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Birzeit Legal Encounters

October 1996

Adrien K. Wing
Sonya R. Braunschweig
Qais Abdel - Fatah



JUDICIAL REVIEW IN PALESTINE



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JUDICIAL REVIEW IN PALESTINE

I.	Introduction	5
II.	Creation of a Palestinian Constitution: Constitutional Review in the Palestinian Draft Basic Law	8
III.	Democracy Without Judicial Review: The British Model	10
IV.	Comparative Perspectives on Systems of Judicial Review: What are Palestine's Options?	12
A.	Implementing Judicial Review Within Different Legal Cultures & Traditions	13
1.	The United States System: An Active, Judicially Determined Form of Review	13
2.	The Israeli System: An Inactive, Judicially Determined Form of Review	14
3.	The South African System: A Constitutionally Enumerated Form of Review	16
4.	Our Proposal for Palestine: An Enumerated Form of Review	17
B.	Judicial Structure for Implementing Judicial Review: Decentralized vs. Centralized	17
1.	The United States Decentralized System: All Courts have the Power of Review	18
2.	The South African Centralized System: Review as a Power for a Constitutional Court	20
3.	Our Proposal for Palestine: A Centralized System of Review	21
C.	Types and Methods of Judicial Review: A Priori/A Posteriori and Abstract/Concrete Review	22
1.	The French System: A Priori and Abstract Review	23
2.	The United States System: A Posteriori and Concrete Review	25
3.	The German System: A Posteriori and Abstract/Concrete Review	27
4.	Our Proposal for Palestine: A Mixed System of Review Based on French and German Influences	31



V.	Suggestions for a System of Judicial Review in Palestine	32
A.	Establishing a System of Review: What is the	
	Appropriate System?	32
B.	The Mechanics of Judicial Review: The Legal Actors	32
	1. Eligibility	33
	2. Tenure	33
	3. Salary and Pension	33
	4. Recruitment	34
	5. Accountability	35
C.	Relation of Reviewing Body to Other Branches of the	
	Government	35
	1. Separation of Powers	36
	2. Judicial Independence	36
VI.	Conclusion	37

JUDICIAL REVIEW IN PALESTINE

Adrien K. Wing,^{*}
Sonya R. Braunschweig,^{**}
Qais Abdel-Fatah^{***}

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and in the next place oblige it to control itself.¹

I. Introduction

In January 1996, the Palestinian people took a step toward democracy by participating in free elections for a president and an eighty-eight member Palestinian national council.² Whatever the weaknesses, the fact that over one million people registered and most voted--males and females, Muslims and

^{*} Professor of Law, University of Iowa College of Law, A.B. 1978, Princeton; M.A. 1979, UCLA; J.D. 1982, Stanford Law School.

^{**} J.D. 1996, University of Iowa College of Law; B.A. 1989, Coe College; M.A. 1992, University of Iowa.

^{***} L.L.M. International and Cooperative Law 1996, University of Iowa College of Law; B.A. 1994, Amman University.

¹ THE FEDERALIST No. 51, at 337 (James Madison) (Random House 1937).

² John Battersby, *Birth of a Nation: Almost*, THE CHRISTIAN SCI. MON., Jan. 19, 1996, at 10.



Christians--for at least some individuals who were not hand-picked candidates of a president, is unique for the region.³

While free elections are a significant step in the establishment of a democratic society, other steps must be made to achieve a new legal order. The Palestinian Authority Basic Law of January 1996 (1996 Draft) tries to break with the past system of occupation and oppression by establishing fundamental principles of democracy. It does this in part by providing for an entrenched bill of rights⁴ which is subject to judicial review by a constitutional court.⁵

Judicial review can be broadly defined as any judicial action that involves reviewing an inferior legal norm to decide whether it conforms to higher legal principle, such as a constitution.⁶ It is entirely possible that the reviewing court will invalidate the inferior legal norm for unconstitutionality if it is necessary or desirable to the outcome of the case.⁷ This definition of judicial review includes review of statutes enacted by the legislature, as well as review of actions taken by administrative and executive agencies for their compliance with constitutional rules and principles of law.⁸

The 1996 Draft calls for judicial review by a constitutional court without explicitly enumerating the mechanics of the system. Yet Palestine's legal history with judicial review has been nominal. While the Jordanian Constitution of 1952 did not formally provide for judicial review, those Palestinians who were Jordanian citizens could call on the High Court to review actions that allegedly violated their rights as citizens. Moreover, the High Court did not have to apply or implement those acts or laws that were considered to be unconstitutional.⁹

³ Adrien K. Wing, *The Palestinian Elections: An International Legal Context*, Presentation for The Jerusalem Fund 2 (Jan. 26, 1996) (on file with Adrien K. Wing).

⁴ See THE PALESTINIAN AUTHORITY BASIC LAW (Fourth Draft), ch. 2, arts. 8-35, *reprinted in* 1996 PALESTINE REP. 15, 17-19 (Special Supplement) [hereinafter 1996 Draft]. Article 8 states:

Palestine recognizes and respects the fundamental human rights and freedoms prescribed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, and other Conventions and Covenants which secure such rights and freedoms. Palestinian authorities shall adhere to the said international agreements.

Id. ch. 2, art. 8.

⁵ See *id.* at ch. 6, art. 113, at 24.

⁶ Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 561 (1993).

⁷ *Id.*

⁸ *Id.* It can also encompass the reviewing of administrative and executive acts in compliance with statutes. *Id.* This, however, is beyond the focus of this article.

⁹ Ibrahim Sha'ban, JUDICIAL REVIEW AND THE CONSTITUTIONALITY OF LAWS 6 (Qais Abdel-Fatah trans. & Martha Charepoo ed., 1995). The High Court in decision no. 44/67 stated:

The Constitution is the source of all authority and it divides this authority between the three branches of the government. Each branch must respect the principles of the

The Court maintained its judicial review power in the West Bank until an Israeli military order abolished its power in 1967.¹⁰

Progress toward developing a democratic society requires that there be constraints on the three branches of government so that no single entity disregards the rule of law. Thus, a central function of judicial review is to ensure the separation of powers within Palestinian society. According to former Chief Justice Bhagwati of the Indian Supreme Court,

[t]he power of judicial review is the most effective weapon in the hands of the judiciary to protect the constitution and keep the different organs or functionaries of the State within the limits of power conferred upon them and to safeguard the basic or fundamental rights of the individual or collectivity from assault by the State or its officers.¹¹

Judicial review also can be used to protect basic individual rights and freedoms identified by the 1996 Draft. To ensure that these fundamental rights are not violated by legislative or executive actions, the judiciary must have the power of judicial review to declare these acts unconstitutional. Thus, judicial review can be a means to effectively protect the rights of individuals and political or religious minorities. Moreover, judicial review can contribute significantly to the development of the law and its adaptation to changing conditions within the emerging Palestinian society.¹²

Constitution, and thus, if the legislative branch enacts an unconstitutional law, the judiciary must not be forced to apply it. Therefore, the courts cannot apply any legislation which was enacted by an unauthorized body or which was enacted without abiding by the constitution.

Id. According to Article 97 of the 1952 Jordanian Constitution, the judges were deemed independent and were "subject to no authority but that of the law." ABID A. AL-MARAYATI, *MIDDLE EASTERN CONSTITUTIONS AND ELECTORAL LAWS* 163 (1968).

¹⁰ Sha'ban, *supra* note 9. The abolition of the High Court profoundly affected the administration of justice in the West Bank. RAJA SHEHADEH, *THE WEST BANK AND THE RULE OF LAW* 18 (1980). Before this structural change, the court structure provided three levels of appeal, starting with the Court of First Instance to the Court of Appeals and finally to the High Court. *Id.* The High Court Justices' duties included appointing judges, disciplining judicial staff, and reviewing complaints made by the Inspector of the Court. *Id.* at 19. "As justices of the highest court in the country, they acted as guardians of the proper functioning and independence of the judiciary. With the elimination of this court, these functions suffered accordingly." *Id.*

¹¹ P.N. Bhagwati, *Role of the Judiciary in Developing Societies: New Challenges*, in *LAW, JUSTICE AND THE JUDICIARY: TRANSNATIONAL TRENDS* 35 (Tun M. Salleh Abas & Dato Visu Sinnadurai eds., 1988).

¹² Alexander von Brunneck, *Constitutional Review and Legislation in Western Democracies*, in *CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON* 233 (Christine Landfried ed., 1988). Constitutional courts try to make their judgments such that the result and the reasoning will be respected by society. *Id.* at 232. They must ensure this so that their specific role in society is not damaged. *Id.* To ensure that their decisions accepted, constitutional judges usually strive internally for consensus and externally for a careful explanation of their reasoning. *Id.* at 233.



The purpose of this article is to consider the contours of judicial review for Palestine. Due to constraints inherent in the various Palestinian-Israeli accords, we realize that these suggestions may have limited applicability during the autonomy period. We are hopeful that an independent Palestine will have more flexibility and authority to consider our suggestions.

To suggest which judicial features, structures, and processes would benefit the implementation of judicial review in Palestine, this article attempts to compare various systems of judicial review within the common-law and civil-law traditions. Section II first discusses the creation of the Palestinian Constitution and the enumerated powers of the judicial system. This discussion reveals that while judicial review is advocated within the Basic Law, the mechanics of the system need to be formulated. Section III outlines the various options for the Palestinian state to consider when devising a system of judicial review. Each system discussed is then critiqued in terms of advantages and disadvantages in protecting fundamental rights and freedoms within Palestinian society. The final section of this article offers our proposal for establishing a Palestinian constitutional court with the power to exercise judicial review.

II. Creation of a Palestinian Constitution: Constitutional Review in the Palestinian Draft Basic Law

To write the first Palestinian Constitution, Palestinian National Authority President Yasser Arafat appointed legal scholars to the Palestinian High Legal Commission.¹³ The Chair of this Commission is a British-Palestinian barrister, Dr. Anis Al-Qasem.¹⁴ It is hoped that the Interim constitution will be the guiding principle upon which a final constitution can be formed.¹⁵ The aim of the Basic Law, according to Dr. Al-Qasem, is to establish a democratic parliamentary system with free political parties, freedom of expression, due process, and "where the rule of law is respected by all."¹⁶ To date, several drafts have been written which have culminated in the publishing of the Fourth Draft in January 1996.

