Volume 6, Number 1 ❑ May 2020

Constitutional Review

PUBLISHED BY CENTER FOR RESEARCH AND CASE ANALYSIS AND LIBRARY MANAGEMENT THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

ISSN: 2460-0016 | E-ISSN: 2548-3870

Consrev
Constitutional Review

Editorial Office

Center for Research and Case Analysis and Library Management
The Constitutional Court of the Republic of Indonesia
Jl. Medan Merdeka Barat No. 6 Jakarta, Indonesia 10110
Phone. (+6221) 23529000 Fax. (+6221) 352177
E-mail: consrev@mkri.id

Constitutional Review is a law journal published by Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia twice a year. The primary purpose of this journal is to disseminate research, conceptual analysis and other writings of scientific nature on constitutional issues. Articles published cover various topics on constitutional courts, constitutional court decisions and issues on constitutional law either in Indonesia or other countries all over the world. This journal is designed to be an international law journal and intended as a forum for legal scholarship which discusses ideas and insights from law professors, legal scholars, judges and practitioners.

CONSTITUTIONAL REVIEW is available in print and online version. Online version can be downloaded on consrev.mkri.id

ISSN: 2460-0016 (print)
e-ISSN: 2548-3870 (online)

THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

Constitutional Review, Volume 6, Number 1, May 2020

Editorial Team

TEH CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
Volume 6, Number 1, May 2020

CONTENTS

Note From Editors

Constitutional Review (CONSREV) aims to be a place where discussion of constitutional issues can take place. Hence, it covers various topics on the constitution, constitutional adjudication, and any related matters on constitutional law around the globe. Since there is an increasing number of national courts cite and discuss foreign decisions, it will also cover constitutional developments throughout the world from a comparative perspective.

To facilitate meaningful interdisciplinary discussion, CONSREV welcomes contributions from law professors, legal scholars, judges, and practitioners to address constitutional matters. Through this process, CONSREV has become one of the main references where constitutional issues are discussed and refined.

The publication of this first issue of May 2020 covers six articles written by legal scholars affiliated with universities and institutions from different countries. This issue begins with the article written by Svetlana Karamysheva on "Protection of Socio-Economic Rights by the Constitutional Court of the Russian Federation." It seeks to examine the role of the Constitutional Court of the Russian Federation in the field of socio-economic rights, including the protection of the right to private property and protection of the right to pension provision.

The next article is presented by Mirza Satria Buana. He discusses the shifting of the legal-politico paradigm, particularly relating to judicial leadership of the Indonesian Constitutional Court because this significantly affects the role of the Court in the political arena. Based on the research, he argues that it is hard to categorize the legal-politico actions of the Indonesian Constitutional Court into either legalism or instrumentalism.

Discussion on the protection of socio-economic rights by the Constitutional Court of Ukraine is presented by Yurii Sheliazhenko. This article traces historical development, doctrine, and impact of constitutional review in Ukraine related to matters of social justice. Yurii found that the Constitutional Court of Ukraine developed a doctrine of social justice based on the values of the rule of law, liberty, and equality, founding a pragmatic balance between the imperatives of individual freedom and economic security.

The Indonesian Constitutional Court decisions on the issue of socio-economic rights became the focus of the article by Rosa Ristawati and Radian Salman. They analyze the two of the Indonesian Constitutional Court's landmark decisions, given the great interest on the issues of *Ulayat* rights and educational rights.

The assessment of the progressive realization of socio-economic rights in Kenya is discussed by Jennifer Gitiri. This article aims to provide a better understanding of socio-economic rights in Kenya and the obligations of the state under international, regional, and national law.

The last article of this issue deals with the Palestinian Constitutional Court's reasoning of its judgment in Rawabi Case presented by Osayd Awawda. This article explains the implications of the judgment on the relationship between the Regime and other major private investors in the West Bank.

As conclusion for this issue of May 2020, the editors of CONSREV expect that all articles presented in this current issue might give insight and understanding of the constitution, constitutional court decisions, and constitutional issues in broader nature, particularly on protection of socio-economic rights, to the reader of this journal.

Editors

Protection of Socio-Economic Rights by the Constitutional Court of the Russian Federation

Svetlana Karamysheva

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 001-035

The article studies practice of the Constitutional Court of the Russian Federation in the field of socio-economic rights. The statistical data analysed illustrates the ever-present socio-economic theme among constitutional complaints lodged with the Constitutional Court, with the lowering of overall proportion of such complaints and increasing of the number of such complaints related to defence of property. Such statistics appear to be consistent with the Court's role in the ongoing transition from Soviet-style planned economy to free market, which implies a substantial shift of obligations connected with property management and social responsibilities from the State to citizens themselves. It follows from the Constitutional Court practice and doctrine that such shift should be done delicately, giving the citizens sufficient period of time to adapt to the changes. In the article, the author focuses on the following categories of complaints considered by the Constitutional Court of the Russian Federation: protection of the right to private property and protection of the right to pension provision. The author observes that the delicate balance that needs to be preserved when dealing with the cases of this type and the slow-pace nature of the transition process often results in criticism towards the Court, notwithstanding the rationale of its decisions. It follows that such criticism is somewhat natural; what matters is the Court's understanding of its mission in the socio-economic field, and maintaining balanced and well-reasoned approach in development of its case-law.

Keywords: Constitutional Court of the Russian Federation, Protection of Property, Social State, Socio-Economic Rights, State Responsibilities.

Legal-Political Paradigm of Indonesian Constitutional Court: Defending a Principled Instrumentalist Court

Mirza Satria Buana

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 036-066

The establishment of the Indonesian Constitutional Court in 2003 signified the formation of a bridge between the judiciary and politics. Through its judicial review process, there is a more tangible presence of the judiciary and court in the political arena. The Court helps with addressing moral predicaments and influencing the products of the legislature. This paper discusses the shifting of the legal-politico paradigm, particularly relating to judicial leadership of the Court because this significantly affects the role of the Court in the political arena. The history of the establishment of the Court's authority in judicial review is explored through a stylised analysis of the actions of two early Chief Justices. This paper also examines two Court decisions which illustrated the Court's authority on judicial review because they demonstrated the importance of policy-driven decisions and judicial restraint. The main argument of this work is that it is hard to categorize the legal-politico actions of the Indonesian Court into either legalism or instrumentalism. Often, the Court synthesises the two. The legal-politico paradigm is a dynamic one. The most feasible model of the Indonesian Constitutional Court is that of a Principled Instrumentalist Court, where policy decisions guide the formation of legislation according to constitutional values, but the judges maintain prudential self-restraint.

Keywords: Constitutional Court, Instrumentalism, Judicial Restraint, Judicial Review, Legalism.

Against the Odds: Protection of Economic, Social, and Cultural Rights by the Constitutional Court of Ukraine

Yurii Sheliazhenko

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 067-109

The article traces historical development, doctrine, and impact of constitutional review in Ukraine related to matters of social justice. It is shown that international review of Ukraine's reports on observance of human rights obligations indicated a low level of compliance during the absence of independent constitutional review by the judiciary. After the establishment of the constitutional review, the compliance was improved against all doubts, whether socio-economic rights are justiciable in the Ukrainian context, and whether the judges are empowered enough to reshape authoritarian policies. Constitutional Court of Ukraine developed a doctrine of social justice based on the values of the rule of law, liberty, and equality, founding a pragmatic balance between the imperatives of individual freedom and economic security. In legal reasoning, judges implemented ideas of the human-centered state and personal autonomy in civil society, close to liberal democratic views, expressed by framers of the Constitution of Ukraine.

Keywords: Constitutional Court of Ukraine, Democratic Nation-building, Economic Security, Human Rights, Personal Autonomy, Social Justice.

Judicial Independence *vis-à-vis* Judicial Populism: the Case of *Ulayat* Rights and Educational Rights

Rosa Ristawati and Radian Salman

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 110-132

Judicial populism may occur when judicial branches are much more influenced by the interest of people majority. In this context, it is when justices deliver decisions according to what the people wanted and not what it has to be decided by laws. The Constitutional Court of the Republic of Indonesia (MKRI) has the pivotal role to protect the Constitution, democracy, and the rule of law principles by adhering judicial independence in the decision making process. This paper aims to briefly find out whether the MKRI decisions on the particular issue of economic and social rights show the tendency of judicial populism and defending judicial independence. A brief conclusion would be drawn from the analysis of the two MKRI's landmark decisions on the relevant issues of economic and social rights, in particular issues of *Ulayat* rights and educational rights (Case Number 35/PUU-X/2012 on the judicial review of Law No. 41 of 1999 on the Forest and Case Number No. 13/PUU-VII/2008 on the judicial review of Law No. 16 of 2008 on the Amendment of the Law No. 45/2007 on the State Budget). In a short analysis of both landmark decisions, the MKRI tends to defend its independence in delivering its decision. The Court also shows its consistency in protecting the Constitution by strictly upholding the constitutional values laid down in the Constitution and against the judicial populism. The Court in both decisions shows its constitutional commitment to preserving democratic values of minority-marginalized protection against the dominant-majoritarian interest. In the particular issue of education rights, the Court hinders the fulfilment of educational rights from the elite interest by preserving the constitutional purpose of making priority 20% for the education budget. In general, the MKRI has to guard preventing the Constitution and the rule of law principles, specifically on the issue of the protection of economic-social rights. It upholds judicial independence and put asides judicial populism.

Keywords: Constitutional Court, Economic-Social Rights, Judicial Populism, Judicial Independence, Majoritarian.

Progressive Nature of Social and Economic Rights in Kenya: a Delayed Promise?

Jennifer Gitiri

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 133-165

This paper evaluates the steps taken towards the progressive realization of social and economic rights (SER) in Kenya. It aims to provide a better understanding of SER and the obligations of the state under international, regional, and national law. It further elucidates the components of progressive realization. Additionally, it identifies the guiding principles of measuring progressive realization and recommendations to develop tools that would monitor progressive realization. Recognition of SER faces many challenges as they are considered as second class rights that are not equal to civil and political rights considered as first-generation rights. The most enduring challenge for SER is that it interferes with the concept of the separation of powers and the political question doctrine by enabling courts to interfere in matters considered to be under the purview of the legislative and executive branch. The paper uses a desktop review of international, regional, and national legal instruments as well as comparative evaluation of SER jurisprudence from a host of jurisdictions. The concept of progressive realization is a goal in the ICSECR, Kenya's Constitution, and other Constitutions with the implication that SER would be implemented over a period of time. Jurisprudence from other jurisdictions is evaluated to determine the lessons learned by Kenya. The paper demonstrates that progressive realization and implementation of SER are still work in progress before they are finally anchored into mainstream human rights, just like political and civic rights. In conclusion, progressive realization of SER imports an immediate obligation by Kenya having ratified the three human right bodies (ICSECR, UNCRC, and CRPWD) pursuant to Article 2(5) (6) of the Constitution to expeditiously move towards the realization of SER. There is a further presumption that the country would refrain from retrogressive measures and instead adopt the minimum content approach in the implementation of SER.

Keywords: Constitutional Court, Progressive Realization, Social and Economic Rights.

The Regime's Violation of the Right to Property in the West Bank, Palestine: Rawabi Project as a Case Study

Osayd Awawda

Constitutional Review, Vol. 6, No. 1, May 2020, pp. 166-189

The purpose of this paper is to assess the Palestinian Constitutional Court's reasoning of its judgment in Rawabi Case, a case in which the Government's expropriation of a large area of privately-owned land was challenged before the Court. The expropriation was to transfer the ownership of that land to Bayti Real Estate Investment Company, a private company that later on built the first planned city in Palestine: Rawabi. This paper explains what implications the judgment in this case has on the relationship between the regime and other major private investors in the West Bank. The paper starts with explaining how some constitutional courts perform the function of providing credible commitments in the economic sphere, where such courts are situated in authoritarian settings. Then, it moves to the specific case of Rawabi, explaining the facts of the case and describing Rawabi's connections to the regime's interests. The paper concludes that the Constitutional Court has failed to perform its main function of upholding the Palestinian Basic Law and, in particular, protecting the right to property for the owners of the expropriated lands.

Keywords: Palestinian Constitutional Court, Rawabi Project, Right to Property, West Bank.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev611

Protection of Socio-Economic Rights by the Constitutional Court of the Russian Federation

Svetlana Karamysheva*
Constitutional Court of the Russian Federation, Saint Petersburg, Russia
svetlana.karamysheva@ksrf.ru

Received: 4 July 2019 | Revised: 7 April 2020 | Accepted: 15 April 2020

Abstract

The article studies practice of the Constitutional Court of the Russian Federation in the field of socio-economic rights. The statistical data analysed illustrates the ever-present socio-economic theme among constitutional complaints lodged with the Constitutional Court, with the lowering of overall proportion of such complaints and increasing of the number of such complaints related to defence of property. Such statistics appear to be consistent with the Court's role in the ongoing transition from Soviet-style planned economy to free market, which implies a substantial shift of obligations connected with property management and social responsibilities from the State to citizens themselves. It follows from the Constitutional Court practice and doctrine that such shift should be done delicately, giving the citizens sufficient period of time to adapt to the changes. In the article, the author focuses on the following categories of complaints considered by the Constitutional Court of the Russian Federation: protection of the right to private property and protection of the right to pension provision. The author observes that the delicate balance that needs to be preserved when dealing with the cases of this type and the slow-pace nature of the transition process often results in criticism towards the Court, notwithstanding the rationale of its decisions. It follows that such criticism is somewhat natural; what matters is the Court's understanding of its mission in the socio-economic field, and maintaining balanced and well-reasoned approach in development of its case-law.

Keywords: Constitutional Court of the Russian Federation, Protection of Property, Social State, Socio-Economic Rights, State Responsibilities.

* Counsellor at the Department of International Relations and Research of Constitutional Review Practice of the Constitutional Court of the Russian Federation, Saint Petersburg, Russia.

I. INTRODUCTION

Probably every person on the planet dreams of not only eternal peace, but also of social justice to one degree or another, as well as of economic prosperity and stability. Socio-economic rights are the second generation rights and as such have special nature, the theoretical debate about which continues to this day. Without going into nuances, it can be said that their main difference from civil and political human rights is that their recognition, implementation and protection are possible only if they are recognized within society; from practical perspective we note the need for the state to participate in creating the conditions and mechanisms for ensuring them.

At the same time, the participation of the state, on the one hand, is a guarantee of the implementation and protection of the socio-economic rights of citizens, and on the other hand, a limiting factor for their realization, since both the economic freedom and opportunities of citizens largely depend on the economic policy of the state, and state social security always limited by budget, economic situation and other circumstances. That is why in different states at the constitutional level the issue of recognition and consolidation of this category of rights is decided differently.

In states where the possibility of judicial protection of this category of rights is legislatively fixed, as in the Russian Federation, the constitutional control body plays a special role. The Constitutional Court of the Russian Federation, which has broad competence in the field of constitutional control a posteriori and which jurisprudence consists primary of the so-called structural rulings, is trying to find a very fragile balance that allows on one side protecting constitutional human rights, and on the other, to not violate the principle of separation of powers and to not interfere in the political and economic sphere, which is the prerogative of the legislator.

In addition to eliminating obvious legislative defects and constitutional contradictions, as well as adjusting law enforcement practice, the Constitutional Court of the Russian Federation primarily establishes certain guidelines for the

development of legislation in the socio-economic sphere, which is characterised by special responsibility and complexity. In its decisions and legal positions, the Constitutional Court, while exercising a stabilising function in matters of implementing the principle of a social state, takes into account the level of real economic opportunities of the country at the present stage of its development and proceeds from the need to find a balance of competing rights and interests so that "the social rights of citizens were properly protected and, at the same time, the ways for reforming, including in the area of social policy, were not closed."[1]

The purpose of this article is to describe (the development over time) and analyze the legal positions of the Constitutional Court of the Russian Federation on the protection of socio-economic rights in order to identify the basic principles that guide the Constitutional Court in resolving this category of cases in order to achieve the mentioned balance.

Due to the limits of the paper, it is impossible to highlight all the legal positions of the Constitutional Court of the Russian Federation on the whole spectrum of socio-economic rights. However, I would like to dwell on the most relevant and from a today's perspective controversial, i.e. in the field of economic rights – to note certain points regarding the right to private property, and in the field of social rights – the right to pension provision.

The first part of the paper is devoted to the description of the situation with socio-economic rights in Russia, first of all, their legislative consolidation, the powers of the Constitutional Court of the Russian Federation, analysis of statistics on appeals to the Constitutional Court and its decisions. It also provides introductory general provisions and legal positions of the Constitutional Court of the Russian Federation in the socio-economic sphere.

The second part of the article analyzes the decisions of the Constitutional Court of the Russian Federation on the right to private property and slightly affects the relationship of the Constitutional Court of the Russian Federation

[1] Valery Zorkin, "Pretsedentnyy kharakter resheniy Konstitutsionnogo Suda Rossiyskoy Federatsii [The Precedent Nature of Decisions of the Constitutional Court of the Russian Federation]," *Zhurnal konstitutsionnogo prava*, no. 12 (2004).

with the European Court of Human Rights and the correlation of their legal positions.

The third part discusses the evolution of the legal positions of the Constitutional Court of the Russian Federation on the issue of pension provision for citizens, including one of the latest high-profile decisions regarding the current pension reform in Russia.

II. SOCIO-ECONOMIC RIGHTS AND THE CONSTITUTIONAL COURTS OF THE RUSSIAN FEDERATION

2.1. Socio-Economic Rights in the Constitution of the Russian Federation

The Constitution of the Russian Federation,[2] adopted at a national referendum on 12 December 1993, became the Constitution of a new country. To mark the beginning of the transition to a new political system based on the rule of law and respect for rights and freedoms, the drafters of the 1993 Constitution took 3 important steps. Firstly, the list of rights and freedoms of a very protectionist nature (rather paternalistic) was reduced, it began to comply with international standards. New guarantees were also introduced to strengthen institutional systems, both federal and regional, aiming at protection and promotion of human rights, and preventing their violation. The third important breakthrough was the accession of Russia to international justice system, guaranteeing of its citizens with the constitutional right to appeal to international jurisdictions, when all domestic methods of protection have been exhausted.[3] Presently the Russian Federation proclaims itself to be a social state whose policy is aimed at creating conditions ensuring a decent life and free development of man. The Constitution of the Russian Federation follows the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 and recognizes: the right to private property, the right to freedom of entrepreneurial and other economic activities (Articles 34, 35, 36), the

[2] "Constitution of the Russian Federation – 1993," http://www.ksrf.ru/en/INFO/LEGALBASES/CONSTITUTIONRF/Pages/default.aspx.

[3] Colodrovschi Danelciuc, "Fédération de Russie [Russian Federation]" (Annuaire international de justice constitutionnelle [The international yearbook of the constitutional justice], 2014), 29-2013.

right to work and protection of labour rights by all means provided for by law, including the right to strike, as well as the right to join trade unions (Article 37), the right to protection of the family, maternity and childhood (Article 38), the right to social security (Article 39), the right to housing (Article 40), the right to health and medical care (Article 41), the right to a favourable environment (Article 42), the right to education (Article 43), the right to freedom of literary, artistic and other forms of creativity (Article 44). Moreover, Article 17 of the Constitution of the Russian Federation establishes that fundamental human rights and freedoms are inalienable and belong to everyone from birth, and Article 2 establishes that the recognition, observance and protection of human and civil rights and freedoms is the duty of the state, without any division into types or categories of these rights. Therefore, the Russian Constitution can be reasonably called extremely "advanced" in the sense of recognising socio-economic human rights. Speaking of the constitutionalisation of social rights in the first place, theoretically, there are three groups of constitutions:[4] constitutions which lack rules on social rights (these are primarily common law countries such as the USA, Canada, the UK); constitutions where social rights are enshrined indirectly through the main goals and principles of the state (for example, Germany, Spain, Malta, etc.); constitutions where social rights are directly enshrined and are subject to constitutional regulation. The Constitution of the Russian Federation thus belongs to the latter group, therefore, in Russia one can "consider social rights enshrined in the Constitution not only as guidelines for the legislator, but precisely as fundamental rights equal in importance to constitutional civil and political rights."[5]

The problem of judicial protection of socio-economic rights arises with renewed vigor during difficult economic periods when along with a decrease in resources, the state's burden to fulfill its social obligations increases.

[4] See e.g.: Natalya Kolotova, "Konstitutsionalizatsiya sotsial'nykh prav – tendentsiya razvitiya sovremennogo prava [Constitutionalization of Social Rights - a Trend in the Development of Modern Law]," *Konstitutsionnoye i munitsipal'noye pravo* [Constitutional and Municipal Law], no. 1 (2019): 5-9.

[5] Valery Zorkin, "Sotsial'noye gosudarstvo v Rossii: problemy sotsializatsii [The Social State in Russia: Problems of Socialization]," *Sravnitel'noye konstitutsionnoye obozreniye* [Comparative Constitutional Review], no. 1 (2008): 49.

The main issue when discussing socio-economic rights from an international law and a comparative law perspectives is the possibility of judicial protection of this group of rights, the justiciability,[6] which includes the ability to have procedural remedies (access to independent and impartial justice), as well as the opportunity to obtain effective compensation for violation of rights.[7]

Article 46 of the Constitution of the Russian Federation establishes a guarantee of judicial protection of rights and freedoms for everyone, without differentiating the groups rights, which accordingly brings social rights under judicial protection and allows citizens of the Russian Federation, unlike many other countries, to have certain specific requirements in the socio-economic sphere, including, first and foremost, actively defend and protect them. The Constitutional Court of the Russian Federation[8] (*hereinafter also* called– CC RF), which is the body of constitutional review, independently exercising judicial power through judicial proceedings on the basis of the federal constitutional law of 21 July 1994 "On the Constitutional Court of the Russian Federation,"[9] plays a huge role in the mechanism of judicial protection of social and economic rights. Analysing thematic statistics of complaints[10] to the Constitutional Court of the Russian Federation, we can see that this method of protection is quite popular among citizens.

2.2. Statistics of Complaints to the Constitutional Court of the Russian Federation

Within the last years, the Constitutional Court of the Russian Federation receives 14-15 thousand constitutional appeals (complaints) annually. Moreover, the overwhelming majority thereof are complaints from citizens and their associations who exercise the right to file a constitutional complaint as enshrined

[6] Dmitrii Kuznetcov, "Sudebnaya zashchita sotsial'no-ekonomicheskikh prav: Pro et Contra [Justiciability of Social and Economic Rights: Pro et Contra]," *Vremya I Pravo* [Time and Law], no. 4 (2014): 6.

[7] "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability," International Commission of Jurists, Geneva, 2008, 10.

[8] See more at "Official Website of the Constitutional Court of the Russian Federation," http://www.ksrf.ru/EN/INFO/Pages/default.aspx.

[9] Federal Constitutional Law of July 21, 1994, No. 1-FCL, on Constitutional Court of the Russian Federation. http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx.

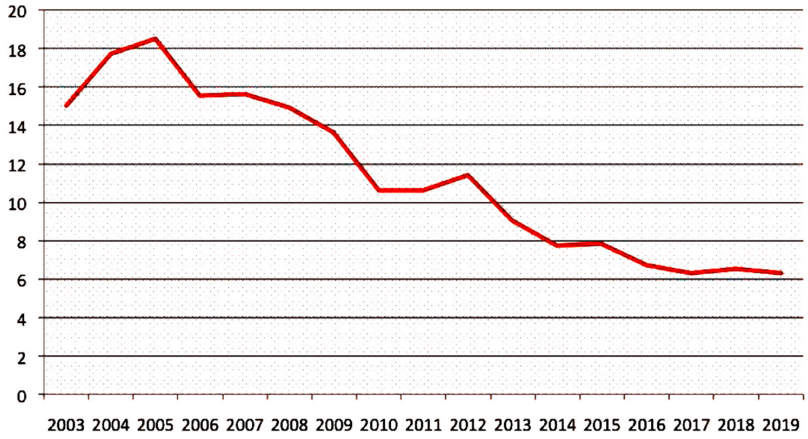
[10] Such annual statistics have been maintained by the Secretariat of the Constitutional Court of the Russian Federation since 2003.

in Article 125 of the Constitution of the Russian Federation. The second place in the number of appeals belongs to general jurisdiction and arbitration courts, which can appeal to the Constitutional Court of the Russian Federation if, while considering a specific case, a court finds that the law applied or to be applied in this case is unconstitutional.

Since it is unreasonable and quite complicated to separate the number of complaints in respect of each social right, the paper represents the graph of the number of complaints on social protection issues (red line on the graph) as a percentage of the total number of appeals to the Constitutional Court of the Russian Federation by years. It makes possible to see how peak years for such complaints correlates with the implementation of state reforms in the social sphere, and to observe a downward trend and maintaining a stable percentage in the following years.

Graphic 1

Graph of the number of complaints for social protection as a percentage of the total number of complaints to the Constitutional Court of the Russian Federation

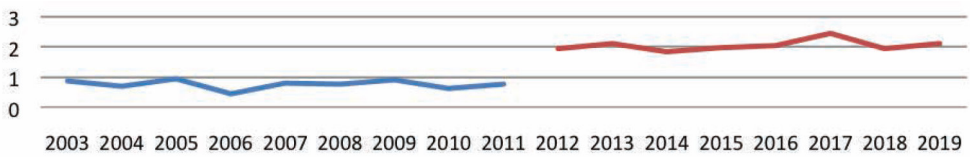


As regards the protection of economic rights, the number of such complaints to the Constitutional Court of the Russian Federation is much smaller, and the statistics have changed thematically. Hence, highlighting for example property

rights complaints, the protection of which by the Constitutional Court of the Russian Federation will be considered in a detail below, until 2011 such appeals were counted in the section "Reform in the field of economics and finance: privatisation, ownership, entrepreneurial activity" (blue line on the graph), and since 2012 years - in the section "Civil law: property right and other property rights" (red line on the graph). The corresponding schedule is presented below:

Graphic 2

Graph of the number of complaints on the issues including property rights as a percentage of the total number of complaints to the Constitutional Court of the Russian Federation



Thus, we can conclude that the number of such appeals never exceeded the 2.5 percent limit.

2.3. Statistics of Decisions of the Constitutional Court of the Russian Federation

Constitutional protection of socio-economic rights is carried out by the Constitutional Court of the Russian Federation by means of constitutional proceedings (consideration of a case to verify the constitutionality of a particular norm) both by holding a public hearing of the case and by applying the procedure without holding a public hearing (written proceedings) the result of which may be:

1. Adoption of the decision on the refusal to consider the case (*hereinafter* - inadmissibility decision). This type of decisions of the Constitutional Court of the Russian Federation can in no case be excluded from the general defence mechanism, since such decisions, firstly, may contain significant legal positions of the Constitutional Court of the Russian Federation, and

even recommendations addressed to the legislator, and secondly, may have purely practical value for the applicants and provide for the possibility of reviewing their cases.

2. Adoption of a decision with final Judgement (*hereinafter* - Judgement):
   - on the recognition of the challenged norm to be in accordance with the Constitution of the Russian Federation (constitutional),
   - on the recognition of a norm as being not in accordance with the Constitution of the Russian Federation (unconstitutional),
   - on recognition of the norm to be in accordance with the Constitution of the Russian Federation in the revealed constitutional and legal sense, which is binding upon the decision.

Below are the statistics on decisions of the Constitutional Court of the Russian Federation in the socio-economic sphere.[11]

Table 1

Statistics on Decisions of the Constitutional Court of the Russian Federation in the Socio-Economic Sphere

Overall number of Judgements of the CC RF	**586**
Among them regarding the issues of social protection and social security	**54**
Among them regarding the issues of property rights and other rights *in rem*	**23**
Overall number of inadmissibility decisions of the CC RF	**33 869**
Among them regarding the issues of social protection and social security	**2822**
Among them regarding the issues of property rights and other rights *in rem*	**1533**

[11] As to 1 July 2019.

2.4. Substantive Aspect of the Decisions of the Constitutional Court of the Russian Federation

The Constitutional Court of the Russian Federation believes that the protection of socio-economic rights is one of the most important of its tasks. Turning to the substantive aspect and the question of how to implement constitutional legal protection of socio-economic rights, I would like to quote judge of the Constitutional Court of the Russian Federation N.S. Bondar, who names the following methods of constitutionalisation of social protection institutions (this classification can be equally applied to the economic sphere): constitutional interpretation of the legal norms of certain branches of social legislation (pension, housing, family, social security law, labour law, etc.); constitutional adjustment of prevailing law enforcement practice, which gave or may give an unconstitutional meaning to the provisions of social legislation; identification of the constitutional nature of the social rights of citizens, giving them qualities of natural, inalienable and basic; interpretation of the norms of the Constitution itself, with the help of which a constitutional assessment and justification of sectorial social legislation is ensured and, at the same time, the development of the content of the constitutional norms themselves without changing the text of the corresponding constitutional provisions on social protection.[12]

A very important aspect in respect of socio-economic rights protection is the issue of methodology. In continental (European) legal systems, although they do not directly apply the political question doctrine, it distinguishes between "legal analysis" and "analysis of opportunities and beliefs,"[13] which may actually include consideration of political issues. However, there are no clear criteria which would make this or that issue purely technical or political, therefore,

[12] Nikolai Bondar, "Zashchita sotsial'no-ekonomicheskikh prav konstitutsionnymi sudami stran Vostochnoy Yevropy. Rossiyskaya Federatsiya. Konstitutsionnoye pravosudiye i sotsial'noye gosudarstvo [Protection of Socio-Economic Rights by the Constitutional Courts of Eastern Europe. Russian Federation. Constitutional Justice and Welfare State]" (M. Institut prava i publichnoy politiki, 2003), 172.

[13] Ceia Eleonora Mesquita,"The applicability of the political question doctrine in the foreign affairs field: should international treaties be regarded as non-justiciable acts?" (Paper presented at the IACL 2007 World Congress, Athens, June 2007).

the border between the problems that are subject to constitutional review is very flexible and variable.[14]

On the issues of the permissibility of restricting the rights and freedoms of man and citizen, the Constitutional Court of the Russian Federation has repeatedly noted that these restrictions must be proportionate to constitutionally recognized goals and at the same time, the essence and the real content of the law itself (for example, Judgements of 19 July 2011 No. 17-P and 22 April 2013 No. 8-P). The constitutional grounds for such an interpretation of the criteria for limiting human rights were the provisions of Section 2 of Article 55 of the Constitution of the Russian Federation, which contains a ban on the derogation of the rights and freedoms of man and citizen, as well as Section 3 of Article 55 that human rights can be limited only to the extent necessary in order to protect constitutional values.

The Constitutional Court of the Russian Federation has also repeatedly emphasized that maintaining citizens' trust in the law and actions of the state presupposes legal certainty, maintaining a reasonable stability of legal regulation, the inadmissibility of arbitrary changes to the current system of norms and the predictability of legislative policy so that participants in the relevant legal relations can reasonably foresee consequences of their behaviour and to be sure of the immutability of their officially recognized status, acquired rights, the effectiveness of state protection, i.e., that the right acquired by them on the basis of the current legislation will be respected by the authorities and will be implemented (Judgements of 16 December 1997 No. 20-P, 24 May 2001 No. 8-P, 19 June 2002 No. 11-P, 23 April 2004 No. 9-P, Decision of 4 December 2003 No. 415-O, etc.).

The Constitutional Court of the Russian Federation also noted that in the field of social security, adherence to the principle of equality means *inter alia* the prohibition of introducing differences in the rights of persons belonging to the same category without objective and reasonable justification (prohibition of

[14] See e.g.: Diane A. Desierto, "Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa," *Asian-Pacific Law & Policy Journal* 11, no. 1 (2009).

different treatment of persons in the same or similar situations) (e.g. Judgement of 16 July 2007 No. 12-P), and differences in the conditions for the acquisition by certain categories of citizens of social rights and its implementation are permissible if they are objectively justified and pursue a constitutionally significant aims, are used to achieve these objectives, and the legal means are proportionate thereto (e.g. Judgment of 15 March 2005 No. 3-P).

The indicated legal positions of the Constitutional Court of the Russian Federation can be called fundamental in the protection of socio-economic rights. In protection of the Court's approach, I would like to bring some arguments empirically extracted from the Court's case law. Firstly, the possibility of constitutional courts to consider issues relating to civil and political rights is not in doubt, because in this case the courts are not included in the assessment of the economic situation or in the redistribution of resources, which traditionally falls under the competence of political branches of government. Secondly, when discussing approximate content of socio-economic rights, it is not taken into account that human rights are an extremely broad category. Each right has its own content, which is established in the framework of international treaties, constitutional law-making, interpretation of rights by courts and other bodies, including supranational ones.[15] Thirdly, the Constitutional Court is not willing to make a strict division between positive and negative rights in respect of the second generation rights.[16] Although it goes without saying that in implementing socio-economic rights, the state often needs to spend more resources than in the case of first-generation rights, however, this is rather a matter of quantity than quality, which does not affect the essence of rights.[17] And finally, the problem of the extent of judicial intervention in the sphere of realisation of socio-economic rights shall be considered from the point of view of admissibility, degree and possibility of influence on democratically elected bodies from the

[15] See Sandra Liebenberg, *Social and Economic Rights in Constitutional Law of South Africa 41-11* (M. Chaskalson et al (eds.)) (Cape Town: Juta, 1996).

[16] For a details in a comparative perspective see: Henry Shue, *Chapters 1-2 of Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980).

[17] Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no.2 (May 1987): 156-229.

side constitutional justice. Without going into theoretical details regarding the relationship between the political branches of government and the judiciary, it should be noted that the democratic legitimacy of constitutional review of the observance of socio-economic rights follows from the need to protect and ensure the interests of minorities or groups of people whose interests are not represented and not protected.[18]

III. PROTECTION OF THE RIGHT TO PRIVATE PROPERTY IN THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

First of all, it should be noted that in the USSR there was virtually no private property right, and since the establishment of the Constitutional Court of the Russian Federation in 1991, the latter has been at the forefront of the political and economic transformations that have taken place in the society. As noted by the President of the Constitutional Court of the Russian Federation V.D. Zorkin, "the constitutionally enshrined right of private property and the right to entrepreneurial activity were truly a stunning novelty for the majority of Russian citizens. The novelty with which the citizens came across for the first time in their lives and with which they simply did not understand what to do. And since the developed legislative framework for the realisation of these rights at the time of the adoption of the new Constitution was practically absent, and even later lagged behind the requirements of legal regulation of relations in the sphere of property and entrepreneurship, the process of realising these rights in Russia has been accompanied by gross and minor violations for many years."[19]

Correcting the legislative and law enforcement practice at that time, the Constitutional Court of the Russian Federation made a great contribution to the establishment and strengthening of the concept of private property law, its

[18] See e.g.: Aoife Nolan, Bruce Porter, Malcolm Langford, "The Justiciability of Social and economic Rights: an Updated Appraisal" (CHRGJ Working Paper No. 15, 2007).

[19] Valery Zorkin, "Rossiya: dvizheniye k pravu ili khaosu. Sotsial'no-gosudarstvennyy krizis i pravovaya sistema [Russia: Movement towards Law or Chaos. Social and State Crisis and Legal System]", http://www.patriarchia.ru/db/text/209611.html [last access: 8 August 2019].

borders and its implementation in the period of the transition from Soviet-style planned economy to free market.

According to Article 35 of the Constitution of the Russian Federation, the right to private property is protected by law (Section 1); everyone has the right to own property, to use it and dispose of it both individually and jointly with other persons (Section 2); no one may be deprived of his property except by a court decision, and the compulsory alienation of property for State needs can be made only on condition of preliminary and equivalent compensation (Section 3).

In the Judgement of 17 December 1996 No. 20-P the Constitutional Court of the Russian Federation established that the right to private property is not absolute and does not belong to such rights that, in accordance with Article 56 (Section 3) of the Constitution of the Russian Federation, are not subject to any restriction. Therefore, within the meaning of Article 55 (Section 3) of the Constitution of the Russian Federation, the right in question can be limited by a federal law, but only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, and ensure defence of the country and state security. This corresponds to the universally recognized principles and norms of international law, in particular the Universal Declaration of Human Rights of 10 December 1948, according to which everyone has obligations to a society in which the free and full development of his personality is possible (Part 1 of Article 29); in the exercise of their rights and freedoms, each person shall be subject only to such restrictions which are established by law solely to ensure due recognition and respect for the rights and freedoms of others and to satisfy the fair requirements of morality, public order and general welfare in a democratic society (Part 2 of Article 29). A similar provision on the permissibility of restricting human and civil rights is also provided for by the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (Article 4).

In the said case, the Constitutional Court of the Russian Federation considered the constitutionality of certain provisions of the law of the Russian Federation "On Federal Bodies of the Tax Police" and came to the conclusion

that the collection of tax cannot be regarded as arbitrary deprivation of an owner of his property – it represents a legitimate seizure of part of the property arising from the constitutional public law obligation.

The Judgement of the Constitutional Court of the Russian Federation dated 20 May 1997 No. 8-P examined the norms of the Customs Code stipulating the right of customs authorities to carry out, along with other types of penalties, confiscation of goods and vehicles as objects of violation of customs rules. The Constitutional Court of the Russian Federation indicated that if a person does not agree with the seizure of property in the form of an administrative decision on confiscation, he has the opportunity to challenge the correctness of the decision in a court; the possibility of appealing decisions and actions of state authorities and their officials to a court is a general guarantee arising from Article 46 (Section 2) of the Constitution of the Russian Federation.

For persons who violate customs laws and for whom the competent state authorities apply sanctions for the offense, the right to use the constitutional guarantee to protect private property through the court is retained, but this protection will take place on the basis of subsequent judicial control. Thus, the Constitutional Court of the Russian Federation established that the issuance by customs authorities of a confiscation of property in the form of a sanction for a customs offense with a guarantee of subsequent judicial control as a way of protecting the rights of the owner does not contradict the requirements of the Constitution of the Russian Federation.

