Volume 5, Number 2 ❑ December 2019

# Constitutional Review


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**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**
**Constitutional Review**, Volume 5, Number 2, December 2019

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# Note From Editors

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Constitutional Review (CONSREV) Journal is an international law journal published twice a year by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. The target of this journal is to discuss writings, research, and conceptual analysis which relates to constitutional issues. Hence it covers various topics on constitution, constitutional courts and its decisions, and any related matters on constitutional law from different countries.

The current issue is December 2019, Volume 5, Number 2 as the last edition in 2019. There are six articles written by scholars from different universities. The first article was written by Joseph Marko, a professor of Comparative Public Law and Political Sciences at the Faculty of Law of the University of Graz/Austria. In his article, he wrote about the role of the judiciary in a divided society. The Constitutional Court of Bosnia and Herzegovina becomes the primary aspect of his research. His paper is divided into three sections. The first one covers the description of the political, constitutional, and economic context of the Socialist Federal of Yugoslavia, including the war in Bosnia-Herzegovina. Then he provided analyses about the constitutional and institutional arrangements found in Dayton/Ohio and Paris in 1995. In the end, the author explains the role of the Constitutional Court as well as the doctrines involved.

The second author on this December 2019 publication is Hennie Strydom. He is a professor in Public International Law and Incumbent of the South African Research Chair in International Law, University of Johannesburg, South Africa. In his writing, Strydom focuses on the protection of economic, social, and cultural rights in international law where readers can find a brief overview of the origin of economic, social, and cultural rights and the codification in the 1966 International Covenant on Economic, Social and Cultural Rights. There are two main focuses provided by Strydom which cover the nature and scope of state obligation in relation to the realization of Covenant rights, then the

role of the United Nations (UN) Human Rights Council and the UN Security Council. The findings of this article state that three contemporary developments explained in his paper could open up new fields than could be further applied in economic, social, and cultural rights.

Then, CONSREV has Mohammad Ibrahim as the third author. He is a lecturer in law at Faculty of Law, Universitas Gadjah Mada. Ibrahim takes the constitutional change in Australia as his topic. In his paper, Ibrahim suggests that Australia should consider amending its Constitution. He proposes that the amendment could create better human rights protection in the country. Moreover, Ibrahim suggests that Canadian model protection of human rights needs to be considered a primary source in order to have reformation in the future.

The fourth author in CONSREV, December 2019 edition is Saniia Toktogazieva. Her current position is the Coordinator of the Human Rights program at the American University of Central Asia in Bishkek, Kyrgyz Republic. Besides, she is also an assistant professor at the same university. In her article, she raises the constitutionalism issue in the Kyrgyz Republic. On her writing, Saniia argues that a viable balance of power in constitutional court acquires an essential element that can promote the constitutionalism. She also proposes that the constitutional court should only be used for dominant powers if the balance does not exist. Finally, she uses the above proposal to demonstrate the work of the Constitutional Court of the Kyrgyz Republic.

The fifth author in this edition is Ibnu Sina Chandranegara. Currently, he is a Vice Dean at Faculty of Law, University of Muhammadiyah Jakarta. On the fifth article, readers could find a topic related to judicial independence and accountability during a political transition. His article focuses on an in-depth analysis of the implementation of constitutional guarantees of judicial independence after the political transition. This article also tries to figure the conceptual of the order in the transition era. In this era, Chandranegara argues that the rule of law in Indonesia was getting stronger.

The last author of this edition is Proborini Hastuti, a lecturer in Constitutional Law at the Faculty of Sharia and Law, Sunan Kalijaga State Islamic University of Yogyakarta. The discussion arises on this article is about shifting the character of the Indonesian Constitutional Court decisions where the political constellation has been influenced it. The result shows that the shift in character in the Indonesian Constitutional Court decisions was done to offset the political constellation in the legislators.

From the six articles provided by six scholars above, the editors of CONSREV hope that this edition, Constitutional Review 5.2, December 2019, could be beneficial and give insight on constitutions, constitutional court decisions, and constitutional issues in broader nature to the readers of this journal.

Editors

## Bosnia-Herzegovina: The Role of the Judiciary in a Divided Society

**Joseph Marko**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 194-221

This paper analyzes the role of the Constitutional Court of Bosnia and Herzegovina for the promotion of social justice under the conditions of a triple transformation from war to peace and from a communist regime based on the Titoist self-management ideology to a liberal-democratic political regime and economic market system in three parts. The first section describes the political, constitutional and economic context during and after the collapse of the former Socialist Federal Republic of Yugoslavia and the war in Bosnia-Herzegovina. The second section describes and analyzes the constitutional and institutional arrangements established under the General Framework Agreement for Peace, concluded in Dayton/Ohio and Paris, 1995. The third section deals with the role of the Constitutional Court and analyzes with reference to its case law the interpretative doctrines developed in its adjudication of the right to property concerning different concepts of property and the right to work in the context of the constitutionally guaranteed right to return of refugees and restitution of property.

**Keywords**: Anti-discrimination, Constitutional Principles, Interpretative Doctrines, Power Sharing, Transitional Justice.

## The Protection of Economic, Social and Cultural Rights in International Law

**Hennie Strydom**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 222-247

This contribution commences with a brief overview of the origin of economic, social and cultural rights and their eventual codification in the 1966 International Covenant on Economic, Social and Cultural Rights. The main part then focuses, firstly, on the nature and scope of state obligations for the realization of Covenant rights and the enforcement mechanisms created under the Covenant and its Optional Protocol, and secondly, on the role of the UN Human Rights Council and the UN Security Council. In the conclusion, three contemporary developments are highlighted which could open up new areas in which economic, social and cultural rights could find further application.

**Keywords:** Agenda 2030, Committee on ESCR, Obligations of Conduct, Obligations of Result, UN Human Rights Council.

## Constitutional Change: Towards Better Human Rights Protection in Australia

**Mohammad Ibrahim**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 248-274

Many legal scholars contend that Australia does not have a charter of rights in its Constitution. The legal scholar Rosalind Dixon, however, suggests that the Constitution does include some provisions that could be viewed as resembling a (partial) bill of rights. This constitutional framework might cause one to ponder whether human rights are adequately protected in the Australian constitutional system. This paper attempts to consider this question. It is argued that the protection of human rights under the Constitution, federal and state laws is not fully capable of responding to at least three human rights crises presented. Accordingly, the paper suggests that Australia should consider the idea of amending the Constitution in order to better human rights protection in the country. It offers suggestion that the Canadian model protection of human rights could be considered as one of the primary sources for reforms in the future.

**Keywords**: Australia, Canada, Constitutional Amendment, Human Rights.

## Constitution without Constitutionalism? Challenges to constitutionalism in the Kyrgyz Republic

**Saniia Toktogazieva**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 275-293

Application of basic principles revolving around the constitutionalism into third wave democracies, produced such phenomenon as constitutions "without constitutionalism". This paper will revisit and discuss this issue in the context of the Kyrgyz Republic. Main argument and thesis of the paper is following: Where a viable balance of power exists, a constitutional court acquires importance as a key element of that order, thus promoting the constitutionalism. If no such balance exists, the constitutional court will soon become a tool of the more dominant powers and thus lose its relevance for a genuine constitutional order. The abovementioned thesis will be demonstrated by the example of the work of Constitutional Court of the Kyrgyz Republic. Mainly it first aims at providing a proper foundation and basic understanding of constitutionalism, further revisiting this concept in the context of Former Soviet Union and finally will discuss the development of constitutionalism in Kyrgyzstan along with challenges faced by the court.

**Keywords**: Constitutional Court, Constitutional Review, Constitutionalism, Kyrgyzstan, Separation of Powers.

## Defining Judicial Independence and Accountability Post Political Transition

**Ibnu Sina Chandranegara**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 294-329

Indonesian constitutional reform after the fall of Soeharto's New Order brings favorable direction for the judiciary. Constitutional guarantee of judicial independence as regulated in Art 24 (1) of the 1945 Constitution, has closed dark memories in the past. This article decides that the Judiciary is held by the Supreme Court and the judicial bodies below and a Constitutional Court. Such a strict direction of regulation plus the transformation of the political system in a democratic direction should bring about the implementation of the independent and autonomous judiciary. But in reality, even though in a democratic political system and constitutional arrangement affirms the guarantee of independence, but it doesn't represent the actual situation. There are some problems that remain, such as (i) the absence of a permanent format regarding the institutional relationship between the Supreme Court, the Constitutional Court, and the Judicial Commission, and (ii) still many efforts to weaken judiciary through different ways such criminalization of judge. Referring to the problem above, then there are gaps between what "is" and what "ought", among others. First, by changing political configuration that tends to be more democratic, the judiciary should be more autonomous. In this context, various problems arise such as (i) disharmony in regulating the pattern of relations between judicial power actors, (ii) various attempts to criminalize judges over their decisions, and (iii) judicial corruption. Second, by the constitutional guarantee of the independence of the judiciary, there will be no legislation that that may reduce constitutional guarantee. However, there are many legislation or regulations that still not in line with a constitutional guarantee concerning judicial independence. This paper reviews and describes in-depth about how to implement constitutional guarantees of judicial independence after the political transition and conceptualize its order to strengthen rule of law in Indonesia

**Keyword**: Judicial Accountability, Judicial Independence, Judicial Reform, Political Transition.

## Shifting the Character of the Constitutional Court Decision Influenced by Political Constellation in Indonesia

**Proborini Hastuti**

Constitutional Review, Vol. 5, No. 2, December 2019, pp. 330-357

Recently, the decisions of the Constitutional Court have become one of the focuses in the dynamics of Indonesian state administration. This research discusses the relevance of political constellation in Indonesia and its influence on the changing character of several constitutional court decisions from self-executing to non-self executing. This research aims to find out how the legal impact of shifting the character of the Constitutional Court's decision in its implementation. This research is a normative study supported by a law, case and conceptual approach. The data used are secondary data, obtained by means of a literature research which is then arranged systematically and analyzed with qualitative analysis. From the results of the analysis it is known that the shift in the character in several decisions of the Constitutional Court was carried out as an effort to offset the political constellation in the legislators. The character shift is done in the hope that it can guarantee the execution of the Constitutional Court's ruling and can be followed up on by the decision of the ruling. This shows that Constitutional Court judges are trying to find a legal breakthrough in the corridor of judicial activism to make an ideal constitutional review decision.

**Keywords:** Constitutional Court, Judicial Activism, Non-Self-Executing, Political Constellation.

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# Bosnia-Herzegovina: The Role of the Judiciary in a Divided Society

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**Abstract**

This paper analyzes the role of the Constitutional Court of Bosnia and Herzegovina for the promotion of social justice under the conditions of a triple transformation from war to peace and from a communist regime based on the Titoist self-management ideology to a liberal-democratic political regime and economic market system in three parts. The first section describes the political, constitutional and economic context during and after the collapse of the former Socialist Federal Republic of Yugoslavia and the war in Bosnia-Herzegovina. The second section describes and analyzes the constitutional and institutional arrangements established under the General Framework Agreement for Peace, concluded in Dayton/Ohio and Paris, 1995. The third section deals with the role of the Constitutional Court and analyzes with reference to its case law the interpretative doctrines developed in its adjudication of the right to property concerning different concepts of property and the right to work in the context of the constitutionally guaranteed right to return of refugees and restitution of property.

**Keywords**: Anti-discrimination, Constitutional Principles, Interpretative Doctrines, Power Sharing, Transitional Justice.

* Professor of Comparative Public Law and Political Sciences at the University of Graz, Austria. Fmr international judge of the Constitutional Court of Bosnia and Herzegovina (1997-2002) and politico-legal adviser of the Special Adviser to the UN Secretary General on Cyprus, Espen Eide, in the negotiations on the re-unification of Cyprus (2016-2018).

## I. INTRODUCTION: THE HISTORIC AND POLITICAL CONTEXT

With the process of dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY), which had been established by the victorious Yugoslav Communist Party after the end of the Second World War, the Socialist Republic of Bosnia and Herzegovina, having been one of the six federal entities of SFRY, was in a particularly difficult sandwich position in 1991. According to Lenin´s and Stalin´s model for communist federations,[1] the federal entities of SFRY had constitutionally been seen as constitutive entities with the `ethnic´ majority population on the respective territory conceived as the state-forming nation for the respective `Yugoslav´ republics, namely Slovenia, Croatia, Serbia, Macedonia and Montenegro. However, as an exception from the rule and due to the historic legacy of the Ottoman and the Habsburg empires and the ensuing demographic situation with no ethnic group in an absolute majority position, Bosnia and Herzegovina could never be considered to be the state of one state-forming nation with other groups in the position of national minorities. Hence, three major groups, Muslims, originally categorized as a religious, not `national´ group,[2] Serbs, and Croats were seen as `constitutive´ for this Yugoslav republic. In order to counteract centrifugal forces following from the state and nation building processes not only in Bosnia and Herzegovina (BiH), but all over Europe in the 19$^{th}$ and the 20$^{th}$ centuries, the Yugoslav Communist Party, under its victorious slogan *Bratstvo i Jedinstvo* (Brotherhood and Unity), took over a *de facto* system of proportional representation and participation of these three groups in all of the republican institutions.[3] This system had already been developed under the Habsburg political system as conflict prevention mechanism, but was not taken over in the period between the two world wars with the establishment of the Kingdom of Serbs-Croats-Slovenes immediately after the First World War and its

[1] Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (New York: Routledge and Cavendish, 2008), 13-20.

[2] Most authors on the history of state and nation building in Yugoslavia follow the official communist doctrine and party history that muslims with a lower-case `m´ were a religious, but not ethnic, group and thus legally recognized as an (ethnically conceived) nation only through the Republican Constitution of 1974, henceforth Muslims with a capital `M.´

[3] Mirsad Abazović, *Nacionalni aspekti kadrova u BiH 1945-1991* [National Aspects of the Formation of Cadres in Bosnia and Herzegovina 1945-1991] (Sarajevo: Bibliotheka Posebna Izdanja, br. 66, 2000).

transformation into the Yugoslav kingdom in 1927, both characterized by Greater Serbian aspirations for hegemony. Finally, in the course of transformation from a communist one-party system to a multi-party system in 1990, this institutional mechanism became constitutionally entrenched and formed the basis for the first multi-party elections in November 1990. However, due to the strong ethnic polarization of society with the foundation of political parties along ethno-national lines, the results of these elections resembled more a census.[4]

Hence, with the final breakdown of Communist Yugoslavia in the course of 1991 and the wars in Slovenia and Croatia in summer and fall of 1991,[5] the newly elected tripartite Muslim/Serb/Croat government faced a problematic impasse when trying to remain `neutral´ and therefore `independent´ from any of the war-faring parties: on the one hand, both Muslim and Croat party leaders were afraid of being left over in a Serb-dominated `rump Yugoslavia´ under the leadership of the no longer socialist, but nationalist-authoritarian regime having been established by Slobodan Milošević in the Republics of Serbia and Montenegro, whereas, on the other, the political leader of the Serb Democratic Party (SDS) in BiH, Radovan Karadžić, threatened war in case of a declaration of independence by a majority vote of Muslim and Croat representatives in parliament. All efforts to reach a political compromise failed and a fully fledged war broke out in BiH in April 1992.[6]

What are the consequences of the following four years of war in BiH, stopped only by NATO-intervention based on a UN-Security Council mandate and followed by the Dayton Peace Agreement of December 1995?[7] Already during

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[4] See Joseph Marko, "Defective Democracy in a Failed State? Bridging Constitutional Design, Politics and Ethnic Division in Bosnia-Herzegovina," in *Practising Self-Government: A Comparative Study of Autonomous Regions*, eds. Yash Gai and Sophia Woodman (Cambridge: Cambridge University Press, 2013), 286.

[5] I have analyzed the political processes leading to the collapse of the SFRY in detail in Joseph Marko, "Processes of ethnic mobilization in the former Yugoslav Republics reconsidered," *Southeastern Europe* 34, no.1 (2010).

[6] See Joseph Marko, "Autonomy or Partition? The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina," in *Local-Self-Government, Territorial Integrity and Protection of Minorities*, ed. Swiss Institute of Comparative Law, Publications of the Swiss Institute of Comparative Law (Zurich: Schulthess, 1996); Sabrina P. Ramet, *The Three Yugoslavias: State-Building and Legitimitation, 1919-1992* (Washington: Indiana University Press, 2006), in particular 381-469.

[7] The following description has been elaborated in detail by Marko, "Defective Democracy", fn 4 and Joseph Marko, "Ethnopolitics and Constitutional Reform in Bosnia and Herzegovina," in *Bosnia-Herzegovina since Dayton: Civic and Uncivic Values,* eds. Ola Listhaug and Sabrina P. Ramet (Ravenna: Longo Editore, 2013).

the war, three new political units came into being. First, under the political leadership of R. Karadžić and the SDS, a new state, called `Republika Srpska´ (RS; not to be confused with the Republic of Serbia) was finally created by secession from the already internationally recognised Republic of Bosnia and Herzegovina in April 1992. Through military attack going hand in hand with ethnic cleansing, the military forces of RS, composed of the former Serb military personnel of the Yugoslav army from BiH, held around 70 per cent of the entire territory of BiH until 1995. The second political unit, called `Herceg-Bosna´, was established in July 1992 by the political leaders of the Croatian party HDZ in those parts of Herzegovina that were defended by so-called `Croatian Defence Forces´ and which formed, at the beginning of the war, a military alliance with the army of the Republic of BiH under the political leadership of its president, Alija Izetbegović, a Muslim. However, after a war within the war had broken out between the Muslim dominated government forces and the Croat Defence Forces in 1993, a third political unit, the `Federation of Bosnia and Herzegovina´ (FBiH) was created under strong pressure of the American administration through the Washington Agreement of April 1994. Whereas the war constitution of RS provided for a strong central state without any legal reference to ethnic groups, the constitution of FBiH provided for a bi-national federal state of Muslims, having renamed themselves in 1993 into Bosniacs, and Croats. This federation was also territorially delimited into so-called cantons. Eight of these cantons were populated with either Bosniac or Croat majority population, only two of them were called mixed cantons with no clear-cut majority population. At the federal level, the constitutional provisions introduced an ethno-national power sharing system for the legislative and executive powers, but also for the judiciary. In addition, the Washington Agreement also provided for a Confederation between the newly independent Republic of Croatia and FBiH.

In conclusion, before the end of the war the territorial and institutional make up of political units on the territory of BiH were characterized by a high degree of territorial and functional asymmetry. In addition, two neighboring states, Croatia and the so-called Federal Republic of Yugoslavia, composed of Serbia

and Montenegro, both of them under the control of S. Milošević, were parties to the conflict, and there were many efforts of international organizations, in particular the United Nations, and the United States to mediate. However, only after the genocide against 8000 Muslim men and boys committed in Srebrenica in July 1995, they were also ready to intervene militarily in order to stop the war.

Not only had the war caused approximately 100.000 casualities. Almost half of the 4.5 million pre-war inhabitants of BiH had become refugees all over Europe, Canada, the US and Australia or internally displaced persons (IDPs) by the end of 1995. It can be seen from figures commissioned from the UNHCR and the OSCE by the judge rapporteur for the case No. U-5/98 (see below) of the newly established Constitutional Court of BiH, also the demographic make-up of BiH had completely changed from a multicultural society with Muslims/ Bosniacs, Croats and Serbs living in all of the municipalities of the former Socialist Republic of BiH to a strictly ethnically divided society and territorally delimited along ethno-national lines as a consequence of genocide and ethnic cleansing during the war.

A comparison of population figures based on the last census in 1991 with 1997 UNHRC figures reported in the Constitutional Court´s case No. U-5/98, Partial Decision III,[8] demonstrates that the number of Serbs increased from 54.3 to 96.8% on the territory of RS, whereas the number of Bosniacs dropped from 28.7 to 2.2% and the number of so-called `Others´ from 7.5% to zero (§ 86). Similar figures demonstrate the effect of ethnic cleansing in FBiH, in particular with the numbers of Serbs decreasing from 17.6 to 2.3% (§ 92). What has been overlooked, however, in most scholarly literature concerning the effects of the war, is the degree of ethnic homogenization of the legislative, executive and judicial institutions in those newly established political entities. Again, the figures commissioned for the case No. U-5/98 are self-evident, in particular for the law enforcement bodies: in RS 97.6% of all judges and prosecutors and 93% of all police officers were of Serb origin (§ 130). In FBiH there was a strong

[8] Published in Official Gazette of BiH, Nr. 23/00. All decisions with concurring and dissenting opinions are also published on the webpage of the Constitutional Court of Bosnia-Herzegovina www.ustavnisud.ba., accessed on 18 August 2019.

preponderance of Bosniac judges and prosecutors with 71.72 % in relation to 23.26% of Croat origin, whereas only 5.0% of Serb origin were left in these bodies. The figures for the police forces are similar with slightly more Croats, but only 1.22% Serbs (§ 136).

In addition, after the end of the war with the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), 14 December 1995,[9] there was – with the exception of police forces – no lustration of the entire civil service, the media or the educational system at all territorial levels so that, for instance, pupils could still learn in 2004 from history or geography textbooks in use in RS or the Croat majority cantons of FBiH that `their´ President is either S. Milošević or F. Tudjman with the respective capitals of the, however, neighbouring countries, *i.e.* Belgrade and Zagreb.

As far as socio-economic conditions are concerned, the entire institutional make up after the Dayton Peace Agreement remained not only strictly ethnically divided, but also created a huge, expensive state machinery with more than 1000 ministers at the level of cantons, entities and the state of BiH for a population of 3.5 million inhabitants after the war. This huge bureaucratic apparatus is and remains highly ineffective due to the complex allocation of competences and the ethnic divisions so that BiH remains aid dependent and thus without investment driven and sustainable economic development to this day. As can be seen from long-term trends, there was and still remains also a highly ethnically divided private labor market and official data delivered by the World Bank show an average value in the unemployment rate of 25.06% between 1991 and 2018 with the highest value of 31.11% in 2006.[10] However, as can be seen from reports, youth unemployment is even officially much higher and purportedly one of the highest world wide with approximately more than 60%.

"This climate is linked to the political situation", a figurehead in the Bosnian youth NGO sector argues, "instability, corruption, and complicated bureaucratic

9 See the text reprinted in International Legal Materials, 35, no.1 (1996), 75-168.

10 See "Bosnia and Herzegovina/Unemployment rate", The Global Economy, accessed August 18, 2019, https://www.theglobaleconomy.com/Bosnia-and-Herzegovina/Unemployment_rate.

procedure for development of new businesses or foreign investments." Then the report goes on:

> It is this complex maze that youth looking for jobs must navigate; with most of the few employment opportunities secured through political connections and personal networks. As such, many qualified, well educated youth – especially those who are loath to give in to the political divisions – are left empty-handed after months of job searching. Most of the private-sector jobs that do exist offer very low wages and poor working conditions. ... The black economy – in which workers do not receive social security, health insurance, or pension payments from their employers – is ubiquitious. So the country now finds itself facing a significant brain drain, with educated, skilled youth deciding that it is easier to look for jobs outside the country ... About 150.000 young people have left since the war ended in 1995, with 10.000 leaving each year. Bosnians living abroad send home remittances that represent 13 percent of the country´s GDP, one of the world´s highest rate.[11]

Against this political and socio-economic background, we have thus to see what the role of the judiciary, in particular of a constitutional court, can be in terms of social justice in a society in a three-fold transition from war to peace and from a communist regime with a more or less centrally planned economy to a liberal democracy based on a market economy.

## II. THE POLITICAL AND CONSTITUTIONAL SYSTEM

As the title of the GFAP indicates, this is a framework agreement whose details are spelled out in eleven annexes concerning military matters, the rebuilding of state institutions, reconstruction of the war-torn economy and the return of refugees and IDPs with a strong international involvement for the achievement of these goals. Annex 3 of the GFAP regulates the first free multiparty elections after the war which had to be organized by the OSCE. Annex 6 establishes a Human Rights Commission, to be composed of an international Ombudsperson and a Human Rights Chamber, a body composed of fourteen judges, with a majority of eight judges including the President to be appointed by the Committee of

[11] See "Why Bosnia has world´s highest youth unemployment rate," *Youth Economic Opportunities*, accessed August 18, 2019, https://youtheconomicopportunities.org/blog/2971/why-bosnia-has-worlds-highest-youth-unemployment-rate.

Ministers of the Council of Europe. Annex 7 regulates the rights and duties for the return of refugees and IDPs to their homes of origin and establishes a Real Property Claims Commission to adjudicate on property issues or disputes in this regard. Annex 10 establishes an international High Representative (HR) to oversee and implement the entire civilian aspects of the peace accord and Annex 11 arranges for an International Police Task Force (IPTF), as UNCIVPOL operation under the auspices of the United Nations. Last, but most important for the purposes of this paper, Annex 4 of the GFAP provides for the Constitution of the renamed state "Bosnia and Herzegovina", thereby replacing the previous constitution of the internationally recognized former "Republic of Bosnia and Herzegovina" with its roots in the communist system.

Annex 4, like any other modern constitution therefore regulates the basic legal system of BiH in terms of institutions and structures. Moreover, it includes a rudimentary human rights catalogue, but in Annex I to Annex 4 alltogether fifteen international human rights instruments were declared directly applicable in BiH, not the least the UN human rights instruments as well as the human and minority rights instruments within the Council of Europe framework. If analyzed both from a constitutional law and political science perspective, it becomes clear that this constitution, having been drafted by US-American lawyers during the negotiations in Dayton/Ohio, was conceived as a political compromise and institutional umbrella for the cease-fire on the ground with many legal lacunae to be filled later by the competent institutions of either the legislative or judicial branches.

A sketch of the institutional structures foreseen in the GFAP in general and Annex 4 in particular will show the following picture:

2. 1. The legal fiction of Article I of the Dayton Constitution, as Annex 4 is colloquially called, declares that "The Republic of Bosnia and Herzegovina ... shall continue its legal existence under international law as a state with its internal structure modified as provided herein...," that is, that RS and FBiH shall form the two "Entities" of Bosnia and Herzegovina

according to paragraph 3. This means in less diplomatic language: the secessionist and war-faring RS is recognized, not necessarily as a sovereign state in terms of international law, but as a separate, political Entity with its territory occupied by military aggression, ethnic cleansing and genocide in spite of the fact that the UN Security Council had strongly opposed the recognition of new, in my interpretation also internal, borders created by violence.[12]

2. 2. Following the model of the constitution of FBiH as part of the Washington Agreement, the Dayton Constitution introduces proportional representation and veto powers in the legislative and executive powers for the so called "constituent peoples", that is, Bosniacs, Croats, and Serbs, unlike the FBiH constitution, however, not for "Others." Hence, Article IV provides for a bi-cameral parliament, with a House of Representatives whose members are to be directly elected in a ratio of 2:1 from the territories of FBiH and RS. The House of Peoples is to be composed on the basis of the ethno-national parity principle by five Bosniacs, five Croats, and five Serbs through indirect elections. According to Article V, there shall be a `collective´ Presidency, again to be composed through direct elections on the basis of ethno-national parity with one Bosniac, one Croat, and one Serb member, whereas the provisions for the so called "Council of Ministers" provide for ethno-national representation in a more indirect way. Hence, the only institution at state level with no textual prescription for ethno-national representation is, according to Article VI, the Constitutional Court of BiH to be composed of nine judges, six of them to be elected by the parliaments of FBiH and RS again in a ratio of 2:1 and three international judges to be selected and appointed by the President of the European Court of Human Rights, established under the European Convention on Human Rights (ECHR). However, as can be seen from this strange rule for the composition of what became called domestic judges in colloquial language, their election

[12] See UNSC-Res. 713, 25th September 1991.

by the parliaments of the Entities and not by the parliament at state level, ensures a *de facto* ethno-national composition to this day with two Serbs from RS, and two Bosniac and two Croats each from FBiH.

2. 3. Again in deviation from the FBiH constitution, Article IV paragraph 3 and sub-paragraphs d) and e) do not only provide for a so called “vital national interest” veto in the House of Peoples with the effect of a suspensive veto in the legislative process which can be overcome by a mediating mechanism in parliament or, in the final analysis, by a legally binding ruling of the Constitutional Court. Moreover, subparagraph d) enables also a veto mechanism, called “Entity veto”, with absolute effect. Hence, practically speaking, nine representatives from RS or eighteen from FBiH can block any decision-making in the House of Peoples.

2. 4. Finally, what makes BiH one of the weakest federations worldwide, is the division of powers between the so called common institutions at state level, described above, and the Entity level. Article III of the Dayton Constitution contains a general system of allocation of powers with a list of enumerated powers on behalf of the “institutions of Bosnia and Herzegovina” so that all those powers not contained in the list shall be those of the Entities. From a comparative constitutional law perspective, it is striking that most of the powers which are considered essential for state sovereignty, namely defence, police, or fiscal policy, are not in the list of enumerated powers so that they belong to the Entities. Article VIII even entrenches an almost absolute fiscal dependence of the “common institutions” because they have to be financed from the revenues of the Entitities.

In conclusion, as can be seen from the description above, with the territorial division into two Entities along ethnic lines created by war and ethnic cleansing, the strict corporate[13] power sharing model entrenched in the constitutions of

[13] Corporate, in contrast to liberal, power sharing is based on the legally entrenched ethno-national predetermination of governmental positions, frequently called `ethnic keys´ in scholarly literature. This distinction can be traced back to Arend Lijphart, “Self-determination versus pre-determination of ethnic minorities in power-sharing systems,” reprinted in Will Kymlicka (ed.), *The Rights of Minority Culture* (Oxford: Oxford University Press, 1995).

both FBiH and BiH, and almost no prescriptions for the institutional mechanisms on Entity level or for the coordination and cooperation between Entities and state institutions, the Dayton constitution is based on a political compromise which mirrored the military situation on the ground in terms of a cease-fire arrangement. Moreover, the Dayton constitution like the entire GFAP with its legal nature as a multilateral international treaty entered into force without parliamentary ratification process, nor is the authentic English text officially translated into any of the three official languages in use in BiH.

This must, in line with the title of this paper, trigger the question, why shall and how can such a state and constitution, imposed by international actors and with the bare minimum institutional mechanisms, be kept together? Who and what are possible integrative forces, if it shall not be doomed to become a "defective democracy" at best?[14] What are the basic values and (international) constitutional law principles in terms of transitional and social justice, possibly requiring not only political stability through negative peace and co-existence in an ethnically deeply divided society, but also positive peace through cooperation and (re-) integration in terms of reconciliation and social cohesion?[15]

## III. THE ROLE OF THE CONSTITUTIONAL COURT IN A DIVIDED SOCIETY

From the perspective which considers legal systems as peaceful dispute resolution mechanisms based on rule of law and not only ethno-national political power sharing because these two principles and their translation into legal and institutional mechanisms might come into conflict, it goes without saying that it is the basic function of a supreme or constitutional court in such a rule of law system that judges should always bear the integration of law, state and society in mind, even if they have to adjudicate, like the Canadian Supreme Court, a claim for secession as this was the case in Reference re Secession of Quebec ([1998] 2

[14] On the concept of defective democracies see Wolfgang Merkel, "Embedded and defective democracies," *Democratization* 11, no. 5 (2004).

[15] See, in particular, Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008).

SCR 217). As we will see from the case law of the Constitutional Court of BiH, this was even more so the case in BiH as a state and society still in transition after a protracted violent conflict. Since I have analyzed the implementation of the GFAP in terms of the functioning of the political party system in detail somewhere else,[16] I will focus in this paper on the comparative constitutional law issues for a constitutional system with a centralized judicial review mechanism. Moreover, I will address the perennial questions of judicial review with regard to the swing of the pendulum between judicial self-restraint and judicial activism in a court with a communist heritage on the one hand, and the permanent equal participation of foreign judges on the other which makes the Bosnian Constitutional Court unique worldwide.

What are, therefore, the underlying notions and premises for such a court when we speak about liberal democracy and market economy, or individual liberal and political human rights in relation with socio-economic and cultural rights? Due to the historic legacy and the involvement of judges coming from different constitutional cultures even in Europe (the foreign judges coming from Sweden, France, and Austria, each from a different `legal family´ with different systems of judicial review) and different ideological viewpoints or legal-theoretical assumptions in terms of positive law, we therefore have a broad range of possible alternatives with regard to questions of social justice, fairness and equality. And what role in particular shall foreigners, sitting with equal rights and duties on the bench of a national constitutional court, play or is this simply a violation of the principle of state sovereignty, as this could be heard as a reproach by politicians and media in BiH, in particular if this is a system imposed on the country?

### 3.1. Constitutional Unity or Pluralism: The Contested Institutional Position of the Constitutional Court

First of all, we have to clarify in howfar Article VI, paragraph 3 of the Dayton constitution foresees a hybrid mix of the US-American and the Austrian-German systems of judicial review.

[16] See Marko, "Defective Democracy," fn 4.

### 3. 1.1. Article VI.3:

The Constitutional Court shall uphold this Constitution.

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.
- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or scope of a general rule of public international law pertinent to the court´s decision."

In particular Article VI.3.a) provides a mechanism for what is called in continental European constitutional systems a centralized abstract judicial review procedure. As can be seen from the text, there is no requirement for a dispute between private parties before ordinary civil or criminal law courts, but the Constitutional Court of BiH functions as a final umpire on disputes between state institutions either on Entity level or between institutions of the Entities and the so-called common institutions on state level. In contrast, Article VI. 3. b) foresees a concrete judicial review procedure with the Constitutional Court as court of final instance, but no power of the

lower courts to adjudicate on the constitutionality of laws to be applied in the case at hand as can be seen from Article VI. 3. b).

