who appointed them to their judicial offices.¹² Therefore, judicial independence is a fundamental element of the judges' role, an element that enables the judiciary to exercise its functions by reviewing the actions of civilians and, more importantly, actions of the executive and the legislature, to ensure the protection of rights and the punishment of transgressors through fair trials.¹³

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

⁸ Bernd Hayo and Stefan Voigt, "Explaining De Facto Judicial Independence," *International Review of Law and Economics* 27, no. 3 (2007): 267, 271–2.

⁹ Roderick A. Macdonald and Hoi Kong, "Judicial Independence as a Constitutional Virtue," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 832.

¹⁰ Steven B. Burbank and Barry Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman (Los Angeles: Sage Publications Inc., 2002), 12.

¹¹ Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 345, 349.

¹² Drew A. Linzer and Jeffrey K. Staton, "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence" (Paper presented at The Annual Meeting of the American Political Science Association, Seattle, September 2011), 5.

¹³ Julio Ríos-Figueroa and Jeffrey K. Staton, "An Evaluation of Cross-National Measures of Judicial Independence," *Journal of Law, Economics, and Organization* 30, no. 1 (2012): 104, 104.

any reason'.¹⁴ Without judicial independence, undue interference would impinge on judges' application of law, causing the courts to become unable to exercise their functions.¹⁵

Owen Fiss provides a practical explanation of judicial independence by arguing that is achieved when three conditions are fulfilled: 'party detachment', 'individual autonomy', and 'political insularity'.¹⁶ Notably, these conditions are different from the elements of judicial independence, which as will be explained later, are the elements that regimes themselves should provide to the judicial power in order to fulfil these conditions.

Party detachment is the independence that judges have vis-à-vis the litigants who stand before the bench. This is the core of the judicial role, which is also referred to as the impartiality of judges. It requires judges to not unduly favour the interest of any party. This concept is also known as behavioural independence, which requires that judges be shielded from subordination to political pressure. To achieve it, judges must have security of occupation, by guaranteeing a fixed tenure,¹⁷ transparent procedures of judicial inspection against 'retaliatory removal',¹⁸ and financial security, through generous salaries and pensions.¹⁹

Next, individual autonomy is the independence of a judge vis-à-vis other judges in the same bench. This allows judges to make their own decisions and pronounce dissenting opinions.²⁰ To achieve it, the grounding of judicial recruitment on merit is necessary, by selecting judges according to their educational qualifications and expertise.²¹ Equally important is a social culture

¹⁴ Richard Stacey and Sujit Choudhry, "International Standards for the Independence of the Judiciary" (The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers, International IDEA, 2013), 2.

¹⁵ Brad Epperly, "Political Competition and De Facto Judicial Independence in Non-Democracies," *European Journal of Political Research* 56, no. 2 (2017): 279, 279; See generally Lewis A. Kornhauser, "Is Judicial Independence a Useful Concept?" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman (Los Angeles: Sage Publications Inc., 2002), 48.

¹⁶ *Ibid.*, 55.

¹⁷ Gerard Brennan, "Judicial Independence," High Court of Australia.

¹⁸ Donald Jackson, "Judicial Independence in Cross-National Perspective," in American Bar Association, *Judicial Independence: Essays, Bibliography, and Discussion Guide* (1999), 27.

¹⁹ Martin L. Friedland, Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council* (1995).

²⁰ Thomas E. Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia,' *William & Mary Bill Rights Journal* 5, no. 1 (1996).

²¹ Jackson, "Judicial Independence."

that obliges the regime to show genuine commitment to the rule of law instead of disdain of courts' rulings and political meddling.²²

Last, political insularity is the independence of the judiciary vis-à-vis other institutions in the state, particularly the executive. Courts, especially constitutional, administrative, and anti-corruption courts, are often targets of undue interference in authoritarian regimes, through procedures that enable the sidelining of 'disloyal' judges. The last concept is also referred to as institutional independence, which requires clear rules of judicial function.²³ What is required to achieve this are reasonable methods for reprimanding personal or professional misdeeds and dismissal for official misbehaviour.²⁴

II. ELEMENTS OF JUDICIAL INDEPENDENCE

Protecting judges as individuals and courts as institutions from undue interference requires a set of principles that can help in establishing the elements of judicial independence. These elements are: independent judges, also known as personal or professional independence; independent courts, also named operational or institutional independence; and independent procedures, also called procedural or decisional independence, which means that other state powers do not unduly interfere in the litigation process.²⁵

There are preeminent international law texts that uphold judicial independence, and provide guidelines for establishing independent judiciaries. The International Covenant on Civil and Political Rights ('ICCPR'), which is 'hard' international law that is legally binding on its signatories, asserts the critical importance of a fair trial, because it is the duty of the judiciary to act as the ultimate guarantor of human rights in the state.²⁶ Domestically, the judiciary acts as such by securing the rule of law to ensure that all legislative actions are consistent with the constitution, and that all executive actions are in

²² Friedland, Canadian Judicial Council.

²³ Peter Russell and David O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World, Constitutionalism and Democracy* (Charlottesville: University Press of Virginia, 2001), 6.

²⁴ Friedland, Canadian Judicial Council.

²⁵ Bernd Hayo and Stefan Voigt, "Explaining Constitutional Change: The Case of Judicial Independence," *International Review of Law and Economics* 48, no. 1 (2016): 1, 5.