The emergence of the Fourth Draft took over two years to complete in a process "which a great number of people and institutions have democratically participated in, and in a manner where the citizen's right to participate in legislation pertinent to him or her was respected."¹⁷ The first proposal for a Palestinian basic law was drafted in accordance with a Palestinian National

¹³ ADRIEN K. WING, *DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE OF PALESTINE: WITH A CASE STUDY OF WOMEN'S RIGHTS* 3 (PASSIA 1994).

¹⁴ Gary Hengstler, *First Steps Toward Justice*, A.B.A. J., Feb. 1994, at 52.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Anis Al-Qasem, *Introduction to THE PALESTINIAN AUTHORITY BASIC LAW (Fourth Draft)*, *supra* note 4, at 16.

Council resolution issued in November 1988 and a 1993 directive from the PLO's Executive Committee.¹⁸ The completed draft was submitted to the Executive Committee in December 1993 for its consideration. The Committee found that it was imperative to open the deliberations so that all sectors of Palestinian society could respond.¹⁹ In response to the comments received, a second proposal was drafted and discussed in February 1994.²⁰ Following the Second Draft's publication in the local media, further changes were made, culminating in a third draft published in May 1994.²¹ After discussing the third proposal, the Palestinian Independent Commission for Citizens Rights established a special legal committee to draft a fourth proposal.²² Upon completion of the fourth proposal, President Arafat requested that the 1996 Draft be reviewed before submitting a final draft to the Palestinian Legislative Council for its consideration.²³

The 1996 Draft outlines the role of the judiciary in Chapter 6, Articles 108 to 114. Article 109 establishes the independence of the judicial system by subjecting judges only to the rule of law.²⁴ The Basic Law also sets forth the structure of the judicial system with the Supreme Court comprising of a high constitutional court, a court of cassation, and a high court of justice.²⁵

The High Constitutional Court will have the power to judicially review the constitutionality of laws and regulations.²⁶ The High Court of Justice will have jurisdiction over administrative disputes,²⁷ and the Court of Cassation will have the power to adjudicate criminal, civil, and commercial matters.²⁸ "The entire judiciary will be revamped and become an appointed one in which there will be guarantees of independence and tenure."²⁹ Moreover, and most

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Al-Qasem, *supra* note 17.

²³ 1996 Draft, title page, *supra* note 4.

²⁴ See 1996 Draft ch. 6 art. 109 ("No other authority may interfere in individual cases or in the administration of justice."). This may not be easy to maintain if other Middle Eastern experiences are taken into consideration. For example, in Saudi Arabia, it is the King and his Council of Ministers who are the definitive decision makers regarding legislative, executive, and judicial matters. See S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 305-27 (1985) (analyzing the Saudi Arabian legal system). See also WING, *supra* note 13, at 29-30 (discussing how the judiciary in most Middle Eastern countries rubber-stamps the policies of the executive branch).

²⁵ See 1996 Draft, ch. 6, art. 113, *supra* note 4, at 24.

²⁶ See *id.* art. 113(1) ("A High Constitutional Court which shall have exclusive jurisdiction of judicial review of constitutionality of laws and regulations and construction of legal provisions in the manner prescribed by law").

²⁷ See *id.* art. 113(3) ("A High Court of Justice which shall have jurisdiction over administrative and other disputes in the manner prescribed by law").

²⁸ See *id.* art. 113(2) ("A Court of Cassation in criminal, civil and commercial matters in the manner prescribed by law").

²⁹ WING, *supra* note 13, at 30.

importantly, the Draft Basic Law states that "no law, administrative order or action may be excluded from review by the judiciary."³⁰

While the Basic Law enumerates the basic judicial structure of the emerging Palestinian state, it fails to explicitly state the roles and responsibilities of the judiciary. Thus, the remainder of this article will compare systems of judicial review and offer suggestions which may benefit the ongoing democratic process within Palestine. For Palestine, the diversity of the various systems can offer not only theoretical choices, but also practical consequences for devising a unique system of judicial review which can penetrate and gain legitimacy in Palestine.

III. Democracy Without Judicial Review: The British Model

It is important to note that judicial review is not synonymous with democracy. Although the trend in newly developing democratic societies is to advocate a system of judicial review,³¹ it is possible to have a system of parliamentary supremacy with no judicial review.³²

For example, even though common-law countries base their structure and institutions on the British model, the British system differs in one important aspect from most common-law countries: it has no form of judicial review.³³ This notable difference is due to the fact that the British system has no "single document or bundle of documents which embody the constitution."³⁴ Instead, the British constitution derives from statutes, customs, common law rules, and constitutional conventions.³⁵ British constitutional laws and norms do not differ from other laws; no distinction is made between fundamental laws and those

³⁰ 1996 Draft ch. 6 art. 113(5), *supra* note 4, at 24.

³¹ See generally Mark F. Brzezinski & Lexzek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L L. 13 (1995) (discussing the expansion of the power of judicial review in Poland after the fall of the Communist Party); Samuel O. Gyandoh, Jr., *Interaction of the Judicial and Legislative Processes in Ghana Since Independence*, 56 TEMPLE L.Q. 351 (examining the implementation of judicial review in Ghana, a former British colony); Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 B.Y.U. L. REV. 41 (analyzing the role of the newly created Constitutional Court within the emerging democratic state of Hungary).

³² Apartheid South Africa was one common-law country which did not allow judicial review. Utter & Lundsgaard, *supra* note 6, at 578; Charles Villa-Vicencio, *Whither South Africa?: Constitutionalism and Law-Making*, 40 EMORY L.J. 141, 145-48 (1991) (essay). Apartheid South Africa followed the British model of legislative supremacy and thus had no power of judicial review. Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a New South African Order: Towards an Alternative Judicial Structure*, 55 ALB. L. REV. 367, 374-75 (1991). Although commentators argued that the judicial system in apartheid South Africa was above reproach and that some of the finest judges in the world sat on the bench, the courts applied the government's discriminatory apartheid policies without question. *Id.* at 375-76.

³³ Utter & Lundsgaard, *supra* note 6, at 577. Common-law nations who have some form of judicial review include, Canada, the United States, India, and Australia.

³⁴ D.C.M. YARDLEY, INTRODUCTION TO BRITISH LAW 3 (1984).

³⁵ MARY L. VOLCANSEK, JUDICIAL POLITICS IN EUROPE 203 (1986).

laws which are not considered fundamental.³⁶ "Because there [is] no constitutional 'higher law' in Great Britain, there [is] nothing upon which to base judicial review."³⁷ Constitutional change within the British system occurs in the same manner as any other legislative change: an ordinary act of Parliament may amend or repeal any existing law.³⁸

Since the Glorious Revolution of 1688,³⁹ the British Parliament has reigned supreme. Thus, it is not possible for the judiciary to question the validity of an act of Parliament.⁴⁰ The British courts must treat all acts of Parliament as legally binding, unless an act has been amended or repealed by Parliament in another statute.⁴¹ "Thus the courts, like all other institutions of the United Kingdom, have powers subordinate to the one most basic concept of the British constitution, the sovereignty of Parliament."⁴²

Although judicial review has not taken hold, the British system has been able to protect civil and political rights through the rule of law.⁴³ The courts will protect certain inalienable personal liberties and fundamental rights unless Parliament has explicitly stated otherwise.⁴⁴ British theorists also emphasize that if the government infringes upon individual rights, a legal remedy is available in a court of law, thereby countering the need for judicial review.⁴⁵

Implementing the British model to a new and developing system of government--such as Palestine--is problematic. The legislative, executive, and

³⁶ "There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional laws which are fundamental or constitutional." Utter & Lundsgaard, *supra* note 6, at 577 (quoting A.V. DICEY, *LAW OF THE CONSTITUTION* 89 (9th ed. 1948)).

³⁷ *Id.*

³⁸ EDWARD MCWHINNEY, *JUDICIAL REVIEW* 31 (4th ed. 1969).

³⁹ Before 1688, the monarch was the supreme law of the land. YARDLEY, *supra* note 34, at 32. In 1688, Parliament seized power from the monarch in a bloodless revolution, thereby ridding the country of the reigning monarch, James II. *Id.* James II was replaced by William III and Mary II, on the condition that they recognize parliamentary supremacy. *Id.*

⁴⁰ *Id.* at 60.

⁴¹ *Id.*

⁴² YARDLEY, *supra* note 34, at 60.

⁴³ See Utter & Lundsgaard, *supra* note 6, at 578 (discussing how a strong "rule of law" tradition can counter parliamentary supremacy in maintaining fundamental freedoms).

⁴⁴ David G. Barnum, *Constitutional Organization and the Protection of Human Rights in Britain and the United States*, in *COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS* 191 (John R. Schmidhauser ed., 1981).

⁴⁵ According to A.V. Dicey, a well-known scholar of British constitutional law:

The Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing liberty.

Id. (citing A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 199 (1967)).

administrative branches of British government have traditionally shown restraint in derogating certain political and civil rights.⁴⁶ For countries like Palestine without such a tradition, parliamentary supremacy can run roughshod over fundamental freedoms.⁴⁷ This, however, is not the only concern that is raised by this type of system.

Another concern is that without a written constitution, no formal separation of power between the three branches of government exists.⁴⁸ Although the legislative power in Great Britain is held by Parliament, the executive power by the Monarch, and the judicial power by the courts,⁴⁹ all three branches of government are interrelated.⁵⁰ Moreover, because the executive is formed from the majority party in Parliament, Parliament is obliged to accept the government's legislative policies.⁵¹

The close relationship between the executive and the legislative branches would not be as much of a concern if the judiciary were able to control, or check, parliamentary activity. In Great Britain, however, no court is allowed to decide whether a law or act of Parliament is constitutional, but must apply the act or law regardless of its content.⁵² Thus, the role of judges is profoundly affected by the concept of parliamentary supremacy: the judges do not act as guardians of a constitution or constitutional rights, and thus do not have the power to decide the constitutionality of legislative acts.⁵³ Since Parliament is not controlled by fundamental and recognized rules, it is not possible to exercise political control over Parliament's actions in accordance with a higher law.⁵⁴

IV. Comparative Perspectives on Systems of Judicial Review: What are Palestine's Options?

Section IV outlines the various options for the Palestinian state to consider when devising a system of judicial review. Subsection A discusses the various ways in which judicial review can be implemented within a society: review determined by the judiciary itself (United States and Israel) and review expressly provided for by a constitution (South Africa). Subsection B discusses possible court structures for Palestine by analyzing centralized and

⁴⁶ *Id.*

⁴⁷ For example, see J.D. van der Vyver, *Depriving Westminster of Its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.-C.L. L. REV. 291, 306-07 (1985); Villa-Vicencio, *supra* note 32, at 145-48.