In conclusion, in both abstract and concrete review cases the rulings and judgments of the Constitutional Court with a monopoly to review all sorts of legal acts whether they are in conformity with the constitution, are legally binding not only for the parties, but *de facto* also serve as a `precedent´ and, if necessary, will abrogate the law in force. Hence, the Bosnian-Herzegovinian system of judicial review resembles more the Austrian-German model of judicial review than the US-system of `diffuse´ judicial review where judges at all levels can set aside legal provisions which they deem inconsistent with the constitution. As I have outlined somewhere else in detail[17], these comparatively summarising statements above became true, however, only after having established the respective rules by case law of the Constitutional Court itself after disputes with the other institutions, in particular the Human Rights Chamber, the Entity Supreme and Constitutional Courts and, finally, also the High Representative, all of whom had contested the competence of the Constitutional Court of BiH to rule on appeal against their decisions.

## 3.2. The Case-law of the Constitutional Court regarding Socio-economic Rights

Hence, I will focus on two judgments of the Constitutional Court and the respective reasoning of the majority and dissenting opinions in order to uncover the ideological and legal-theoretical underpinnings concerning the interpretation, in particular methods of interpretation, of liberal human rights, including socio-economic rights in the context of the various spheres of transformation already mentioned above.

### 3.2.1. Case No. U-5/98

Already in 1998, the then Chair of the Presidency, Alija Izetbegović, submitted a request for judicial review with the allegation that more than

[17] See Joseph Marko, "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance," in *European Diversity and Autonomy Papers*, 7/2004, accessed 1 September 2019 www.eurac.edu/en/research/autonomies/minrig/publications/Pages/European-Autonomy-and-Diversity-Papers-(EDAP).aspx.

twenty provisions of the Entity Constitutions were not in conformity with the Dayton Constitution because the Entity parliaments had violated their obligation from Article XII, paragraph 2 to bring Entity constitutions in line with the Dayton constitution within three months. After more than two years of deliberation, this case, No. U-5/98, was handed down in 2000 in the form of four partial decisions.[18] Many of the claims made affected the institutional design at Entity level described above so that this request for judicial review was–seen from a political perspective–also an attack on the political compromise concluded in Dayton and constitutionally entrenched with the strict ethno-national power dividing system, in particular the territorial division and, in effect, the ethno-national homogenization of institutions at the Entity level with its effects seen as main obstacles for the reconstruction of the state and the economy. However, in terms of constitution-building and institution-engineering, the architects of Dayton had also insisted on the return of refugees and IDPs, the restitution of property and, in particular, the legal obligation following from Annex VII, Article II: "19. Parties undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without any preference for any particular group."

As one immediately can see from this quote, the provisions of the entire GFAP as a political compromise can have either a static effect, with the ethno-national, power dividing territorial and institutional elements trying to preserve the status quo at the time of the conclusion of the truce, or a dynamic effect to be based on the return of refugees and IDPs if seen as a positive state duty to create the necessary social, economic and political conditions for their reintegration and thus the re-establishment of a multicultural society as it had existed before the war. The entire legal structure

[18] See Official Gazette of BiH, Nr. 11/00, Nr. 17/00, Nr. 23/00 and Nr. 36/00. All decisions with concurring and dissenting opinions are also published on the webpage of the Constitutional Court www.ustavnisud.ba., accessed August 18, 2019.

and therefore the political compromise in Dayton was obviously based on a constitutional "open-endedness and ambiguity"[19] which provided the ground for the judicialization of politics and put the Constitutional Court under enormous political pressure.[20]

It is, therefore, all the more important to reflect on the methods of interpretation in this case and to clarify which different normative force was given to different types of constitutional provisions? There is the rather abstract language of the preambular provisions of Annex 4 referring to the promotion of "the general welfare and economic growth through the protection of private property and the promotion of a market economy" in a situation of transformation from a communist to a democratic system. However, there are the only seemingly much more concrete constitutional rules laid down in the enumeration of liberal human rights in Article II of the Dayton constitution, guaranteeing a "right to property" in general and the "right" of all refugees and IDPs "to freely to return to their homes of origin" and "the right, in accordance with Annex 7 the the General Framework Agreement, to have restored to them the property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them."

Following from the request of Alija Izetbegović to abrogate Articles 58 and 59 of the RS constitution as violating these constitutional principles and rights, not only the meaning of the normative principle of a market economy, but also the normative substance of the right to property became a matter of strong dispute which was decided by the majority of the Constitutional Court in Partial Decision 2 of case No. U-5/98.

[19] See Michel Rosenfeld, "Constitutional Identity," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 764.

[20] See also the reviews of and comments about these judgments by Carsten Stahn, "Die Verfassungsrechtliche Pflicht zur Gleichstellung der drei Ethnischen Volksgruppen in den Bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton? [The Constitutional Obligation to Guarantee Collective Equality of the Three Ethnic Groups in the Bosnian Entities – New Hope for the Model of Dayton?]" *Zeitschrift für öffentliches Recht und Völkerrecht* 60, no. 3-4 (2000); International Crisis Group, "Implementing Equality: The 'Constituent Peoples' Decision in Bosnia and Herzegovina," *Balkans Report*, No. 128, 16 April 2002; Anna Morawiec Mansfield, "Ethnic but equal: the quest for a new democratic order in Bosnia and Herzegovina," *Columbia Law Review* 103 (2003).

The contested provisions read as follows:

> Article 58, paragraph 1
>
> Property rights and obligations relating to socially-owned resources and the conditions of transforming the resources into other forms of ownership shall be regulated by law.
>
> Article 59
>
> Natural resources, urban construction sites, real estate and goods of particular economic, cultural and historical significance determined by law to be of general interest, shall be state-owned.
>
> Certain goods of general interest may also be privately owned property under the conditions determined by law.
>
> ...

As one can see from the text, there are the terms and concepts of "socially-owned", "state-owned" and "privately owned property" and their relationship to be clarified by interpretation. As a precondition, what normative force, if any, does the language of a preambular provision with its reference to economic growth and a market economy have?[21] Can the preamble of the Dayton constitution serve as a standard of review for the Entities constitutions? Then what is the normative content of a right to property? Is it – in the classic liberal tradition – only a negative individual human right against state interference and what are then the limits of state interference? Or can it also be more than a negative individual right and create even positive obligations in systematic interpretation with the text of Article II of Annex 7 quoted above?

The majority of the judges followed the opinion written by the judge-rapporteur in this case, the author of this paper, by arguing that all constitutional provisions, that is, also the preambular provisions, establish "basic constitutional principles and goals for the functioning of Bosnia and Herzegovina ... that must be perceived as constitutional guidelines or

[21] On the contestation about the normative force of preambles in constitutions see Liav Orgad, "The preamble in constitutional interpretation," *I•CON* 8, no.4 (2010).

limitations for the exercise of the responsibilities of Bosnia and Herzegovina and the Entities." (§ 13). In conclusion, the majority argues under §§ 14 and 15, that there are at least two interpretative doctrines following from the constitutional principles and rights which must serve as a standard for judicial review:

First, the right to private property is not only an individual right, but also an "institutional safeguard" clause:

> "Demonstrated by the relationship between `the protection of privately owned property´ and a market economy in the text of the Preamble and Article II of the Constitution of BiH, the right to property is not only an individual right, which requires judicial protection against any illegitimate state interference, but also an institutional safeguard as one of the prerequisites for a functioning market economy."

Second, there is a an absolute limitation against state interference into human rights, originally developed by German constitutional law as so called *Wesensgehaltssperre*, that is, the absolute limitation to infringe the essence of a human right even through democratic legislation:

> It follows from the case law of the European Court of Human Rights that in balancing the demands of the community's general interests, the State's interference with property rights and the requirements of the protection of individual rights, that such a fair balance presupposes the possibility of a balance, i.e. the factual existence of goods in privately owned property. If privately owned property can be reduced to next to nothing through legislation by nationalising, for instance, entire fields of industries, such legislation would fundamentally infringe on the right to property, and in particular, as it is viewed as a necessary requirement of a market economy expressly foreseen by the Constitution of BiH. Therefore, in the final analysis, the supremacy of the Constitution of BiH in accordance with Article III.3 (b), which supersedes, inter alia, the Constitutions of the Entities, would no longer have any reasonable meaning if it allowed the abolishment of privately owned property. This idea is expressed in the case law of Central European constitutional courts as `in no case may the essence of a basic right be encroached upon´, thereby establishing an absolute restriction on the infringement of constitutionally guaranteed rights through legislation.

By applying these standards of review, the Court argued under § 17 that the constitutional category of "socially owned" property, which - as a legacy of the former Titoist-communist self-management system – denies both private persons as well as the state the legal status to be considered the owner of property, can no longer be considered to conform to the requirements of the Dayton constitution outlined above, because it creates, in theory and practice, serious obstacles for any privatization process in Bosnia and Herzegovina, in particular for foreign direct investment to create sustainable economic growth and thus "to establish a properly functional market economy."

However, following from judicial self-restraint, the majority of the Court also argued that the challenged provision could be read in two ways, either as a mere legislative authorization of the RS parliament or as a constitutional duty to transform all socially owned property into either private or state owned property in order to promote a mixed economy on the basis of a market system. The majority therefore argued on the basis of a constitutional doctrine to be found in many federal systems that a challenged provision must be upheld as long as it can be interpreted in conformity with the higher ranking law, so that the second alternative has to be applied and therefore it upheld the challenged provision of Article 58, paragraph 1 RS constitution.

In his dissenting opinion, judge Hans Danelius from Sweden and a former judge of the Swedish Supreme Court with, however, no tradition of constitutional judicial review and also a former member of the European Commission of Human Rights, did, based on his experience and the legal doctrines developed by these bodies, deny the first rule elaborated by the majority of the Court concerning a right to property to be seen not only as an individual right, but also as an "institutional safeguard" clause and the conclusion that the contested provision of the RS constitution must be interpreted as a positive duty:

> Finally, with respect to the provisions in Article II of the Constitution of BiH, which guarantee the right to property in the context of the general protection of human rights, I find it natural to start the analysis by

referring to Article 1 of Protocol No. 1 to the European Convention on Human Rights. That Article provides, inter alia, that every natural or legal person is entitled to the peaceful enjoyment of his possessions, that no one shall be deprived of his possessions except on specific enumerated conditions, and that the State shall be free to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.

It appears from the wording of Article 1 of Protocol No. 1 that it is intended to provide protection for the individual's existing property. The provision has generally been understood not to include any right to acquire property, and this interpretation has been confirmed by the European Court of Human Rights, for instance in the case of Marckx v. Belgium (European Court of Human Rights, Judgment of 13 June 1979, Vol. No. 31). Against this background, Article 1 cannot be considered to impose on the State an obligation to privatise State-owned property or otherwise to ensure that certain property is private and not owned by the State or other public organs.

In Article II, paragraph 3 of the Constitution of BiH, the right to property appears as one of numerous enumerated human rights, and there seems to be no reason why the protection of the right to property in this paragraph should be different from the protection provided by Article 1 of Protocol No. 1.

In other words, the right to property as a human right is an individual right. It does not impose obligations regarding the social and economic system of a country. It protects the property which an individual owns at a given moment and does not include any right for him to acquire other property in the future.

Moreover, the majority of the Constitutional Court abrogated the contested provisions of Article 59 RS constitution based on the interpretative doctrine of an absolute limitation for legislation to infringe the essence of human rights:

20 ...To declare natural resources, urban construction sites, and real estate to be state-owned property *ex constitutione* infringes on the very essence of privately owned property as an individual right and an institutional safeguard.

21. In addition, the ability to expropriate on behalf of the general interests of the State or society was an important element of the communist constitutional doctrine and must thus be viewed as a legacy of that period. If legislation can abolish constitutionally guaranteed rights by

> making reference to unspecified general interests, it would ridicule the basic principle of the rule of law, with the Constitution as paramount, because there is virtually nothing which could not be construed as of `general´ interest. Hence, the Constitutions of the Entities must not grant such broadly construable legislative authorizations that could deprive human rights of any meaning. Such a legal technique violates the principle of efficiency.

### 3.2.2. Case No. U-19/01

In the end, the second case to be dealt with in our context is Case No. U-19/01. This was again an abstract review procedure challenging Article 152 of the RS Labour Law, having been adopted in 2000. This case is of special interest with regard to socio-economic rights in the narrower sense, that is, the right to work within the framework of the right of return of refugees and IDPs to their homes, that is, their towns and villages, and be provided with the necessary conditions to make a living in their familiar surroundings.

As can be seen from the reasoning of the Constitutional Court in case No. U-5/98 Partial Decision 3, at § 88, one of the contextual elements established to judge discriminatory behaviour against returnees to RS was the discrepancy in numbers between so-called "minority returns", that is, Bosniacs and Croats willing to return to their homes of origin now under the Serb-dominated adminstration of RS, and the overall numbers of returnees insofar only 10.17% of all returnees did belong to the former category. Moreover, the unemployment rate among returnees was as high as 92%.[22] Seen against this background Article 152 of the Labour Law of RS stipulated:

> Employees having an employment contract on the day of 31 December 1991 with an employer seated on the territory which is now part of Republika Srpska, whose working relationship with that employer was illegally terminated between that date and the effective date of this Law, shall have the right to file a request for severance pay within three months from the effective date of this Law.

[22] See Nedim Kulenović, *Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation* (Sarajevo: Working Paper 5/2016, Analitika, Center for Social Research, 2016), 46.

Moreover, Article 158 established a commission to be appointed by the minister in charge of labor to finally decide on such requests with legally binding effect.

The majority opinion of the Constitutional Court in this case, when reasoning about a possible discriminatory intent of Article 152, made even an abstract reference to Article 6, § 1 of ICESCR as legal source to be taken into consideration, but found no evidence for direct or *de jure* discrimination by the legislator of RS and therefore went on to find out whether the distinction made in the text of Article 152 concerning "persons or groups to be compared" might amount in effect to an indirect or *de facto* discrimination between Serbs, Bosniacs and Croats due to the historical context of ethnic cleansing when employees were dismissed or put on waiting lists on ethnic grounds. Hence, the majority went on to deliberate on the question whether Article 152 could be considered to have an objective and reasonable justification and established that the overall aim of the contested Article is "creating legal certainty for those companies that ceased or reduced their activities due to the war, and which were after the war faced with the problem of resuming their work under conditions of a market economy. Such legal certainty may also be essential for investors in such companies and for the general development of the economy of Bosnia and Herzegovina" (§ 25). On the other hand, the reasoning goes on,

> there is a right of those unlawfully dismissed or placed on a waiting list to be reinstated into their previous positions. Their reinstatement may not be possible in all cases and may largely depend on the economic conditions of their previous employer. Although this individual interest is of high importance, the Constitutional Court considers the public interest outlined above, could reasonably be considered to prevail (§ 26).

As can be seen from this reasoning, the majority opinion not only ignores to elaborate on the meaning of the right to work, including the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses according to Article 6 § 1 ICESCR in the context of Bosnia

and Herzegovina, but also simply applies a mere rationality test in the terminology of the US Supreme Court between a highly abstract public interest, not in any way further empirically substantiated, and the “right” to work, that is, to be reinstated after having been illegally dismissed on ethnic grounds and therefore being seriously discriminated against which is, moreover, linguistically denigrated to a simple “individual interest.”

It must therefore come as no surprise that the author of this paper delivered a dissenting opinion in this case and argued that even the majority opinion had recognized that the effects of past de jure discrimination are upheld by Article 152 RS Labor law so that the contested provision must trigger `strict scrutiny´ for review in the terminology of the US Supreme Court, and thus the application of the proportionality principle as the European equivalent in terms of standards of review.

In conclusion, the dissenting opinion outlines that Article 6, § 1 ICESCR has to be read in conjunction with the provisions of Articles II. 5 of the Dayton constitution as a guaranteed right, not simply an individual interest so that the “balancing” of guaranteed rights against public interests requires that all elements of the proportionality test are strictly met. Hence, it has to be tested not only whether the means employed are legitimate and appropriate to achieve the objective, but also whether they are the least restrictive in the guarantee of rights that are available. Seen in this light, Article 152 does not meet the standards of the proportionality test. Its legitimacy must be contested since the recognized illegal dismissals in the past, which formed a part of an organized campaign of ethnic cleansing, are upheld and thereby legalized, creating new discrimination. Second, severance pays instead of reinstatement and the establishment of a commission instead of an independent court in the meaning of Article 6 ECHR to finally decide on requests are not the least restrictive means possible:

> 16. In times of prosperity, it would certainly be easier to maintain the present workforce while at the same time reinstate former employees. Also, some areas or branches of the labour market may face greater

> difficulties than others. However, it is a constitutional imperative of utmost importance not to uphold discriminatory practices or even create new legislation which discriminates in effect. Thus, the economic burden as a result of the war has to be proportionately distributed between all parts of the population as well as between the private sector and the state budget. An approach which transforms this constitutional obligation into an affirmative action plan to re-employ at least a certain number of Bosniac and Croat men and women would be less burdensome on the victims of discrimination while at the same time taking into account the present economic difficulties. Most importantly, it would give returnees the same chance to access the limited available positions as the majority Serb population presently have, and thereby bring the right to return into balance with the public interest in a sustainable economy. Lastly, such legal guidelines on a proportionate distribution of the existing positions according to criteria of professional qualification would meet the obligation of the public authorities to facilitate the return process.

Hence, the conclusion of the dissenting opinion:

> 17. In view of feasible alternatives which the majority Decision does not take into consideration, Article 152 of Labour Law of the RS, by categorically excluding any reinstatement nor providing for any equivalent solution, cannot be considered a necessary and proportionate means. Article 152 of Labour Law of the RS does not find a reasonable relationship of proportionality between the means employed (symbolic compensation and exclusion of any reinstatement) and the aim sought to be realised (compensation for suffered discrimination under tight economic conditions). It is thus discriminatory and in violation of Article II.4 in conjunction with Article II.5 of Constitution and Article 6 § 1 ICESCR, Annex I of Constitution of Bosnia and Herzegovina.

## IV. CONCLUSIONS

As can be seen not only from these judgments,[23] most of the problems of the reconstruction of the state and economy and reconciliation of society in terms of the civilian implementation of the GFAP were brought before the Constitutional Court of BiH. Seen from hindsight, the Constitutional Court of BiH was, through the judicialization of politics in a process of triple transformation after a terrible war, necessarily a very active court and thus, together with the High

[23] See in particular the more than 1000 pages commentary by Nedim Ademović and Christian Steiner, *Constitution of Bosnia and Herzegovina. Commentary* (Sarajevo, Konrad-Adenauer-Stiftung, 2010).

Representatives in BiH, probably one of the two institutions constantly working for the reintegration of state and society inspite of the de facto ethno-national composition among `domestic´ judges and the participation of three international judges. Concerning the role of the latter in processes of constitutional adjudication, two phenomena must be highlighted. In terms of human rights protection, their role was to serve as translators and mediators for the domestic judges, because all of them had been trained under the communist system and therefore had no experience with the ECHR and its implementation in the member states of the Council of Europe or the case law of the European Court of Human Rights. In this regard, all the judges irrespective of their ethnic feelings developed an esprit de corps concerning the protection of liberal, that is, negative human rights against infringements by public authorities.

Secondly, and astonishingly, as could be seen from the description and analysis of the two cases above, most conflicts of interpretation in terms of ideological underpinnings and legal-theoretical assumptions concerning the relationship between liberal, negative rights and social rights and corresponding positive duties of state authorities did not flare up between domestic judges trained under the communist regime and international judges coming from liberal-democratic regimes, but among the international judges themselves coming from different legal cultures with different practices of judicial review. However, as can be seen from the overview on the case law of the Constitutional Court of BiH analysed by Ademović and Steiner, quoted above in footnote 17, questions and problems of socio-economic rights in the narrow meaning did not play a prominent role in the adjudication of the Constitutional Court of BiH, and if, only in connection with problems of discrimination on the basis of ethnic origin.

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# The Protection of Economic, Social and Cultural Rights in International Law

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**Abstract**

This contribution commences with a brief overview of the origin of economic, social and cultural rights and their eventual codification in the 1966 International Covenant on Economic, Social and Cultural Rights. The main part then focuses, firstly, on the nature and scope of state obligations for the realization of Covenant rights and the enforcement mechanisms created under the Covenant and its Optional Protocol, and secondly, on the role of the UN Human Rights Council and the UN Security Council. In the conclusion, three contemporary developments are highlighted which could open up new areas in which economic, social and cultural rights could find further application.

**Keywords:** Agenda 2030, Committee on ESCR, Obligations of Conduct, Obligations of Result, UN Human Rights Council.

## I. INTRODUCTION

The concept of economic, social and cultural rights is, as an international human rights concern, most significantly linked to the 1966 International Covenant for the Protection of Economic, Social and Cultural Rights (ICESCR). By 2019, this Covenant had 170 states parties, an achievement that is just short of the 173 states parties to the 1966 International Covenant on Civil and Political Rights (ICCPR). These seminal Covenants, which together with the 1948 Universal Declaration of Human Rights, are commonly referred to as the International Bill

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of Rights, represent the different ideological approaches to the two categories of rights and in state obligations of implementation between economic, social and cultural rights on the one hand and civil and political rights on the other, a divide that was not part of the conceptualization of the Universal Declaration of Human Rights.

However, legal developments at both the international and domestic levels in subsequent years have eroded the original arguments used to justify differences in state obligations, justiciability and implementation with respect to the two categories of rights. In addition, socio-economic rights are no longer an unfamiliar topic in legal systems and evolving jurisprudence at the international, regional and domestic level has main-streamed this category of rights which are now also an integral part of the international community's development agenda. In this context, and given the constraints of space and remit, this contribution will commence with a brief revisit of the origins of these rights and their eventual codification in the ICESCR. The main part of the contribution will then, firstly, focus on the nature and scope of the state obligations states parties assume under the Covenant and the role of the different enforcement mechanisms created by the Covenant and its Optional Protocol, and secondly, on the roles of the Human Rights Council and the Security Council in the protection of economic, social and cultural rights. The conclusion covers some recent developments which may have further implications for the role of economic, social and cultural rights.

## II. BRIEF HISTORICAL OVERVIEW

Since the international codification of economic, social and rights is primarily a post-World War II development, this part will highlight a few key historical developments[1] since the adoption of the UN Charter in 1945. While the Charter refers to human rights and fundamental freedoms in several places,[2] economic and social rights are not specifically mentioned. Instead they seem to be implied

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[1] For a comprehensive account see Ben Saul (ed), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948 – 1966 Vol I* (Oxford: Oxford University Press, 2016).

[2] UN Charter, preamble, Arts 1(2) and (3); 55.

where the Charter speaks about the need to promote "higher standards of living, full employment, and conditions of economic and social progress and development and to find solutions in respect of international economic, social, health and related problems".[3] Seemingly, the same is also implied where the Charter spells out the powers and functions of the Economic and Social Council (ECOSOC) by stating that the Council will be entitled to "make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters".[4] In terms of the Charter, UN member states also pledge to take joint and separate action for the achievement of the above objectives.[5]

These ideals had links with the principles set out in the Atlantic Charter of 1941, a statement by the UK and US governments for the new post-war organization and which were subsequently endorsed by 26 allied countries in the Declaration of the United Nations of 1 January 1942. Of the four freedoms listed by President Franklin D Roosevelt in his famous State of the Union address on 9 January 1941, 'freedom from want'[6] foreshadowed the need for the development of economic conditions in the post-WWII international community of states that could respond to the social and economic needs of citizens everywhere in the world.[7]

Perhaps one of the most important early developments in the codification of socio-economic rights after the establishment of the United Nations is the adoption in 1948 of the Universal Declaration of Human Rights, which was ECOSOC's first project, following its establishment in 1946, to bring into effect an international bill of rights.[8] As Saul[9] has pointed out, already during the drafting process for a Universal Declaration, disagreements were emerging between states on having a catalogue of social and economic rights. However, the controversy was not over having such rights enumerated in an international instrument, but over their implementation, enforcement, supervision and justiciability.

3 UN Charter, art 55(a) and (b).
4 UN Charter, art 62(1).
5 UN Charter, art 56.
6 The others were freedom of speech, freedom of religion and freedom from fear.
7 Saul, *The International*, 96.
8 ECOSOC res 1/5, 16 February 1946.
9 Saul, *The International*, 99.

Arguably, what tempered the divisions at the time was the 1944 American Law Institute's Statement of Essential Human Rights which distilled a universal list of basic individual rights found in different countries and traditions. The commentary to the Statement pointed out that social and economic rights were already enshrined in the constitutions and other laws of a range of countries. This included the right to property (50 constitutions); education (40 constitutions); work (9 constitutions); conditions of work (18 constitutions); and housing (11 constitutions).[10] To this one should add changing social conditions as a result of the effects of WWII, greater industrialization and political sentiments in favour of social democracies, either as part of a national tradition (Latin America) or as a remedy for totalitarianism (Europe).[11]

Given the ideological divisions between East and West after WWII, it is truly remarkable that when the 58 UN members at the time voted in the General Assembly[12] for the adoption of the Universal Declaration there were only eight abstentions and no dissenting voice. To accommodate the diverse views of the Soviet Union and other socialist states, who favoured an interventionist role of the state for the realization of the social and economic rights in the Declaration, and their western counterparts, who opted for market forces, individual endeavours and voluntary methods, a compromise provision was needed on the issue of implementation. This took the form of article 22, which reads as follows:

> "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Perhaps what also facilitated consensus amongst the UN member states at the time was the fact that the Declaration was not intended as a binding document but was merely proclaimed by the General Assembly in the preamble as a "common standard of achievement for all peoples and all nations...". This

[10] *Ibid.*, 101.
[11] *Ibid.*, 102.
[12] General Assembly resolution 217A(III) of 10 December 1948.

agreement on the 'common standard of achievement' also covers the following social, economic and cultural rights: the abolition of slavery and the slave trade in all their forms (article 4); the right to own property and not to be arbitrarily deprived of it (article 17); the right to social security (article 22); the right to work and to favourable conditions of work (article 23); the right to a standard of living adequate for an individual's health and well-being (article 25); right to education (article 26); and freedom of participation in cultural life (article 27).

A peculiar aspect of article 22 is the mentioning of the right to social security since this provision is aimed at ensuring the implementation of the Declaration and not at the enumeration of specific economic and social rights. This is even more peculiar since the right to social security is regulated in article 25. According to commentators the explanation for the incorporation of the right to social security in article 22 had to do with the fact that it was meant to carry a broad and general meaning in that provision to denote the concept of social justice as the all-embracing idea behind the realization of all economic, social and cultural rights and to prevent a restricted, technical interpretation.[13]

The importance of the Universal Declaration as a point of reference for future developments in the codification of human rights standards and for transforming our understanding of human rights must not be underestimated. By providing for social, economic and cultural rights alongside civil and political rights at a time when the former category was often conceived as not worthy of recognition on a par with the latter category, it has laid the foundation for later formulations in numerous General Assembly and Security Council resolutions and other international law instruments re-affirming the indivisibility, interdependence and interrelatedness of all human rights. The Declaration also underlines the similarities between the two categories of rights by using the same language in describing the subject of the right ('everyone is...') and by implying that the implementation of these rights is not dissimilar to the implementation of civil

[13] Rodrigo Uprimny, "Article 22 and The Role of Economic, Social and Cultural Rights in the Realization of Social Justice," in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, ed. Carla Ferstman and Tony Gray (London: Routledge, 2018), 173-175.

and political rights as far as their urgency is concerned. For instance there is no provision subjecting any of the social and economic rights to 'progressive realisation' by the state.[14]

## III. TREATY-BASED AND OTHER SELECT MECHANISMS FOR THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

### 3.1. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The 1966 ICESCR is the most comprehensive international instrument for the protection of economic, social and cultural rights. By virtue of articles 21 and 22, ECOSOC was mandated to report from time to time to the UN General Assembly on the measures taken and the progress made in achieving general observance of the rights in the Covenant and to bring to the attention of other organs of the UN any matters which may assist such organs in deciding on the measures to be taken that could contribute to the effective progressive implementation of the Covenant. In 1985, these functions were transferred to a newly established body, the Committee on Economic, Social and Cultural Rights.[15] Yet another change in the enforcement capacity of the Covenant was effected in 2008 when the UN General Assembly adopted the Optional Protocol to the Covenant[16] empowering the Committee to receive and consider communications by or on behalf of individuals or groups of individuals claiming to be victims of a violation of the rights in the Covenant, matters that will be dealt with below.[17] By 2019, the Optional Protocol, which entered into force on 5 May 2013, had 24 ratifications.

This section will focus on three substantive issues in the Covenant, namely the Covenant's peculiar formulation in respect of the recognition of the rights,[18]

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[14] Danwood M Chirwa, "The Universal Declaration of Human Rights, Economic, Social and Cultural Rights and Human Rights Discourse," in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance*, ed. Carla Ferstman and Tony Gray (London: Routledge, 2018), 183-184.

[15] ECOSOC resolution 1985/17 (28 May 1985).

[16] General Assembly resolution 63/117 (10 December 2008).

[17] *Ibid.*, Art 2.

[18] The Covenant contains the following rights pertaining to: work (art 6); conditions of work (art 7); trade unions (Art 8); social security (Art 9); family (Art 10); standard of living (Art 11); physical and mental health (Art 12);

the state obligations in respect of the realization of the rights, and the supervisory role of the Committee on Economic, Social and Cultural Rights.

### 3.1.1. The Formulation of the Rights

In contrast to the Universal Declaration on Human Rights and the ICCPR, the Covenant on ESCR does not formulate the rights provisions with the emphasis on the person as the bearer of the right (ex. Everyone has...) but commences each provision with: "The States Parties recognize the right of everyone..." or "undertake to", for example. This is so, since unlike in the case of civil and political rights, which are predicated on the universal assumption that these rights restrain state intervention, the rights in the Covenant on ESCR emphasize their programmatic nature and their dependence on positive state action and resources.[19] Furthermore, the realization of these rights is inextricably linked to the right to self-determination in article 1 of the ESCR Covenant which has an identical formulation with article 1 of the ICCPR. The Human Rights Committee, which is the supervisory body of the ICCPR, has commented that the right to self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of the individual rights in the ICCPR.[20] By the same token, it should fulfil the same function in the ICESCR. By virtue of the right to self-determination all peoples freely determine their political status and pursue their economic, social and cultural development and freely, and for their own ends, dispose of their natural wealth and resources. As a result, states parties to the Covenant are obligated to promote the realization of the right to self-determination and shall respect that right in conformity of the UN Charter.[21]

### 3.1.2. State Party Obligations

The above obligation in respect to self-determination is supplemented by the obligations in article 2 which apply to the full range of rights enumerated

education (Arts 13, 14); and cultural life (Art 15).

[19] Chirwa, "The Universal Declaration," 184.

[20] HRC *General Comment* No 12 (13 March 1984).

[21] ICESCR, art 1() – (3). See also art 25.

in the Covenant. Article 2 comprises three provisions, articulating the nature and extent of state party obligations for the realization of the Covenants substantive provisions. Firstly, it imposes on states parties the obligation to take steps,[22] to the maximum of their available resources "with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures".[23] The steps to be taken include procuring international assistance and cooperation, especially through economic and technical means, for achieving the objectives of the Covenant. Secondly, states parties undertake to guarantee the exercise of the rights in the Covenant without discrimination of any kind as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[24] In the third instance, article 2 singles out developing countries by leaving it to their discretion the extent to which they would guarantee the Covenant's economic rights to non-nationals with due regard to human rights and their national economy.[25]

What needs to be emphasized here is that when states commit to treaty obligations by ratifying or acceding to a treaty they also commit to the *pacta sunt servanda* rule under article 26 of the 1969 Vienna Convention on the Law of Treaties, which means that the treaty must be performed in good faith. The observance of a treaty under the good faith obligation has the further consequence that a state is prevented from invoking the provisions of its domestic law as justification for its failure to perform a treaty.[26] Consequently, a state mindful of the implications of these rules can be expected to act responsibly when considering its ability to perform in terms of a treaty that will eventually bear the state's consent and to avoid

[22] Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford: Oxford University Press, 2014), 137; Manisuli Ssenyonjo, "Economic, Social and Cultural Rights: An Examination of State Obligations," in *Research Handbook on International Human Rights Law*, ed. S Joseph and A McBeth (Cheltenham: Edward Elgar Publishing Ltd, 2010), 36.

[23] *Ibid.*, Art 2 (1).

[24] *Ibid.*, Art 2(2).

[25] *Ibid.*, Art 2(3).