In the Judgement of 11 March 1998 No. 8-P the Constitutional Court of the Russian Federation recognized the norms of the RSFSR Code of Administrative Offenses and the Customs Code of the Russian Federation, on the basis of which citizens were deprived of their property without a court decision and without the possibility of appealing against the said actions in a court of law – contrary to Article 35 (Section 3) of the Constitution of the Russian Federation and its judicial guarantees of property rights, which correspond to the norms of international law, providing, in particular, the right of everyone in determining his rights and obligations in any civil proceedings to a fair and

public hearing by a competent, independent and impartial tribunal established by law (Article 14 of the International Covenant on Civil and Political Rights of 19 December 1966).

This legal position was developed in later decisions of the Constitutional Court of the Russian Federation, for example, in the Judgement of 16 July 2008 No. 16-P:

> The constitutional guarantees of the protection of private property rights by law and the permissibility of deprivation of property, only by a court decision, expressing the principle of inviolability of property, and constitutional guarantees of judicial protection extend both to the sphere of civil law relations and to relations between the state and the individual in the public law sphere. This means that in cases of seizure of property from the owner, regardless of the grounds for such seizure (including to ensure criminal proceedings), since it is mandatory and involves a dispute about the right to this property, an effective judicial procedure must be carried out.
>
> The seizure of property from the owner or legal owner is permissible without a court decision only in cases where such a seizure is a procedural measure of an interim nature and is temporary, does not lead to the deprivation of a person's right of ownership and involves subsequent judicial control; the alienation of property seized as evidence in a criminal case is impossible without a court decision.

By virtue of the fundamental principles of the rule of law and legal equality, state interference in property relations (and the Constitutional Court of the Russian Federation has repeatedly called attention to it in its decisions) is permissible only if it is not arbitrary and does not upset the balance between the requirements of the interests of society and the necessary conditions for protecting fundamental rights of the individual, suggest a reasonable proportionality of the means used and the aim pursued, thus, a balance is ensured between constitutionally protected values and provides that a person is not subjected to excessive burden.[20]

[20] See Valery Zorkin, *Axiological Aspects of the Russian Constitution. Chapter in Constitutional Topography Vol.6* (Eleven International Publishing. 2010); Thomas Kleinlein, "The Procedural Approach in International Human Rights Law and Fundamental Values: Towards a Proceduralization of the Interface of International and Domestic Law?" (European Society of International Law (ESIL) 2017 Annual Conference (Naples) (April 15, 2018)).

Hence, by the Judgement of 14 June 2015 No. 13-P the contested provisions of the Federal Law "On State Registration of Rights to Real Estate and Transactions Therewith" were recognized as not complying with the Constitution of the Russian Federation to the extent that they did not allow payment to a *bona fide* purchaser, from whom housing was sought, one-time compensation at the expense of the treasury of the Russian Federation in cases where, for reasons beyond the control of it, in accordance with a court decision that entered into legal force to compensate him for harm caused as a result of the loss of such property, recovery under an executive document within one year from the day the calculation deadline for presenting this document for execution was not carried out on the grounds of the lack of grounds for holding the competent state body responsible for illegal actions (inaction) associated with the state registration of rights to the indicated premises.

One more case can be noted regarding the rights of a *bona fide* purchaser and the actions of state bodies. In the Judgement of 22 June 2017 No. 16-P the Constitutional Court of the Russian Federation recognized the disputed provision of the Civil Code of the Russian Federation inconsistent with the Constitution of the Russian Federation to the extent that it permits the recovery from unlawful possession of residential premises, which had been escheated, from its *bona fide* purchaser, who, on a chargeable purchase of this dwelling, relied on the data of the Unified State Register of Real Estate and, in the manner prescribed by law, registered the ownership of it, by and appropriate public law body in the case when this public law body has not taken – in accordance with the requirements of reasonableness and prudence in the control of escheated property – timely measures to establish it and properly register the ownership of this property.

In this case, the Constitutional Court of the Russian Federation agreed with the position of the European Court of Human Rights, according to which the claim for housing on the claim of a public law body, subject to repeated verification by the public authorities themselves during administrative procedures for registering property rights with title documents and transactions concluded in relation to the relevant object, entails disproportionate interference with the

exercise of the right of ownership of housing, if public authorities know about the status of the dwelling as an heirless property, but failed to take timely action to obtain title and protection of their rights thereto.

3bis. Private Property Rights by Constitutional Court of the Russian Federation and by European Court of Human Rights

Russia is a party to the Convention for the Protection of Human rights and Fundamental Freedoms.[21] Hence, Russia has recognized jurisdiction of the European Court of Human Rights (*hereinafter* – the ECtHR) whose decisions and legal positions constitute a part of Russian legal system.[22]

Until recently, it seemed that on the issue of relationship between Russia's Constitution and the Convention there was absolutely no serious theoretical problem. After all, both the Constitution and the Convention quite clearly "refer to a coinciding catalogue of fundamental rights and freedoms"[23] and in 2006, Constitutional Court of the Russian Federation pointed out in its Resolution that the subject of its regulation, as well as that of the ECtHR, was one and the same, namely - human rights and fundamental freedoms.

However, every year is witnessing a growing number of ECtHR rulings that artificially precipitated collisions between statutes in Russia's Constitution and the Convention. As a result, the ECtHR is factually demanding chat Russia must change its Constitution - a demand that is unconditionally groundless from the legal point of view.[24]

---

[21] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[22] For the detail in respect of interaction of national legal order and the ECtHR see among many other sources: Frank Emmert, "The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe - Conclusions Drawn and Lessons Learned" (Paper at Indiana University Robert H. Mc.Kinney School of Law, December 2011), Frank Emmert and Leonard Hammer, *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven International Publishing, 2012); Oreste Pollicino and Oleg Soldatov, "Striking the Balance between Human Rights Online and State Security Concerns: The Russian Way in a Comparative Context," *German Law Journal* 19, no. 1 (2018); Alec Stone Swet and Helen Keller, *Assessing the Impact of the ECHR on National Legal Systems* (Oxford Scholarship Online, 2008).

[23] Valery Zorkin, "The dialogue of the Constitutional Court of the Russian Federation and the European Court on Human Rights in the context of constitutional order." ksrf.ru>News/Speech/Pages/ViewItem.aspx.

[24] For the details see Marianna Abramova, "Constitutional Justice of Russia within the judicial landscape of contemporary Europe," Number 40 (2018): 21-44.

Nevertheless, the positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights regarding private property rights have many points of contact.

First of all, it should be noted that the positions of the courts are close on the issue of which specific rights fall under the guarantee of property rights. The European Court of Human Rights has repeatedly pointed out that the concept of "property" within the meaning of Article 1 of Protocol No. 1 to the Convention has an autonomous meaning that does not boil down to the right of ownership of things and does not depend on a formal classification under national law; some other property rights and interests may be protected under this article (for example *Beyeler v. Italy* ([GC], number 33202/96, § 100, ECHR 2000-I)).

The Constitutional Court of the Russian Federation also adheres to a broad understanding of property when it comes to constitutional guarantees. In particular, the Constitutional Court of the Russian Federation noted that the concept of "property" used in Article 35 of the Constitution of the Russian Federation in its constitutional sense covers both property rights and claim rights (Judgement of 15 February 2016 No. 3-P). Such rights include, for example, the rights of claim and the legitimate interests of creditors in bankruptcy proceedings (Judgement of 16 May 2000 No. 8-P), as well as property claims of shareholders with protection of the rights of shareholders, including minority shareholders as a weak side in the system of corporate relations (Judgement of 10 April 2003 No. 5-P).

Developing the aforementioned position on the concept of property, the European Court developed the concept of "legal expectation". Although Article 1 of Protocol No. 1 to the Convention applies to property owned by a person and does not confer him the right to receive property, in certain circumstances the "legal expectation" of receiving the property may also be protected. In the case of *Béláné Nagy v. Hungary* ([GC], number 53080/13, ECHR 2016, § 74–75), the Court stated that such an expectation should be more definite than just hope, and should be based on a rule of law or on a legal act, such as a court

decision (judgement). The applicant was granted a disability pension in the aforementioned case, which was later cancelled.

The ECtHR found that the refusal to pay money in 2012 caused the applicant an unnecessary burden. According to the Court's position, the applicant, starting from 2001, had "legitimate expectations for a disability pension and when her medical condition required it", therefore these expectations were regarded by the European Court as "property", which falls under the protection of the Article 1 of the First Additional Protocol (the protection of property). It was noted that "if the payment established by the legislation in force at that time, as well as by contributions made to the pension fund, may, under certain conditions, give rise to a right of ownership" (§ 36), as well as "in cases where there is a certain right in accordance with national legislation to receive social benefits, the importance of such a right must be confirmed by the application of Article 1 of Protocol No. 1" (§ 37). The Court, in the light of the circumstances of the case, has found a violation of Article 1 of Protocol No. 1 to the Convention.

The concept of legal expectations is also found in the practice of the Constitutional Court of the Russian Federation. For example, the CC RF drew attention to the existence of grounds for legitimate expectations of a reduction in heating fees when equipped with individual meters for living quarters in an apartment building, also equipped with a common house meter (Judgement No. 30-P of 10 July 2018). Legislation that did not allow the testimony of individual metering devices to be taken into account if their safety in separate rooms was not ensured was found to be contrary to the Constitution of the Russian Federation, in particular its Article 35.

Also of interest is the proximity of the approaches of the European Court of Human Rights and the Constitutional Court of the Russian Federation on issues related to confiscation of property - the measure, also being, according to the terminology of the European Court of Human Rights, an interference with the right of ownership guaranteed by Article 1 of the Additional Protocol No. 1. The Court's Judgment in *Frizen v. Russia* (number 58254/00, 24 March 2005) concluded that the confiscation of the property of the owner in criminal

cases brought against his wife must be justified, necessary and based on the law. Since these conditions were not fulfilled in the present case, the European Court found a violation of Article 1 of Protocol 1. The Constitutional Court of the Russian Federation took a similar position, recognizing in its Judgement of 25 April 2011 No. 6-P that the provisions of the law contradict the Constitution of the Russian Federation when allowing sanctioning administrative offenses to confiscate an offense instrument belonging to another person who did not commit unlawful acts with its use. The Constitutional Court of the Russian Federation noted that this situation actually means the application of a measure of responsibility to a person who is not guilty of an administrative offense, and therefore does not correspond to the provisions of Article 35 (Sections 1-3) of the Constitution guaranteeing the right to private property.

Courts have similar positions with regard to the amount of penalties. The ECtHR Judgment in the case of *Mamidakis v. Greece* (number 35533/04, 11 January 2007) established that a financial liability arising from the payment of a fine if it places an undue burden on the person concerned or it has a significant impact on his financial condition, may cast doubt on this right, guaranteed by the first paragraph of the same Article. The Constitutional Court of the Russian Federation referred to this decision when it reviewed constitutionality of the provisions of the Code of the Russian Federation for Administrative Offenses. In the Judgement of 17 January 2013 No. 1-P the Constitutional Court of the Russian Federation noted that the provisions of the law which, by establishing a significant minimum administrative fine, do not allow a fine to be imposed below the minimum limit, which contradicts to Article 35 (Sections 1- 3) of the Constitution and this do not allow, among other things, to take into account the property status of the offender.

And last thing to be discussed in this section is the approaches of the European Court of Human Rights and the Constitutional Court of the Russian Federation to the issue of protecting property rights in respect of one of the most widely discussed cases – the *Yukos* case. In the Judgment in the case *OAO Neftyanaya Kompaniya Yukos v. Russia* (number 14902/04, 20 September 2011)

[Former First Section]), the European Court of Human Rights found *inter alia* a violation of Article 1 of the First Additional Protocol to the Convention by looking at circumstances of the case outside its national context, which ultimately led to the adoption of the Judgement of the Constitutional Court of the Russian Federation of 19 January 2017 No. 1-P. In the said Judgement the Constitutional Court of the Russian Federation, referring to the problem of alleged violation of the ownership rights of shareholders, noted in paragraph 7 of the Judgement that Russian law does not exclude the possibility of protecting their rights violated by the management of the company. In this regard, in particular, the Government of the Russian Federation is authorized to initiate consideration of the issue of payment of the corresponding amounts in the procedure for the distribution of the newly discovered property of a liquidated legal entity provided for by Russian and foreign legislation, which can only be done after settlements with creditors and taking measures to identify other property (for example hidden in foreign accounts). However, such a payment – based on the legal positions expressed in this Judgement – in any case should not affect budget revenues and expenses, as well as property of the Russian Federation.

In this sense, the Constitutional Court once again emphasised the recognition and real existence in the Russian legal field of the possibilities of protecting property rights.

It is also important that the Constitutional Court of the Russian Federation, in contrast to the approach of the ECtHR, identifies the constitutional and legal meaning of Article 113 of the Tax Code of the Russian Federation, as follows from the legal positions formulated in the Judgement of 14 July 2005 No. 9-P, where the CC RF specified the requirements of Article 57 of the Constitution of the Russian Federation according to their meaning in a systemic connection with other basic constitutional provisions on rights and freedoms that have direct effect. Based on the taxpayers reference to the fact that they could not have foreseen which interpretation of this article the Constitutional Court of the Russian Federation would undertake, in essence, would mean upholding an unconstitutional interpretation of its provisions based on a purely formal

understanding of the statute of limitations for tax liability offenses, contrary to its actual constitutional legal meaning. Such kind of links are actually used to justify the admissibility of dishonest behaviour of a taxpayer, which was aimed at concealing arrears both in the course of tax control measures and in the audited taxation period as a whole.

Thus, the Constitutional Court of the Russian Federation turned to a comprehensive analysis of the national legal provisions raised in this case, which was not done by the ECtHR in its Judgment (the full English translation of the Judgement of the Constitutional Court can be found on the official webpage of the CC RF).

A time analysis of the legal positions of the Constitutional Court devoted to the right of the private property allows us to conclude that this institution in Russia is now fully established, the exercise of property rights is guaranteed at the European level. Possible restrictions by federal law of the right to own, use and dispose of property, based on the general principles of law, must meet the requirements of justice, be adequate, proportional and necessary to protect constitutionally significant values, including private and public rights and the legitimate interests of others. The state should not arbitrarily interfere in the activities of participants of market transfers.

IV. PROTECTION OF THE RIGHT TO PENSION PROVISION IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

The dissolution of the USSR had a great effect on the social sphere, primarily in the sense of political ideology. The emphasis with the purely paternalistic role of the state for all was shifted to the personal development of the majority and the protection of the most vulnerable minority. It follows from the Russian Constitutional Court practice and doctrine that such shift should be done delicately, giving the citizens sufficient period of time to adapt to the changes.

The Constitution of the Russian Federation in accordance with the goals of the social state (Article 7, Section 1) guarantees everyone social security by

age, in case of illness, disability, loss of a bread-winner, for raising children and in other cases established by law (Article 39, Section 1). The most important element of social security, the main content of the provision of a person's livelihood, is pension provision. State pensions in accordance with Article 39 (Section 2) of the Constitution of the Russian Federation are established by law.

Reforms of the pension system have occurred quite often in the history of modern Russia due to various reasons, and the Constitutional Court of the Russian Federation has always acted as a guarantor of a certain level of protection of citizens in this matter while distancing itself from interference in the sphere of material and financial capabilities of the state.

As the Constitutional Court of the Russian Federation itself indicated in its Decision of 20 November 1998 No. 176-O, it cannot establish specific amounts of pensions, allowances, types of benefits, etc., since such would mean an assessment of the appropriateness and economic feasibility of decisions of the legislator, which does not belong to the powers of the Constitutional Court.

In general, the main positions from which the Constitutional Court of the Russian Federation proceeds when resolving cases related to pension disputes are: the need to ensure equal conditions for the realization of acquired social rights (Judgement of 3 June 2004 No. 11-P), the inadmissibility of unjustified differentiation in the conditions and norms of social security (Judgement of 25 December 2007 No. 14-P), the inadmissibility of lowering the level of pension provision for citizens (Judgement of 25 December 2007 No. 14-P) and the inadmissibility of significant imbalances between payments for compulsory social insurance and provided insurance coverage (Judgement of 22 March 2007 No. 9-P).

Now I would like to consider in a detail some of the CC RF positions in the field, as well as a number of significant cases of the Constitutional Court of the Russian Federation in this area.

Regarding the early decisions of the Constitutional Court of the Russian Federation, one can note the Judgement of 16 October 1995 No. 11-P, where

the suspension of the payment of pensions to persons while in prison was recognized as a restriction on the right to social security.

The Constitutional Court of the Russian Federation indicated that retirement pensions are granted in connection with labour or other activities that the legislator recognizes as socially useful. Working citizens, including those in places of deprivation of liberty, through a system of compulsory insurance contributions to the Pension Fund of the Russian Federation participate in the formation of funds for the payment of labour pensions. Thus, these pensions are earned, deserved by previous work, service, and fulfilment of certain duties significant for society.

In the Judgement of 15 June 1998 No. 18-P the Constitutional Court recognized provisions of the Law of the Russian Federation "On the Payment of Pensions to Citizens Going for Permanent Residency outside the Russian Federation" as not complying with the Constitution of the Russian Federation to the extent that they allow depriving pensioners of the right to receive their retirement pensions if they went abroad for permanent residence before 1 July 1993, or after that date, but did not leave immediately before traveling to the territory of the Russian Federation, having established discrimination on ground of nationality and the uncertainty of their normative content.

In the Decision of 21 December 2000 No. 276-O the Constitutional Court of the Russian Federation indicated that, having established for men and women a different age for retirement and the necessary length of service for an old-age pension on general terms and on favourable terms, the legislator applied differentiation, based on physiological and other differences between them, as well as on the basis of the special social role of women in the society related to motherhood, which is consistent with the provision of Article 38 (Section 1) of the Constitution of the Russian Federation, in accordance with which the motherhood is protected by the state and cannot be viewed as a discriminatory restriction of constitutional rights, since such a decision of the legislator provides - in accordance with Article 19 of the Constitution of the Russian Federation - the achievement of a genuine rather than formal equality.

This does not preclude a possibility in future, during the implementation of the pension reform, to resolve the issue of whether retirement pension should be awarded to men on the same conditions as to women.

The most important decision in the pension sphere is the Judgement of the Constitutional Court of the Russian Federation of 29 January 2004 No. 2-P where the Court established that determining the legal grounds, conditions of appointment, the procedure for calculating pensions and their sizes, the legislator is based on the economic possibilities of society on this stage of its development – should strive to gradually increase the level of pension provision, primarily for those with pensions below the subsistence level, in order to satisfy their basic necessities of life. Moreover, the previously established social security measures for pensioners cannot be cancelled without an equivalent replacement.

In the Judgement of 10 July 2007 No. 9-P, the Constitutional Court of the Russian Federation protected the rights of insured persons in case of non-payment or incomplete payment by the employer of insurance contributions to the Pension Fund of the Russian Federation.

The federal legislator, carrying out the legal regulation of relations in the field of compulsory pension insurance, must ensure a balance of constitutionally significant interests of all subjects of these relations, and the rules established by him to maintain the stability and autonomy of the financial system of compulsory pension insurance should not invalidate the constitutional right of citizens to retirement pensions.

Failure to pay the insurance contributions to the Pension Fund of the Russian Federation in full for the insured persons working under the employment contract due to the nature and purpose of the compulsory pension insurance and the need to ensure the rights of these persons should not impede the exercise of their rights in a timely manner and receive a retirement pension in full. Corresponding contributions must be paid, and their payment – based on the public law nature of the relationship between the state and the Pension Fund of the Russian Federation and the characteristics of the relationship between the state, policyholders and insured persons – must be provided, including by way

of enforcement. Otherwise, the essence of the state's obligation to guarantee the right of insured persons to a retirement pension would be distorted.

The challenged laws were found to be inconsistent with the Constitution of the Russian Federation to the extent that in case of non-payment or incomplete payment the insurer (employer) of insurance premiums for certain periods of labour activity of these persons – they allow not to include such periods in their insurance period taken into account when determining the right to a retirement pension, and to reduce the size of its insurance part when assigning (recalculating) a retirement pension. In addition, it happens in the absence of sufficient guarantees for the unhindered exercise of the pension rights of insured persons who worked under an employment contract and who fulfilled the legal conditions for acquiring the right to a retirement pension.

The Judgement of 26 January 2018 No. 10-P reviewed constitutionality of laws, on the basis of which the issue of recovering from a citizen recognized as a disabled person, the amounts of disability pension received and the monthly payment of money in the case when the certificates are submitted to receive appropriate social protection measures, compiled on the basis of medical and social examination, were declared invalid due to procedural violations committed during such an examination.

By virtue of the legal position repeatedly expressed by the Constitutional Court of the Russian Federation, the Constitution of the Russian Federation obliges the state to protect dignity of the individual as a necessary prerequisite and basis for all other inalienable human rights and freedoms, the condition for their recognition and respect, and nothing can be the basis for diminishing individual dignity. In the field of pension provisions, this presupposes, in particular, the establishment of such legal regulation, which – in accordance with the related provisions of Articles 1 (Section 1), 2, 17 (Section 1), 18, 19 (Section 1) and 55 (Sections 2 and 3) of the Constitution of the Russian Federation, with the principles of legal certainty and maintaining the trust of citizens in the law and actions of the state, would guarantee citizens that decisions on the appointment of a pension are made by the authorised state bodies on the

basis of strict implementation of legislative requirements, as well as careful and a responsible approach to assessing the factual circumstances with which the law connects the emergence of the right to a pension, thoroughness in preparing documents confirming the existence of conditions necessary for assigning a pension and determining its size so that a citizen as a participant in the relevant legal relations can be confident in his officially recognized status and that the rights acquired by virtue of this status will be respected by the state and will be implemented (Judgement of 14 January 2016 No. 1-P; Decision of 7 December 2017 No. 2794-O et al.).

The Constitutional Court of the Russian Federation noted that although a citizen's receipt of the indicated amounts in the absence of legal grounds for it or in an amount greater than what is due under the law falls under the signs of unjust enrichment at the expense of the Pension Fund of the Russian Federation, it should be borne in mind that the citizen is obligated to return the received amounts from the moment the relevant decision is made, the funds due to the identification of only formal (procedural) violations of the procedure for recognising a citizen as a disabled person, another institution of medical and social expertise – in the absence of established facts of bad faith (illegality) on the side of the person concerned – would lead to a disruption of the balance of public and private interest in the pension sector.

In accordance with the revealed constitutional and legal meaning, it is recognized that the contested provisions cannot serve as a basis for recovery from a citizen recognized as a disabled person of the disability pension received and monthly cash payment in that case.

And finally, I would like to dwell on one of the latest decisions of the Constitutional Court of the Russian Federation, which received the greatest public response.

4bis. Pension Reform in Russian Federation

The pension reform currently underway in Russian, in particular, provides for an increase of age from 60 to 65 years for men and from 55 to 60 years for women, upon reaching which a retirement insurance pension is awarded on a

common basis; a five-year increase in the age for assigning a social retirement pension to citizens who are not eligible for an insurance pension, as well as the age required for the early appointment of an old-age insurance pension to citizens who work in the Far North and equivalent areas.

The said norms on raising the retirement age became the reason for numerous protests and public demonstrations, as well as the subject of application of a group of deputies of the State Duma of the Federal Assembly of the Russian Federation who addressed the Constitutional Court of the Russian Federation.

In accordance with the applicants' position, the challenged provisions "boil down to the fact that the norms on raising the age are unreasonably introduced, upon reaching which social and insurance pensions will be awarded, which worsens and diminishes the constitutional rights of citizens to social security in old age," and the law itself "as published contrary to the opinion of the majority of citizens and does not meet generally accepted criteria of a social state, as it does not contribute to a decent life and free development of Russian citizens.

In its Inadmissibility Decision of 2 April 2019 No. 854-O, the Constitutional Court of the Russian Federation noted the following:

The choice of organisational and legal forms and mechanisms for the implementation of the constitutional right to pension provision falls within the competence of the legislator, who has a fairly wide margin of appreciation in determining the types of pensions, legal grounds and the procedure for their provision, rules for the appointment and allocation, as well as the formation of the financial basis for their payment. In the exercise of the authority in this area, the legislator has the right not only to establish but also to change the conditions of pension provision, while observing the requirements of the Constitution of the Russian Federation, including its Articles 17 (Section 1), 19 (Sections 1 and 2), 39 (Sections 1 and 2) and 55 (Sections 2 and 3).

Within the meaning of Articles 7, 15 (Section 4), 39, 55 (Section 3), 71 (paragraphs "a" and "c") and 72 (paragraph "g" of part 1) of the Constitution of the Russian Federation in conjunction with relevant international legal documents,

the legislator is authorised to increase the retirement age, if such an increase is due to socio-economic, demographic, biomedical and other objective factors.

Raising the retirement age – by virtue of Articles 19 (Sections 1 and 2), 39 (Sections 1 and 2) and 55 (Sections 2 and 3) of the Constitution of the Russian Federation – should not lead to abolition or derogation of the constitutional right to social security by age, protected by the constitutional principles of equality and justice. The Constitutional Court of the Russian Federation did not reveal violations of these principles.

The decision also noted compliance with the principle of maintaining citizens' trust in the law and actions of the state, since the new legislation provides for a phased reform, the existence of a transition period to adapt to the amendments, as well as additional guarantees for working citizens of pre-retirement age.

The Constitutional Court of the Russian Federation once again emphasized that it solves exclusively legal issues and does not consider the contested normative provisions for socio-economic, political and other expediency, including the impact on the socio-economic and political situation, as well as from economic feasibility (Judgements of the Constitutional Court of the Russian Federation of 11 November 1997 No. 16-P, 22 July 2002 No. 14-P, 9 July 2012 No. 17-P, 19 March 2014 No. 6-P, and 6 December 2018 No. 44-P; Decisions of the Constitutional Court of the Russian Federation of 12 July 2001 No. 179-O, 2 October 2003 No. 382-O, etc.).

Thus, it was established that the contested provisions do not contain uncertainty regarding the compliance with the Constitution of the Russian Federation, since it does not exclude the possibility of augmenting the retirement age by a federal law. The question of the appropriateness of this measure cannot be resolved by the Constitutional Court of the Russian Federation; otherwise, the Court would go beyond its competence, the request was deemed not raise grounds for further consideration.

This decision was criticized by the political opposition, as well as by a fairly broad mass of the population, however, considering it in the context of

the study, the fidelity of the Constitutional Court of the Russian Federation to its previous legal positions and the principle of reasonable constitutional and legal restraint and non-interference in the discretion of the legislator, which is recognized as unconditional the right to make political decisions, and therefore the principle of separation of powers and the foundations of the constitutional system of the Russian Federation.

V. CONCLUSION

As I noted, the problem of the extent of judicial intervention in the sphere of realisation of socio-economic rights shall be considered from the point of view of admissibility, degree and possibility of the influence on democratically elected bodies from the side constitutional justice.

The decisions cited earlier and the legal positions of the Constitutional Court of the Russian Federation illustrates the conclusion on the general role of the Constitutional Court of the Russian Federation in protecting the socio-economic rights of citizens both from a historical perspective and at the present stage of development of Russia. As N.S. Bondar noted back in 2003, the social policy of today's democratic Russia declares two main tasks: firstly, to protect the most vulnerable parts of the population from the harsh impact of the emerging market; secondly, to promote the economic activation of various segments of the population and, on this basis, contribute to the liberation of the state from the function of the direct "guardian" of its citizens, to overcome the Soviet legacy of state paternalism in the social sphere.[25] After 15 years, we can say that these tasks are still relevant. Therefore, often when resolving cases in the socio-economic sphere, the role of the Constitutional Court of the Russian Federation is to find a very delicate balance between the interests of various social groups and the interests of the state, between the possibilities for personal development and the right to state support and, more broadly, between two concepts – a social and legal democratic state, proclaimed by the Constitution of the Russian Federation.

[25] Bondar, "Zashchita sotsial'no-ekonomicheskikh," 161.

The present analysis of the legal positions of the Constitutional Court of the Russian Federation in the socio-economic sphere allows us to conclude also that:

1. The Constitutional Court may interpret the provisions of the Constitution taking into account the specific historical situation and make a dynamic correction of its legal positions.
2. The Constitutional Court develops a doctrine of constitutional self-restraint to prevent the potential encroachment of the Court on the powers of the executive or legislator. This doctrine allows to opt for more general instructions given remain final and obligatory.

In such a context, one can compare the Constitutional Court of the Russian Federation with a chess player. As a chess player, the Constitutional Court moves its pawns on the chessboard of the Russian state. The task of this party is to uphold the rule of law. And victory is not the only aim in this process of building a state governed by law, it is also important to suppress any attack thereon. The Constitutional Court of Russia, to continue the chess metaphor, is not blocked in this game. After a stormy beginning and difficult times (the formation of the new Russian state), the Constitutional Court of the Russian Federation today finds opportunities and can count on winning combinations, even if it is restricted with the constitutional system of checks and balances.[26]

BIBLIOGRAPHY

Abramova, Marianna. "Constitutional Justice of Russia within the judicial landscape of contemporary Europe." *Revista Derecho del Estado,* no. 40 (2018). https://dx.doi.org/10.18601/01229893.n40.02.

Alston, Philip and Gerard Quinn. "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights." *Human Rights Quarterly* 9, no.2 (May, 1987). https://www.jstor.org'stable/762295?seq=1.

[26] Marie-Elisabeth Baudoin, "La Cour constitutionnelle de la Fédération de Russie vue par un juriste français [The Constitutional Court of the Russian Federation seen by a french lawer]," Cahiers du Conseil constitutionnel [Notebooks of the Constitutional Council] no. 28, July, 2010.

Baudoin, Marie-Elisabeth. "La Cour constitutionnelle de la Fédération de Russie vue par un juriste français [The Constitutional Court of the Russian Federation seen by a french lawer]." Cahiers du Conseil constitutionnel [Notebooks of the Constitutional Council] no. 28. July, 2010. https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-cour-constitutionnelle-de-la-federation-de-russie-vue-par-un-juriste-francais.

Bondar, Nikolai. "Zashchita sotsial'no-ekonomicheskikh prav konstitutsionnymi sudami stran Vostochnoy Yevropy. Rossiyskaya Federatsiya. Konstitutsionnoye pravosudiye i sotsial'noye gosudarstvo [Protection of Socio-Economic Rights by the Constitutional Courts of Eastern Europe. Russian Federation. Constitutional Justice and Welfare State]." M. Institut prava i publichnoy politiki, 2003.

Constitution of the Russian Federation. "Constitution of the Russian Federation – 1993." http://www.ksrf.ru/en/INFO/LEGALBASES/CONSTITUTIONRF/Pages/default.aspx.

Constitutional Court of the Russian Federation. "Federal Constitutional Law of July 21, 1994, No. 1-FCL." http://www.ksrf.ru/en/Info/LegalBases/FCL/Pages/default.aspx.

Danelciuc-Colodrovschi, Natasa. "Fédération de Russie [Russian Federation]". Annuaire international de justice constitutionnelle [The international yearbook of the constitutional justice], 2014. https://doi.org/10.3406/aijc.2014.2178.

Desierto, Diane A. "Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa." *Asian-Pacific Law & Policy Journal* 11, no. 1 (2009).

Emmert, Frank. "The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe - Conclusions Drawn and Lessons Learned." Paper at Indiana University Robert H. Mc.Kinney School of Law, December 2011.

Emmmert, Frank and Lenonard Hammer. *The European Convention on human rights and fundamental freedoms in Central and Eastern Europe*. The Hague: Eleven International Publishing, 2012.

International Commission of Jurists. "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability." Geneva, 2008. https://www.escr-net.org/docs/i/1143054.

Kleinlein, Thomas. "The Procedural Approach in International Human Rights Law and Fundamental Values: Towards a Proceduralization of the Interface of International and Domestic Law." European Society of International Law (ESIL) 2017, Annual Conference (Naples), April 15, 2018.

Kolotova, Natalya. "Konstitutsionalizatsiya sotsial'nykh prav – tendentsiya razvitiya sovremennogo prava [Constitutionalization of Social Rights - a Trend in the Development of Modern Law]." *Konstitutsionnoye i munitsipal'noye pravo* [Constitutional and Municipal Law], no.1 (2019).

Kuznetcov, Dmitrii. "Sudebnaya zashchita sotsial'no-ekonomicheskikh prav: Pro et Contra [Justiciability of Social and Economic Rights: Pro et Contra]." *Vremya I Pravo* [Time and Law], no. 4 (2014).

Liebenberg, Sandra. *Social and Economic Rights in Constitutional Law of South Africa 41-11* (M. Chaskalson et al (eds.)). Cape Town: Juta, 1996.

Mesquita, Ceia Eleonora. "The applicability of the political question doctrine in the foreign affairs field: should international treaties be regarded as non-justiciable acts?" Paper presented at the IACL 2007 World Congress, Athens, June 2007.

Nolan, Aoife, Bruce Porter, Malcolm Langford. "The Justiciability of Social and economic Rights: an Updated Appraisal." CHRGJ Working Paper No. 15, 2007.

Official Website of the Constitutional Court of the Russian Federation. "About the Court." http://www.ksrf.ru/EN/INFO/Pages/default.aspx.

Pollicino, Oreste and Oleg Soldatov. "Striking the Balance between Human Rights Online and State Security Concerns: The Russian Way in a Comparative Context." *German Law Journal* 19, no. 1 (2018).

Popova, Arina V. "A Guide to Legal Research in Russia (update version)." A peper from Haser Global Law School Program. https://www.nyulawglobal.org/globalex/Russia_Legal_Research1.html.

Shue, Henry. *Chapters 1-2 of Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton University Press, 1980.

Sweet, Alec Stone and Helen Keller. *Assessing the Impact of the ECHR on National Legal Systems*. Oxford Scholarship Online, 2008.

Zorkin, Valery. "Rossiya: dvizheniye k pravu ili khaosu. Sotsial'no-gosudarstvennyy krizis i pravovaya sistema [Russia: Movement towards Law or Chaos. Social and State Crisis and Legal System]." URL: /http://www.patriarchia.ru/db/text/209611.html.

Zorkin, Valery. "Pretsedentnyy kharakter resheniy Konstitutsionnogo Suda Rossiyskoy Federatsii [The Precedent Nature of Decisions of the Constitutional Court of the Russian Federation]." *Zhurnal konstitutsionnogo prava*. no. 12 (2004).

Zorkin, Valery. "Sotsial'noye gosudarstvo v Rossii: problemy sotsializatsii [The Social State in Russia: Problems of Socialization]." Sravnitel'noye konstitutsionnoye obozreniye [Comparative Constitutional Review], no. 1 (2008).

Zorkin, Valery. *Axiological Aspects of the Russian Constitution. Chapter in Constitutional Topography Vol.6*. Eleven International Publishing. 2010.

Zorkin, Valery. "Dialog Konstitutsionnogo Suda Rossiyskoy Federatsii I Evropeiskogo Suda po pravam tcheloveka v kontexte konstitutsionnogo pravoporiadka [The dialogue of the Constitutional Court of the Russian Federation and the European Court on Human Rights in the context of constitutional order]." http://ksrf.ru>News/Speech/Pages/ViewItem.aspx.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev612

Legal-Political Paradigm of Indonesian Constitutional Court: Defending a Principled Instrumentalist Court

Mirza Satria Buana[*]
Lambung Mangkurat University, Banjarmasin, Indonesia
mirza.buana@ulm.ac.id

Received: 2 May 2018 | Revised: 20 March 2020 | Accepted: 1 April 2020

Abstract

The establishment of the Indonesian Constitutional Court in 2003 signified the formation of a bridge between the judiciary and politics. Through its judicial review process, there is a more tangible presence of the judiciary and court in the political arena. The Court helps with addressing moral predicaments and influencing the products of the legislature. This paper discusses the shifting of the legal-politico paradigm, particularly relating to judicial leadership of the Court because this significantly affects the role of the Court in the political arena. The history of the establishment of the Court's authority in judicial review is explored through a stylised analysis of the actions of two early Chief Justices. This paper also examines two Court decisions which illustrated the Court's authority on judicial review because they demonstrated the importance of policy-driven decisions and judicial restraint. The main argument of this work is that it is hard to categorize the legal-politico actions of the Indonesian Court into either legalism or instrumentalism. Often, the Court synthesises the two. The legal-politico paradigm is a dynamic one. The most feasible model of the Indonesian Constitutional Court is that of a Principled Instrumentalist Court, where policy decisions guide the formation of legislation according to constitutional values, but the judges maintain prudential self-restraint.

Keywords: Constitutional Court, Instrumentalism, Judicial Restraint, Judicial Review, Legalism.

---

[*] Associate Professor at Faculty of Law, Lambung Mangkurat University, South Kalimantan, Indonesia. A Doctor of Philosophy (Ph.D) from TC Beirne, School of Law, University of Queensland, Australia.

I. INTRODUCTION

In Indonesia's post-authoritarian context, the Court is often depicted as the manifestation of the constitutionalism principle. The Court guarantees that the supreme law of the land, the 1945 Constitution, maintains its position as a legal touchstone for the drafting and implementation of legislation. The Court also ensures a system of checks and balances in which political products can be challenged by constitutional provision.[1] The Court, because closely dealing with the constitutionality of legislation, often overlaps in action and works with the Legislature (the DPR) and Executive (the President) branches of government because they jointly draft and formulate legislation.[2] Since its establishment in 2003, the Court has undergone and survived fluctuations in political dynamics and pressures. The Court has two options: first, it must uphold the doctrine of parliamentary sovereignty, meaning that the Court must only either uphold or strike down legislation. Second, the Court can act as a legal activist by highlighting political motives underlying the legislation under review.[3] It is often questioned as to whether the Court takes part in legal activism or sliding politically progressive juristocracy. Each option presents different perspectives and results in a different outcome.