⁴⁸ ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 17 (1989) (citing E.C.S. WADE & G. GODFREY PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 53 (9th ed. 1985)).

⁴⁹ YARDLEY, *supra* note 34, at 76.

⁵⁰ For an extensive listing of how these branches are closely connected, see *id.* at 76-78.

⁵¹ BREWER-CARIAS, *supra* note 48, at 17.

⁵² *Id.*

⁵³ *Id.* at 19.

⁵⁴ *Id.*

decentralized systems of review. Subsection C analyzes the types and methods of judicial review by discussing the differences between *a priori* (before legislative promulgation) and *a posteriori* (after legislative promulgation) and abstract and concrete review. Each system discussed is then critiqued in terms of advantages and disadvantages in protecting fundamental rights and freedoms within Palestinian society.

A. *Implementing Judicial Review within Different Legal Cultures and Traditions*

In the process of formulating a system of judicial review best suited for the emerging Palestinian state, it is not enough to look at the legal rules regarding the concept of judicial review. It is necessary to analyze how the various legal cultures and traditions have affected the evolution of judicial review within each given society. Because law is "an expression of the culture,"⁵⁵ ideas about the law, and in this case judicial review, vary according to the historical-cultural context. This section will discuss the emergence of judicial review within three different cultures and traditions: the United States, Israel, and South Africa.

1. *The United States System: An Active, Judicially Determined Form of Review*

Although the United States Constitution does not explicitly confer the power of judicial review on the judiciary, it does place the Constitution on a higher plane, making it distinct from and superior to ordinary law.⁵⁶ The written Constitution along with the fundamental rights it guarantees has been instrumental in the development of judicial review in the United States.

The Supreme Court has assumed responsibility for interpreting the Constitution to resolve disputes between the Constitution and legislative or executive acts.⁵⁷ Basing his argument on the hierarchical nature of the Constitution, Chief Justice John Marshall in *Marbury v. Madison*⁵⁸ stated that the Court has the power and the duty to review legislation that violates constitutional principles.⁵⁹ He argued that because the Constitution is the supreme law of the land, it is the judiciary's province "to say what the law is"⁶⁰ in order to uphold and protect the Constitution. Thus, "[w]hen the statute (the lower form of law) conflicts with the Constitution (the higher form of law), the

⁵⁵ JOHN BARTON ET AL., *LAW IN RADICALLY DIFFERENT CULTURES* 2 (1983).

⁵⁶ Article VI of the U.S. Constitution states that the Constitution is "the supreme Law of the Land."

⁵⁷ See Barnum, *supra* note 44, at 184-85.

⁵⁸ 5 U.S. (1 Cranch) 137 (1803).

⁵⁹ *Id.* at 177-78.

⁶⁰ *Id.* at 177.

latter is given controlling effect by the courts."⁶¹ Accordingly, the United States courts have become the guardians of the U.S. Constitution, as well as of the various states' constitutions.⁶²

Judicial review in the United States has been affected in part by the federal political structure--the Constitution defines the different roles the national and state governments are to take within society.⁶³ Because it is impossible to enumerate the exact powers of the national and local governments, numerous conflicts will occur between the two.⁶⁴ Thus, three distinct types of review have evolved from this federalist system of government: a national judicial review, referring to the courts' power to pass judgment upon the validity of congressional acts; a federal judicial review, referring to the courts' power and duty to apply U.S. constitutional law when a state constitutional provision or statute is in conflict; and a states' judicial review, referring to the state courts' power to decide the validity of state legislative acts according to the respective state constitution.⁶⁵ Thus, the federal system has opened the way for U.S. courts to assert their power and influence in reviewing legislation and other governmental decisions.⁶⁶

2. *The Israeli System: An Inactive, Judicially Determined Form of Judicial Review*

American constitutional law has played a role in the development of the Israeli judicial system, even though it has not influenced the development of the Israeli legislative and executive branches of government.⁶⁷ The Israeli Supreme Court has borrowed from the U.S. Supreme Court in the areas of free speech, equality, and freedom of religion.⁶⁸ The Israeli courts are not always able to act in the same manner as the U.S. courts, however, because "[t]he power of the

⁶¹ Utter & Lundsgaard, *supra* note 6, at 180.

⁶² BREWER-CARIAS, *supra* note 48, at 137. "There is now general, if not universal, agreement that when the Supreme Court has decided a case on the basis that a particular statute (or particular executive action) is unconstitutional, the *judgment* in that case is binding not only on the States but on the other two federal branches." Antonin Scalia, *Federal Constitutional Guarantees of Individual Rights in the United States of America*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 59 (David M. Beatty ed., 1994).

⁶³ See U.S. CONST. art. 1, § 8.

⁶⁴ Barnum, *supra* note 44, at 185.

⁶⁵ BREWER-CARIAS, *supra* note 48, at 137.

⁶⁶ Barnum, *supra* note 44, at 187.

⁶⁷ This has been due in part because of the many legal layers that previously existed in the area now known as Israel, including Ottoman civil law, religious law (Christianity, Islam, and Judaism), and British common law. For a legal study of these layers, see Adrien K. Wing, *Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule*, 18 YALE J. INT'L L. 95, 102-07 (1993). Other factors include Israel's parliamentary system of government and a unitary state, rather than a federal state.

⁶⁸ Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS 405-62, 457 (1990).

Israeli courts to engage in constitutional adjudication of the American type is seriously circumscribed by their limited power of judicial review."⁶⁹

The Israeli Supreme Court, although an active branch of the government, does not exercise judicial review in the same manner as the United States Supreme Court.⁷⁰ Like the United States Constitution, the Israeli Basic Law does not enumerate the power of judicial review. Israel, however, is also similar to the British system in that it does not have a formal, written constitution.⁷¹ There are nine Basic Laws⁷² which have codified existing practices to form their governing authority.⁷³ Because there is no one governing document or bill of rights, the Israeli Court cannot claim to be the guardians of the supreme law of the land.⁷⁴

"In the absence of a formal constitution in Israel, the Legislature enjoys legislative supremacy."⁷⁵ Because the power is centralized in the Parliament, the Supreme Court cannot invalidate decisions of the government for being unconstitutional.⁷⁶ Even though the Court does not have the power of constitutional review, the judiciary has the power to construe, apply, and develop legislation so long as the law is not altered or voided.⁷⁷

The Supreme Court, however, has declared certain legislative acts of the Knesset void. The Court has used its judicial review power "to invalidate Knesset legislation when it conflicts with an *entrenched* clause in a basic law and *if it was not enacted with the specified majority*."⁷⁸ Therefore, the Court exercises its judicial review power only to apply and to maintain the integrity of Knesset legislation.⁷⁹

⁶⁹ *Id.* Israeli commentators often use American constitutional theories and ideas to advocate the strengthening of judicial review within the Israeli system. *Id.* at 459.

⁷⁰ Martin Edelman, *Judicial Review and Israel's Struggle for a Written Constitution*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 157-75, 157 (Donald W. Jackson & C. Neal Tate eds., 1992).

⁷¹ Daniel Schorsch & Uri Shoham, *THE LEGAL SYSTEM OF ISRAEL IN MODERN LEGAL SYSTEMS CYCLOPEDIA* 5.120.2 to 5.120.39, at 5.120.12.

⁷² The nine Basic Laws include The Knesset (1958), Israel Land Administration (1960), The President (1974), The Government (1968), The State Economy (1976), The Armed Forces (1976), Jerusalem, The Capital of Israel (1980), The Judiciary (1984), and The State Comptroller (1988). Edelman, *supra* note 70, at 161.

⁷³ *Id.*

⁷⁴ *Id.* at 157.

⁷⁵ Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 *TEMPLE L.Q.* 405, 417 (1983).

⁷⁶ Edelman, *supra* note 70, at 162. With regard to the Supreme Court's general role in reviewing Knesset legislation, the Court has stated that "[h]owever negative the opinion of the judiciary may be about [an] arrangement, in the absence of a constitution, the Knesset possesses the authority and power to pass a discriminatory statute, and if it has done so, there is not option but to act on it." *Id.* at 172 (citing *Cohen v. Minister of Labor and Welfare*, 41 P.D. 540, 543 (1986)).

⁷⁷ Shapira, *supra* note 75.

⁷⁸ *Id.* at 171.

⁷⁹ See Edelman, *supra* note 70, at 170 (discussing the supremacy of the Knesset in light of the Supreme Court's limited use of judicial review).

The Supreme Court has extended its power of judicial review in administrative matters when acting as the High Court of Justice.⁸⁰ Although the Basic Law does not enumerate the High Court's administrative review power and the Knesset has passed no statutory guidelines for this power, the Supreme Court has constructed a system of review to safeguard fundamental individual rights.⁸¹ Moreover, the Court has expanded the scope of administrative review by allowing judicial review of all the executive's administrative actions.⁸² The Court bases this power of review on the assumption that the executive does not have the power to violate fundamental rights.⁸³ If, however, the Parliament authorizes the executive to take action which violates fundamental freedoms, the Court cannot undermine the Knesset's expressed intent.⁸⁴ Absent this intent, administration actions must abide by the fundamental principles of liberty and individual rights.⁸⁵

3. *The South African System: A Constitutionally Enumerated Form of Review*

The Constitution of the Republic of South Africa 1993⁸⁶ signifies a marked departure from the rule of law under apartheid.⁸⁷ Prior to the enactment of the Interim Constitution, South Africa followed the British principle of parliamentary supremacy in which no form of judicial review was allowed.⁸⁸ Instead, the courts were required to interpret legislation in accordance with Parliament's intention,⁸⁹ even if the outcome would be morally unjust.⁹⁰

⁸⁰ According to the Basic Law, the Supreme Court acts as a high court of justice when adjudicating administrative issues. SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 95 (1994). Because the Israeli judicial system does not have a separate administrative court system, the Court has been overburdened by the amount of cases it must hear. *Id.*

⁸¹ Shapira, *supra* note 75, at 418. For a discussion of reasons why the Court has extended its judicial review power in the area of administration actions, see Shetreet, *supra* note 80, at 387.

⁸² *Id.* at 385.

⁸³ Shapira, *supra* note 75, at 419.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Hereinafter referred to as the interim Constitution.