[26] Vienna Convention on the Law of Treaties (1969), Art 27.

a situation where the consent to be bound is given for politically expedient or symbolic reasons. By acting with indifference to the realisability of a treaty's objectives, states will undermine the rule of law and the trust that is needed to make inter-state relations work.[27] The good faith obligation applies with equal force to the interpretation of treaties. The general rule of treaty interpretation in article 31 of the Vienna Convention on the Law of Treaties clearly states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In general, the good faith rule in this provision aims at the "fulfillment of a treaty in a way that the other party (or parties) to the treaty may reasonably expect on the basis of the text agreed upon, or, in other word, in such a way as is required by the sense and purpose of the treaty, as understood by the contracting parties in good faith".[28]

Of particular importance in understanding the nature and scope of state obligations in terms of the above provisions in the Covenant on Economic, Social and Cultural Rights, is General Comment No 3, issued by the Committee[29] on Economic Social and Cultural Rights in 1990.[30] In this Comment, the Committee distinguishes between obligations of conduct and obligations of result or between obligations which are of immediate effect and obligations which are subject to progressive realization due to limitations imposed by available resources. Under the first category is classified the obligation 'to take steps' for the realization of the substantive rights and to 'guarantee' that the rights will be exercised without discrimination.[31] As to the taking of steps the Committee is further of the view that while the full realization of the rights may be achieved progressively, steps towards that goal must be taken within a relatively short time after entry into force of the Covenant for the state in question. Furthermore, the steps in question

[27] "*Cabčikovo-Nagymaros Project (Hungary v Slovakia)*" (ICJ Reports, 1997), para 142.
[28] R Kolb, "Article 2(2)," in *The Charter of the United Nations: A Commentary vol I*, ed. B Simma *et al* (2012), 178.
[29] The Committee is established in terms of ECOSOC resolution 1985/17.
[30] CESCR, General Comment No 3: *The nature of States parties' obligations*, Document E/1991/23.
[31] *Ibid.*,para 1, 2.

should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[32]

While it is within the discretion of each state party to decide for itself which realization measures are the most appropriate under the circumstances in respect of each of the rights, the Committee urged states to indicate in their reports under article 16 of the Covenant not only the measures they have taken but also the reasons why the measures are considered the most appropriate under the circumstances. However, it is ultimately for the Committee to decide whether all appropriate measures have been taken by the state party.[33]

In respect of the 'progressive realization' obligation, the Committee has admonished that this should not be interpreted in a way that will deprive the obligation of all meaningful content. While it is a flexible device, taking into account political, social and economic realities, it must still be understood in the context of the overall objective, namely the full realization of the rights in the Covenant. Consequently, it imposes an "obligation to move as expeditiously and effectively as possible towards that goal".[34]

An especially noteworthy aspect of the Comment, is the Committee's explication of the 'minimum core obligation' states parties have to ensure the satisfaction, at the very least, of minimum essential levels in respect of each right. This means that a "State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Charter".[35] Consequently, in cases where a state party attributes its failure to meet its minimum core obligation to a lack of available resources, it "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".[36]

[32] *Ibid.*, para 2.
[33] *Ibid.*, para 4.
[34] *Ibid.*, para 9.
[35] *Ibid.*, para 10.
[36] *Ibid.*

In 2017, the Committee adopted a comprehensive General Comment on state obligations in the context of business activities[37] with the purpose of addressing the adverse impacts of business activities on human rights. According to the Comment, business activities "include all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure".[38]

In terms of the non-discrimination provision in the Covenant, the Comment is of the view that the duty on the state party to prohibit discrimination, both in the formal and substantive sense, in the exercise of economic, social and cultural rights, includes the duty to prohibit discrimination by non-state entities, especially in the case of those segments of the population that face a greater risk of suffering inter-sectional and multiple discrimination, like women and children, indigenous peoples and people with disabilities.[39] Overall, the Committee understands the Covenant to impose obligations on states parties at three levels, i.e. to respect, to promote and to fulfil, which apply to situations at the domestic level as well as extraterritorially in situations over which a state party may exercise control.[40] In this context the Committee confirms the international law principles by means of which a state party may be held responsible for the actions or omissions of non-state parties, namely if (a) the non-state entity acts on the instruction, or under the control or direction of the state party in respect of a certain activity; (b) if, by law, the non-state entity is empowered to perform certain governmental functions; or (c) the conduct of the non-state party is acknowledged by the state party and adopted as its own.[41]

The obligation to respect is violated when a state party prioritizes the interests of non-state entities over Covenant rights "without adequate

37 General Comment No 24 (2017), UN Doc E/C.12/GC/24 (10 August 2017).
38 *Ibid.*, para 3.
39 *Ibid.*, para 7 – 9.
40 *Ibid.*, para 10.
41 *Ibid.*, para 11.

justification, or when they pursue policies that negatively affect such rights".[42] This obligation also has implications for bilateral trade or investment treaties in case of a potential conflict between such treaties and the Covenant. In view of the obligation in article 26 of the 1969 Vienna Convention on the Law of Treaties to perform binding treaties in good faith, the Committee holds the view that states should determine in advance whether a conflict exists and refrain from entering into trade and investment treaties when this is indeed the case.[43]

The obligation to protect means that a state party must act preventively to avoid infringements of the rights in the Covenant in the context of business activities. This will require an effective criminal or administrative sanctions regime for violations and a legal framework requiring business entities to exercise human rights due diligence with a view to identify, prevent and mitigate the risk of violations of Covenant rights.[44] Also noteworthy is the Committee's focus on the combating of corruption, which, according to the Committee, undermines a state's ability to mobilize resources for the realization of the rights in the Covenant and which leads to discriminatory access to public services, favouring those who have close links with the authorities.[45]

The obligation to fulfil is an obligation of result. It requires that states parties take steps to the maximum of their available resources to facilitate and promote the enjoyment of Covenant rights, which, in certain cases, may require the direct provision of goods and services essential for such enjoyment.[46] Apart from requiring the mobilization of state resources in this instance, the obligation to fulfil may also require directing the efforts of business entities towards this objective.[47]

[42] *Ibid.*, para 12.
[43] *Ibid.*, para 13.
[44] *Ibid.*, paras 14 – 16.
[45] *Ibid.*, para 20.
[46] *Ibid.*, para 23.
[47] *Ibid.*, paras 23, 24.

A substantial part of the Comment deals with remedies in case of a violation. It requires in the first instance effective monitoring, investigation and accountability mechanisms; secondly, remedies, judicial and other, must be available, effective and expeditious; and thirdly, business entities must be prevented from escaping accountability by hiding behind the so-called corporate veil or by obstructing the making available of information.[48]

### 3.1.3. The Supervisory Role of the Committee

Under the Covenant states parties have an obligation to submit reports to the Committee indicating which measures they have taken in achieving the objectives of the Covenant.[49] Such reports may also indicate factors and difficulties affecting the degree of compliance with state party obligations in the Covenant.[50]

The reporting duties of states were dealt with in the Committee's first General Comment,[51] spelling out the objectives of reporting. The first objective, which is of special significance in the case of a state party's first report, is that it must entail a comprehensive review with regard to national legislation, administrative rules and procedures aimed at ensuring the fullest possible conformity with the Covenant.[52] The second objective is to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis so that a proper diagnosis and knowledge of the situation are demonstrated.[53] The third objective is to enable the government to demonstrate that a principled policy-making has in fact been undertaken to provide a basis for the establishment of priorities that are commensurate with the provisions of the Covenant.[54] The fourth objective is to facilitate public scrutiny of government policies and to involve various sectors of society in the formulation, review and implementation of the

48 *Ibid.*, paras 38 *et seq*.
49 Covenant art 16.
50 *Ibid.*, Art 17(2).
51 General Comment No 1 (1989).
52 *Ibid.*, para 2.
53 *Ibid.*, para 3.
54 *Ibid.*, para 4.

policies.[55] The fifth objective is to provide a basis for the state party and the Committee to effectively evaluate the extent to which progress has been made towards realization of the Covenant's obligations.[56] The sixth objective is to enable the state party to develop a better understanding of problems and shortcomings encountered in the progressive realization of the Covenant rights.[57] The seventh objective is to enable the Committee and the states parties as a whole to facilitate the exchange of information and to develop a better understanding of the common problems faced by states.[58]

In assisting states with their reporting duties, the UN Secretary-General, on request by the General Assembly, published a compilation of reporting guidelines for states in 2009.[59] The guidelines are intended to bring about some uniformity in the method of reporting and the substantial issues states parties are required to provide information on. Since the guidelines are of a technical nature they fall outside the scope of this contribution.

Apart from issuing general comments of the kind above, the Committee also issues Concluding Observations in response to reports submitted by states parties.[60] The purpose of these reports is to point out positive and negative aspects in individual countries regarding the implementation of the Covenant and to make recommendations to improve the situation. An example is the Committee's 2014 Concluding Observations in respect of Indonesia's first report where the Committee raised concerns about the lack of information on jurisprudence invoking the Covenant before lower courts and the insufficient number of legal professionals hindering victims' access to redress.[61] Various other issues of concern also featured in the report, among them discriminatory practices and high levels of corruption.

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55 *Ibid.*, para 5.
56 *Ibid.*, para 6.
57 *Ibid.*, para 8.
58 *Ibid.*, para 9.
59 UN Doc HRI/GEN/2/Rev.6 (3 June 2009).
60 "UN Treaty Body Database," United Nations Human Rights, Office of the High Commissioner, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5, accessed on 18 August 2019.
61 UN Doc E/C.12/IDN/CO 1 (19 June 2014).

A further avenue for bringing violations to the attention of the Committee was introduced in 2008 with the adoption of the Optional Protocol to the Covenant referred to earlier. This instrument authorized the Committee to receive and consider petitions from individuals or groups against the national state provided that the state is a party to the Optional Protocol, all available domestic remedies have been exhausted and the complaint has been declared admissible by the Committee.[62] An interesting feature of this mechanism is that the Committee is entitled, after receipt of the complaint and before a determination on the merits, to request the state to take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable harm to the victim/s of the alleged violation.[63] The Committee may also provide its good offices to achieve a friendly settlement between the parties commensurate with the Covenant's requirements. A settlement of this kind forecloses a determination by the Committee on the merits of the complaint.[64]

The Optional Protocol also introduces the inter-state complaint mechanism[65] which is a well-known, but ineffective, treaty-based human rights protection measure. The availability of this mechanism, which allows a state party to submit a complaint against another state party alleging non-compliance with the Covenant, is conditioned upon a declaration by both states parties indicating their acceptance of the inter-state complaint mechanism. Thus, ratification of the Optional Protocol alone is not enough to bring this mechanism into effect. Moreover, states parties are reluctant to make use of this mechanism since the complaining state may expose itself to a complaint by the state party against whom the mechanism was invoked.

Another discretionary procedure subject to a declaration by a state party is an inquiry by the Committee.[66] This is a confidential procedure in

[62] Optional Protocol arts 1 -3.
[63] *Ibid.*, Art 5.
[64] *Ibid.*, Art 7.
[65] *Ibid.*, Art 10.
[66] *Ibid.*, Art 11.

the case of reliable evidence received by the Committee indicating grave or systematic violations by a state party of the rights in the Covenant. The Committee is then entitled to invite the state party to cooperate in the examination of the evidence. Following the findings by the Committee after completion of the inquiry, the Committee may invite the state party concerned to indicate in its reports to Committee the measures that were taken in response to the Committee's findings.[67]

## IV. THE UN HUMAN RIGHTS COUNCIL

The Council was established in 2006[68] to replace the former UN Human Rights Commission which has become politically tainted by its politically correct membership which included some of the worst human rights abuser countries in the world. It is debatable whether the Council, which replaced it, constitutes a substantial improvement in this area when we take into account that countries like Saudi Arabia, Afghanistan, Egypt, Cameroon and the DRC currently occupy seats on the Council.[69] These fault lines will remain since they are inherently part of the obligatory regional spread of countries to be represented on the Council: African states 13; Asia-Pacific 13; Latin America 8; Western Europe and others 7; and Eastern Europe 6.[70] The picture is rounded off by futile requirements for membership, namely that when members are elected the UN General Assembly must take into account the contributions of candidates to the promotion and protection of human rights[71] and once elected, members shall uphold the highest standard in the protection and promotion of human rights (*sic*).[72]

In any event, the Council is attempting to comply with its mandate by means of a universal periodic review[73] of the human rights situation in all UN

[67] *Ibid.*, Art 12.
[68] "Resolution Adopted by the General Assembly," General Assembly, United Nations, March 15, 2006, https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf.
[69] "Membership of the Human Rights Council," United Nations Human Rights Council, accessed on 18 August 2019, https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx.
[70] "Resolution Adopted by the General Assembly," 60/251 *supra* para 7.
[71] *Ibid.*, para 8.
[72] *Ibid.*, para 9.
[73] *Ibid.*, para 5(e).

member states, the special procedures inherited from the defunct UN Human Rights Commission[74] and a complaints procedure.[75] The latter is a victim-oriented and confidential procedure to investigate consistent patterns of gross and reliability attested human rights violations of all kinds.[76]

As part of the universal periodic review process, the Council's assessment will, as a matter of course, also cover the situation with regard to economic, social and cultural rights in the country under review. However, this topic has been the subject of Council resolutions as well. A recent example is the resolution adopted in March 2019[77] calling on states to give full effect to economic, social and cultural rights and to take all appropriate measures to implement the Council's resolutions in this regard.[78] It also underlines the importance of access to justice and an effective remedy for violations of these rights as well as the need to consider legal remedies as the best way to give domestic legal effect to the rights in the Covenant.[79]

In 2019, the Council has also again taken up, by way of a resolution, the issue of unilateral coercive measures (sanctions) and their impact on the enjoyment of all human rights.[80] According to the preamble "no state may use or encourage the use of any type of measure, including, but not limited to economic, or political measures, to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from its advantages of any kind". Apparently, this statement is conditioned upon the Council's view in the preamble that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among states". In the resolution's operative part the Council therefore "[s]trongly condemns the continued unilateral application and enforcement by certain powers of such

74 *Ibid.*, para 5(g).
75 Established in terms of Human Rights Council resolution 5/1 (2007) section IV.
76 For a more comprehensive account of these mechanisms see L Richardson, "Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council," *Human Rights Law Review* 15 (2015): 409.
77 UN Doc A/HRC/REC/40/12 (8 April 2019).
78 *Ibid.*, para 3.
79 *Ibid.*, paras 8, 9.
80 UN Doc A/HRC/RES/40/3 (5 April 2019).

measures as tools of pressure against any country..."[81] and "[r]ejects all attempts to introduce unilateral coercive measures, and the increasing trend in this direction..."[82] Apparently, what the Council is addressing here are the type of traditional, indiscriminate sanctions imposed against states and which predate contemporary targeted sanctions aimed at individuals or legal entities within a state. In the latter case there is no clear and binding international law norm prohibiting the unilateral imposition of such sanctions.

In any event, what the Council is concerned about are the human rights consequences of unilaterally imposed coercive and indiscriminate measures against states. In this regard it is of the view that such measures create obstacles to the full implementation of rights set forth in all international human rights instruments;[83] entails adverse implications for the enjoyment of human rights by innocent people;[84] and deprive people of their own means of subsistence and development.[85]

Of special significance is the Commission of Inquiry established by the Council in 2013 to investigate the systematic, widespread and grave violations of human rights in the Democratic Peoples' Republic of Korea (DPRK).[86] In its report, published in 2014,[87] the Commission pointed out that the right to food, freedom from hunger and to life, in the case of the DPRK, are not matters to be assessed in the context of food shortages and access to a commodity. What the state has done was to use food as a means of control over the population and confiscation and dispossession of food and deliberate starvation have followed the same logic.[88] The Commission also found evidence of systematic, widespread and grave violations of the right to food and that "decisions, actions and omissions by the State and its leadership caused the death of at least hundreds of thousands of people and inflicted permanent physical and psychological injuries on those who

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81 *Ibid.*, para 5.
82 *Ibid.*, para 14.
83 *Ibid.*, para 2.
84 *Ibid.*, para 6.
85 *Ibid.*, para 12.
86 HRC resolution 22/13 (21 March 2013).
87 UN Doc A/HRC/25/62 (7 February 2014).
88 *Ibid.*, paras 46, 47, 52.

survived".[89] Based on the nature and scope of these violations, the Commission reached the conclusion that they constituted crimes against humanity which merit a criminal investigation by a competent national or international organ of justice.[90]

## V. THE UN SECURITY COUNCIL

Initially, counter-terrorism measures imposed by the Security Council prior to and in response to the 9/11 terrorist attack in the United States were oblivious to the human rights guarantees individuals affected by the measures were entitled to. This is illustrated by two seminal resolutions. In 1999, in a binding chapter VII resolution, the Security Council acted against the Taliban in Afghanistan and demanded the surrender of Osama bin Laden to a country where he had been indicted.[91] In the case of non-compliance with this request, all states were, inter alia, obliged to impose a flight ban on and freeze the funds and financial resources owned or controlled by the Taliban.[92] The resolution further expected states to "act strictly in accordance" with the resolution "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement…" prior to the date of coming into force of the measures imposed by the resolution.[93] In terms of its open-endedness, this provision, seemingly, also ruled out the applicability of treaty-based human rights obligations member states were bound to respect. The second resolution is the famous resolution 1373, adopted by the Council in response to the 9/11 terrorist bombings in the USA. Acting again under chapter VII of the UN Charter, the Council imposed broad-based obligations on states aimed at preventing and suppressing the financing of terrorist attacks as well as the criminalization of such activities.[94] The only human rights obligations invoked by this resolution were those applicable to the granting of refugee status when states had to take measures aimed at ensuring

[89] *Ibid.*, para 53.
[90] *Ibid.*, paras 74, 78.
[91] SC resolution 1267 (1999) para 2.
[92] *Ibid.*, para 4.
[93] *Ibid.*, para 7.
[94] SC resolution 1373 (2001) paras 1, 2.

that an asylum-seeker has not facilitated or participated in the commission of terrorist acts.[95]

Shortly before the adoption of resolution 1373, UN member states gave their blessing in the 2000 United Nations Millennium Declaration for respect for human rights and fundamental freedoms and for the rule of law as key objectives for international relations in the 21st century. In addition, under the peace, security and disarmament section of the Declaration, Heads of State and Government committed themselves, in two separate but successive statements, to ensure the implementation of human rights treaties and to "take concerted action against international terrorism".[96] Barely three years later the Security Council, meeting at the level of Ministers of Foreign Affairs, called on states to ensure that the measures they take in combating terrorism comply with "all their obligations under international law … in particular international human rights, refugee and humanitarian law".[97] In 2004, the Council reiterated this call, but only in the preamble of a resolution that was adopted under Chapter VII of the UN Charter.[98] Then in 2005, the Council again included the call in the operative part of resolution,[99] which, like the one in 2003, obviously lacked binding force. Moreover, the measures in question were of the less-invasive type, covering the prevention and prohibition of incitement to commit terrorist acts, the strengthening of border controls, and the prevention of the indiscriminate targeting of different religions and cultures.[100]

Two further developments strengthened the concern with human rights. The one was the *In Larger Freedom* report by the UN Secretary-General who warned against compromising human rights guarantees in the fight against terrorism and urged member states to create a special rapporteur that could monitor and report on the compatibility of counter-terrorism measures with human rights

95 *Ibid.*, para 3(f).
96 GA resolution 55/2 (18 September 2000) para 9.
97 Security Council resolution 1456 (2003) para 6.
98 Security Council resolution 1566 (2004).
99 Security Council resolution 1624 (2005) para 4.
100 *Ibid.*, para 4 read with paras 1 – 3.

laws.[101] The other was the World Summit Outcome Document[102] which confirmed again that international cooperation in the fight against terrorism must comply with member states' human rights obligations.[103] Based on these developments, the UN Secretary-General in 2006 submitted his Recommendations for a Global Counter-Terrorism Strategy[104] which lists as one of the priority areas for developing states' preventive capacity the need for promoting the rule of law and respect for human rights.[105] A few months later, the General Assembly published the United Nations Global Counter-Terrorism Strategy[106] which provides for a list of measures aimed at ensuring that respect for human rights and the rule of law remains essential to all components of the counter-terrorism strategy. Among these measures is the resolve to support the monitoring roles and recommendations of the Human Rights Council, the UN High Commissioner for Human Rights and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering[107] terrorism.

Over time the institutional mechanisms created by the Security Council in the combating of terrorism, such as the various Counter-Terrorism Committees[108] and the Office of the Ombudsperson[109] started to play an active role in ensuring that counter-terrorism measures, such as the listing of persons and legal entities, asset freezes and travel bans, were implemented with due regard for human rights guarantees.[110] Although the emphasis is often on procedural guarantees pertaining to the listing or de-listing of individuals and legal entities, various resolutions speak in general terms about human rights obligations that must be complied with when states adopt and implement counter-terrorism measures. The

[101] UN Doc A/59/2005 (21 March 2005) para 94.
[102] General Assembly resolution 60/1 (24 October 2005).
[103] *Ibid.*, paras 82, 85.
[104] UN Doc A/60/825 (27 April 2006).
[105] *Ibid.*, para 77.
[106] General Assembly resolution 60/288 (20 September 2006).
[107] *Ibid.*, section IV, paras 6 -8.
[108] Security Council resolutions 1267 (1999); 1373 (2001); 1988 (2011); 2253 (2015).
[109] Security Council resolution 1904 (2009) paras 20, 21.
[110] For a comprehensive account of these developments see Hennie Strydom, "Counter-Terrorism Sanctions and Human Rights" in *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard*, ed. T Maluwa, M du Plessis & D Tladi (2017), 395 at 406 *et seq*.

latest example in this category is Security Council resolution 2462 (2019), which in addition to a preambular paragraph to that effect, contains a provision in its operative part determining that "all States shall" comply, inter alia, with their human rights obligations when adopting domestic laws for the implementation of Security Council counter-terrorism measures.[111] In other instances measures impacting specifically on economic and social rights were mentioned. This is the case with resolution 1452 (2002) which excludes from the operation of certain Security Council measures funds or other financial assets or economic resources that states have been determined to be necessary for basic expenses, foodstuffs, rent or mortgage, and medicines and medical treatment.[112]

## VI. CONCLUSION

Since the adoption of the International Covenant on Economic, Social and Cultural Rights the realization of the rights enumerated in the Covenant has evolved to a point where the justiciability issue has lost its relevance. There is now general acceptance at both the international and domestic levels that such rights too are capable of legal adjudication. Furthermore, the application and interpretation of state obligations under article 2(1) of the Covenant differentiate between obligations of conduct and obligations of result. While the latter is subject to progressive realization without precisely identifiable outcomes, the former is more tangible and requires immediate attention and realization, namely the obligation to ensure the availability of the rights on a non-discriminatory basis and the obligation to take steps to achieve progressively the realization of the rights.

Moving forward on this basis there seems to be three contemporary developments that may further shape the future realization of economic, social and cultural rights. The first is the adoption of the 2030 Agenda for Sustainable Development by the General Assembly in 2015.[113] This Agenda is described as –

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[111] Security Council resolution 2462 (2019) para 5. See also para 6.
[112] Security Council resolution 1452 (2002) para 1.
[113] UN Doc A/RES/70/1 (21 October 2015).

> ...an Agenda of unprecedented scope and significance. It is accepted by all countries and is applicable to all, taking into account different national realities, capacities and levels of development and respecting national policies and priorities. These are universal goals and targets which involve the entire world, developed and developing alike. They are integrated and indivisible and balance the three dimensions of sustainable development.[114]

Several of the goals adopted by the Agenda[115] have a bearing on economic, social and cultural rights. They include Goal 1 (end poverty in all its forms everywhere); Goal 2 (end hunger and achieve food security); Goal 3 (ensure healthy lives and promote well-being); Goal 6 (ensure availability and sustainable management of water); Goal 7 (ensure access to affordable and reliable and modern energy for all); Goal 8 (promote full and productive employment and decent work for all); Goal 12 (ensure sustainable consumption and production patterns); and Goal 13 (take urgent action to combat climate change and its impacts).

The Agenda and its implementation featured prominently in a 2019 resolution of the UN Human Rights Council on the question of the realization in all countries of economic, social and cultural rights.[116] In the preamble the resolution recognizes that the seventeen Sustainable Development Goals and the 169 targets of the Agenda cover a wide range of issues relating to economic, social and cultural rights, in particular with regard to the availability, accessibility, affordability and quality of services and issues relating to domestic resource mobilization, international cooperation and the right to development. In the operative part the resolution underlines the importance of access to justice and an effective remedy for violations of economic, social and cultural rights[117] and recognizes that the Agenda's development goals and targets are aimed at, inter alia, realizing the human rights of all which are integrated and indivisible.[118] This places the realization of economic, social and cultural rights squarely within the project for the realization of the 2030 Agenda for Sustainable Development.

[114] *Ibid.*, para 5.
[115] *Ibid.*, paras 54 *et seq*.
[116] UN Doc A/HRC/RES/40/12 (8 April 2019).
[117] *Ibid.*, para 8.
[118] *Ibid.*, para 10.

The second development is the 2016 report of the UN Secretary-General, submitted on request of the Human Rights Council, on the question of the realization in all countries of economic, social and cultural rights.[119] The subject-matter of this report are the measuring and monitoring of progress or regression in the realization of human rights at the national level, which the report considers as inherent in states' human rights obligations.[120] Hence, the report states that "measuring and monitoring the state of economic, social and cultural rights in a country is a question of accountability of duty bearers towards rights holders. It is also a crucial element when considering the protection of those rights before the courts".[121] Furthermore, measuring progress in the realization of these rights is "related to obligations to respect, protect and fulfil" the rights in the Covenant.[122] Given the nature of these obligations, the report warns that the notion of the progressive realization of the Covenant rights is not a mere policy statement but needs to be thoroughly documented by means of the monitoring by states of their targeted steps, the use of maximum available resources, the use of appropriate means, such as laws, policies and program, and clearly established timeframes, indicators and benchmarks.[123] Consequently, in light of these human rights obligations, the report recommends that[124]-

> all States should implement as soon as possible transparent, participatory and accountable human rights measurement systems, including specific indicators and benchmarks for individuals and communities on their territory or under their jurisdiction. In this context, human rights indicators are essential tools for bridging the gap between development, governance and the human rights frameworks.

How successfully states will be able to comply with recommendations of this kind is a question of the availability and reliability of data, the bureaucratic capacity to correctly and contextually analyze the data and to use it effectively for the promotion of the Covenant rights.

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[119] UN Doc A/HRC/31/31 (27 January 2016).
[120] *Ibid.*, para 3.
[121] *Ibid.*, para 5.
[122] *Ibid.*, para 11.
[123] *Ibid.*, para 13.
[124] *Ibid.*, para 64.

The third, and last, development is the 2019 Draft Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises.[125] As a work in progress, undertaken by a working group of the Human Rights Council, its future adoption and impact are more speculative, but what should not be doubted is that it is a serious project with determined constituencies driving it. At this point it should be noted that the Draft covers all human rights and their bearers who have suffered a violation by a state or a business enterprise, through acts or omissions in the context of business activities. Once adopted and ratified states parties will incur well-crafted and wide-ranging obligations in respect of the investigation of violations, access to justice, legal assistance, legal liability, remedies and the regulation of business activities under their jurisdiction and impact assessments with a view to prevent human rights abuses in the course of business activities.

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Vienna Convention on the Law of Treaties (1969), Art 27.

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# Constitutional Change: Towards Better Human Rights Protection in Australia

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**Abstract**

Many legal scholars contend that Australia does not have a charter of rights in its Constitution. The legal scholar Rosalind Dixon, however, suggests that the Constitution does include some provisions that could be viewed as resembling a (partial) bill of rights. This constitutional framework might cause one to ponder whether human rights are adequately protected in the Australian constitutional system. This paper attempts to consider this question. It is argued that the protection of human rights under the Constitution, federal and state laws is not fully capable of responding to at least three human rights crises presented. Accordingly, the paper suggests that Australia should consider the idea of amending the Constitution in order to better human rights protection in the country. It offers suggestion that the Canadian model protection of human rights could be considered as one of the primary sources for reforms in the future.

**Keywords**: Australia, Canada, Constitutional Amendment, Human Rights.

## I. INTRODUCTION

It is frequently asserted that Australia is one of the few countries in the world that does not have a bill of rights in its constitution nor does it have

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an enumerated list of rights in its federal legislation.[1] This assertion, however, has been described as an orthodox view given that Australia actually does have a sort of charter of rights which is quite narrow compared to international standards.[2] Indeed, a recent comparison study has suggested that while the average number of Universal Declaration of Human Rights ('UDHR') provisions contained in constitutions around the world is thirty-five, there are only six provisions in the Australian Constitution that are similar to UDHR provisions.[3] As such, one might be forgiven to question whether the Australian Constitution provides adequate protection of human rights.

In the federal level, the Commonwealth Parliament adopted a new model of rights protection by enacting the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[4] This statutory framework gives a greater role on the part of the Parliament through Parliamentary Joint Committee on Human Rights (PJCHR) in ensuring the compatibility of Bills of Acts and legislative instruments with human rights.[5] Before this, in 1986 the Parliament also established an Australian Human Rights Commission which is tasked to run several functions under anti-discrimination and human rights laws established by the Parliament.[6] In the state level, at least two state parliaments, the Australian Capital Territory (ACT) Legislative Assembly and the Victorian Parliament have decided to adopt the dialogue model in providing human rights protection by enacting the *Human Rights Act 2004* (ACT)[7] and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[8]

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[1] See, for example, Robert French, "Protecting Human Rights Without a Bill of Rights," *The John Marshall Law Review* 43, no. 3 (Spring 2010): 769; Michael Kirby, "Protecting Human Rights in Australia without a Charter," *Commonwealth Law Bulletin* 37, no.2 (June 2011): 255; Susan Crennan, "Magna Carta, Common Law Values and the Constitution," *Melbourne University Law Review* 39, no.1 (2015): 340.

[2] Rosalind Dixon, "An Australian (Partial) Bill of Rights," *International Journal of Constitutional Law* 14, no. 1 (January 2016): 81.

[3] Colin J Beck et al, "Constitutions in World Society: A New Measure of Human Rights" (January 2017): 11, http://dx.doi.org/10.2139/ssrn.2906946.

[4] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

[5] *Ibid*.

[6] "Functions of the Australian Human Rights Commission," *Australian Human Rights Commission*, last accessed February 15, 2019, https://www.humanrights.gov.au/about/functions-australian-human-rights-commission.

[7] *Human Rights Act 2004* (ACT).

[8] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

This paper seeks to examine whether the Constitution along with the existing laws are effective in protecting human rights in Australia. It does this by first exploring the brief history of the formation of the Australian constitution which leads to narrow rights being expressed in the constitution as well as the emergence of implied rights in Part II. Afterward, it outlines the protection of human rights under federal and state laws before assessing the efficacy of rights protection performed by the PJCHR. In Part III, it explains why Australia needs a constitutional amendment to better its rights protection despite the fact that countries with bills of rights in their constitution are not necessarily more free than Australia. In Part IV, it suggests that Australia should adopt the Canadian model protection of human rights by extending the rights provisions in the Constitution. It is argued that doing so would serve as a stronger human rights protection mechanism.

## II. HOW DOES RIGHTS PROTECTION WORK IN AUSTRALIA?

### 2.1. Human Rights in Drafting the Constitution

In formulating the Australian Constitution that took place in successive conventions, it can be said that the founding fathers made considerable reference to the Constitution of the United States. [9] However, the influence of the American Constitution that bolster the desire to incorporate an extensive list of rights into the constitution did not receive a welcome reception from the leading colonial citizens.[10] At the 1898 Melbourne Convention, for example, the proposal of the Attorney General for Tasmania, Andrew Inglis Clark, to guarantee equal protection before the law was rejected by votes of twenty-three to nineteen.[11] It is believed that there were two primary considerations that led to the rejection of the proposal which was based on the Fourteenth Amendments of the US Constitution.[12]

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9 Kirby, "Protecting Human Rights," 264.
10 *Ibid*.
11 *Ibid*.
12 French, "Protecting Human Rights," 771.

First, there was a concern that the equal rights protection would affect the states' legislative powers.[13] The opposition of the proposal argued that the recognition of equal rights protection could potentially keep states from regulating the employment of Asian workers.[14] In fact, more specifically, Isaac Isaacs, who later became the Chief Justice of the High Court of Australia, contested the anti-discrimination proposal on the footing that it would strike down laws that exclude Asian and African mining workers.[15] As explained by Robert French, Former Chief Justice of High Court of Australia, during the making of the constitution and even long after the federation, Western Australian had racially biased immigration laws and other laws that kept persons with Asian and African descent from mining on a goldfield.[16]

Secondly, it was contended that such right protection was unnecessary to be inserted in the Australian Constitution.[17] This was so because the Fourteenth Amendment occurred primarily to ensure that there would be no deprivation of African-American rights in the wake of the civil war.[18] From this line of thought, Australia would not have a civil war over racial matter such as that which occurred in the United States because there were not much people of colour in the country. Accordingly, the opponent of the equal rights protection proposal was definitive that there was no need to insert a provision forbidding discrimination against people on the ground of their race in Australia.[19]

Notwithstanding the foregoing, the other proposals in regard to certain rights advanced by Clark were successfully inserted into the final draft. Those are trial by jury (s80), the prohibition on the Commonwealth making laws in respect of religion (s116), and the protection of discrimination based on residence (s117).[20] The insertion of such rights into the Constitution does not

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[13] *Ibid*.
[14] *Ibid*.
[15] Kirby, "Protecting Human Rights," 264.
[16] *Ibid*.
[17] French, "Protecting Human Rights," 771.
[18] *Ibid*.
[19] Kirby, "Protecting Human Rights," 264.
[20] Jim McGinty, "A Human Rights Act for Australia," *The University of Notre Dame Australia Law Review* 12 (Dec 2010): 2.

preclude the founding fathers from being criticised. Indeed, there has been a sharp criticism that the drafters of the constitution had an intention to discriminate and to disrespect human rights.[21] The intention of the framers of the Constitution turned out to have adversely affected those who were seen as undesirable. At least two actions demonstrated this.

First, the Constitution did not recognise the existence of Indigenous Australians and their citizenship.[22] It was not until 1967 when the amendment of the constitution repealed the discriminatory clauses laid down in s51 xxvi and s127.[23] Indeed, it was the decision of the High Court of Australia through *Mabo vs Queensland* that corrected the misinterpretation of the common law doctrine of *terra nullius*, which for a long time kept Indigenous Australians such as Merriam people from having legal entitlement to land.[24] Through this decision, the Merriam people were declared entitled "as against the whole world to possession, occupation, use and enjoyment of the island".[25]

Second, the Commonwealth Parliament, at the outset of its work, enacted the Immigration Restriction Act 1901 to place restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants.[26] This legislation later became a precursor of the White Australia Policy, which imposed certain criteria to exclude non-white Europeans to migrate to Australia.[27] While many, perhaps, did not want to admit that there was a racial prejudice in the policy, it was clear that the non-European policy allowed, for instance, immigration officers to interpret the true skin colour of those who might wish to migrate to Commonwealth of Australia.[28] Based on this criterion, then, the immigration officers would determine whether the applicants are suitable to migrate. With respect to

[21] *Ibid* 3.
[22] *Ibid*.
[23] French, "Protecting Human Rights," 774.
[24] Barbara Hocking, "Aboriginal Law Does Now Run in Australia-Reflections on the Mabo Case: From Cooper v. Stuart through Milirrpum to Mabo," *Sydney Law Review* 15 (1993): 205.
[25] *Mabo v Queensland* (1992) 175 CLR 1.
[26] *Immigration Restriction Act 1901* (Cth).
[27] McGinty, "A Human Rights," 3.
[28] NFSA Films, "Admission Impossible," filmed in 1992 in Australia, *video*, 54:22, https://www.youtube.com/watch?v=uPfJRetYP04.

the Constitution, however, it does not only protect rights that are expressly stated, but also those that are not clearly outlined in the Constitution as will be explained briefly below.