²⁶ *Ibid.*

conformity with enacted statutes.²⁷ This duty would not be adequately fulfilled without insulating the judiciary from undue interference. Article 14 of the ICCPR provides that:

All persons are equal before courts and tribunals, and all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law.²⁸

The United Nations Human Rights Committee produced an influential document that provides an authoritative interpretation of this binding Article, known as General Comment No. 32.²⁹ It is a valuable explanation of the right of fair trial and how even non-signatories to the ICCPR must fulfil it, since it is part of customary international law.³⁰ The General Comment provides a working definition for an independent judiciary in light of that Article: courts must be impartial, display no bias or favour, not pre-judge cases, be politically independent, and not be subject to or beholden to influence from the legislative or executive branches of government, in order to fulfil their functions without fear.³¹

Leading international organisations and judicial support networks held numerous discussions to define a set of ideal provisions of judicial independence to which states around the world should strive to adhere.³² These organisations and networks described them as ‘ideal’ because, in reality, it is not possible to adhere to all of them.³³ Thus, judicial independence is a principle that requires substantial protection of the judiciary as a first step, then continues demanding constant improvement of states’ adherence to those provisions. Accordingly, it is not expected of states that they fulfil all the obligations described in this set.³⁴

²⁷ See generally Lisa Hilbink, “The Origins of Positive Judicial Independence,” *World Politics* 64, no. 4 (2012): 587.

²⁸ UN Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [3].

²⁹ *Ibid.*

³⁰ Katherine Glenn Bass and Sujit Choudhry, “Constitutional Review in New Democracies,” (International IDEA, 2013), 4.

³¹ *Ibid.*, 15-29.

³² James Melton and Tom Ginsburg, “Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence,” *Journal of Law and Courts*, no. 2 (2014): 187, 187–8.

³³ Charles M. Cameron, “Judicial Independence: How Can You Tell It When You See It? And, Who Cares,” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Steven B. Burbank and Barry Friedman (Sage Publications Inc., 2002), 134.

³⁴ Lydia Brashear Tiede, “Judicial Independence: Often Cited, Rarely Understood,” *Journal Contemporary Legal Issues* 15 (2006): 129, 136.

Rather, a progressive endeavour to provide the judiciary with essential protection from undue interference is what this set demands.³⁵ Considering the varying degrees of progressing in that endeavour, states around the world have shown various degrees of commitment to the provisions of this set, which means they fall on different points along the spectrum of judicial independence. Thus, it is incorrect to classify judiciaries around the world according to a simple dichotomy of ‘independent’ and ‘not independent’.³⁶

The global standards of judicial independence can be synthesised from four primary documents that were produced by international organisations to support judges worldwide: the Basic Principles on the Independence of the Judiciary by the UN (‘Basic Principles’);³⁷ the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers (‘Special Rapporteur’);³⁸ the Universal Charter of the Judges (‘Universal Charter’);³⁹ and the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors (‘International Principles’).⁴⁰

The organisations that arranged conferences and discussions to prepare those documents are among the leading and most influential organisations in the field of judicial independence and the rule of law around the world.⁴¹ These documents therefore offer an authoritative, comprehensive source for a set of principles that assists in assessing the independence of judicial institutions, bearing in mind that comparative differences do appear when the assessment is conducted.

³⁵ Ibid.

³⁶ Mathew D. Mc Cubbins, Roger Noll and Barry R. Weingast, “Conditions for Judicial Independence,” *Journal of Contemporary Legal Issues* 15 (2006): 105, 123.

³⁷ Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1 (*Basic Principles of Judicial Independence*).

³⁸ Leandro Despouy, Special Rapporteur, *Report of the Special Rapporteur on the independence of judges and lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009) (*Special Rapporteur on the independence of judges*).

³⁹ The Universal Charter of the Judge approved by the International Association of Judges on 17 November 1999 art 1.

⁴⁰ José Zeitune, “International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors” (Paper, International Commission of Jurists, 2004).

⁴¹ See International Association of Judges’s website at <http://www.iaj-uim.org/home/> and International Commission of Jurists’ website at <https://www.icj.org/>

These four international documents can be employed to pragmatically evaluate the degree of independence in both higher and lower courts.⁴² In what follows, the elements of judicial independence — personal, institutional, and procedural — will be explained in turn, to show how the principles related to each element protect the independence of judges. These principles are set to eliminate, or at least reduce as much as possible, undue political interference of the non-judicial officials in judges' profession.⁴³

2.1. Personal Independence

The rules of judicial tenure are the major focus of most materials on judicial independence. Judicial tenure includes all aspects of judges' profession: appointment and selection, term of office, remuneration and salaries promotion, resignation, discipline, and removal. For the aspect of selection, the Basic Principles declare that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'.⁴⁴ Also, the Universal Charter asserts that '[w]here this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, which includes substantial judicial representation'.⁴⁵ One purpose of requiring this limited involvement is to avoid to judicial self-restraint, which might occur if the judiciary is the sole controller of judicial selection, leading to avoiding judicial review of critical matters that might trigger a response of irrepressible political incursion into courts' independence.⁴⁶ Both provisions avow the need to have a selection process that is transparent and objective, with limited involvement of non-judicial institutions that are unlikely to have common improper motives, to avoid the dominance of the executive power.

Regarding judicial appointments to constitutional courts, Choudhry and Bass convincingly argue, in a way similar to Kelsen's original vision, that

⁴² Robert M. Howard and Henry F. Carey, "Is an Independent Judiciary Necessary for Democracy?" *Judicature* 87, no. 6 (2004): 284.

⁴³ Bass and Choudhry, "Constitutional Review," 4.