⁸⁷ See Ziyad Motala, *Socioeconomic Rights, Federalism and the Courts: Comparative Lessons for South Africa*, 112 S. AFR. L.J. 61 (1995) [hereinafter Motala, *Socioeconomic Rights*]. For a discussion of apartheid and its effect on the rule of law, see ZIYAD MOTALA, *CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA* 70-82 (1994) [hereinafter MOTALA, *CONSTITUTIONAL OPTIONS*].

⁸⁸ See Motala, *Socioeconomic Rights*, *supra* note 87; *supra* notes ___ and accompanying text (discussing the role of parliamentary supremacy in the British context). "The most salient departure from the [British] model is in South Africa where the [] model [is] applied to the white population only." MOTALA, *CONSTITUTIONAL OPTIONS*, *supra* note 87, at 70.

⁸⁹ Motala, *Socioeconomic Rights*, *supra* note 87, at 64 (citing to Chief Justice Steyns quote in HUGH CORDER, *JUDGES AT WORK: THE ROLE AND ATTITUDES OF THE SOUTH AFRICAN APPELLATE JUDICIARY, 1910-1950* at 12 (1984)).

Unlike the rule of law under apartheid, the new Constitution sets forth a bill of rights and expressly allows for judicial review.⁹¹ "The introduction of a chapter of rights requires the judiciary to examine both the procedural and substantive elements of legislative and executive decisions, and, where these conflict with the chapter of rights, the judiciary has the constitutional power to trump such decisions."⁹² This power of review lies in the hands of a new Constitutional Court,⁹³ which is the first time a South African court has been made the guardian of a Constitution.⁹⁴ The new South African Constitutional Court has issued several important opinions, including the invalidation of the death penalty.⁹⁵

4. Our Proposal for Palestine: An Enumerated Form of Review

We endorse the adoption of the South African system with its constitutionally enumerated form of judicial review. Palestine, like South Africa, has to overcome a long legacy of oppression and domination which can be better accomplished by the delineation of constitutional precepts and norms of the Court. The United States system, although active in form, is not appropriate for the Palestinian context. At the time of implementation of judicial review, the United States did not suffer from a long and harmful period of domination. The Palestinian experience with the judicial system was often that it acted in accordance with Israeli policies of occupation. Thus, for the Palestinian people to gain trust in the judicial system, the rights and duties of the Court must be constitutionally, or legislatively, enumerated so that the public can determine the effectiveness and fairness of the jurists. The Israeli system is not appropriate for Palestine as it is not judicially active. To transform Palestinian society into a democratic society, it will be necessary for the Court to have the power to actively implement those standards set forth in the 1996 Draft.

B. Judicial Structure for Implementing Judicial Review: Decentralized vs. Centralized

Another important distinction in analyzing the concept of judicial review involves the establishment of a judicial structure--identifying the court,

⁹⁰ "The traditional view was that the judiciary had to stand aloof from the public, politics and the media, and was not to indulge in the exercise of questioning the morality or justness of a law." Motala, *Socioeconomic Rights*, *supra* note 87, at 64.

⁹¹ S. AFR. INTERIM CONST. chap. 3.

⁹² AZHAR CACHALIA ET. AL., *FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION* 4 (1994).

⁹³ S. AFR. INTERIM CONST. § 98.

⁹⁴ Motala, *Socioeconomic Rights*, *supra* note 87, at 62.

⁹⁵ See *The State v. Tmakwanyane & Mchunu*, Case No CCT/3/94, June 6, 1995.

or courts, that are to be the guardians or protectors of the constitution. Although democratic countries have valued the role of judicial review, the legal and cultural differences have prevented these societies from implementing identical judicial structures.⁹⁶ "Deep-seated suspicions of the judicial office, commitments to legal positivism, and other more practical considerations have meant that judicial review in various countries is conducted by different *organs* of review. . . ."⁹⁷ These judicial systems, however, may be distinguished into two broad structural categories of review: decentralized and centralized.

A decentralized system of review (the United States) is characterized by the fact that all justices within the judicial structure have the power to declare acts and laws unconstitutional.⁹⁸ Therefore, any court in the system may consider the validity of a law in question and apply or reject it, depending on whether the law is found to be constitutional or unconstitutional.⁹⁹ A centralized system of review (South Africa), on the other hand, has one single institution acting as a constitutional judge. It is this institution which has jurisdiction to decide the constitutionality of legislative and executive actions.¹⁰⁰

1. *The United States Decentralized System: All Courts Have the Power of Review*

In the United States no special court is required to review the constitutionality of acts and legislation.¹⁰¹ Rather, the United States system is based on a decentralized system of review, or an all-courts model.¹⁰² Any court, be it state or federal, has the power to exercise judicial review and declare an act or law unconstitutional.¹⁰³ Thus, it is not necessary for a higher court to approve a lower court's declaration of unconstitutionality for the lower court's decision to be legitimate.¹⁰⁴

Like the centralized system of review, this type of system is based on the principle of constitutional supremacy.¹⁰⁵ The judicial structure for review, however, differs greatly. For example, any court, be it state or federal, has the power to review the constitutionality of laws and actions without any

⁹⁶ MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45 (1971).

⁹⁷ *Id.*

⁹⁸ *Id.* at 127.

⁹⁹ *Id.*

¹⁰⁰ See BREWER-CARIAS, *supra* note 48, at 185.

¹⁰¹ *Id.* at 138.

¹⁰² C. Neal Tate, *Comparative Judicial Review and Public Policy: Concepts and Overview*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 7 (Donald W. Jackson & C. Neal Tate eds., 1992).

¹⁰³ *Id.*; BREWER-CARIAS, *supra* note 48, at 138.

¹⁰⁴ Tate, *supra* note 102, at 7.

¹⁰⁵ BREWER-CARIAS, *supra* note 48, at 127.

jurisdictional limitations.¹⁰⁶ Courts always decide constitutional matters when a concrete case is involved and when the issue of constitutionality is necessary to outcome of the case.¹⁰⁷

At the lowest level of the federal judicial system lies the district courts. These courts hear federal civil and criminal cases,¹⁰⁸ controversies involving citizens of different states,¹⁰⁹ cases in which the United States is a party,¹¹⁰ *habeas corpus* proceedings,¹¹¹ and civil rights actions in which state officials have violated constitutional rights.¹¹²

The United States Courts of Appeals are one step above the district courts. The district systems are organized into larger units known as circuits, with each circuit having one court of appeal.¹¹³ These courts have only appellate jurisdiction: all district court decisions may be appealed to these courts.¹¹⁴ The appellate courts have also been given jurisdiction to review certain administrative agencies, including the National Labor Relations Board, tax courts, and the Federal Power Commission.¹¹⁵

The United States Supreme Court sits at the apex of the federal judicial system, having both appellate and original jurisdiction.¹¹⁶ The Court's appellate jurisdiction is the mostly widely used, as the Court is the final arbiter of constitutional issues.¹¹⁷ Thus, the Court can review federal appellate decisions, state cases which hinge on the validity of state and federal law in accordance with the Constitution, and decisions arising out of the specialized federal courts.¹¹⁸

The appellate jurisdiction, however, is comprised of mandatory and discretionary review. The right to appeal and invoke mandatory jurisdiction is limited to important constitutional issues.¹¹⁹ In all other cases, the Court has discretionary power to review when a party petitions for a writ of certiorari.¹²⁰

¹⁰⁶ *Id.* at 138.

¹⁰⁷ *Id.*

¹⁰⁸ 28 U.S.C. § 1331 (1995).

¹⁰⁹ 28 U.S.C. § 1332 (1995).

¹¹⁰ 28 U.S.C. § 1345, 1346 (1995).

¹¹¹ 28 U.S.C. § 2241 (1995).

¹¹² 28 U.S.C. § 1343 (1995).

¹¹³ BREWER-CARIAS, *supra* note 48, at 138.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 139.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ BREWER-CARIAS, *supra* note 48, at 140.

¹¹⁹ *Id.* at 141.

¹²⁰ *Id.* at 142.

2. *The South African Centralized System: Review as a Power for a Constitutional Court*

The new and democratic Constitution of South Africa centralizes the system of judicial review by establishing a special Constitutional Court. It is the duty of this specialized Court to hear "all matters relating to the interpretation, protection and enforcement of the provisions of [the] Constitution."¹²¹ Although the Constitution enumerates several areas in which the Constitutional Court has jurisdiction, the most important is namely the power to examine the constitutionality of acts and bills in Parliament.¹²²

As guardian of the Constitution, the Constitutional Court must interpret the provisions of the Interim Constitution and must approve the implementation of a final constitution.¹²³ Although much of the Constitution's provisions have established meaning, "there are many provisions in [the] Interim Constitution that are not self-defining and will in time be the objects of judicial interpretation."¹²⁴ For example, the Interim Constitution provides for equal protection, under the law and also for affirmative action.¹²⁵ It will be the Constitutional Court's duty to determine the correct weight each principle is to be given within the constitutional context.¹²⁶

The Constitutional Court holds a unique and important position under the Interim Constitution which has made it imperative that the justices appointed be committed to the rule of law and no longer following principles of apartheid.¹²⁷ Of the eleven members serving on the Court, four are appointed by the President.¹²⁸ While the remaining seven members are chosen by the President, they must be placed on a nomination list nominated by the Judicial Service Commission (JSC).¹²⁹ The JSC is comprised of the Minister of Justice and four senators chosen by the President, two representatives for the attorneys and two from the advocate's profession, the Chief Justice, a judge president chosen by all the judge presidents, and a representative of the nation's law school deans.¹³⁰

¹²¹ S. AFR. INTERIM CONST. § 98(1).

¹²² CACHALIA ET. AL., *supra* note 92, at 13.

¹²³ *Id.* at 64.

¹²⁴ *Id.* at 65.

¹²⁵ S. AFR. INTERIM CONST. § 8; Motala, *Socioeconomic Rights*, *supra* note 87, at 65.

¹²⁶ Motala, *Socioeconomic Rights*, *supra* note 87, at 65.