## 2.2. Express and Implied Rights in the Constitution

### 2.2.1. Express Rights

The express rights are the rights that are clearly stated in the Australian Constitution. These rights are extremely narrow, comprising of only three political and civil rights and two economic rights.[29] Cheryl Saunders describes these constitutional rights as rights-type provisions because these clauses seem to place restrictions on the Commonwealth power as opposed to giving positive rights to individuals.[30] With respect to the lack of rights recognition in the Constitution, George Williams suggests that this was the result of the framers of the Constitution being influenced by English legal scholars such as Dicey and Bryce who did not see the need to include rights in written constitutions.[31]

As previously stated, there are three political and civil rights enshrined in the Constitution. Firstly, trial by jury which is guaranteed in s80. More specifically, however, the guarantee only applies to 'indictable' offences under federal laws.[32] In other words, this section would not apply if the state legislation declared that an offense is not to be tried on indictment. Secondly, religious freedom as laid down in s116. Although this section forbids the Commonwealth Parliament from making laws that would establish a national religion or impedes individuals from exercising their religion or imposes any religious observance, this section does not apply to state laws either.[33] In relation to s80 and s116, The High Court has also been criticised for interpreting the provision too narrowly. For example, in

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[29] McGinty, "A Human Rights," 6.

[30] Cheryl Saunders, "The Australian Constitution and Our Rights," in *Future Justice* (Sydney: Future Leaders, 2010), 120.

[31] French, "Protecting Human Rights," 774.

[32] Saunders, "The Australian Constitution," 121.

[33] *Ibid*.

*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, the High Court held that s116 allowed laws prohibiting advocacy detrimental to the prosecution of war by the Commonwealth.[34] Thirdly, the right not to be discriminated based on state residence as stated in s117. This provision has been considered as worthy but not having a significant practical use due to the rarity of the discrimination.[35]

The economic rights in the constitution consist of some protection related to property rights (s51 xxxi) and the right to interstate trade (s92). While the former requires the Commonwealth authority to provide 'just terms' in the acquisition of property, the latter guarantees free market access between states.[36] In contrast with the narrow interpretation of political and civil rights, the High Court has construed these provisions broadly, giving a wider operative space allowing economic rights to develop.[37] For example, in *Betfair Pty Limited v Western Australia*, the High Court held that the amendments to the Betting Control Act, which placed new restrictions on Betfair were found to have contravened section 92 of the Constitution since, among other things, the prohibition of betting constituted a discriminatory burden on interstate trading.[38] Moreover, in *Minister of Army v Dalzie*, the High Court appeared to have taken a wide view of the concept of property in interpreting s51 xxxi of the Constitution, as it took the view that property means "...any tangible or intangible thing which the law protects under the name of property".[39]

### 2.2.2. Implied Rights

Unlike express rights which are clearly set out in the Constitution, implied rights are the outcome of a judicial interpretation method namely 'implication from text and structure'.[40] The implied rights can be divided into

34 Adrienne Stone, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement," *Sydney Law Review* 27, no. 1 (2005): 32.
35 McGinty, "A Human Rights," 8.
36 *Ibid*.
37 Stone, "Australia's Constitutional Rights," 32.
38 *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.
39 *Minister of Army v Dalziel* (1944) 68 CLR 261.
40 Stone, "Australia's Constitutional Rights," 32.

two categories. The first rights category is derived from the implication of the provisions establishing the Parliament and the Government.[41] For instance, through a series of decisions in 30 years, the High Court has held in *Lange v ABC*[42] that there exists an implied freedom of political communication.[43] It has been established that the implied freedom of political communication was the source of the common law in order that federal and state laws adhere to it. Additionally, in *Roach v Electoral Commissioner*,[44] the Court invalidated federal law provisions which purported to take away the rights of prisoners to vote. In making its judgment, the Court relied upon section 24 that requires Members of the House of Representative to be directly elected by the people.[45]

The second rights category is implied from the provisions that establish the power of the judiciary. The implied rights were conferred on individuals based on Chapter III of the Constitution which values the independence and the impartiality of the court.[46] In several cases, the High Court has found that the Constitution provides some rights protection so as to ensure the integrity of the judicial system. In *Kable v Director of Public Prosecutions*,[47] for example, the court held that the NSW legislation regulating preventive detention was invalid on the basis that the state Parliament was prohibited under Chapter III of the Constitution to confer power on state courts.[48]

Despite recognition of implied rights, some commentators have expressed concerns relating to the exercise of this judicial interpretation and the scope of the implied rights. The High Court has been accused of engaging in judicial activism and undermining the rule of law for continuingly discovering implied rights and striking down the social policy enacted by

[41] Saunders, "The Australian Constitution," 122.
[42] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[43] Kirby, "Protecting Human Rights," 275.
[44] *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[45] See s24 of the *Australian Constitution*.
[46] Saunders, "The Australian Constitution," 123.
[47] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.
[48] McGinty, "A Human Rights," 10.

the democratic institution.[49] On the contrary, there has been a concern on the extent to which the protection given to the implied rights is unclear.[50] One, for example, might question whether Australia protects freedom of speech and freedom of the press considering that there is no clear provision stating that in the Constitution. Nor is there a legal principle to refer in order to determine, for example, the limit of the speech that is permitted under the Constitution.

### 2.3. Commonwealth Legislation Protection

It is probably fair to say that the rights protection under federal legislations is more certain and more applicable than the rights protected under the Constitution. Take, for example, the *Racial Discrimination Act 1975* (Cth) (RDA)[51] upon which the High Court relied on to resolve issues in *Mabo v Queensland*.[52] In this case, the court struck down the *Queensland Coast Islands Declaratory Act 1985* (Qld) purporting to eliminate the native title of Murray Islanders due to its incompatibility with the RDA. Besides introducing anti-race discrimination law, the Commonwealth Parliament has also passed legislations that prohibit discrimination on the grounds of sex,[53] disability[54] and age.[55]

Moreover, through the *Australian Human Rights Commission Act 1986* (Cth), as the name suggests, an Australian Human Rights Commission has been established.[56] Pursuant to the *Australian Human Rights Commission Act 1986* (Cth) as well as anti-discrimination federal laws, the Commission is tasked with:

- investigating and conciliating complaints of discrimination or breaches of human rights;

[49] James Allan, "The Three Rs of Recent Australian Judicial Activism: Roach, Rowe and (No)'Riginalism," *Melbourne University Law Review* 36, no. 2 (2012): 777–782.
[50] Saunders, "The Australian Constitution," 124.
[51] *Racial Discrimination Act 1975* (Cth).
[52] *Mabo v Queensland* (1988) 166 CLR 186.w
[53] *Sex Discrimination Act 1984* (Cth).
[54] *Disability Discrimination Act 1992* (Cth).
[55] *Age Discrimination Act 2004* (Cth).
[56] History of the Commission, *Australian Human Rights Commission*, https://www.humanrights.gov.au/about/what-are-human-rights/history-commission.

- holding public inquiries into human rights issues of national importance and making recommendations to address discrimination and breaches of human rights;
- developing human rights education programs and resources for schools, workplaces and the community;
- providing independent legal advice to assist courts in cases that involve human rights principles;
- providing advice and submissions to parliaments and governments to develop laws, policies and programs consistent with existing national laws and international human rights agreements;
- undertaking and coordinating research into human rights and discrimination issues.[57]

The rights protection under Commonwealth statutory has been described as more straightforward.[58] This is so because the Commonwealth Parliament has given legal recognition of the rights that can be effectively enforced throughout the country.[59] Such protection, nevertheless, is still being criticised for covering limited rights.[60] Furthermore, the limited power conferred upon the Australian Human Rights Commission indicates that the Commission would be incapable of providing effective remedies if human rights were breached by the Commonwealth power.[61]

## 2.4. State and Territory Rights Protection

The statutory protection of human rights has been initiated in ACT and the State of Victoria ('Victoria') with the inspiration from the United Kingdom's 'dialogue model'.[62] In ACT, the Legislative Assembly passed the *Human Rights Act 2004* (ACT), which does not only recognise civil and political rights, but also respects economic, social, and cultural rights. In

[57] "Functions of the Australian."
[58] Saunders, "The Australian Constitution," 125.
[59] *Ibid*.
[60] McGinty, "A Human Rights," 12.
[61] *Ibid* 15.
[62] Robert French and others, "Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons," *Brief* 42, no. 2 (2015): 24.

the last regard, they are translated into the right to education.[63] Similarly, but not exactly, the Victorian Parliament enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic), giving statutory recognition to various civil and political rights.[64] Considering the reluctant attitude towards the notion of establishing a bill of rights by way of Constitution or federal legislation, the adoption of these human rights acts has been regarded as an achievement.[65]

Both of those acts require a new bill to be accompanied by a statement of compatibility. If a bill were found to be incompatible with human rights, the extent to which the incompatibility of the bill with human rights should be outlined.[66] Irrespective of such requirement, the declaration of incompatibility does not impact on the validity and operation of the law.[67] It is also worthy to note that the Victorian Charter has given power to the Supreme Court of Victoria to interpret legislation in accordance with human rights as well as declaring whether legislation is inconsistent with human rights although it does not have an authority to strike down the law.[68]

In terms of the advantages of this type of rights protection, several observations are worth pointing out. Firstly, unlike the other federal, state and territory legislations which offer limited rights protection, the model adopted by the ACT and Victoria has enumerated an extensive list of protected rights.[69] Secondly, it is not at odds with the supremacy of Parliament. Rather, it aims to bring about consistency between legislative or executive action and fundamental human rights by fostering dialogue between arms of governments.[70] Finally, and perhaps most importantly,

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[63] Part 3A of the *Human Rights Act 2004* (ACT).

[64] Part 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[65] See, for example, Helen Watchirs and Gabrielle McKinnon, "Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia," *University of New South Wales Law Journal* 33(1) (2010): 136; Saunders, "The Australian Constitution," 133.

[66] See s28 and s29 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC); s32 and s33 of the *Human Rights Act 2004* (ACT).

[67] *Ibid*.

[68] See s32 and s36 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC).

[69] McGinty, "A Human Rights," 13.

[70] George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope," *Melbourne University Law Review* 30, no. 3 (2006): 901.

this dialogue model of human rights protection puts a great stress on ensuring that the human rights principles are taken into consideration at the beginning of the legal and policy making processes.[71]

The rights protection model introduced in ACT and Victoria has also obtained various responses. There is, for instance, one recommendation to improve the statutes by expressly stating non-derogable rights such as the right against torture in the Act.[72] Other has criticised the establishment of human rights acts for it would give a greater role on the part of unelected lawyers and unelected judges in public policy making.[73] More importantly, the High Court has delivered a decision in *Momcilovic v The Queen*,[74] in which it addressed the question of whether the involvement of a court in rights protection under the dialogue model is consistent with the principle of separation of powers.[75]

The majority of the court held that the power of a state court to interpret legislation in accordance with human rights as laid out in s32 of the Victorian Charter was valid.[76] Although the majority of the court also ruled that the power conferred upon a state court to declare the incompatibility of legislation as laid out in s36 was valid, it held that such power was not within the exercise of the judiciary.[77] This was so due to the characteristic of such declaration which is resembling an advisory opinion and non-binding in nature.[78] Interestingly, the ruling of the court has also come to be viewed as the High Court's suggestion that the dialogue model of human rights in Victoria cannot be applied at the federal level.[79] It is

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71 *Ibid* 903.
72 Watchirs and McKinnon, "Five Years," 170.
73 James Allan, "The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism," *Melbourne University Law Review* 30, no. 3 (2006): 921–922.
74 *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').
75 George Williams and Lisa Burton, "Australia's Exclusive Parliamentary Model of Rights Protection," *Statute Law Review* 34, no. 1 (2013): 89.
76 *Ibid*.
77 *Ibid*., 89–90.
78 *Ibid*.
79 Helen Irving, "The High Court of Australia Kills Dialogue Model of Human Rights," *The Australian*, September 16, 2011, http://www.theaustralian.com.au/business/legal-affairs/high-court-kills-dialogue-model-of-human-rights/news-story/4aad1e8e57fb5cdd7ba265a64c540f50.

believed that adopting the dialogue model at the federal level would breach the separation of powers.[80]

### 2.5. Rights Protection Under the Human Rights (Parliamentary Scrutiny) Act 2011

The adoption of Victorian Charter and Human Rights Act in Victoria and ACT has encouraged other governmental entities to inquire as to whether they should do likewise.[81] In fact, the Federal Government began to grapple with the question of how human rights in Australia should be protected.[82] As a result, an Australian National Human Rights Consultation Committee was established in order to investigate the adequacy of human rights protection at the national level and find measures to better the current system.[83] After conducting the federal inquiry for a year, the Committee recommended in its report, among other things, that Australia should adopt the dialogue model of human rights protection, which had been earlier introduced in ACT and Victoria.[84]

The Government, however, rejected the recommendation and instead proposed a somewhat different model which was called 'Australia's Human Rights Framework'.[85] It excluded the insertion of a charter of rights into the proposed legislation because there was a concern that that would be politically divisive.[86] In 2011, the Commonwealth Parliament passed the proposed legislation. Therefore, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('HRPS Act') came into force. It is worthy to note two distinctive features of rights protection model under the legislation. First, the statute established the Parliamentary Joint Committee on Human Rights ('PJCHR') tasked to examine and report the compatibility of a proposed legislation and legislative instruments with human rights.[87] Secondly, the

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80 Fiona Chong, "Human rights vs the High Court: how far can a Charter go?" *Analysis & Policy Observatory*, November 23, 2011, http://apo.org.au/node/27269.
81 Saunders, "The Australian Constitution," 133.
82 *Ibid.*
83 *Ibid.*
84 French and others, "Human Rights Protection," 2.
85 *Ibid.*
86 Williams and Burton, "Australia's Exclusive," 71.
87 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s7.

HRPS Act also requires a proposed legislation and legislative instruments to be accompanied by a statement of compatibility ('SOC').[88] Nevertheless, there would be no effect on the validity and the enforceability of the legislation if the requirement were not met.[89]

The Australia's Human Rights Framework is a unique model of rights protection. It can be assumed that this current framework is similar to the UK's model that has been adopted in ACT and Victoria. But this assumption is not completely true because the Australia's model does not give the role to the courts to interpret legislation in accordance with human rights nor to make a declaration of incompatibility such as in the UK.[90] Another exceptional element from this 'exclusive parliamentary model' is that there is not an extensive list of rights outlined in the statutory framework.[91] The statute instead defines human rights as 'the rights and freedoms recognised and declared by' one of the seven international treaties to which Australia is a party.[92] Despite this, the HRPS Act has been referred to as a welcome development as it confirms the commitment of the Commonwealth to comply with its international obligation.[93]

With respect to the effectiveness of the exclusive parliamentary model drawing from the statutory framework, some commentators doubt that the current model would bring about strong protection regime of human rights. George Williams and Lisa Burton, for instance, point out at least two pertinent concerns. The first concern relates to the way in which rights defined in the HRPS Act.[94] It has been suggested that the absence of an enumerated list of rights against which the SOC is examined, will likely to affect the clarity of analysis made by the PJCHR.[95] The second concern is associated with the lack of legal consequence if Parliamentarians do not

[88] *Ibid.*, 8.
[89] *Ibid.*, 8-9.
[90] Saunders, "The Australian Constitution," 131.
[91] Williams and Burton, "Australia's Exclusive," 59–60.
[92] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s3(1).
[93] Dan R Meagher, "The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts," *Federal Law Review* 42, no. 1 (2014): 24.
[94] Williams and Burton, "Australia's Exclusive," 88.
[95] *Ibid.*

comply with the requirement to pass a bill with a SOC nor consider the PJCHR's report.[96] Further, they opine that even if these two problematic features have been addressed, there is no guarantee that the Parliament will abide by the scrutiny regime in view of the absence of independent judicial supervision.[97]

Additionally, there have been attempts to assess the operation of the exclusive parliamentary model. One study found that the Parliamentarians and the Government Officials have failed to fulfil their obligation adequately.[98] In part this is due to the lack of rights literacy of government departments and in part because of no sanctions provided for failing to comply with the HRPS Act.[99] In a more recent study, a more comprehensive approach has been conducted to evaluate the operation and the impact of the current rights protection regime in the span of four years since its operation.[100] One of the key findings was that almost three-fourths of the PJCHR's reports, which indicated that proposed legislations were potentially incompatible with human rights, did not have any effect at all to the outcome of the proposed legislations.[101] This was so mainly because of the delay of the PJCHR's report being delivered.[102] Further, it reinforced the need for judicial involvement in the current regime to supervise the compliance of the branches of the government with their responsibility.[103]

## III. THE NEED FOR CONSTITUTIONAL AMENDMENT

It has been explained that the Constitution only provides very limited rights protection in the forms of express rights and implied rights. But introducing broader rights by way of either constitutional change or federal legislation may

[96] *Ibid.*, 90.
[97] *Ibid.*, 91–92.
[98] Shawn Rajanayagam, "Does Parliament Do Enough: Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act," *University New South Wales Law Journal* 38, no. 3 (2015): 1046.
[99] *Ibid.*, 1076–1077.
[100] George Williams and Daniel Reynolds, "The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights," *Monash University Law Review* 41, no. 2 (2016): 469.
[101] *Ibid.*, 490.
[102] *Ibid.*
[103] *Ibid.*, 507.

be difficult to achieve because of the Australian political and legal culture that seems somewhat antagonistic towards the notion of a bill of rights. Indeed, history shows that the attempts to incorporate human rights into the constitution and the federal legislation have failed several times. In fact, an attempt to extend the existing rights in the Constitution such as freedom of religion, trial by jury and just terms of property acquisition was overwhelmingly rejected in the 1988 Australian referendum.[104] This was so because a constitutional change is notoriously difficult to achieve due to s128 of the Constitution which requires a double majority of states and the people.[105] In addition, the efforts to introduce a charter of human rights through federal legislation seemed to always lead to the similar outcome. Two initiatives to make legislations by reference to the International Covenant on Civil and Political Rights gained strong resistance from several states.[106]

Notwithstanding the foregoing, the need for better human rights protection in Australia persists. At least, three major rights issues are worth pointing out. First, there has been a growing number of legislations passed by the Parliament that infringe basic freedoms. In a survey identifying current federal and state laws, George Williams found that, up to 2015, there were 350 instances of laws that arguably encroach on essential rights and freedoms in a healthy democracy, 209 of which have been made since the terrorist attack in September 2001.[107] To take one example, as shown by George Williams, s 35P of the *ASIO Act* makes it possible to imprison journalists up to 10 years for writing a story on special intelligence operation even if it is done for public interest.[108] This, in turn, reinforces the inadequacy of the exclusive parliament model in preventing the Parliament from producing laws that are incompatible with human rights.

Secondly, Australia has been heavily criticised for its tough detention policy for refugees and asylum seekers who fled conflict, persecution or violence by

[104] French and others, "Human Rights Protection," 24.
[105] Kirby, "Protecting Human Rights," 266.
[106] *Ibid*., 265–266.
[107] George Williams, "The Legal Assault on Australian Democracy," *Queensland University of Technology Law Review* 16, no. 2 (2016): 37–40.
[108] *Ibid*., 38.

boat[109] despite some developments such as a dramatic decline of children being detained[110] and a transition from indefinite detention to open centre.[111] While it is true that the strong protection border policy have effectively prevented trafficking, people smuggling and even potential terrorist attacks in the future, it should be maintained that genuine asylum seekers running away from persecutions, death threats and wars in their home country should be treated with dignity. As Thomas Albrecht, UNHCR's Regional Representative in Canberra, Australia once stated "Seeking asylum is not 'illegal'. Refugees need and deserve protection and respect. The basic human right of every person to seek asylum from persecution is not diminished by their mode of arrival."[112]

Finally, and equally important, there is a need to entrench a non-discrimination clause into the constitution in order to provide full recognition and rights to the Australian first people. Such need stems from stark inequality between Indigenous Australians and non-Indigenous Australians. Historically, there was a trajectory of legal policy that arguably aimed to entrench the inequality.[113] As illustrated by Megan Davis, through five historical periods (frontier, protection, self-determination, practical reconciliation, and new paternalism), the legal framework at constitutional, federal and policy levels have resulted in deep inequality in the present day.[114] As Indigenous peoples see it, by inserting a constitutional provision on racial non-discrimination clause would, at least, serve as an integral part of recognising the their rights.[115]

In a public lecture, an Australian legal academic, Hilary Charlesworth explained that the Australian great reluctance in providing a comprehensive

[109] "Australia asylum: UN Criticises 'Cruel' Conditions on Nauru," *BBC News*, November 18, 2016, http://www.bbc.com/news/world-australia-38022204.
[110] Australian Human Rights Commission, "Asylum Seekers, Refugees and Human Rights," Snapshot Report 2nd Edition (2017), 14.
[111] *Ibid.*, 35.
[112] UNHCR Regional Representation in Canberra, "Refugees Need and Deserve Protection and Respect," *UNHCR*, October 31, 2016, https://www.unhcr.org/news/press/2016/10/5817bf3b4/refugees-need-and-deserve-protection-and-respect.html.
[113] Megan Davis, "Closing the Gap in Indigenous Disadvantage: A Trajectory of Indigenous Inequality in Australia," *Georgetown Journal of International Affairs* 16 (2015): 35-41.
[114] *Ibid.*
[115] *Ibid.*, 41-42.

human rights protection was based upon two underlying reasons.[116] First, there has been a deep concern particularly in 1970s that the guarantee of human rights would restrain the power of states legislatures. This concern seems to have prevailed in several states such as New South Wales where the Parliamentary Committee declined not to address the systemic defect of rights protection due to parliamentary sovereignty in 2001.[117] Secondly, there has been a profound belief that the Parliament is the right institution for protecting rights. It follows that conferring such authority upon the court would undermine the Australian democracy. This has been accompanied with scepticism that judges will more likely to be seduced to seize more power by using their moral understanding rather than their legal expertise in making decisions concerning human rights.[118]

The objections above, however, are not wholly valid. Although it is true that introducing a bill of rights in federal and sub-national jurisdictions may affect the legislative power, such as in ACT and Victoria, the notion of Parliamentary sovereignty seems rather odd. The Constitution binds both Commonwealth and States Parliaments. Their powers are either expressly or impliedly limited, thereby, they are not sovereign in any event.[119] With regards to the Parliament as the best protector of rights, this contention is indefensible due to the fact that, the exclusive parliamentary model under the HRPS Act has not adequately restrained the responsible government from making laws that infringe human rights as I have demonstrated. Further, the view of describing an introduction of a bill of rights in the constitution as anti-democratic is rather old-fashioned because there already exists a partial bill of rights in the Constitution which is just extremely narrow.[120] Also, the scepticism put forward by the opponent of the bill of rights is difficult to sustain as the High Court has been very cautious in construing the constitutional right provisions. This is so because, as Rosalind Dixon has argued, for most of Australian history, a majority of justices of the

[116] Hilary Charlesworth, "The Australian experiment with human rights charters," *Law Library of Victoria Public Lecture*, September 21, 2016, https://www.lawlibrary.vic.gov.au/file/385/download?token=4DCbUnHA>.
[117] Kirby, "Protecting Human Rights," 266–267.
[118] Charlesworth, "The Australian Experiment," 8.
[119] Saunders, "The Australian Constitution," 133.
[120] Dixon, "An Australian (Partial)," 82–83.

High Court has been strongly committed to a form of legal conservatism, which places strong emphasis on formal legal materials and arguments.[121]

Another objection which could be raised to the idea of amending the Constitution to extend rights provisions comes from a view that holds that countries that have a list of extensive rights in their Constitution are not necessarily freer than those who do not such as Australia. As mentioned at the outset, the Australian Constitution has only six provisions in the Australian Constitution that are similar to UDHR provisions. Meanwhile, its neighbouring country such as Indonesia has adopted a long list of human rights under Article 28A-J in its Constitution that Tim Lindsey describes as 'lengthy and impressive, granting full range of protections extending well beyond those guaranteed in most developed states'.[122] This long list of rights, however, does not guarantee the rights protection of members of religious, ethnic and sexual minority groups who have often been subject to discrimination and persecution.[123] Therefore, it should be acknowledged that countries with list of rights provisions in their Constitution does not necessarily guarantee the protection of basic freedoms and human rights in practice.

It is, however, important to note that inserting rights provisions into the Constitution would grant legal protection to those who have or will be suffered from rights violation even if they are unable to access to justice and have their voice heard. By including freedom of speech and freedom of the press in the Constitution, for example, would protect individuals from the encroachment of the state on their rights to speech and to make a news story, which are healthy in a democratic society. This does not mean that every right listed in international human rights treaties should be listed in the Australian Constitution. Human rights, at best, should be seen as moral rights, or to use

[121] *Ibid.*, 95.
[122] Tim Lindsey, "Indonesia: devaluing Asian values, rewriting rule of law," in *Asian Discourses of Rule of Law*, ed. Randall Peerenboom (London: RoutledgeCurzon, 2004): 301.
[123] See, for example, Melissa Crouch, "Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities?," *Singapore Journal of Legal Studies* 96 (2007); Melissa Crouch, "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis," *Sydney Law Review* 34 (2012); Eleni Polymenopoulou, "LGBTI Rights in Indonesia: A Human Rights Perspective," *Asia Pacific Journal on Human Rights and The Law* 19 (2018); Leo Suryaddinata, "Ethnic Groups and the Indonesian Nation-state," in *Routledge Handbook of Contemporary Indonesia*, ed. Robert W. Hefner (Abingdon: Routledge, 2018).

the word of Amartya Sen, articulations of social ethics, comparable to-but very different from-utilitarian ethics.[124] Whilst it is acknowledged that the ways of advancing the ethics of human rights need not be confined only to making new laws,[125] or in this case extending rights protected by the Constitution, as I have argued above, the current legal framework under the Constitution, federal and state laws does not seem adequate in protecting universal human rights. Thus, Australia would be well-advised to make an amendment to the Constitution so as to provide a better human rights protection.

## IV. ADOPTING CANADIAN MODEL OF RIGHTS PROTECTION

It is now convenient to consider what aspects of the Canadian's right protection model should be adopted by Australia. Before doing so, it is required to explain the reasons why the Canadian model is relevant to be applied in Australia. First, unlike the UK and New Zealand which share a unitary state, Australia and Canada adopt federalism. The federal principle suggests that if a national bill of rights were to be introduced, this right protection model should be applied equally to both the Commonwealth and the States.[126] Secondly, Australia and Canada are both countries that have a written constitution which is difficult to amend. The Constitution outlines specific principles upon which the way the rights protection designed should be based. Finally, in *Momcilovic*, the High Court has reduced the opportunity for dialogue model to be applied at the Federal level. It held that a declaration of incompatibility which is one of the distinct features of the dialogue model was not an exercise of judicial power. As Robert French observed:

> In any event, in the exercise of appellate jurisdiction, this Court cannot interfere with such a declaration. A declaration of inconsistent interpretation, being non-judicial and not incidental to judicial power, cannot be characterised as a judgment, decree, order or sentence of the Supreme Court falling within the appellate jurisdiction conferred upon this Court by s 73 of the Constitution.[127]

[124] Amartya Sen, "Human Rights and the Limits of the Law," *Cardozo Law Review* 27 (2006): 2916.
[125] *Ibid.*, 2919.
[126] Cheryl Saunders, "Protecting Rights in the Australian Federation," *Adelaide Law Review* 25 (2004): 207.
[127] Momcilovic, 47-48.

In my own view, there are at least several components that are worth considering to be adopted by Australia. First, an entrenched bill of rights in the Constitution. In 1982, Canada adopted a Charter of Rights and Freedoms after experimenting with a national bill of rights in 1962 which was widely considered to be ineffectual.[128] The Charter guarantees various rights and freedoms including fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, and language rights,[129] which are arguably similar to civil and political rights. As to the type of rights that might be incorporated into the Australian Constitution, I would suggest civil and political rights comparable to those listed in the ICCPR. In addition, prohibiting discrimination on the basis of gender and sexual preference in all circumstances would be a major advance for universal human rights.

Secondly, and equally important, a full recognition of status and rights of the Indigenous people. In s35 of the Charter, the status and rights of the Aboriginal people in Canada is expressly recognised.[130] Additionally, the Prime Minister of Canada is required to hear the representative of the Aboriginal people in the process of amending the constitution.[131] Australia can adopt these provisions to some extent in order to close the inequality gap between Indigenous Australians and non-Indigenous Australians. It has been shown that throughout history the Australian legal frameworks have perpetuated the inequality suffered by the Indigenous people.[132] As such, the constitutional recognition of status and rights of the first Australian peoples would be a major breakthrough.

Thirdly, the notwithstanding clause which allows the legislation to override the constitutional rights for a five-year period.[133] In Canada, this particular clause can be triggered by the Parliament as well as the legislature of the province by making a declaration that the legislation overrides protected rights in the Charter. This clause appears to seek an appropriate balance between the rights

[128] Saunders, "The Australian Constitution," 130.
[129] *The Constitution Act 1982* being Schedule B to the Canada Act 1982 (UK), 1982, c 11-part I.
[130] *The Constitution Act 1982*, s35.
[131] *Ibid*.
[132] Davis, "Closing the Gap," 35–42.
[133] *The Constitution Act 1982*, s33.

protection and the Parliament authority. In the Australian context, the notion of the notwithstanding clause would be relevant to consider if there were an initiative to extend broader rights in the Constitution. This is so mainly because there is a strong opposition against judicial review on the basis of parliamentary sovereignty that has gained popularity.[134] Although judicial review has been exercised for a century,[135] meaning that such opposition does not seem to be a pertinent issue, adopting the notwithstanding clause would reconcile the authority of Parliament and the need for judicial review of laws that infringe the rights protected in the Constitution.

## V. CONCLUSION

Australia has been widely known as one of the founding members of the United Nations. Indeed, the Universal Declaration of Human Rights was adopted when Dr Herbert Vere Evatt, a former judge of the High Court became the President of the United Nations General Assembly.[136] It is not surprising then that Australia has also ratified a number of important international treaties concerning human rights. But nevertheless, when it comes to the domestic rights protection, it does not seem to be in harmony with international standards. As this paper has suggested, while a bill of rights has been adopted in some States, it is difficult to sustain that the current protection regime under the Constitution, Federal laws, and the HRPS Act is effective in safeguarding human rights.

In many cases, there is a real need for extending the rights protected by the Constitution. It is also acknowledged that constitutional change is notoriously difficult. But it would not be impossible to achieve if the wider public came to grips with a view that the Constitution and the HRPA Act provide very limited rights protection, leaving vulnerable peoples at risk of human rights abuses without any significant remedies. Moreover, it is argued that instead of opting

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[134] Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115(6) (2006).

[135] Adrienne Stone, "Disagreement and an Australian Bill of Rights," *Melbourne University Law Review* 26, no. 2 (2002): 495-496.

[136] Australia and the Universal Declaration on Human Rights, *Australian Human Rights Commission*, https://www.humanrights.gov.au/publications/australia-and-universal-declaration-human-rights.

for dialogue model, Australia should adopt the Canadian's right protection model. Some elements that are worth considering include an entrenched bill of rights, a recognition of the first Australians people and their rights, and the notwithstanding clause. Not only will it provide a more effective framework for safeguarding human rights, but it will also strike a balance between the judiciary and the legislature.

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# Constitution without Constitutionalism? Challenges to constitutionalism in the Kyrgyz Republic

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**Abstract**

Application of basic principles revolving around the constitutionalism into third wave democracies, produced such phenomenon as constitutions "without constitutionalism". This paper will revisit and discuss this issue in the context of the Kyrgyz Republic. Main argument and thesis of the paper is following: Where a viable balance of power exists, a constitutional court acquires importance as a key element of that order, thus promoting the constitutionalism. If no such balance exists, the constitutional court will soon become a tool of the more dominant powers and thus lose its relevance for a genuine constitutional order. The abovementioned thesis will be demonstrated by the example of the work of Constitutional Court of the Kyrgyz Republic. Mainly it first aims at providing a proper foundation and basic understanding of constitutionalism, further revisiting this concept in the context of Former Soviet Union and finally will discuss the development of constitutionalism in Kyrgyzstan along with challenges faced by the court.

**Keywords**: Constitutional Court, Constitutional Review, Constitutionalism, Kyrgyzstan, Separation of Powers.

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## I. THEORETICAL BACKGROUND: THE NOTION OF CONSTITUTIONAL REVIEW AND CONSTITUTIONALISM

The scholarship of comparative constitutional law has experienced a vibrant grow over the past decade,[1] especially the issues revolving around the constitutional review and the role of courts in maintaining and consolidating the process of democratization.[2] As it was described by Shapiro, "what once appeared to be American exceptionalism came into play in most European, Continental ... and in some Asian democratic states."[3] The review of the current contemporary scholarship reveals emerging trends in the field of comparative constitutional law that is evolving both thematically and geographically. Substantial boom in literature is being observed outside of the western world from Latin America to Africa[4] and from Former Soviet Union[5] to Asia.[6] These regions are also being consumed by emerging trends in comparative constitutional law as abusive constitutionalism,[7] sham constitutions, constitutions without constitutionalism,[8] failing constitutionalism.[9]

The global trend towards "juristocracy"[10] has greatly complemented to a new convergence of the overall role and functions of constitutional courts. The

[1] Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (OUP Oxford, 2012); Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar Publishing, 2011); Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, *Routledge Handbook of Constitutional Law* (Routledge, 2013); Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP Oxford, 2014).

[2] Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, Consequential Courts: Judicial Roles in Global Perspective (Cambridge University Press, 2013).

[3] Martin Shapiro, "Courts in Authoritarian Regimes" in Tom Ginsburg and Tamir Moustafa; Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, 2008), 326.

[4] Douglas Greenberg Vice President et al., *Constitutionalism and Democracy: Transitions in the Contemporary World: Transitions in the Contemporary World* (USA: Oxford University Press, 1993).