⁴⁴ *Basic Principles of Judicial Independence*, art 10.

⁴⁵ *The Universal Charter of the Judge*, art 9.

⁴⁶ G. Alan Tarr, *Without Fear or Favour: Judicial Independence and Judicial Accountability in the States* (Stanford University Press, 2012).

different political actors have to participate in appointing constitutional judges, because that promotes the judges' accountability and 'creates a sense of political investment', urging those who might lose in litigation before a court to abide by its judgments rather than challenging its independence.⁴⁷ Both scholars support this argument by proposing a set of principles that 'must' guide the appointment procedures of constitutional judges: 'widespread participation from different political constituencies; division of the powers to appoint and remove justices; and establishing qualifications to ensure the selection of judges of high legal expertise'.⁴⁸ The critical impact of constitutional court's rulings makes it necessary to shield them from potential attempts to undermine their legitimacy, especially by losing parties.⁴⁹

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

There are five models of appointing constitutional judges that are relatively consistent with the principles mentioned above. The first is the legislative supermajority model, in which the parliament dominates the appointment procedure. The essence of this model requires a supermajority for candidates to be appointed, which might be two-thirds or three-fifths of the parliament, to prevent the ruling party from achieving a simple majority to appoint its nominees.⁵⁰ In states that have two chambers system, both chambers may participate in electing candidates. Because of the supermajority requirement, this model promotes a process of compromise and negotiation between opposition and government party in the parliament. In Germany, this model was a factor in fostering a collective

⁴⁷ Sujit Choudhry and Katherine Glenn Bass, "Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence" (Center for Constitutional Transitions at UNY Law and International Institute for Democracy and Electoral Assistance, 2014), 10.

⁴⁸ Ibid.

⁴⁹ John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77, no. 4 (2002): 962, 1002–3, 1007.

⁵⁰ Andrew Harding, Peter Leyland and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," in *Constitutional Courts: A Comparative Study*, ed. Andrew Harding and Peter Leyland (London: Wildy, Simmonds & Hill, 2009), 15.

sense of political investment among parties when appointing judges to the Federal Constitutional Court.⁵¹ Nevertheless, a compromise on a candidate may be difficult in states that have intense partisan conflicts. Another challenge to this model in states with highly-fragmented parties is that a deadlock could be encountered during the appointment if the parties come to reach the specified supermajority.⁵²

The second model is the judiciary-executive model, in which both judicial and executive powers share the authority to appoint constitutional judges. Generally, senior judges from higher courts propose a list of candidates to the executive power, which must, in turn, formally appoint the candidates it selects from that list.⁵³ Other versions of this model have both roles exchanged between the executive and the senior judges, in which the latter appoint the selected candidates from a list that the executive power proposes. The reason behind excluding the parliament in this model is to shield the court from short-term political concerns.⁵⁴ Nonetheless, this sort of shielding might exclude the opposition in the parliament, which undermines the sense of political investment in the constitutional court, and might trigger accusations of political bias. The Egyptian Supreme Constitutional Court and the Iraqi Federal Supreme Court are appointed according to variations on this model.⁵⁵

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

⁵¹ Choudhry and Bass, 9.

⁵² *Ibid*, 11–12.

⁵³ Harding, Leyland and Groppi, 14.

⁵⁴ Bass and Choudhry, "Constitutional Review," 12.

⁵⁵ *Ibid*.

especially in states where the president is not from the majority party in the parliament, which could divert the hearings from their original goal of assessing the judicial qualifications of those candidates.⁵⁶

The fourth model is the judicial council model, in which political parties participate in creating a council to insulate the appointment procedures from undue interference. Often, non-political actors take a role in this council, such as law scholars, bar associations, and human rights activists. The council supervises the appointment process by inviting eligible candidates to submit their applications, interviewing them, and either sending a short list of the most suitable candidates to the executive and legislative powers to appoint who they both agree on, or directly selecting the candidates in a determinative manner. South Africa is a prominent example of a state that applies in this model. Its Judicial Service Commission is composed of executive officials, members of both chambers of parliament, judges, lawyers, and law scholars, and this helped to establish a sense of political investment, with its judgments being widely respected.⁵⁷ Another iteration of this model is to require recommendations of candidates from the judicial council at the first formation of the court (i.e. selecting the candidates for the first bench ever), while in following appointments, filling vacant chairs in the bench, the constitutional court itself, not the judicial council, nominates candidates to the president. A problem with this model is the ability to compose the council of qualified members, and how to reach an agreement about the criteria for membership, particularly in developing and transitional states.⁵⁸

Last is the multi-constituency model. Mainly to avoid controversy over designing a selection committee, the three powers (with the participation of civic organisations in some variations of this model) engage in the appointment process by having a specified quota of the court's posts.⁵⁹ In contrast with the judicial council model, the participants have either direct or indirect authority to

⁵⁶ Harding, Leyland and Groppi, 14.

⁵⁷ Choudhry and Bass, 'Constitutional Courts,' 11.

⁵⁸ Harding, Leyland and Groppi, 14.