The Court's approaches to judicial review align with two contesting legal paradigms: legalism and instrumentalism.[4] The former stresses the fidelity of law, meaning that the law's authority lies in its autonomy as a social system. It guarantees that judges' methods of legal reasoning must uphold impartiality and from political interest. In the practical realm, judges must be able to exclude the influence of political factors, including judges' personal preferences or their political loyalties.[5] For the sake of analysis, it is important to note that legalism is more sociological than formalism. The latter stresses the rigidity of a law,

[1] Suri Ratnapala, "The Idea of a Constitution and Why Constitutions Matter," *Policy*, (Summer, 1999/2000): 3.
[2] As stipulated in Article 5 (1) and Article 20 of the 1945 Constitution (as amended).
[3] Mirza Satria Buana, "*Hubungan Tarik-Menarik antara Kepastian Hukum dan Keadilan Substansial dalam Putusan MK* [Substantive Justice and Legal Certainty on the Constitutional Court's decisions]" (LLM Thesis, Islamic University of Indonesia, 2010), 45.
[4] Theunis Roux, "Indonesia's Judicial Review Regime in Comparative Perspective," *Constitutional Review* 4, no. 2 (December, 2018): 192.
[5] *Ibid.*, 200.

claiming that law is a close-logical system and independent from nonlegal or sociopolitical influences.[6] Formalism extols the classical notion of the separation of power, implying that the judiciary must not interfere with the tasks of the Legislature and Executive branches by deconstructing the meaning of legislation. Judges, in this respect, can only 'find' the law, and are prohibited from creating the law.[7] In contrast, in legalism, the judges are allowed to be creative if there is 'open texture' in the written law.[8] Despite these differences, both legalism and formalism share a prescriptive account; law should be elaborated on what the law and its institutions should do. As a result, they prefer legal abstraction, rather than an empirically provable fact.

In contrast, instrumentalism is closely related to legal realism. Nonetheless, it also has several differences. Legal realism characterizes law as a flexible entity that can be either influenced by or influence, sociopolitical and economic realms.[9] However, legal realism relates more to a descriptive theory, while instrumentalism as the heart of the theory offers a practical answer for a legal problem. Instrumentalism is inherently pragmatic. It is known as 'pragmatic instrumentalism' which has several practical aims. First, it considers law not as an autonomous and self-sufficient system, but as merely an instrument to reach external-substantive goals that are derived from sources outside the law. Second, it treats 'the law in action' which considers the nature of law through social means. Thus, law science and legal institutions must resort to social sciences in order to construct a policy.[10] Third, in practical terms, the judiciary through judicial review can create and modify legislation under review in order to fit with the sociopolitical and economic conditions. In other words, the court modifies legislation under review to meet contemporary needs, circumstances, and interests.

---

6 Arthur Lenhoff, "On Interpretive Theories: A Comparative Study in Legislation," *Texas Law Review* 27 (1949): 313.
7 Donald Gifford, *Statutory Interpretation* (Sydney: The Law Book Company, 1990), 49.
8 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 132.
9 John C. Gray, *The Nature and Sources of The Law* (New York: The Macmillan Company, 1938), 100.
10 Robert S. Summer, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of our Dominant General Theory about Law and its Use," *Cornell Law Review* 66 (1981): 863.

The Indonesian Constitutional Court has a history of dynamic shifts in guiding the legal paradigm. Legalism, with a constrained court and principled judges, gave way to instrumentalism and its relatively instrumentalist-unconstrained court characterized by strategic policy decision-making.[11] This instrumentalist court easily slid into acting as a political court, positing itself as a solely political, rather than a legal actor.[12] This assertion can be evidenced by the appointing of Akil Mochtar, a former politician, to the Court as first a Justice and then the third Chief Justice in early 2013. The decision ultimately proved to be a mistake: Akil was arrested over bribery charges.[13] It became clear that the Court was not immune from politicisation, suddenly lost public confidence. Akil's involvement within the court system has been considered a 'Trojan Horse' strategy to weaken judicial power from within.[14] Bribery involving a judge occurred again in 2017 when Justice Patrialis Akbar was charged with accepting a bribe of USD 70,000 and IDR 4.043 million to grant a judicial review to a case involving businessmen's interest in Livestock Law.[15] In these two cases, the Court failed to systematically withdraw all matters of political interest from the competence of the judiciary.[16] These two cases of judicial corruption cases demonstrate that an instrumentalist court is prone to political influences, which could determine how the Court behaves. And, this politically influenced court could tarnish the integrity of the overall Court itself. Thus, this paper aims to revisit the concept of an instrumentalist court and suggest a more principled instrumentalist court.

This study discusses the dynamic of the *legalpolitico* paradigm of the Constitutional Court: legalism and instrumentalism, particularly relating to

[11] Theunis Roux, "American Ideas Abroad: Comparative Implications of U.S. Supreme Court Decision-Making Models," *International Journal of Constitutional Law* 13, no.1 (2015): 33.

[12] Roux, "Indonesia's Judicial Review," 207.

[13] The Jakarta Post Online, "KPK names Akil Mochtar suspect of money laundering charges," The Jakarta Post, 26 October 2013, http://www.thejakartapost.com/news/2013/10/26/kpk-names-akil-mochtar-suspect-money-laundering-charges.html.

[14] Feri Amsari, "Kuda Troya bagi MK [Troy's Horse strategy for demising the Constitutional Court]," *Kompas*, 4 April 2013.

[15] Tempo.com, "Patrialis Akbar Charged for Accepting Bribes," Tempo, 13 June 2017, https://en.tempo.co/read/news/2017/06/13/055884133/Patrialis-Akbar-Charged-for-Accepting-Bribes.

[16] Tim Lindsey, "Indonesian Trial Process and Legal System, Background Notes" (Unpublished Paper).

judicial leadership of the Court, because this significantly affects the role of the Court in judicial review and the political arena. This issue is inspired by the United States (U.S) Supreme Court, in which there has been a debate between legalism and realism perspectives.[17] This study scrutinizes the ideal role of the Court and its judges in the current form of Indonesia's democracy. It contemplates several Court decisions in the light of the bias of the Court towards certain political influences. The decisions provide partial evidence for the best way the Court sought to legitimate its decision. The public expects that the Court can tame or lessen political interests in both the substance and implementation of legislation through its judicial review. Besides its progressive role in the political arena, the public also demands that the Court be held accountable in its exercise judicial review authority.

First, both the legal and political contexts of the Court will be presented. This section stresses the shift in judicial leadership influenced by legalism court to that of instrumentalism. The shift reflects the legal paradigm of the Court and its approach to addressing demands for constitutionality in legislation. This section also presents previous attempts by the Court to politically restraint its judicial review in order to soothe the tensions with the DPR. In these instances, the Court introduced 'conditional' decisions. The following section highlights two decisions that illustrate the importance of defending the Court's instrumentalist nature to preserve constitutional values and the rule of law principle. One decision illuminates the political and functional importance of prudential restraint in the Court. The aim of restraint is to prevent the Court from becoming 'political court' and to promote its accountability and integrity. The following section presents a realistic model of what a 'balanced-court' may look like as one based on principled instrumentalism.

[17] Brian Z. Tamanaha, *Beyond The Formalist-Realist Divide: The Role of Politics in Judging* (New Jersey: Princeton University Press, 2010).

II. SHIFTING LEGAL PARADIGM: A QUESTION OF LAW'S AUTHORITY[18]

Politics have strongly influenced the formation of Indonesia's rule of law; politics often determine whether or not a law may be effectively constructed. Since early independence, politics have prevailed over aspiration for a more reliable rule of law. As an example, President Soekarno, in his *Demokrasi Terpimpin* (Guided Democracy), prioritized state security over human security by attaching law enforcement institutions, including the Police, Public Prosecutor and Judiciary under his executive power while lessening participatory democracy.[19] The idea of constitutional sovereignty through judicial review had been recognized, but could not be materialized because it was considered too liberal.[20] The law and its institutions were merely used as 'tools' for 'Soekarno's revolutionary dream.' The next regime, President Soeharto, more and less preserved and modified those previous authoritarian settings and further developed an illiberal rule of law in a more sophisticated way. As a result of more than 23 years under authoritarian governance, Indonesia's rule of law is still strong political, and whether democracy has been realized is still being contested.[21]

Amidst the constitutional amendments process from 1999-2002,[22] Indonesia's rule of law has undergone several changes and dynamics. First, the constitutional amendments process removed the wording *rechtsstaat* from the 1945 Constitution. The removal sparked interpretation regarding Indonesia's legal paradigm. Many believe that Indonesia's current legal paradigm is no longer aligned with the Civil Law tradition. It is significantly influenced by the Common Law and other legal traditions, including the international and comparative laws.[23] This

[18] This section is greatly influenced by Roux's works. See Roux, "Indonesia's Judicial Review." See also Theunis Roux, "American Ideas Abroad," 90-118.

[19] Fachrizal Afandi, "The Justice System Postman: The Indonesian Prosecution System at Work," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. Mellisa Crouch (Cambridge: Cambridge University Press, 2019): 88.

[20] Saldi Isra, "*Gagasan Bernegara Yamin* [Yamin's Suggestion on Nation-State]," *Koran Tempo*, 2 September 2014.

[21] Endy M. Basuni, "Indonesia's Democracy Alive, but Needs More Kicks," *The Jakarta Post,* 17 July 2019.

[22] The amendment of the 1945 Constitution underwent four stages: first was on 19 October 1999, the second was on 18 August 2000, the third was on 9 November 2001, and the last stage was on 10 August 2002.

[23] Buana, *Hubungan Tarik-Menarik*, 101.

interpretation affects the approaches employed by judges to dispute resolution and legislation interpretation and review.

Second, the second stage of the constitutional amendment process involved the transplanting of international human rights norms into national law. This process demonstrates that the government must comply with international human rights norms. Consequently, the Court has to adapt to an international context and develop through allowing 'constitutional borrowing' in court decisions and its interpretation. The adoption marked the beginning of the age of internationalization of constitutional law in Indonesia.[24] The legal transplant forced Indonesian jurists to be more open-minded and think globally; jurists were suddenly required to master national law and understand comparative law methodology. Diverse approaches to interpretation have challenged the old-school paradigm of simple syllogism.

While Indonesia's law was still undergoing a transition from semi parliamentarism into presidentialism, the People's Consultative Assembly (MPR) impeached President Abdurrahman Wahid (known publicly as Gus Dur) without a strong legal base. In learning from the preceding experience, the next administration, President Megawati Soekarnoputri and her political party (PDI-P) argued for the importance of the Constitutional Court in scrutinizing the mechanism of impeachment.[25] This argument is the real political reasoning behind the establishment of the Court (*occasio legis*). Today, the Constitutional Court is known for its crucial mandates: to review the legislation according to the Constitution,[26] to make a ruling on disputes between state institutions, to order the dissolution of political parties found in violation of the Constitution, to issue binding verdicts on contested election results, and to oversee and evaluate

[24] Bisariyadi, "Referencing International Human Rights Law in Indonesian Constitutional Adjudication," *Constitutional Review* 4, no. 2 (2018): 251.

[25] Stefanus Hendrianto, "From the Humble Beginning Law to The Functioning Court: The Indonesian Constitutional Courts 2003-2008" (Doctoral Dissertation, University of Washington, 2008), 44.

[26] The Court combines two approaches to judicial (constitutional) review. The judges can conduct either a material or substantial review, or a formal review. A substantial review covers theoretical and philosophical aspects of the legislation and traces congruency of the legislators' intention regarding the Constitution. On the other hand, a formal review can be divided into two aspects: an examination of both the legislature's legal authority and of its procedural aspects. *See*, Internal Regulation of the Constitutional Court No 06 of 2005 on Procedural Code, art 4.

impeachment processes.[27] It is important to note that the Court cannot review other types of laws below the level of legislation, as these types of laws fall within the review jurisdiction of the Supreme Court.[28] Neither can the Constitutional Court review the constitutionality of subordinate regulations, as the Supreme Court only can review regulations made under any law against such law.[29]

By establishing the Constitutional Court, Indonesia has adopted a contemporary legal discourse: judicial politics. It depicts the presence of political influences on judicial behaviour. In this way, the Court plays a significant role in addressing moral predicaments and controlling the products of the legislature and the conduct of the executive. It also maintains the more tangible presence of judicial process and court rulings in the political spectrum.[30]

Philosophically speaking, the abovementioned changes and dynamics have moulded the Court into a 'salad bowl' institution, which employs judges with diverse legal paradigms, including legalism and instrumentalism. Despite the diversity of judges, the role of judicial leadership, held by the Chief Justice, is crucial in shaping the Court's paradigm. To analyse dynamics inside the Court, this study first traces the Court's legal foundation which was established using a legalism perspective.

2.1. Legalist Inspired Court

In its first years of establishment, Prof Jimly Asshiddihiqe, a constitutional professor at the University of Indonesia, chaired the Court. In order to strengthen its position as a new judiciary body, the Chief often expressed many jargon considering the importance of the Court, such as: " (The Court) as the Guardian of the Constitution", and " The Sole Interpreter of the Constitution."[31] Moreover,

[27] Article 24C (1) and (2), the 1945 Constitution.

[28] Regarding the split authority between the Supreme Court and the Constitutional Court, Article 24A (1), the 1945 Constitution (Amended) (Indonesia) states: "The Supreme Court shall have the authority to ... review ordinances and regulations made under any law against such law." See Simon Butt and Tim Lindsey, "Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33," (Bulletin of Indonesian Economic Studies 44, 2008), 242.

[29] Tim Lindsey, "Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in A Split Jurisdiction," *Constitutional Review* 4, no. 1 (2018): 28.

[30] Bjorn Dressel, "Governance, Courts and Politics in Asia," *Journal of Contemporary Asia* 44 (2014): 265.

[31] Jimly Asshidiqie, *Konstitusi dan Konstitusionalisme di Indonesia* [Constitution and Constitutionalism in Indonesia] (Jakarta: KonPress, 2006), 7.

the Court's architecture also resembles a Roman building, with its nine pillars representing the nine Justices of the Court, imitating the nine Justices in the US Supreme Court. All of these jargons and infrastructure images were used to strengthen the notion of legal autonomous and the principle of the rule of law.

Prof Asshiddiqie established the foundation of the Court as the spearhead of Indonesia's rule of law by stressing its judicial independence. Simply because there will be no legal supremacy without the independence of the judiciary.[32] The Court had tried to accomplish prerequisites for the independence of the judiciary such as, judges' personal independence legally guaranteed for the term of office and tenure, judges' freedom from colleagues' influences, collective independence allows independence to participate and regulate the court's budgeting, and lastly, the court substantive independence which manifests itself when deciding cases.[33] The first three prerequisites relate to the general judiciary reform agenda to separate the judiciary from the Ministry of Justice,[34] while the last prerequisites relate to the Court's fairness and impartiality which should be examined from its decisions.

In that period, the Court enjoys a high degree of judicial independence and involvement in the political arena.[35] Under the judicial leadership of Prof Asshiddiqie, the Court exercised the technical function of the Court which has duties to sustain and deduce legal propositions. It must apply, define or reinforce rules or doctrines, which eventually contribute to strengthening the structures of the social order.[36] To boost the technical quality of its decisions, the Court developed consistent standards for judges' reasoned opinions with declaratory style,[37] and encouraged judges' freedom to write his own individual opinion. This Anglo-American judgements style allows judges to express their perspectives and reasoning through either a concurring or dissenting opinion.[38]

---

32 Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in *Judicial Independence: The Contemporary Debate*, ed. Jules Deschenes and Shimon Shetreet (M.Nijhoff: Hingham, 1995), 58.

33 *Ibid*., 59.

34 Daniel S. Lev, "The Politics of Judicial Development in Indonesia," *Comparative Studies in Society and History* 7, no. 2 (1965): 173-199, 174.

35 Dressel, "Governance, Courts and Politics," 264.

36 Martin Shapiro, *Court: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 15.

37 Simon Butt (2015) in Roux, "Indonesia's Judicial Review," 192.

38 Arne Mavcic, *The Constitutional Review* (Den Bosch Netherlands: Book World Publications, 2001), 76.

Despite this, there is a freedom of judges to express their own opinions based on their legal paradigm. This legalist court still embedded with technical jurisprudence.[39] This attitude is a result of strong civil law tradition, especially from Kelsen's doctrine, stating that the law has its self-legitimation which corresponds to objectivity. In other words, it contains analytical objectivity, which means that the state and the law are an objectively logical-formal structure.[40] Similarly, the common law also has legalism tradition represented by Austin who firmly states that law is objectively rational, rather than intuitive, political or ideological. And it has the dynamic that allows it to be self-supporting and self-developing and is neutral from social controls.[41]

As a result of its philosophical standing, the legal construction or modification should start from an internal point of view because the legal system is a closed logical system: the judge endeavouring to trace the legislative intent of the legislation (historical jurisprudence). Legislative intent is synonymous with the civil law's concept of *ratio legis*.[42] Statutory interpretation, in the civil law tradition, is referred to as the law finding (*rechtsvinding*) process in which the judge endeavours to 'find' a hidden legal question within the internal system of the law. The judges should provide the sole basis for determining the essence of the enactment. Their purpose is to seek to investigate the ascertainment of the intent or purpose underlying the enactment in question.[43]

The rigidity of judges' interpretation in civil law tradition must be sought in the nature of the inquisitorial system and the absence of the jury system. The judge becomes the only one who creates a balance between certain rules and the justice of the particular case.[44] Furthermore, in Indonesia's legal context, the Dutch colonial law, *Algemene Bepalingen* (AB) [General Provision] art 20 stated that "the judge must decide the case according to the legislation." Even though the Dutch legislation is no longer valid, the majority of judges often consider

[39] Slightly similar to what Pound said as 'mechanical jurisprudence' in Roux, "American Ideas," 11.
[40] Hans Kelsen, *The Pure Theory of Law* (California: University of California Press, 1967), 3.
[41] John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954), 117.
[42] Lenhoff, "On Interpretive Theories," 325.
[43] *Ibid.*
[44] *Ibid.*, 334. An inquisitorial court gathers evidence for itself, without discarding unfavourable evidence. It is centralised in nature.

'law' to be merely legislation.[45] This attitude occurs because the legislation does not explicitly explain the meaning of 'law' in that Act and its articles. And it creates overly reliant on civil law tradition and approaches. In that way, judges of the Court are considered as 'gatekeepers' of their country's legal tradition.[46]

Furthermore, this technical function requires a non coercive approach to the DPR and the Executive, as institutions that have original intent of the legislation. Parliamentary sovereignty should be respected because the only law is that which is created by the state via the legislature, and it should be reduced to the form of legislation.[47] This technical function is represented by the judicial presumption of the constitutionality of legislation. It embraces the idea of strict interpretation which has the advantage of certainty and predictability but with the possible disadvantage of injustice.[48]

To soothe the tension, the Court has modified its decisions by declaring a 'conditionally' decisions, in two scenarios. First, conditionally unconstitutional means that the submission is granted conditionally by declaring the legislation unconstitutional, but allows the executive and legislature to revise the legislation based on the requirements and interpretation of the Court. Second, conditionally constitutional means that the review is rejected conditionally. The Court raises questions about the constitutionality of the legislation but refuses to invalidate it. Instead, the Court provides both the executive and legislature with some requirements and interpretation of the Court. The future constitutionality of the legislation depends on how it is enforced.[49] By changing the nature of its decisions, the Court can act cautiously in refashioning the legislation. According

[45] Elisabeth Nurhaini Butarbutar, "*Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antinomi dalam penerapannya* [Freedom of Judge: Law-finding and Antinomy]," *Mimbar Hukum* 23 (2011): 70.

[46] Joseph Raz, Ethic in The Public Domain: Essay in The Morality of Law and Politics (Oxford: Clarendon Press, 1996), 359.

[47] Giorgio Bongiovanni, "*Rechststaat* and *Grundnorm* in the Kelsenian Theory," in *Legal System and Legal Science* (The Hague: ARSP, 1997), 65.

[48] Michael Kirby, *The Judges* (Sydney: Australian Broadcasting Corporation, 1983), 61.

[49] Simon Butt, "Conditional Constitutionality, Pragmatism and the Rule of Law" (Legal Studies Research Paper No. 09, 28, The University of Sydney, 2009), 1. Additionally, it is also important to note that the Court has regular type of decision outcomes, such as: the submission is granted. This means the legislation is unconstitutional; the submission is granted partially. This means not all submissions are granted; the submission is rejected, that is, the legislation under review is constitutional; And lastly, the application of review cannot be accepted by the Court, is inadmissible, due to the lack of legal standing.

to Siregar, there were moments when the Court refrained from its activism to avoid confrontation with the DPR.[50]

Moreover, with regard to the 'conditionally' outcome, the legislation that had been reviewed can be reviewed again if either the executive or the legislative powers do not follow the Court's requirements and interpretation. In this respect, the Court has an exception to the *nebis in idem* principle: the applicants can re-submit their review application concerning the same legislation that had already been decided by the Court. However, the claimant must use a different constitutional article as a touchstone to review the legislation.[51]

It is clear that the rationale of 'conditionality' in the Constitutional Court is to make its decision more politically palatable.[52] This is the practice of politics of judiciary which the Court exercises its political self-restraint.[53] The Court tries to restraint its power to interfere with the legal drafting process and attempts to emphasize its role only as a legalism court. Nevertheless, in its legal paradigm development, the Court had slightly shifted its paradigm when the Court entirely abolished the *Law of State Electricity* as it considered the legislation too liberal and in breach of national interest.[54] In this decision, the Court used 'state ideology'-*Pancasila* -as its dominant reasoning.[55]

By considering ideologies as judicial reasoning means that the Court accepted the notion of ideologically strategic decision-making, which is under the realm of institutionalism, where the Court acts strategically to create policy and considers external influences to legislation. In this regard, the legalist court acts more in line with theories related to sociological thought than formalist thought. When the Court considers 'state ideology' meaning that it has expressed its autonomy as a social system and a dominant cultural ideology.[56] Prof Asshiddiqie also

[50] Fritz E. Siregar, "Indonesia Constitutional Court Interpretation Methodology (2003 – 2008)," *Constitutional Review* 1, no. 1 (2005): 3.
[51] Internal Regulation of the Constitutional Court No 6 of 2005 (Indonesia) art 42. This regulation is an exception of Law No 24 of 2003 (Indonesia) art 60.
[52] Butt, "Conditional Constitutionality," 2.
[53] Richard A. Posner, "The Meaning of Judicial Self-Restraint," *Indiana Law Journal* 59, no. 1 (1983): 12.
[54] Judicial Review of State Electricity Law, Decision of Constitutional Court No: 001-021-022/PUU-I/2003.
[55] *Ibid*.
[56] Roux, "Indonesia's Judicial Review," 199.

agrees to some extent with 'judge-made law', if it is needed for judicial interest. Judge's decision, as a logical construction, can construct the new meaning of legislation with there is any legal vacuum.[57] Nevertheless, the legal vacuum becomes the one possible condition to construct the new meaning of legislation. Prof Asshiddiqie's intellectual standing has similarities with Hart's inclusive approach to decision making. Hart re-opened the opportunity to strengthen the role of the court by encouraging judges to use their discretion in making new laws or filling the gaps if the written laws were too general, unclear or defective.[58] The judges are allowed to be 'creative' if there was 'open texture' in the written law. It is clear that legalism can accommodate judicial creativity in various well-known ways.

Despite the fact that legalist courts have developed into more sociological mindsets, this paper argues that legalism alone is an insufficient guide for judges' legal reasoning. A legalist mindset should mingle with external aspects of law, including politics and social justice aspirations. When the political condition becomes more complex and discriminatory, the Court needs to step in to employ strategic policy-based decisions that are sensitive to social needs. It is a prescriptive account of what the Court should do. Instrumentalist-based-decision-making has enriched the Court's decisions. This article argues that legalism is still an important foundation for understanding the rule of law and constitutionalism, but instrumentalism, with restraints, is often a more realistic choice.

2.2. The Rise of Instrumentalist Court

The rise of instrumentalist Court is depicted when Chief Justice Mahfud MD began to articulate the law's authority in the form of 'substantive justice' approach to judicial decision-making. Philosophical concepts such as justice, equity and fairness became more reliant as touchstones in determining the constitutionality of legislation.[59] In this era, the Court could resolve an immediate

[57] Jimly Asshiddiqie and Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara* [Comparison of Ten Constitutional Courts in the World] (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006), 11.
[58] H.L.A. Hart, *The Concept of Law*, 132.
[59] Buana, *Hubungan Tarik-menarik*, 110.

political issue; by not only reviewing legislation under review but also making new norms to fit social justice aspiration. This legal paradigm comes with the advantage that justice may be satisfied, but has the disadvantage of uncertainty and inconsistency.[60] Instrumentalism court should be critical when it reviews legislation because legislation is the product of politics. This position is represented by the judicial presumption of unconstitutionality and embraces the idea of judicial activism. Nevertheless, it is also important to note that just because legislation is a function of politics, it does not mean that the law's authority is a function of politics. The impartiality and neutrality of the legal drafting methods in which political mandates are interpreted and applied are guarantee Law's authority.

The critical point of view toward legislation departs from the assertion that the legal ontology of the legislation is constructed by social experiences, which are substantially subjective, intuitive and practical.[61] Therefore, enacted legislation is not necessarily filled by positive values; it may be ill-intended and politically opportunistic.[62] Legislation can thus be seen as an ideology compromised by the status of domination.

Instrumentalism expands the judicial reasoning from *ratio legis* into *occasio legis*, a concept that posits both the political and social condition as the real reason for the enactment of the legislation.[63] In this regards, the Court engages with its ideological function, which involves the maintenance of currents of ideology which legal doctrine maintains, implements and serves to legalise government and empower the social order.[64] The state governs and transmits its ideology to the people through the court decisions by applying the law to the cases.[65]

Mahfud MD once admitted that "since I have authority (as a Chief Justice), I will do *ijtihad* (legal contemplation in Islamic law's concept) to progressively

[60] Kirby, *Judge*, 61.
[61] Luiz Fernando Coelho, "A Contribution to a Critical Theory of Law", in *Legal Philosophy: General Aspects: Concepts, Rights and Doctrines*, ed. Michel Troper and Annalisa Verza (Steiner, 2002), 34.
[62] *Ibid*.
[63] Lenhoff, "On Interpretive Theories," 325.
[64] Shapiro, *Court: A Comparative and Political Analysis*, 228.
[65] *Ibid*.

change unfair legislation."[66] This pro-justice and policy-preference-maximiser attitude is supported by the principle of *non liquet* or *ius curia novit,*[67] meaning that a judge cannot avoid offering or reasoning through to a solution, even though there is a lack of clarity in the law.[68] As a result, justice is in the hands of the judge. This principle is confirmed by the positive law on Judiciary Law stating that "the court cannot reject a case brought by disputants even where the law is absent, unspecific or vague.[69] This norm can be interpreted in two ways: first, the judge can be creative by finding the law, but only through the law's internal values, as in the legalism perspective. Second, the judge can endeavour to 'create' and 'modify' legislation by considering external values that could be sociological and even political. Mahfud MD clearly employed the latter approach.

This norm obliges the judges to know all about the legal aspects of legislation. It opens possibilities for judges to be more creative in constructing their legal reasoning. The Judiciary Law states, "...judges both in the Supreme Court and the Constitutional Court systems must also understand, elaborate and rely on customary or unwritten law."[70] These two articles should be considered as legal norms guiding judges to not only decide cases according to the law (text of legislation) but to maximize all materials both written and unwritten, legally, sociologically and even politically. As mentioned in the previous discussion on legalism, there are principle states that 'the judge must decide the case according to the law.'[71] The word 'law' should be interpreted in a broad sense, which also includes unwritten laws and social justice aspirations.

The reliance on the internal aspect of legislation is one of the areas of critics. Legalism claim that the 'truth' of the legislation can be found internally through historical enquiry of legislative intent. However, finding legislative intent

66 Informal discussion with Prof Mahfud MD, when author attended his lecture.

67 Bagir Manan, "*Kekuasaan Kehakiman* [Judicial Power]" (Paper presented at General Lecture, Airlangga University, 1 December 2011), 8.

68 Noel Struchiner, "The Meaning of Justice," in *Legal Philosophy: General Aspects: Concepts, Rights and Doctrines: proceeding of the 19th World Congress of the International Association for Philosophy of Law and Social Philosophy* (IVR), ed. Michel Troper and Annalisa Verza (New York, June 1999), 112.

69 Article 10 (1), Law No 48 of 2009 on Judiciary.

70 Article 5 (1), Law No 48 of 2009 on Judiciary.

71 Article 4 (1), Law No 48 of 2009 on Judiciary

has a fundamental flaw. It divorces legislation from its contemporary context. By using legislative intent, the court applies a retrospective perspective, not a contemporary or prospective point of view. Legislative intent is a myth because legislators have many intentions and interests. The intentions are not always wise. It may be political and pragmatical. Thus it is impossible to trace the true intention of the legislation. Furthermore, Corcoran states that the discerning legislative intent approach in statutory interpretation is insufficient.[72] There are areas of concern missing, including contextual problems, the indeterminacy of language, and the validity of extra-legal norms.

Additionally, over-reliance on the legislation could result in over-simplification because legislation presents only a small part of the law; most legislation is rooted in the nature of social relations, which change as social conditions change.[73] Today, this approach is balanced by the minor doctrine of equity, which is distinguishable from the rigidity of the laws. When the main object of legislation is unreasonable and unjust, judges are at liberty to expound the statute by equity to disregard it.

It is also important to note that instrumentalism does not aim to eradicate fidelity of law but endevour to set law's authority as contingent, not on its autonomy from politics, but law's usefulness as an instrument for the pursuit of a political goal.[74] The idea of constitutionalism is still embraced. This idea relates to a law's authority and how this authority is still guided by the constitution. It functions as the most paramount legal touchstone. Thus, it must be able to oversee and tame the political interests on legislation under review. The Court's Justices have taken an oath to respect and uphold the constitution. Thus, they have an obligation under the constitution to defend it from encroachment and the misleading law-making processes of legislators. In other words, constitutional validity must surpass the principle of democracy. In this sense, legislation as a manifestation of the 'people's voice' is inferior to legal supremacy, represented

[72] Suzanne Corcoran, "Theories of Statutory Interpretation," in *Interpreting Statutes*, ed. Suzanne Corcoran and Stephen Bottomley (Sydney: The Federation Press, 2005), 30.
[73] Lenhoff, "On Interpretive Theories," 326.
[74] Roux, "Indonesia's Judicial Review," 198.

by the judiciary. It is contended that majority rule is denied in principle by constitutionalism through judicial review.[75]

Nevertheless, political nuances are real in constitutional law dynamics. Legislation must be seen realistically as a mere projection of political power. It is not really a 'people's voice' drafted through legislative drafting, but it is not always purely derived from the people's aspirations. Instead, it can be based on compromised dealing.[76] Lastly, legislation is static, often out-of-date with current and progressive social and political changes. Thus, the Court must step forward to interpret, review and contextualise the legislation to fill in any gaps in the legislation. In this regards, the law's authority derives from the desirability of the outcomes it produces.[77]

When the Court has become more instrumental by heroically reviewing and changing legislative intent, the DPR started to fight back by revising the Constitutional Court Law. The next section highlights the Court's decisions that depict contestation of aspirations between the DPR that wanted the Court to be strictly legalism or even worse, a formalist court, and the Court that defends its independence of judiciary.

III. THE DISCOURSE OF LEGAL-POLITICO PARADIGM'S THROUGH JUDICIAL REVIEW

There are two Constitutional Court's decisions that effectively represent the opinions on whether the Court should respect parliamentary sovereignty or creatively change the wording of legislation in creating policy. These two decisions were crucial because they challenged the revised Constitutional Court Law by the DPR. The revised Law was a political response to the practice of the 'Progressive Court' under Mahfud MD's judicial leadership. In these two decisions, there were three important legal questions. The first is related to whether the Court had the power to declare constitutionality of articles that are

[75] *Ibid.*, 182.

[76] Mohammad Mahfud MD, *Politik Hukum di Indonesia* [Policy-Oriented in Indonesia] (Jakarta: Rajawali Press, 2009), 22.

[77] Roux, "Indonesia's Judicial Review," 200.

not demanded by parties and expand its decisions to other legislation's articles under review. The second is related to whether the Court could stipulate or insert policy or new norms into legislative articles under review. The third is related to whether the Court has the power to utilize other related legislation as constitutional touchstones.

3.1. Surpassing an Applicant's Demands

The first Court decision[78] targeted two important articles in the 2011 Constitutional Court Law.[79] The first was Article 45A, which states: "The Court's decision is restricted to declare the unconstitutionality of article that is not demanded by applicants." The judges decided that the Court has the power to surpass the applicant's demands in its decision because the Court's decision dealt with the public interest. The decision affected not only the applicants but also all citizens of Indonesia (*erga omnes*). The Court also argued that articles under review are systematically interrelated.[80] Legalism influenced this decision because it is a legalist belief that legislation is a systematic legal building block within which articles are inter-linked provisions. Thus, this type of Court decision is unavoidable, and it is the essence of judicial review. Lastly, the judges must follow the demand of the applicant to provide a justiciable decision (*ex aequo et bono*). In addition to this reasoning, the Court also employed comparative insight by referring to the practice of the Korean Constitutional Court which allows the Korean Court to declare unconstitutionality on the whole for selected articles in legislation under review. However, the Court's reasoning did not consider the notion of independence of the judiciary that the applicants stressed in their demand. Article 24 (1) of the 1945 Constitution states that "the judiciary (including the Constitutional Court) is an independent institution which aims to elevate the rule of law and justice."

Besides the fact that the systematic aspect of the legislation was inspired by legalism, this decision also employed an instrumentalism perspective. The Court, for the sake of legal development, can and must expand upon the legal

[78] Judicial Review of Constitutional Court Law, Decision of Constitutional Court No 48/PUU-IX/2011.
[79] Law No 8 of 2011 on Revision of Law No 24 of 2003 on Constitutional Court Law.
[80] Judges' Consideration, Decision of Constitutional Court No 48.

questions demanded by the applicant. The Court's Justices have taken the vow to respect and uphold the constitution by interpreting and contextualizing the constitutional norms. Justices have an obligation under the constitution to defend it from encroachment and misleading law-making processes by legislators. This is the manifestation of the Court's ideological function. Historically speaking, this practice had developed judicial review practice, as evidenced by the landmark decision of *Marbury v. Madison* by the US Supreme Court. In this case, the US Supreme Court surpassed the demand of the applicant through its verdict. In other words, the practice of judicial review in the Indonesian Court was inspired by the instrumentalist thinking of the US Supreme Court. This decision reaffirms that the Court possesses the authority to surpass applicant's demands in order to fulfil the bigger outcome of law reform: substantial justice. The Court is the main expounder of the Constitution.

This issue of surpassing an applicant's demand combined two perspectives into a cohesive whole. Legalism inspired this decision by emphasizing the inter-linkage of legal norms within the legislation. Invalidating a norm or norms would potentially change the whole meaning of legislation under review. Additionally, instrumentalism also enriched this decision by stressing the importance of public and contemporary needs of the decision. Judicial review of legislation has strong public law influences where this decision will bring significant effects to the public. Thus, the Court has an obligation to fulfil public sentiments on justice and legal certainty.

3.2. Decision based Policymaking

The ability of the Court to make law and policy is hotly debated. The second article under review was Article 57 (2a), which stipulates: "The Court's decision was restricted to stipulating or inserting policy or new norms into legislative articles under review." It is a controversial article that prevented the Court's judges from becoming 'positive legislators'. The DPR's representatives in the Courtroom stressed that the authority of the Court is only to declare whether the legislation under review is either constitutional or unconstitutional, and not to express policies or new norms. The DPR argued that the Court must respect

the classical notion of separation of power (*Trias Politica*).[81] In other words, the DPR wanted the Court only to exercise its technical functions. Blackstone had criticized this attitude toward the judges as their identity being that of the 'living oracles of the law' because the judges act only as passive receivers rather than an active and creative creator of law.[82]

The judges rejected the DPR's arguments. The Court declared that the article under review was unconstitutional because it hindered the noble aim of the Court to uphold the rule of law, constitutionalism and justice. The policy-driven decision-making is crucial for filling the 'legal vacuum' of legislation under review. The legislative review processes take time and may be delayed by politics, so the Court must progressively fill the 'vacuum'. It is important to note that the reason for decision-making policy preference is not only because of a legal vacuum but to fulfil social justice aspiration.

As an instrumentalist institution, the Court and its Justices must wholeheartedly embrace social nuances and surroundings while conveying affirmative action in decision-making. Legalism argues that judges should be neutral. However, remaining neutral in unjust and discriminatory circumstances can be naive and lead to further injustice and discrimination. This policy preferences decision corresponds with Holmes' perspective on the role of the judge lawmaking: "I think that the judges have failed to adequately to recognise their duty in weighing the considerations of social advantage. The duty is inevitable, and the outcome of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious."[83]

It is important to remember that policy-driven decision-making aims to create a contemporary interpretation of what legislation under review should cover and achieve. A contemporary outlook could remedy inherent flaws in legislation relating to the fact that legislation is often static and sociopolitically out-of-date. By emphasizing policy-driven decision-making, the Court has exercised

[81] *Ibid.*, the DPR's Defence.
[82] William Blackstone, *Commentaries on the Laws of England* (Whitefish MT: Kessinger Publishing, 2007), 69.
[83] Oliver W. Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457.

its ideological function to maintain social order through the implementation of legal doctrines.[84] It requires that the Court possesses substantive independence in deciding on cases where the judges have the freedom to consider not only the internal perspective but also the external determinacy of decision making. A judge has the sovereignty to uphold his perspectives while utilizing logical deduction and has a responsibility to discuss with his predecessors and review customs and the Constitution.[85]

While the court can make law and even policy, it has surpassed legislative bodies as the authentic author of law. To balance this instrumentalist approach, this paper revisits Posner's arguments on 'pragmatic instrumentalism' which he described as "a disposition to ground policy judgements on facts and consequences rather than on conceptualism and generalities."[86] This is perhaps too practical and deficient in normativity and morality. It lacks a moral compass making pragmatism lose its noble purpose. Despite Posner often stating that his 'everyday pragmatism' is not derived from abstract values, his pragmatism is a mere concretisation of abstract values which also include morality. Thus, morality cannot be entirely alienated from the judicial function. As Justice Holmes famously stated in 1897, "the law, if not part of morality, is limited by it."[87] This assertion synthesises the gap between instrumentalism and legalism by accepting a morality, a value that sets what the judges ought to be in decision-making.