[5] Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press, 2008); Wojciech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer Science & Business Media, 2002); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Science & Business Media, 2005).

[6] Jiunn-rong Yeh, *Asian Courts in Context* (Cambridge University Press, 2014); Rosalind Dixon and Tim Ginsburg, *Comparative Constitutional Law in Asia* (Edward Elgar Publishing, 2014); Albert H. Y. Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); Andrew Harding and Penelope Nicholson, *New Courts in Asia* (Routledge, 2010).

[7] David Landau, "Abusive Constitutionalism," *UCDL Rev.* 47 (2013): 189.

[8] H. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism: An African Political Paradox," in *Constitutionalism and Democracy: Transitions in The Contemporary World*, ed. Douglas Greenberg, S. N. Kartz, B. Oliviero and S. C. Wheatley (1993), 65- 80.

[9] Armen Mazmanyan, "Failing Constitutionalism: From Political Legalism to Defective Empowerment," *Global Constitutionalism* 1, no. 02 (July 2012): 313–33.

[10] Ran Hirschl, *Towards juristocracy: The Origins and Consequences of the New Constitutionalism*, (Harvard University Press, 2004). 3.

mere understanding of basic phenomenon of constitutional courts is now being deeply rooted in the notion of constitutionalism. As Ran Hirschl emphasized "sweeping worldwide convergence to constitutionalism ... entails far more than a mere adherence to majority rule".[11] Due to shifting nature of constitutionalism, the democracy is no longer understood as "canonical" majority rule/ parliamentary sovereignty, but rather as "minorities possess legal protection in the form of a written constitution, which even a democratically elected assembly cannot change".[12] It still remains unclear what does constitutionalism mean? Are there any criteria or definition against which the global constitutionalism can be tested? Overall there is no strictly defined definition or understanding of constitutionalism. According to Andras Sajo "constitutionalism is closely linked to traditional nineteenth century liberalism, which always escaped textbook definitions and resisted positive description".[13] However, existing scholarly literature in the field of constitutionalism share common traits that constitutionalism is a set of principles, ideals and values revolving around the organizational structure of government.[14] Reviewing the works of scholars as Andras Sajo, Giovanni Sartori, Michel Rosenfeld and Louis Henkin one can blueprint such principles of limited nature of government, respect for individual rights and rule of law as core values associated with constitutionalism.[15] One may ask what the limited government means. The primary understanding of limited government lays on written nature of constitution. As Chief Justice Marshal emphasized in Marbury vs. Madison, the entire purpose of writing the US constitution was to limit the government, not to empower it.[16] Existing scholarly literature in deliberative democracy highlights basic role of judicial review as a complementary tool in

[11] *Ibid.*, 2.
[12] *Ibid.*, 2.
[13] Andras Sajo, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999). 9-13.
[14] Cass R. Sunstein, "Constitutionalism after the new deal," *Harvard Law Review* 101, no. 2 (December 1987): 421-423; Bruce Akerman, "The Rise of World Constitutionalism," *Virginia Law Review* 83, no. 4 (1997): 788-791.
[15] Andras Sajo, *Limiting Government,* 9-13; Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *American Political Science Review* 56: 853-859; Michel Rosenfeld, *Constitutionalism, identity, difference and legitimacy: theoretical perspective* (Duke University Press, 1994), 5-10; Louis Henkin, "A New Birth of Constitutionalism: Genetic Influence and Genetic Defects" in *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspective*, ed. Michel Rosenfeld, 40-42.
[16] Marbury V. Madison, 5 U.S. 137 (1803), 177.

ensuring the limited nature of government.[17] Application of basic principles revolving around the constitutionalism into third wave democracies, namely African/Asian and Former Soviet Union countries produces an interesting paradox. Namely, range of constitutions "without constitutionalism"[18] and "sham constitutions".[19] As Mazmanyan highlighted the constitutionalism in former Soviet Union States "has failed to meet the definition in several ways, but most importantly in that it continuously lacked sensitivity to the most essential aspect limit on government."[20]

## II. DISCUSSION

### 2.1 Hardships Faced by FSU Courts: from Shut Down to Major Institutional Reconfiguration

At the end of the twentieth century, along with precipitous collapse of communist regimes across the East and Central Europe, culminating in the disappearance of the Soviet Union itself in 1991, the broad transformational trend toward democratization included dutiful processes of constitution-making and, as part of it, establishment of constitutional courts. These newly emerging democracies became active producers of constitutional courts[21] and late 1980's turned into the period of "the great constitutional borrowings."[22]

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[17] Hans Kelsen, "Pure Theory of Law" German edition by Max Knight Published. Gloucester, Mass. ; Peter Smith, 1967, 1989; Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Southern California Law Review*: 1307-1351; Nino, Carlos Santiago, *The Constitution of Deliberative Democracy* (Yale University Press, 1996); Chapter VII: Judicial Review in a Deliberative Democracy, 187-216; John Hart Ely, *Democracy and distrust* (1980), 73-104; Alexander Bickel, *The Least Dangerous Branch* (1986), 1-29; Aharon Barak "The Judge in a Democracy" part 1 the Role of the Judge 1- 88.

[18] H. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism".

[19] David S. Law, Mila Versteeg, "Sham Constitutions," *101 California Law Review* (2013): 865-911, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4207&context=californialawreview.

[20] Armen Mazmanyan, "Failing Constitutionalism: from Political Legalism to Defective Empowerment," *Global Constitutionalism* (2012): 313-333. https://doi.org/10.1017/S2045381711000128.

[21] Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005), 3; Radoslav Prochazka, *Mission Accomplished on Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002), 16; Kim Lane Scheppele, "A Comparative View of the Chief Justices` Role. Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe," *University of Pennsylvania Law Review* 154: 1757-2006; Wojciech Sadurski, "*Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*," *Kluwer Law International*, (2002).

[22] Wiktor Osiatynski, "Paradoxes of Constitutional Borrowings" *International Journal of Constitutional law* (2003): 244-268; Vlad Perju, "Constitutional transplants, borrowing and migrations" in *Oxford Handbook of comparative constitutional law*, ed. Michel Rosenfeld and Andras Sajo (Oxford University Press, 2012),1304-1327; Vicki C. Jackson, "Comparative constitutional law: methodologies" in *Oxford Handbook of comparative constitutional law*, ed. Michel Rosenfeld and Andras Sajo (Oxford University Press, 2012), 54-74.

After the collapse of the Soviet Union majority of states were functioning through introducing amendments to previous Soviet Constitutions. It generally took from 2 up to 4 years for different states to establish constitutional courts. However, by the time of the establishment and in the process of negotiations the courts were already disciplined through reforms and major court shut downs.

This could be illustrated in the example of Russian Constitutional Court, since this particular state was the first signal upon what the entire region followed a certain constitutional pattern- namely the wave of constitutional court suspensions.[23] By the time of the final adoption of the constitution President Yeltsin was able to firmly concentrate power and furthermore to make sure that the most sympathetic draft would go into the referendum.[24] The constitution drafting of the first Constitution of RF was a back and force rival between president and parliament. The question about legitimacy of the court was not discussed whatsoever. However, after the popular support in referendum Eltsin gained confidence and called for a Constitutional Assembly to draft a new constitution. The draft constitution that the assembly was working was based on presidential draft however yet incorporated many elements of parliamentary draft as well.[25] But the Supreme Soviet refused to ratify it, because "accepting the documents that resulted from a presidential initiative was, therefore, tantamount to a surrender."[26] President Eltsin issued an edict suspending the work of the legislature and existing RSFSR constitution. Supreme Soviet and Constitutional Chamber had emergency meeting both of them condemned the actions of president however both the media and army was controlled by president. He used his authority blockaded the white house and arrested certain members of the Supreme Soviet. As a result of it the constitutional court was suspended.[27] Referendum was called and the constitution was adopted in December 1993.

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[23] Armen Mazmanyan, "Failing Constitutionalism: From Political Legalism to Defective Empowerment," *Global Constitutionalism* 1, no. 02 (July 2012): 316.

[24] Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (Bloomsbury Publishing, 2011), 67.

[25] *Ibid.*, 69.

[26] *Ibid.*, 76.

[27] *Ibid.*, 86.

According to Sadurski, Constitutional Courts of Central Asian countries along with other Former Soviet Union states attempted to acquire their legitimacy on dealing with separation of powers disputes rather then fundamental rights. Most of the Courts were strongly empowered by the constitutional arrangements to settle disputes instead of dealing with rights.[28] Other scholars as Mazmanyan describe the period of early constitution drafting "the pattern of constitutional romanticism".[29] However, this period did not last long, romanticism ended after number of activist attempts taken by constitutional courts to deal with separation of powers issues. It started first in Russia in 1993 when President Yeltsin suspended the Constitutional Court in response to its decision, which was evidently against the will of the President. The wave of suspensions continued in Kazakhstan (1995) where President Nazarbaev substituted the Constitutional Court with new institutional named Constitutional Council that up to this date remains loyal agent of President.[30] It was also a response to the Courts decision on SOP, which was decided against the will of the President. Finally, Belarusian Constitutional Court in 1996 has also suffered the end of "constitutional romanticism" when President Lukashenko forced the resignation of Constitutional Court Judges and replacement of them by judges who remain loyal to Lukashenko up to this date as well. Starting as a signal from Russia this wave of suspension captured almost entire FSU region either directly or indirectly.[31] Some states were directly influenced by it and followed the pattern of Russia by packing courts (Belarus); others were indirectly influenced by introducing constitutional amendments (Kazakstan). In other states courts managed to survive however loosing their legitimacy and becoming disciplined agents of the incumbent (Tajikistan, Uzbekistan, Azerbaijan).

What is even more paradoxical is that the courts in this region is being empowered more and more. Alexei Trochev in his book "Judging Russia" presents

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28 Wojciech Sadurski, *Rights before courts.*

29 Armen Mazmanyan, "Failing Constitutionalism: From Political Legalism to Defective Empowerment," *Global Constitutionalism* 1, no. 02 (July 2012) p. 316.

30 D. Nurumov & V. Vashcankha, *Constitutional Development of Independent Kazakhstan in R. Elgie, S. Moestrup, Semi-Presidentialism in the Caucasus and Central Asia* (2016).

31 Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago London : The University of Chicago Press, 2000).

an interesting observation on evolving nature of the constitutional review power in Russian Federation. His major concern is why the power of Russian Constitutional Court strengthens while the "Russian democracy weakens".[32] His comprehensive research suggests that it has been done on purpose, namely the empowerment of the judiciary in Russia was not based on good will of the politicians, rather it was a product of their hidden motives driven by their own self-interest and self-ambitions. Analysis of the case law of RCC made by Trochev from 1990-2006 revealed the fact that the expansion of constitutional review in Russia allowed the executive branch to expand their own power over the legislative.[33]

Despite this massive process of constitutional courts suspensions, there were very few countries that somehow managed to survive this wave of suspensions and overall the influence of "post constitutional romanticism". Among those states are Kyrgyzstan and Ukraine. To certain extent Armenia and Georgia can be included to this list as well. This was due to the fragmented nature of politics and due to political uncertainty. Existing in such conditions the courts of Ukraine and Kyrgyzstan became more of strategic courts. Furthermore, this exceptional cases demonstrate more or less smooth and objective application of insurance theory in the region. This was due to the fragmented nature of the politics which again traces us back to the main hypothesis under the insurance theory.

### 2.2. Kyrgyz Constitutional Court and Constant Change of Roles: From Loyal Agent of the President to the Agent of Neutrality

First democratic constitution of the Kyrgyz Republic established Constitutional Court following the German model of centralized/concentrated system of judicial review. Unlike current Constitutional Chamber the Court had power to conclude on constitutionality of election results, which gave a great opportunity for former President Akaev to use this power of the court for his own sake. From the early decisions of this institute one was able to see Court`s constant expansion of the powers of the President.

[32] Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press, 2008).

[33] *Ibid.*

The constitution of the Kyrgyz Republic has been revised 8 times in the last 25 years. Then-President Akayev, between the years of 1994 and 2003, with the help of the referendum, introduced four of these eight amendments. Below is a brief description of these amendments:

- The Constitution of Independent Kyrgyzstan was adopted in 1993[34].
- In October 1994, as the result of a referendum, the "Jogorku Kenesh" Parliament of the Kyrgyz Republic was divided into two chambers.
- In February 1996, President Akayev called for another referendum, which resulted in a substantial increase of presidential powers under the new text of the Constitution. If the core of the 1993 Constitution was the principle of separation of powers, it was shifted to the principle of "supremacy of people", which according to the 1996 revisions, was expressed and guaranteed by the President.
- In October 1998, another referendum took place in the Kyrgyz Republic that introduced private property rights over lands for the citizens of the Kyrgyz Republic and recalculated deputy seats in both chambers of parliament. Finally, new revisions of the constitution took away the inviolability of MPs of the parliament that were guaranteed by the previous constitution.
- The February 2003 referendum, among other things, reintroduced a one-chamber (single house) Parliament and lowered the number of Members of Parliament (MPs) from 105 to 75. Higher arbitration court was merged with the Supreme Court.
- 2006: under the pressure of the opposition the compromised constitution was adopted between Bakiev and the opposition that have decreased Presidential powers that were highly extended by Akaev.
- 2007 Bakiev used the referendum to amend the constitution that pretty much brought back the 2003 version of it.
- 2010: New text of the Constitution was adopted as a result of the April 2010 uprisings which introduced the premier-presidential form of governance.

[34] Konstitucia Kyrgyzskoi Respubliki [Constitution of the Republic of Kyrgyzstan], May 5,1993, adopted by the Supreme Soviet of the Kyrgyz Republic.

- 2016: Number of amendments were introduced to the 2010 text of the constitution. The most important ones are revocation of citizenship and change of the status of international treaties on human rights.

This chronology of events reflect how a constitution, the supreme law of the land, can be used by the political branches of government as a tool for their own self-empowerment and ambitions. However, this research does not aim at reflecting all those revisions and amendments. Rather, it targets recent constitutional reforms and its influence on the current conditions and future development of constitutionalism in the Kyrgyz Republic.

One of the controversial decision of the Court was the advisory opinion[35] on the new draft of the text of the Constitution developed based on 1994 referendum. As a result of the referendum Parliament was divided into two chambers with substantially low number of MPs instead of one house parliament as it used to be before. This strategy and constitutional move enabled President Akaev to diffuse the power of the parliament, thus making it more adoptable to presidential control. Further political developments in Kyrgyzstan reflected this specific hypothesis, namely Akaev was able to adapt Parliament to presidential control. Constitutional Court found the draft of the text in accordance with the constitution and moreover stated that such redistribution of power within the parliament ensures the protection of the constitution and the system of separation of powers.

Another heatedly debated decision of the court was on presidential elections. On July 13, 1998 constitutional court of the KR allowed[36] President Akaev to be re-elected for 3rd term claiming that his first presidential term (1991-1995) does not count due to the fact Kyrgyzstan had not yet adopted the constitution of the independent state back then. This decision allowed Akaev to run for another presidential term, which technically was his 3rd one, thus

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[35] Reshenie Konstitucionnogo Suda Kyrgyzskoi Respubliki po proektu zakona KR o vnesenii izmeneniy v konstitucii KR [Decision of the Constitutional Court of the KR on draft law on introducing admentment to the Constitution], November 9, 1995.

[36] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 13 iulya 1998 goda [The Decision of the Constitutional Court of the Kyrgyz Republic of Jul. 13, 1998], Jul. 13, 1998.

enabling him to overcome the constitutional limitations proscribed by Article 43 of 1993 Constitution.

Thus, in the face of political stability and certainty constitutional court chose the path which led to being a loyal agent of the president. For over 10 years President Akaev has been empowering the constitutional court for the purposes of expanding his own powers.

The uprisings of 2005 and so called "tulip revolution", as a result of which President Akaev had to flee Kyrgyzstan, completely changed political situation. Newly elected President Bakiev had been constantly confronted by a strong opposition and he did not have a strong influence over Parliament as Akaev used to have. Various political actors have been trying to push through the new draft of the Constitution including President Bakiev. In 2006, Parliament by majority vote introduced changes to the Constitution by substantially increasing its own power. By unanimous decision Constitutional Court annulled the reforms introduced by Parliament until the new Constitution will be adopted by a way of referendum.[37]

Another decision of the Kyrgyz CC that has been reached shortly after the previous one during the politically fragmented and uncertain times also greatly contributes to the main hypothesis. The same year after the new constitution was adopted by a mean of referendum first party-based parliamentary elections took place. As a result of the elections pro-Bakiev political party gained the majority vote. By the decision of the Central Election Commission opposition party was excluded from gaining seats in the Parliament. This was done by strict application of 5% threshold. However, constitutional court overruled the decision of the Commission and one of the strongest opposition parties were allowed to gain seats in the parliament.[38] This case is also a demonstration of Court`s neutrality and overall willingness to reach pro-democratic decision when political situation in State is not stable and uncertain.

[37] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 14 sentyabrya 2007 goda [The Decision of the Constitutional Court of the Kyrgyz Republic] Sep. 14, 2007.

[38] Reshenie Konstitusionnogo Suda Kyrgyzskoi Respubliki ot 2008 goda [The Decision of the Constitutional Court of the Kyrgyz Republic], 2008.

However, this attitude of the court for being neutral and pro-democratic did not last long. Within the period of 2007-2009 President Bakiev have managed to gain a substantial control over the political situation in Kyrgyzstan. This accordingly led the Court to become a loyal agent of the President again in second time.

In 2009, Constitutional Court of the KR upheld the constitutionality of the reform presented by Bakiev.[39] The constitutional reform granted some Presidential Council that never existed before, the right to determine who will perform the duties of the President if he/she for some reason, early resigns. In this case, the decision will be taken by a majority vote of all the participants of the Council. This gesture taken by the President can be easily tied to his attempts to prepare his son Maksim Bakiev to become his successor.

Accordingly, one can see the constant shift of the roles of the court from being a loyal agent of the president to more neutral and independent decision-maker. The primary reason behind this shift lies on constant change of regime and uprisings that took place in Kyrgyzstan. In response to Bakiev`s abuse of power, Kyrgyzstan experienced another *coup d'etat* in 2010 which brought tremendous changes both to our Constitution and overall institutional framework.

The constitutional reform of 2010 produced a new constitution for the Kyrgyz Republic with substantial revisions in terms of the system of separation of powers and checks and balances.[40] From a relatively strong and concentrated presidential system of governance, the Kyrgyz Republic began a premier-presidential hybrid system of government. Accordingly, this section will explore those major changes under the 2010 Constitution, including the power of the Constitutional Chamber to maintain or improve balance of power between the political branches while strengthening constitutional stability.

One of the key differences between the 2010 Constitution and all other previous versions is in the introduction of “parliamentarism”. This will be the

[39] Zakluchenie Konstitucionnogo Suda KR po proektu zakona o vnisenii izmeneniy v Konstitisiu Kyrgyzskoi Respubliki vnesennogo Prezidentom KR na rassmotrenie JK [The Conclusion of the Constitutional Court of the KR on the draft law on introducing amendments to the constitution proposed by the President for a review of the Supreme Council of the KR] Jan.21, 2010.

[40] Konstituciya Kyrgyzskoj Respubliki [Constitution of the Kyrgyz Republic] 27 June 2010.

underlining basis for overview of the current constitution. In the classical parliamentary system, the president is elected not by people but by parliament. The current Constitution of the KR preserved both an elected President and Parliament. However, the powers of president have been reduced, but not eliminated. Due to the fact that this is a new constitutional design for Kyrgyzstan, and due to the collegial nature of the parliament and lack of strongly established political parties, this was a good solution to counter-balance Parliament with elected President.

The unlikely governmental toppling, the 'second revolution' of April 2010, materializing to the surprise of the by-then very confident regime of Bakiyev, resulted in a severe political vacuum. Overnight, there was no president, no prime minister and cabinet, no parliament, and soon enough, not even the constitutional court. As the legitimating instrument of Bakiyev's rule, even the constitution could not be held up as any basis of authority. But even more than the collapse of nearly the entire institutional system of government, it was the relatively level field of victorious revolutionaries, about a dozen politicians, that provided for the atmosphere of indeterminacy and anarchy at the time. Taught by the bitter lesson of post-March 2005 developments, when the granting of authority to one person soon resulted in complete dominance of that person, the key political leaders in 2010 resisted any such authorization of one of them. The resulting Provisional Government[41] was a group of fourteen seasoned politicians, each with supreme ambitions, each commanding significant financial and political support of their own, each with a team of power-and reward-hungry functionaries and clients behind them. If Kyrgyzstan had ever been looking for a balance of powers, that fortuitous period was its best situation of balance. What that balance lacked, obviously, was any legitimate and legal basis of power, except the unconvincing rhetoric about popular revolutionary mandate and the even less convincing "dressing" of all decisions by decrees. Due to the fact that this is a new constitutional design for Kyrgyzstan, due to collegial nature of the

[41] Dekret Vremennego Pravitel`stva Kyrgyzskoi Respubliki [The Decree of the Interim Government of the Kyrgyz Republic] Apr.7, 2007, No. 1.

parliament and lack of strongly established political parties, this was a good solution to counter-balance Parliament with elected President.

As a result of 2010 events Constitutional Court of the KR was dismissed and replaced by a Constitutional Chamber of the Supreme Court, which started functioning since 2013. One of the key differences of 2010 constitution with all other previous texts of the constitution is in the introduction of "parliamentarism". This will be the underlining basis for overview of the current constitution. Usually in classical parliamentary system president is elected not by people but by parliament. Current Constitution of the KR reserved both elected President and Parliament. However, the powers of president have been gradually reduced yet not diminished them completely. The Constitutional Chamber of the Supreme Court is a special institution empowered to exercise constitutional review following a centralized model. Primary sources regulating the activities of the Chamber is the Constitution and Constitutional law on Constitutional Chamber and Constitutional law on status of Judges.[42] The abovementioned legal framework empowers the Chamber to exercise both *a priori* (in concluding the constitutionality of international treaties not entered into force for Kyrgyzstan and concluding the constitutionality of amendments to current constitution) and ex post factum review (review the constitutionality of normative legal acts) along with the abstract review. Thus, the Chamber is a hybrid of the German and French models of constitutional review. In comparison to previous Kyrgyz Constitutions, such as the Constitution of 2007, the powers of the Chamber have been limited in terms of its involvement into political arena, namely, the Chamber can no longer review the election results. The Constitutional Chamber started its work very promisingly however it did not last long.

The Chamber`s decision regarding the mandate of the Prosecutor General's office gave rise to criticism that was indicative.[43] Influential deputies of the

[42] Konstitucionnuj zakon Kyrgyzskoj Respubliki o Konstitucionnoj palate Verhovnogo suda Kyrgyzskoj Respubliki [Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic] June 13, 2011, No. 37. Konstitucionnuj zakon Kyrgyzskoj Respubliki o statuse sudej Kyrgyzskoj Respubliki [Constitutional Law on the Status of Judges in the Kyrgyz Republic] July 9, 2008, No. 141.

[43] Reshenie Konstitusionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitusionnosti stat`I 34 UKRKR [The Decision of the Constitutional Chamber of the Supreme Court of the KR on case involving the constitutionality of article 34 of the CPCRK] Jan.13, 2014.

parliament as well as representatives of the presidential office–and the president himself at a later point–greeted the decision with disapproving surprise, public denouncements of the court and its judges, and eventually even with proposals to cut down the eleven-judge court to nine (that is, to forego filling the two vacant seats, thereby opening a precedent for later modifications of the Constitutional Chamber's legal foundations). The fact that the court issued a reconciliatory follow-up explanation of its decision, where it said that the decision had no retroactive effect and all business conducted differently from the decision till now would remain valid, was a worrisome symptom.

Furthermore, there were number of further decisions of constitutional chamber that could greatly demonstrate severe challenges to the establishment of constitutionalism in Kyrgyzstan. However, there were worrisome signs that changes might be coming, including unequivocal speeches of President Atambayev to that extent and later the actual referendum of 2016 took place with all possible procedural and substantive violations of the norms of the constitution and the legislation on referendum, the regulation of the Parliament and other laws. However, the scenario might have been different if Constitutional Chamber continued to issue persuasive, even if not always favorable, decisions that reaffirmed the spirit of the balanced framework, there might be some robust achievements to boast. However, at certain point, particularly after the Judgment on Biometric registration[44] when President showed certain pressure on the Chamber, they have become too cautious and self-restraint. Thus, just like for other presidents (Akaev and Bakiev) it was now easier for Atambaev to make the constitutional referendum and pass the amendments and also receive the support of the Constitutional Chamber.[45]

Primary challenges for Kyrgyzstan for constitutional implementation predominantly were the failure to establish the state based on Constitutionalism.

[44] Reshenie Konstitucionnoi Palaty Verhovnogo Suda Kyrgyzskoi Respubliki po delu o proverke konstitucionnosti zakona o biometricheskoi registracii grazhdan Kyrgyzskoi Respubliki [Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on constitutionality of the law on biometric registration of the citizens of the Kyrgyz Republic] September 14, 2015 No. 11-p.

[45] Zakon Kyrgyzskoi Respubliki o naznachenii referenduma po proektu po proektu zakona Kyrgyzskoi Respubliki ot 2 noyabrya 2016 goda [Law of the Kyrgyz Republic on calling the referendum on introduced amendments to the Constitution of the KR] November 2, 2016.

Thus, producing a "constitution without constitutionalism". This further led to the 2016 constitutional amendments and substantial weakening of the work of the Constitutional Chamber and furthermore the weakening of the viable balance of power.

## III. CONCLUSION

Application of basic principles revolving around the constitutionalism into third wave democracies, produced such phenomenon as constitutions "without constitutionalism". This paper revisited and discussed this issue in the context of the Kyrgyz Republic. Main argument and thesis of the paper was following: Where a viable balance of power exists, a constitutional court acquires importance as a key element of that order, thus promoting the constitutionalism. If no such balance exists, the constitutional court will soon become a tool of the more dominant powers and thus lose its relevance for a genuine constitutional order. The abovementioned thesis was demonstrated by the example of the Kyrgyz Republic. It first provided a proper foundation and basic understanding of constitutionalism, further revisited this concept in the context of Former Soviet Union and finally discussed the development of constitutionalism in Kyrgyzstan along with challenges faced by the constitutional review mechanism.

Thus, primary challenges for Kyrgyzstan for constitutional implementation predominantly were the failure to establish the state based on Constitutionalism. Thus, producing a "constitution without constitutionalism". This further led to the 2016 constitutional amendments and substantial weakening of the work of the Constitutional Chamber and furthermore the weakening of the viable balance of power.

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# Defining Judicial Independence and Accountability Post Political Transition

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**Abstract**

Indonesian constitutional reform after the fall of Soeharto's New Order brings favorable direction for the judiciary. Constitutional guarantee of judicial independence as regulated in Art 24 (1) of the 1945 Constitution, has closed dark memories in the past. This article decides that the Judiciary is held by the Supreme Court and the judicial bodies below and a Constitutional Court. Such a strict direction of regulation plus the transformation of the political system in a democratic direction should bring about the implementation of the independent and autonomous judiciary. But in reality, even though in a democratic political system and constitutional arrangement affirms the guarantee of independence, but it doesn't represent the actual situation. There are some problems that remain, such as (i) the absence of a permanent format regarding the institutional relationship between the Supreme Court, the Constitutional Court, and the Judicial Commission, and (ii) still many efforts to weaken judiciary through different ways such criminalization of judge. Referring to the problem above, then there are gaps between what "is" and what "ought", among others. First, by changing political configuration that tends to be more democratic, the judiciary should be more autonomous. In this context, various problems arise such as (i) disharmony in regulating the pattern of relations between judicial power actors, (ii) various attempts to criminalize judges over their decisions, and (iii) judicial corruption. Second, by the constitutional guarantee of the independence of the judiciary, there will be no legislation that that may reduce constitutional guarantee. However, there are many legislation or regulations that still not in line with a constitutional guarantee concerning judicial independence. This paper reviews and describes in-depth about how to implement constitutional guarantees of judicial independence after the political transition and conceptualize its order to strengthen rule of law in Indonesia

**Keyword**: Judicial Accountability, Judicial Independence, Judicial Reform, Political Transition.

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# I. INTRODUCTION

After the fall of the New Order, the 1945 Constitution secure a constitutional guarantee of judicial independence. Judicial Independence was fully emphasized in Art 24 (1) of the 1945 Constitution, which was previously never been as clear as after amendments in mid-1999-2002.[1] However, even though on constitutional stage has guaranteed independence of judiciary, but many legislation and regulations relating to judiciary contains several problems such as (i) some legislation are not synchronized especially on institutional relation between Supreme Court, Constitutional Court and Judicial Commission, and (ii) some legislation and regulation tried to weakening constitutional guarantee on independence of judiciary which was formulated on the 1945 Constitution.

The presence of judicial reform law package such as Judiciary Act on 2004, Law Supreme Court Act on 2004, Constitutional Court Act on 2003, and Judicial Commission Act on 2004 which was compiled under democratic and participatory political structured, [2] but it still often received pressure and resistance especially through the judicial review.[3] Therefore, another court reform law package such as Supreme Court Act in 2009, Judiciary Act on 2009 and Judicial Commission Act on 2011 and Constitutional Court Act in 2011 are existed to rearrange the relationship between the judiciary and judicial commission after Constitutional Court Decision Number 005/PUU-IV/2006.[4] However, on the other hand, another court reform law package such as Constitutional Court

[1] Elucidation of Art 24 and 25 of the 1945 Constitution: "Judiciary is an independent power, meaning that it is independent of the influence of the authority of the Government. In this regard, guarantees must be made in the Law regarding the position of judges."

[2] Saldi Isra, *Kekuasaan Kehakiman dalam Transisi Politik di Indonesia* [Judicial Power Post Political Transition in Indonesia], in Komisi Yudisial, *Problematika Hukum dan Peradilan di Indonesia* [Law and Judiciary Problematics in Indonesia], (Jakarta: Judicial Commission of Republic Indonesia, 2014), 66-69.

[3] For example, several supreme court judges submitted a petition for judicial review on Judicial Commission Act of 2004 and Judiciary Act of 2004 and registered as Case No. 005/PUU-IV/2006. It shows format and institutional disharmony between Supreme Court, Judicial Commission and Constitutional Court. In the case, the Constitutional Court granted part of the petition of the petitioners so that the authority of the Judicial Commission to support the function of creating responsible judiciary became confined. Even in the case, the Constitutional Court ruled itself that it could not be supervsed by the Judicial Commission. The Constitutional Court also provides judicial orders for legislators to carry out integral improvements for the harmonization and synchronization of the Law relating to Judiciary. This case shows that there is no permanent format for institutional relations after reformation in 1998. Zainal Arifin Hoesein, *Kemerdekaan Kekuasaan Kehakiman* [Judicial Independence] (Malang: Setara Pers, 2010), 39-40.

[4] Duwi Handoko, *Kekuasaan Kehakiman di Indonesia* [Judicial Power in Indonesia] (Pekanbaru: Hawa dan Ahwa, 2015), 19-22.

Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011 brought legal policy which has a direction to restrain their independence, especially in decisional powers.

Through Constitutional Court Act on 2011, Juvenile Justice System Act on 2012, and the Supreme Court Bill in 2011, the judges are prohibited to make a decision that exceeds the limit (*ultra petita).* If the court makes a decision that can cause chaos situation, then the judge can be punished through criminal sanctions.[5] Besides, criminalization of judges strictly appears in Juvenile Justice System Act on 2012, by providing two years imprisonment or a maximum of Rp.200,000,000.00 (two hundred million rupiah) as a criminal sanction if the judge does not use diversion.[6] Referring to some legal problems as described, there are gaps between what "is" and what "ought to", among others. First, by changes political configuration that tend to be more democratic, the judiciary should be more autonomous.[7] But in reality, various problems arise such as (i) disharmony in regulating the pattern of relations between judicial power actors, (ii) various attempts to criminalize judges over their decisions, (iii) judicial corruption. Second, by the constitutional guarantee of the independence of the judiciary, there will be no legislation that reduced constitutional guarantee. But in reality, many legislation or regulations that still not in line with a constitutional guarantee concerning judicial independence. This paper has the intent to reviews and analyzes in-depth about how to implement constitutional

5 Art 97 third version of Supreme Court Bill of 2011: The "Supreme Court in the cassation level is prohibited: a. Making a decision that violates the law; b. Making a decision that causes confusion and damage and results in riots; c. Prohibited from making decisions it is impossible to implement because it is contrary to reality in the midst of society, customs, and habits that are hereditary so that it will lead to disputes and commotion, prohibited from changing the joint decision of the Chief Justice of the Supreme Court and Chairperson of the Judicial Commission, and/or Joint Decree on The Code of Ethics and Judicial Guidelines unilaterally" and Art 57 (2a) of Constitutional Court Act of 2011: "The Constitutional Court Decision does not contain: a) Conclusion other than as referred to in paragraph (1) and paragraph (2); b) judicial order to the legislator, and c) creating of norms as a substitute norm that are declared contrary to the 1945 Constitution."

6 Art 96 of Juvenile Justice System Act of 2011: "Investigators, Public Prosecutors and Judges who deliberately do not fulfill the obligations referred to in Art 7 (1) shall be sentenced to a maximum of two years imprisonment or a maximum fine IDR 200,000,000.00 (two hundred million rupiah)." Teguh Satya Bakhti, et.al. *RUU Mahkamah Agung: Pengkajian Filosofi, Sejarah, Asas, Norma dalam Dinamika Perkembangan Ketatanegaraan Indonesia* [Supreme Court Bill: Study on Philosophy, History, Principle, Norms in Constitutional Structure Development in Indonesia] (Jakarta: Research and Development Body on Supreme of Court, 2014), 88-90.

7 Benny K. Harman, *Konfigurasi Politik dan Kekuasaan Kehakiman* [Political Configuration and Judiciary] (Jakarta: Elsam, 1998), 40.

guarantees of judicial independence and judicial accountability and conceptualize ideas to strengthening rule of law.