⁵⁹ Ibid 14.

appoint their nominees to the court. If it is direct, participants can appoint their candidates without having to consult or gain the approval of other participants, which allows them to act independently. If it is indirect, participants can either nominate candidates or approve already-nominated ones. Notably, if parliament members do not reach an agreement on candidates, then appointments by them might be delayed. This model could theoretically create a divided panel, since judges might tend to show 'gratefulness' for the institutions that selected them by unjustifiably serving their interests. In Italy, this model has been applied since 1953 and it endorsed a positive sense of political investment in the court's composition.⁶⁰ The Turkish Constitutional Court also adopted this model in the constitutional amendments of 2010.⁶¹

In all these models, judicial appointments must be based on objective criteria. The Special Rapporteur emphasises 'the importance of the establishment and application of objective criteria in the selection of judges, [which] should relate particularly to qualifications, integrity, ability and efficiency'.⁶² The International Principles declare that 'selection criteria must not be discriminatory and must embody safeguards against appointments based on partiality or prejudice'.⁶³ Thus, a merit-based, and not partiality-based, selection process is a prerequisite for appointing qualified judges.

Furthermore, judges must have secure terms of office, which might take the form of long-fixed terms, retirement-age terms, or life-long terms. Most states prefer a long fixed-term of appointment for constitutional judges to ensure more frequent replacements compared to the other two forms, seeking a bench that represents prevailing moral values of the wider public.⁶⁴ Allowing renewable terms, especially when such renewals are dependent on legislative or executive approvals, might impinge on the personal independence of the judges. The reason is the possibility of judges' being under pressure to make decisions that unduly

⁶⁰ Choudhry and Bass, 12.

⁶¹ *Ibid.*

⁶² *Special Rapporteur on the independence of judges*, [30].

⁶³ *International Principles on Judicial Independence*, 72.

⁶⁴ Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Massachusetts: Edward Elgar Publishing, Inc., 2011), 270.

please those from whom they need renewal.⁶⁵ Germany, for instance, changed its Federal Constitutional Court's law in 1970, from allowing for renewal of terms by parliament members to non-renewable terms, to eliminate politically-driven approved or refused renewals.⁶⁶

Additionally, promoting judges must be according to non-arbitrary processes, and accepting a judge's resignation must require the involvement of both judicial and executive (or legislative) officials to prevent any forced resignation.⁶⁷ Courts must not be abolished or restructured to terminate judicial tenures; and removal procedures, including those of disciplining judges, must be conditional upon the investigation of grave incapacity or misbehaviour under the supervision of judicial institutions. The Universal Charter affirms that '[a] judge must be appointed for life or such other period and conditions, that the judicial independence is not endangered' and '[a] judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure'.⁶⁸ Also, the International Principles proclaim that '[t]he determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing'.⁶⁹

2.2. Institutional Independence

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

Additionally, judges must not be rewarded or punished for performing their judicial tasks. Thus, they must avoid any reward from the executive or

⁶⁵ Bass and Choudhry, 4.

⁶⁶ Donald Kommers, *Autonomy Versus Accountability: The German Judiciary, in Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Virginia: University Press of Virginia, 2001), 148–9.

⁶⁷ Ubaid ul-Haq, "Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who Has the Right Idea?" (2010).

⁶⁸ *The Universal Charter of the Judge*, art 8.

⁶⁹ *International Principles on Judicial Independence*, 56.

legislative powers for a judgment they have made. Most importantly, they must enjoy immunity from punishment or revenge by litigants whose interests have been adversely affected by a judgment. This immunity must also take the form of physical security, through ensuring the safety of judges and their families, especially when threats have been made against them. The Universal Charter states that '[c]ivil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under specific circumstances ensuring that his or her independence cannot be influenced.'⁷⁰ Moreover, the International Principles assert that '[a]ll necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.'⁷¹

Furthermore, judges as public officials must refuse to fill roles that are likely to intrude into their performance of judicial duties, such as roles of policy advising for the government or statutory counselling for the Parliament. This issue entwines with judges' personal independence, as accepting such role might cause conflict of interest and lead to biased judgments. Nevertheless, in cases where there is no probability of contradiction between judges duties and a particular role, being appointed to that role is acceptable, such as acting as a member of investigation commission after retirement, or holding an administrative position in the judiciary under the supervision of the judicial power. The Basic Principles confirm that 'judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.'⁷² Moreover, the Special Rapporteur asserts 'the importance of the participation of judges in debates concerning their functions and status as well as general legal debates.'⁷³ Both provisions support that judges be involved in what might strengthen the rule of law and uphold justice in their states, as long as such involvement does not impinge on their independence.

⁷⁰ *The Universal Charter of the Judge*, art 7.

⁷¹ *Special Rapporteur on the independence of judges*, [160], citing *Specific standards on the independence of judges, lawyers and prosecutors*, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, Council of Europe.

⁷² *Basic Principles of Judicial Independence*, art 8.

⁷³ *Special Rapporteur on the independence of judges*, [45].

Also, assigning cases to judges must not be in a way that allows the legislative or executive power to choose who should sit on the bench for a certain case. Thus, the docket control must be managed by courts alone to prevent capricious allocation of critical cases to specific judges.⁷⁴ Furthermore, transferring judges between courts, and forming judicial benches must be rigid and immune to discretionary control by the executive power. Such immunity might assist in preventing retaliation against judges who pronounce judgments unfavourable to the executive.⁷⁵ The Universal Charter declares that the administration of the judiciary ‘must be organised in such a way, that it does not compromise the judges’ genuine independence’.⁷⁶

Importantly, it is not possible for courts to be completely independent from the legislature, because the latter’s approval of the court’s budget is required.⁷⁷ Thus, it is critical for the judiciary to participate in preparing its budget with the parliament. This participation helps to prevent any coercive financial restrictions against the judiciary and shield the judiciary from any external pressure. Moreover, funding and resourcing of courts must be adequate to facilitate the courts’ work, without leaving the executive power to control the allocation of funds to the judiciary. The Special Rapporteur endorses that ‘entrusting the administration of funds directly to the judiciary or an independent body responsible for the judiciary is much more likely to reinforce the independence of the judiciary’.⁷⁸

2.3. Procedural Independence

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

⁷⁴ Jonathan P Kestellec and Jeffrey R Lax, “Case Selection and the Study of Judicial Politics,” *Journal of Empirical Legal Studies* 5, no. 3 (2008), 407.