This paper argues that the Court can only exercise its policy-driven decision-making approach where the text is insufficient for answering contemporary legal and social problems, including the imbalance between discriminatory political and social conditions. It is the 'morality' standard of judicial decision-making. The role of policy is to fill gaps in the law. It is a principled instrumentalist approach, which places judges as a creative counterparts of the legislators. Nevertheless, the judges must remain impartial and disinterested in politics.

[84] Shapiro, *Court: A Comparative and Political Analysis*, 228.
[85] Holmes, "The Path of the Law," 465.
[86] Richard Posner, "Law, Pragmatism and Democracy: Reply to Somin," *A Journal of Politics and Society* 16, no. 4 (2004): 471.
[87] Holmes, "The Path of the Law," 241.

3.3. Systematic Legislation-based Decision Making

The second important decision[88] was a judicial review to abolish Article 50A of the 2011 Constitutional Court Law. The article states: "The Court, in its judicial review, cannot utilize other related legislations as a constitutional touchstone, besides the constitution." The applicants argued that this article contradicted other constitutional provisions, particularly Article 22A, which states that "further technical aspects of constitutional norms and legislation's drafting will be provided in the legislation." This article specifies that the constitutional and legislative norms are inter-related. The Court decided by referring to its previous decision (precedent),[89] that legislation is created as a legislative body's interpretation of the constitution. In other words, the constitution delegates its provisions to legislative drafting processes. Thus, legislation can be used as legal material in judicial review processes.

Through this decision, the Court reaffirmed that it has the ability to systematically consider and comment on legislation under review. The Court has the authority to sustain and deduce legal propositions. This attitude relates to the Court's technical function. However, none of the judges used a systematic decision-making approach in defending this article. This article argues that when a judge considers the interrelation between articles within one piece of legislation that of another piece of legislation, that judge is utilizing his internal perspective on the law. This intellectual exercise is rooted in legalist thinking, which states that law is a closed system of logical thinking and systematically constructed. This legal paradigm considers legislation, as one of the materials of the Justice in judicial review, has its objectivity. In other words, it contains analytical objectivity, which means that the state (written) law is an objectively logical-formal structure.[90]

By utilising this internal systematic perspective on law, the legal construction may depart only depart from an internal viewpoint. A judge, during the decision-making process, is encouraged to trace the legislative intent of the legislation,

[88] Judicial Review of Constitutional Court Law, Decision of Constitutional Court No 49/PUU-IX/2011.
[89] *Ibid*. The Court pointed Decision of Constitutional Court No 27/PUU- VII/2009 on Supreme Court Law.
[90] Kelsen, *The Pure Theory of Law*, 3.

it being part of historical jurisprudence tenet.[91] Statutory interpretation, in the civil law tradition, is referred to as the law finding (*rechtsvinding*) process in which a judge endeavours to 'find' a hidden legal question within the internal system of the law. The judges should not aim to 'make' the law because judges' main purpose is to investigate the ascertainment of the intent underlying the enactment of legislation.[92]

This article argues that judges are not only bound to consider interrelated pieces of legislation but also to consider, elaborate, and understand diverse values of law and justice both in written law and customary laws. These principles and values will frequently be expressed in constitutional form. In instrumentalist thinking, decision making involves positive inquiry, not just normative analysis (moral and pre-existing legal reasoning). The court should seriously consider social policy, facts, 'consequences' and 'appropriateness' as the main references. Law-making is case-specific by nature. Under instrumentalism, the judge has to be the creative counterpart of the legislator by emphasizing multidisciplinary approaches to decision-making to assist the Justices where they have policy choice.[93] In this decision, however, the Court did not clearly stress its philosophical stance.

It is also important to note that the applicants' demands for this decision were to strike down several articles in the 2011 Constitutional Law. One of the demands also related to the dismissal of judges from office.[94] The Court decided the article under review was unconstitutional. This applicants' demand is closely related to judges' personal interest, which opens the discourse whether the Court ethically can decide the case closely relates to it or not.

IV. A MORAL COMPASS: JUDGES' PRUDENTIAL SELF-RESTRAINT

As a consequence of the principle of constitutionalism, within which one of the central tenets stresses that all governmental institutions must have been

[91] Lenhoff, "On Interpretive Theories," 325.
[92] *Ibid.*
[93] Posner, "The Meaning," 21.
[94] Constitutional Court Law, Article 87, Law No 8 of 2011 on Revision of Law No 24 of 2003.

accountable for policies and decisions, the Court has a pivotal role in upholding constitutional supremacy. Technically, the Court is an institution established to control the main governmental institution's legal products, especially the Legislature (the DPR), which creates policies through legislation. In this regards, the independence of the judiciary and constitutionalism go hand in hand because a judiciary that has independence and impartiality in reviewing legislation would significantly elevate constitutional supremacy over political influences. On the contrary, if the judiciary cannot be trusted or acts in an unconstrained manner, it could stray from constitutionalism.

The Court, as a controller, also needs to work professionally and impartially to make sure that the law, not the subjectivity of judges, rules. No manner how involved in activism the Court is, when its judges can manifest their value judgments and preferences about matters related to constructing a decision, they should remain principled, and embrace consistency, and maintain an awareness of his personal conflicts of interest. The liberty to create and modify laws and exercise judicial prudential self-restraint, therefore, go hand in hand. The latter will not devolve into judicial supremacy if the former is not valued.[95] The Court, judges in particular, must also exercise self-restraint with their liberty in creating and managing law. The judicial restraint is pivotal for avoiding the possibility of sliding toward 'juristocracy', when the judiciary has no limit of wisdom and discretion.[96]

With regard to judicial self-restraint, Posner asserts that it is a contingent good, a time and place-bound, rather than absolute.[97] This practical definition of restraint needs a normative and moral-based perspective in order to balance the freedom of judge in delivering his decisions. The value of morality requires impartiality in the application of good moral rules. In other words, freedom of judge needs to be exercised in a morally responsible way; judges must not have prejudiced towards or against any particular side or party, fair, unbiased.[98]

[95] William J. Haun, "The Virtues of Judicial Self-Restraint," *National Affairs* (2018). https://www.nationalaffairs.com/publications/detail/the-virtues-of-judicial-self-restraint.
[96] Edward McWhinney, *Judicial Review in the English-speaking World* (Toronto: University of Toronto Press, 1956), 188.
[97] Posner, "The Meaning," 14.
[98] "Oxford Constitutional Law," https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e338.

Thus, instrumentalist judges must also employ impartial benevolence as the direct and sole determiner of the court's decisions.[99] Impartiality construed as impartial benevolence is required because a judge has certain official and crucial roles in protecting the rule of law and constitutionalism. Impartiality is the core principle in relation to fairness and objectivity of judicial decision-making,[100] its noble aim against bias and subjectivity is considered to be a principle of natural justice. In this regard, law is not only described merely as an instrument (as instrumentalist believes) but also as a responsible and accountable instrument. By merging practical aims of instrumentalism, including pro-poor and justice aspirations with prescriptive and moral-based perspectives of legalism through upholding to impartiality, a principled instrumentalist court can be constructed to answer more dynamic and problematics legal issues facing by post-authoritarian country like Indonesia, while upholding to the fidelity of law and constitutionalism value.

The Indonesian Constitutional Court practices restraint because it is aware of its position in the political arena. Technically, the 'conditional' decisions have manifested a self-imposed restriction on judicial decision-making by allowing the legislative and executive branches to develop government policy. This practice is known as political self-restraint, in which the judges give prudence to the practical political constraint involved with the exercise of judicial power. When the Court discussed and decided the constitutionality of Article 87 of the Constitutional Court on the judge's dismissal from office. In this case, the Court did not employ judicial restraint. When dealing with applicants' demands which were closely related to judges' personal interests, the Court firstly needs to identify which demands directly relate to judges' personal interests and which affect the Court as an institution. The Court must make decisions only based on the former, not the latter one.[101]

[99] John Kekes, "Morality and Impartiality," *American Philosophical Quarterly* 18, no. 4 (1981): 295-303: 301.

[100] Final Report by the Special Rapporteur L. M. Singhvi, The Administration of Justice and the Human Rights of Detainees: Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc. E/CN.4/Sub.2/1985/18.

[101] Decision of Constitutional Court No 49, Dissenting opinion of Justice Harjono.

In the cases where judges' conflict of interest is so strong, judges must prudentially exercise judicial and functional self-restraint in order to honor the integrity of the Court. The judges must show prudence regarding issues that could potentially hinder the Court's function as the guardian of the Constitution. The Court and its justices should be reminded that they have a responsibility to uphold constitutional values: justice and equality should be sought, without personal bias. Therefore, Justices should be free to exercise and elaborate on their individual liberties with a principled attitude.

V. CONCLUSION

This article concludes that the legal-politico actions of the Indonesian Constitutional Court cannot be strictly dichotomized into either legalism or instrumentalism. Three issues presented from two selected Court's decisions highlight the dynamic of the Court's decision-making reasoning in which the Court synthesised the two. In the first issue, the Court was allowed to surpass an applicant's demands for the sake of justice and create policy preferences to reconstructjusticiable legislation and policies. It is an instrumentalism-inspired decision. Second, the issue of decision-based policymaking, the Court confirmed as an instrumentalist court. Nevertheless, the last issue on systematic legislation-based decision making, the Court stressed the inter-linked provisions on legislation that affirms legislation as a systematic legal building block which was inherently a legalism postulate. The most feasible model of the Indonesian Constitutional Court is that of a Principled Instrumentalist Court, where policy decisions guide the formation of legislation according to constitutional values. Still, the judges maintain prudential self-restraint as a moral compass for instrumentalist court.

BIBLIOGRAPHY

Afandi, Fachrizal. The Justice System Postman: The Indonesian Prosecution System at Work. In *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* edited by Mellisa Crouch. Cambridge: Cambridge University Press, 2019.

Amsari, Feri. "Kuda Troya bagi MK [Troy's Horse strategy for demising the Constitutional Court]." *Kompas*, 4 April 2013.

Asshiddiqie, Jimly and Ahmad Syahrizal. *Peradilan Konstitusi di Sepuluh Negara* [Comparison of Ten Constitutional Courts in the World]. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006.

Asshidiqie, Jimly. *Konstitusi dan Konstitusionalisme di Indonesia* [Constitution and Constitutionalism in Indonesia]. Jakarta: KonPress, 2006.

Austin, John. *The Province of Jurisprudence Determined*. London: Weidenfeld and Nicolson, 1954.

Basuni, Endy M. "Indonesia's Democracy Alive, but Needs More Kicks." *The Jakarta Post,* 17 July 2019.

Bisariyadi. "Referencing International Human Rights Law in Indonesian Constitutional Adjudication." *Constitutional Review* 4, no. 2 (2018).

Blackstone, William. *Commentaries on the Laws of England*. Whitefish MT: Kessinger Publishing, 2007.

Bongiovanni, Giorgio. "*Rechststaat* and *Grundnorm* in the Kelsenian Theory." In *Legal System and Legal Science*. The Hague: ARSP, 1997.

Buana, Mirza Satria. "*Hubungan Tarik-Menarik antara Kepastian Hukum dan Keadilan Substansial dalam Putusan MK* [Substantive Justice and Legal Certainty on the Constitutional Court's decisions]." LLM Thesis, Islamic University of Indonesia, 2010.

Butarbutar, Elisabeth N. "*Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antinomi dalam penerapannya* ["Freedom of Judge: Law-finding and Antinomy]." *Mimbar Hukum* 23 (2011).

Butt, Simon. "Conditional Constitutionality, Pragmatism and the Rule of Law." Legal Studies Research Paper no. 09, 28, The University of Sydney, 2009.

Butt, Simon and Tim Lindsey. "Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33." Bulletin of Indonesian Economic Studies 44, 2008.

Coelho, Luiz F. "A Contribution to a Critical Theory of Law." In *Legal Philosophy: General Aspects: Concepts, Rights and Doctrines*, edited by Michel Troper and Annalisa Verza. Steiner: 2002.

Constitutional Court Law. Law No 8 of 2011 on Revision of Law No 24 of 2003.

Corcoran, Suzanne. "Theories of Statutory Interpretation." In *Interpreting Statutes*, edited by Suzanne Corcoran and Stephen Bottomley. Sydney: The Federation Press, 2005.

Decision of Constitutional Court No 27/PUU- VII/2009 on Supreme Court Law.

Dressel, Bjorn. "Governance, Courts and Politics in Asia." *Journal of Contemporary Asia* 44 (2014).

Gifford, Donald. *Statutory Interpretation*. Sydney: The Law Book Company, 1990.

Gray, John C. *The Nature and Sources of the Law*. New York: The Macmillan Company, 1938.

Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1994.

Haun, William J. "The Virtues of Judicial Self-Restraint." *National Affairs* (2018). https://www.nationalaffairs.com/publications/detail/the-virtues-of-judicial-self-restraint.

Hendrianto, Stefanus. "From the Humble Beginning Law to the Functioning Court: The Indonesian Constitutional Courts 2003-2008." Doctoral Dissertation, University of Washington, 2008.

Holmes, Oliver W. "The Path of the Law." *Harvard Law Review* 10 (1897).

Internal Regulation of the Constitutional Court No 06 of 2005 on Procedural Code.

Isra, Saldi. "*Gagasan Bernegara Yamin* [Yamin's Suggestion on Nation-State]." *Koran Tempo*, 2 September 2014.

Judicial Review of State Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court No 48/PUU-IX/2011 (The Constitutional Court of the Republic of Indonesia).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court No 49/PUU-IX/2011 (The Constitutional Court of the Republic of Indonesia).

Kekes, John. "Morality and Impartiality." *American Philosophical Quarterly* 18, no. 4 (1981).

Kelsen, Hans. *The Pure Theory of* Law. California: University of California Press, 1967.

Kirby, Michael. *The Judges*. Sydney: Australian Broadcasting Corporation, 1983.

Lenhoff, Arthur. "On Interpretive Theories: A Comparative Study in Legislation." *Texas Law Review* 27 (1949).

Lev, Daniel S. "The Politics of Judicial Development in Indonesia." *Comparative Studies in Society and History* 7, no. 2 (1965).

Lindsey, Tim. "Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in A Split Jurisdiction." *Constitutional Review* 4, no. 1 (2018).

Lindsey, Tim. "Indonesian Trial Process and Legal System, Background Notes." Unpublished Paper.

Manan, Bagir. "*Kekuasaan Kehakiman* [Judicial Power]." Paper presented at General Lecture, Airlangga University, 1 December 2011.

Mavcic, Arne. *The Constitutional Review*. Den Bosch Netherlands: Book World Publications, 2001.

Mc Whinney, Edward. *Judicial Review in the English-speaking World*. Toronto: University of Toronto Press, 1956.

MD, Mohammad Mahfud. *Politik Hukum di Indonesia* [Policy-Oriented in Indonesia]. Jakarta: Rajawali Press, 2009.

Posner, Richard A. "The Meaning of Judicial Self-Restraint." *Indiana Law Journal* 59, no. 1 (1983).

Ratnapala, Suri. "The Idea of a Constitution and Why Constitutions Matter." *Policy* (Summer, 1999/2000).

Raz, Joseph. Ethic in The Public Domain: Essay in The Morality of Law and Politics. Oxford: Clarendon Press, 1996.

Roux, Theunis. "American Ideas Abroad: Comparative Implications of U.S. Supreme Court Decision-Making Models." *International Journal of Constitutional Law* 13, no. 1 (2015).

Roux, Theunis. "Indonesia's Judicial Review Regime in Comparative Perspective." *Constitutional Review* 4, no. 2 (December, 2018).

Shapiro, Martin. *Court: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

Shetreet, Shimon. "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges." In *Judicial Independence: The Contemporary Debate*, edited by Jules Deschenes and Shimon Shetreet. M.Nijhoff: Hingham, 1995.

Siregar, Fritz E. "Indonesia Constitutional Court Interpretation Methodology (2003 – 2008)." *Constitutional Review* 1, no. 1 (2005).

Struchiner, Noel. "The Meaning of Justice." In *Legal Philosophy: General Aspects: Concepts, Rights and Doctrines: proceeding of the 19th World Congress of the International Association for Philosophy of Law and Social Philosophy* (IVR), edited by Michel Troper and Annalisa Verza. New York, June 1999.

Summer, Robert. "Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of our Dominant General Theory about Law and its Use." *Cornell Law Review* 66 (1981).

Tamanaha, Brian Z. *Beyond The Formalist-Realist Divide: The Role of Politics in Judging*. New Jersey: Princeton University Press, 2010.

Tempo.com. "Patrialis Akbar Charged for Accepting Bribes." Tempo, 13 June 2017, https://en.tempo.co/read/news/2017/06/13/055884133/Patrialis-Akbar-Charged-for-Accepting-Bribes.

The 1945 Constitution (as amended).

The Jakarta Post Online. "KPK names Akil Mochtar suspect of money laundering charges." The Jakarta Post, 26 October 2013, http://www.thejakartapost.com/news/2013/10/26/kpk-names-akil-mochtar-suspect-money-laundering-charges.html.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev613

Against the Odds: Protection of Economic, Social, and Cultural Rights by the Constitutional Court of Ukraine

Yurii Sheliazhenko*
KROK University, Kyiv, Ukraine
sheliazhenkoiuv@krok.edu.ua

Received: 7 January 2020 | Revised: 11 April 2020 | Accepted: 15 April 2020

Abstract

The article traces historical development, doctrine, and impact of constitutional review in Ukraine related to matters of social justice. It is shown that international review of Ukraine's reports on observance of human rights obligations indicated a low level of compliance during the absence of independent constitutional review by the judiciary. After the establishment of the constitutional review, the compliance was improved against all doubts, whether socio-economic rights are justiciable in the Ukrainian context, and whether the judges are empowered enough to reshape authoritarian policies. Constitutional Court of Ukraine developed a doctrine of social justice based on the values of the rule of law, liberty, and equality, founding a pragmatic balance between the imperatives of individual freedom and economic security. In legal reasoning, judges implemented ideas of the human-centered state and personal autonomy in civil society, close to liberal democratic views, expressed by framers of the Constitution of Ukraine.

Keywords: Constitutional Court of Ukraine, Democratic Nation-building, Economic Security, Human Rights, Personal Autonomy, Social Justice.

* Research Associate of the Faculty of Law at KROK University.

I. INTRODUCTION

During the 1948 United Nation (UN) General Assembly in Paris, Ukraine abstained from the vote for the Universal Declaration of Human Rights (adopted by 48 votes of 58), criticizing it for lack of emphasis on economic and social rights.[1] This ideologically driven move revealed a superficial attitude of the communist regime to the issue. Later, when Ukraine aligned with the majority of nations taking on human rights obligations, it was always a puzzle, how serious is the commitment. The legal system of post-communist Ukraine tried hard to make it serious.

This research is aimed to describe, analyze, and discuss historical development, doctrine, and impact of constitutional review in Ukraine related to matters of social justice, focusing on the performance of the Constitutional Court of Ukraine in its mission to uphold and enforce economic, social, and cultural rights.

Relevant literature in the field includes mainly doctrinal, but also political and economic studies, discussing the nature, scope, and justiciability of the socio-economic and cultural rights, as well as domestic and global instruments of its protection.

The fundamental value of human dignity, protected by the Constitution of Ukraine, includes access to minimal social benefits needed to ensure a sufficient and decent standard of living, stated Constitutional Court of Ukraine in 2018 decision.[2] Natalia Shaptala, former Chairman of the Court, also said the Constitution of Ukraine prescribes an extremely wide spectrum of social rights, but it is important to make them real in practice, not still in declarations as usual.[3]

Constitution of Ukraine was adopted in 1996, three years after 1993 World Conference on Human Rights in Vienna, and incorporated a wide scope of standards contained in international human rights instruments, as urged Vienna

[1] Eleanor Roosevelt, "Human Rights," in *Peace on Earth* (New York: Hermitage House, 1949), 66-7.

[2] No 9-r/2018 of 7 November 2018 (Decision of the Constitutional Court of Ukraine, 2018).

[3] "Konstytutsiina yustytsiia ta rynkova ekonomika: suchasni ta perspektyvni naukovo-praktychni realii" [Constitutional Justice and Market Economy: Contemporary Scientific and Practical Trends and Prospects]," Constitutional Court of Ukraine, accessed on 15 November 2019, http://www.ccu.gov.ua/novyna/konstytuciyna-yustyciya-ta-rynkova-ekonomika-suchasni-ta-perspektyvni-naukovo-praktychni.

Declaration and Programme of Action.[4] Articles 1, 3 of the Constitution say that Ukraine is a sovereign and independent, democratic, social, law-based state; the human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social values.[5] Chapter II of the Constitution, named "Human and Citizen's Rights, Freedoms and Duties," have many marks of the precise wording of core international human rights treaties, including International Covenant on Economic, Social and Cultural Rights (ICESCR).

There are a number of doctrinal and comparative publications suggesting that constitutional review can play an important role in the protection of the rights enshrined in ICESCR, especially in the context of transitional justice. United Nation - the Office of the High Commissioner for Human Rights (UN OHCHR) notes that a number of national constitutional courts and regional treaty bodies like European Court of Human Rights (ECtHR) provide remedies against violations of the rights;[6] for example, the Colombian Constitutional Court ordered the Government should ensure right to a minimum standard of living for internally displaced persons.[7] Chinkin described ways of post-conflict restoration of socio-economic rights.[8]

Christian Courtis, in a comprehensive report on social justice adjudication at international, regional, and domestic levels, written for International Commission of Jurists, discussed various objections to the justiciability of economic, social, and cultural rights, such as uncertain content of the rights, procedural difficulties, and lack of judicial capacity. To refute the objections, he analyzes cases and practices from different jurisdictions and links socio-economic rights with civil and political rights, universally recognized as justiciable. For example, he points out

4 United Nations, "Vienna Declaration and Programme of Action" (World Conference on Human Rights, A/CONF.157/23, 12 July 1993).

5 Constitution of Ukraine.

6 UN Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (New York and Geneva: United Nations, 2005).

7 UN Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (Geneva: United Nations, 2014).

8 Christine Chinkin, "The Protection of Economic, Social and Cultural Rights Post-Conflict" (Paper series commissioned by the Office of the High Commissioner for Human Rights, 2009), http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf.

on inconsistency of argument that, under the principle of separation of powers, the judiciary should not encroach on the domain of other branches of power, namely the legislative and the executive powers responsible for welfare policies. Judicial review of political decisions is a part of the mutual control of powers, often described as "checks and balances," which guarantees the inviolability of civil and political rights. Courtis argues that it must also work for socio-economic rights since all human rights are interconnected.[9]

Several authors highlighted the impact of austerity policies on the constitutional protection of economic, social and cultural rights. Swaminathan suggested that national enforcement of socio-economic rights, undermined by structural adjustment programs of the International Monetary Fund and the World Bank, may help the people of developing countries to retake control over their governments, compromised by the international financial system.[10] Michalowski studied how conflicts between social rights and sovereign debt obligations can be resolved under international law, particularly with regard to the constitutional justiciability of social rights.[11] The issue was raised with references to case law of constitutional courts in a monograph of Ssenyonjo, discussing possible establishment of a World Court of Human Rights,[12] and in edited books, such as "Sovereign Debt and Human Rights" highlighting role of the judiciary in definition of minimal core human rights obligations,[13] and "Making Sovereign Financing and Human Rights Work" where constitutional review of economic emergencies invocation is discussed.[14]

Landau studied models of social rights enforcement by the courts in several countries, criticizing the "negative means" such as striking down a law and individualized rights enforcement. He argues the judiciary should issue positive

9 Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008).

10 Rajesh Swaminathan, "Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights," *Columbia Journal of Transnational Law* 37, no. 1 (1998): 161.

11 Sabine Michalowski, "Sovereign Debt and Social Rights – Legal Reflections on a Difficult Relationship," *Human Rights Law Review* 8, no. 1 (2008): 35–68, https://doi.org/10.1093/hrlr/ngm042.

12 Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law (Oxford: Hart Publishing, 2009).

13 Ilias Bantekas and Cephas Lumina, eds., *Sovereign Debt and Human Rights* (Oxford University Press, 2019).

14 Juan Pablo, Bohoslavsky, and Jernej Letnar Cernic, eds., *Making Sovereign Financing and Human Rights Work* (Oxford: Hart Publishing, 2016).

orders forcing the state to provide social services because structural changes and innovative remedies are needed to protect the poor and deal with social injustices.[15]

According to doctrinal studies, the Constitutional Court of Ukraine developed a systemic approach to matters of social justice. Holovaty notes that the Court many times expressed in judgments strict view that in social and law-based state idea of social justice must be guaranteed by the rule of law and embodied into law-making and law-enforcement activities of the State.[16]

Verlanov scrutinized the Court's application of the Universal Declaration of Human Rights, ICESCR and European Social Charter (revised), studied methods of rights protection by the Court.[17] Inshyn, Miroshnychenko, and Paida highlighted the importance of the Court's judgments for the protection and development of constitutional cultural rights and freedoms.[18]

Bulkat critically analyzes opinions of the Court, pointing to contradictions between upheld rights and recognition of the limited economic capacity of the state to deliver social benefits.[19] Judge Chubar highlighted socio-economic rights protection of vulnerable categories of people by the Court, including victims of Chernobyl disaster, military and law enforcement personnel, pensioners and veterans; also he admitted that Ukraine for a long time arranged increase in spending on social benefits, which become the burden for the state budget undermining stability of financial system, especially in view of low effectiveness of welfare programs in Ukraine (20-22%) comparing to the similar programs in Eastern and Western Europe with 30-50% effectiveness rates.[20]

---

15 David Landau, "The Reality of Social Rights Enforcement," *Harvard International Law Journal* 53, no. 1 (Winter 2012): 189–247.

16 Serhiy Holovaty, "Concept of the Rule of Law – Difficulties of its perception in the post-Soviet legal culture (Ukraine's experience)," (Report, Venice Commission, 2016), accessed on 15 November 2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2016)015-e.

17 Serhii Verlanov, *Ekonomichni i sotsialni prava liudyny: yevropeiski standarty ta yikh vprovadzhennia v yurydychnu praktyku Ukrainy (zahalnoteoretychne doslidzhennia)* [Economic and social rights of human: European standards and their implementation in judicial practice in Ukraine (broad theoretical research)] (Lviv: Krai, 2009).

18 Mykola Inshyn, Yurii Miroshnychenko, and Yurii Paida, "Protection of Constitutional Cultural Rights and Freedoms of Citizens by The Constitutional Court Of Ukraine," *Baltic Journal of Economic Studies* 4, no. 4 (2018): 134–9. https://doi.org/10.30525/2256-0742/2018-4-4-134-139.

19 Liudmyla Bulkat, "Pytannia sotsialnoho zakhystu v aktakh Konstytutsiinoho Sudu Ukrainy [The issue of social protection in the acts of the Constitutional Court of Ukraine]," *University Scientific Notes* 58 (2016): 23–34.

20 Liudmyla Chubar, "Problemy realizatsii sotsialnykh prav na suchasnomu etapi ta yikh zakhyst u konstytutsiinomu

Among notable achievements of the Court, former Chairman Judge Holovin mentioned decisions in the cases concerning labor and welfare rights.[21] Former Chairman Judge Baulin pointed out the influence of judgments of the European Court of Human Rights (ECtHR) on legal reasoning of the Constitutional Court of Ukraine, in particular in cases concerning social benefits.[22] The procedure of the constitutional complaint in Ukraine was also studied by Faiz.[23]

The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine and composed of 18 judges, appointed by the President, by the Verkhovna Rada (parliament), and by the congress of judges, each of which appoints 6 judges for 9-years term, who cannot be reappointed. The mixed composition of the Court predetermines its relative independence and plurality of legal thoughts represented there, also abundantly expressed in dissenting opinions published with mega political judgments. There is possibly a field for further study of judicial politics, strategic behavior of judges, etc. But this research is focused rather on the dynamics and outcome of constitutional review, according to the methodical requirement to take into account the autonomy of legal processes as explained in another article of the author.[24]

Among 295 summaries of opinions and decisions of the Constitutional Court of Ukraine published in English in the constitutional database of Venice Commission,[25] representing near 74% of total opinions and decisions,[26] there are

sudochynstvi [Contemporary problems of realization of social rights and its defense in constitutional justice]," *The Herald of the Constitutional Court of Ukraine* 6 (2003):111–4.

21 Anatolii Holovin, "15 Years of Constitutional Justice in Ukraine: Accomplishments, Challenges, Prospects," in *The Protection of Human Rights by Bodies Of Constitutional Justice: Possibilities And Problems of Individual Access.* Materials of International Conference (Kyiv: Logos, 2011), 411–24.

22 Yurii Baulin, "The Jurisprudence of the Constitutional Court of Ukraine on the Protection of Human Rights Recognized by the Ukrainian Legislation and Acts of International Law," in *Global Constitutionalism and Multi-layered Protection of Human Rights – Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia* (Seoul: Constitutional Court of Korea, 2016), 133–67.

23 Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (2016): 103–28, http://dx.doi.org/10.31078/consrev215.

24 Yurii Sheliazhenko, "Autonomous Processual Model of Law," *Philosophy of Law and General Theory of Law* 1 (2019): 91–111. https://doi.org/10.21564/2227-7153.2019.1.186739.

25 "The CODICES database," European Commission for Democracy through Law (Venice Commission), Council of Europe, accessed on 15 November 2019, http://www.codices.coe.int.

26 Since 1996, the Court issued 361 decisions and 37 opinions searchable and accessible in Ukrainian at the official website of Constitutional Court of Ukraine (http://ccu.gov.ua/en) and in the Legislation of Ukraine Database (https://zakon.rada.gov.ua/laws?lang=en).

54 linked by thesaurus to the category "Economic, social and cultural rights." The author selected 26 cases of the sort (see Appendix) on the base of doctrinal and political significance for further historically embedded analysis.

The results of this research are laid in Section II, which consists of five subsections. Historical background before the establishment of the Court in Subsection 2.1 helps to understand the origins and necessity of constitutional review. Subsection 2.2 describes the framework of the review and discusses doubts concerning power and independence of the Court. Doctrinal principles of social justice explained in Subsection 2.3, and the Court's intercourse with economic and political turbulence is discussed in Subsection 2.4 to conceptualize a balanced judicial approach to the protection of social, economic and cultural rights. Subsection 2.5 assesses the impact of the Court's jurisprudence to address the doubts about the non-binding, declarative character of socio-economic rights. Findings of the article help to understand how constitutional justice can make the political and economic transition more fair and legal, since the Ukrainian experience can be helpful to other nations in transition, and to formulate proposals aimed to strengthen constitutional review in the matters of social justice.

II. ANALYSIS AND DISCUSSION

2.1. Protection of Economic, Social and Cultural Rights before the Establishment of the Constitutional Court of Ukraine

Ukraine signed International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1968 and ratified it in 1973. In the first periodic report[27] on implementation of the covenant, submitted in 1978, government of Ukrainian Soviet Socialist Republic (SSR) claimed that "The rights and freedoms recognized in the Covenant were guaranteed to the citizens of the Ukrainian SSR long before that international instrument entered into force." Indeed, economic, social and cultural rights (including rights to work, fair remuneration, leisure, education,

[27] United Nations, Economic and Social Council, "Reports submitted in accordance with Council resolution 1988 (LX) by states parties to the International Covenant on Economic, Social and Cultural Rights covered by articles 6 to 9: Ukranian Soviet Socialist Republic" (E/1978/8/Add.22, 26 September 1978).

social security, and medical care) were prioritized in 1937 Constitution of Ukrainian SSR before the civil and political rights (severely restricted to ensure the rule of communist party)[28] with further proclamation in Article 37 of 1978 Constitution of Ukrainian SSR[29] that "the socialist system ensures enlargement of the rights and freedoms of citizens and continuous improvement of their living standards through the fulfillment of social, economic and cultural development programs."

According to the mentioned periodic report, state funding of social benefits for workers increased from 1.670 million roubles in 1970 to amount of 2.630 million roubles in 1976; also, during consideration of the report in 1980 the state informed about its efforts to finance and organize the construction of housing available to citizens at low rents, 3-5% of family income, so in 1976-1980 over 6 million people had received the housing.[30]

However, the report also claimed "the complete absence of unemployment, which was eliminated in the country as early as 1930." The same statement in second periodical report[31] of Ukrainian SSR caused many questions during an expert discussion in 1984 working group session,[32] on which Fedir Burchak, representative of Ukrainian SSR, gave dodgy answers. He explained by "advantages of planned economy" extraordinary growth of declared number of jobs after 1970. Also, he concealed criminalization of unemployment and homelessness, claiming that constitutional provisions forbidding evasion from socially useful work "carried no sanctions."

In fact, older constitutions of Ukrainian SSR of 1919 and 1929 were recognized no right to work but obligation to work; these constitutions were manifestly deprived of any rights those who don't belong to working class. According to

[28] Constitution (The Basic Law) of the Ukrainian Soviet Socialist Republic of 1937.

[29] Constitution (The Basic Law) of the Ukrainian Soviet Socialist Republic of 1978.

[30] United Nations, Economic and Social Council, "Sessional working group on the implementation of the International Covenant on Economic, Social and Cultural Rights: summary record of the 18th meeting" (E/1980/WG.l/SR.18, 28 April 1980).

[31] United Nations, Economic and Social Council," Implementation of the International Covenant on Economic, Social and Cultural Rights. Second periodic reports submitted by States parties to the Covenant concerning rights covered by articles 6 to 9 in accordance with the first stage of the programme established by the Economic and Social Council in its resolution 1988 (LX): Ukranian Soviet Socialist Republic," E/1984/7/Add.9 (13 March 1984).

[32] United Nations, Economic and Social Council, Sessional working group of governmental experts on the implementation of the International Covenant on Economic, Social and Cultural rights: summary record of the 15th meeting, E/1984/WG.1/SR.15 (30 April 1984).

Article 214 of the 1960 Criminal Code of Ukrainian SSR, vagrancy, begging, and parasitic lifestyle were punishable by imprisonment or correctional labor for a term of one to three years. This article, repressing the unemployed, was in force until 1992, despite soviet leader Khrushchev in 1961 declared an end to the "dictatorship of the working class," introduced by Lenin in the first years of 1917 revolution and developed by Stalin during next decades, including creation of the Gulag system of forced labor camps. Attempt of Communist party in the second half of XX century to create welfare state ensuring a livelihood to all workers, according to Marxist principles, without robust economic culture led to shortages of consumer goods and services and subsequent collapse of socialist economy. Concealed patterns of unemployment in Soviet Union were revealed by western surveys long time before its dissolution, as well as low labor productivity of oppressed and underpaid population[33] (popular saying of the time – "In the Soviet Union the people are pretend to work, and communists are pretend to pay").

Ukraine started to publish statistics of unemployment only after gaining independence, and yet, as admitted in third periodical report[34] of 1994, official figure 181 000 of unemployed citizens does not reflect real situation of the time, namely the hidden unemployment of 2.2 million of people, or 9% of working age population. So, governmental data remained questionable even in post-soviet Ukraine.

Another indicator of injustice, observed both in soviet and independent Ukraine, is deep social inequality. Despite in Ukrainian SSR and other republics of USSR advanced system of social welfare was built with universal services widely available, there was generally low level of service and unfair redistribution of resources in favor of the nomenclature of the Communist party and elite in capital cities; while some people enjoyed the benefits of socialist welfare,

[33] Paul R. Gregory and Irwin L. Collier Jr., "Unemployment in the Soviet Union: Evidence from the Soviet Interview Project," *The American Economic Review* 78, no. 4 (1988): 613-32. See also: José Luis Ricón, "The Soviet Union: Achieving full employment," *Nintil*, https://nintil.com/the-soviet-union-achieving-full-employment/.

[34] United Nations, Economic and Social Council, Ukraine: implementation of the International Covenant on Economic, Social and Cultural Rights. Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant, E/1994/104/Add.4 (17 October 1994).

others were excluded.[35] This inequality became drastic after free-market reforms. In 2001, during the consideration of the fourth periodic report of Ukraine in UN Committee on Economic, Social and Cultural Rights, judge Ariranga Pillay mentioned, referring to the UNDP report, that 30% of the population of Ukraine was poor and 15% lived in abject poverty. He pointed out that such poverty was in part attributable to the process of economic transition, which had served to enrich only a tiny minority; poverty affected the most vulnerable segments of the population, especially the elderly, women and children, in a variety of ways, including prostitution, child abandonment and trafficking.[36] Described crisis of social justice, in our view, vividly highlighted need of constitutional review during the political and economic transition to prevent unfavorable outcomes, such as abyss of inequality, mass poverty, and rampant crime.

Ukraine had come a long way to introducing the institute of constitutional review by the independent judiciary body. In the time of ratification of ICESCR, Ukrainian SSR was part of the Soviet Union where no jurisdiction of judges to change the law was recognized. The constitutional supervision was conducted nominally by the legislatures of the union and member republics, expected to control somehow their own extensive powers. In Soviet Ukraine ensuring observance of the Constitution was a function of the Presidium (standing body) of the Verkhovna Rada (legislature) of the Ukrainian SSR, which also was the highest body of state authority in Ukrainian SSR; courts enforced rights of citizens accordingly to the laws having no authority to question its constitutionality; the Procurator-General of USSR with subordinated to him Procurator-General of Ukrainian SSR and local procurators were responsible for overall (with exception to legislatures) supervision of the strict and uniform observance of laws.[37]

In 1989 Committee of Constitutional Supervision of the USSR was established[38] and influenced the field of law in Ukrainian SSR during subsequent years before

[35] Elena Iarskaia-Smirnova and Karen Lyons, "Social Work in Former Soviet Union Countries: Mapping the Progress of 'The Professional Project'," *European Journal of Social Work* 21, no. 1 (2018): 114–27. https://doi.org/10.1080/13691457.2016.1255926.