¹²⁷ MOTALA, CONSTITUTIONAL OPTIONS, *supra* note 87, at 249.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

3. *Our Proposal for Palestine: A Centralized System of Review*

At present, it may be difficult to fill all levels of the Palestinian judiciary with judges competent to review constitutional issues. The condition of the Palestinian legal profession was detrimentally affected by the changes made to the court and social structure by the Israeli government prior to the signing of the peace agreement.¹³¹ These include the closing of Palestinian schools and universities for extended periods of time, the denial of appellate review to Jordan's Court of Cassation for those residing in the West Bank, military decrees limiting individual rights, and military courts used to litigate a wide-range of issues.¹³² Because the Palestinian court structure was delegitimized in the eyes of the people, the "lawyers, whose welfare directly depends on the healthy functioning of those courts, have been comprised accordingly."¹³³

To establish an all-courts system such as the United States, it is necessary to have experienced judges well-versed in the study of constitutional law. For many Palestinians, the establishment of democratic institutions is a new prospect. While it is possible to utilize the experiences of those diaspora lawyers who have lived and worked within Western democratic institutions, this number is limited. To ensure that the Constitution is uniformly enforced during the transition period of reinstituting legal institutions and norms, it is better for decision-makers not to follow the United States decentralized model, but place experienced legal professionals within a specialized constitutional court.

The Palestinian Basic Draft Law establishes a specialized constitutional court, but does not, however, explicitly outline the duties and functions of this court. Although the South African Constitution has not been in existence for long, Palestinian decision-makers can learn from the South African experience. Both nations have a comparable cultural and legal history, and a deep mistrust of the judicial system exists in both nations. "The success of the Interim Constitution[s] and the nature and success of the final constitution[s] will greatly depend on the caliber of people who are appointed to serve on the Constitutional Court."¹³⁴ This new Palestinian Constitutional Court should consist of distinguished individuals including, but not limited to, lawyers, judges, scholars, and activists. One common attribute that all of these individuals must share is that their integrity is above reproach.

To ensure that the justices appointed to the Constitutional Court meet the qualifications set by the Palestinian Executive Council, it may be beneficial to establish an independent commission whose duty is to nominate potential

¹³¹ See GEORGE E. BISHARAT, *PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK* 125 (1989).

¹³² *Id.* at 125-26.

¹³³ *Id.* at 126.

¹³⁴ MOTALA, *CONSTITUTIONAL OPTIONS*, *supra* note 87, at 249.

candidates to the Court. The structure of this commission would not necessarily have to be comprised in the same manner as the South African JSC. To gain legitimacy in the eyes of the electorate, this commission could draw its members not only from the legislative assembly, but the universities, legal professions, and local councils.

C. *Types and Methods of Judicial Review: A Priori/A Posteriori and Abstract/Concrete Review*

In comparing the systematic differences of judicial review, it is important to examine whether the constitutionality of a law or official action is determined before (*a priori*)¹³⁵ or after (*a posteriori*)¹³⁶ a law or action is promulgated.¹³⁷ It is also necessary to analyze in what circumstances judicial review can be used to declare a law or act unconstitutional: whether a court may decide legal questions not directly arising from actual cases (abstract), or whether a court's decision must be made in the context of a specific legal dispute (concrete).¹³⁸ The answers to these issues affects the way in which judicial review is used in a given legal culture.

For example, the model of judicial review that France has adopted emphasizes the role of the courts in finalizing political disputes between the three branches of government.¹³⁹ This is due to the fact that only *a priori* and abstract review is allowed. Thus, individuals are denied the right to challenge the constitutionality of executive and legislative decisions.

In comparison, the United States model "reflects an underlying philosophy of popular sovereignty, placing emphasis on the individual and on individual rights."¹⁴⁰ The United States system of judicial review allows an individual to challenge a law or action only if it has been promulgated and if a concrete case or controversy exists. Allowing individuals to challenge the constitutionality of a promulgated law or action, along with the fact that all

¹³⁵ *A priori* review requires that laws be referred to the appropriate court for review before promulgation, but after the final adoption by parliament. Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 41-57, 45 (Donald W. Jackson & C. Neal Tate eds., 1992).

¹³⁶ *A posteriori* review requires laws to be referred to the appropriate court for review after promulgation. *Id.*

¹³⁷ Tate, *supra* note 102, at 6.

¹³⁸ *Id.*

¹³⁹ Louis Aucoin, *Judicial Review in France: Access of the Individual Under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform*, 15 B.C. INT'L & COMP. L. REV. 443 (1992).

¹⁴⁰ *Id.* at 444-45.

United States judges have the power to declare laws and actions unconstitutional, enforces the notion of protecting individual rights.¹⁴¹

The German model, on the other hand, is a good example of a system seeking to find a balance between parliamentary supremacy and the protection of individual rights.¹⁴² Under this model, the court not only has power to review legislation in an actual case or controversy, but it also may review the constitutionality of promulgated laws or actions in the abstract. Consequently, the German model allows a court to determine abstractly the constitutionality of an act or law, while still maintaining a means for protecting individual rights.

1. The French System: A Priori and Abstract Review

The French Constitution of 1958 created the Constitutional Council (*Conseil Constitutionnel*) to decide constitutional issues, as well as to monitor and control presidential and parliamentary elections.¹⁴³ "The French Constitutional Council exercises *a priori* abstract review exclusively, and solely upon referral by political authorities."¹⁴⁴ In accordance with Article 61 of the Constitution, the Council must review legislation after it is formally adopted by Parliament, but before it is promulgated. This type of abstract review enables the French Constitutional Council to intervene in and alter the outcomes of the legislative process.¹⁴⁵

The unpromulgated bill must be sent to the Constitutional Council within fifteen days after being passed,¹⁴⁶ after which the Council has only one month to decide its constitutionality.¹⁴⁷ In making its decision, the Council hears no arguments nor does it publicize individual or dissenting opinions.¹⁴⁸ The Constitutional Council can decide to nullify a bill completely or partially,

¹⁴¹ See *id.* at 445.

¹⁴² *Id.*

¹⁴³ See Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS 38-67, 53 (Albert Rosenthal & Louis Henkin eds., 1990). Today, the Council exercises its power in not only issues pertaining to constitutional law, but also criminal, civil, procedural, and international law. Jacqueline Lucienne Lafon, *France*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 289-305, 298 (C. Neal Tate & Torbjorn Vallinder eds., 1995).

¹⁴⁴ Stone, *supra* note 135, at 47.

¹⁴⁵ *Id.* at 48. Initially, the French Constitution only allowed the President of the Republic, the Prime Minister, the President of the Senate, or the President of the National Assembly to ask for legislative review. Aucoin, *supra* note 139, at 449. In 1974, however, this constitutional provision was amended to include "sixty senators or sixty representatives of the National Assembly." *Id.* at 450.

¹⁴⁶ *Id.* at 48. If, however, a bill is promulgated without being sent to the Council, the enacted law cannot be scrutinized or reviewed by the Council or another court. *Id.*

¹⁴⁷ See BREWER-CARIAS, *supra* note 48, at 257 (discussing the time limit in which the Council must make a decision and the possibility for a reduced period of review in emergency situations).

¹⁴⁸ Louis Favoreu, *The Constitutional Council and Parliament in France*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 81-108, 92 (Christine Landfried ed., 1988).

or to let it stand. It is possible, however, for the Parliament to resubmit the "corrected" bill, even if it was nullified in the first examination.¹⁴⁹

The placement of judicial review power in the hands of a special constitutional court stems from France's pre-Revolutionary experience with judicial corruption. In pre-Revolutionary France, parlements acted as the higher court by examining legislation and actions to make sure they were not "contrary to the fundamental laws of the Kingdom."¹⁵⁰ The French Comparativist Rene David explains that the parlements failed in this endeavor for several reasons:

The supreme courts of pre-Revolutionary France, the parlements, made themselves very unpopular by opposing all reforms to the traditional legal system. Assiduous in their defense of an antiquated system based on the inequality of social classes and on self-serving premises, they failed in their ambition of becoming the nation's representatives. Nor did they succeed in really controlling government action or in imposing procedural rules upon it. Of their many ill-advised interferences in politics and government, people remember their opposition to those organizational reforms that the monarchy did attempt from time to time. Abolition of the parlements was one of the first acts of the French Revolution, on November 3, 1789.¹⁵¹

Thus, the current structure of the French judicial system is a response to the historical mistrust of a judge's role in checking abuses of power by the legislature or the executive.¹⁵²

Because of the judicial and executive excesses of power in pre-Revolutionary France, the concept of parliamentary supremacy emerged as a means to counteract previous abuses.¹⁵³ Although a preference for parliamentary supremacy existed under the Third and Fourth Republics, new constitutional measures were needed to ensure the separation of powers.¹⁵⁴ Thus, the Constitutional Council under the 1958 Constitution was created to act as an arbiter in disputes between the legislature and the executive.¹⁵⁵ The Council, however, holds more of a political, as opposed to judicial, form of

¹⁴⁹ *Id.* at 104. This process is known as "double-barreled" review. *Id.*

¹⁵⁰ BREWER-CARIAS, *supra* note 48, at 252.

¹⁵¹ Aucoin, *supra* note 139, at 446-47 (citing RENE DAVID, FRENCH LAW 23 (Michael Kindred trans., 1972)).

¹⁵² *Id.*

¹⁵³ *Id.* at 447.

¹⁵⁴ *Id.* at n.25.

¹⁵⁵ *Id.* at 449.

review¹⁵⁶--even though the Council's function is to judge, this power is exercised within the political arena.¹⁵⁷

Parliamentary supremacy is still a dominant characteristic of the French legal system. For example, a private individual may not challenge the constitutionality of a law by petitioning the Council.¹⁵⁸ Instead, the power to challenge legislation is reserved to politicians "who will usually belong to the same majority which passed the challenged statute."¹⁵⁹

The Constitutional Council, however, has actively expanded its power of review in the area of human rights.¹⁶⁰ The Constitutional Council has tried to "constitutionalize" and protect certain rights and freedoms which include: the right to privacy, freedom of association, the right to asylum, and freedom of education.¹⁶¹ It has even stepped beyond the bounds of a priori review in limited circumstances. The Council has ruled that if a proposed law modifies or expands the scope of an existing law, the Council may not only decide on the constitutionality of the proposed amendment, but also decide on the constitutionality of the existing law.¹⁶²

The concept of judicial review has substantially evolved since its inception in the 1958 Constitution. Reform efforts have been seriously suggested to allow individuals the right to challenge the constitutionality of laws and actions.¹⁶³ Thus far the reform efforts have not been successful.

2. *The United States System: A Posteriori and Concrete Review*

In contrast to the French legal system, the United States Constitution limits the courts ability to review only actual "cases" and "controversies."¹⁶⁴ As a result, no abstract or hypothetical questions may be brought before the

¹⁵⁶ See CAPPELLETTI, *supra* note 96, at 2-6 (discussing the role of political control of constitutionality within the French judicial system).