⁷⁵ Lydia Brashear Tiede, “Judicial Independence: Often Cited, Rarely Understood,” *Journal Contemporary Legal* 15 (2006): 129, 136, 79.

⁷⁶ *The Universal Charter of the Judge*, art 11.

⁷⁷ Daniel M Klerman, and Paul G Mahoney, “The Value of Judicial Independence: Evidence from Eighteenth Century England,” *American Law and Economics Review* 7, no. 1 (2005): 1, 2–3.

⁷⁸ *Special Rapporteur on the independence of judges*, [43].

Hence, courts must have autonomy to decide whether matters fall within their jurisdiction, in a manner that prevents executive or legislative impingement on the courts' role. By having such comprehensive jurisdiction, courts can obstruct legislative diminution of courts' jurisdiction that Ubaid ul-Haq correctly describes as 'the most effective means through which [executive and legislative] branches could invade the judiciary'.⁷⁹ Moreover, Lydia Tiede refers to expanding court's jurisdiction as a purpose of judicial reform:

[J]udicial reform efforts have focused on providing judges with specific powers to decide certain types of cases which were previously out of the purview of the courts. For example, judicial reform in some former dictatorships, has focused on providing power to civil courts to hear cases once primarily reserved for military courts. Comparatively, the institutionalisation of power and authority of non-elected officials also may enhance independence.⁸⁰

Additionally, the executive power must execute courts' judgments without any changes. Individuals, corporations, commissions, executive agencies, and local governments must comply with courts' judgments, because, in many legal systems, 'the judiciary ... has neither the capacity to enforce its will nor the ability to oversee compliance with its instructions'.⁸¹ The Basic Principles and the International Principles uphold that '[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.⁸²

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

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

⁷⁹ Ul-Haq, "Judicial Independence in Light," 12, 41.

⁸⁰ Jodi Finkel, "Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court," *Journal of Latin American Studies* 35, no. 4 (2003): 777.

⁸¹ McCubbins, Noll and Weingast, "Conditions for Judicial Independence."

⁸² *Basic Principles of Judicial Independence*, art 3; *International Principles on Judicial Independence*, 22.

protect a party or policy that might or did lose political power and in fact did so, this might logically be counted an effective court.⁸³

He argues against what might be considered a promising approach to solve this difficulty, which is ‘to assume that the ostensible purpose is to deter constitutional actors from abusing their position or abusing individual human rights; if we find that in fact they were so deterred because of the prospect of a robust response from the court, we could perhaps conclude there is success.’⁸⁴ His counter-argument is that ‘even here, how are we to judge the motivation or not of the actors and what standards are we to apply if not those laid down by the court itself?’⁸⁵

This explanation demonstrates how difficult it is to build criteria for assessing a court’s degree of effectiveness, as original intentions are hard to identify, and genuine motivations behind the political elites’ complicity with a constitutional judgment are even harder to detect.⁸⁶ Both challenges impede determining the true impact of constitutional courts. Another incorrect approach is the statistical analysis of judgments, because significant cases for a certain regime could make only a small number of cases compared to the entire caseload of the court.⁸⁷ Additionally, significant cases may relate to separate subjects of the court’s jurisdiction, and not all courts make their judgments available to the public.⁸⁸ Thus, it is incorrect to assess a court’s effectiveness according to statistics, as Comella concurs:

[S]ome laws are more important than others. A court would not be [effective] if it never deviated from the parliament with respect to the key issues, even if it overturned lots of legal provisions of marginal importance ... [and] it may very well happen that a parliamentary majority abstains from enacting a particular law out of fear that the court will invalidate it. A strong judiciary may cause this sort of ‘chilling effect’ on the legislature.⁸⁹

⁸³ Harding, Leyland and Groppi, 23.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid., 9.

⁸⁷ Ibid., 8–9.

⁸⁸ Alec Stone Sweet, “Constitutional Courts,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andrés Sajó (Oxford University Press, 2012), 828.

⁸⁹ Comella, 272.

Nevertheless, in the normative sense, constitutional courts are established primarily to ensure adherence to the constitution, by holding the state powers accountable and upholding the constitution's supremacy over legislation, leading to 'effective implementation of constitutional rules'.⁹⁰ This is the normative purpose of establishing a constitutional court, and a court is considered effective to the extent it correctly performs that fundamental function and pronounces judgments that are 'consistent with the norms set out in the constitution'.⁹¹ Therefore, for a constitutional court to be effective, it should make use of available opportunities to fulfil 'the specific purpose of protecting the constitution', which may be facilitated by adopting a purposive rather than a literalist approach in adjudication.⁹²

A suitable approach to assess a certain constitutional court's effectiveness might be that proposed by Sweet, because, as the following benchmarks suggest, effectiveness should be assessed on a case-by-case basis, taking into consideration the differences between cases' subjects and the political tensions present at submission time:⁹³

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

Second, and the most important, constitutional judgments should be strongly-reasoned and logically-justified. A court that makes decisions that are criticised by constitutional jurists as being rationally absurd or lacking cogency would give rise to questions about its competence or motivation.⁹⁴ Assessing a court's arguments is subject to many factors such as: the record of the judgments it has issued, the constitutional heritage of its predecessor (if any), the purposes that the court was established to fulfil, the sort of the review conducted by the court (whether abstract or concrete), and more importantly the nature of

⁹⁰ Chen and Maduro, 97.