[36] United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights Twenty-sixth (extraordinary) session: summary record of the 41st meeting, E/C.12/2001/SR.41 (28 August 2001).

[37] Leonid Yuzkov, *Constitution of Soviet Ukraine* (Kyiv: Politvidav Ukraini Publishers, 1984).

[38] Herbert Hausmaninger, "The Committee of Constitutional Supervision of the USSR," *Cornell International Law Journal* 23, no. 2 (1990): 287–322.

the dissolution of the Soviet Union in 1991. Dr. Fedir Burchak, mentioned before, became a member of the Committee in the capacity of the Head of Legal Division of the Presidium of the Verkhovna Rada of Ukrainian SSR. In particular, the Committee declared unconstitutional and void some restrictions of rights to work, education, and protection of the family of Soviet citizens on the basis of propiska, which was residency permit and instrument of state control over internal migration, especially into main cities (Moscow and Leningrad in Russia, Kyiv in Ukraine were strictly mentioned in the resolution of the Committee[39]).

In 1989 Verkhovna Rada amended the Constitution to establish the Committee of Constitutional Supervision of Ukrainian SSR, but this decision was never implemented. Instead, in 1990 Verkhovna Rada amended the Constitution again introducing the Constitutional Court, but failed to elect judges of the court next years due to conflict between parliament and president. Only the head of the Constitutional Court, Leonid Yuzkov was elected and appointed to chair the Working Group of the Constitutional Commission of Ukraine, designed to draft the new Constitution of Ukraine. In 1992, Ukraine applied to join the Council of Europe, so its Commission for Democracy through Law, known as the Venice Commission, was involved in the drafting.

In 1993 at the invitation of Mr. Yuzkov four Venice Commission's rapporteurs accompanied by the secretary were traveled to Kyiv, received by President Leonid Kravchuk and met with the members of Constitutional Commission. During the meeting and in the next opinions on Ukrainian constitutional reform (in particular, evaluating in 1997 its outcome[40]) Venice Commission raised concerns about abundance of socio-economic rights in the new constitution, noting that "The list of human rights appears to be exhaustive and in line with international instruments, but some of these rights seem to be more political goals than real, enforceable rights," so it may cause unrealistic expectations among the people and inability of courts to protect these rights, undermining the rule of law. Answering the concerns, "The Ukrainian hosts explained that this is due to the

[39] Committee of Constitutional Supervision of the USSR, "Conclusion concerning legislation on propiska of citizens" (No 11(2-1), 26 October 1990).

[40] "Opinion on the Constitution of Ukraine, CDL-INF(1997)002-e," Council of Europe, Venice Commission, 11 March 1997.

constitutional tradition prevailing in the country, and to the fear that the people might not appreciate a constitution without such provisions," as quoted in the memorandum after the meeting.[41] Wolczuk puts out that full protection of social and economic rights for the moment was the agenda of left-wing parties when their right-wing opponents were concerned only with enforcement of Ukrainian ethnic identity after the centuries of russification under the Moscow imperial rule. As for pro-presidential centrists, they were seeing in socio-economic rights no more than an impediment to free-market reforms.[42] When the constitutional agreement was reached in 1995, no efforts were made by the legislators to develop a more pragmatic approach to constitutional rights, especially socio-economic ones; as suggested Venice Commission, maintenance in force de-jure these rights which were ineffective de-facto for the sake of popular demand and national cohesion can offer ground for interventions by the Constitutional Court.[43]

After the adoption of the new Constitution of Ukraine in 1996, a new law on the Constitutional Court was passed; judges were appointed and took an oath on 18 October 1996, so the court started to function. One of the first decisions in 1997 was stated that Verkhovna Rada henceforth has no authority to give an official interpretation of the Constitution it solely performed by previous decades since this authority under the new Constitution belongs to the Constitutional Court of Ukraine.[44]

For that time, the country was suffered from an economic crisis caused by a transition from socialist to a market economy: labor income fell in a half, large arrears were accumulated in wage and pension payments, majority of the population lived in poverty receiving different forms of social benefits.[45]

41 "Meeting on the draft Constitution of Ukraine: Secretariat memorandum, CDL(1993)042-e," Council of Europe, Venice Commission, 25 June 1993.

42 Kataryna Wolczuk, *The Moulding of Ukraine: The Constitutional Politics of State Formation* (Budapest: Central European University Press, 2001).

43 "Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the president of Ukraine, CDL(1995)040-e," Council of Europe, Venice Commission, 11 September 1995.

44 Ivan Tymchenko, "Mechanism of Constitutional Jurisdiction in Defence of Rights and Freedoms of Man and Citizen," in Yurii Bytiak et al., eds., *The Legal System of Ukraine: Past, Present, and Future. Volume II. Constitutional Foundations of the Legal System of Ukraine and Problems of Improvement* (Kharkiv: Pravo, 2013): 121–47.

45 John Odling-Smee et al., *Ukraine: IMF Economic Reviews* (Washington: International Monetary Fund, 1995).

In the next years, the suffering became deeper after the world economic crisis of 2008 and armed conflict in Eastern Ukraine started in 2014. In that context Constitutional Court of Ukraine developed a doctrine of the rule of law based on social justice and issued a number of judgments protecting vulnerable categories of people from socio-economic and cultural deprivation, enforcing human rights guaranteed by the Constitution of Ukraine. The Court interpreted these rights in light of international treaties ratified by Ukraine – in particular, ICESCR, European Convention on Human Rights, and European Social Charter (Revised), the last ratified in 2006 with significant reservations, excluding the right to social and medical assistance, protection of migrant workers and their families, and the right of workers to the protection of their claims in the event of the insolvency of their employer.

2.2. Constitutional Framework and the Powers of the Court

Human rights in economic, social and cultural spheres are comprehensively implemented in Section II of the Constitution of Ukraine, including some formulations enshrining personal autonomy. In particular, Article 43 guarantees everyone right to work he or she free chose, as well as the right to proper, safe, and healthy labour conditions, and to remuneration no less than the minimum wage determined by law. Article 45 enshrines the worker's right to rest. Article 36 guarantees the right of citizens to form trade unions and join the trade union, and Article 44 guarantees the right of workers to strike. Right of citizens to social security is guaranteed by Article 46, and right of everyone to a sufficient standard of living according to Article 48 includes adequate nutrition, clothing, and housing; Article 47 particularly protects right to housing. Article 49 guarantees everyone the right to health protection, medical care, and medical insurance. Accordingly to Article 53, everyone shall have the right to education, and complete general secondary education shall be compulsory. The freedom of literary, artistic, scientific, and technical creative activities, as well as protection of intellectual property guaranteed to citizens by Article 54. Article 51 prescribes the state protection of family, childhood, motherhood, and fatherhood. Equality of all human beings in dignity and rights is recognized in Article 21; Article 23

guarantees the right of everyone to free development of personality, and Article 24 proclaims equal constitutional rights of citizens, as well as equality of the rights of women and men.

Even though the Constitution of Ukraine does not guarantee progressive socio-economic development supported by maximum available resources, it contains formal safeguards to prevent a decline in achieved standards of social justice. Article 22 prohibits the abolition of constitutional rights. Also, Article 64 prohibits restriction of constitutional rights, unless such restriction stipulated by the Constitution; according to the article, such restrictions can't be imposed on the rights to non-discriminatory treatment, to housing, to protection of family, parenthood, and childhood, but other socio-economic rights can be restricted on temporary basis under martial law or a state of emergency.

Also, as mentioned above, some human rights in the Constitution of Ukraine are literally guaranteed to citizens, not to everyone. On the other hand, according to Article 26 of the Constitution, foreigners and stateless persons staying in Ukraine on legal grounds shall enjoy the same rights and freedoms and bear the same duties as citizens of Ukraine, except as restricted by the Constitution, laws, or international treaties of Ukraine.

Article 8 of the Constitution recognizes the principle of the rule of law. According to Article 9 of the Constitution, international treaties in force agreed to be binding by the Verkhovna Rada of Ukraine are an integral part of the national legislation. So, the rights guaranteed by ICESCR are the law and must be justiciable in Ukraine.

Jurisdiction of the Constitutional Court of Ukraine to decide on compliance with the Constitution of Ukraine (constitutionality) of laws and other legal acts, to provide the official interpretation of the Constitution of Ukraine, to provide opinions on the constitutionality of amendments to the Constitution, of international treaties, of questions that are proposed to be put for a referendum, and on the observance of the constitutional procedure of impeachment of the President of Ukraine is described in Section XII and Article 159 of the Constitution. Apart of individual constitutional complaints, the Constitutional Court of

Ukraine considers constitutional petitions lodged by Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (the ombudsman initiated many landmark cases of the Court), 45 or more People's Deputies of Ukraine, the President of Ukraine, and the Supreme Court.

Decisions and opinions adopted by the Constitutional Court of Ukraine are binding, final, and may not be challenged (Article 151.2). Laws and other legal acts or their particular provisions which the Court found unconstitutional lose their legal force, and damages caused by enforcement of unconstitutional acts must be compensated by the State (Article 152).

The Court's autonomy in controlling the judicial process is limited. Article 153 of the Constitution prescribes that the Constitution and law determine the organization, operation, and procedures of the Court. Decisions of the Court are not considered the law because the Constitution as basic and superior law requires in Articles 8 and 85 the laws shall be adopted by the Verkhovna Rada. This feature of the civil law system, in my view, means that judges formally are not trusted to make the law and must surrender to the political will of the legislators. Of course, in practice, judges inevitably made the law, at least in a broad theoretical sense (not the law in the strict constitutional terminology, i.e., statute law), vitalizing prescriptions of outdated, vague and contradictory statutes in complicated situations of real life, hardly foreseen by the legislators, as well as developing, upholding, and changing case law (which, by the way, many jurists denied to recognize as a source of law, even preferring to call it "court's practice," not the precedent). Many problems with the realization of economic, social, and cultural rights in Ukraine are caused by deprivation of personal autonomy,[46] and the Constitutional Court of Ukraine, deprived of judicial autonomy, have a little opportunity to change the situation.

Despite Article 149 of the Constitution proclaims the independence of judges and prohibits any influence on a judge of the Constitutional Court of Ukraine, factual dependence of judges on political will is so deep that the Verkhovna Rada

[46] Coalition for Personal Autonomy, "Ukraine: problems with implementation of the International Covenant on Economic, Social and Cultural Rights," *Pravdoshukach,* 31 August 2018, https://truth.in.ua/en/public/358/.

and the President repeatedly influenced and incapacitated the Constitutional Court of Ukraine, blocking appointment or inauguration of judges, dismissing them and manipulating with adoption of procedural law. For example, after the 2016 changes to the Constitution of Ukraine, the Court was obliged to receive but unable to hear personal constitutional complaints until 2018 because of delay in the adoption of the new law about the Court, since the old law become discrepant to the Constitution. The function of the Constitutional Court of Ukraine was paralyzed by politicized dismissals of judges[47] and holding their offices vacant[48] during political crises in 2007 and in 2014; a number of judges were prosecuted for alleged involvement in seizure of power by the former president Yanukovych in 2010 who supposedly pushed the Court to overrule constitutional reform of 2004 and restore excessive presidential authority.[49] Venice Commission warned in 1996 that the functioning of the Constitutional Court can be blocked by the non-appointment of judges,[50] but this warning wasn't seriously considered, possibly because the political elite had no intention to strengthen independent constitutional review.

On the other hand, the composition of the Court, mixed from judges appointed by the legislative, executive, and judicial branches of power, ensures its relative independence and allows incorporating a pragmatic account of social justice into highly demanded adjudication of disputes between competing elites. This position of impartial adjudicator distinguishes the Constitutional Court of Ukraine from other courts in the country, often criticized for lack of impartiality and judicial independence.[51] A commitment of the Court to social justice helps it to remain impartial, gaining trust by upholding the core value of legal culture.

---

47 International Commission of Jurists, "Ukraine: dismissal and criminal prosecution of judges undermine independence of the judiciary," last modified on 20 March 2014, https://www.icj.org/ukraine-dismissal-and-criminal-prosecution-of-judges-undermine-independence-of-the-judiciary/.

48 Iryna Budz, "What Prevents Ukrainian Judiciary From Becoming Truly Effective And Independent?" *VoxUkraine*, last modified on 24 July 2019, https://voxukraine.org/en/what-prevents-ukrainian-judiciary-from-becoming-truly-effective-and-independent/.

49 LB.ua, "Yanukovych charged with constitutional coup. Ex-Justice Minister Lavrynovych is another suspect in the case," last modified on 6 September 2017, https://en.lb.ua/news/2017/09/06/4436_yanukovych_charged.html.

50 Council of Europe, Venice Commission, "Opinion on the draft Constitution of Ukraine" (CDL-INF(1996)006-e, Council of Europe, Venice Commission, 21 May 1996).

51 Maria Popova, "Ukraine's Politicized Courts," in *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine,* eds. Henry E. Hale and Robert W. Orttung (Stanford University Press, 2016), 143-61.

Also, some elder judges themselves are interested in quiet retirement and social benefits; this factor not only constrain them from partisanship as observed Trochev[52] but encourage to establish a doctrinal link between social justice and judicial independence, as in 2016 decision[53] concerning pensions of judges which claims that high social security of judges protects their impartiality and integrity.

2.3. Social Justice by the Constitution: Rule of Law, Equal Treatment, and Autonomy

Apart from pressure by corrupted politicians on the Court, another factor impeding justiciability of economic, social, and cultural rights proclaimed by the Constitution of Ukraine and international human rights treaties is a tendency to consider it simply as declarations of intentions imposing almost no legal obligations on the State. This view, in particular, can be found in official opinions and expert publications of the Venice Commission.

In 1996 opinion the Commission criticized the draft Constitution of Ukraine, pointing out, that "the very exhaustive character of the list including rights of a social, economic and environmental character poses problems for their guarantee by the courts." Also, the Commission found unsatisfactory the formulation of Article 3, paragraph 1 "the human being... is recognised in Ukraine as the highest social value." In view of Commission, it gives, at least in translation, the impression that the individual is seen in the function of society and not in its inherent value and dignity, which precedes the state, is unique, irreplaceable, and incomparable.[54]

In 1997 opinion Venice Commission noted that the already adopted Constitution of Ukraine in Article 3 still considers the human being as the highest social value and not simply the highest value. Also, it expressed its skepticism concerning the justiciability of socio-economic rights "which have to be implemented on the basis of parliamentary statutes and executive action,"

[52] Alexei Trochev, "Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in Post-Communist Colored Revolutions," in *Consequential Courts: Judicial Roles in Global Perspective,* eds. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge University Press, 2013), 82.

[53] Case No 4-rp/2016 of 8 June 2016 (Decision of the Constitutional Court of Ukraine, 2016).

[54] Supra, note 50.

urging it is "unrealistic" to expect the implementation of these rights directly by the courts.[55] Judge Mykhailo Hultai argued that socio-economic rights cannot be protected by the state and by the court, unless to the extent that they are a prerequisite for the implementation of civil and political rights and freedoms; therefore constitutional complaints appealing solely to these rights must be considered inadmissible.[56]

It seems that constitutional emphasis on social character of the value of human was misunderstood by the experts of the Venice Commission. This emphasis doesn't diminish inherent value and dignity of individual, but demand to respect it in the social life. Interconnection and interdependence of all human rights, civil-political and social-economic-cultural, is well-known principle proclaimed in the Vienna Declaration and Programme of Action three years before the Constitution of Ukraine was adopted. Even critics of socio-economic rights such as judge Hultai can't deny that personal security and civil liberties of individual are weak if not supported by dignified standard of living, minimum means of existence in civilized society guaranteed by welfare state. Social security protects democracy and free-market from crime and radicalism induced by hopeless poverty. Taking apart disputable option of universal basic income, it is widely recognized that the welfare state is obliged to care for vulnerable groups assuming that the most of people are capable to take benefits of social life without the direct assistance of the state. Judge Chubar wrote: Article 48 of the Constitution of Ukraine proclaims the right of every citizen of Ukraine and his or her family to sufficient standard of living, including food, clothes, housing; but this in no way means that the state must provide everyone these livelihoods, instead the state creates an environment in which individuals can actively pursue the sufficient standard of living, and only if some citizens are certainly unable to do it, the state must provide to the needy social benefits in sum no less than a living wage.[57]

[55] Supra, note 40.

[56] Mykhailo Hultai, "Normative constitutional complaint in Ukraine as a national legal remedy" (Report, Venice Commission, 2018), accessed on 15 November 2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2018)015-e.

[57] Supra, note 20.

Being urged to prefer the individual freedom to the economic security, Ukrainian lawmakers upheld both in the 1996 Constitution of Ukraine. Members of the Working Group of the Constitutional Commission, playing a key role in drafting the constitution, were committed to the ideal of personal autonomy in the social state. The first head of the Constitutional Court and chairman of the group Leonid Yuzkov in 1992 co-authored with a member of the group Yevheniia Tykhonova article saying in the civilized state human is the center of social life, based on liberty, natural rights, honor, and dignity; such state integrates people within its territory in civil society, that is an association of free and equal autonomous persons.[58] Member of the group Volodymyr Kopieichykov in the 1991 book "Democracy and Personality" wrote:

> "A person isn't a passive product of social interactions but a living and active agent characterized by autonomy in the own development and by internal structure differing from the social. Freedom is inherent to individual independent in self-formation, activity, and development."[59]

In 2004 decision the Court interpreted constitutional principle of the rule of law as the supremacy of law in a society demanding that the State should embody this principle into law-making and law-enforcement activities, in particular, into the statute laws, which essentially should be permeated above all by the ideas of social justice, freedom, and equality.[60]

According to the 2012 decision of the Court, Ukraine as a social state recognizes the human being as the highest social value and distributes the public wealth according to the principles of social justice. It is mindful of the consolidation of public consent in society. The main objective of the social state is the creation of conditions for implementation of social, cultural and economic human rights, the facilitation of independence and responsibility of every person for his or her actions and the provision of social assistance for those citizens who cannot provide a sufficient standard of living for themselves and their families due to circumstances beyond their control.[61]

---

[58] Leonid Yuzkov and Yevheniia Tykhonova, "Konstytutsiia yurydychna i faktychna [Juridical and factual constitution]," *Law of Ukraine* 1 (1992): 9.

[59] Volodymyr Kopieichykov, "*Narodovlastie i lichnost* [Democracy and Personality]" (Kyiv: Ukraina, 1991).

[60] No 15-rp/2004 of 2 November 2004 (Decision of the Constitutional Court of Ukraine, 2004).

[61] No 3-rp/2012 of 25 January 2012 (Decision of the Constitutional Court of Ukraine, 2012).

Another 2012 decision of the Court emphasized that right to personal autonomy is necessary for full development of human in democratic society because of natural voluntarily and dynamism of human behavior, independency of individual from the state, local self-government, and other juridical and physical persons, especially in the spheres of private and family life where individual is free to define his or her behaviour and the extent to which others can become familiar with it, as stated in the Constitution and Civil Code of Ukraine.[62]

The Court recognized not only the personal autonomy, but further autonomy of groups and organizations aimed to realize social and cultural rights, namely autonomy of religious groups in assembling without permission of local authorities[63] and autonomy of workers to create trade unions without overcomplicated bureaucratic procedure,[64] declaring unconstitutional restrictive legislation rooted in the Soviet past. In 2001 decision the Court ruled that Ukraine as a social state must support organizations of civic society, but defended the autonomy of NGOs declaring unconstitutional provisions of the legislation requiring youth and children organizations should be members of one particular nationwide coalition to apply for public funding.[65] Interestingly, in 2004 decision on unconstitutionality of compulsory age limit of 65 years imposed by the law on candidates to academic positions the Court literally upheld the autonomy and self-governance of higher education institutions[66] – the principle proclaimed in the initial draft Constitution of 1992 but removed during political squabbles next years. Indeed, the principle of autonomy was comprehensively developed by the Court.

Principle of equality in socio-economic rights was applied by Constitutional Court of Ukraine, for example, in 1999 opinion declared unconstitutional draft law amending the Constitution of Ukraine by the entitlement to a guaranteed old-age pension from the age of 55 years for women and 60 years for men on the ground that citizens' right to social protection is guaranteed to all citizens

[62] No 2-rp/2012 of 20 January 2012 (Decision of the Constitutional Court of Ukraine, 2012).
[63] No 6-rp/2016 of 8 September 2016 (Decision of the Constitutional Court of Ukraine, 2016).
[64] No 11-rp/2000 of 18 October 2000 (Decision of the Constitutional Court of Ukraine, 2000).
[65] No 18-rp/2001 of 13 December 2001 (Decision of the Constitutional Court of Ukraine, 2001).
[66] No 14-rp/2004 of 7 July 2004 (Decision of the Constitutional Court of Ukraine, 2004).

and does not depend on the age they reach,[67] and in 2002 decision declared unconstitutional immunity of the deputies of local councils against dismissal from their main job in other organizations without preliminary consent of local council on the ground that labor rights of all citizens should be protected equally by the courts.[68]

These examples of legal reasoning of the Constitutional Court of Ukraine represent its doctrine of social justice, based on the values of the rule of law, liberal democracy, social state, personal (group, organizational) autonomy, and equality in economic, social, and cultural rights guaranteed by the Constitution of Ukraine.

2.4. Constitutional Justice in Times of Economic and Political Turbulence

The life expectancy of average national constitution was estimated as 19 years.[69] Constitution of Ukraine survived 23 years, for now, and the Constitutional Court of Ukraine contributed a lot to make it happen. Particularly remarkable is its tendency to protect economic, social, and cultural rights avoiding extremities of squander and shortages.

For example, according to the data of the World Bank,[70] in 1998, inflation in Ukraine was 10.6% which was twice higher than overall global inflation 5.3%. 23 July 1998 Verkhovna Rada adopted the Law on the temporary prohibition of raising the prices and tariffs for housing, municipal services, and public transport provided to citizens of Ukraine; the law prescribed to freeze mentioned prices and tariffs at the level of 1 July 1998. The President of Ukraine has challenged the law in the Constitutional Court of Ukraine. 2 March 1999, the Court decided the law is unconstitutional and void because the parliament interfered with the powers of government to implement price policies contrary to the constitutional principle of the separation of powers.[71] 16 March 1999 Verkhovna Rada adopted

[67] No 2-v/1999 of 2 June 1999 (Opinion of the Constitutional Court of Ukraine, 1999).
[68] No 6-rp/2002 of 26 March 2002 (Decision of the Constitutional Court of Ukraine, 2002).
[69] Zachary Elkins et al., *The Endurance of National Constitutions* (Cambridge University Press, 2009).
[70] "Inflation, consumer prices (annual %) – Ukraine, World (1997-2001)," The World Bank Data, accessed on 15 November 2019, https://data.worldbank.org/indicator/FP.CPI.TOTL.ZG?end=2001&locations=UA-1W&start=1997.
[71] No 2-rp/99 of 2 March 1999 (Decision of the Constitutional Court of Ukraine, 1999).

proclamation accusing the Court and the President in violation of socio-economic rights, emphasizing that wage arrears are exceed 10 million hryvnas (near 8% of GDP) and workers are deprived of means for living.[72] The same day the government and the National Bank of Ukraine informed International Monetary Fund (IMF) about the progress in liberalization of prices as part of economic reforms supported by IMF; according to the memorandum of economic policies, delays in obtaining a ruling by the Constitutional Court prevented the increase in tariffs for communal services in 1998, but, following the decision of the Constitutional Court, tariffs for gas and electricity (services regulated by the central government) planned to be increased by 25% and 20% respectively.[73] 17 March 1999 the parliament amended the Law on prices and pricing, freezing prices in case of arrears of wages or social benefits and obliging the government to coordinate with the parliament any changes in prices and tariffs; that amendment 10 February 2000 the Court avoided as non-constitutional.[74] After the attempts of parliament to freeze the prices, inflation was reached 22.7% in 1999 and 28.2% in 2000; after the Court cancelled these price regulations, in 2001, inflation was dropped to 12%. Hypothetically, in case of inability of the Court to strike down populist legislation Ukraine was doomed to hyperinflation as it happened in Zimbabwe, where stubborn attempts to freeze prices forcedly reduced almost to nothing value of national currency and fastened social degradation, caused tendencies like food shortages in agrarian economy.[75]

Further case law of the Court shows a balanced approach to protection of the socio-economic rights in the circumstances of the financial difficulties of the state. In 2007, decision it declared unconstitutional annual termination of welfare rights by the law on the state budget,[76] but in 2011 the Court emphasized

[72] Verkhovna Rada of Ukraine, "Proclamation of the Verkhovna Rada of Ukraine Concerning the Cancellation by the Constitutional Court of Ukraine of the Law of Ukraine on the Temporary Prohibition of Rising the Prices and Tariffs for Housing, Municipal Services, and Public Transport Provided to Citizens of Ukraine" (16 March 1999).

[73] International Monetary Fund, "Ukraine Letter of Intent and Memorandum of Economic Policies," 16 March 1999, https://www.imf.org/external/np/loi/1999/031799.htm.

[74] No 2-rp/2000 of 10 February 2000 (Decision of the Constitutional Court of Ukraine, 2000).

[75] Michael Winesjuly, "Zimbabwe Price Controls Cause Chaos," *New York Times,* 3 July 2007, https://www.nytimes.com/2007/07/03/world/africa/03cnd-wzimbabwe.html.

[76] No 6-rp/2007 of 9 July 2007 (Decision of the Constitutional Court of Ukraine, 2007).

the social and economic rights envisaged in the legislation are not absolute[77] and in 2012 decision the Court interpreted the principle of social state as protection of needs in social security within the limits of the financial capacity of the state obliged to keep the budget balanced distributing public wealth in fair and non-discriminatory way.[78] In 2018, deciding the limitation of child benefits is constitutional[79] the Court made reference to 2007 statement of the Committee on Economic, Social and Cultural Rights, saying: where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances.[80] Unfortunately, this obligation neglected in Ukraine at the level of public policy; it demonstrates problem of non-enforcement of judgments, most of them in social security cases, according to Committee of Ministers of the Council of Europe (CM CoE), persistent since 2004 because of insufficient compliance of authorities.[81] As admitted Baulin, there are no necessary funds in the state budget to execute judgments of the ECtHR,[82] including pilot judgment in the case of Yuriy Nikolayevich Ivanov v. Ukraine and next landmark judgment in the case of Burmych and Others v. Ukraine ordered CM CoE to deal with 12 143 admissible complaints about violations of the right to a fair trial by non-enforcement of domestic judgments in Ukraine.[83]

In 2019, Ukrainian Helsinki Human Rights Union informed CM CoE the government allocated in the state budget only 600 million UAH (near 22 million EUR) to pay the debt before the victims of non-enforcement of judgments which is much less than needed annual payment; total estimated amount of the debt exceeds 1 billion EUR.[84] It can't be said that the state is unable to pay the debt,

77 No 20-rp/2011 of 26 December 2011 (Decision of the Constitutional Court of Ukraine, 2011).

78 Supra, note 61.

79 Supra, note 2.

80 United Nations, "Economic and Social Council, An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant: Statement of the Committee On Economic, Social And Cultural Rights" (E/C.12/2007/1, 21 September 2007).

81 H46-35 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine: Supervision of the execution of the European Court's judgments, CM/Del/Dec(2019)1348/H46-35 (Council of Europe, Committee of Ministers, 6 June 2019).

82 Supra, note 22.

83 Case of Burmych and Others v. Ukraine, dated 12 October 2017 (Judgment of the European Court of Human Rights, 2017).

84 Reply from the authorities (22/08/2019) following a communication from a NGO (25/07/2019) in the cases of

since military spending in Ukraine increased almost 7 times last 5 years, to 3.8 billion EUR; only 2% of debt is planned to repay in 2020, while military budget increased by 560 million EUR, the sum sufficient to pay a half of debt instead. Despite President Volodymyr Zelensky was recently elected after his campaigning to stop the war, he personally and proudly announced an increase in the war budget with no mention that such expenses will be taken at the cost of socio-economic stagnation and further decline of the rule of law.

By 2004 memorandum Ukraine took obligation before IMF to strengthen the rule of law, implementing a comprehensive reform of the judicial system;[85] in 2010, Ukraine also promised to IMF further reforms on the issue of judicial enforcement due to resolve the problem of non-payment of loans.[86] Consequently, the law adopted in 2011 prescribed raise of court fees 4 times in civil cases and 8 times in administrative cases. In the interests of social development, civil associations were exempted from a court fee for taking legal action to protect the rights of their members. To ensure the exemption will not be abused, on the request of nonprofit economic association aimed in collective management of copyright the Constitutional Court of Ukraine officially interpreted this exemption as non-applicable to organisations of collective management of property rights because these organizations are not civil associations;[87] the Court's interpretation contained profiteering from enforcement of extortive copyright regimes, according to Shaheed, harmful to personal autonomy in scope of creative, artistic and academic freedom, opportunities to participate in cultural life and enjoy the benefits of scientific progress as guaranteed by the article 15 of ICESCR.[88]

In 2015 Ukraine promised IMF a selective increase of court fees, aiming to double court fee revenues, as well as establishment of private enforcement

Burmych and Others, Ivanov and Zhovner group v. Ukraine, Applications No. 46852/13, 40450/04, 56848/00 (Council of Europe, Committee of Ministers, 23 August 2019).

85 International Monetary Fund, "Ukraine — Letter of Intent, Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding," 11 March 2004, https://www.imf.org/external/np/loi/2004/ukr/01/index.htm.

86 International Monetary Fund, "Ukraine: Letter of Intent, and Technical Memorandum of Understanding," 10 December 2010, https://www.imf.org/external/np/loi/2010/ukr/121010.pdf.

87 No 12-rp/2013 of 28 November 2013 (Decision of the Constitutional Court of Ukraine, 2013).

88 United Nations, Human Rights Council, "Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Copyright policy and the right to science and culture" (A/HRC/28/57, 24 December 2014).

profession with consequent changes in fees for enforcement of judgments.[89] New economic barriers in access to justice were noted in 2017 during universal periodic review of Ukraine.[90] Reacting to challenge, in 2019, Constitutional Court of Ukraine issued decision in Khlipalska case upon individual constitutional complaint of woman denied in compulsory enforcement of a judgment ordered the state tax office to answer her public information request because she was unable to make advance payment required by the law in the sum of two minimum wages; she argued it is prohibitive amount of advance payment depriving unwealthy people the possibility to pursue enforcement of court decisions in their favor. The Court declared unconstitutional the provisions of Article 26.2 of the Law of Ukraine "On Enforcement Proceedings" about mandatory payment in advance by the person in whose favor the court decision was adopted, as a necessary condition to begin the enforcement of such decision by the state executive service, by the reason that said financial burden is incompatible with a constitutional principle of binding force of judgments.[91]

The Court's protection of human rights was especially significant in politically sensitive cases, such as the case of constitutionality of the power of the Ministry of Finance of Ukraine to access personal data which the ministry used to suspend payment of pensions to internally displaced persons (IDPs) alleging 30-40% of 1.7 mln registered IDPs are fraudsters because they still live in the areas controlled by separatists after supposed displacement.[92] According to report of the Council of Europe Project "Strengthening the Human Rights Protection of Internally Displaced Persons in Ukraine", hundreds of thousands of IDPs have not been displaced by the armed conflict in the Eastern Ukraine itself, but as a result of having to cross to government-controlled areas (GCAs) and register as IDPs, as national legislation currently conditions payment of

[89] "Ukraine: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding," International Monetary Fund, 27 February 2015, https://www.imf.org/external/np/loi/2015/ukr/022715.pdf.

[90] United Nations, Human Rights Council, "Summary of Stakeholders' submissions on Ukraine: Report of the Office of the United Nations High Commissioner for Human Rights" (A/HRC/WG.6/28/UKR/3, 31 August 2017).

[91] No 2-r(II)/2019 of 15 May 2019 (Decision of the Constitutional Court of Ukraine, 2019).

[92] BBC Ukraine, "Minfin shukatyme shakhraiv sered tykh, komu platiat dopomohu [Ministry of Finances seeks for fraudsters among recipients of social benefits]," 1 March 2016, https://www.bbc.com/ukrainian/business/2016/03/160301_verification_social_benefits_az.

pensions to persons from GCAs on IDP registration; the report urged Ukraine to protect privacy of IDPs and repeal all legislation demanding civilians from the conflict areas must register as IDPs to get their pensions.[93] Constitutional Court of Ukraine declared unconstitutional provision of the Budget Code of Ukraine allowed the Ministry of Finance to access personal data of IDPs.[94] Despite the government constantly tries to suspend pensions to as many as possible IDPs, number of registered IDPs was decreased to 1.4 mln,[95] not to 1-1.2 mln as was intended after the unconstitutional monitoring of personal data, which shows that the Court's decision protected access to pensions for approximately 200 to 400 thousands of civilians whose right to social security was infringed both by the conflict in the Eastern Ukraine and anti-social policies.

Upholding the rule of law and human rights, the Constitutional Court of Ukraine managed to preserve values of social justice in the times of armed conflict, indebtedness, and austerity. It was achieved without direct economic analysis of law, which may be useful to apply in the future to check whether particular economic policies are socially responsible, and to calculate proper sum of damages caused by violations of human rights for further repayment by the order of the court.

2.5. Case Law and Impact of Decisions of the Constitutional Court of Ukraine Protecting Economic, Social, and Cultural Rights

As I mentioned before, guarantees of economic, social and cultural rights in the Constitution of Ukraine was critically received by the European experts immediately after the adoption of the basic law. Especially, Venice Commission in 1997 opinion expressed skepticism about justiciability of the rights to housing, to health protection, and to a sufficient standard of living. The case law of Constitutional Court of Ukraine shows the rights are justiciable, at least in conservative interpretation (aimed to protect vulnerable groups).

---

93 Council of Europe, *Enhancing the National Legal Framework in Ukraine for Protecting the Human Rights of Internally Displaced Persons* (Kyiv, 2016).

94 No 7-r/2018 of 11 October 2018 (Decision of the Constitutional Court of Ukraine, 2018).

95 Ministry of Social Policy of Ukraine, "Vnutrishnio peremishcheni osoby [Internally displaced persons]," accessed 15 November 2019, https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html.

The Court ensured fairness during privatization of the state-owned housing in the decision recognized right to privatize free of charge more than one apartment in total size within the limits of sanitary norm, which envisages 21 square meters of total floor space per tenant and every member of his or her family and an additional 10 square meters per family.[96] In other decision, the Court ruled that military personnel don't require registration of place of residence to obtain housing.[97] Also, the Court recognized that protection from eviction of retired workers from service quarters includes those who retired early,[98] for example, due to damages to health caused by Chernobyl disaster. In 2018 the Court proclaimed unconstitutional legislative amendments restricting the social benefits available to persons affected by the catastrophe;[99] after the decision, budgetary funding of the benefits was increased by 12% to protect fully their right to a sufficient standard of living.[100]

In 1998, Constitutional Court of Ukraine decided to declare unconstitutional the decree of government in part concerning the list of paid medical services in public health care system on the ground that the constitutional right to health protection, medical care and medical insurance (Article 49 of the Constitution) guarantees that medical care must be provided free of charge in state and municipal medical facilities.[101] Also, in 2002, the Court decided the Article 49 means that the state-owned and communal health protection institutions shall provide medical care to every citizen irrespective of its scope and without prior, immediate or subsequent payment for such care, but the scope of the medical care, system of public and private medical insurance, as well as the procedures for granting medical services beyond the basic free-of-charge medical care on a paid basis in state and public health institutions, and the list of such services, must be laid down by the law.[102] These decisions of the Court became cornerstones of the legal regulation of the national system of the protection of health in

[96] No 15-rp/2010 of 10 June 2010 (Decision of the Constitutional Court of Ukraine, 2010).
[97] No 11-rp/2002 of 13 June 2002 (Decision of the Constitutional Court of Ukraine, 2002).
[98] No 6-rp/2014 of 11 June 2014 (Decision of the Constitutional Court of Ukraine, 2014).
[99] No 6-r/2018 of 17 June 2018 (Decision of the Constitutional Court of Ukraine, 2018).
[100] Law of Ukraine on Amendments to the Law of Ukraine about the State Budget of 2018.
[101] No 15-rp/1998 of 25 November 1998 (Decision of the Constitutional Court of Ukraine, 1998).
[102] No 10-rp/2002 of 29 May 2002 (Decision of the Constitutional Court of Ukraine, 2002).

Ukraine, which is funded at the level 3.4 bln EUR in 2019, or approximately 9% of total budgetary spending.[103]

Similar decision the Court made upholding the constitutional right to free primary education in 2002. It declared unconstitutional provisions of the decree of the Cabinet of Ministers of Ukraine making payable use of textbooks in public elementary schools which must be free of charge according to the Constitution of Ukraine.[104]

The Court also protected dignity and personal autonomy of individuals restricted in their legal capacity for mental illness. 2018 decision declared unconstitutional provision of the Law on Citizens' Appeals restricting the ability of such persons to petition the authorities, for example, asking for necessary measures to improve their welfare; the Court ruled incapacitated individuals must be allowed to submit petitions in person, not only through a guardian, under Article 40 of the Constitution giving everyone the right to file individual or collective written petitions which must be considered and answered by the authorities.[105] It shows the Court cares about the justiciability of socio-economic rights both as the collective rights and the individual rights, helping every person in need to be heard by the state.

III. CONCLUSION

Ukraine ratified the International Covenant on Economic, Social, and Cultural Rights in 1973 as a formally sovereign republic in the Soviet Union. These rights were embedded in the constitutional law and guaranteed by well-financed policies of the state. Access to the exercise of these rights was regulated on the base of loyalty to a communist regime, which severely restricted civil and political rights, preventing the judiciary from interference, in particular, allowing no independent constitutional review. After the collapse of a socialist economy, dissolution of the USSR, and proclamation of independence of Ukraine

[103] Law of Ukraine on the State Budget of 2019.
[104] No 18-rp/2002 of 21 November 2002 (Decision of the Constitutional Court of Ukraine, 2002).
[105] No 8-r/2018 of 11 October 2018 (Decision of the Constitutional Court of Ukraine, 2018).

in 1991, socio-economic rights were severely limited to ensure the economic and political transition from socialism to democracy, especially, free-market reforms, democratic nation-building, as well as protection of the civil and political rights oppressed in the past. All the time, international observers noted grave violations of human rights in the country.