¹⁵⁷ BREWER-CARIAS, *supra* note, 48, at 253. The Council's influence in this sphere is due in part to the political nature of the nine appointed judges: three are appointed by the President of the Republic, three by the President of the National Assembly, and three by the Senate. FRENCH CONST. art. 56.

¹⁵⁸ Private citizens may be able to overturn executive actions by bringing suit within an administrative court. Aucoin, *supra* note 139, at 461. Executive acts, however, can only be overturned if the administrative court finds the government acted in "excess of [its] power" which ultimately violated fundamental rights. *Id.* (citing FRANCOISE DREYFUS & FRANCOIS D'ARCY, *LES INSTITUTIONS POLITIQUES ET ADMINISTRATIVE DE LA FRANCE* 155, 387 (2d ed., 1987)).

¹⁵⁹ CAPPELLETTI, *supra* note 96, at 4-5.

¹⁶⁰ Aucoin, *supra* note 139, at 454.

¹⁶¹ *Id.* (case citations omitted).

¹⁶² *Id.* at 455. See Decision 85-187 of Jan. 25 1985, C. const., 1985 D.S. Jur. 361 (Fr.) (declaring that a 1984 law implementing emergency rule in New Caledonia was reviewable, because the Court had to determine the constitutionality of the 1985 amendment which modified the 1984 law).

¹⁶³ *Id.* at 455-56.

¹⁶⁴ U.S. CONST. art. III, § 2.

judiciary, and hence no advisory opinions may be given by the court.¹⁶⁵ Once the parties establish an actual case or controversy, they must also establish an "injury in fact" and a "personal stake in the outcome."¹⁶⁶ The claimant thus must show some actual injury or that some direct injury will occur in the near future.¹⁶⁷ It is also necessary to establish that the harm is individuated and not merely one which could affect the general public in an indefinite manner.¹⁶⁸ Even if a party wishes to file an amicus curiae brief,¹⁶⁹ the party must have a special interest in the case and have asked the Court for permission, or had the consent of the parties involved.¹⁷⁰ The U.S. model requires these qualifications so that courts cannot address abstract questions, thereby limiting the power of the courts to decide issues better addressed by other governmental institutions.¹⁷¹

Not only must a party have standing to sue and show direct injury, the party must demonstrate that the statute is invalid.¹⁷² Because the validity of an act is presumed constitutional, a party must clearly and undoubtedly establish that the act is unconstitutional.¹⁷³ In addition to this qualification, the constitutionality or unconstitutionality of a law will be decided only if that decision is absolutely necessary to the outcome of the case.¹⁷⁴ A court, however, will refrain from declaring an action or law unconstitutional if the issue is deemed by the court to be a political question.¹⁷⁵

The Supreme Court of the United States is the final arbiter of constitutional issues, and its decisions are binding on the lower courts. Although this requirement allows a more uniform interpretation of the Constitution, it does not mean that the Constitution cannot evolve with the

¹⁶⁵ BREWER-CARIAS, *supra* note 48, at 144.

¹⁶⁶ *United States v. Richardson* 418 U.S. 166 (1974); *De Funis v. Odegaard*, 416 U.S. 312 (1974).

¹⁶⁷ BREWER-CARIAS, *supra* note 48, at 146.

¹⁶⁸ *Id.*

¹⁶⁹ Literally means "friend of the court." HENRY C. BLACK, BLACK'S LAW DICTIONARY 54 (Abridged 6th ed., 1991). Amicus curiae briefs are often filed in appeals cases which influence public interest. *Id.* Permission to file is needed for those being sent to U.S. Court of Appeals, unless the party is a government official or agency. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights").

¹⁷² See BREWER-CARIAS, *supra* note 48, at 146-47.

¹⁷³ See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) ("The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.").

¹⁷⁴ BREWER-CARIAS, *supra* note 48, at 147; *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.").

¹⁷⁵ Political questions usually involve foreign policy issues and internal matters of the government. BREWER-CARIAS, *supra* note 48, at 148.

changing social and political climate.¹⁷⁶ On the contrary, the Supreme Court has often overturned previous decisions of the Court in cases which have erroneously applied a constitutional principle.¹⁷⁷

It is possible, however, for the Court to avoid deciding delicate or controversial issues.¹⁷⁸ For example, the Court may interpret a statute in such a manner so as to avoid the issue of constitutionality,¹⁷⁹ invalidate a statute for being vague,¹⁸⁰ or strike down a law for improper delegation of power.¹⁸¹ While reinterpreting a statute, voiding a statute for vagueness, or striking a law for improper delegation of a particular power effectively protects an individual's rights, it does not establish a constitutional norm which must be followed by the legislature.¹⁸² The legislature is free to reconsider or reenact a statute which makes the legislature's intent clear and concise.¹⁸³ The Court may also use the "political question" doctrine to avoid deciding controversial issues, or those issues relating to the government's internal and foreign affairs.¹⁸⁴ "Indeed, the latitude given the [U.S.] Supreme Court is at once an expression of confidence in the judiciary and a realization that 'judicial review is at least potentially a deviant institution in a democratic society.'"¹⁸⁵

3. *The German System: A Posteriori and Abstract/Concrete Review*

The emergence of a federal constitutional court after World War II was due to the experiences under the Nazi regimes--the public no longer could lay blind faith in the legislature to protect civil and political liberties.¹⁸⁶ In place of legislative supremacy emerged an interest in the judiciary to protect the rights of

¹⁷⁶ *Id.* at 150.

¹⁷⁷ See *Brown v. Board of Education*, 347 U.S. 483 (1954) (overturning *Plessey v. Ferguson*, 163 U.S. 537 (1896), which promoted the doctrine of separate but equal).

¹⁷⁸ CAPPELLETTI, *supra* note 96, at 81.

¹⁷⁹ See *Ex parte Randolph*, 20 F.Cas. 242, 254 (1833) ("If [legislative acts] become indispensably necessary to the case, the Court must meet and decide them; but if the case may be determined on other points, a just respect for the legislative requires that the obligation of its laws should not be unnecessarily and wantonly assailed").

¹⁸⁰ See *Connally v. General Construction Co.*, 269 U.S. 385 (1926) (holding that a statute will be void for vagueness if a person "of common intelligence must necessarily guess at its meaning and differ as to its application.").

¹⁸¹ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (allowing delegation of powers to the executive when "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). The delegation rules since the 1930s have been relaxed; it is unlikely that excessive delegation will be an issue when Congress lays down explicit rules to guide the agency with the delegated powers.

¹⁸² CAPPELLETTI, *supra* note 96, at 82.

¹⁸³ *Id.*

¹⁸⁴ See BREWER-CARIAS, *supra* note 48, at 147.

¹⁸⁵ *Id.* (quoting A.M. BICKEL, *THE LEAST DANGEROUS BRANCH* 128 (1962)).

¹⁸⁶ Utter & Lundsgaard, *supra* note 6, at 470.

individuals.¹⁸⁷ The 1959 Constitution also broke with the past by binding the legislature, the executive, and the judiciary to a higher rule of law.¹⁸⁸ Thus, in post-war Germany a constitutional court with powers of judicial review was established to protect rights "entrenched" in the new Constitution.¹⁸⁹

The German system blends the French and United States model to balance the concept of legislative supremacy against the constitutional needs of the individual. The German Constitution of 1949 establishes a federal constitutional court as the "supreme guardian of the Constitution."¹⁹⁰ The main role of the Constitutional Court, according to a former president of the Court, "[is to] control the power of the state, to insure compliance with constitutional law, and to make the Constitution more concrete and attend to its further development."¹⁹¹

One way the Court ensures the viability of the Constitution is through its power of concrete judicial review. This type of review arises out of an ordinary lawsuit, but is structurally different than the U.S. model.¹⁹² If a German court considers a state or federal law unconstitutional and its validity is relevant to the ongoing case, the court must suspend the case until the Constitutional Court makes a constitutional determination.¹⁹³ This determination is limited to the question raised by the referral--the Court cannot review the case in its entirety.¹⁹⁴ Once a determination is made, the lower court is bound by the Constitutional Court's final decision when rendering a judgment in the suspended case.¹⁹⁵

The German system not only allows concrete review, but also abstract review. Similar to the French system, abstract review allows the Court to intervene and alter legislative processes. But unlike the French system, abstract review in Germany only amounts to a small proportion of the Court's cases--one percent of the cases reaching the Court are through the abstract review process.¹⁹⁶

¹⁸⁷ *Id.*

¹⁸⁸ Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 845-46 (1991). Previous German Constitutions could easily be amended and were not binding in all areas. *Id.* at 846.

¹⁸⁹ Utter & Lundsgaard, *supra* note 6, at 470.

¹⁹⁰ BREWER-CARIAS, *supra* note 48, at 204.

¹⁹¹ Kommers, *supra* note 188, at 850-51 (quoting Ernst Benda, Relationship of the Bundestag and the Federal Constitutional Court 7 (unpublished manuscript)).

¹⁹² Christine Landfried, *Constitutional Review and Legislation in the Federal Republic of Germany*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON, 147-67, 152 (Christine Landfried ed., 1988).

¹⁹³ BREWER-CARIAS, *supra* note 48, at 212.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Stone, *supra* note 135, at 46. This means that ninety-nine percent of the cases heard in the Court are through an individual's direct appeal that some actual right has been violated. *Id.*

Abstract judicial review is used to determine the compatibility of federal and state laws with the Basic Law, or between state laws and federal laws.¹⁹⁷ The federal government, the state government, or one-third of the members in the Bundestag can request the Court to use its abstract review powers.¹⁹⁸ Thus, this procedure allows the Court to analyze the constitutionality of a law without dealing with a specific case.¹⁹⁹ The German Basic Law, however, stipulates that the referral of legislation to the Court must occur within one month after it has been promulgated.²⁰⁰ Even if the request for judicial review is withdrawn, the Constitutional Court may review the legislation if it is in the public's best interest.²⁰¹

The German model also allows the filing of individual constitutional complaints. This occurs when a private individual claims a judgment, an administrative act, or a statute violates fundamental rights.²⁰² For the Court to use its review power in this type of situation, the claimant must have personally and directly suffered from the government's actions.²⁰³ "[T]he constitutional complaint can be brought before the [Court] against any state act, whether legislative, executive or judicial, but in all cases, it can only be exercised once the ordinary judicial means for the protection of the fundamental rights have been exhausted."²⁰⁴ This means of protecting fundamental rights is important to German society--roughly ninety-seven percent of the three thousand cases filed each year were individual petitions.²⁰⁵

To protect entrenched constitutional rights, any decision by the Court on the constitutionality of a statute is regarded as law, thereby binding all institutions of federal and state government, courts, and public officials.²⁰⁶ The jurisdiction of the Court, unlike that of the U.S. Supreme Court, is compulsory.²⁰⁷ Thus, the Constitutional Court must make decisions in accordance with the Basic Law regardless of whether the issue involves a political question.²⁰⁸ Although in the U.S. no "convincing theoretical explanation of where the Supreme Court's power comes from and how it should

¹⁹⁷ GERMAN BASIC LAW, art. 93, § 2, no. 2.