⁹¹ See especially Harding, Leyland and Groppi, 4–5, 24.

⁹² Victor Ferreres, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism," *Texas Law Review* 82 (2003), 1705, 1711.

⁹³ Sweet, 825.

⁹⁴ Harding, Leyland and Groppi, 22.

the state's constitution itself, since the constitution is the core reference in the review process.⁹⁵

Third, the court's decisions should be perceived as having binding effect on those subject to its jurisdiction. If a regime acts contrary to a court's decisions when its interests are at risk, then the binding effect of the court's judgments is undermined. For some regimes, maintaining control, punishing political enemies, and rewarding allies are far more important than showing obedience to the constitutional court's judgments.⁹⁶

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

First, direct, original action (or petition). This action is submitted by a person (whether legal or natural) who might be aggrieved — or was in fact aggrieved as some legal systems require — by the application of a certain law, seeking direct challenge of its constitutionality. This action is distinguished for its independent feature, since the fact of being aggrieved by the application of the law suffices as an acceptable reason to submit this sort of action.⁹⁷ The constitutional court starts by examining whether the grievance, claimed by the submitter, is possible, or actual, and caused by the challenged law. If that is found true, then the submitter is considered as having an 'interest' in this action, and the constitutional court proceeds to assess the consistency between the constitution and the challenged law.

This avenue is different from that of limiting direct, original access to certain executive or legislative officials, who have standing without aggravation, such as the president, the prime minister, a specified number of parliament members,

⁹⁵ Juliane Kokott, and Martin Kaspar, "Ensuring Constitutional Efficacy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 805–11.

⁹⁶ Sweet, 825.

⁹⁷ Harding, Leyland and Groppi, 9.

or a human rights agency.⁹⁸ This action is considered the most efficient avenue of constitutional review, since it has minimal procedures compared to the other three avenues, which assists the constitutional court to achieve prompt constitutional stability in the legal system.

This avenue of constitutional review is consistent with the positive constitutional right that some systems provide for every citizen, namely the right to have access to the specialised court and enjoy equality before the judiciary.⁹⁹ Nevertheless, some states do not allow for this action, for example, the Constitutional Council in France.¹⁰⁰ Additionally, many other constitutional courts confine this action only to individual rights violations, for example, the German and Spanish Constitutional Courts.¹⁰¹

The second avenue is subsidiary referral conducted by ordinary courts when judges perceive a serious possibility of unconstitutionality concerning a certain legislative provision.¹⁰² Here, judges *sua sponte* (i.e. without the request of the parties) suspend the litigation and refer the issue of unconstitutionality to the constitutional court.¹⁰³ The importance of this avenue lies in enabling the judges themselves to refer legislative provisions that are potentially unconstitutional to the constitutional court without a request from a disputing party, allowing ordinary judges to participate in maintaining the constitutional consistency of the legal system.¹⁰⁴

The third avenue is the adversary's rebuttal. The rebuttal is conducted upon a request from a disputing party to the ordinary court, in which that party challenges the constitutionality of a certain legislative provision that the court expresses its intention to apply in the dispute. In contrast to the previous avenue, the rebuttal cannot be *sua sponte* initiated by the judge.¹⁰⁵ If the ordinary court found this rebuttal serious and worthy of constitutional assessment, then it is

⁹⁸ Andrew Harding, "The Fundamentals of Constitutional Courts" (International IDEA, April 2017), 5.

⁹⁹ Comella, 267.

¹⁰⁰ *Ibid.*

¹⁰¹ Comella, 267; Sweet, "Constitutional Courts," 828.

¹⁰² Harding, "The Fundamentals of Constitutional Courts."

¹⁰³ Harding, Leyland and Groppi, 9.

¹⁰⁴ Comella, 267.

¹⁰⁵ Andrew Harding, "The Fundamentals of Constitutional Courts," 5.

obliged to suspend the litigation, as it is the duty of the judge not to apply legislative provisions that appear to be unconstitutional.¹⁰⁶ Then, the judge allows the adversary to request, within a defined period, the constitutional court's assessment of the challenged law. If the period expires without the adversary submitting the request, then the ordinary court continues with the procedures of the original dispute and disregards any further objections from the same adversary regarding that legislative provision.¹⁰⁷

The fourth avenue is confrontation by the constitutional court itself, which takes place while the constitutional court is adjudicating on a constitutional dispute presented to it through one of the three avenues mentioned above, or while answering a request to interpret a constitutional or a legislative text. If the court realises that another legislative provision, relevant to the original dispute is unconstitutional, then it has the right to *sua sponte* review it.¹⁰⁸ The confrontation is a matter that asserts the comprehensive jurisdiction of the constitutional court on all laws even if they are not directly challenged by a certain person or entity.¹⁰⁹

In conclusion, these four avenues provide constitutional courts with regular review of laws, but the vital benchmark of those explained above is to have strongly-reasoned and well-argued judgments.