The Constitution of Ukraine adopted in 1996 enshrined high standards of human rights and established the Constitutional Court of Ukraine that ensured fairness of further transition, upholding economic, social, and cultural rights in times of crises and conflicts. Independent constitutional review by the judiciary in post-communist Ukraine helped the nation to make progress in compliance with international human rights law, which was also noted by international experts and represents valuable experience for other nations in transition. Human rights enshrined by ICESCR are universally recognized in the contemporary world, as points out Strydom,[106] so, every civilized nation should protect it, in particular via legal adjudication.

Retired Judge Hultai in 2018 and other experts of Venice Commission in 1996-1997 spoke critically about the justiciability of socio-economic rights in principle. However, our research shows the Constitutional Court of Ukraine is capable to deliver necessary judgments that are enforced by the state, restoring social justice for hundreds of thousands of people. Moreover, contrary to the criticism of conservative measures like striking down a law and individualized rights enforcement, such measures, seen as insufficient by some comparative scholars, in practice became adequate to nudge legal and political system towards social justice.

After more than two decades of functioning, the Court developed impressive doctrine and case law to protect economic, social and cultural rights enshrined in the Constitution of Ukraine and international human rights treaties. These include the rights to free development of personality, to work, freely chosen and fairly paid, in healthy labor conditions; as well as rights to rest and leisure; to

[106] Hennie Strydom, "The Protection of Economic, Social and Cultural Rights in International Law," *Constitutional Review* 5, no. 2 (2019): 222-247.

create trade unions, to strike, and other labor rights; rights to social security, to a sufficient standard of living, including adequate nutrition and clothing; rights to housing, to health protection, to education, to the freedom of literary, artistic, scientific and technical creative activities, to protection of intellectual property, to protection of family, childhood, motherhood and fatherhood; and so on.

In the official interpretation and application of relevant constitutional provisions, the Court is dedicated to the principles of the rule of law, equality, and social justice. Furthermore, the Court implemented in its legal reasoning the ideas of personal autonomy, close to liberal democratic views expressed in academic publications of the framers of the Constitution in first years after the proclamation of independence of Ukraine. In several decisions, the Court protected the privacy of individuals, as well as the autonomy of NGOs, trade unions, and religious groups from restrictive regulations and unjustified intrusions.

Despite enormous pressure, the Court found a pragmatic balance between the values of individual freedom and economic security, helping Ukraine to avoid extremities of squander and shortages in contingent times of economic and political crisis. For example, the Court canceled laws on price regulations, in such way emancipated businesses and reduced inflation, but also ruled that primary medical services and use of textbooks in public elementary schools must be free of charge to guarantee constitutional rights to education and health care.

The case of quashed price regulations also proves the hypothesis of Christian Courtis mentioned in the introduction to this article, that constitutional review helps to protect socio-economic rights at least by safeguarding the separation of powers. Defending the constitutional powers of the executive branch from ill-conceived, ideologically driven directive of panicking legislators, the Constitutional Court of Ukraine not only preserved the integrity of the legal and political system but secured market economy and welfare of the people depending on it.

Initial restraints in institutional autonomy of the Court, permanent pressure on judges and their reluctance to invoke economic analysis of law are marks of the imperfectness of the Court. On the other hand, empowered in 2016 with the authority to consider individual constitutional complaints, the Constitutional

Court of Ukraine evolves for better being the cornerstone of liberal democracy, rule of law, social justice, political and economic stability, as well as sustainable development of Ukraine.

Four ways to improve constitutional review in Ukraine related to matters of social justice can be proposed: further reforms strengthening autonomy of judiciary; application of economic analysis of law to measure and compensate injustices; prioritization of the cases when immediate adjudication is needed; and deeper cooperation with civil society and expert community through human rights reporting, academic conferences and *amicus curiae* briefs.

Appendix:
Selected Jurisprudence of the Constitutional Court of Ukraine
in Social Justice Cases

Date of Decision	Case Number	Rights at Stake (Resume)	Applicant	Court's Assessment	Dissenting Opinions
25.11.1998	15-rp/1998	Access to health care (free-of-charge services at public hospitals)	66 MPs	Governmental decree declared partly unconstitutional	0
2.03.1999	2-rp/99	Adequate standard of living, executive powers (price regulation)	President of Ukraine	A law declared unconstitutional	0
2.06.1999	2-v/1999	Social security (pension age)	Verkhovna Rada of Ukraine	Draft law declared unconstitutional	1
10.02.2000	2-rp/2000	Adequate standard of living, executive powers (price regulation)	President of Ukraine	A law declared partly unconstitutional	2
18.10.2000	11-rp/2000	Trade unions (freedom of establishment)	186 MPs, Ombudsman	A law declared partly unconstitutional	0
13.12.2001	18-rp/2001	Autonomy of youth NGOs (access to funding)	51 MPs	A law declared partly unconstitutional	0
26.03.2002	6-rp/2002	Right to work (privileges of deputies of local councils)	Ministry of Internal Affairs of Ukraine	A law declared partly unconstitutional	0
29.05.2002	10-rp/2002	Access to health care (free-of-charge services at public hospitals)	53 MPs	Constitution of Ukraine interpreted in favor of MPs, not the executive	0

Date of Decision	Case Number	Rights at Stake (Resume)	Applicant	Court's Assessment	Dissenting Opinions
13.06.2002	11-rp/2002	Right to housing (for military servicemen; financing of construction)	Ministry of Defence of Ukraine	A law interpreted in favor of the applicant	0
21.11.2002	18-rp/2002	Right to education (free-of-charge use of textbooks)	47 MPs	Governmental decrees are partly unconstitutional	0
7.07.2004	14-rp/2004	Right to work (higher education institution head's maximum age)	56 MPs	A law declared partly unconstitutional	1
2.11.2004	15-rp/2004	Human dignity, judicial power (mitigation of punishment for crime)	Supreme Court of Ukraine	A law declared partly unconstitutional	2
9.07.2007	6-rp/2007	Social security (sufficient financing)	46 MPs	Budget law is partly unconstitutional	0
10.06.2010	15-rp/2010	Right to housing (privatization of apartment)	Individual	A law interpreted in favor of the applicant	0
26.12.2011	20-rp/2011	Social security (sufficient financing)	49 MPs; 53 MPs; 56 MPs	Budget law is partly unconstitutional.	0
20.01.2012	2-rp/2012	Personal autonomy (protection of private data)	Local council	The scope and substance of constitutional rights were clarified	0
25.01.2012	3-rp/2012	Social security, executive and judicial power (calculation of payments)	Pension Fund of Ukraine	Constitution and laws were interpreted in favor of the applicant	4
28.11.2013	12-rp/2013	Artist rights (court fee for copyright claims)	Collecting society	Laws were interpreted against the applicant	0
11.06.2014	6-rp/2014	Housing (prohibition of eviction of retired workers from service quarters)	Individual	A law interpreted in favor of the applicant	0
8.06.2016	4-rp/2016	Social security, judicial independence (limitation of judges' pensions)	Supreme Court of Ukraine	Laws were declared partly unconstitutional	2

Date of Decision	Case Number	Rights at Stake (Resume)	Applicant	Court's Assessment	Dissenting Opinions
8.09.2016	6-rp/2016	Autonomy of religious organizations (permission for public ceremonies)	Ombudsman	A law declared partly unconstitutional	4
17.06.2018	6-r/2018	Social security (allowances for victims of Chernobyl disaster)	50 MPs	Laws were declared partly unconstitutional	1
11.10.2018	7-r/2018	Social security, privacy (discrimination of IDPs)	Ombudsman	A law declared partly unconstitutional	3
11.10.2018	8-r/2018	Personal autonomy of mental patients (direct access to justice)	Ombudsman	A law declared partly unconstitutional	0
7.11.2018	9-r/2018	Child benefits (limitation during the economic crisis)	50 MPs	A law declared constitutional	3
15.05.2019	2-r(II)/2019	Enforcement of judgments (economic barriers)	Individual	A law declared partly unconstitutional	0

BIBLIOGRAPHY

Bantekas, Ilias, and Cephas Lumina, eds. *Sovereign Debt and Human Rights.* Oxford University Press, 2019.

Baulin, Yurii. "The Jurisprudence of the Constitutional Court of Ukraine on the Protection of Human Rights Recognized by the Ukrainian Legislation and Acts of International Law." In *Global Constitutionalism and Multi-layered Protection of Human Rights – Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia*, 133–67. Seoul: Constitutional Court of Korea, 2016.

BBC Ukraine. "Minfin shukatyme shakhraiv sered tykh, komu platiat dopomohu, [Ministry of Finances seeks for fraudsters among recipients of social benefits]." 1 March 2016. https://www.bbc.com/ukrainian/business/2016/03/160301_verification_social_benefits_az

Bohoslavsky, Juan Pablo, and Jernej Letnar Cernic, eds. *Making Sovereign Financing and Human Rights Work.* Oxford: Hart Publishing, 2016.

Budz, Iryna. "What Prevents Ukrainian Judiciary From Becoming Truly Effective And Independent?" *VoxUkraine,* last modified on 24 July 2019. https://voxukraine.org/en/what-prevents-ukrainian-judiciary-from-becoming-truly-effective-and-independent/.

Bulkat, Liudmyla. "Pytannia sotsialnoho zakhystu v aktakh Konstytutsiinoho Sudu Ukrainy [The issue of social protection in the acts of the Constitutional Court of Ukraine.]" *University Scientific Notes* 58 (2016): 23–34.

Chinkin, Christine. "The Protection of Economic, Social and Cultural Rights Post-Conflict." Paper series commissioned by the Office of the High Commissioner for Human Rights (2009). http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf.

Chubar, Liudmyla. "Problemy realizatsii sotsialnykh prav na suchasnomu etapi ta yikh zakhyst u konstytutsiinomu sudochynstvi [Contemporary problems of realization of social rights and its defense in constitutional justice.]" *The Herald of the Constitutional Court of Ukraine* 6 (2003):111–4.

Coalition for Personal Autonomy. "Ukraine: problems with implementation of the International Covenant on Economic, Social and Cultural Rights." *Pravdoshukach,* 31 August 2018. https://truth.in.ua/en/public/358/.

Conclusion of 26 October 1990 in the case No 11(2-1) concerning legislation on propiska of citizens, Committee of Constitutional Supervision of the USSR.

Constitution (The Basic Law) of the Ukrainian Soviet Socialist Republic of 1937.

Constitution (The Basic Law) of the Ukrainian Soviet Socialist Republic of 1978.

Constitution of Ukraine, adopted 28 June 1996.

Constitutional Court of Ukraine. "Konstytutsiina yustytsiia ta rynkova ekonomika: suchasni ta perspektyvni naukovo-praktychni realii [Constitutional Justice and Market Economy: Contemporary Scientific and Practical Trends and

Prospects]." Accessed on 15 November 2019. http://www.ccu.gov.ua/novyna/konstytuciyna-yustyciya-ta-rynkova-ekonomika-suchasni-ta-perspektyvni-naukovo-praktychni.

Constitutional Court of Ukraine. "The Acts of CCU." Accessed on 15 November 2019. http://ccu.gov.ua/en/storinka/acts-ccu.

Council of Europe. *Enhancing the National Legal Framework in Ukraine for Protecting the Human Rights of Internally Displaced Persons*. Kyiv: 2016.

Council of Europe, Venice Commission. "Meeting on the draft Constitution of Ukraine: Secretariat memorandum, CDL(1993)042-e." 25 June 1993.

Council of Europe, Venice Commission. "Opinion on the Constitution of Ukraine, CDL-INF(1997)002-e." 11 March 1997.

Council of Europe, Venice Commission. "Opinion on the draft Constitution of Ukraine, CDL-INF(1996)006-e." 21 May 1996.

Council of Europe, Venice Commission. "Opinion on the present constitutional situation in Ukraine following the adoption of the Constitutional Agreement between the Supreme Rada of Ukraine and the president of Ukraine, CDL(1995)040-e." 11 September 1995.

Council of Europe, Venice Commission. "The CODICES database." Accessed on 15 November 2019. http://www.codices.coe.int.

Courtis, Christian. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability.* Geneva: International Commission of Jurists, 2008.

Decision in case No 15-rp/1998 of 25 November 1998, Constitutional Court of Ukraine (Ukraine).

Decision in case No 2-rp/99 of 2 March 1999, Constitutional Court of Ukraine (Ukraine).

Decision in case No 2-rp/2000 of 10 February 2000, Constitutional Court of Ukraine (Ukraine).

Decision in case No 11-rp/2000 of 18 October 2000, Constitutional Court of Ukraine (Ukraine).

Decision in case No 18-rp/2001 of 13 December 2001, Constitutional Court of Ukraine (Ukraine).

Decision in case No 6-rp/2002 of 26 March 2002, Constitutional Court of Ukraine (Ukraine).

Decision in case No 10-rp/2002 of 29 May 2002, Constitutional Court of Ukraine (Ukraine).

Decision in case No 11-rp/2002 of 13 June 2002, Constitutional Court of Ukraine (Ukraine).

Decision in case No 18-rp/2002 of 21 November 2002, Constitutional Court of Ukraine (Ukraine).

Decision in case No 14-rp/2004 of 7 July 2004, Constitutional Court of Ukraine (Ukraine).

Decision in case No 15-rp/2004 of 2 November 2004, Constitutional Court of Ukraine (Ukraine).

Decision in case No 6-rp/2007 of 9 July 2007, Constitutional Court of Ukraine (Ukraine).

Decision in case No 15-rp/2010 of 10 June 2010, Constitutional Court of Ukraine (Ukraine).

Decision in case No 20-rp/2011 of 26 December 2011, Constitutional Court of Ukraine (Ukraine).

Decision in case No 2-rp/2012 of 20 January 2012, Constitutional Court of Ukraine (Ukraine).

Decision in case No 3-rp/2012 of 25 January 2012, Constitutional Court of Ukraine (Ukraine).

Decision in case No 12-rp/2013 of 28 November 2013, Constitutional Court of Ukraine (Ukraine).

Decision in case No 6-rp/2014 of 11 June 2014, Constitutional Court of Ukraine (Ukraine).

Decision in case No 4-rp/2016 of 8 June 2016, Constitutional Court of Ukraine (Ukraine).

Decision in case No 6-rp/2016 of 8 September 2016, Constitutional Court of Ukraine (Ukraine).

Decision in case No 6-r/2018 of 17 June 2018, Constitutional Court of Ukraine (Ukraine).

Decision in case No 7-r/2018 of 11 October 2018, Constitutional Court of Ukraine (Ukraine).

Decision in case No 8-r/2018 of 11 October 2018, Constitutional Court of Ukraine (Ukraine).

Decision in case No 9-r/2018 of 7 November 2018, Constitutional Court of Ukraine (Ukraine).

Decision in case No 2-r(II)/2019 of 15 May 2019, Constitutional Court of Ukraine (Ukraine).

Elkins, Zachary, et al. *The Endurance of National Constitutions.* Cambridge University Press, 2009.

Faiz, Pan Mohamad. "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court." *Constitutional Review* 2, no. 1 (2016): 103–28. http://dx.doi.org/10.31078/consrev215.

Gregory, Paul R., and Irwin L. Collier Jr. "Unemployment in the Soviet Union: Evidence from the Soviet Interview Project." *The American Economic Review* 78, no. 4 (1988): 613-32.

H46-35 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine: Supervision of the execution of the European Court's judgments, CM/Del/Dec(2019)1348/H46-35 (Council of Europe, Committee of Ministers, 6 June 2019).

Hausmaninger, Herbert. "The Committee of Constitutional Supervision of the USSR." *Cornell International Law Journal* 23, no. 2 (1990): 287–322.

Holovaty, Serhiy. "Concept of the Rule of Law – Difficulties of its perception in the post-Soviet legal culture (Ukraine's experience)." Report, Venice Commission, 2016. Accessed on 15 November 2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2016)015-e.

Holovin, Anatolii. "15 Years of Constitutional Justice in Ukraine: Accomplishments, Challenges, Prospects." In *The Protection of Human Rights by Bodies Of Constitutional Justice: Possibilities And Problems of Individual Access.* Materials of International Conference, 411–24. Kyiv: Logos, 2011.

Hultai, Mykhailo. "Normative constitutional complaint in Ukraine as a national legal remedy." Report, Venice Commission, 2018, accessed on 15 November 2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2018)015-e.

Iarskaia-Smirnova, Elena, and Karen Lyons. "Social Work in Former Soviet Union Countries: Mapping the Progress of 'The Professional Project'." *European Journal of Social Work* 21, no. 1 (2018): 114–27. https://doi.org/10.1080/13691457.2016.1255926.

Inshyn, Mykola, Yurii Miroshnychenko, and Yurii Paida. "Protection Of Constitutional Cultural Rights and Freedoms of Citizens by The Constitutional Court of Ukraine." *Baltic Journal of Economic Studies* 4, no. 4 (2018): 134–9. https://doi.org/10.30525/2256-0742/2018-4-4-134-139.

International Commission of Jurists. "Ukraine: dismissal and criminal prosecution of judges undermine independence of the judiciary." Last modified on 20 March 2014, https://www.icj.org/ukraine-dismissal-and-criminal-prosecution-of-judges-undermine-independence-of-the-judiciary/.

International Monetary Fund. "Ukraine — Letter of Intent, Memorandum of Economic and Financial Policies and Technical Memorandum of Understanding." 11 March 2004, https://www.imf.org/external/np/loi/2004/ukr/01/index.htm.

International Monetary Fund. "Ukraine Letter of Intent and Memorandum of Economic Policies." 16 March 1999, https://www.imf.org/external/np/loi/1999/031799.htm.

International Monetary Fund. "Ukraine: Letter of Intent, and Technical Memorandum of Understanding." 10 December 2010, https://www.imf.org/external/np/loi/2010/ukr/121010.pdf.

International Monetary Fund. "Ukraine: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding." 27 February 2015, https://www.imf.org/external/np/loi/2015/ukr/022715.pdf.

Judgment of 12 October 2017 in the case of Burmych and Others v. Ukraine, European Court of Human Rights.

Kopieichykov, Volodymyr. *Narodovlastie i lichnost'* [Democracy and Personality]. Kyiv: Ukraina, 1991.

Landau, David. "The Reality of Social Rights Enforcement." *Harvard International Law Journal* 53, no. 1 (Winter 2012): 189–247.

Law of Ukraine on Amendments to the Law of Ukraine about the State Budget of 2018 year.

Law of Ukraine on the State Budget of 2019.

LB.ua. "Yanukovych charged with constitutional coup. Ex-Justice Minister Lavrynovych is another suspect in the case." last modified on 6 September 2017, https://en.lb.ua/news/2017/09/06/4436_yanukovych_charged.html.

Michalowski, Sabine. "Sovereign Debt and Social Rights – Legal Reflections on a Difficult Relationship." *Human Rights Law Review* 8, no. 1 (2008): 35–68. https://doi.org/10.1093/hrlr/ngm042.

Ministry of Social Policy of Ukraine. "Vnutrishnio peremishcheni osoby [Internally displaced persons]." Accessed 15 November 2019, https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html.

Odling-Smee, John, et al. *Ukraine: IMF Economic Reviews*. Washington: International Monetary Fund, 1995.

Opinion in case No 2-v/1999 of 2 June 1999, Constitutional Court of Ukraine (Ukraine).

Popova, Maria. "Ukraine's Politicized Courts." In *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine,* edited by Henry E. Hale and Robert W. Orttung, 143–61. Stanford University Press, 2016.

Reply from the authorities (22/08/2019) following a communication from a NGO (25/07/2019) in the cases of Burmych and Others, Ivanov and Zhovner group v. Ukraine, Applications No. 46852/13, 40450/04, 56848/00 (Council of Europe, Committee of Ministers, 23 August 2019).

Ricón, José Luis. "The Soviet Union: Achieving full employment." *Nintil,* accessed on 15 November 2019, https://nintil.com/the-soviet-union-achieving-full-employment/.

Roosevelt, Eleanor. "Human Rights." In *Peace on Earth*, 65–71. New York: Hermitage House, 1949.

Sheliazhenko, Yurii. "Autonomous Processual Model of Law." *Philosophy of Law and General Theory of Law* 1 (2019): 91–111. https://doi.org/10.21564/2227-7153.2019.1.186739.

Ssenyonjo, Manisuli. *Economic, Social and Cultural Rights in International Law.* Oxford: Hart Publishing, 2009.

Strydom, Hennie. "The Protection of Economic, Social and Cultural Rights in International Law." *Constitutional Review* 5, no. 2 (2019): 222–247. https://doi.org/10.31078/consrev522.

Swaminathan, Rajesh. "Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights." *Columbia Journal of Transnational Law* 37, no. 1 (1998):161.

Trochev, Alexei. "Fragmentation? Defection? Legitimacy? Explaining Judicial Roles in Post-Communist Colored Revolutions." In *Consequential Courts:*

Judicial Roles in Global Perspective, edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, 67–92. Cambridge University Press, 2013.

Tymchenko, Ivan. "Mechanism of Constitutional Jurisdiction in Defence of Rights and Freedoms of Man and Citizen." In *The Legal System of Ukraine: Past, Present, and Future. Volume II. Constitutional Foundations of the Legal System of Ukraine and Problems of Improvement,* edited by Yurii Bytiak et al., 121–47. Kharkiv: Pravo, 2013.

UN Office of the High Commissioner for Human Rights. *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions.* New York and Geneva: United Nations, 2005.

UN Office of the High Commissioner for Human Rights. *Transitional Justice and Economic, Social and Cultural Rights*. Geneva: United Nations, 2014.

United Nations, Economic and Social Council. "An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources Under an Optional Protocol to the Covenant: Statement of the Committee On Economic, Social And Cultural Rights." E/C.12/2007/1, 21 September 2007.

United Nations, Economic and Social Council. "Committee on Economic, Social and Cultural Rights Twenty-sixth (extraordinary) session: summary record of the 41st meeting." E/C.12/2001/SR.41 (28 August 2001).

United Nations, Economic and Social Council. "Implementation of the International Covenant on Economic, Social and Cultural Rights. Second periodic reports submitted by States parties to the Covenant concerning rights covered by articles 6 to 9 in accordance with the first stage of the programme established by the Economic and Social Council in its resolution 1988 (LX): Ukranian Soviet Socialist Republic." E/1984/7/Add.9, 13 March 1984.

United Nations, Economic and Social Council. "Reports submitted in accordance with Council resolution 1988 (LX) by states parties to the International Covenant on Economic, Social and Cultural Rights covered by articles 6 to 9: Ukranian Soviet Socialist Republic." E/1978/8/Add.22, 26 September 1978.

United Nations, Economic and Social Council. "Sessional working group on the implementation of the International Covenant on Economic, Social and Cultural rights: summary record of the 18th meeting." E/1980/WG.l/SR.18, 28 April 1980.

United Nations, Economic and Social Council. "Sessional working group of governmental experts on the implementation of the International Covenant on Economic, Social and Cultural rights: summary record of the 15th meeting." E/1984/WG.1/SR.15, 30 April 1984.

United Nations, Economic and Social Council. "Ukraine: Implementation of the International Covenant on Economic, Social and Cultural Rights. Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant." E/1994/104/Add.4, 17 October 1994.

United Nations, Human Rights Council. "Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Copyright policy and the right to science and culture." A/HRC/28/57, 24 December 2014.

United Nations, Human Rights Council. "Summary of Stakeholders' submissions on Ukraine: Report of the Office of the United Nations High Commissioner for Human Rights." A/HRC/WG.6/28/UKR/3, 31 August 2017.

United Nations. "Vienna Declaration and Programme of Action." World Conference on Human Rights, A/CONF.157/23, 12 July 1993.

Verkhovna Rada of Ukraine. "Proclamation of the Verkhovna Rada of Ukraine Concerning the Cancellation by the Constitutional Court of Ukraine of the Law of Ukraine on the Temporary Prohibition of Rising the Prices and Tariffs for Housing, Municipal Services, and Public Transport Provided to Citizens of Ukraine." 16 March 1999.

Verkhovna Rada of Ukraine. "Legislation of Ukraine." accessed on 15 November 2019, https://zakon.rada.gov.ua/laws?lang=en.

Verlanov, Serhii. *Ekonomichni i sotsialni prava liudyny: yevropeiski standarty ta yikh vprovadzhennia v yurydychnu praktyku Ukrainy (zahalnoteoretychne*

doslidzhennia) [Economic and social rights of human: European standards and their implementation in judicial practice in Ukraine (broad theoretical research)]. Lviv: Krai, 2009.

Winesjuly, Michael. "Zimbabwe Price Controls Cause Chaos." *New York Times,* 3 July 2007, https://www.nytimes.com/2007/07/03/world/africa/03cnd-wzimbabwe.html.

Wolczuk, Kataryna. *The Moulding of Ukraine: The Constitutional Politics of State Formation.* Budapest: Central European University Press, 2001.

World Bank Data. "Inflation, consumer prices (annual %) – Ukraine, World (1997-2001)."Accessed on 15 November 2019. https://data.worldbank.org/indicator/FP.CPI.TOTL.ZG?end=2001&locations=UA-1W&start=1997.

Yuzkov, Leonid, and Yevheniia Tykhonova. "Konstytutsiia yurydychna i faktychna [Juridical and factual constitution]." *Law of Ukraine* 1 (1992): 9.

Yuzkov, Leonid. *Constitution of Soviet Ukraine.* Kyiv: Politvidav Ukraini Publishers, 1984.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev614

Judicial Independence *vis-à-vis* Judicial Populism: the Case of *Ulayat* Rights and Educational Rights

Rosa Ristawati[*]
Faculty of Law, Airlangga University, Surabaya, Indonesia
rosa@fh.unair.ac.id

Radian Salman[**]
Faculty of Law, Airlangga University, Surabaya, Indonesia
radian.salman@fh.unair.ac.id

Received: 5 June 2019 | Revised: 25 February 2020 | Accepted: 8 April 2020

Abstract

Judicial populism may occur when judicial branches are much more influenced by the interest of people majority. In this context, it is when justices deliver decisions according to what the people wanted and not what it has to be decided by laws. The Constitutional Court of the Republic of Indonesia (MKRI) has the pivotal role to protect the Constitution, democracy, and the rule of law principles by adhering judicial independence in the decision making process. This paper aims to briefly find out whether the MKRI decisions on the particular issue of economic and social rights show the tendency of judicial populism and defending judicial independence. A brief conclusion would be drawn from the analysis of the two MKRI's landmark decisions on the relevant issues of economic and social rights, in particular issues of *Ulayat* rights and educational rights (Case Number 35/PUU-X/2012 on the judicial review of Law No. 41 of 1999 on the Forest and Case Number No. 13/PUU-VII/2008 on the judicial review of Law No. 16 of 2008 on the Amendment of the Law No. 45/2007 on the State Budget). In a short analysis of both landmark decisions, the MKRI tends to defend its independence in delivering its decision. The Court also shows its consistency in protecting the Constitution by strictly upholding the constitutional values laid down in the Constitution and against the judicial populism. The Court in both

[*] Lecturer at the Faculty of Law, Airlangga University. Holds a Ph.D. in Constitutional Law from Maastricht University, The Netherlands.

[**] Lecturer at the Faculty of Law, Airlangga University. Holds a Ph.D. in Constitutional Law from Maastricht University, The Netherlands.

decisions shows its constitutional commitment to preserving democratic values of minority-marginalized protection against the dominant-majoritarian interest. In the particular issue of education rights, the Court hinders the fulfilment of educational rights from the elite interest by preserving the constitutional purpose of making priority 20% for the education budget. In general, the MKRI has to guard preventing the Constitution and the rule of law principles, specifically on the issue of the protection of economic-social rights. It upholds judicial independence and put asides judicial populism.

Keywords: Constitutional Court, Economic-Social Rights, Judicial Populism, Judicial Independence, Majoritarian.

I. INTRODUCTION

The word populism was from the Latin word populous, which has the meaning of "people".[1] In practice, populism does not always connect to the political authority which attaches to the executive branch or the legislative branch but also may come into existence to the judiciary branch on particular decisions. In this context, the Court delivers decision on behalf of the people will and decides not according to the majority in favor. This article aims to find out whether the Constitutional Court of Indonesia (MKRI) could consistently defend its independency and survive in dealing with the phenomena of judicial populism, a phenomena where the judiciary branch is interfered with by the will of the majoritarian people. This article is specifically addressed to look how the Constitution is being uphold in particular issues of the protection of rights of social and economic rights, which in this article are represented by the *Ulayat* rights and the educational rights. The argument in this article is started with a brief of description of the emergence of populism in Indonesia. However, it will specifically be addressed to look how the populism influences the Court decision and how the Court could survive its independence. This article aims to address specific cases which relevant to the social, economic rights by analyzing the Court's decisions on such issues. It ends up with the issue on how the judicial populism may interrupt the principle of judicial independence.

[1] Matthijs Rooduijn, "A Populist Zeitgeist?: The Impact of Populism on Parties, Media and the Public in Western Europe" (Dissertation, University van Amsterdam, 2013), 6.

The Constitutional Court has the pivotal role to protect social and economic rights in Indonesia. The role may be reinforced through constitutional restraints against any violation of social economic rights in Indonesia. Indonesia as a democratic and rule of law state has strong values of constitutional democracy that could hinder from the negative manifestation of populism. The Court may overlay with the dilemma of being counter-majoritarian where in one side delivering a justified-reasoning of judgment, the Judges may *vis* a vis to the populism and stand against the majority of people will. Against the populism, the Court shall be an intermediate institution bridging the rule of law and people demand. As an intermediate institution, the Court may become counterpart institution when the legislative or executive become populist. To be an intermediate institution, the Court shall act as its nature, applying the law and holding the ground of constitutionalism and legalism. To protect social, economic rights, the Court has to uphold the core values of legitimacy, judicial objectivity and act according to its basic mandate to adjudicate disputes even when it has to contradict with the will of people majority in order to protect the minority interest. In this context, against judicial populism, the Court's decision has to combine well-reasoned judgment, and an ironclad will resist the sometimes violent force of public opinion.[2] According to the shared values approach, a judge's duty is to adjudicate disputes by giving effect to underlying principles even if this means acting contrary to public sentiment. In all situations, but especially in the face of surging political populism, judges must recall and fulfill this basic mandate. Ironically where the legislature becomes populist, courts have an obligation to compensate for this democratic deficit and actively defend the societal shared values. This additional responsibility, however, may trigger judicial populism. In order to avoid this phenomenon, Court (like integrative representatives in the political sphere) must remain vigilant, shield their decisions from fleeting changes to the public mood and draw on society's fundamental core of shared values.[3]

This paper would try to analyze how the issue of judicial populism may influence the independence of the Indonesian Constitutional Court. An

[2] Alon Harel, "Courts in a Populist World," VerfBlog, 27 April 2017, 4.
[3] Harel, "Courts in a." 5.

inclination to favor judicial independence is fundamental to ensure that all people are securely governed by the Rule of Law. In analyzing the issue, this paper attempts to analyze two Constitutional Court landmark decisions, namely: Case Number 35/PUU-X/2012, reviewing Law No. 41 of 1999 on the Forest and the Case Number No. 13/PUU-VII/2008, reviewing Law No. 16 of 2008 on the Amendment of the Law No. 45/2007 on the State Budget 2008 (the APBN). Both Court's landmark decisions are in particular cases of the Court's Decision, which influence the state fulfillment on the economic and social rights. Both are expected to represent the landmark of the Court's Decision on economic and social rights in the field of education rights and water rights. In the end, it is expected to give a preliminary hypothesis on the tendency of whether or not the judicial populism is undermining judicial independence.

II. POPULISM AND THE JUDICIAL POPULISM

Populism may emerge coincide with democracy. According to Rousseau, democracy is a form of government which the sovereign may put the government in the hands of the whole people or of a majority of them.[4] In this context, populism may arise when the majority in a democracy is being dominant, and the minority is being neglected. Democracy gives opportunity to the rise of populism in a way that democracy gives privilege and priority to the interest of the people majority. The debate over populism movement actually has been started as the concept of the state in Ancient Greek history developed. Plato concerned that as well as oligarchy, democracy is the same having the potential of excessiveness which caused opposite direction reaction.[5] Furthermore, Plato determined that the people are the third class who are not politician but being the largest and the most powerful class in a democracy.[6] This may be the root of how populism is being arise in the modern day. On the other hand, Polybius, who was famous for the "cycle of Polybius," came up with the theory that democratic government might transform into a bad shape of government since it is naturally generating

[4] Jean-Jacques Rousseau, *Social Contract*, translated by Jonathan Bennett (2017), 33.
[5] Plato, *The Republic*,423.
[6] Plato, *The Republic*,425.

vice inseparable such as in democracy lawless ferocity and violence.[7] The concern on bad government when everything on the people majority will would also an issue of undermining minorities will. In politics, populism is known as politics conducted through a relatively direct relationship between a charismatic leader and the people.[8] This is in line with the argument of Cas Mudde who argued that populism is about the elite and the people.[9]

On the other arguments, populism is democratic in a sense that common people are trustworthy and competent-given a chance to make wise choices.[10] Populism is a movement of against the established authority, against both the private and government sector and distrusted the elites who has the power.[11] There is a difference between populism and progressivism. While progressivism is in the tone of moralistic with the intention of reforming government and society, populism distrusts representative government and seek to constrain it.[12] In general, the populist and the progressives initiate the process in different objectives. The progressives have intention to serve as an additional check on representative government in order to improve the quality and effective government, whereas the populist intends to have a radical vision in order to undermine the representative government by shifting power to the people.[13] In general, progressivism recognizes the legitimation of representative government but requiring better progress for society. It demands changes that fit with the development and global changing in the community.

In general term, populism may be a threat for democratic principles in ways that it may be a parasite to the ecosystem of constitutional democracy.[14] Populism

---

7 Polybius, *The History of Polybius Book Six*, *in* Parentheses Publication Greek Serie, trans. Evelyn S. Shuckburgh (Cambridge, Ontario, 2012), 355.

8 Olle Törnquist, "Stagnation or Transformation in Indonesia," *Economic and Political Weekly* XIIX, no. 50 (13 December 2014): 23 – 27.

9 Cas Mudde, "The Populist Zeitgeist," *Government and Opposition* 39, no.3 (2014): 541 – 563.

10 Abubakar Eby Hara, "Populism in Indonesia and its Threats to Democracy," *Advances in Social Science, Education and Humanities Research (ASSEHR)* 129 (2018): 106.

11 Abubakar, "Populism in Indonesia," 106. In this definition, see also, Ehito Kimura, "Populist Politic in Indonesia," (Asia Pacific Bulletin, East- West Center no. 407, 7 December 2007).

12 Abubakar, "Populism in Indonesia," 107.

13 Kenneth P. Miller, "Constraining Populism: The Real Challenge of Initiative Reform," *41 Santa Clara Law Revie* 1037 (2001).

14 Théo Fournier, "From Rhetoric to Action – A Constitutional Analysis of Populism" (EUI Working Paper LAW 2018/08, European University Institute, Italy, 2017) : 4.

may manipulate constitutional democracy principles through the populist rhetoric of majority manipulation, by creating a unitary and uncompromising majority and the manipulation of the rule-of-law principles.[15] The manipulation of majority as unitary and homogenous is that because the majority is assumed to be undivided or undifferentiated. Still, such an assumption is a fiction considering that the majority in a democracy is an accumulation of different minority expectations.[16] Furthermore, the constitutional structure with the check and balances and the human rights framework would become slower and fierce because populists gradually would change regulations; for example, values such as political pluralism, transnational solidarity, and protection of minorities would render incompatible with populism interest.[17] In this context, the Constitutional Court may have the role of an institution by integrating a proper and firm legal framework into its judicial decision and protecting democratic values from negative tendencies in order to strengthen the foundation of democracy.

In Indonesia, populism is the peril of the representative democracy system where restricted elites in bureaucracy and the oligarchic system emerge within the system. To this extent, people realize that the representative government does not represent the interest of the people. The process of government is merely reflecting the interest of particular groups such as political parties in the political system. To this extent, the populism movement proclaims for defending the neglected group. The issue of populism is actually not being significant in the whole political system in Indonesia. It is because the movement is not quite often and not that tangible controlling the political system in Indonesia.[18] But the indication and the potential movement of populism has been shown by several political parties, mass organization, as well as an individual. In a political situation, the Court may be an object of political populism. However, in a different situation, the Court may show its tendency of populism and become

[15] Théo Fournier, "From Rhetoric to," 3.
[16] Théo Fournier, "From Rhetoric to," 5.
[17] Théo Fournier, "From Rhetoric to," 6.
[18] Bala Raju Nikku and Azlinda Azman, "Populism in the Asia: What role for Asian Social Work?" *Social Dialogue Issue*, September 17, 2017, https://socialdialogue.online/SDpdf/VOL.17.pdf.

populist Court when it put forward the people will suppress the minority interest while putting aside the judicial independence and impartiality. To this extent, judicial populism may emerge. There are several aspects that may indicate the rise of judicial populism. One of the aspect is that when the Court's decision is decided not according to majority in favor but merely that the decision is based on the pressure of the people majority's interest. In this context, the judges may wrongly interpret the Constitution. Judicial populism has to be differentiated from what is called by judicial activism. A populist judge adheres a more aggressive form of judicial activism when a judge makes priority for not only policy over precedent but also over the process.[19] A populist judge would be instead of seeking legitimacy by framing his role as championing the majority of people will against that undermine that will.[20] To this extent, judicial populism may be shown from how the judge tends to speak for the people or when the Court delivers decision adjusted and influenced by the majority of the people will while it is actually beyond justice, impartiality, and judicial independence. However, the Court could oppose the people majority will by inserting the resistance of populism in its judicial decision on the basis of legalism and the core values.[21] This is what we commonly known as counter-majoritarian role of the Court. It is when the Court is trying to defend judicial independence as well as safeguarding democratic values by, for example protecting the minority. In such way, the judicial populism has the tendency of being in opposite purpose with the values of the rule of law. It may be undermined the judicial independence as one of the essential judiciary principle.