In order to analyze main problem of this article, the discussion will consist of five parts, namely the I-V parts. Part I is an introduction intended to outline the main reasons why defining judicial independence and judicial accountability is important and explaining some anomaly that occurs in realizing the independence of judicial power and accountability after constitutional changes. Part II delivered a theoretical framework that will be used in this article and become an indicator of defining judicial independence and accountability. Part III describes the results of research and analyzes every stage of defining judicial independence into legislation and regulation and what needs to be done to realizing Art 24 (1) The 1945 Constitution to strengthening the concept rule of law. Part IV describing the results of research and analyze every stage on defining and implement judicial accountability as part judicial reform main agenda into legislation and regulation and what needs to be done to realizing Art 24 (1) The 1945 Constitution to propose transparency and accountability of the judiciary. Part V draws the conclusions that conclude the article.

## II. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

The nature of judicial independence are divided into two conceptions. The first concept of judicial independence is the personal independence of judges, in this concept, it is often analogous to as the concept of "authors of their own opinions."[8] The judiciary has realized its independence if the judges can make decisions without fear of internal (vertical) or external (horizontal) pressure to resolve cases with certain conditions. In other words, personal independence can be achieved when the output of the judicial process can reflect its judicial preferences.[9] This conception often spoiled with *core independence* or personal independence (*What judges think is what they produce).*[10] The second concept

[8] Lewis A. Kornhauser, "Is Judicial Independence a Useful Concept?", in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Stephen B. Burbank and Friedman Barry, (California: Sage, 2002), 42-55.
[9] Theodore Becker, *Comparative Judicial Politics* (Landham: University Press of America, 1970), 1-8.
[10] *Ibid*.

of judicial independence is institutional independence.[11] It appears that judicial independence depends on other branches of power, especially if it is associated with decisions that are routinely ignored or poorly implemented. This concept often interpreted as collective independence of institutional independence, or referred to maxim "what judges think is what they produce and what they produce controls the outcomes of legal conflicts."[12] The separation between personal (core) and institutional (collective) independence provides what Feld and Voigt said about *de facto* and *de jure* independence. Feld and Voigt define in more detail the component. *De facto* components include: (1) average tenure of judges; (2) deviation of the term of office of the judge; (3) number of judges dismissed; (4) the frequency of the number of judges being replaced in court; (5) salary of real judges; (6) judicial budget allocation; (7) the frequency of changes in basic regulations regarding judicial authority; and (8) the level compliance of other branches with respect to judicial decisions.[13] While the components of the judicial independence in a *de jure* including (1) the ability to maintain constitutional norms; (2) level of complexity in changing the constitution, (3) judge's selection mechanism; (4) judge's tenure, (5) judge's retirement; (6) procedure for dismissal; (7) the possibility of re-elected; (8) judges' salaries; (9) accessibility to become a Chief Justice; (10) case allocation; (11) judicial review; and (12) accountability and transparency of the judiciary.[14]

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[11] The Federalist United States in the Federalist papers 78th argued, lack of financial support and the judicial infrastructure is an "intervention", the judicial authorities to rely on the help of other branches of power actively to appreciate the existence and leeway in the decision making. James Madison, et al., *The Federalist Papers* (New York: New American Library, 1961), 112.

[12] Charles M. Cameron, "Judicial Independence: How Can You Tell It When You See It? And, Who Cares?" in *Judicial Independence at the Crossroads. An Interdisciplinary Approach*, ed. Stephen B. Burbank and Friedman Barry (California: Sage, 2002), 42-55 and Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *American Journal of Comparative Law* 44 no. 4, (1996): 605-626.

[13] The components of de facto are: (1) average length of tenure; (2) deviation of average length of tenure from de jure prescriptions; (3) number of judges removed from office; (4) frequency of changes in the number of judges in the court;¡ (5) real salary of judges; (6) real court's budget; (7) number of constitutional changes in relevant articles; and (8) compliance by other branches on court rulings. Lars P Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19, no. 1 (2003): 497-527.

[14] The components of de jure are: (1) whether the highest court is anchored in the constitution; (2) how difficult is it to amend the constitution, (3) appointment procedure of judges; (4) their length of tenure, (5) whether there is a fixed retirement age of judges in the court; (6) removal procedures; (7) whether the reelection of judges is possible; (8) protection and adequacy of salary of judges; (9) accessibility to the highest court; (10) procedure for allocation of cases in the court; (11) judicial review ; and (12) transparency of the court. Lars P Feld and Stefan Voigt, "Economic Growth".

Accountability is the same as the judicial independence, both of which are important foundations for the rule of law.[15] On a sociological level, the court obtains public trust rather than because of its independence guaranteed through legal norms.[16] Accountability makes the judicial authority's ruling becomes more respected.[17] Therefore, the enforcement of a code of ethics for the position of the judge becomes an important foundation as the core of judicial accountability for personal independence, so judicial access becomes a supporting foundation for the achievement of institutional accountability. It appears that there is a separation of meaning which is the foundation of judicial accountability, namely "(1) *the judge who is accountable to the law, to the higher principles of justice, and to her own sense of ethical responsibility*, and (2) *the judge who is deemed "accountable" only to the extent that he is held accountable by some external force with powers of discipline or retribution."*[18] According to David Pamintel, some corridors can be understood as a cornerstone is *the "First, we all want judges who will follow the law, respecting and applying proper legislative enactments, setting aside any personal legislative agenda."* In this opinion, David Pamintel expressed his great hope to the judge to be able to do *"the right thing"* for a judge even though the phrase "*the right thing*" cannot be measured normatively.[19] Ferejohn and Kramer explained,

> No one really believes that law is wholly indeterminate, but virtually everyone recognizes that modem jurisprudential tools create a range of legitimate choices in almost any given case. And even those who believe

[15] David Pamintel stated " The rule of law further requires that no public official be above the law or exempt from its requirements. While public officials enjoy a measure of immunity while working in their official capacities. The rule of law requires that they are nonetheless be subject to the same laws as every other individual outside the sphere of their official duties." David Pimentel, "Balancing Judicial Independence and Accountability in A Transitional State," *Pacific Basin Law Journal* 33, no. 2 (2016):155-157.

[16] Lorne Neudorf argues *when the judiciary is either consumed or subject to influence or intimidation by corrupt officials, groups, or individuals, the citizens will not trust it, and they will lack confidence that the resort to the judicial process will become a just resolution of their contractions.* Lorne Neudorf, *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan* (Canada: Springer, 2012), 229.

[17] David Pimentel argues that "*Public confidence in the courts is inspired not so much by independence as by accountability: if the public perceives the court to make principled decisions based on the law, and without corrupt motive or influence, they will trust the judiciary and abide by its decisions. A judge may be deemed "accountable," by just about any definition, if he adheres to the normative ethical and legal principles of her culture and society."* David Pimentel, "Balancing Judicial Independence," 159.

[18] David Pimentel, "Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges› Courage and Integrity," *Cleveland State Law Review* 51, no 1 (2015): 13-14.

[19] David Pimentel, "Reframing the Independence".

> in objectively "right" answers appreciate that the process by which these answers are generated hinges on arguments and judgments of a kind about reasonable people can (and will) subjectively disagree.[20]

David Pamintel concluded that the meaning of "*the right thing*" was that the judge did not exceed the *"cross the line"* limits, so that the meaning of accountability in the first corridor was how to position the judge as a dignified and dignified position for his actions over not exceeding the limit (law).[21] As for the *second*, David Pamintel stated

> The second issue for consensus - and a far easier one to assert - is that the judge is striving to do "a" (if not "the") right thing should do it for the right reason. Biases, outside pressures, contests of interest, and other self-dealing or self-interested behaviors are all anathema to the proper and ethical exercise of judicial powers. Here the focus is not on the decision itself being wrong-indeed, the judge's brother-in law may well have deserved to win the case under the law anyway-but with the judges' improper reasons for rendering that decision. These expectations we have of the judges are tied up in the concept of accountability.[22]

For this matter, David Pamintel gave a classification regarding the accountability of the judiciary into two parts among other "(1) *personal accountability* and (2) *institutional accountability*. Personal accountability is interpreted as *the subjective or personal accountability of the judge that comes from within; one's internal moral compass is not a function of one's vulnerability to discipline or other retribution for misdeeds*."[23] Accountability that is born from within a judge is due to the integrity that is already inherent and "maintained" to remain inherent in him.[24] Such expectations are considered to be maintained if supported by the supervision and enforcement of ethical norms to maintain the nobility of the judge's position. Therefore, the involvement of the institution in charge of this is a relevant choice for realizing personal accountability. Whereas concerning institutional accountability, it refers to David Pamintel's opinion that

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[20] John A. Ferejohn & Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77, no. 2 (2002): 962-963.

[21] *David Pimentel, "Reframing the Independence."*

[22] *Ibid.*

[23] *Ibid.*, 20.

[24] *Ibid.*

> Judges cannot be allowed to run amok and must be held accountable for their own lapses of ethics or other abuses of judicial authority. A disciplinary regime must be in place to police judicial misconduct, and those enforcement mechanisms will be observable, both on paper and-unless it is an entirely confidential process-in operation. When the public is outraged by "Judicial activists" they will call for "more accountability" in terms of enhanced power to rein in the perceived miscreant judges.[25]

Placing institutional accountability hopes that the judicial institution will become the "right thing" because its actions are institutionally correct. For Zainal Arifin Mochtar, the holding of accountable power will further increase public confidence. Accountability of the judiciary is very dependent on the accountability of judges. Decisions produced by judges must be legally justified. The judge only decides based on the evidence at the trial with the consideration to uphold the law and bring justice.

## III. DEFINING INDEPENDENCE

After being appointed as Chief Justice of the Supreme Court in 1996, Sarwata said that the first thing he intends to do was to conduct internal consolidation.[26] Sarwata keeping his promises together with his successors to maintains consolidate even though invisible.[27] Judicial reform itself declared since the amendment to the 1945 Constitution and when Bagir Manan appointed as Chief Justice in 2001.[28] By broad support, especially from newly appointed non-career judges,[29] reformist judges and officials, civil society groups and donor agencies, slowly but surely the first judicial reform agenda has proceeded as it should.

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25 *Ibid.*, 21.

26 Rifqi S. Assegaf, "Judicial Reform in Indonesia 1998-2006," in *Reforming Laws and Institutions in Indonesia: An Assessment*, ed. Naoyuki Sakumoto and Hikmahanto Juwana (Tokyo: Institute of Developing Economies Japan External Trade Organization, 2007), 11-12.

27 Rifqi S. Assegaf said "up until the end of his leadership in 2000, the Supreme Court - and the Indonesian courts in general - were never more solid in maintaining the status quo. The appointment of Ketut Suraputra as acting Chief Justice in 2000, and who was followed by Taufik, brought about almost no discernible changes." Rifqi S. Assegaf, "Judicial Reform," 13.

28 Sebastiaan Pompe, *Judicial Reforms in Indonesia: Transparency, Accountability and Fighting Corruption,* presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005. 4-5.

29 Anna Erlyana said "There were 9 noncareer justices appointed in 2000, which constitutes almost 20 % of the total justices in the Supreme Court." Anna Erlyana, "Administrative Court and Legal Reform Since 1998 In Indonesia," in *Reforming Laws and Institutions in Indonesia: An Assessment*, ed. Naoyuki Sakumoto and Hikmahanto Juwana (Tokyo: Institute of Developing Economies Japan External Trade Organization, 2007), 83-84.

The first stage of judicial reform agenda to defining constitutional guarantee of judicial independence is a one-roof system policy. The adoption of a one-stop system has a historical connection with the Association of Indonesia's Judges (*Ikatan Hakim Indonesia* or IKAHI) memorandum on "Improvement of Judiciary Position Accordance to the 1945 Constitution" which explained in IKAHI's National Conference at Ujung Pandang in October 23rd, 1996. In 1997, Ali Budiarto Secretary-General IKAHI, proposed that the Judiciary Act on 1970 to be reviewed. The proposal was submitted because some articles in Judiciary Act on 1970 were replicas of Judiciary Act on 1964, which provide legality for executive (president or government) intervention on behalf of revolution.[30] After fall of the New Order, this effort finally materialized in Judiciary Act on 1999 which amended Judiciary Act on 1970 by provided Art 11 which turn judicial administration from two roof systems into one roof system.[31] Beside, Judiciary Act on 1999 also regulating the transfer of organizational, administrative and financial affairs of judges from the Ministry of Justice into the Supreme Court, and also regulates General Court's jurisdiction to deal cases involving members of the Army, unless otherwise determined by the Supreme Court. However, at that day, one roof system has not been implemented properly, because the organizational, administrative and financial affairs of Religious Courts and Military Courts Judges are still under the Ministry of Religion and the Ministry of Defense. The transfer of this one roof system completed in 2004 through Judiciary Act 2004 which eliminates Judiciary Act on 1970 and Judiciary Act on 1999.

After one roof system stage, the next stage is the establishment of special courts. For Rikardo Simarmata, there are two main factors underlie formation special courts.[32] *First*, the need to create a debt settlement mechanism and business certainty for investors to implement the Letter of Intent (LoI) agreement

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[30] *Ibid.*, 38.

[31] Art 11 Judiciary Act of 1999.

[32] Rikardo Simarmata, "Politik Hukum Peradilan di Indonesia Masa Orde Baru dan Reformasi [Court Legal Policy on New Order and Reformation Era in Indonesia]" in *Putih Hitam Pengadilan Khusus* [Black and White of Special Court], Judicial Commission (Jakarta: Secretariat General of the Judicial Commission, 2013), 145-146.

between the government and the International Monetary Fund (IMF). The LoI requires structural adjustments including in the judicial sector. According to Tim Lindsey, the commercial court is one of the courts made by this framework.[33] Besides establishing a commercial court, the LoI requires another adjustment through minimizing the role of the state (neo-liberal), which results in establishing a labor court as a substitute for the Tripartite. Previously, the settlement of disputes between employers and workers was handled by third parties as the government side, meanwhile, in the labor court, employers and workers were confronted directly without the presence of a government.[34] The second factor is the need to overcome the gap between the judicial reform agenda and external demands (public pressure and markets).[35] As mentioned earlier, the judicial reform process has slow movement until 2004. This condition is connected with the failure of legislation reform which did not necessarily exclude corrupt behavior or increases the professionalism of judges. This situation increase mistrust to the judiciary and forming special courts as a way out. [36] Bagir Manan has a view that the presence of a special court was to guarantee the quality and accuracy of court decisions.[37] For Adriaan Bedner, the special court was intended to improve the performance of judicial services which had

[33] Tim Lindsey, *Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia, in Asian-Pacific Economic Literature* (Sydney: Asia Pacific School of Economics and Government, The Australian National University dan Blackwell Publishing Asia Pty Ltd, 2005), 2.

[34] Herlambang Perdana Wiratraman, "*Good Governance and Legal Reform in Indonesia*" (Thesis, Faculty of Graduate Studies Mahidol University, 2007), 4.

[35] Rikardo Simarmata, "*Politik Hukum Peradilan di Indonesia* [Court Legal Policy on New Order and Reformation Era in Indonesia]," 147.

[36] The formation of a new government /state institution in response to existing distrust of government/state institutions is a symptomatic act. This action resulted in the formation of dozens of independent state agencies in the form of state auxiliary organs and executive branch agencies. The independent state institution has collaborative powers of executive, legislative and judicial. Zainal Arifin Mochtar, "*Penataan Lembaga Negara Independen di Indonesia* [Reorganizing State Auxiliary Organ in Indonesia]" (Dissertation, Faculty at Law University of Gadjah Mada, 2012), 149.

[37] Bagir Manan said there is a growing opinion supporting the formation of special courts to guarantee accuracy and quality of court verdicts. To avoid misunderstandings, many people refer to these as chambers, which means that they still remain under the courts as laid out in current regulations. Forming special courts (Courts/chambers outside the four current divisions), would not be an easy task as it would have to be based on a regulation which would involve the government and legislative assembly, and would also affect the state budget. Lastly it would require specialization of the judges in specific areas of law, all this would entail a lot of time and effort to bring forth. Bagir Manan, *Independence of the Judiciary: Indonesian Experience* (Speech on Celebrating the 50th Anniversary of Supreme Court of Pakistan), 3.

a deteriorating image.[38] Therefore, it can be concluded that the establishment special courts is a reflection institutional independence of judiciary.

After the reformation, the idea to establish a special court was developed, especially for fulfilling demands of judicial reform. At the end of New Order, a special court was formed, namely the Juvenile Court based on Child Protection Act on 1997. Besides, the decentralization of government and diversification of function of the and liberalization and democratization is in all areas of life, therefore, a special court are increasingly being established by the Government. Commercial Court is established in 1998, by Emergency Act on 1998 which was later passed into Commercial Court Act on 1998. Subsequently, in 2000 and 2002, followed by the establishment of the Human Rights Court,[39] and the Corruption Court.[40] In addition, Labor Court[41] and Fisheries Court.[42] In the end, until mid-2005, more than 12 types of special courts had been established, among other: (1) Juvenile Court[43] (criminal law); (2) Commercial Court[44] (civil law); (3) Human Rights Court[45] (criminal law); (4) Corruption Court[46] (field of criminal law); (5) Labor Court[47] (civil law); (6) Fisheries Court[48] (criminal law); (7) Tax Court[49] (Administrative Law); (8) Shipping Court (field of civil law); (9) Sharia Court[50] in Aceh (Islamic law); (10) Customary Courts in Papua[51] (execution of decisions related to District court); (11) the Traffic Court[52] (criminal law) and recently,

[38] Adriaan Bedner said the strategy to establish special courts to improve judicial performance has been central to Indonesian policies pertaining to the administration of justice. In combination with attempts to reinforce dispute settlement outside the court system - for instance by regulating and promoting mediation, and by establishing Human Right's Commission and Ombudsman - this should ultimately lead to a complete restructuring of the judiciary. Adriaan Bedner, "Rebuilding the Judiciary in Indonesia: The Special Courts Strategy," *Yuridika* 23, no. 3 (September-December 2008), 230.
[39] Human Rights Court Act of 2000.
[40] Corruption Eradication Commission Act of 2002.
[41] Labor Court Act of 2004.
[42] Fisheries Act of 2004.
[43] Juvenile Court Act of 1997 *juncto* Juvenile Court System Act of 2011.
[44] Bankruptcy Act of 2004.
[45] The Human Rights Court Act of 2000.
[46] Corruption Eradication Commission of 2002.
[47] Labor Court Act of 2004.
[48] Fisheries Act of 2004.
[49] Tax Court Act of 2002.
[50] Presidential Decree Number 11 of 2003 concerning Syariah Court and Syariah Court for Province of Aceh.
[51] Papua Special Autonomy Act of 2001.
[52] Indonesian Republic Police Act of 2002.

(12) regional head election court[53] (constitutional and administrative law). In fact, according to Jimly Asshiddiqie, there were always new ideas to form other special courts which are generally intended to make law enforcement more effective in certain fields, such as forestry court, and so on.[54] Not only special court which explicitly and officially referred to as a court, Jimly Asshiddiqie also notes that many growing and developing institutions which, although not explicitly referred to as courts, have the authority and work mechanism like 'a court'.[55] The institutions which are 'judicial' but not referred to as courts, or known theoretically as quasi-court or semi-court.[56] Some of them are in the form of state commissions, but some others use the term body or even authority. These institutions, besides being judicial, but often mixed functions with regulatory functions and/or administrative functions.[57] Some examples include: (1) Anti-Monopoly Supervisory Commission (*Komisi Pengawasan Persaingan Usaha* or KPPU);[58] (2) Broadcasting Commission (*Komisi Penyiaran Indonesia* or KPI);[59] (3) Central Information Commission (*Komisi Informasi Pusat* or KIP) and Regional Information Commission (*Komisi Informasi Daerah* or KID);[60] (4) Election Supervisory Agency (*Badan Pengawas Pemilu* or Bawaslu);[61] (5) Ombudsman (*Ombudsman Republik Indonesia* or ORI); [62] (6) Financial Service Authority (*Otoritas Jasa Keuangan* or OJK).[63]

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53 Regional Head Election Act of 2016.

54 According to Jimly Asshiddiqie, sometimes the initiatives come from members of House of Representatives/DPR, but sometimes also come from the Government itself which often not based on the results of integrated studies, mostly because of weak coordination between government agencies themselves. That is why, special courts continue to grow and increase in number after reform. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]" in *Putih Hitam Pengadilan Khusus* [Black and White of Special Courts], ed. Judicial Commission (Jakarta: Information Center of Secretary General Judicial Commission, 2013), 5-6.

55 Based on law, such institutions have authority to examine and decide or dispute on legal violation cases, and even certain ethical violations cases with final and binding decisions. The meaning is to provide justice for the parties who have been harmed. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]," 11.

56 *Ibid.*

57 Regulatory functions can be linked to legislative functions according to *trias politica* doctrine, while administrative functions are identical to executive functions. Therefore, state commissions or institutions that have the authority it can be said an institution that has a mixed function. Jimly Asshiddiqie, "Pengadilan Khusus [Special Court]," 13.

58 This institution was formed based on Anti-Monopoly Act of 1999.

59 Broadcasting Act of 2002.

60 Public Information Disclosure Act of 2008.

61 Election Organizer Act of 2011.

62 Originally this institution was named the National Ombudsman Commission formed based on Presidential Decree Number 44 of 2000. In 2008, the position of this institution was increased and its name was changed to the Ombudsman of Republic of Indonesia (ORI) based on Ombudsman Act of 2008.

63 Financial Services Authority Act of 2011.

In the third stage, the judicial reform agenda were institutionalizing the judicial review into the judiciary. The establishment of the Constitutional Court is a purpose to realize constitutional review.[64] On the other hand, the supreme court has authority to legality review. In case of exercise Constitutional Court authority on constitutional review during the transition period, the Supreme Court has issued Supreme Court Regulation Number 2 on 2002 concerning Procedures for Organizing Constitutional Court and the Supreme Court Authority. After then, Supreme Court Regulation No 1 of 2011 which states that to submit application for judicial review is carried out by (1) directly to the Supreme Court and (2) through the District Court in charge of applicant's domicile.[65] Based on this provision, character judicial review at the Supreme Court concerns public law issues so judicial review was handled by the chamber of Administration case. This is similar to the administrative court process in other countries which have authority to review general binding rules including general policy regulations as long as they cause legal consequences, but do not include in judicial review. [66] After the Amendment of the 1945 Constitution and provide Constitutional Court Act on 2003, the Constitutional Court began to operationalize the authority of constitutional review.

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[64] Jimly Asshiddiqie stated that constitutional review and judicial review must be distinguished. The distinction is made at least for two reasons. *First*, constitutional reviews other than those carried out by judges but also carried out by institutions other than judges or courts, depending on which institution the Constitution provides the authority to do so. *Second*, the origins concept of judicial review has broader understanding of the object, for example legality review under the regulation against legislation, while the constitutional review only concerns reviewing its constitutionality. Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara* [Comparative Constitutional Review Models] (Jakarta: Konpress, 2006), 2-3.

[65] Art 31A Supreme Court Act of 2009 *Juncto* Art 20 (2) letter c and paragraph (3) Judiciary Act of 2009 compare with Art 2 (3) Supreme Court Regulation of 1993.

[66] Paulus Effendie Lotulung, who once stated administration court have resolved jurisdiction to administration at first instances, high administration courts for the second instance and the supreme court for cassation and judicial reviews. Paulus Efendi Lotulung. *State Administration Courts in Indonesia's Judiciary System* (10th Congress International Association of Supreme Administrative Jurisdictions, Sydney, Australia, Sunday 7-Thursday 11 March, 2010), 1. Imam Soebechi, the Supreme Court Judge once said that the Supreme Court's authority to review regional regulation would be handed down to the administrative court. However, the idea of the Supreme Court has consequences for the review of the concepts of *regeling* and *beschikking*, because so far administrative court has only resolved disputes in the clusters of administrative decisions (*beschikking*), not regulatory disputes (*regeling*). Besides these two ideas, the plan to amend the Constitutional Court Act was also tried to be groped so that the Constitutional Court would not only review the constitutionality of the legislation, but also be able to review all level laws and regulations, including the Regional Regulation. Enrico Simanjuntak, "Kewenangan Hak Uji Materiil pada Mahkamah Agung [Supreme Court Authority for Judicial Review]," *Jurnal Hukum & Peradilan* 15, no. 3 (2015), 346.

In the fourth stage, judicial reform has focused on minimizing political intervention on the appointment and dismissal process of judges. Art 24A (2) of the 1945 Constitution has determined Supreme Court Judges must have integrity and have good and fair personality, professionality and experienced at law. Meanwhile, Art 24C (5) of the 1945 Constitution has determined Constitutional Court Judges must have integrity and has good and fair personality, statesmen who are experts at the constitutions, and not concurrently state officials. It is not known exactly why the conditions are made differently, even though still there are similarities between them. Chief Justice is required to be experienced at law, while Constitutional Justices must be expert at the constitution. In addition to the terms and conditions to be Chief Justice, constitutional justices and judges under the Supreme Court, after the amendment to the 1945 Constitution, *ad hoc* judges were introduced. Even though among the six special courts act that regulate *ad hoc* judges, none of them provides a clear enough understanding of what is meant by the *ad hoc* judge. General norms concerning all conditions of Supreme Court Judges which stipulated at The 1945 Constitution are further elaborated in Supreme Court Act on 1985 as amended by Supreme Court Act on 2004 and Supreme Court Act on 2009. On the other hand, terms and condition of the Constitutional Court Judges are stipulated in Constitutional Court Act on 2003 as amended by Constitutional Court Act on 2011 *jo* Constitutional Court Act on 2014. However, in 2014, Constitutional Court Act on 2014 was revoked by the Constitutional Court through Decision Number 1-2/PUU-XII/2014. Regarding terms and conditions of the Supreme Court Judges, Supreme Court on 1985 distinguishes divide the path by separated between career judges and non-career judges. Non-career candidates must have at least 15 years of experienced at law. [67] Later on, experienced condition refined and increased through Supreme Court Act on 2004. [68] Some changes occur through Supreme Court Act on 2009 which reduced experience conditions and add another condition.[69] According Supreme Court Act on 2004 where previously for non-

[67] Art 7 (2) Supreme Court Act of 2004.
[68] Art 7 Supreme Court Act 2004.
[69] Art 7 (3) Supreme Court Act 2009.

career paths must have experienced at least 25 years, now revised to 20 years. Meanwhile, career candidates must have experienced 20 years and have ever at least 3 years have been high judges.[70] Another education level condition for non-career candidates must have a master and doctoral degrees, while career candidates are masters, and both of these pathways require a Bachelor at Law degree. It cannot be known with certainty why the conditions for having a master's degree are applied to candidates from career paths. Therefore, the requirement for Supreme Court Judges can be categorized as follows:

**Table 1. Categorization of Requirements for Supreme Court Judges**

| Description | Career Candidates | Non-Career Candidates |
|---|---|---|
| Nationality | Indonesian Citizen | |
| Religious | Faith in God | |
| Age | Minimum 45 years Maximum 60 years | |
| Level Education | Masters of law with a Bachelor of law degree or other Bachelor degree which related with law | Doctor of Law or Masters of law with a Bachelor of law degree or other Bachelor degree which related with law |
| Experienced | At least 20 years become a judge, including at least 3 years as a high court judge | Experience in the legal profession and/or legal academics for at least 20 years |
| Physical and Psychological | Able to be physical and psychological to carry out duties | |
| Behavior | Never been imposed temporary termination due to violations code of conduct and/or judges guidelines | Never been sentenced to imprisonment based on a court of law for committing a crime that is threatened with 5 years or more imprisonment |
| Specific Terms | Must have integrity and has good and fair personality, professionalism and experienced at law. | |

[70] Art 7 (3) Supreme Court Act 2009.

On the matter selection of judge mechanism, before the Amendment the 1945 Constitution, there were no clear rules. The law only stipulates that candidates for supreme court judges are proposed by the DPR to the President. Then, the President as head of state appoints by political decision. DPR also has to consult with Supreme Court and the government through the Ministry of Justice.[71] However, after the reformation era, the process of selecting Supreme Court Justice has a different route. DPR took over the role of the government and the Supreme Court at the election process. Since 2000 the selection mechanism for supreme justices has been carried out through a mechanism called fit and proper tests.[72] This model is a new step on finding Supreme Court Justice who is clean and has high moral integrity. The fit and proper test mechanism began with nominations from the Supreme Court and the government. Besides, DPR opens up the possibility of nominating non-career judges which can be submitted either by the government or other parties such as NGOs, Indonesian Judges Association (*Ikatan Hakim Indonesia*) and Indonesian Advocates Association (*Perhimpunan Advokat Indonesia*).[73] From 17 judges which selected in 2009, among them were non-career judges from legal academics and legal practitioners, while the other 8 judges were career judges. The involvement of academics and legal practitioners outside career judges is intended to improve court performance.[74] This process upholds the principle of transparency, which is enough to provide opportunities for a broader community to participate and increase objectivity in the selection process.[75] However, this

[71] Art 8 Supreme Court Act of 1985.

[72] Initially, the fit and proper test were carried out by Central Bank of Indonesia against officials who lead a Bank through the Controlling Shareholders, Managers (Commissioners and Directors), to Executive Officers. The fit and proper test in banks is regulated in Minister of Finance Decree No. 52/KMK.017/1999 and Governor Central bank of Indonesia Decree No 31/12/Kep/GBI, dated February 8th, 1999. According to this joint decree, it was determined that every election of directors or leaders in the banking environment must go through a fit and proper test. Zaenal Arifin, *Fit and Proper Test dalam Proses Pemilihan Pejabat Negara* [Fit and Proper Stest Mechanism in State's Official Selection] (Jakarta: Final Report Legal Research Team, 2005), 14-15.

[73] Three things that can be used in the fit and proper test. *First* is moral integrity. *Second*, vision and mission, and *third*, legal understanding. These three things were assessed in the fit and proper test process. This model is expected to minimize the opportunity for bad track record judges. Zainal Arifin Mochtar and Iwan Satriawan, "Efektivitas Sistem Penyeleksian Pejabat Komisi Negara di Indonesia [Efectivity on State's Commisioner Selection in Indonesia]," *Jurnal Konstitusi* 6, no. 3 (September 2009), 151-152.

[74] Konsorsium Reformasi Hukum Nasional (KRHN), *Mahkamah Agung di Masa Transisi* [Supreme Court in Transition Era] (Jakarta; KRHN, 2001), 25.

[75] The Academic Studies on Judicial Commission Bill of 2004, 19.

method also brought some weaknesses. First, transparency has not been fully implemented. There is still a dark room that is far from public monitoring. DPR's assessment has not been done accountably, there are still considerations beyond the objective results of the selection. The public does not know how DPR members provide an assessment of integrity, legal understanding, or vision and mission of candidates. There is a strong suspicion that some members of the DPR have made judgments based on personal or political interests, or even there was bribery in the process. [76] Second, the lack of public participation. The time given to the public to participate in observing and making complaints related to the candidate is still too short and insufficient. Third, the objective parameters used to assess candidates still unclear. Fourth, the qualifications of the selected candidates have not matched to the needs of the Supreme Court. *Fifth*, some DPR members acted or argued in an unethical manner during the fit and proper test process, which disrespect judge candidates.[77]

Finally, the selection process by the DPR puts political interests ahead.[78] Therefore, the establishment of the Judicial Commission which has the authority to propose the appointment of Supreme Judges and has other authorities to maintain and uphold the honor, dignity and behavior of judges implies that the Judicial Commission has taken over functions previously held by the Supreme Court, President and DPR. The Judicial Commission acts as a selection committee for judges who will be elected by the DPR. The Judicial Commission proposes three candidates for each vacancy in the Supreme Court.[79] According to Fajrul Falaakh, recruitment methods involving the role of the Judicial Commission, Parliament and the President called the multi-voter model because involves many parties on Supreme Court Judges selection process. [80]

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[76] Mahkamah Agung, *Cetak Biru Pembaharuan Mahkamah Agung Republik Indonesia* [Blue Print Reformation of Supreme Court] (Jakarta: Supreme Court of Republic Indonesia, 2003), 69.

[77] *Ibid*.

[78] One practice that becomes an indicator is the unfolding of the "toilet lobby" scandal which was revealed when the fit and proper test was carried out for the Legal Commission on House of Representatives in 2013. Saldi Isra, "Meluruskan Kuasa DPR [Redirecting the Power of House of Representative]," *Kompas*, October 13, 2013.

[79] Art 18 (5) Judicial Commission Act on 2004.

[80] Fajrul Falaakh, *Transparansi dan Akuntabilitas Yudikatif di Indonesia* [Transparency and Judicial Accountability in Indonesia] (Human Rights Training Materials for the Judicial Commission Network, Denpasar, June 22 – 26th, 2010 and Bandung, June 29th – July 3rd, 2010). Organized by PUSHAM UII in collaboration with the Judicial Commission and Norwegian Centre for Human Rights (NCHR), 19-20.