III. DE JURE AND DE FACTO INDEPENDENCE

The importance of differentiating between *de jure* and *de facto* judicial independence arises from the fact that writing constitutional provisions and enacting laws to protect the judiciary do not necessarily result in a *de facto* independent judiciary.¹¹⁰

I begin with the definition of *de jure* independence. Rios-Figueroa and Staton define it as 'formal rules designed to insulate judges from undue pressure, either

¹⁰⁶ Harding, Leyland and Groppi, 9.

¹⁰⁷ Comella, 267.

¹⁰⁸ Ibid., 268.

¹⁰⁹ Ibid.

¹¹⁰ Hayo and Voigt, "Explaining De Facto Judicial Independence."

from outside the judiciary or from within'.¹¹¹ Examples of such rules are those related to judicial appointment and removal procedures, tenure, inspection, and budget. These rules may be contained in the constitution itself or in statutes (enacted under the authority of the constitution) that establish and regulate the courts. Similarly, Linzer and Staton define *de jure* independence as 'a set of formal institutions [reflected in law] —such as fixed budgets or cumbersome removal procedures— that are thought to provide incentives for independent judging'.¹¹²

The principles explained above about the elements of judicial independence (personal, institutional, and procedural) seek to achieve *de jure* independence, in order to reach *de facto* independence, since the former is a necessary but not sufficient condition for the latter. These principles include the notions that judicial appointments must be based on qualification and merits; that judges must refuse to fill roles that may impinge on their judicial duties; and that courts must have autonomy to decide whether matters fall within their jurisdiction.¹¹³

De facto independence can be measured by two distinct, yet related, criteria: autonomy and influence.¹¹⁴ Autonomy means that 'judges be the authors of their own opinions',¹¹⁵ and that they do 'not respond to undue pressures to resolve cases in particular ways'.¹¹⁶ Stated otherwise, judges are independent in the sense of autonomy when their decisions reflect their own application of the law, and when what they think sincerely about the dispute before them determines their judgment.¹¹⁷

In comparison, influence means that a court's decisions are 'enforced in practice even when political actors would rather not comply', instead of being

¹¹¹ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).

¹¹² Drew A. Linzer and Jeffrey K. Staton, "A Global Measure of Judicial Independence," *Journal of Law and Courts* 3, no. 2 (2015), 223, 225.

¹¹³ Charles D Crabtree and Christopher J Fariss, "Uncovering Patterns among Latent Variables: Human Rights and Judicial Independence" *Research & Politics* 2 (2015): 1, 2.

¹¹⁴ Clifford J. Carrubba and Christopher Zorn, "Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States," *Journal of Politics* 72, no. 3 (2010): 812, 822–3.

¹¹⁵ Kornhauser, "Is Judicial Independence a Useful Concept?"

¹¹⁶ *Ibid.*, 45–55. See Epperly, "Political Competition," 279; Rosenn S. Keith, "The Protection of Judicial Independence in Latin America," *The University of Miami Inter-American Law Review* 19, no. 1 (1987): 1, 3–35.

¹¹⁷ Frans Van Dijk, Frank van Tulder and Ymkje Lugten, "Independence of Judges: Judicial Perceptions and Formal Safeguards," *Netherlands Council for the Judiciary* 4 (2016); Charles Crabtree and Michael J. Nelson, "New Evidence for a Positive Relationship between De Facto Judicial Independence and State Respect for Empowerment Rights," *International Studies Quarterly* 61, no. 1 (2017): 210.

routinely ignored or poorly implemented.¹¹⁸ Hamilton et al argue that courts depend on the assistance of other political authorities to enforce their decisions because they lack financial or physical means of coercion.¹¹⁹ According to Cameron, judicial independence in this sense reflects a causal relationship between how judges ‘think the underlying conflict they are adjudicating should be resolved and how it is resolved in practice’.¹²⁰

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

Rios-Figueroa, Linzer, and Staton affirm that assessing *de facto* independence is a challenging task because of the difficulty of isolating lack of autonomy as the principal reason why a judge has acted in a particular way.¹²¹ Other reasons for issuing judgments that are in favour of the regime include, but are not limited to, the relevant legal texts being unclear or not supporting decisions against the regime, poor quality argument before the Court due to the incompetence of counsel, or incompetence on the part of judges themselves.¹²²

However, this thesis, through the methodology it adopts (which is explained in its introduction), provides compelling evidence that the problem with the Court’s judgments lies in poor argumentation and ill justification of decisions.

¹¹⁸ Ibid., See Daniel M Brinks, and Abby Blass, “Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice,” *International Journal of Constitutional Law* 15, no. 2 (2017): 296, 304.

¹¹⁹ Ibid.; see Jeff Yates, Andrew B. Whitford and David Brown, “Perceptions of the Rule of Law: Evidence on the Impact of Judicial Insulation,” *Social Science Quarterly* 100, no. 1 (2019):198.

¹²⁰ Cameron, “Judicial Independence,” 134–43.

¹²¹ Kirk A Randazzo, Douglas M Gibler and Rebecca Reid, “Examining the Development of Judicial Independence,” *Political Research Quarterly* 63, no. 3 (2016): 583, 587; Frans Van Dijk and Geoffrey Vos, “A Method for Assessment of the Independence and Accountability of the Judiciary,” *International Journal for Court Administration* 9, no. 1 (2017): 1, 6.

¹²² See Van Dijk and Philip, “Reaction on the Comments.”; Bernd Hayo and Stefan Voigt, “The Long-Term Relationship between *De Jure* and *De Facto* Judicial Independence,” *Economics Letters* 183, no. 1 (2019); Clifford J Carrubba et al, *The Comparative Law Project* (Emory University, 2015); Helmke, Gretchen, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2012).