With regards to judicial populism, we may refer to the Colombian Constitutional Court. The Court might have an extreme experience when facing challenge as its nature (as an independent institution) under the populist leader regime. The Colombian Constitutional Court played its role as an intermediate leading the consolidation of a rival political project conducting a forum to discuss

[19] Yasser Kureshi, "What is Judicial Populism and how does it Work in Pakistan?" www.dawn.com/news/1461194/what-is-judicial-populism-and-how-does-it-work-in-pakistan.

[20] Kureshi, "What is?"

[21] Alon Harel, "Courts in a Populist World," VerfBlog, 27 April 2017, https://dx.doi.org/10.17176/20170428-104853.

problems and design public policy setting back public policy for the internally displace people rights by the incumbent government.[22] In this context, the Court has its own political project with wide public support, including the agenda of judicial protection of social and economic rights, which made visible individual and groups traditionally neglected.[23]

III. JUDICIAL POPULISM AS A THREAT TO JUDICIAL INDEPENDENCE

The Constitutional Court is one of the judiciary branches which the power is separated from the other two branches. As an independent branch, the Court has judicial independence, which gives the Court institutionally independence from any kind of intervention while performing its judiciary power. In Indonesia, the MKRI is one of the Court holding judiciary power. As the nature of the Court, the Constitution provides the guarantee of its independence on Article 24 Section (1) of the Constitution, which declared that the judicial power is independent in performing its judicial process to uphold law and justice.[24] According to the Basic Principles on the Independence of the Judiciary, the principles of judiciary independence are including as follows:

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to*

[22] Jorge Gonzales-Jacome, "In Defense of Judicial Populism: lessons from Colombia," *Int'l J. Const. L*,(3 May 2017).
[23] Jacome, "In Defense of."
[24] Indonesian Constitution. Art. 24 (1).

> *mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."* [25]

According to Article 3 (1) of Law No. 48 of 2009, the judiciary independence in Indonesia is defined in more specific for the judges in doing their duties and functions. It is stipulated that judges and the constitutional judges shall preserve the judiciary independence. Section (2) of the Article specifies that any interventions from any other parties against the court's affairs are prohibited, instead of according to the Constitution. Furthermore, the explanation of Article 3 Section (1) determines that the judiciary independence has the meaning that the Court is free from any interventions and free from any kind of physical and psychological intimidation. In this context, it is in line with the general term of judicial independence according to Arjana Llano which argues that the judiciary independence consist of two aspects namely:

> "The first relates to the way judges are kept in safe from the improper influence of third parties (individuals or institutions). Whereas, the second related to the extent judges think, act, and decide independently of certain factors other than actual and lawful ones. The first factor refers either to the legal system or practically to the judicial system, whereas the second factor refers more to the opinion of the judges."[26]

To this extend, the judiciary independence leaves loopholes to the rise of judicial populism in particular when judges decide not according to the justice and legal certainty, but according to what the people want. In this context, judges are driven by the majority of the people will and not decide as what it has to be decide and even decide beyond the laws. In practice, the judicial independence grants judges the freedom to think, freedom of action, and freedom to decide. However, it does not mean that judges could be beyond the laws. The judges have to be in accordance to the Laws and has judiciary obligation to do legal finding. They has to do legal finding activity on the basis of social justice and legal certainty. Article 5 (1) the Law on Judiciary Power stipulates that the

[25] Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

[26] Arjana Llano, "Independence of the Judiciary," *Juridical Tribune* 3, no. 2 (December 2013): 109 – 115.

judges and the constitutional judges has to find, apply, and understand the legal values and social justice within the community. In particular, in such way, the MKRI exceedingly also has a special challenge in guarding the Constitution and protecting its values. This may give the Court high-pressure and more challenge while protecting the Constitution as its main duty, the Court is intimidated by the people will. To this extent, the Court has put forward the judiciary independence and put aside the majority of people will. The judges have to be independent in the decision making and decide according to the Law and justice in protecting the Constitution.

Judicial independence and impartiality of the judiciary, legal certainty, non-discrimination, equality before the law, and respect for human rights are the essential rule of law principles. Those rule of law principles shall be applied alongside with the principle of democracy. The rule of law principles are essential for the implementation of democracy as well as providing protection of democratic values within political system. On the other hand, the Court provides restoration and improvement of community security that will prevent democracy against any negatives excess of populism. It has the role to bridge the societies dealing with the legacy and conflict, as well as providing the foundations for building inclusive, well-governed societies and political peace stability. As one of the institutions holding the judiciary power, the Constitutional Court is the vanguard institution to make effective the laws in the corridor of the rule of law framework[27]. In the judicial process, the Court has to ensure that the Constitution is put forwarded among other things. It is mainly because the Constitution strongholds the basic constitutional rules and the demand of particular majorities while it secures the Court's independence in particular the Constitutional Court and Supreme Court in interpreting the Constitution and the Laws, and sets up and protects the standards framework of rule of law.[28]

[27] Pratikno and Cornelis Lay, "From Populism to Democratic Polity: Problems and Challenges in Surakarta, Indonesia,", *PCD Journal* III , no. 1-2 (2011) : 33 – 62.

[28] Neil Walker, "Populism and Constitutional Tension" (Monnet Working Paper 15/17, Symposium: Public Law and The New Populism, 2013). Accessed online at: www.JeanMonnetProgram.org : Neil Walker defines "In functional terms, a constitution typically involves a 'triple lock' control of the political system. The first and most fundamental lock involves the entrenchment of the basic constitutional rules of the game against amendment or replacement, or at least a requirement of special majorities. The second lock concerns the independence of the constitutional court or other apex courts in interpreting the constitution and the laws made under it. The

To this extent, the Indonesian Constitution has provided the design of the Constitution which in general has accommodated values on the pluralism and minority safeguard. Under the Indonesian Constitution, democracy is living co-existence with the rule of law under Article 1 of the Indonesian Constitution. Democracy, as it is stipulated in Article 1 (2) of the Indonesian Constitution (the Amendment) confirms that the Constitution ensures that the sovereignty is in the hands of the people and is implemented according to the Constitution. The Article emphasizes that democracy in Indonesia is constitutional democracy as well as giving strong commitment to the protection of democracy by giving the sovereignty to the people but all the implementation has to be in accordance to the Constitution, thus the Laws. The Constitution also ensures that the rule of law is adopted and that, it provides constitutional basis for any conflict resolutions have to be resolved in accordance to the law.

The principle of judicial independence and impartiality has to be reflected in the judicial activities of the Constitutional Court. The Constitutional Judges have to decide independently. However, they have to really make sure that the decision is not only for the interest of particular groups but for the interest of the entire people, including the minorities. In the decision making process, the judges have to confirm that the constitution is protected as well as making sure that the provisions of the Constitution are interpreted as what it has to be. Therefore, the Court decisions provide constitutionality guarantee and preclude from judicial populism, which may disrupt the independency of judicial.

IV. JUDICIAL POPULISM, THE EDUCATIONAL RIGHTS, AND THE *ULAYAT* RIGHTS

This section will be a brief and preliminary analysis of whether the MKRI's decision which relevant to the issue of judicial populism. The analysis will be drawn from the two of MKRI's landmark decisions on the issue of economic and social rights, in particular the *Ulayat* rights and rights to education. The analysis

third lock involves the basic 'rule of law' requirement that government be conducted according to laws that have been duly passed under the widely-endorsed foundational constitutional pact and interpreted by a judiciary insulated from executive or other partial interference".

is focused on the Court's consideration for analyzing the Court legal reasoning and the basis of the Court Decisions. The analysis would be drawn to find the Court's experience on avoiding judicial populism while defending the judicial independence and protecting the Constitution. As one of the Court's competence to conduct a judicial review on the constitutionality of the Laws, the Court has to show its consistency to preserve its nature as an independent institution. The Court has to decide what has to be decided and put forward the Constitution by referring to the constitutional values laid down in the Constitutional provisions. The commitment is essential to prevent judicial populism where judges speak on the basis of interest of majority people rather than speak as what the Constitution intended on the basis of justice and constitutional certainty.

The protection of economic and social rights is being an essential in the area of constitutional protection and adjudication under the area of the constitutional duty. The scope of economic and social rights may be broad. The economic rights are commonly including the right to use, posses, exchange, dispose property and even including rights to get economic interest and benefit.[29] On the other hand, social rights are defined as rights to food, housing, health care, and social security.[30] David Landau argues that much of social rights has to do with the majoritarian and benefits to the middle and upper class while there is a strong relationship between the remedy model by the court and the identity of the beneficiaries from the intervention.[31] In the context of judicial populism, the Constitutional Court has to come up with the decision of conforming marginalized or minority interest in order to protect democracy and uphold the Constitution and the rule of law. Both landmark Court's decisions may show that in a struggle to defending judicial independence, the court is avoiding being populist.

In the Case Number No.35/PUU-X/2012 on the Judicial Review of the Law No. 41 of 1999 concerning on Forestry, the Court reviewed the constitutionality of Article 1 Paragraph (6), Article 4 Paragraph (3), Article 5 Paragraph (1),

[29] Terence Daintith, "The Constitutional Protection of Economic Rights," *I.CON* 2, no. 1 (2004): 56-90.
[30] David Landau, "The Reality of Social Rights Enforcement," *Harvard International Law Journal* 53, no. 1 (2012): 190-246.
[31] Landau, "The Reality of," 202.

Paragraph (2), Paragraph (3), and Paragraph (4), as well as Article 67 Paragraph (1), Paragraph (2), and Paragraph (3) the Law No. 41 of 1999 on Forestry against Article 1 Paragraph (3), Article 18B Paragraph (2), Article 28C Paragraph (1), Article 28D Paragraph (1), Article 28G Paragraph (1), Article 28I Paragraph (3), and Article 33 Paragraph (3) the UUD NRI 1945. The petitioners in the judicial review claimed that their traditional forest territories as part of their *ulayat* rights were disappeared so that they did not get access to get benefit managing their traditional forest, and so, they did not get access to work and income sources. The Court justified that the fundamental aspect is that the Constitution recognizes and respects the ethnic indigenous community as the entity and, therefore, shall have rights and obligations. To this extent, the ethnic indigenous community is the legal subject and that, may not be ignored in particular when the Law regulates the allocation of natural resources. Moreover, the Court assumed that the UUD 1945 has already provided the Constitutional basis as it is mentioned in Article 33 Section (2)[32], Section (3)[33], and Section (4) of the UUD 1945[34]. In this Court's Decision, the Court implies that the ownership and occupancy of the natural resources by the state is for the entire people including the ethnic indigenous people since there is a fundamental aspects of indigenous rights in the exploitation of natural resources. In this context, the Court would like to protect democratic values in terms of protecting the minority as well as put aside the elite government interest and populist interest. The Court refers to not only people as the member of customary legal community but also people as an individual. In fact, in reality was different since there was different treatment. In that such different treatment, the ethnic indigenous community is potentially losing their rights in particular their traditional *ulayat* rights. This situation gives difficulties to the ethnic indigenous people to fulfill their daily needs. The people

[32] Indonesian Constitution of 1945. Art 33(2). "Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State".

[33] Indonesian Constitution of 1945. Art 33(2). "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people".

[34] Indonesian Constitution of 1945. Art 33(4). "The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy".

are getting difficult to get access to gain benefit from the forest as the natural resources. The ethnic indigenous people are mostly as the victim against the domination of the elite government and majority of people who have interest in the natural resources. As the victim, they are weak against the state, elite government, and the majority groups who has the strong ownership. The Court in its Decision had made a clear standing that the unfair, in justice, and the ignorance of the ethnic indigenous people as minority community is caused by the regulation, which partially tends to give benefit to the elite government and majority people. The Court's Decision reflects that the consideration has to be in accordance with the principle of justice and constitutional-democracy, and that any situation which puts minority (ethnic-indigenous community) inferior against the elite and majority domination is unconstitutional and against the constitutional values. In this context, the Court shows the tendency of against populism where minority interest is undermined by majority interest.

Furthermore, the Court affirms that the constitutional values which recognizes the ethnic-indigenous community have a consequence that the community has the right to get benefit from the indigenous forest as well as getting their *Ulayat* rights (the Land-indigenous rights). The Court said that it is also as a consequence of the customary indigenous law as living law. The Court refers to the legal history in Indonesia, which had recognized the ethnic-indigenous people since the period of Colonial Netherlands. In this context, the Court emphasizes that the recognition of the ethnic indigenous community after the Amendment of the Constitution is based on Article 18B Paragraph (2), as well as according to the legal basis of the Law No. 39 of 1999 on the Human Rights; Law No 32/2004 on the Local Government; Law No 31 of 2004 on the Fishery; and Law No 27 of 2007 on the Management of the Coastal Territory and Small Islands. This argument is also in line with the Court Decision on Case Number 3/PUU-VIII/2010 in which the Court gave recognition to the ethnic-indigenous people with the consideration of Article 33 Paragraph (3) UUD 1945. In such previous Decision, the Court affirmed that the exploration of the natural resources for the prosperity of the people has to be considered as a right not only as individual

rights which had been existed but also as the collective rights which belongs to the ethnic-indigenous community (the *Ulayat* rights), as the ethnic-indigenous community right as well as other constitutional rights which have been attached to the community and have been guaranteed by the Constitution, for example, the rights to pass and the right to access healthy environment. In this context, the Court consistently supports the protection of democratic values by respecting the ethnic minority community as well as its ethnic customary law.

Moreover, the Court also refers to Article 1 paragraph 4, the Forestry Law, which provides the legal basis to avoid overlapping of authority between the state authority and the ethnic indigenous authority in terms of forest. The Court was consistently stick to Article 18B paragraph (2) and Article 28I paragraph (3) the UUD NRI 1945 determining that the recognition and protection of indigenous forest is integrated with the *Ulayat* rights (the indigenous-land rights) of ethnic-indigenous rights. This is not because the majority will of the people interest but rather because the consequence of the recognition of indigenous law as the living law in Indonesia. Therefore, the state policy on classifying the indigenous forest as part of the forest under the state ownership and the intention to exploit the forest for the prosperity of the whole people or at this context for the majority of the people is declared to be unconstitutional by the Court as and contradict to Article 1(3), Article 18 B (2), Article 28 D (1) and Article 28I (3) the UUDNRI 1945. The Court said that Article 1 (6) of the Forestry Law, which stipulates that the recognition to the indigenous forest as part of the forest under the management of the state would have impact of neglecting the rights of ethnic-indigenous community.

To this extent, the Court Decision indicates that the Court came up as bridging the gap between the Legislative and the President and the people by determining that a norm has a character of conditional constitutional. According to the Court decision, the Forestry Law has to be understood imperatively that the government when determining the forest area is required to involve the participation from people as a control for government in order to make sure the fulfilment of the constitutional rights and in order to ensure that the

majority and minority of the people are living in prosperity and gaining access to a healthy environment as well as getting their property rights which shall not be reduced by anyone else. In this context, the Court refers to Article 28H Section (1) and Section (4) of the UUD NRI 1945. In general, the Court shows the commitment and effort to uphold the constitutional value of the recognition of the ethnic-indigenous community as well as the commitment to protect democracy value on accommodating and respecting the minority rights. The Court shows its consistent stance in defending its independency by referring to the Constitution. It declared that the Constitution is ensuring the recognition and constitutional existence of the ethnic-indigenous community as well as its traditional-indigenous "*ulayat"* rights as long as it is still alive and according to the society and the principle of unitary Republic of Indonesia as it is stipulated in Article 18 B Section (2) of the UUD NRI 1945. The Court also defended the minority ethnic indigenous rights of the ethnic indigenous community against the eviction and from the elite-populist interest, which means that the Court has protected constitutional democracy values. This is also in order to protect the cultural identity and the traditional indigenous *ulayat* rights from any threats of tyranny majority.

In general remarks, the Court's Decision shows that the Constitutional Court decided the case by defending minority against the majority. It defended the existence and *ulayat* rights of the minority-ethnic-indigenous community against the extinction and tyranny of the majority. The Court also shows the tendency of being impartial and independence instead of showing the tendency of judicial populism. It, in fact, shows the commitment of protecting minority from any kind of elite-populist interest, such as the interest of the domination of natural resources by state for the public purpose.

On the Court's landmark decision of the educational rights, the fulfilment of the economic, social rights may describe how the Court could avoid judicial populism and preserve the constitutional and the rule of law principles. However, the Court's Decision may show the tendency of being protective of democracy and the rule of law. However, it may slightly speak as what the interest of the

majority will of the people. The Court Decision No. 13/PUU-VI/2008 on the Judicial Review of Law No. 16/2008 on the State Budget decided that the state obligation to provide education budget for the fulfilment of the education rights has the character of immediate. It has the meaning that the Court with majority in favour affirmed that in the fulfilment of the education rights, State has an immediate obligation to provide and allocate budget for education according to the Constitution. This Court's Decision actually shows the tendency of being populist but still in the corridor of accommodating the minority by making priority to access education in the form of providing free education for majority and minority of the people. At this context, the Court decided that the Constitution is literally requiring 20% budget from APBN to be allocated to the fulfilment of education rights. In theory, the education rights are in the regime of economic, social, and cultural with the characteristic of being aspiration and progressively realization.

The Court affirmed that the method of the educational budget calculation determined by the government. However, the Court assumed that the method is not a method which is intended by the Constitution and not the rightly method to allocate the percentages of educational budget in Law APBN-P 2008. The Court strictly argued that the method has to be strictly in accordance to the Constitution, and that, any other basis method to calculate the educational budget is unconstitutional and shall be put aside. The Court declared that the use of any method for allocating educational budget by the government would not eliminate any interest groups to invoke their constitutional rights in case there is potential or factual injury caused by the government method. To this extent, the Court gives room for the government to use any other methods which are beyond the constitutional method as well as giving opportunity to any groups to invoke their constitutional rights.[35]

In general, the Court strongly affirms to uphold the constitutional norms which make a priority to the 20% educational budget allocation from the state

[35] Judicial Review of Law No. 16/2008 on the State Budget. Case Number 13/PUU-VI/2008. The Constitutional Court of the Republic of Indonesia.

budget and from the local government budget. The Court emphasizes that the 20% allocation budget for education is a constitutional obligation which put obligation for the government to stick with the percentages in the Constitution.[36] Therefore, the Court decided on the basis of upholding the rule of law and constitutional democracy principle in the Constitution that the fulfilment of the education rights has to be in accordance with the Constitution. In order to anticipate the negligence of the rule of law principles, the Court reminds the legislative and executive branch as well as giving guidance to the local government to allocate 20% state budget and local government budget for the fulfilment of education rights. At this context, the Court was about abiding and being counterpart of the legislative and the executive. The Court assumes that the method of budget allocation used by the government and the legislative may have been adjusted with the situation and condition also according to the demand of the people but does not in accordance to the Constitution. Therefore, the Court assumed that the policy of budget allocation for education which was legalized in the UU APBN-P 2008 was unconstitutional since it was only 15.6% and not 20% as required by the Constitution. The decision shows that the Court had defended the principles laid down in the Constitution and ordered the legislative and the executive to strictly fulfill the education rights by allocating 20% state budget for the educational budget.

Both landmark Decisions were taken by majority in favour by the Constitutional judges. The Court's decision shows that the MKRI, in particular area of economic and social rights, which in this paper is addressed to the minority-ethnic-indigenous rights or marginalized economic and social rights for access to traditional forest to fulfil their economic rights and the education rights for all the people, had given respects and protection to the Constitutional values, and had decided of what it has to be decided according to the Constitution. The Court has proved that it had defended its independence by not deciding of what it was to be demanded by the public. The court shows that its decision is not affected by the majority pressures. The Court also had shown its impartiality

[36] *Ibid.*

as a bridge between the others branches and tend to put forward the justice and the rule of law while putting aside judicial populism. The Court may be an institution to perform check and balances and prevent any populist policy produced by the populist government, which may make a priority to majoritarian people will, but on the other hand, may push away the minority. In its decision of education budget, the Court shows its attitude of defending its independency while performing its function of check and balances against other branches. The Court is about override of being judicial populism by protecting the Constitution, democracy, and the rule of law in Indonesia. The Court has shown its attitude to deliver its transformative decisions by setting considerable remedial in the decision on educational state budget. Its commitment to implement what is in accordance with the Constitution is shown in the decision of affirming the recognition to the marginalized groups as well as affirming their *Ulayat* rights as in accordance with the Constitution values in respecting the indigenous minority groups in Indonesia. Both decisions are indicating that the MKRI does not about gaining political support but make small improvement by giving advice to the executive and legislative in terms of allocation method for the fulfilment of educational rights.

V. CONCLUSION

The Constitutional Court has the role to maintain the improvement process balance with the constitutional democracy principles. While the rule of law is the basis of democracy, it is an effective instrument promoting responsibility, accountability, reciprocity, and trust in the effort to accommodate the interest of majority and minority. Within the rule of law framework, the Constitutional Court shall integrate judicial independence and protect constitutional democracy values in its judicial decision making.

The Court has the role to be an effective catalyst to resist populism in the judicial decision making by setting the democracy standards, such as cultural identity, pluralism values, religion, human rights, economic prosperity, ethnicity, citizenship, the judicial independence, and system of government which in line

with the effort to protect the economic and social rights. Those standards could resist populist politics that are mainly based on the division and rules. In this context, the Court shall put forward the judicial independence and put aside for being judicial populist. The Court shall involve in grassroots organizing and helping people to understand democracy and the rule of law by its judicial decision as a counter-act of populist policies, and form alternative polices to counteract the development of economic and social rights. Hence there is a continued role for the Constitutional Court to provide legal certainty for the protection of economic and social rights.

The Constitutional Court, as the legal institution holding judiciary powers, shall prove to make function the Laws properly in the implementation of economic and social rights protection. As the institution bridging the elite government and the people, the Court has to provide more opportunities and mechanisms for minorities to express their will. As the stabilizer and equalizer, the Court has an important role since the fact that between constitutional democracy and populism are coincide and have to be reconciled. In this context, the Court has to ensure that the minority interests are accommodated in all aspects of the state.

The Court facilitates effective control to the parliament, which representing the majority of people will and the government branch, which has the power to make laws. The Indonesian Constitution has provided facilitation of the effective control by setting the mechanism of checks and balances. Both analyzed Court's Decisions set down the landmark of the Court's Decision on the effort of protecting the economic and social rights as well as upholding democracy and the rule of law. The Indonesian Constitutional Court has shown a tendency to keep away from judicial populism by putting forward the judicial independence. In line with the Constitution, the Court has the effort to hold up populism. The Court shows its legitimacy and independence to make sure everything has already in line with the Constitution and the Laws.

Populism may trigger the emergence of judicial populism when the Court put forward the people will while putting aside the judicial independence and impartiality. In this context, such tendency is what we may call as judicial

populism. Judicial populism may be envisaged from how the judge tends to speak for the people or when the Court delivers decision adjusted and influenced by the majority of the people will while it is actually beyond justice, impartiality, and judicial independence. From both the Court's landmark Decisions discussed in this paper, it shows that the MKRI, in particular area of educational rights and *ulayat* rights, which in this paper is addressed to the minority-ethnic-indigenous rights for access to traditional forest to fulfil their economic rights and the education rights for all the people, had given respects and protection to the Constitutional values, and had decided of what it has to be decided according to the Constitution. The Court has proved that it had maintained its independence by not deciding of what it was to be demanded by public.

BIBILIOGRAPHY

Alon, Harel. "Courts in a Populist World." VerfBlog, 27 April 2017. https://verfassungsblog.de/courts-in-a-populist-world/. DOI: https://dx.doi.org/10.17176/20170428-104853.

Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations

Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Daintith, Terence. "The Constitutional Protection of Economic Rights." *I.CON* 2, no. 1 (2004).

Eby Hara, Abubakar. "Populism in Indonesia and its Threats to Democracy." *Advances in Social Science, Education and Humanities Research (ASSEHR)* 129 (2018).

Fournier, Théo. "From Rhetoric to Action – A Constitutional Analysis of Populism." EUI Working Paper LAW 2018/08, European University Institute, 2017.

Jacome, Jorge Gonzales. "In Defense of Judicial Populism: lessons from Colombia." *Int'l J. Const. L*,(3 May 2017). http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/

Kimura, Ehito. "Populist Politic in Indonesia." Asia Pacific Bulletin No. 407, *East- West Center,* 7 December 2007.

Kureshi, Yasser. "What is Judicial Populism and how does it Work in Pakistan?" www.dawn.com/news/1461194/what-is-judicial-populism-and-how-does-it-work-in-pakistan.

Landau, David. "The Reality of Social Rights Enforcement." *Harvard International Law Journal* 53, no. 1 (2012).

Liano, Arjana. "Independence of the Judiciary."*Juridical Tribune* 3, no. 2 (2013): 109 – 115. http://tribunajuridica.eu/arhiva/An3v2/7%20Llano.pdf.

Mietzner, Marcus. "Indonesia's 2009 Elections: Populism, Dynasties and the Consolidation of the Party System." *Lowy Institute for International Policy* (2009).

Mietzner, Marcus. "Reinventing Asian Populism: Jokowi's Rise, Democracy, and Political Contestation in Indonesia." *Policy Studies* 72 (2015).

Miller, Kenneth P. "*Symposium Constraining Populism: The Real Challenge of Initiative Reform.*" *41 Santa Clara Law Review* 1037 (2001).

Mudde, Cas. "The Populist Zeitgeist." *Government and Opposition* 39, no. 4 (2014).

Nikku, Bala Raju Nikku and Azman, Azlinda. "Populism in the Asia: What Role for Asian Social Work?" *Social Dialogue,* September 17, 2017.

Plato. "The Republic." http://www.idph.net.

Polybius. *The History of Polybius Book Six*, in *Parentheses Publication Greek Series*. Translated by Evelyn S. Shuckburgh. Cambridge, Ontario, 2012.

Pratikno and Cornelis Lay. "From Populism to Democratic Polity: Problems and Challenges in Surakarta Indonesia." *PCD Journal* III, no. 1-2 (2011).

Rooduijn, Matthijs. "A Populist Zeitgeist?: The Impact of Populism on Parties Media and the Public in Western Europe." *Dissertation,* University van Amsterdam, 2013.

Rousseau, Jean-Jacques. *Social Contract*. Translated by Jonathan Bennett, 2017. www.earlymoderntexts.com.

Savitri, Laksmi Adriani and Devi Adriyati. "The Demise of Emancipatory Peasant Politics? Indonesian Fascism and The Rise of Islamic Populism." ERPI 2018 International Conference Paper, International Institute of Social Studies (ISS) Coin The Hague, Netherlands, 17-18 March 2018 .

Törnquist, Olle. "Stagnation or Transformation in Indonesia?" *Economic and Political Weekly* XXIIX, no. 50 (13 December 2014).

Walker, Neil. "Populism and Constitutional Tension." Jean Monnet Working Paper 15/17, Symposium: Public Law and The New Populism, 2017.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev615

Progressive Nature of Social and Economic Rights in Kenya: a Delayed Promise?

Jennifer Gitiri*
Office of the Attorney General & Department of Justice, Nairobi, Kenya
Jennifer.Gitiri@ag.go.ke

Received: 1 June 2019 | Revised: 14 April 2020 | Accepted: 30 April 2020

Abstract

This paper evaluates the steps taken towards the progressive realization of social and economic rights (SER) in Kenya. It aims to provide a better understanding of SER and the obligations of the state under international, regional, and national law. It further elucidates the components of progressive realization. Additionally, it identifies the guiding principles of measuring progressive realization and recommendations to develop tools that would monitor progressive realization. Recognition of SER faces many challenges as they are considered as second class rights that are not equal to civil and political rights considered as first-generation rights. The most enduring challenge for SER is that it interferes with the concept of the separation of powers and the political question doctrine by enabling courts to interfere in matters considered to be under the purview of the legislative and executive branch. The paper uses a desktop review of international, regional, and national legal instruments as well as comparative evaluation of SER jurisprudence from a host of jurisdictions. The concept of progressive realization is a goal in the ICSECR, Kenya's Constitution, and other Constitutions with the implication that SER would be implemented over a period of time. Jurisprudence from other jurisdictions is evaluated to determine the lessons learned by Kenya. The paper demonstrates that progressive realization and implementation of SER are still work in progress before they are finally anchored into mainstream human rights, just like political and civic rights.

* Jennifer Gitiri is an Advocate of the High Court of Kenya and works as a Senior State Counsel at the Office of the Attorney-General and Department of Justice.

In conclusion, progressive realization of SER imports an immediate obligation by Kenya having ratified the three human right bodies (ICSECR, UNCRC, and CRPWD) pursuant to Article 2(5)(6) of the Constitution to expeditiously move towards the realization of SER. There is a further presumption that the country would refrain from retrogressive measures and instead adopt the minimum content approach in the implementation of SER.

Keywords: Constitutional Court, Progressive Realization, Social and Economic Rights.

I. INTRODUCTION

The purpose of this paper is to evaluate how the concept of progressive realization has been used as a tool for the enforcement of social and economic rights (SER) in Kenya. This is done by providing a background to SER in general and Kenya in particular. The qualitative research used a desktop review of published scholarly literature as well as a case study method. Reliance on jurisprudence from South Africa has been made due to the great strides made in that country in the enforcement of SER. The article examines the influence of the International Covenant on Social, Economic, and Cultural Rights (ICSECR) in the development of the concept of progressive realization globally before narrowing down to Africa. However, the focus of the study would be on Kenya and how jurisprudence from the rest of the world has influenced adjudication of SER in Kenya, the challenges in the enforcement of SER, remedies and its monitoring mechanisms.

Progressive realization of SER is a standard adopted by States in response to popular demands in Constitution making, seeking a SER vision, overcoming historical injustices, post conflict situations, and affirmative action.[1] It further describes the central theme in state parties' obligation to the enforcement of SER in the international human rights treaties encapsulated in Article 2 of ICSECR,[2] Article 4 of UNCRC,[3] and Article 4 of CRPWD.[4] As noted by the High Court of

[1] Dawood Ahmed and Elliot Bulmer, *Social and Economic Rights International IDEA Constitution-Building Primer 9, 2nd Ed* (Stockholm: International Institute for Democracy and Electoral Assistance, 2017), 12-14.

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR), UNTS 993, entered into force 3 January 1976.

[3] UNTS, "UN Convention on the Rights of the Child 1989," (UNTS 1577, entry into force 2 September 1990).

[4] UNTS, "Convention on the Rights of Persons with Disabilities 2006" (Volume 2515, entry into force 3 May 2008).

Kenya in the case of "*The Attorney General and two others v John Kabui Mwai and Others.*"

> The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socioeconomic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that, the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socioeconomic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2)(b).[5]

This is an obligation to take appropriate measures towards the realization of economic, social, and cultural rights to the maximum of available resources.[6] The reference to resource availability reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State's compliance with its obligation to take appropriate measures is assessed in the light of available financial resources.[7] Many national constitutions now allow for the progressive realization of economic, social and cultural rights.

Kenya passed a transformative Constitution in 2010 that prioritized its people in the Article 1 as being sovereign. The empowerment of the vulnerable and the marginalized individuals was one of its greatest promises expounded in Article 43 on social and economic rights. The design of this article is to enable those at the bottom to access socioeconomic rights they were denied for a long time. Moreover, it was meant to bring equality by elevating the enforcement of SER to the same status as civil and political rights through the removal of the second class status of SER. The achievement of empowerment rights was to be realized progressively in Article 21(2) of the Constitution. However, this promise has encountered numerous challenges inherent in the enforcement of SER like limited resources, balancing the political question doctrine, what would be reasonable and proportional in the enforcement of SER, and the establishment of the minimum core content of the right in question.

---

5 High Court of Kenya at Nairobi, Petition No. 15 of 2011 at 6.
6 ICESCR, Article 2(1); CRC, Article 4; CRPD, Article 4(2).
7 ESCR General comment 3, Article 2, par.1 (General Commentaries).

II. BACKGROUND

The foundation of progressive realization of SER is the Universal Declaration of Human Rights (UDHR),[8] which recognized a universal regime of human rights and enforcement in Article 22-27 that are inherent, indivisible, and inalienable. Though not binding, the UDHR is considered as forming part of customary international law (*erga omnes*) through recognition in treaties such as the International Covenant on Social, Economic and Cultural Rights (ICSECR), United Nations Convention on the Rights of the Child (UNCRC), Convention on the Elimination of Discrimination Against Women (CEDAW)[9] and the Convention on the Rights of Persons with Disabilities (CRPWD). SER is also codified in regional legal instruments like the European Social Charter of 1996, the Protocol of San Salvador of 1988 in America, and the African Charter on Human and Peoples Rights (ACHPR) of 1981.[10] Similarly, SER has been codified in the Constitutions of many states like Brazil, Kenya, and South Africa.

The western concept of human rights is made in reference to civil and political rights as occupying the first generation rights. First-generation rights are anchored by the International Covenant on Civil and Political Rights (ICCPR).[11] Thus SER is considered second-generation rights because they require certain qualifications before implementation, such as progressive realization[12] Second generation rights are protected by ICESCR. Dr. Willy Mutunga, the former Chief Justice of Kenya, stated that the global world is accepting that the Bill of Rights ensures the correction of deficiencies in a representative democracy. Moreover, he also asserted that the enforcement of economic and social rights would ensure that society achieves equality. Global recognition of the progressive realization of SER has been problematic since the establishment of the ICSECR as a human

8 Preamble, Universal Declaration of Human Rights (UDHR) adopted 10 December 1948.

9 UNTS, "Convention on the Elimination of All Forms of Discrimination against Women 1979" (Treaty Series 1249, Entry into force 3 September 1981), https://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf.

10 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 member States of the African Union (AU).

11 ICSECR, note 3.

12 Khule Kani Moyo, *The Jurisprudence of the South African Constitutional Court on Socio-Economic Rights, in Foundation for Human Rights, Socio-economic Rights: Progressive Realisation?* (Johannesburg: Foundation for Human Rights: 2016), 58.

right instrument.[13] The clearest illustration is the challenges experienced in recognition of SER in many jurisdictions.

The first challenge was an ideological one between the West and the East as part of the existing then conflict that manifested in the cold war between communism and democracy. The west argued that only rights existing in the ICCPR or civil and political rights were worthy of recognition because they were negative rights and did not require budgetary allocations. This was disabused in the case of *Schachter v Canada*.[14] In this case, the honorable judges of the Canadian Supreme Court of Canada opined that any costs and remedies that a court awards always come with budgetary consequences in terms of expenditure and saving of cash. Moreover, while a right can be a political or civil right, it does not mean that financial costs do not come from the decision. For instance, in *Askov,* the judges dealt with a case that involved the right to fair trial comprising political and civil rights. In their opinion, it was stated that the state should conduct criminal trials expeditiously.[15] Illustrating that, the decision would lead to more courthouses and judicial staff like prosecutors and judges, all of which have budgetary implications. Nevertheless, the Court did not rule on the means through which the state would meet this need since the executive has the prerogative to meet the requirement. Thus, this similar approach is taken when dealing with economic and social rights.

The West also thought that enforcement of the SER would be on an international scale and not subject to national implementation as part of the spread of socialist ideology.[16] Beyond the availability of resources, other challenges to the realization of SER were fears that the doctrine of separation powers may be violated as courts were capable of intruding into matters of policy and executive functions in particular and interfere with the political doctrine question. In other respect, it is due to a lack of guiding principles that SER is considered not precise.

[13] T Kondo, "Socio-Economic Rights in Zimbabwe: Trends and Emerging Jurisprudence," *African Human Rights Law Journal* 17 (2017): 163-193.
[14] Schachter v Canada [1992] 2 SCR 679, [63].
[15] R v Askov [1990] 2 SCR 1199.
[16] R v Askov [1990] 2 SCR 1199, 23.

The argument by the socialist East was that political and civil rights could not be enjoyed in an environment of inequality and rampant poverty. After overcoming the initial conflict, western nations were cautious against binding themselves to ICSECR, despite this agreement being enforced in 1976 as second-generation rights.

The first-generation rights comprised political and civil rights under ICCPR promoted by western countries. The most enduring assumption by western constitutions has been that negative rights are protected (political and civil) are sufficient since liberty assumes the existence of SER.[17] Yet millions of individuals in the western world live below the poverty line and would need the protection of ICSECR.

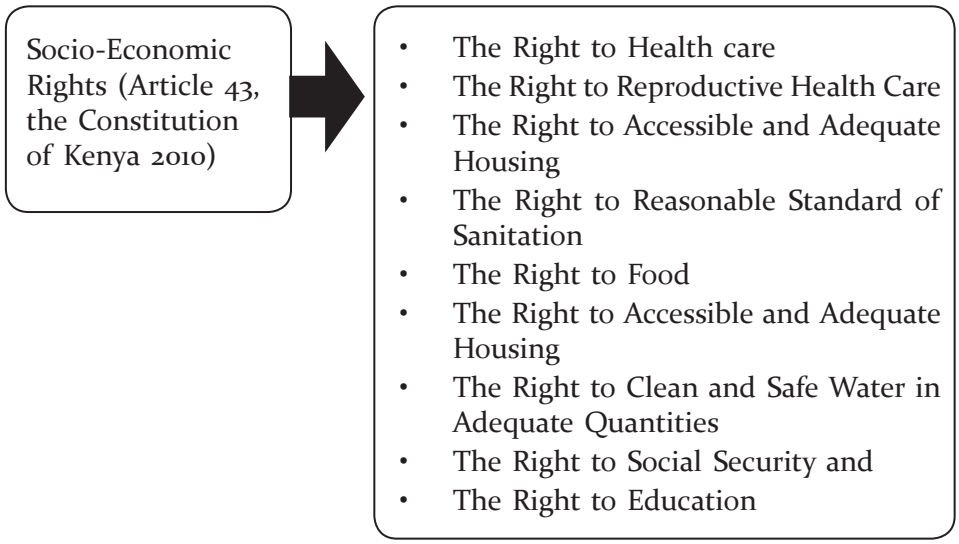
For most jurisdictions, the concept of progressive realization of SER is still a novel one in most legal discourse. This is despite many jurisdictions recognizing this class of rights but pulling back when faced with enforcement. For example, though India and Ireland recognize socioeconomic rights, they have declared them non-enforceable.[18] The Canadian Charter that provided a very helpful interpretation of human rights was quiet in the context of SER. Similarly, the common law was silent, mainly constrained by the formal and technical reasoning that is hostile to the developing jurisprudence in SER. In Africa, the endurance success in the implementation of SER is attributed to the Constitution of South Africa of 1996 as well as Kenya's 2010 Constitution and especially the accompanying innovative interpretation that has filled the void.