¹⁹⁸ *Id.*

¹⁹⁹ Landfried, *supra* note 192, at 152.

²⁰⁰ Stone, *supra* note 135, at 48.

²⁰¹ BREWER-CARIAS, *supra* note 48, at 210.

²⁰² Favoreu, *supra* note 143, at 52.

²⁰³ BREWER-CARIAS, *supra* note 48, at 211.

²⁰⁴ *Id.*

²⁰⁵ Favoreu, *supra* note 143, at 52. Nearly all of the individual petitions challenged administrative actions or judicial judgments, and not the constitutionality of a legislative act. *Id.*

²⁰⁶ Kommers, *supra* note 188, at 841-42.

²⁰⁷ *Id.* at 842.

²⁰⁸ *Id.*

be used"²⁰⁹ exists, the German Basic Law sets forth in ten different articles the powers of the Constitutional Court.²¹⁰ These articles set forth the Court's authority to examine--upon the request of a land (state), or the Bund (federal government), or of one-third of the members of the Bundestag (federal parliament)--the constitutionality of state and federal statutes that contradict and conflict with the German Basic Law.²¹¹ Article 93(2) of the Basic Law confers on the Court the power to exercise any other jurisdiction which is authorized by law,²¹² thereby allowing the Court to review every significant constitutional issue that arises.²¹³ Therefore, any controversies regarding the Court's use of its judicial review power can be resolved by examining the Basic Law itself--"for no reliance on a *theory* of judicial review is necessary to justify the exercise of judicial power."²¹⁴

Judicial review within the German system can lead to some negative consequences. With regard to abstract judicial review, legislators often allow the Court to dictate the terms of legislation by revising "unconstitutional" legislation to conform with the policy considerations taken by the Court.²¹⁵ Thus, the decisions made by the German, as well as the French, Constitutional Courts often take the place of the legislative process: the legislators allow the courts to impose, often word-for-word, the language to be used in the new legislation.²¹⁶ The possible outcome of this type of "juridicization of policy-making processes"²¹⁷ is that more and more issues are not being debated by the legislature, but rather are being decided by a "government of judges."²¹⁸ Commentators argue that adopting the Court's opinion in the legislation process involves the Court in day-to-day political functions.²¹⁹ The use of *a priori* review can also be used to obstruct the government from implementing its agenda, thereby furthering parliamentary politics by other means.²²⁰

²⁰⁹ Burt Neuborne, *Justiciability, Remedies, and the Burger Court*, in *THE BURGER YEARS* 3-20, 3 (Herman Schwartz ed., 1987).

²¹⁰ Kommers, *supra* note 188, at 840-41.

²¹¹ *Id.*

²¹² GERMAN BASIC LAW art. 93(2).

²¹³ See Kommers, *supra* note 188, at n.9.

²¹⁴ *Id.* at 843 (emphasis added).

²¹⁵ Stone, *supra* note 135, at 52. The 1967 German legislature almost copied word-for-word, comma-for-comma, the 1966 Court's decision regarding electoral finance reform. *Id.* at 53.

²¹⁶ *Id.* at 54.

²¹⁷ *Id.* at 53.

²¹⁸ For example, during 1983 the Socialist Workers' Party in Spain tried to pass legislative and constitutional reforms. Stone, *supra* note 135, at 54. From 1983 to 1985, the opposition sent six laws to the Constitutional Court for judicial review. *Id.* The Court found three out of the six to be unconstitutional in whole or in part. *Id.* This process caused the great delays to the Spanish government, as the court took over a year to give its decision in five of the six cases. *Id.*

²¹⁹ *Id.*

²²⁰ Stone, *supra* note 135, at 54.

While the French system only allows for abstract review, the German system has recognized that this can be problematic. Allowing individual constitutional complaints and concrete review results in a direct, but not necessarily political, means to review legislation and enforce fundamental freedoms.²²¹

4. *Our Proposal for Palestine: A Mixed System of Review Based on French and German Influences*

In devising a system of judicial review, Palestine must consider the lessons learned from the French legal system. Like pre-Revolutionary France, the Palestinian people have been subjected to injustices under courts implementing so-called "justice." Thus, it is likely they will have no trust in the judicial branch, but rather view it as an illegitimate institution established to deprive them of their freedoms and liberties (or even as an evil whose role it is to legalize their suffering and misery). This fear can be overcome if the Palestinian Constitution does not limit judicial review to *a priori* and abstract review. Individuals must be able to challenge legislation for infringing on their rights. A constitutional court which affords individuals the opportunity to challenge the constitutionality of laws and actions will offer greater protection of fundamental rights. One way to ensure the independence and strength of this institution is for Palestinians not to model their appointment process after the French. The political nature of the French system, along with the requirement of *a priori* and abstract review, ensures the judiciary has a limited role in the separation of powers. In devising a new system of governance, it is necessary for Palestine to devise a system which can counter the emergence of a potential despotic government.

Moreover, in structuring Palestinian judicial review, the balance struck by Germany--between legislative supremacy and protection of individual rights--should be taken into consideration. Allowing individuals to petition the Court for redress when governmental action has caused direct harm may be the answer. Although Palestinian society has not traditionally placed as much importance on individual rights as in the West, the use of individual constitutional complaints can be used as a tool to effectively curb the excesses of parliament or other regulatory authority--especially in cases when minority rights, whether the minority be political, religious, or otherwise, are being ignored.

Unlike the United States system of judicial review, the Palestinian system should allow *a priori* and abstract review, similar to that implemented in Germany and France. Since the law-making process is totally new in Palestine, some mechanism for *a priori* review should exist to review new legislation. This type of judicial review is more efficient, less time consuming, and offers a

²²¹ See BREWER-CARIAS, *supra* note 48, at 211.

second opinion on the constitutionality of disputed legislation within a newly emerging democratic society. To curb the Court from becoming a "government of judges," the Court's decision on the constitutionality of the unpromulgated law must be returned within a short, specified period of time. It will be imperative for the Palestinian government to have the power to implement leading law reform, and thus it will be necessary for the executive and the legislature to act in a timely fashion. If the law is held by the Constitutional Court for an extensive period of time, much needed reforms may be hindered in the process.

V. Suggestions for a System of Judicial Review in Palestine

This Section formally establishes the system of judicial review we feel would be appropriate for Palestinian society. It also discusses various considerations which must be taken into account before the Constitutional Court can begin functioning, such as the mechanics of the legal structure and the qualifications of the jurists. This Section concludes by analyzing the relation of the Constitutional Court to other branches of government and the implications of the separation of powers doctrine and judicial independence on the concept of judicial review.

A. *Establishing a System of Judicial Review: What is the Appropriate System?*

Assuming that an autonomous Palestinian state is established, we feel that it is imperative that the Constitution expressly establish a system of judicial review.²²² Although the 1996 Draft does establish a constitutional court, it is necessary to define its role either within the Constitution itself, or by passing legislation, such as a judicial act. We agree with the 1996 Draft proposal establishing a centralized constitutional court, similar to the South African model.²²³ We further propose the adoption of abstract and concrete review based on the German model, but with an exception: We see the need for some procedure of *a priori* review similar to the French system.²²⁴

B. *The Mechanics of Judicial Review: The Legal Actors*

In devising a system of judicial review, it is also necessary to formulate the requirements needed to have a well-functioning judicial system. These such requirements include defining who in society is eligible to serve on the Court,

²²² See Section III., A., 4. (discussing our proposal for a constitutionally enumerated form of review based on the South African model).

²²³ See Section III., B., 3. (discussing our proposal for a centralized constitutional court).

²²⁴ See Section III., C., 4. (discussing our proposal for a mixed system of judicial review based on German and French influences).

how the jurists will be chosen, the amount of time the jurists may serve, the salary paid for their services, and how the jurists will be held accountable.

1. *Eligibility*

The Constitutional Court should not be limited to judges and lawyers, but also include scholars and activists. A mixture of these professions should be sought so that differing experiences can be utilized in the process of judicial review. Because the Palestinian legal profession was detrimentally affected by the Israeli occupation, a limited number of active lawyers and judges exist within Palestine. Therefore, it is imperative to utilize the experiences of Palestinian scholars and activists who resided in Palestine during the *intifada* and also use those diaspora lawyers, judges, activists and scholars who have lived and worked within Western democratic institutions. Although these individuals come from different life experiences, they all must share a commitment to the rule of law and a character that is beyond reproach.

2. *Tenure*

To establish a legitimate constitutional court, we advocate breaking with the past system of life tenure for the jurists. We advocate renewable term limits, because it is possible to remove those judges that do not live up to the standard of law, and it informs the judges that they must abide by the Constitution or be dismissed. By establishing a one-term limit qualification, it is possible that there will be a rapid turnover rate which has implications for the Court's ability to make coherent decisions and to remain independent.²²⁵ This turnover rate could mean that judicial decisions will change as the membership changes and that judges will have too short of time to become familiar with the Court's function before having to leave office.²²⁶ By allowing for renewable terms, the turnover rate can be decreased while still maintaining checks on the judiciary's power.

3. *Salary and Pension*

The level of judges' salaries and pensions can define not only the Court's independence and autonomy, but also define the quality of those judges who will serve on the Court.²²⁷ A judge that is poorly compensated is more likely to

²²⁵ George H. Gadbois, Jr., *The Institutionalization of the Supreme Court of India*, in *COMPARATIVE JUDICIAL SYSTEMS: CHALLENGING FRONTIERS IN CONCEPTUAL AND EMPIRICAL ANALYSIS* 111-42, 133 (John R. Schmidhauser ed., 1981).

²²⁶ *Id.*

²²⁷ *Id.* at 124

be influenced by various forms of bribery and unethical conduct.²²⁸ Moreover, the salaries and pensions need to be commensurate with the private sector. If this is not the case, the best legal talent in Palestine will not accept judicial appointments, which means the important decisionmaking roles will be filled by less experienced and less competent individuals.²²⁹ Inadequate pension funds can also lead to corruption, as sitting jurists could use their position to ensure their retirement fund.