On the matter of constitutional judge, it has been stipulated in Art 24C of 1945 Constitution. Art 24C (3) of the 1945 Constitution states that the Constitutional Court has nine constitutional judges which selected by President for three judges, DPR for three judges, and Supreme court for the last three judges. Also, Art 24C (5) of the 1945 Constitution stipulates that constitutional Justices must have integrity and personality that is not impeccable, fair, statesmen, and not concurrently as state officials. The constitutional foundation is further regulated in Art 15 and Art 18 (1) of Constitutional Court Law on 2003. Art 19 and Art 20 (2) of the Constitutional Court Law on 2003 also states that the nomination and election of constitutional justices must be carried out transparently and participative, as well as objectively and accountably. In terms of appointment procedures of constitutional justices, Art 20 (1) of the Constitutional Court Law on 2003 stipulates that selection process, election, and submission of constitutional judges are regulated by each institution, namely the Supreme Court, DPR, and President.[81] The conditions changed Constitutional Court Law on 2011, especially on level education, experience, and age. The constitutional judge candidates must be a doctor and master's degree of law with at least 15 years of experience in legal professional and/or has been a state official. To become a constitutional judge is at least 47 years old or at most 65 years of age at the time of appointment. [82] Another revision for constitutional judge requirements re-occurs on Emergency Law on 2013. The requirements for the level of education from having a master and doctor of law degree changed to only a doctor of law degree. Another new requirement is the candidate must have been stopped become a member of a political party for 7 years as a minimum period before being submitted as a constitutional judge candidate. [83] Those new requirements considered contrary to the 1945 Constitution,[84] and therefore some people submitted a petition to review the law to the Constitutional Court.[85] In the end, the constitutional court stated

[81] Art 16 Constitutional Court Act of 2003.
[82] Art 15 Constitutional Court Act of 2011.
[83] Art 15 Government Regulation in Lieu of Law of 2013 concerning Constitutional Court.
[84] Constitutional Court Decisions Number 1-2/PUU-XII/2014, 13.
[85] Constitutional Court Decisions Number 81/PUU-IX/2011, 60.

that those regulations regarding having stopped being a member of a political party was not contrary to the 1945 Constitution.[86] According to the explanation, selection and appointment process contains the *split* and *quota* perspective. Deciphering the juridical concept of the selection and appointment process of constitutional judges is explained in the following table:

**Table 2. Juridical concepts of selection and appointment process of constitutional judges**

| The 1945 Constitution | Judiciary Act | Constitutional Court Act |
|---|---|---|
| Appointment of 9 constitutional judges determined by the President begins with a submission of 3 constitutional justices by the House of Representatives, the President and the Supreme Court. [Art 24C (3)] | Submission of each of the 3 constitutional judges by the Supreme Court, Parliament and President. [Art 34 (1)] | Determination of the president through a presidential decree to appoint 9 constitutional justices submitted by 3 constitutional justices by the House of Representatives, the President and the Supreme Court no later than 7 working days from the submission of candidates received by the President. (Art 18) |
| Constitutional judges must have integrity and personality, fair, statesmen, and not state officials [Art 24C (5)] | The requirement to be a constitutional judge is a statesman, integrity, personality and fair. (Art 33) | The requirement to be a constitutional judge is a statesman, integrity, personality and fair. (Art 15) |

86 *Ibid.*

| The 1945 Constitution | Judiciary Act | Constitutional Court Act |
|---|---|---|
| | | Terms of candidates for constitutional judges: Indonesian citizens, doctoral and masters with a bachelor's degree at law, Believe in God Almighty and have a noble character, minimum age of 47 years and a maximum of 65 years at the time of appointment, physically and spiritually capable in carrying out their duties, they have never been sentenced to imprisonment based on court decisions, are not declared bankrupt based on court decisions, have legal work experience of at least 15 years and/or have been state officials. Administrative requirements for candidates for constitutional justices: a statement to become a constitutional judge, curriculum vitae, copy of education certificate that has been legalized, a list of assets and a source of income accompanied by valid supporting documents and approved by the institution authorized person and taxpayer number (Art 15) |
| | | Prohibitions on the position of constitutional judges as other state officials, members of political parties, employers, advocates, civil servants. (Art 17) |

| The 1945 Constitution | Judiciary Act | Constitutional Court Act |
|---|---|---|
| Regarding the appointment of constitutional justices and the conditions stipulated in the law. [Art 24C (6) and Art 25] | The elements of constitutional judge submission consist of the nomination concept which is carried out transparently and participative, and the concept of election carried out in an objective and accountable manner. [Art 34 (2) and (3)] | The nomination of constitutional justices is carried out transparently and participative. (Art19) |
| | | The constitutional judge in his appointment both as a member and or chairperson/vice chairman pronounces oaths and promises according to his religion before the President. (Art 21) |
| | Further provisions regarding the terms and procedures for the appointment of constitutional judges are regulated in the law. (Art 35) | Provisions regarding the procedures for selection, selection and submission of constitutional judges are regulated by each authorized institution in the submission of constitutional justices and carried out objectively and accountably. |

The fifth stage is strengthening the status of judges. The status of judges as state officials were initially regulated in Art 1 (1) State Official which Clean and Free of Corruption, Collusion and Nepotism Act of 1999. Furthermore, the status of the judge becomes a state official already stipulated in Art 1 (4) on State Civil Apparatus of 2014. The status of state official is explained in Art 11 (1) letter d of the Act, that State Officials, one of which consists of, The Chairperson, Deputy Chairperson, Junior Chairperson and Chief Justice of the Supreme Court, as well

as the Chairperson, Deputy Chairperson and Judges of all Justice Bodies. The status of the judge as a state official is reaffirmed in Art 2 on State Official Law of 1999 states that one of the state administrators is judge.[87] This provision is specifically excluded from *ad hoc* judges. [88] By guaranteed judge status as state official based on the idea that judges are personnel who carry out the power of judiciary and not the executive. By civil servants as judge's status it's very possible to intervene on their independency because the structural, psychological, and character of the corps and bureaucracy carries and demands certainties. [89] The independence of judges in the rule of law (*rechtstaat*) is absolutely terms. This is in accordance with the International Commission of Juris principles on independence of judge.

There are several consequences arising from this description. *First*, on recruitment pattern, education, career, rank, the term of office, and fulfillment of the rights and facilities of judges as state officials. *Second*, state officials have a term of office, for example, five years and can be reelected for one period. However, this term cannot be applied to judges in Indonesia. This is due to the position of the judge not recognizing periodicity, but career and retirement. Besides, state officials also do not recognize rank system. However, like civil servants, judges have ranks or groups. The rank of the judge follows the rank of the civil servant. Similarly, the salary structure.[90] In terms of recruitment and education of judge candidates, there are consequences to becoming more complicated. Typically, state officials are selected through the selection process

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[87] The position of the judge as a state official is also stated in Art 19 Judiciary Act of 2009 which states that "Judges and Constitutional Judges are state officials who carry out judicial powers regulated in law." Then in its development the status of this judge is also re-affirmed as stated in Art 122 (e) State Civil Apparatus Act of 2014 which states that State Officials are "Chairperson, vice chairman, young chairman and Supreme Judge and chairman, vice chairman and judge of all judicial bodies except *ad hoc* judges". It should be noted in this latest development that the State Civil Apparatus Law issues ad hoc judges from the meaning of "judges" who are categorized as state officials. This of course can be a potential problem in the future, given the notion that the "judge" in the Judiciary Act of 2009 also covers *ad-hoc* judges. Taufiqurrohman Syahuri, *Hakim Pasca UU Aparatur Sipil Negara* [Judges After State Servant Officer Law] Minutes on Public Discussions Organized by *Lembaga Kajian dan Advokasi untuk Independensi Peradilan* (LeIP)with *Forum Diskusi Hakim Indonesia* (FDHI), 25 January 2014.

[88] Constitutional Court Decision No 32/PUU-XII/2014, 111-112.

[89] Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi* [Building Legal Policy, Enforcing Constitutionalism] (Jakarta: Radja Grafindo, 2010), 103.

[90] Whereas according to Art 3 (2) Government Regulation No. 94 of 2012 concerning Financial Rights and Facilities of Judges under the Supreme Court, provide amount of the basic salary of judges are the same as civil servants.

of other institutions, general elections, or appointments. So far, the pattern of recruitment of judges is almost similar to civil servants, although it has its procedures, namely through the candidate civil servant selection process and education for judge candidates. As a result, in 2010, the Chief Justice of the Supreme Court issued a Decree of the Chief of the Supreme Court Number 169/KMA/SK/X/2010 concerning Implementation of the Education Program and Integrated Training for Judge Candidates.

## IV. DEFINING ACCOUNTABILITY

In addition to defining judicial independence and how to incorporated many judicial reform policies, another direction of judicial reform means defining judicial accountability, especially in terms of open justice. Before the reformation era, almost all types of information that existed and managed by the courts were closed. In some cases, the court rejected the request of civil society to access court decisions. The court seemed afraid to show the decision they made. Also, other information which also difficult to access is the judge's track record, court service fees, court budget, and others. It has become a common behavior. This kind of closure can only be opened through "gift" or "insider assistance". You can imagine how access to clogged information contributes to unclean behavior in the judicial administration. in the past, the court was considered do not understand that open justice principles were not only seen from trials that were open to the public but also documents relating to the judicial process or access to justice. The meaning of open court is reduced by Judiciary Act in that era. The conclusion was in the past (new order) the court did not understand the principle of an open justice principle that was universally applicable.[91] Copies of court decisions and other information are not

[91] J. J. Spigelman said that "The principle of open justice is one of the most pervasive axioms of the administration of justice in common law systems. It was from such origins that it became enshrined in the United States Bill of Rights where the Sixth Amendment guarantees a criminal accused the right to a 'speedy and public trial'. More recently, it is incorporated in international human rights instruments such as Art 14 of the International Covenant on Civil and Political Rights ('ICCPR')14 and Art 6 of the European Convention for the Protection of Human Rights ('European Convention'), as adopted and implemented by the British Human Rights Act 1998 (UK). In both treaties, the right is expressed as an entitlement to 'a fair and public hearing by an independent and impartial tribunal established by law." J. J. Spigelman, "The Principle of Open Justice: A Comparative Perspective," *UNSW Law Journal* 29, no 2 (2006), 147.

easy things to obtain at that time. Various stories arise about the difficulty of obtaining a copy of the court's decision. Starting from academic groups such as students, civil society groups, and other community feels the bitterness of the situation. The court argued that a copy of the court decisions could only be given to litigants. Furthermore, the court argued that some decisions were confidential so that they could not be accessed by the public.[92] It is difficult to get a copy of the court decision intertwined with obscurity and even the absence of information about the mechanism of this matter. For those who want a copy of the decisions, they will be faced with a request for money from a court employee so that a copy of the decision can be given or to be given quickly.[93] In addition, the refusal to provide other public information makes the judiciary a bunker of the meaning of "secrecy".[94] The closure of the court has the potential to trigger a variety of other irregularities. For example, the interaction between lawyers and judges in the practice of bribery. For lawyers who have direct contact with judges, the issue can be made easier because lawyers can negotiate the decisions that will be handed down without paying attention to the prosecutor's demands.

Some cases prove that even if the prosecutor demands the maximum, the judge can release the defendant. Unlike the case with a lawyer who does not have direct contact with a judge, a third party is required to contact the judge. Usually, the role of third parties is more practical and safer for the clerks. The initiative came together between the judge and the lawyer, but it can also be

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[92] This mistreatment behavior of judicial officials is very obvious in ignoring the rights of court users, or the public in general, to access public documents or documents that are the rights of court users. Things that have become public knowledge are public documents in the form of court decisions, minutes of hearings, court records and other documents that should be accessible to court users that cannot be obtained free of charge. Judicial officials especially the court administration, often charge a fee to people who want to have court documents categorized as public documents, illegally. Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia, *Laporan Penelitian Keterbukaan Informasi Pengadilan (2014)* [Reports on Open Justice] (Jakarta: Mappi-FHUI, 2014], 31-32.

[93] Indonesia Corruption Watch (ICW) stated that the closure of the court began to occur from the simplest thing, namely information about the costs of registering cases in court, especially for civil cases. At that time, ICW Researchers had difficulty finding information about court fees at each District Court in Jakarta. Indonesian Corruption Watch, *Menyingkap Tabir Mafia Peradilan* [Investigate the Judicial Corruption] (Jakarta: Indonesia Corruption Watch, 2002), 117.

[94] Rifqi S. Assegaf and Josi Katarina, *Membuka Ketertutupan Pengadilan* [Opening Closed Judiciary] (Jakarta: Lembaga Kajian dan Advokasi untuk Independensi Peradilan, 2005), 23.

from the clerks himself. [95] Another example, the practice of judicial corruption concerns a copy of the court decision on a corruption case. Copies of court decisions on corruption cases that have permanent legal force (*inkracht*) are high economic value. The trick is to slow down (delay) submit the copy to the executor. For corruptors, the late copy not only slows down the execution but also opens the opportunity to escape. It is not impossible, some of the corruptors who escaped were helped by slowing down submitting the process of executor.

The picture of this closure certainly makes people wonder, why courts snatch away public information rights beside provide and protect it. By blocking public access to information is undeniably fertilizing the practice of closed policy-making processes, for example in terms of promotion and transfer of judges. [96] At that time (even to date) it is unknown whether the criteria or requirements of a judge get promotion and transfer. The promotion and mutations at that time were very vulnerable to subjectivity which led to nepotism.[97] Oversight decisions are a form of requesting responsibility to the judge and a means to control probability over the abuse. However, the obstruction of public access to court decisions led to a lack of supervision for the decision. Because of difficulty to access court decisions, it is not surprising the decision-based on the teaching process and legal discourse was difficult. [98] In the end, Liza Fahira concluded several reasons that caused difficulties in accessing information in court, among others: *First*, basically the culture of closure was still strong in the judiciary. In such cultures, even open-minded people tend to be afraid of opening information that should be open to the public; *Second*, there are intentions of

[95] The role of the clerk in a case is so extraordinarily important that it causes lawyers to do not necessarily work hard. For example, the clerk often made answers to the trial process for lawyers. By fully "understanding" the judge - in many cases, clerk of court often drafted the legal considerations - is very easy for the clerk to compile an answer that is acceptable to the judge's logic. In this position, for a lawyer, who "holding" the clerk can not only hold a judge but also hold all the judges who handle the case. Saldi Isra, "Keterbukaan Pengadilan dan Akses terhadap Keadilan [Open Justice and Access to Justice]" (Paper presented at the Seminar *Preparation of Legal Development: Background Study for 2010-2014*, organized by National Planning and Development Agency, Jakarta, December 17th, 2008), 9.

[96] Ridwan Mansyur, "Keterbukaan Informasi Di Peradilan Dalam Rangka Implementasi Integritas dan Kepastian Hukum [Court Disclosure Information to Implement Judicial Integrity and Legal Certainty]," *Jurnal Hukum dan Peradilan* 4, no 1 (March 2015), 89.

[97] Rifqi S Assegaf, *Pelatihan Keterbukaan Informasi Pengadilan* [Short Course on Judicial Transparancy] (Bandung: USAID-C4J, 2011), 66.

[98] Rifqi S. Assegaf and Josi Katarina, *Membuka Ketertutupan Pengadilan [Opening Closed Judiciary]*, 91.

certain officials in the court, including judges, to cover up information, both to avoid public attention to the mistakes or negative practices they have committed, to be able to extort information requesters or because of other motives; *Third,* there are weaknesses in legislation which led to open interpretation to certain information may not be open to the public.[99]

After Amendment of the 1945 Constitution, the judicial reform agenda desired another movement to defining judicial accountability not only focusing on judicial independence sector. In line with this, openness justice principles were realized by some judges, especially by the Chief of Supreme Court, Bagir Manan. The Chief Justice continuously emphasized openness in the court and called on judges and court officials to uphold openness.[100] The next step was taken through Blueprint Book of 2003 on Supreme Court Reform Agenda. In the Blueprint there was a recommendation that DPR, President, and the Supreme Court shall make a rule that grants easier access court information, including court decisions.[101] This was also recommended by Bagir Manan as Chief Justice of Supreme Court; Toton Suprapto and Marianna Sutadi as Junior Chief Justice; and Supreme Court Judge, Abdul Rahman Saleh.[102] One main indicator of success on the Blueprint is forming "rules grant people to have easier access on court decisions." [103] Even though Supreme Court Act of 2004 was passed about four months after the ratification of Constitutional Court Act of 2003, but Supreme Court Act of 2004 does not include the responsibility and accountability section in the clause. In Chapter III Part Two Art 12 until Art 14 Constitutional Court Act of 2003 is explicitly determined: *First*, the Constitutional Court is responsible

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[99] Liza Fahrihah, "Mendorong Keterbukaan Informasi di Pengadilan [Towards Judicial Transparency]" in *Bunga Rampai Kisah Masyarakat Sipil Melawan Korupsi* [Selective Story on Civil Society fighting against corruption], ed. Liza Fahrihah (Jakarta: LeIP, 2014), 35.

[100] Information systems aim to build the transparency of the justice system. Openness is not only meant as a form of public service, but also a creating control system for the judicial process. Public access to every court decision is important for judicial reform. Public access will encourage judges to be careful, qualified and impartial considering that each decision or determination will be a discourse or scientific observation. Bagir Manan, *Sistem Peradilan Berwibawa (Suatu Pencarian)* [Judicial Dignity] (Yogyakarta: FH UII Press, 2005), 11.

[101] Mahkamah Agung Republik Indonesia, *Cetak Biru Pembaruan Mahkamah Agung Republik Indonesi*a [Blue Print on Reformation of Supreme Court], 101.

[102] Liza Fahrihah, *Mendorong Keterbukaan Informasi di Pengadilan* [Towards Judicial Transparancy], 36.

[103] Mahkamah Agung Republik Indonesia, *Cetak Biru Pembaruan Mahkamah Agung Republik Indonesi*a [Blue Print on Reformation of Supreme Court], 102.

for regulating organization, personnel, administration, and finance in accordance with the principles of good and clean governance; *Second*, the Constitutional Court is obliged to publicly announce periodic reports concerning: (a) applications that are registered, inspected and decided; (b) financial management and other administrative tasks. The report is published in periodic news published by the Constitutional Court; and *Third*, people have access to obtain the Constitutional Court. However Supreme Court argues that even without inclusion certain norms in Supreme Court Act on 2003, it doesn't mean there is no effort to improve the performance. For example, the Supreme Court has set vision and mission, namely "Realizing the rule of law through judiciary that is independent, effective, efficient and obtains public trust, professionalism and provides legal services that are quality, ethical, affordable and low cost for the community and able to answer calls public service".[104]

As a form of follow-up, the Chief Justice formed an internal team for the Chief Justice Decree concerning implemented open justice principles, which then resulted in Chief Justice Supreme Court Decree Number 144/KMA/SK/VIII/2007 concerning Information Disclosure in the Court. In the drafting process, the toughest debate occurred was the issue of transparency in court decisions. The Supreme Court, especially the Chief Justice, saw that the court's decision was their livelihood and image, so there was resistance to the proposal which put court decisions have to be Published by the court.[105] Furthermore, there is a paradigm that the publication of court decisions is an additional criminal sanction which stipulated in Art 10 Criminal Code. Also, there is another issue related to Judges Intellectual Property Rights, if it has to be published. Some Supreme Court Judges considered the decision they produced had intellectual property rights so it should not be published. In the end, court decisions remain in the category of "information that the court must announce". The Decree stipulates that the decisions on District Courts and Appellate Courts that have not been

[104] Ridwan Mansyur, *Keterbukaan Informasi di Peradilan* [Openness Information in Court], 89.
[105] Dimas Prasidi, "Akses Publik terhadap Informasi di Pengadilan [Public Access to Information in Court]," *Jurnal Konstitusi* 7, no. 3 (June 2010), 179-180.

legally binding in certain cases are included in that category. Other issues that have been debated are the session agenda, personal information excluded from the verdict, and the method of providing information.

In the end, the Chief Justice of Supreme Court Decree has set new standard for managing information and public services. The Chief Justice of Supreme Court Decree also initiated a fundamental change in the development of the bureaucracy in the judiciary. Meanwhile, the public Information Disclosure Act of 2008 is claimed to be the key to opening the gate towards a significant change for upgrading the performance of public services and aims to facilitate public access and transparency, including bureaucracy in judiciary.[106] The Chief Justice Supreme Court Decree was a breakthrough and meaningful inheritance of the Chief Justice of the Supreme Court, Bagir Manan. This breakthrough is one of the recommendations on Blueprint Book of 2003 on Supreme Court Reform Agenda. The recommendation is that court decisions can be accessed by the public, for the benefit of learning and as a comparison of data for internal court circles. There are many general principles which accommodated on The Decree, among other: [107] First, *Maximum Access Limited Exemption – MALE,* which requires majority information managed by the court to be open and set an exception to cover up information which is only for the greater public interest, privacy, and the commercial interests of a person or legal entity: *Second*, no reason needed if someone requests public or court information. *Third*, Organizing access to information with cheap, fast, accurate and timely; *Forth*, Providing complete and correct information; *Fifth*, proactive to information which related to the court which is important to be known by the public; *Sixth*, provided administrative sanctions for parties that intentionally obstruct or hinder public access to information in court; and *seventh*, provided a simple objections and appeals mechanism for parties who feel their rights to obtain information in the court are not fulfilled.

[106] *Ibid.*, 180
[107] Art 2 Chief Justice of Supreme Court Decree No. 144/KMA/SK/VIII/2007 concerning Information Disclosure in the Court.

In 2011, The Supreme Court made some adjustments with reforming the decree by forming Chief Justice of Supreme Court Decree No 1-144/KMA/SK/I/2011 concerning the Guidelines of Information Service at the Court. Through the new Decree, coordination of implementation of public services for open justice more optimized. The Decree stated that information service has two procedures, among other (1) general procedures and (2) special procedures. The main difference is if the general procedure start with an application for information is submitted indirectly while the special procedure *vice versa*. The Principal Officers must be at the Supreme Court and the four Courts Chamber for implementation of this service, so the chart of a desk job as follows:

**Tabel 3. Information Service Management at Supreme Court and Below**

<table>
<tr><th rowspan="2">Manager</th><th colspan="2">First level court/Appellate Court</th><th rowspan="2">Supreme Court</th></tr>
<tr><th>General/ Administrative Court</th><th>Religious/ Military Court</th></tr>
<tr><td>Manager of Information & Documentation</td><td>Court Leaders</td><td>Court Leader</td><td>Case: Supreme Court Clerks<br>Non Case: Secretary of Supreme Court</td></tr>
<tr><td>Information and Documentation Management Officer</td><td>Clerks/ Secretary</td><td>Case: Clerks/ Head of Clerks<br>Non Case: Secretary/ Head of Deep Court Administration</td><td>Officer at Supreme Court: Head Bureau of Law & Public Relations, Administrative Affairs Agency<br>Work Unit: Every Director General/ Head of Body</td></tr>
</table>

| Manager | First level court/Appellate Court | | Supreme Court |
|---|---|---|---|
| | General/ Administrative Court | Religious/ Military Court | |
| Information Officer | Junior Clerks/ other employee appointed by the Chief of Court | Junior Clerks/ other employee appointed by the Chief of Court | Administration Body: Subdivision of Data & Services Information<br>Directorate General: Head of Subdivision of Documentation & Information<br>Research, Development and Education Agency: Head of Sub-Department of Administration |
| Information Person in Charge | Leadership unit at the echelon level IV | Leadership unit at the echelon level IV | Leadership unit at the echelon level IV |

After establishment Public Service Act of 2009, the Chief Justice Supreme Court issued another Decree Number 026/KMA/SK/II/2012 concerning Standard Judicial Services as the basis for each work unit in all judicial bodies in providing services to the public. Court Service Standards consist of case and non-court services. Court service standards also mandate establishment of service standards for smaller work units to be adjusted to their respective characteristics, for example, geographical conditions and case characteristics. In general, the Service Standards in the Court include: Court Administrative Services, Legal Aid Services, Complaint Services and Information Request Services. Therefore, the issuance of Public Service Act of 2009 and the Chief Justice of Supreme Court Decree No. 026/KMA/SK/II/2012 establishes regulations regarding efforts to implement open justice principles in another part of defining judicial accountability in Indonesia

## V. CONCLUSION

This article has examined the consequences of constitutional guaranteed on judicial independence in the third amendment, judicial reform agenda carried out with two types policy, among other (1) institutional guarantee of judicial independence and (2) personal guarantee independence of judicial independence. Relating to institutional guarantees are included in several policies, namely (i) one roof system and room system in the Supreme Court, (ii) Establishment of special courts, and (iii) institutionalization of judicial review on perpetrators of judicial power. While personal guarantees are poured on policies (i) reforming the filling and dismissal of judges and (ii) structuring the status of judges. Furthermore, judicial accountability is divided into two patterns, namely (1) institutional accountability and (2) personal accountability. The pouring institutional accountability is reflected in the regulation of information disclosure in the judiciary initiated by the judiciary's own power as well as legislation which indirectly encourages the personal accountability of judges for all their activities in the technical domain of the judiciary.

This article also shows that legal policy concerning judicial independence and justice accountability as goals of judicial reform after the reformation is focused on the institutional development rather than the personal (judges) independence and accountability of judges. Finally, this policy creates an unbalanced situation in achieving the objectives of judicial reform which also creating a gap between institutional development and enhancing the integrity capacity of judges. However, as a recommendation, that the legislators need to make comprehensive changes relating to the Law on Judicial Power such as the Judiciary Act, the Supreme Court Act, the Constitutional Court Act, and including the Judicial Commission Act. These changes are intended to organize the upstream and downstream sides of the judiciary system. The upstream side as intended is related to the filling and structuring of jurisdiction especially concerning special courts. Meanwhile, the downstream side is related to supervision and dismissal mechanism of judges

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# Shifting the Character of the Constitutional Court Decision Influenced by Political Constellation in Indonesia

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**Abstract**

Recently, the decisions of the Constitutional Court have become one of the focuses in the dynamics of Indonesian state administration. This research discusses the relevance of political constellation in Indonesia and its influence on the changing character of several constitutional court decisions from self-executing to non-self executing. This research aims to find out how the legal impact of shifting the character of the Constitutional Court's decision in its implementation. This research is a normative study supported by a law, case and conceptual approach. The data used are secondary data, obtained by means of a literature research which is then arranged systematically and analyzed with qualitative analysis. From the results of the analysis it is known that the shift in the character in several decisions of the Constitutional Court was carried out as an effort to offset the political constellation in the legislators. The character shift is done in the hope that it can guarantee the execution of the Constitutional Court's ruling and can be followed up on by the decision of the ruling. This shows that Constitutional Court judges are trying to find a legal breakthrough in the corridor of judicial activism to make an ideal constitutional review decision.

**Keywords:** Constitutional Court, Judicial Activism, Non-Self-Executing, Political Constellation.

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# I. INTRODUCTION

The written constitution is in principle, the most important legal and political remedy for the implementation of constitutionality. Therefore it is necessary for the functioning of each democratic political system that a constitution is implemented. The top principle of existence and functioning of the democratic society and a state governed by the rule of law is the supremacy of the Constitution, which is at the same time the principal concept of the constitutional review. In the constitutional review discourse, there is a firm conviction that law enforcement must be able to give meaning to the state system, especially to uphold basic human rights in the constitution.[1] The diversity and complexity of successful constitutional cultures, that it is possible to conceive of many different yet equally reasonable ways to address each area of constitutional concern.[2]

The constitutional court's power to supervise the development of ordinary law, however, will almost inevitably be limited.[3] The ideas and legal theories of Kelsen and his model of the court as a negative legislator have influenced the design of specialized constitutional courts in the Western world. Kelsen, in accordance with his positivist jurisprudence, believed in a strict hierarchy of law and that ordinary judges should only apply a law that is legislated by the parliament. Kelsen believed that the constitution ought to be the supreme law of the land and that no statute could violate it.[4] To effectively restrain the legislature and ensure the compatibility of law with the higher normative order of the constitution, Kelsen believed, a special, extrajudicial organ was necessary. The Kelsenian model establishes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review and act as the guarantor of the constitutional order. This body, typically called a constitutional court, operates as a negative legislator because it has the power to reject but

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1 Lawrence M. Friedman, *Hukum Amerika Sebuah Pengantar [American Law An Introduction]*, trans.Wishnu Basuki (Jakarta: PT. Tata Nusa, 2001), 252-253.

2 Ken I. Kersch, "The New Legal Transnationalism, the Globalized Judiciary and the Rule of Law," *Washington University Global Studies Law Review* 4, no.2 (2005): 367.

3 Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law", I.CON.International Journal of Constitutional Law 1, no. 1 (January 2003): 86.

4 Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation", *German Law Journal* 9, no. 10 (2008): 1299.

not propose legislation.[5] Some features of constitutional courts also press them in the direction of activism.[6]

In the construction of the Indonesian Constitution, the institutions tasked with guarding and ensuring the constitutionality of the law are the Constitutional Court of the Republic of Indonesia (hereinafter abbreviated as MK). Through its decision, it not only fulfills the role of guarantor of constitutional supremacy but also contributes to the understanding and application of fundamental principles in the law or rule of law.[7] The Constitutional Court can assess and decide the act that has been ratified by the President if it is true that the act passed by the President violates the normative provisions of the regulation above (in this case the 1945 Constitution). Therefore, the Constitutional Court can state that the Law is null and void in part or in the whole of the articles of the law submitted for "constitutional review". Reviewing of the Act by the Constitutional Court is an assessment of political products created between the president and the legislative council or regional council on the material of a law. So that the product of the law created and approved by the president really does not conflict with the 1945 Constitution or the interests of community rights. In constitutional cases,[8] whenever the text is vague, legislatures have a free choice in borderline cases and cannot be second-guessed by judges.

The Constitutional Court of the Republic of Indonesia is one of the state institutions that always attract the attention of many circles, not least related to the decisions produced regarding the reviewing of laws. Initially the decision to review the law is only in the form of an amber that grants an application, declares that the application cannot be accepted and rejects the application for part or all by stating a law, article, paragraph or phrase contradicts the 1945

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5 Tom Ginsburg, "Building Reputation in Constitutional Courts: Political and Judicial Audiences,"*Arizona Journal of International & Comparative Law 28,* no. 3 (2011): 540.

6 Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation:Toward Decentralization?" *International Journal of Constitutional Law* 2, no.3 (2004): 484.

7 Daniela Cristina Valea, "The Role of the Romanian Constitutional Court in Protecting and Promoting Human Fundamental Rights and Freedoms," accessed August 2, 2018, https://www.researchgate.net/publication/271880289_The_Role_of_the_Romanian_Constitutional_Court_in_Protecting_and_Promoting_Human_Fundamental_Rights_and_Freedoms.

8 Randy Barnett, "Interpretation and Construction," *Harvard Journal of Law and Public Policy*34, no. 12 2011: 69.

Constitution of the Republic of Indonesia and states that it has no binding legal force (legally null and void).[9] But today the Constitutional Court has also created a variant of the decision, namely a conditionally unconstitutional decision; a conditionally constitutional decision; decisions that delay the application of the decision (limited constitutional); and decisions that formulate new norms.[10] The Constitutional Court through the four variants of the decision is often considered to have changed its role from negative legislature[11] to positive legislature.[12] The Constitutional Court in this corridor made itself as the third room in the legislative process because it cannot be denied that the variant of the decision influenced the legislative process in the legislature. This is an external control tool that is owned by the Constitutional Court to carry out purification of the legal products produced by the legislative institution despite the polemic of the Constitutional Court as a positive legislature.

At the next level, the variant of the Constitutional Court's decision as mentioned above carries its own dynamics in the character of the Constitutional Court's decision. This can be seen from the decision which tends to need further regulation.[13] Another thing that also needs to be considered is that considering the norms in the law are a unified system, there is an implementation of decisions that must go through certain stages that depend on the substance of the relevant decision. In this case, there are decisions that can be directly implemented without having to make new regulations or changes and some need further regulation first.[14] When a decision will be effective immediately

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[9] As stipulated in Article 56 paragraph (3) and Article 57 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court.

[10] Syukri Asy'ari, et.al, *Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012) [Model and Implementation of Constitutional Court Decisions in Constitutional Review (Study of Decisions of 2003-2012)]* (Jakarta: Case Research and Assessment Center, Management of Information and Communication Technology of the Constitutional Court of the Republic of Indonesia, 2012), 2.

[11] Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961), 286.

[12] Allan R. Brewer-Carias, *Constitutional Court as Positive Legislators: A Comparative Law Study* (Cambridge: University Press, 2013), 8.

[13] Martitah stated that the Constitutional Court's decision had two characteristics, namely a verdict whose nature could be directly implemented and a verdict whose nature needed further regulation. See in Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* [Constitutional Court: From Negative Legislature to Positive Legislature?] (Jakarta: Konspress, 2013), 28.

[14] "Kekuatan Mengikat dan Pelaksanan Putusan MK [The Binding Strength and Implementation of the Constitutional Court's Decision]," Muchamad Ali Safa'at, accessed August 1, 2018, http://safaat.lectu.re.ub.ac.id/files/2014/03/Kekuatan-Mengikat-dan-Pelaksanaan-Putusan-MK.pdf.

without the need for further action in the form of the need to implement the amended law, this decision can be said to be self-executing,[15] in the sense that the decision is carried out by itself. This happens because the negated norm has certain characteristics that can be applied automatically without changes or with changes in laws that contain the norms reviewed and negated. In the end, the decision to review the law is not only directly executable but also those that cannot be directly executed (not self-executing). This is one of the dynamics that occur related to the shift in the character of the Constitutional Court's decision regarding the review of the law.

The example of the Constitutional Court's decision which can be said to be non self-executing is the Constitutional Court Decision Number 110-111-112-113/PUU-VII/2009 concerning the Determination of Seats Phase II in the 2009 Legislative Elections. The material review related to the ruling on Article 205 paragraph (4) and Article 212 paragraph (3) of Law Number 10 Year 2008 concerning General Elections for Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Representative Council. At the level of implementation, this decision still requires legal instruments that are operational. This is due to the fact that in the ruling, the Court issued a ruling with the effect of retroactive laws for the first time. So, the Constitutional Court's decision is very clear in its execution requires regulations to "turn on" the retroactive provisions made by the Constitutional Court.

The dynamics that occur as mentioned above, regarding the changes in the character of the Constitutional Court's decision are basically influenced by Indonesia's political conditions which influence the Constitutional Court Judges. The Constitutional Court Judge must try to find legal breakthroughs in the corridor of judicial activism to create an applicable Constitutional Court decision. Adressat's[16] decision which often ignores the Constitutional Court's decision and policy makers who seem not to comply with the Constitutional Court's decision

[15] Maruarar Siahaan, "Peran Makamah Konstitusi dalam Penegakan Hukum Konstitusi [The Role of Constitutional Court in Law Enforcement of the Constitution]," *Journal of Hukum* 16, no. 3 (July 2009): 364.