This is hard to accept from the judges of a constitutional court, particularly considering the high level of expertise and long years of experience that those judges supposedly have. The criticism of the 36 judgments of the Court is not targeted to what counsel argued, or how clear the relevant legal texts were. Rather, it is against the Court's arguments and justifications used to reach the conclusion in each judgment.

States are obliged to guarantee a *de facto* independent judiciary because 'compliance [with judicial independence rules] is the normal organisational presumption'.¹²³ Also, Martha Finnemore and Kathryn Sikkink argue that the reason for that obligation is the basic rule *pacta sunt servanda*, i.e. the social contract between the people and their rulers. Therefore, they consider guaranteeing *de facto* independence as an integral element of the state's legitimacy.¹²⁴

The emphasis on *de facto* independence comes from the observation that global norms are becoming more influential, and that it is only a matter of time before more states ostensibly adopt constitutional methods to protect the judiciary, even if not in the practical realm. In other words, because of the influence of these methods in distinguishing between democratic and authoritarian regimes; the latter are more likely to adopt these methods without having the capacity or readiness to truly implement them. As a result, such incapacity will cause 'decoupling between promise and practice'.¹²⁵

Tsutsui and Hafner-Burton emphasise that the adoption of those methods might regularly take the form of 'a symbolic gesture to signal that the government is not a deviant actor'.¹²⁶ Both authors contend that, in some international treaties of human rights, if 'the legitimacy of a treaty grows to the extent that non-ratifying states look like deviants, governments are more likely to ratify

¹²³ Beth A Simmons and Richard H Steinberg, *International Law and International Relations: An International Organization Reader* (Cambridge University Press, 2007).

¹²⁴ Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, (Massachusetts Institute of Technology Press, 1998), 903–4.

¹²⁵ Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* (London: Sage Publications, 1999), 145.

¹²⁶ Emilie M Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises* (Chicago: University of Chicago Press, 2005).

without willingness or capacity to comply with the provisions, thus increasing the likelihood of decoupling'.¹²⁷

De facto independence of constitutional courts relates primarily to their legitimacy. Because constitutional review could result in nullifying legislation based on unconstitutionality, such nullification might be objected to as an undemocratic decision, because constitutional courts consist of unelected judges, as opposed to the legislator who is an elected representative of the people.¹²⁸

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

To elaborate, if a court is demonstrating an illogical, unpersuasive interpretation of the constitution, then it is highly expected to be politically biased and even arbitrary.¹²⁹ There is no 'perfect' interpretive mode that a constitutional court can consider; rather, the judicial review style and judicial tradition play a role in shaping a suitable interpretive model.¹³⁰ For example, constitutional courts in the common law system issue precedents that are binding upon all courts, with prospective (and sometimes retroactive) effects that make their legal impact at the same level as a law.

In civil law systems, courts sometimes provide basic, sparse reasoning in their judgments. Harding and Leyland affirm that judgments of civil law courts

¹²⁷ Oona A Hathaway, "Do Human Rights Treaties Make a Difference?" (Faculty Scholarship Series Paper No. 839, Yale Law School, January 2002); Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington, D.C: Georgetown University Press, 2005).

¹²⁸ Chen, Albert H Y and Miguel Pioares Maduro, "The Judiciary and Constitutional Review," in *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner and Cheryl Saunders (Abingdon: Taylor and Francis, 2013), 103.

¹²⁹ Harding, Leyland and Groppi, 22.

¹³⁰ Chen and Maduro, 103.

generally ‘do not engage with the arguments presented or those referred to by other judges or in other cases dealing with similar issues, especially those with which the judge presumably disagrees; they fail in general terms to justify the decisions taken; holdings are binding but not the reasoning.’¹³¹ Thus, a more explained reasoning of the conclusion they reach is required in every judgment to demonstrate a robust adjudication process.

IV. CONCLUSION

In conclusion, this Article has delved into the establishment of a comprehensive set of criteria for assessing the de jure independence of constitutional courts. Recognizing the significance of judicial independence in upholding the rule of law, protecting individual rights, and ensuring democratic governance, this study has aimed to provide a framework that enables an objective evaluation of the independence of constitutional courts worldwide.

By employing methods of conceptual and doctrinal analysis, this Article has identified three key elements of de jure judicial independence: personal, institutional, and procedural. These elements serve as the foundation for the developed criteria, which encompass various dimensions of a constitutional court’s functioning.

The criteria presented in this Article offer a multidimensional approach to assessing the independence of constitutional courts. They encompass the composition of the court, including the appointment and removal processes, the tenure of judges, the court’s jurisdiction and access to justice, as well as its overall effectiveness and administrative matters. By examining these aspects in detail, it becomes possible to ascertain the extent to which a constitutional court operates independently from external interference.

Moreover, this Article has emphasized the importance of distinguishing between de jure and de facto judicial independence. While constitutional provisions and laws are necessary for establishing de jure independence, they

¹³¹ Harding and Leyland, “Constitutional Courts of Thailand and Indonesia,” 333.

do not automatically guarantee its practical realization. Therefore, the developed criteria not only take into account the formal legal framework but also consider the actual functioning and effectiveness of the court in practice.

By providing a comprehensive and structured framework for assessing de jure independence, this Article aims to contribute to the promotion of an impartial and effective judiciary worldwide. It is hoped that the criteria outlined herein will facilitate discussions, research, and reforms in the field of judicial independence, ultimately strengthening the rule of law and upholding democratic principles in diverse constitutional contexts.

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