With this in mind, we recommend a highly competitive salary and pension for those who will sit on the country's most important bench. These salaries should be included in the civil service budget, so that the government has no control to stop a jurist's payment for rendering a decision that is not in the government's interest.

4. Recruitment

The process of recruiting and appointing judges to the Palestinian Constitutional Court will have a great deal of influence in the independence and legitimacy of the Court. Like South Africa, the Palestinian judiciary and legal profession was detrimentally affected by a system of domination and oppression. The rule of law in each of these societies was manipulated to reinforce the dominant groups' role within society, thereby delegitimizing the judicial system within the eyes of the oppressed. Because of the existence of a similar historical-cultural tradition in Palestine and South Africa, we propose that the Palestinians adopt a commission for recruiting jurists along the lines of the South African Judicial Service Commission.²³⁰ Such commission's role within the judicial system is to nominate those individuals who are committed to upholding the rule of law and with no ties with the Israeli occupation.

Because this commission serves an important role in establishing a democratic regime within Palestine, it is imperative that the members of this commission be above reproach and not be political appointees. This commission could be popularly elected which would give them some accountability within Palestinian society. In the alternative, this commission could be modeled after the South African system by including a combination of individuals, such as the Minister of Justice, several members of the legislature,

²²⁸ *Id.*

²²⁹ *See id.* For example, Indian judicial salaries have remained the same since the 1950s, as the Indian Constitution fixed the jurists' salaries. *Id.* This has kept the most competent lawyers and scholars from seeking governmental employment. One chief justice stated that out of 27 members of the bar who had been offered judgeships, none had accepted the offer. *Id.* at 125.

²³⁰ *See supra* notes 230-31 and accompanying text (describing the function of the South African Judicial Service Commission).

members chosen by the bar, the Chief Justice, and representatives from the legal community.²³¹ A few members could even be appointed by the President.

5. *Accountability*

The 1996 Draft sets forth that judges may not be removed from office, but that some form of disciplinary action may be taken.²³² Jurists must know that they will be held accountable for their actions and that the law does not protect them if they have committed a serious crime or abused their power. Thus, we propose that a standard for impeachment be set forth in Palestine, similar to the model used in the United States:²³³ All governmental officials, including jurists, should be held to the same standard and removed from office for being convicted of treason or bribery, or for committing a serious abuse of power. A procedural mechanism for an individual's removal from office must be devised to ensure that no constitutional rights are violated in the process.

C. *Relation of Reviewing Body to Other Branches of the Government*

It will be important for the Palestinian Legislative Council to discuss the merits of an independent and autonomous judiciary. In so doing, the role of the separation of powers doctrine and the means by which independence can be achieved will need to be debated. For a system of judicial review to work within the Palestinian system, we feel that the judiciary must not be hindered by the political dictates of the party in power. The Constitutional Court must be independent enough to decide controversial issues, including the decisions handed down by the State Security Courts in Gaza.²³⁴ By protecting minority positions from being denied fundamental rights and curbing the Executive's abuse of power, the Constitutional Court can significantly contribute to the legitimacy and function of democracy.

²³¹ See *supra* notes 129-30 and accompanying text (examining South Africa's implementation of a Judicial Service Commission to nominate candidates to serve on the Constitutional Court).

²³² See 1996 Draft, ch. 6, art. 112 ("Judges shall be irremovable, and the law shall regulate their disciplinary accountability.").

²³³ Article II, § 4 states that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. ART. II, § 4. There has been much debate, however, over the meaning of "high crimes and misdemeanors" as it is a vague standard.

²³⁴ For a discussion of these courts and the human rights violations which have occurred since its inception, see AMNESTY INTERNATIONAL, TRIAL AT MIDNIGHT: SECRET, SUMMARY, UNFAIR TRIALS IN GAZA (June 1995).

positions from being denied fundamental rights and curbing the Executive's abuse of power, the Constitutional Court can significantly contribute to the legitimacy and function of democracy.

1. *Separation of Powers*

The separation of powers doctrines relies on two different, but interconnected ideas: the concept of checks and balances on every branch of the government and the concept of power being dispersed among the legislative, executive, and judicial branches of government.²³⁵ Without some system of separation of powers, a despotic and absolute regime emerges. As Montesquieu stated, "There would be an end of everything were the same man or the same body, whether the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."²³⁶

For judicial review to be effective and offer a legitimate means for seeking redress against legislative or executive actions, the emerging Palestinian democracy must allow for some separation of powers. To prevent the abuse of fundamental rights and freedoms within the 1996 Draft, the judiciary must be allowed to act in accordance with the constitution, even if its decision impinges on the executive or the legislature. The boundaries of each organ of the government should be established--constitutionally or legislatively--so that the Constitutional Court can use its judicial review power "to control unconstitutional invasions or interferences of powers in the sphere reserved to the other."²³⁷

2. *Judicial Independence*

Judicial independence is important in protecting individuals and groups of people against arbitrary state actions.²³⁸ Judicial independence implies "the *degree* to which judges believe they can decide, and do decide disputes, consistent with their own conception of the judicial role in interpreting the law, in *opposition* to what those who have *political* power think about or desire in such matters."²³⁹ Thus, the independent nature of a court is related to the extent

²³⁵ Motala, *supra* note 32, at 368.

²³⁶ 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* 152 (1900).

²³⁷ BREWER-CARIAS, *supra* note 48, at 20.

²³⁸ Motala, *supra* note 233, at 367.

²³⁹ David. S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L.Q. 405, 420 (1975).

exist which do not allow the removal of a jurist merely at the whim of the President or the government, or for taking a stand contrary to the government's position. Jurists must have confidence in the system and know that the only way they can be removed is for seriously violating the rule of law.²⁴¹

Another way of ensuring judicial independence within Palestine is to allow the judiciary some mode of fiscal autonomy. If a government has the power to withdraw or freeze funding, the ability to challenge governmental actions is decreased, thereby delegitimizing the role of the judiciary. One way to guarantee the Court's fiscal autonomy is to stipulate within the Palestinian Basic Law, or within a judicial act, that the legislature cannot reduce judicial funding below the amount appropriated for the previous year. This provision should also state that the legislature will release the judiciary's funds on a regular and automatic basis.

VI. Conclusion

To provide and maintain justice and freedom, it is essential that some form of judicial review exist within the new Palestinian Constitution. All substantive power has been in the hands of the Israeli military government and its civil administration. Palestinians have had little or no say in the political and administrative policies and practices that affect their lives. On the contrary, they have openly fought against and struggled with authority, and in so doing, the rule of law has been disregarded in many instances.

By accepting the decisions handed down by the Constitutional Court, the government can use judicial review to show their legitimacy--even if the decision challenges the power of the executive or the legislative branch. This cannot happen overnight, but, by establishing the Constitution as the supreme law of the land and abiding by its principles, in time the Palestinians can come to trust their government.

Palestinian society will have to be educated about the role that judicial review is to play. It is important that the judiciary--especially those courts at the highest level--publish opinions stating the reasons for their decisions.

In using judicial review, the courts will have to take account of the role that Islam plays within the society. There are several factions outside of the Palestinian Liberation Organization who do not want a democratic state. Instead, they advocate the establishment of an Islamic republic. It may be difficult for the court to gain legitimacy in the eyes of the Islamic fundamentalist movement, but the court must recognize the rights of the minority position.

In proposing a system of judicial review for the newly emerging Palestinian state, cultural traditions and the historical-legal context must be taken into account. In so doing, we have attempted to devise a system of review that will penetrate into society. This system includes the establishment of a

²⁴¹ See Section V., B., 5. (explaining our proposal for holding jurists accountable).

separate constitutional court with constitutionally, or legislatively, enumerated powers.²⁴² We endorse this model as Palestine will have to overcome a long history of oppression and domination which can be better accomplished by the delineation of constitutional precepts and norms of the Court. Another underlying reason for a centralized constitutional court is that the legal profession has been detrimentally affected by Israeli occupation, and thus it would be difficult to fill all levels of the Palestinian judiciary with individuals who are experienced and competent to review constitutional questions. We also propose that the method and type of judicial review to be used by the Palestinian judiciary should be based on French and German influences.²⁴³ Judicial review should not be limited to concrete cases, but rather be extended to abstract issues. Because the law-making process in Palestine is totally new, one way to ensure the constitutionality of disputed legislation is by referring it to the Constitutional Court for a determination. In devising a system of judicial review, it is also necessary to outline the mechanics of the system. Thus, we propose that the composition of the Court not be limited to judges and lawyers, but also include scholars and activists.²⁴⁴ We do not favor life tenure for these jurists, instead we advocate renewable term limits which will ensure that the judiciary's actions can be reviewed for not abiding by the standard of law.²⁴⁵ It will also be necessary for Palestine to establish adequate pensions and salaries for its jurists, as this defines the quality of the judges who serve on the Court and the Court's level of independence.²⁴⁶ The jurists who serve on the Constitutional Court must have impeccable records which can be assured during the recruitment process. We advocate that a commission, either elected or appointed, should nominate the candidates to serve on the Court.²⁴⁷ Finally, we propose that an impeachment process be devised so that jurists know they will be held accountable for their actions.²⁴⁸

This proposed use of judicial review is a progressive step in the establishment of a democratic Palestine. This is not merely tinkering of an existing premise of law within a society, rather it is a leading law reform. It is not intended to adjust the legal system to change, but is being used to change society. To achieve even a semblance of democracy, "one must envision the possibility of achieving a better society in order to propose specific measures

²⁴² See Sections IV., A., 4. and IV., B., 3.

²⁴³ See Section IV., C., 4.

²⁴⁴ See Section V., A., 1.

²⁴⁵ See Section V., A., 2.

²⁴⁶ See Section V., A., 3.

²⁴⁷ See Section V., A., 4.

²⁴⁸ See Section V., A., 5.

for attaining it. . . ."249 Only by applying and trying to abide by democratic principles is legitimate Palestinian self-rule a possibility.

249 John H. Merrymann, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, in *LAW IN RADICALLY DIFFERENT CULTURES* 5-11, 8 (John H. Barton et al., 1983).



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P.O.Box 14 Birzeit, Palestine

Tel: 972-2-9982135

Fax: 972-2-9982137

E-Mail: law@birzeit.edu

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Law Center - Birzeit University
P.O.Box 14 Birzeit-Palestine
Tel: 972-2-9982135
Fax: 972-2-9982137
E-Mail: law@birzeit.edu