[16] Adressat can be interpreted as a party affected by these norms. Based on this understanding, the authors interpret the decision adressat is the party affected by the enforcement of the decision, especially the decision of the Constitutional Court.

makes the Constitutional Court's decision cannot be implemented so as to create a state that remains unconstitutional. Law is indeed a political and legal product that underlies policies. So it cannot be denied that politics influence the policies made. On this basis, the Constitutional Court Judges finally created a variant of the decision as explained so that inevitably policy makers must follow up. If the decision on the dispute over the results of the general election, the decision of the Constitutional Court will affect the political constellation in Indonesia differently from the decision of the judicial review. The decision in its implementation was strongly influenced by the political constellation. The law is a product of politics itself so that decisions related to this matter will also be influenced by the ongoing political constellation.

Based on the above background, the problem raised in this study is whether the political constellation in Indonesia affects the shift in the character of the Constitutional Court's decision from self-executing to non-self-executing and does it have a legal impact on the implementation of the Constitutional Court's decision?

## II. RESULT & DISCUSSION

### 2.1. Origin of the Concept of Self Executing to Non-Self Executing

The Constitutional Court has affirmed itself as a guardian of democracy which upholds the principles of substantive justice in every decision,[17] therefore the Court is judged as a judicial institution whose performance and authority are guided by the enforcement of the rule of law and constitutional supremacy. The Constitutional Court also functions as a derivation of its citizens, namely as the guardian of constitution, the interpreter of constitution, the protector of citizen constitutional rights and the protector of human rights.[18] The court

[17] Constitutional Court of the Republic of Indonesia, "Mengawal Demokrasi Menegakkan Keadilan Substantif [Guarding Democracy Upholding Substantive Justice]" (Jakarta: Annual Report of Constitutional Court, 2009), 8.

[18] Badan Pembangunan Hukum Nasional, "Efektivitas Peran Mahkamah Konstitusi Sebagai Penjaga Konstitusi (Perspektif Pembinaan Hukum dan Demokrasi) [The Effectiveness of the Role of the Constitutional Court as the Guardian of the Constitution (Perspective of Law and Democracy Development)]," *Paper* presented in Continuing Legal Education (CLE) at the Center for Research and Development of BPHN, (Ministry of Law and Human Rights, dated, May 3, 2013, Jakarta), 2.

accepts that the constitution protects, by implication, measures of freedom of political communication and resolves the main contours of the doctrine.[19]

The 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law affirm that the Constitutional Court is a court of first and final level whose decisions are final and binding. Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states, among other things, "The Constitutional Court has the authority to try at the first and final level whose decisions are final." Article 47 of the Constitutional Court Law states, "The Constitutional Court Decision obtains permanent legal force since its completion in the open plenary session for the public." As determined by determined by Article 47 that the decision is directly binding since it was pronounced at the plenary session open to the public.

The effect of the existence of the Constitutional Court's decision which has permanent legal power is that it is prospective looking forward and not backward looking.[20] This means that all legal actions that were previously considered legitimate or illegitimate did not turn out to be illegitimate or become valid only because the Constitutional Court's decision was binding since the pronunciation in the plenary session was open to the public. Legal actions carried out based on laws that have not been declared as having no binding legal force are legal actions that are legally valid, including the consequences of legal acts that are also legally valid. Though civil law countries usually have different specialized courts with well-defined jurisdictions (such as administrative, tax, or labor), these tend to be depoliticized and fairly deferential to the other branches of government. The constitutional courts, however, appear more political and qualitatively different from regular courts-hardly surprising since one goal of the Kelsenian theory was insulation of ordinary courts from politics.[21]

The final nature of the Constitutional Court's decision shows that the Constitutional Court's decision directly obtained legal force and the Constitutional

[19] Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law," *Indiana Journal of Global Legal Studies* 13, no.1 (Winter 2006): 43.
[20] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* [Procedural Law of Constitutional Review] (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2005), 318-319.
[21] Donald P. Kommers, "An Introduction to the Federal Court," *German Law Journal* 2, no.9 (2001): 30.

Court's decision had legal consequences for all parties relating to the decision. This is because the Constitutional Court's decision is different from the general court ruling which only binds parties (inter parties). All parties must comply with and implement the Constitutional Court's decision. In the Constitutional Court's decision related to the judicial review of the law for example, if the Constitutional Court decides an Act against the Constitution and declares it has no binding power, the decision is not only binding on the party who filed a case in the Constitutional Court but also binding for all citizens (*erga omnes*).[22] Besides that the Constitutional Court ruling also applies the principle of *res judicata pro veritatehabetur*, meaning that the judge's decision must be considered correct and must be carried out. So that there is no reason not to carry out the Constitutional Court's decision, even without any forced efforts by any party to carry out the Constitutional Court Decision (the principle of self-respect).[23] The Constitutional Court is also due to being the first and last court, so there is no other legal effort that can be taken. A decision if no legal remedy can be taken means that it has a permanent legal force (*in kracht van gewijsde*) and obtains a binding force (*resjudicata pro veritatehabetur*).[24]

The decision of the Constitutional Court since it was pronounced before a court that is open to the public can have three powers, namely:[25]

2.1.1. Binding Power

The power of binding on the Constitutional Court's ruling is different from that of an ordinary court, not only includes parties who are litigants, namely the applicant, government, House of Representatives (DPR)/ House of Regional Representatives (DPD), or related parties who are permitted to enter the proceedings, but the decision is also binding on all people, state institutions,

[22] Machmud Aziz, "Pengujian Peraturan Perundang-Undangan dalam Sistem Peraturan Perundang-Undangan Indonesia [Judicial Review in the Indonesian Legislation System]," *Journal of Konstitusi* 7, no. 5 (October 2010): 132.

[23] Widodo Ekatjahjana, "Mencermati Ratio Decendi MK dalam Putusan Nomor 122/PUU-VII/2009 tentang Penderogasian Norma Hukum dan Sifat Putusan PTUN [Observing Ratio Decendi in Decision Number 122/PUU-VII/2009 concerning the Derogation of Legal Norms and the Character of PTUN Decisions]," *Journal of Konstitusi* 7, no. 5 (October 2010): 8.

[24] Fajar Laksono Soeroso, "Aspek Keadilan dalam Sifat Final Putusan Mahkamah Konstitusi [The Justice Aspect in the Final Nature of the Constitutional Court's Decision]," *Journal of Konstitusi* 11, no. 1 (March 2014): 66.

[25] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia [The Procedural Law of the Constitutional Court of the Republic of Indonesia* (Jakarta: Sinar Grafika, 2012), 214.

and legal entity within the territory of the Republic of Indonesia.This applies as a law as created by law makers. Constitutional Court Judges are said to be negative legislators whose decisions are *erga omnes*, aimed at all people.

#### 2.1.2 Strength of Proof

Article 60 of the Constitutional Court Law stipulates that the material contained in the paragraph, article and/or part of the law that has been reviewed cannot be appealed for review. Thus, the decision of the Court that has reviewed a law is a proof that can be used that has obtained a definite power (*gezag van gevijsde*). It is said that the definite strength or *gezag van gevijsde* can be negative or positive. The definite strength of a decision is negatively interpreted as saying that the judge may no longer decide on a case for an application that was previously decided as referred to in Article 60 of the Law of the Constitutional Court. In civil law, this is interpreted, only if the same party is submitted with the same subject matter. In relation to the constitutional case whose verdict is *erga omnes*, the petition for reviewing the same material has been decided. The decision of the Constitutional Court which has the legal power to remain so can be used as a positive proof of force with certainty that what has been decided by the judge has been considered correct. The opposite proof is not permitted.

#### 2.1.3 Executorial Strength

As a legal act of a state official intended to end a dispute that will nullify or create a new law, then, of course, it is expected that the decision is not only dead words on paper. As a judge's decision, each person will then talk about how it will be implemented in reality. However, as mentioned above, it is different from the ordinary judge's decision, then a decision that has been binding on the parties in a civil case gives the party won the right to request that the verdict be executed if it concerns the punishment of the loser to do something or pay a sum of money. In such a case it is said that the decision that has permanent legal force has executive strength, namely that the decision is carried out and if necessary by force.

The problem arises when the power mentioned above is only oriented to the normative reality, whereas in reality the decision of constitutional review only ends without proper implementation. The execution of the ruling of the Constitutional Court has been deemed to have materialized with the announcement of the decision into the State Gazette as ordered by Article 57 paragraph (3) of the Law of the Constitutional Court. Of course, this is an ambiguous matter considering the function of the Constitutional Court as a guardian of the constitution, not only as a mere constitutional jewelry. Therefore it is not surprising that when in its development the Constitutional Court positioned itself as a positive legislature in several decisions of constitutional review. Even this reflects that the Constitutional Court judges tried to apply judicial activism in their decisions to take legal breakthrough steps to minimize politicization in the implementation of the Constitutional Court's decision.

The Constitutional Court Decision which states that an article does not have binding legal force must be contained in the State Gazette within a period of no later than 30 (thirty) working days after the decision is pronounced (Article 57 paragraph (3) of the Constitutional Court Law). The link between the revision and amendment to the law has absolutely nothing to do with the implementation of the Constitutional Court's decision. The amendment to the Act is carried out only to synchronize with the articles which have been declared as having no legal force binding by the Constitutional Court. The implementation of the null and void decision model that can be directly implemented (self-executing) is the initial design of the existence of a constitutional court whose decision eliminates a norm if it is contrary to the constitution. The existence of the Constitutional Court as a negative legislator, as introduced by Hans Kelsen is through a statement to abolish a legal situation (declaratory) by not requiring a special apparatus to carry out a declaratory decision. Decisions stating the material content of articles, paragraphs, or parts of the law, even the law as a whole is contrary to the constitution and does not have binding legal force can

be automatically removed from the relevant law and no longer valid. In general, the decisions of the Constitutional Court that are self-executing can be found in the decision model that legally revokes and states that they are not valid (null and void).[26] The Constitutional Court's decision in reviewing constitutional declaratory laws means that the Constitutional Court ruling eliminates a new legal situation or establishes a new law as a negative-legislator.[27] Declarative nature does not require one apparatus to carry out the decision of the Constitutional Court. The Constitutional Court, because of its authority in adjudicating at the first and last level whose decisions are final and binding to examine the law against the constitution, has the right to interpret the constitution (the final interpreter of the constitution).[28] Over time, not all of the Constitutional Court's decisions that granted the petitioners' petition could be directly implemented (self-executing) because in the implementation of the Constitutional Court's decision it still needed follow-up with the formation of new laws, amendments to the law or the formation of other legislation. This is a decision called non-self executing. This happens because the decision has influenced other norms and requires revisions or the formation of new laws or regulations that are more operational in its implementation, in other words, this decision cannot be immediately implemented (non-self executing) without legislation new or other legislative products because it creates a legal vacuum.

The statement above arises because the Constitutional Court's decision is now approaching the positive nature of the legislature. In this matter, Kelsen distinguished the legislative functions carried out by parliament and the courts. Parliament is a positive legislator because the parliament has the constitutional authority to make the law based on its own policy base, while the judiciary that has the authority to examine the law is negative

[26] Syukri Asyari, e*t. Al.*, "Model dan Implementasi": 694.

[27] A. Fickar Hadjar, et.al., *Pokok-Pokok Pikiran dan Rancangan Undang-Undang Mahkamah Konstitusi* [Principles and Thoughts and Draft Law of the Constitutional Court] *(*Jakarta: KRHN dan Kemitraan, 2003), 34.

[28] According to Jimly Asshiddiqie, the authority of the Constitutional Court can be related to the six functions of the Constitutional Court, one of which is as the Final Interpreter of Constitution. Jimly Asshiddiqie, *Konstitusi Ekonomi* [Economic Constitution] (Jakarta: Kompas Press, 2010), 50.

legislator because the judiciary carries out legislative functions in order to annul the law, an action that Kelsen considered as making a law negatively.[29] Nevertheless, Kelsen has warned from the beginning that the differentiation of parliamentary legislative functions from the judiciary as a positive legislator and negative legislator will fade when the judiciary enters the territory to protect the constitutional rights of citizens. The judiciary when examining cases in order to protect constitutional rights will explore and seek a measure of the scope of constitutional rights. In this context, the court will become omnipotent super legislators.[30]

Kelsen's prediction above finally came true. The Constitutional Court in its practice in various countries tasked with protecting the constitutional rights of citizens changed to positive legislators. Christian Behrendt has conducted a research with a comparative approach that is concerned with the development of the model of decisions by the Constitutional Court in Belgium, France, and Germany where the judicial decisions contain an order to the parliament to draft legislation in accordance with the decision. In his final conclusion, Behrendt stated emphatically that there was no other choice but to ignore the negative theory of the legislator. This conclusion directs that the role of the court which has been so large in the legislative process emphasizes the position of the court which is also a positive legislator.[31] The deviation from the restriction of the style of the decision by the Constitutional Court by giving rise to several variants of the decision on the consideration of realizing substantive justice was apparently regarded as a form of arrogance by the House of Representatives (DPR). This can be seen when Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court in Article 57 paragraph (2a) implicitly stipulates that the Constitutional Court is 'prohibited' to create a variant of a decision

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[29] Hans Kelsen, *Teori Umum Hukum dan Negara* [General Theory of Law and State] (Jakarta: Bee Media, 2007), 327-328.

[30] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5, no. 1 (January 2007): 62-69.

[31] Christian Behrendt, "Le JugeConstitutionnel, Un Législateur – Cadre Positif (The Constitutional Judge: A Positive Law Maker-Framework)" (Ph.D dissertation, University of Paris, 2005), 14-16.

that is not in accordance with the corridor of restriction as that has been set. The provisions are as follows:

Article 57

> The verdict of the Constitutional Court whose verdict stated that the content of paragraph, article and/or section of the law contradicted the 1945 Constitution of the Republic of Indonesia, the material contained in the paragraph, article and/or section of the law had no power binding law.

The decision of the Constitutional Court which has its decision stated that the establishment of the said law does not fulfill the provisions for the establishment of laws based on the 1945 Constitution of the Republic of Indonesia, the law does not have binding legal force.

(2a) The decision of the Constitutional Court does not contain:

> Amber other than as referred to in paragraph (1) and paragraph (2); order to the legislator; and the formulation of norms as a substitute for the norms of the law which are stated to be contrary to the 1945 Constitution of the Republic of Indonesia.

DPR felt that the decision variant that was often raised by the Constitutional Court castrated the legislative position as a positive legislator, so DPR then revised the Constitutional Court Law and regulated the provisions as above. But the ambition of forming this law was then broken by the Constitutional Court through its decision stating that the provision was contrary to the 1945 Constitution of the Republic of Indonesia through the Constitutional Court's decision. This is found in the Constitutional Court Decision Number 48/PUU-IX/2011 concerning review of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court. In consideration of the court point [3.13] stated that the provisions of Article 57 paragraph (2a) of Law 8/2011 are contrary to the purpose of establishing the court to uphold law and justice, especially in the context of enforcing the constitutionality of the norms of the law in accordance with the constitution. The existence of Article 57 paragraph (2a) of Law 8/2011 results in the obstruction of the court from (i) reviewing the

constitutionality of norms; (ii) filling the legal vacuum as a result of the Court's ruling which states that a norm is contrary to the constitution and does not have binding legal force.

Apart from the polemic above, the existence of a decision variant raised by the Constitutional Court can show the existence of non-self executing. The implementation of decisions that are non-self executing can be understood still requires the next stage, namely the follow-up by the executor of the decision both through the legislative and regulatory processes. The variant of the decisions mentioned earlier is essentially temporary (*einmalig*) until the executor of the Constitutional Court's decision takes over in the formation or revision of the legislation. This reflects the shift in the character of some of the Constitutional Court's decisions from self-executing to non-self executing.

### 2.2. Political Constellation in the Context of the Constitutional Court Decision

Judicial power is always inherent in politics, and basically, it is identical with concepts such as influence, persuasion, manipulation, coercion, force, and authority. In this context the nature of power can be reviewed into six dimensions, first, the potential and actual dimensions mean that one can have the potential for power, such as wealth, land, weapons, knowledge, social status, popularity and so on. Next, the dimensions of consensus and coercion are the two contradictory concepts. In the dimension of coercion, politics will be seen as a form of struggle, domination, and conflict, while the dimension of consensus, power is more interpreted as an effort to unite these various conflicts and make it a situation to organize society in general.[32] For information that some scholars argue that Constitutional Court adopts strong form of constitutional review in deciding cases concerning economic and social rights.[33]

[32] Susanto Polamolo, "Nalar Fenomenologi; Mahkamah Konstitusi dalam Pusaran Kekuasaan dan Bahaya Krisis Weltanschauung [Phenomenology of Reason; The Constitutional Court in the Weltanschauung Crisis of Power and Danger]," *Journal of Konstitusi* 11, no. 2 (June 2014): 226.

[33] Philippa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court," *Australian Journal of Asian Law* 10, no. 1 (2008): 100-132.

The power constellation in Indonesia gives us a picture of a 'tradition of political hegemony', as mentioned earlier, that the Constitutional Court will be confronted with this tradition of hegemony based on articles which mention the duties and authority. The political tradition that is meant here is the question of the impossibility of a purely separate judicial institution with two other institutions (executive and legislative). Therefore, Article 18 of Law No. 24 of 2003 openly implies an exclusive relationship from each institution; this is where the reality of a hegemonic tradition is developing in a structural and administrative direction. In the power orientation, Indonesian politics before and after the reformation cannot be said to experience significant changes, where it can be measured in an orientation perspective. The main orientation of Indonesian politics still revolves around the idea of power and not the effectiveness of power use. This is really surprising because power struggles can only be justified if it can be shown that in practice they are able to use power exercise in a way that brings benefits to as many people as possible.[34]

The study proves that law is a political product so the character of the contents of each legal product will be very determined or colored by the balance of power or political configuration that gave birth to it. A fact that cannot be denied, that the formation of law in a country including in Indonesia cannot be separated from the influence of the prevailing political system, including in this case the influence of the national political system of the country itself.[35]

Events that occur in the contextual context in this matter regarding the Constitutional Court's decision, it does not necessarily make the Constitutional Court's decision directly understood deterministically-empirically, that is, from the judge's decision then trigger the implementation that is in accordance with

[34] In the case of Indonesia, it is very evident that the impetus for power struggles is far higher than the impetus for the right use of power. Symptoms such as the emergence of so many political parties are intensively consolidating themselves to form external organ units, on the other hand, the parties that consolidate with the support of a broad constituency actually experience a split into (internal fractioning). There is a complicated typology in this section, but from the large currents of political power that are currently consolidating, on the one hand, they weaken each other's positions, which is due to political institutionalization being sacrificed in favor of political personalization. See the comparison study in Saiful Arif, *Demokratisasi Sistem Politik dan Pemerintahan* [Democratization of Political and Government Systems] (Aveross Press, 2011), 38.

[35] Atom Ginting Munthe, "Postur 'Rasionalis' dalam Politik Luar Negeri Indonesia Pasca Suharto ['Rationalist' Posture in Post-Suharto Indonesian Foreign Policy]," *Law Journal of Pro Jusitia* 24, no. 3 (July, 2006): 191-202.

the decision's conclusions and finally leads to changes in the implementation of state affairs. As well as the development of political thought which is capable of encouraging various constitutional structure inventions, the same thing applies to the implementation of the Constitutional Court decisions that are influenced by the existing political process.

Ideally, the establishment of the Constitutional Court in Indonesia aims to strengthen the protection of constitutional democracy. The state, in this case, the Indonesian government, must guarantee the fulfillment of the constitutional rights of its citizens which have historically been suppressed by integralist policies and political authoritarianism of the New Order regime. As for the trend of modern state administration, government policy is outlined in a written positive law formulation which is the result of political representation of the people's representatives, and which then applies to the public.[36]

A number of decisions of the Constitutional Court regarding the constitutional review indirectly have encouraged the political process. This is one of the legal consequences of the Constitutional Court's decision which has a role in encouraging the political process to change the law. One of the legal consequences that can be caused by a Constitutional Court decision is that it can nullify or create a political process, to ensure that the prevailing political practices continue in accordance with the constitutional corridor.

Although the decision is final and binding, but the reality is sometimes that the decision of the Constitutional Court is not obeyed or canceled by the legislator. The House of Representatives and the President as legislators have no Constitutional Court ruling. Law Number 12 of 2011 concerning the Establishment of Legislation, one of the materials for the completion of the law is a follow-up to the decision of the Constitutional Court. These conditions cause the Constitutional Court's decision as if it has no meaning because there is no role for legislators (DPR and President) who cannot and do not follow

[36] Yance Arizona, et.al., *Pancasila dalam Putusan Mahkamah Konstitusi (Kajian terhadap Putusan Mahkamah Konstitusi dalam Perkara yang Berkaitan dengan Perlindungan Hak Kelompok Marjinal)* [Pancasila in the Constitutional Court's Decision (Study of the Constitutional Court's Decision in Case Related to Protecting the Rights of Marginalized Groups)] (Jakarta: Epistema Institute, 2014), 5-6.

up on the Constitutional Court's decision. Therefore, it is necessary to find a solution to the ruling of the Constitutional Court in making the law for the Constitution can be obeyed by the legislator.[37] The substance of the politically charged law can be used by law, with expectations that occur in accordance with the will of the community, and also in accordance with the will of the Constitution. Therefore, those who consider their constitutional rights and/or authorities to be disadvantaged as a result of their decision to act can exercise the judicial review of the Constitutional Court. The constitutional rights referred to the rights stipulated in the 1945 Constitution of the Republic of Indonesia. This judicial review is important in order to maintain law order so that there is no material conflict between conventions. The decision of the Constitutional Court which discusses the making of the law with the 1945 Constitution of the Republic of Indonesia was conveyed to the House of Representatives, the Regional Representative Council, the President, and the Supreme Court.

Submission of the Constitutional Court's rules to the DPR and the President can force state institutions and law-making institutions immediately follow up on the decision of the Constitutional Court. Although the Constitutional Court decision is final and binding, the reality is that sometimes the Constitutional Court's decision is not followed up by DPR or the President.

For example, the decision of the Constitutional Court Number 10/PUU-VI/2008 concerning a judicial review case of Article 12 letter c of Law Number 10 of 2008 concerning General Elections of Members of the People's Legislative Assembly, Regional Representatives Council, and Regional People's Representative Council (the Election Law of the DPR, DPD and DPRD/Regional Peoples Representatives Council). Article 12 of Law Number 10 Year 2008 that does not include domicile and non-political party requirements for prospective DPD members, and Article 67 of Law Number 10 Year 2008 which does not contain provisions on the need for a National Identity Card (KTP) in the province to be represented and Non-

[37] Widayati, "Problem Ketidakpatuhan terhadap Putusan Mahkamah Konstitusi tentang Pengujian Undang-Undang [Problems of Non-Compliance with the Constitutional Court's Decision Regarding Judicial Review]," *Journal of Pembaharuan Hukum* IV, no. 1 (January - April 2017): 2.

political party approval for the completeness of the requirements for prospective DPD members. This means that what is being requested by the applicant is the absence of norms and non-party political norms in Article 12 and Article 67 of Law Number 10 Year 2008, not the norms that are formulated in full in article, paragraph, or part of the law. In its ruling, the Constitutional Court stated that Article 12 letter c of Law Number 10 Year 2008 remained constitutional as long as it is interpreted in the province to be represented. The subject of debate is Law Number 8 of 2012 concerning the Election of Members of the DPR, DPD, and DPRD, the terms of domicile of the DPD members are still regulated, namely in Article 12 (c) that is approved, "residing in the territory of the Unitary Republic of Indonesia". The sound of the provision is the same as the sound of the article in the law that has been cancelled by the court. Likewise in the latest law, Law Number 7 of 2017 concerning General Elections. The *a quo* law may not be interpreted by the Constitutional Court which requires the provision of candidates for DPD members to remain constitutional in the provinces to be represented. This is a form of discrepancy in the follow-up to the Constitutional Court's decision because the norm returned by the Constitutional Court. This is not following Article 10 paragraph (1) of Law Number 12 of 2011 concerning the Formation of Regulations that contain material that must be regulated by laws and regulations which contain all provisions concerning applicable laws and regulations.

Even though the Constitutional Court's ruling is *erga omnes*, it is not a constitutional court ruling that is not only for judicial review applicants who request the use of the law but also for all parties related to the Constitutional Court's ruling. The Constitutional Court as a judicial institution for its decisions is obeyed and acted upon, because it is a legal responsibility for the legislators, and also the implementation of the decision on constitutional formation for citizens granted by the Constitution of the Republic of Indonesia. In 1945, especially those who wanted to hear the review of the Constitutional Court.

### 2.3. Legal Impact of Disobedience of the Constitutional Court's Decision

According to Achmad Ali, the legal consequences are a result given by law, for an act of legal subject. Furthermore, he identified legal consequences in 3 (three) groups:[38]

2.3.1. Legal consequences in the form of birth, change or disappearance of certain legal rules;

2.3.2. Legal consequences in the form of birth, change or disappearance of a particular legal relationship; and

2.3.3. Legal consequences in the form of sanctions.

Non-compliance with the decisions of the Constitutional Court can be implemented because there are no instruments or institutions that provide legal responsibilities that are final and binding. The final decision and all the Constitutional Courts are very beneficial for everyone outside the Constitutional Court to follow up on the final and binding decision.[39] Although in Article 24C paragraph (1) of the Constitution of the Republic of Indonesia of 1945 only states that the decision of the Constitutional Court is final, it is not followed by the word "binding", but it can be stated that the final decision of the Constitutional Court means relating to the decision of the Constitutional Court, once the verdict was finished. The basis for the implementation of the Constitutional Court's ruling on those relating to the decision, to separate the decision, without any coercion. Therefore, it is the implementation of the Constitutional Court ruling, moral awareness and also legal awareness of the relevant institutions.[40] The implementation of the Constitutional Court's ruling is also automatic, not the executing agency. Therefore moral awareness and also legal awareness for parties related to the Constitutional Court's ruling, because the implementation of the Constitutional Court's ruling is also a constitutional obligation for the parties related to the decision of the Constitutional Court. The implementation of the

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[38] Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis & Sosiologis)* [Revealing the Veil of Law (A Philosophical & Sociological Study)] (Jakarta: PT. Toko Buku Agung, 2002), 251.

[39] Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi pada Pengujian UU terhadap UUD* [Problems with the Implementation of the Constitutional Court's Decision on the Constitutional Review] (Jakarta: Raih Asa Sukses, 2015), 233.

[40] *Ibid*.

Constitutional Court's ruling is automatic and there is no institution responsible for resolving the Constitutional Court's ruling. There is no provision for parties who do not and do not follow up on the decisions of the Constitutional Court. The disobedience of litigants, including the legislative bodies implementing the Constitutional Court's ruling, can in some way affect the rules, and even if repeated non-compliance occurs, the community is increasingly disadvantaged for the Constitutional Court. When the problem is made by the Constitutional Court's decision to continue as it is now, it can be a future, and the Constitutional Court will be issued by justice seekers. The problem is, there are no formal rules or regulations that govern the implementation of the Constitutional Court's ruling. The House of Representatives and the Government as parties directly related to the decision of the Constitutional Court, namely responding to and carrying out the decisions of the Constitutional Court, immediately follow up. Therefore, to maintain legal order with regulations that stipulate that its hierarchy is lower must not be contradictory to higher regulations, it will attach laws with laws that cost contrary to the 1945 Constitution of the Republic of Indonesia, the DPR and the President must immediately be obeyed and acted upon by the President to immediately amend the law to be adjusted to the decision of the Constitutional Court.

In the judiciary tradition that has been developing for a long time, a decision must have binding nature, because this is related to the absolute authority of the judiciary, which has the power to make judgments. Of course it is useless if a decision that takes the process sometimes takes a very long and tiring tempo, but in the end, it does not have binding legal force, the result is just a waste. Problems at the level of implementation/execution of decisions like this are often the organs of the Constitutional Court, because there is no executorial institution for the decisions of the two courts, and there is no threat of serious sanctions if they do not implement the decisions of both organs.[41] During this time the implementation of the Constitutional Court's ruling only relied on good

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41 Denny Indrayana and Zainal Arifin Mochtar, "Komparasi Sifat Mengikat Putusan Judicial Review Mahkamah Konstitusi dan Pengadilan Tata Usaha Negara [Comparison of the Binding of Judicial Review Decisions of the Constitutional Court and the State Administrative Court]," *Journal of Mimbar Hukum* 19, no. 3 (October 2007): 442-443.

cooperation/relations between the Constitutional Court as an institution judicial with the legislating organs (DPR and the President), as well as the implementing organs of the law (government). If there are no good intentions from the three organs, which are affected by the implications of the Constitutional Court's decision, of course, the Constitutional Court's decision will only be a waste, or just become a paper tiger, which has no implementation power.

Judicial power is the weakest branch of the three branches of power that exist; therefore its authority is only as a case breaker. The rest to execute the decisions issued, the judicial organ requires the intervention of the executive to become the executor. Although the Constitutional Court currently has extraordinarily high authority, namely as an authoritative organ to conduct the constitutional review, which means that it serves to limit and supervise other state organs to run in the corridors set by the constitution, but it cannot guarantee guarantee the implementation of the provisions outlined by the Constitutional Court. Even it is often denied. Especially now with the tendency towards judicial activism, where the role of the judicial institution as the guarantor of the constitution will be increasingly dominant, the decision of the Constitutional Court will be subject to fierce challenges from non-judicial state actors affected by the Constitutional Court's decision.

Therefore, the constitution and the regulation that regulates the authority of the Constitutional Court in listing final words are always followed by the final and binding words. These courts can persuade other government bodies that their judgment is substantially in line with the practices of other democratic countries.[42] Although it has been stated explicitly, the decisions of the Constitutional Court are denied or ignored by the legislating organs and/or other non-judicial actors, especially if the two words are not stated side by side and explicitly, it is possible to interpret that the decisions are the final is not necessarily binding, because there are no provisions that explicitly regulate it.[43] The actual impact of judicial

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[42] Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments," *Duke Journal of Comparative and International Law* 14, no.2 (2004): 344.

[43] Ahmad Syahrizal, "Problem Implementasi Putusan MK [Problems of the implementation of the Constitutional Court's Decision]," *Journal of Konstitusi* 4, no. I (March 2007): 115.

decisions often depends on the behavior of executive and legislative bodies that implement the rulings. Consequently, when a court hears a case involving the interests of those controlling the executive and legislative institutions, those interests can threaten to obstruct the court intended outcome. This is also evident from several Constitutional Court decisions that are not applicable because they seem to be ignored by the decision address. Based on the analysis conducted on the constitutional court's decisions related to forestry, plantations, and mining, it can be said that the level of compliance of state administrators can be seen based on whether or not a constitutional court decision is granted which is either partially or wholly by state administrators, DPR, to the judiciary. The government and the DPR appear to be more disobedient to the decisions of the constitutional court. One of them seemed in the absence of a constitutional court decision that cancels a norm in the Plantation Law but it is not accommodated by the government and parliament in revising the Plantation Law, then there is also no response from the government to the decision the constitutional court related to the judicial review of the Forestry Law, especially regarding the issue of the mechanism of inauguration and abolition of customary law communities as mandated by Article 67 paragraph (1), paragraph (2), and paragraph (3) of the Forestry Law which is considered constitutional by the Constitutional Court but the government instrument to date mechanism inauguration and abolition of indigenous law community does not yet exist. Slightly different from the general court that handles criminal acts of natural resources that are more obedient to the decisions of the constitutional court by using the decisions of the relevant constitutional court as a consideration in deciding cases.[44]

As a result, the Constitutional Court's decision is not implementable in its character, when it reaches the application stage, the Constitutional Court Decision will be blocked by many obstacles that interfere with the execution of the decision. Therefore it is necessary to have a collective awareness strategy of all

[44] Adam Mulya Bunga Mayang and Adeline Syahda, *Kepatuhan Penyelenggara Negara terhadap Putusan Mahkamah-Konstitusi (Analisis Terhadap Putusan Mahkamah Konstitusi tentang Kehutanan, Pertambangan dan Perkebunan)* [Compliance of State Administrators on Constitutional Court Decisions (Analysis of Constitutional Court Decisions on Forestry, Mining and Plantations)] (Jakarta: Yayasan Konstitusi Demokrasi Inisiatif, 2017), 34.

state institutions and other non-state organs, to jointly apply the Constitutional Court's decisions to conditions that are clearly desired by the constitution. The implementation of the Constitutional Court's ruling will be very absurd without a positive response from the legislative and the government forming organs in general. During this time there are often gaps and disparities between the stages of reading and the implementation of final decisions in the field. If this big problem is left unchecked, undoubtedly the decision of the Constitutional Court will only have a symbolic power that adorns the state news sheet.

## III. CONCLUSION

Based on the discussion above, related to the shift in the character of the constitutional court's decision from self-executing to not self-executing, it came to the conclusion that the dynamics were influenced by Indonesia's political conditions which influenced the constitutional court judges. *Adressat* often ignore the decisions of the Constitutional Court and policy makers as if they do not obey so that the Constitutional Court's decision cannot be implemented to create a state that remains unconstitutional. The reality is that sometimes the Constitutional Court's decisions are ignored and are not followed up by the legislative council of the people and the President as the legislative body. Because of it, Constitutional Court judges must try to find legal breakthroughs in the corridors of judicial activism to create applicable constitutional review decisions. The judges created a decision variant that was more directed to the decision of non-self executing. The existence of the nature of non-self executing because to carry out the Constitutional Court's decision still needs to be followed up with the next, namely the follow-up by the executor of the decision either through the legislative or regulatory process. It was said so because the ruling influenced other norms and requested a revision or making new laws or regulations that were more operational in their implementation. In other words, this decision cannot easily be carried out without the presence of new laws or other regulatory products because it can lead to a legal vacuum. This is what reflects the change

like the Constitutional Court from self-executing to non-self executing. In the end, the *adressat* of the decision as a policy maker must inevitably follow up.

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# Biography

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# AUTHOR GUIDELINE

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