SER comprises the whole range of rights contained in the Bill of Rights or Article 43 of the Constitution of Kenya consisting of the following: the right to health care, reproductive health care, accessible and adequate housing, reasonable standards of sanitation; adequate food of acceptable quality; clean and safe water in adequate quantities, to social security; and the right to education.

[17] Brian Ray, "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy," *Washington University Global Studies Law Review* 9, (2010): 399.

[18] Moyo, *The Jurisprudence of,* 23.

Figure 1:
Architecture of Social, Economic Rights in Kenya



This research is qualitative in nature and used the desktop review of international, regional and domestic legal instruments such as the General Commentary Number 3, ICSECR, UDHR, ACHPR, Kenya's 2010 Constitution and the Constitution of South Africa. This was supplemented with SER jurisprudence emanating from the High Court of Kenya and the Constitutional Court of South Africa, which have been relied on by courts in Kenya. This is in addition to a review of scholarly writings by eminent authors and electronic media.

Case study and comparative analysis of SER jurisprudence from other jurisdictions, especially South Africa provide illustrations of how the South African Constitutional Court (SACC) has addressed the progressive realization of SER. Decisions of the SACC have been used to the extent that they have helped the advancement SER in Kenya.

III. THE CONCEPT OF PROGRESSIVE REALIZATION

The concept of progressive realization is new in most legal systems. This is because civil and political rights did not require qualifications like SER before implementation. In many jurisdictions, the justiciability of SER is either not accepted, underdeveloped, or just beginning to emerge.[19] The realization of SER is a challenging task in international human rights law because the rights are said to be vague and imprecise. Thus, a standard was created known as progressive realization, which was adopted in regional, domestic, and international law.[20]Article 2(1) of ICESCR, which requires States to ensure that SER is fully realized. CESCR stated that to progressively realize these rights, states should recognize that these rights cannot be achieved within a short duration of time. Truly, the Constitution of South Africa, especially Sections 26, 27, and 36 and Article 21(2) of the Kenyan Constitution are similar and states that the State should take a policy, legislative and other steps that include ensuring standards are set to progressively realize the achievement of rights stated in Article 43. However, because there are variable financial capabilities among states, there should be flexibility in meeting the differences. This is achieved through obligations of protecting, respecting, promoting, observing, and fulfilling these rights.[21]

Furthermore, the progressive realization of SER highlights the complexity involved in the enforcement of SER. It depicts the resource dependent nature of these obligations when it comes to SER.[22] The gist of the concept is that rights would not be realized immediately but rather that needs that are basic are met. The State plays a huge role in taking necessary steps to ensure the achievement of SER. It would amount to facilitation of access through the removal of legal, administrative, operational and financial constrains that act as barriers towards the realization of SER.[23] The concept can be used by a claimant to establish the

[19] S Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Pretoria: Juta and Company Ltd, 2010), 191.

[20] The East African Centre for Human Rights, *A compendium on economic and social rights cases under the Constitution of Kenya 2010* (Nairobi: EACHR, 2015), 6.

[21] David Landau, "The Reality of Social Rights Enforcement," *Harvard International Law Journal* 53, no. 1 (2012): 190-247.

[22] Moyo, *The Jurisprudence of,* 58.

[23] Liebenberg, *Socio*-economic, 129.

extent of unreasonableness by the state failing to ensure the full realization of SER.[24] It should therefore be read in the context of the objectives of CESCR as articulated in the case of *Grootboom* that in the realization of rights, there should be a full justification and careful consideration when it comes to retrogressive measures to fully utilize available resources".[25] Moreover, it would mean that the definition of progressive realization is contextual, as illustrated by the Courts in South Africa, that have given an interpretation of the meaning of progressive realization. They state that it refers to the ripping into pieces of administrative, financial, operational, and legal obstacles that may hinder access to these rights and their expansion to a larger population of individuals.[26] For instance, in *Grootboom*, the economic and social rights that were always violated through discrimination by the apartheid system like the right to access to water, food, housing, health, sanitation, and education.[27]

3.1. Progressive Realization in Europe

The initial ideological differences between the East and the West affected the realization of SER in Europe. This was shown when two international treaties were created in 1950, like the European Convention on Human Rights in 1950.[28] However, since it was not enough to protect rights, the European Social Charter was signed in Turin in 1961.[29] This was meant to ensure that Europe achieved the minimum required standards in education, health, housing, social protection, non-discrimination, and employment. This allowed states to choose economic and social rights to guarantee through a reporting system that traces whether states are living up to the standards and obligations.[30] However, the European Charter of Human Rights had no single entitlements for any arising complaints if an infringement occurred in States.

---

[24] I Merali & V Oosterveld, *Giving meaning to Economic, Social and Cultural Rights* (Philadelphia: University of Pennsylvania Press, 2011), 1.

[25] Grootboom, para. 45, citing CESCR General Comment No. 3 (1990) para. 9.

[26] Grootboom, para. 45.
92. CESCR General Comment 3 (1990) para. 9.
93. Grootboom, para. 45.

[27] Natasha G Menell, "Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa," *Cornell International Law Journal* 49 (2016): 724.

[28] T. Stein, "Constitutional Socio-economic Rights and International Law: You are not Alone," *PER / PELJ* 16, no. 1 (2013).

[29] European Social Charter (1961) (Hereinafter ESC).

[30] ESC, Article 20, Part IV.

Moreover, the treaty was revised in 1996.[31] This enabled airing of complaints, with trade unions being able to highlight issues.[32] The European Union took the step of improving social protections in Europe with Title IV of the EU Charter on Human Rights included a solidarity name in December 2009 to ensure protections of SER through a legal framework.

3.2. America and Progressive Realization of Social Economic Rights

The Inter-American system that protects SER and the South African Charter is similar in their approach to the realization of SER in a progressive manner. However, the American mechanism is thought to be limited in terms of their effectiveness in the legal remedies that they offer.[33] The western system makes a distinction between categories that human rights are classified since every state has its own cautions that legally bind them to grant SER. For instance, the Brazilian system is such that the judiciary has adopted assertive stances when upholding SER. As opposed to South Africa, the Brazilian Courts have always determined the extent of SER where the state can be ordered to provide services and goods to the petitioner.[34] The United States was among the last nations to sign the ICSECR in 2007 without ratification.

3.3. Progressive Realization in Africa

A vast majority of African states (90%) have ratified the ICSECR.[35] The ICSECR influenced the drafting of the African Charter in 1981 for more than 15 years since the adoption of ICSECR. However, the protections under the charter are narrower than those of the ICSECR. The influence of the two legal instruments on constitutional provisions in Africa is limited since many states have not translated them into constitutional provisions due to a lack of political will.[36] Few African states have shown a lot of innovation in the adjudication of

[31] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995).
[32] Menell, "Judicial Enforcement of," 726.
[33] Stein, "Constitutional Socio-economic," 12.
[34] Octavio Luiz Motta Ferraz, "Harming the Poor Through Social Rights Litigation: Lessons from Brazil," *Texas Law Review* 89 (2011): 645.
[35] M. Ssenyonjo, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa," *Neth Int Law Rev* 64, (2017): 259–289.
[36] Ssenyonjo, "The Influence of," 267.

SER, perhaps borne out of decades of rampant poverty, corruption, conflict, and oppression. The best examples are Kenya and South Africa. Pursuant to Article 2(5)(6), the ICSECR forms part of Kenya's domestic legal system, having ratified it in 1992. In South Africa, for instance, a progressive realization has been deployed mainly to enforce SER to housing, health care, water, and sanitation.[37] Thus apart from Kenya and South Africa, where domestic courts have adopted ICSECR interpretation in the implementation of SER, the great majority of African states[38] are reluctant to enforce SER despite ratifying the ICESCR and ACHPR. These states find the enforcement of SER non-justiciable directives as principles of state policy.

IV. ENFORCEMENT OF SOCIAL ECONOMIC RIGHTS IN KENYA

Since the 2010 Constitution was promulgated, the enforcement of SER by the Kenyan courts has made a lot of progress. Other than using progressive realization to enforce housing rights as in the *Muthurwa* case[39] and other SER, Kenya has gone further and used it to advance the right to equality and healthcare, non-discrimination as well as affirmative action. But as a preliminary matter, the courts had to deal with the challenges of *locus standi* and award of costs that stood in the way of progressive realization of SER in Kenya. Other challenges like internal and external limitations envisaged in Article 24 of the Constitution act as claw back on the realization of SER.

4.1. The Challenge of *Locus Standi*

Before 2010, only the Attorney-General had the *locus standi* to bring legal action on behalf of the public. This curtailed any action that would relieve the suffering of members of the public since the Attorney-General could always defend the State. The Article 22 and 258 of the 2010 Constitution changed all that by expanding standing to members of the public who had an interest

[37] Constitution of South Africa, 1994, Section 26,27 and 36.

[38] Such as the Constitutions of Nigeria (1999), Lesotho (1993), Sierra Leone (1991), Ghana (1992), Ethiopia (1994), Uganda (1995) and the Gambia (1996).

[39] Satrose Ayuma and 11 Others v. The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others. High Court of Kenya, Petition No. 65 of 2010, para 54 (Decision of August 2013) (Hereinafter Muthurwa Case).

in any matter violated fundamental rights, and freedoms could begin legal proceedings on behalf of the people. This was affirmed in the case of the *Republic v Independent Electoral and Boundaries Commission & Another*, where the High Court highlighted that "*the Judiciary acts as the repository and watchdog and is enjoined to enforce and defend the Constitution*."[40] Rules on *locus standi* have further been entrenched by Article 22(3), which requires the Chief Justice to enforce and make the laws that ensure that constitutional rights in the Constitution are adjudicated. Thus, it would enable vulnerable people whose SER are routinely violated access to justice. This has been implemented by the Chief Justice through the establishment of the Constitution's Practice and Procedure Rules of 2013[41] with the aim of facilitating access to justice to all in accordance with Article 22 of the Constitution of Kenya.

4.2. Limitation of SER

A proper understanding of SER is not complete without investigating internal and external limitations of human rights and SER in particular. SER is subject to further limitations in international and national law, giving the impression that implementation of the rights is not absolute. This is despite clear legal provisions on the implementation of SER in international,[42] regional[43], and national law. These instruments have internal mechanisms for the limitation of human rights. The clearest indication that the progressive realization of SER is limited in international law is found in Article 4 of the ICSECR, which states as follows:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[44]

[40] Ex-Parte Councillor Eliot Lidubwi Kihusa& 5 Others [2012] eKLR, para 78.

[41] The Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013, Legislative Supplement No. 47, 28 June 2013, Kenya Gazette Supplement No. 95, Rule 3(2).

[42] The ICESCR Assented to by Kenya on 1 May 1972; The CRC Ratified by Kenya on 30 July 1990; The CEDAW Assented to by Kenya on 9 March 1984; The UNCRPD. Signed by Kenya on 30 March 2007.

[43] ACHPR; The Protocol on the Rights of Women in Africa (2003). Ratified by Kenya on 6 October 2010; The African Charter on the Rights and Welfare of the Child (1990). Ratified by Kenya on 25 July 2000.

[44] ICSECR, Article 4.

This provision has been adopted by Article 24 of the Kenya's constitution to the effect that since SER fall into the category of human rights that can be derogated by the state, such rights can be limited so long as it is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. The effect of this provision is to hamper the realization of SER in Kenya.

V. CHARACTERISTICS OF SER IN KENYA

5.1. Award of Costs in SER

Other than widening standing, the courts in Kenya have used their discretion and have been lenient with respect to the award of costs in matters dealing with SER, particularly where public interest litigation is concerned. In *John Harun Mwau & 3 Others v. Attorney General & 2 Others the Court,*[45] the court opined that:

> The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.[46]

Judicial discretion in the award of costs has further been strengthened by the Mutunga Rules that have facilitated access to justice.[47] Therefore, citizens have been emboldened into entrenching SER, which could happen in cases where the plaintiffs can count on "litigation-oriented organizations that can support a prolonged and strategically planned litigation campaign; extensive charitable or State funding; and public interest or rights oriented lawyers who can do the legal work."[48] The progressive realization has extended into protecting the violation of non-discrimination and equality.

---

[45] High Court Petition No. 123 of 2011.
[46] *Ibid*., para 179.
[47] Mutunga Rules, Rule 26.
[48] A. Cahill-Ripley and D. Hendrick, D, *Economic, Social and Cultural Rights and Sustaining Peace: An Introduction* (London: Friedrich-Ebert-Stiftung, 2018), 15.

5.2. Advancing Non-discrimination and Equality

The progressive realization of rights has been used in Kenya to advance non-discrimination and equality and the balancing of competing interests. The Courts in Kenya have argued that all rights are inter-related and independent. Consequently, they have adopted a holistic approach to the interpretation of the rule of the constitutional completeness, paramountcy, harmony, exhaustiveness of the Constitution, and its self-sufficiency in particular.[49] In the *Federation of Women Lawyers Kenya and Others v The Attorney General and Others,*[50] the court stated that:

> It is important to understand the basics which are that the rights contained in the Bill of Rights are interrelated and mutually supportive. The specific constitutional rights must not be seen in isolation but must be understood in their textual settings and in their social and historical context.[51]

In addressing itself to matters of standing, costs, and indivisibility of rights, the Kenyan courts have moved into unchartered areas of affirmative action. The Attorney-General, in particular, has used progressive realization as a defense to petitions against State violation of non-discrimination and equality in the advancement of affirmative action.[52] The petitioners challenged the composition of the Supreme Court, where the petitioners argued that affirmative action, as provided in Article 27(8), was not subject to liberal realization as contended by the Attorney-General but rather for immediate implementation. The honorable Court aligned with the arguments of the Attorney-General, who stated that affirmative action was subject to progressive realization pending formulation of policy and legislative measures. This decision represented a major set-back in matters of gender equality and non-discrimination.

This impression was corrected in the *Centre for Rights Education and Awareness (CREAW) and eight others v Attorney General & another.*[53] This petition

[49] Muthurwa Case.
[50] High Court Petition No. 102 of 2011.
[51] *Ibid.*, para 41-42.
[52] FIDA-Kenya case, 38.
[53] Petition No. 207 & 208 of 2012, [2012] eKLR (CREAW case).

challenged the appointment of County Commissioners on the ground; *inter alia*, that the President breached Articles 10 and 27(8) of the Constitution when he appointed only ten women and 37 men to occupy the 47 positions.[54] The court rightfully put progressive realization in the context that only Article 21(2) of the Constitution (on progressive realization) applied to the rights contained in Article 43 of the Constitution (SER), and not all the rights in the Bill of Rights.[55] In this regard, the Court found that:

> The Constitution is thus very clear on what rights are subject to the progressive realization test-the social and economic rights to health care, education, water, housing, and sanitation. Such rights require the allocation of resources, and as is the case with similar provisions in the [ICESCR], the state's obligation is made subject to the availability of resources. Had it been the intention to make the principle that is not more than two thirds of elective and appointive positions should be of the same gender subject to progressive realization, nothing would have been easier than for the Constitution to make this specific provision.

However, the Supreme Court of Kenya Advisory Opinion,[56] in their opinion on the two-thirds gender rule, was another setback in the advancement of rights to non-discrimination and equality. In the advisory, Attorney-General requested the Court to give their opinion on the two-thirds gender rule. The majority opinion in the Court was of the view that affirmative action was subject to progressive realization by using the word aspirational.

One of the major criticisms of the developments in Kenya is that despite these innovations, litigation is confrontational in meaning.[57] A more robust approach by the courts of an inquisitorial nature would be more preferable because, for every violation that ends up in court, many others fall by the way for lack of representation. The overall and majority view is that there is no going, progress in the advancement of SER can only move forward.

---

[54] CREAW case, para 11-16.

[55] *Ibid*., para 47.

[56] In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, para 1-2 & 27-30.

[57] *Ibid* at 13.

5.3. Right to Health Care in Kenya

Access to health care and constitutional provisions on SER and health, in particular, could not come at the right time. Since the passage of Kenya's 2010 Constitution, many litigants have gone to court in an attempt to enforce this right. The first of such a case was *PAO v. AG,*[58] where the petition challenged the constitutionality of Sections 2 and 34 of the Anti-Counterfeit Act. The argument advanced was that the provision would have an adverse effect on access to essential medicines like generic medication for managing HIV. In the case, the petitioner's argument was that a broad interpretation counterfeit would encompass generic drugs, therefore, making it difficult to treat HIV. Further, limiting access to generic drugs would make it difficult for the poor, vulnerable, and marginalized access the right to health care.

The hallmark of achieving SER in Kenya has been public interest litigation. This was demonstrated in *the Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others.*[59] This case was brought the best interest of the public in opposing the discrimination of mentally disabled people. In the case, the petitioners were of the view that the Respondents had discriminated against mentally disabled people denying them rights such as health, education, and financial support.

The petition failed on a technicality since the Petitioner failed to properly set their case with the judges stating that the case lacked clarity and objectivity. Therefore, the Court did not determine the matter on merit. The petitioners had failed to adduce sufficient evidence to make a legal assessment on discrimination as alleged. Moreover, the case was dismissed on a lack of particularity since they did not show the specific provisions of the constitution that were violated. The court, in coming to a determination, considered the social and economic context of HIV, stating that it remains a burdensome healthcare problem in Kenya for most families. The court stated that the patient's right to access drugs is subsumed within the broader context of access to affordable health care. The

[58] High Court of Kenya, Petition No. 409 of 2009 (PAO case).
[59] High Court Petition No. 155A of 2011 (Hereinafter Kenya Society for Mentally Handicapped case).

court upheld the *Treatment Action Campaign* case,[60] stated that access to drugs in the hospital was a significant part of the right to health. Therefore, failing to ensure access violates the right to health in the Constitution.

Similarly, the healthcare rights enforced in Kenya under the SER rubric requires a petitioner to demonstrate an inability to afford life-sustaining drugs. In *Mathew Okwanda V Minister of Health and Medical Services & 3 others,*[61] the petitioner in the case was an elderly man diagnosed with diabetes mellitus and lacked financial resources to manage the condition due to its prohibitive costs. The petitioner stated that he needed urgent medical assistance and sought legal redress to ensure that his social rights were upheld, as stated in Article 43. He also argued that he was entitled to affordable care, quality, safe, and clean water, housing, and social security in accordance with Articles 2(5) and (6) of the Constitution and relevant laws like Article 11 of the ICESCR with the state having an obligation to uphold these rights. Similar to the *Kenya Society for Mentally Handicapped* case, the petition failed due to its presentation in an omnibus manner. Although the court dismissed the petition, it acknowledged the obligation of the state to ensure that SER is upheld.

VI. STANDARD OF REVIEW IN SOCIAL ECONOMIC RIGHTS

The standard of review of progressive realization of SER is pegged on the availability of financial resources, political question doctrine minimum content, and reasonableness.

6.1. Availability of Resources

Built into the enforcement of SER is a limitation on the accessibility to financial resources. Many Constitutions that have stipulations for SER show that depends on the available financial resources. Unlike political and civil whose realization is not pegged on the availability of financial resources, legal provisions touching on enforcement of SER in international and domestic law

[60] Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002).
[61] Petition 94 of 2012 Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] Eklr.

have a financial implication built into it. Critics who believe that SER is misplaced have given this reasoning prominence as an illustration as to why they should not be enforced. What is often forgotten is that all rights, including political, civil, social, or economic, require direct and indirect financial provision.[62] The Courts have argued that financial availability affects the extent to which state measures can be said to be reasonable. In the case of *Grootboom*, which has been affirmed by Kenya courts, the judges stated that there exists a difference between means and goals. The measures must be meticulously balanced to achieve an expeditious goal and ensure the availability of resources as a significant factor in ensuring the enjoyment of SER rights. Though the courts have further argued that they have no desire in re-arranging the State's budget, it is clear some of the decisions point towards that direction. In doing so, courts are disadvantaged since they do not have full facts and evidence about the State's financial position in action being adjudicated upon.

The High Court of Kenya in *Mathew Okwanda Case*[63] and relying on the Soobramoney case held as follows:

> *16.* Therefore, even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question. The South African constitutional court in *Soobramoney v* Minister of Health (Kwazulu Natal) 1998 (1) SA 765 (CC) interrogated the question of right to access to health care and emergency treatment. The court was called upon to determine whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order obliging a public hospital to admit him to renal dialysis programme of the hospital. According to the guidelines for the programme the applicant was unqualified. The court in its judgment noted that the Ministry of Health had conclusively proved that there were no funds available to provide patients such as the applicant with the necessary treatment. The court also observed that if the overall health budget was substantially increased to fund all health care programs this would diminish the resources available for the State to meet other social needs. The court stated as follows; "The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the

[62] Moyo, *The Jurisprudence of*, 60.
[63] Moyo, *The Jurisprudence of*, 64.

larger needs of society rather than focus on the specific needs of particular individuals within society.

This position was adopted in the John Kabui Mwai case (cited above) wherein the court observed that, 'The realisation of socioeconomic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socioeconomic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socioeconomic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socioeconomic goods and services that focus beyond the individual.

Therefore, the availability of resources for the fulfillment of SER remains a great concern.

6.2. The Political Question Doctrine

The political question doctrine is another standard the courts have to balance carefully. The dilemma for the courts in most jurisdictions is which matters belong to the courts and which ones belong to other state institutions? The political question doctrine arises in litigation and which by the implied principle of the Constitution is omitted from a final determination.[64] It refers to discussing the Court's jurisdiction in a significant as the Court's foray into the policy arena.[65]

In the *Mitu-Bell case,*[66] the petitioners were evicted from land they had settled in as squatters. The land belonged to the Kenya Airports Authority, and they were evicted on the grounds that it was a flight path. The case was filed at the High Court of Kenya where the court held *inter alia*, "*That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programs on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.*" The Kenya Airports Authority dissatisfied with the decision appealed to the Court of Appeal which overturned the High Court decision and held as follows:

[64] Bantekas.I and Oette.L, *International Human Rights Law and Practice 2nd edition* (Cambridge: CUP, 2016), 13.
[65] M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law 2nd ed* (Oxford: Hart, 2016), 3.
[66] Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR.

> Under the political question doctrine and noting the provisions of Article 20(2) and 20 (5) (c) of the Constitution, a trial court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socioeconomic rights solely on the basis that it would have reached a different conclusion.

Scholars have argued that courts should decline to adjudicate on matters that are outside its jurisdiction especially matters on a policy that attaches to SER. According to the separation of powers, matters of policy are within the purview of the legislature and the executive. When the courts interfere in these matters, it means that they are second-guessing the wisdom of the executive and legislature. This is exacerbated by the inability of courts to define the boundaries of their jurisdiction in relation to the political question succinctly.

6.3. Reasonableness

The Courts will use the test of reasonableness to examine whether adequate measures taken by the state in response to the violation of a particular SER are reasonable or not. In doing so, the court may not compare other existing measures, ones it considers what is available as being reasonable; the test for this requirement would be satisfied.

In Kenya, the High Court in the case of *Federation of Women Lawyers Kenya*[67] opined thus:

> The Government must ensure that the National and County Governments have laws, policies, programs and strategies that are adequate to meet its obligation under Article 27. The measures must establish coherent programs towards the progressive and the immediate realization of all the rights within the State's available means. The programs and the legislations must be capable of facilitating the realization of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive, not for the courts. We think the measures they adopt must be reasonable, practicable and they must be able to address the long term and the short term needs of the vulnerable groups of our society.

Similarly, the High Court of Kenya in *Jaffer v Ministry of Justice*[68] relied on the Grootboom's case and held that:

[67] Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another, Petition No. 102 of 2011.
[68] Jeffer Isaak Kanu V Ministry Of Justice, National Cohesion And Constitutional Affairs & 3 Others [2013] Eklr.

> 38. The common argument as seen above is that the measures taken by the State must be reasonable. In the South African Constitutional Court case of Government of the Republic of South Africa v Grootboom 2001(1) SA 46(CC) regarding the State's responsibility on provision of socioeconomic rights the Court rendered itself thus;
>
> "A court considering reasonableness will not enquire whether more desirable or favorable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met."

Grootboom overturned the requirement for rationality articulated in *Soobromaney.* This test has, however, been criticized for being insufficient in attesting to the actual content of SER and the nature of obligations they portend to protect.[69] In effect, it has allowed courts to be lazy in providing for normative content in respect of SER.[70] Due to this failure to provide for the core content, it is doubtful that it is still able to provide adequate protection to the poor vulnerable groups and save them from the harm that would arise without the court's assistance.[71]

This criticism based on two stages required in the adjudication of constitutional rights:[72] The first stage involves the development of the content of the right and whether the actions of the defendant violates the right in question. The second is an inquiry into reasons for the first limitation and its proportionality.[73] The reasonableness test facilitates the distinction between the two requirements.[74] Similarly, in *Grootboom* the court simply affirmed the violation of the right to affordable housing without articulating its content as provided for in Section 26 of the South African Constitution. Moreover, the reasonableness tests a

[69] Center for Economic and Social Rights, *The Universal Periodic Review: A Skewed Agenda? Trends Analysis of the UPR's Coverage of Economic, Social and Cultural Rights* (New York: CESR, 2016), 11.

[70] Liebenberg, *Socio*-economic,173.

[71] A. Cahill-Ripley, "Challenging Neoliberalism: Making Economic and Social Rights Matter in the Peace building Agenda," in *Economic and Social Rights in a Neoliberal World*, ed. Frey D and MacNaughton. Gn (Cambridge: Cambridge University Press, 2018), 8.

[72] Cahill-Ripley, "Challenging Neoliberalism."

[73] Section 36(1)(e) of the Constitution. of South Africa.

[74] Grootboom para. 41.

perception of entitlement to goods and services, whereas it should only be a reasonable government mechanism.[75]

6.4. Minimum Core Content

The lingering question in progressive realization is the minimum right's content being adjudicated upon. The minimum core content is an approach based on General Comment 3 of 1990 of the CESCR on the nature of the obligations of States Parties under the ICESCR. The concept of minimum core content suggests the existence of degrees of the fulfillment of SER arising from a basic need to survive and the socioeconomic expectations required in the process.[76] In effect, it simply suggests that certain needs are more important and therefore desire protection. The minimum content provides a standard and mirror through which progressive realization that is relativist in nature is viewed in international, regional, and domestic law. It provides States with the discretion to implement SER pursuant to the availability of financial resources.[77] It, therefore, provides directions and steps only intervening when there is a pointer towards regression.[78] A failure to accommodate this concept has an effect on the justifiability of SER as its context and meaning is left for speculation. Minimum core content ensures certain obligations on states to fulfill.[79] This is a minimum right strategy that points to maximum gains as a prelude to minimum gains in the context of SER.[80] However, this concept has been criticized for threatening the broader goals SER since such scales are yet to be determined.[81] Additionally, insisting on minimum content only manages to direct attention towards the performance of developing countries,[82] which avoids addressing those suffering similar violations in developed counties. Moreover, there is a tendency to rank claimants as an assessment of

[75] Carol C Ngang, "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The obligation to Take Other Measures," *African Human Rights Law Journal* 14, no. 2 (2014).
[76] CESCR General Comment No. 3 (1990) para. 9.
[77] ICCPR, Art. 2(1).
[78] General Comment *No. 3*,
[79] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, "Report on the Fifth Session, Supp. No. 3, Annex III, ¶ 10, U.N. Doc. E/1991/23" (1991, hereinafter *General Comment No. 3*).
[80] Kondo, "Socioeconomic Rights in," 165
[81] Ahmed and Bulner, *Social and Economic,* 13.
[82] Ray, "Engagement's Possibilities and," 400.

economic growth or defense policies are disregarded.[83] Finally, at a conceptual level, it would not be fair to argue that minimum content in a country like Mali is equivalent to Canada and, if so, what would be the standard?

6.5. *Minister of Health and Others v Treatment Action Campaign and Others*[84]

This case confirmed the reasonableness test adopted in *Grootboom,* which was delivered two years later. The issue, in this case, was whether the court could and should intrude on contentious matters considered bordering on state policy. The case arose out of the Department of Health, restricting to two sites out of the nine provinces for Nevirapine given to pregnant ladies who lived with HIV and were a few days or weeks from giving birth.

The Court in South Africa rejected the advanced argument that it was for the national scientific authorities and no longer for judges to prescribe drugs. The court held that it was exactly the principle of separation of powers in the Constitution that requires the judiciary to test the national policies and establish if they have departed from the State's obligation to take reasonable measures to recognize SERs.

VII. REMEDIES IN SOCIAL ECONOMIC RIGHTS

The progressive nature of SER is evident in the remedies that are granted in case of a breach. The violations of SER like those experienced in societies emerging from conflict such as the apartheid regime are systemic and on a large scale. For that matter, monetary compensation would not be an adequate remedy. The Courts have sought innovative remedies in addressing these violations. This was borne out of necessity and the fact that in many of the suits filed, the plaintiffs or communities are poor without access to legal services and sometimes have to rely on public interest litigation (PIL) to argue their case.[85] The Courts have particularly imported remedies in judicial review and administrative law into

[83] Landau, "The Reality of Social," 191.
[84] (No 2) 2002 (5) SA 721 (CC).
[85] *Ibid*., 63.

SER, such as prohibitory and mandatory orders. Others are reporting orders, supervisory orders, and meaningful engagement to effect conduct in violation of SER.

7.1. Prohibitory Orders

Prohibitory and mandatory orders are orders that are commonly used in administrative law. Currently, they are being used in the context of SER purposely to compel some conduct of the state of an economic and social nature. A Prohibitory order in SER may involve a threatened interference in existing access to SER.[86]

7.2. Mandatory Orders

Mandatory orders are granted in circumstances where the violation of a right includes failure by a State organ, or compulsory order would be given.[87] Mandatory orders provide effective relief for violations SER, especially in providing benefits and services to a particular class of people in situations where it is vital and where the relief can be clearly defined. In *TAC,* it was clear that the court was prepared to grant this relief where a state failed to uphold its constitutional duties of a social and economic nature. It clearly showed that courts had the capacity to intrude into matters of policy, the budget that has distribution implications.[88] In the same case, the court ordered the state to immediately eliminate restrictions from the provision of the drug known as Nevirapine in clinics and hospitals as well as grant and facilitate its use.

7.3. Orders of Meaningful Engagement

A meaningful engagement is increasingly becoming synonymous in cases that deal with evicting the poor. This is a mandatory order, for example, where there is a violation of the right to adequate housing that requires parties to engage purposely to explore solutions to the violation.[89] This order is an innovation by

[86] *Ibid.*
[87] Paul O'Connell, "The Death of Socio-Economic Rights," *Modern Law Review* 74, no. 4 (2011): 532-554.
[88] *Ibid.*
[89] Occupiers of 51 Olivia Road, Berea Township and 197 Mainstreet, Johannesburg V City of Johannesburg & Others (Oliver Road Case) para. 21.

the Constitutional courts in South Africa that allows parties to continue discussing till an amicable solution can be reached in cases of evictions. It is cognizant of the vulnerable state of persons about to be evicted whose reaction would be a refusal to negotiate. Thus in such circumstances court have a duty to bring the parties together and for the state to make reasonable efforts to engage.[90] The objective of the engagement is tow fold: first, to ascertain the consequences of the eviction, and second, it is to allow the party and the authority to act in a reasonable manner when it comes to people's housing needs. In view of the court, meaningful engagement occurs where people are evicted in ways that would render them homelessness.[91] In *Olivia Road case,* the court ordered the city of Johannesburg have meaningful engagement in conformity with the statutory duties of the municipality and the rights, duties, and fundamental freedoms of the applicant.[92]

7.4. Reporting Orders and/or Continuing Mandamus

The Courts have also created other orders known as reporting orders that require authorities to report back to court to show progress when implementing orders. In the alternative, parties may be required to negotiate their course of action and give effect to the particular right. The role of the court in this context is supervisory, while at every stage issuing new sets of directives to regulate the engagement. This continues until such time that the violation is remedied. Parties to the suit are free to file affidavits where they are not satisfied with the progress.[93]

The Supreme Court of Canada, Constitutional Court of South Africa, and the Supreme Court of India have affirmed that the court has the power to issue mandatory orders and thereafter retain supervisory jurisdiction to ensure compliance in cases of violations of SERs. In the case of *Minister of Health v Treatment Action Campaign,* the South African Constitutional Court held that "a mandamus and the exercise of supervisory jurisdiction' may be necessary to

[90] *Ibid*., para. 15.
[91] Moyo, *The Jurisprudence of,* 50.
[92] *TAC*, para. 7.
[93] Olivia Road, para. 24.

ensure an effective remedy for a breach of any constitutional right, including a socioeconomic right."[94] The Supreme Court of Canada in *Doucet-Boudreau v Nova Scotia*[95] held that a judge—after ordering that the government builds minority-language schools—can retain and exercise jurisdiction over the case by requiring the government to report back on the progress made to comply with the court orders.

In India, the Supreme Court adopted a similar approach and upheld that, "As the relief is positive and implies affirmative action, the decisions are not "one-shot" determinations but have on-going implications."[96] This concept of continuing mandamus ensures that a court monitors the implementation of its orders

7.5. Constitutional Damages

The jurisprudence developed in South Africa in evictions and violation of the right to housing has meant that the State is a party in all applications for evictions (private or public) due to its constitutional obligation. The underlying rationale is that the State has a constitutional duty to protect its citizens from evictions and should facilitate dialogue and mediation processes. This finding was espoused in the case of the *city of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*.[97]

In Kenya, the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society* held that:

> We hasten to add that in any eviction, forcible or otherwise, adequate and reasonable notice should be given. Respect for human rights, fairness and dignity in carrying out the eviction should be observed. The constitutional and statutory provisions on fair administrative action must be adhered to.[98]

With regards to damages for violation of SERs, the High Court in Kenya in JOO (also known as *J M) v Attorney General held that,*

[94] Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC).
[95] Doucet-Boudreau v Nova Scotia (Minister of Education) [2003]3 SCR 3.
[96] Sheela Barse v Union of India (1988) AIR 2211 (SC) at 221).
[97] 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).
[98] Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR.

> The National Government & the County Government has failed to implement and/or monitor the standards of free maternal health care and services thus resulting in the mistreatment of the Petitioner and violation of her right to dignity, and treatment that is devoid of cruelty, inhuman and not degrading.[99] *The court then awarded damages to the Petitioner as a result of the infringement of her right to health.*

VIII. MONITORING MECHANISMS FOR PROGRESSIVE REALIZATION

The progressive realization is subject to a monitoring mechanism in line with international and national law. However, monitoring is a complex process carried out by various institutions, namely the state, the civil society, and democratic institutions.[100] The CESCR has a monitoring system for the implementation of the ICSECR in which states regularly submit reports to the committee that monitors compliance of states.[101] The Optional Protocol to the ICSECR is part of the complaints, and the inquiry process forms another tier of monitoring of compliance is achieved. The Kenya National Commission on Human Rights (KNCHR) is a statutory body tasked with monitoring compliance of human rights. The High Court is another important link in the monitoring process through its decisions. Considering that monitoring is done by a plethora of institutions, the major challenge is the construction of a simplified monitoring tool with the capacity to not only scrutinizes but make them available to the general public.

Methods used in monitoring compliance with the obligation of progressive realization include benchmarking, such as analysis of resource allocation, identifications of violations, some economic tools, and a combination of any of the above. The latter is the most preferred mechanism in measuring compliance.[102]

---

99 J O O (also known as J M) v Attorney General & 6 others [2018] Eklr.

100 Chenwi, Lilian, *Monitoring the Progressive Realisation of Socio-economic Rights Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court.* Community Law Centre, University of the Western Cape Research paper written for Studies in Poverty and Inequality Institute, 2010: 5

101 Chenwi, Lilian, Monitoring the Progressive.

102 Chenwi, Lilian, Monitoring the Progressive.

IX. CONCLUSION

In conclusion, though Kenya has made tremendous progress in the adjudication of SER, many challenges still exist. This is an indication that progressive realization of SER is still work in progress, and these challenges would have to be addressed before being anchored into mainstream human rights, just like political and civic rights. For a start, it is generally agreed that the realization of all economic, social, and cultural rights will not be achieved in a short period of time.[103] Therefore, States are responsible for the progressive realization of the rights in question and need to make every effort towards fulfilling that goal. This is despite the wisdom behind the enforcement of SER as their self-reinforcing nature, especially in societies that are undergoing a transformation. The case for enforcement is hinged on the idea that continued violation has a direct and negative impact on key values enshrined in international, regional, and even domestic instruments such as equality, human dignity, and discrimination. In that sense, the transformative agenda of the Constitution cannot be met unless vices of inequality and extreme poverty are addressed. Therefore, the conversation about progressive realization is a good starting point.

The Courts in Kenya have similarly struggled to find adequate remedies anytime SER is violated. Nevertheless, courts have developed ingenious ways of developing new remedies that speak directly to these violations, while expanding and giving meaning to old ones such as prohibitory and mandatory order. Other developments in Kenya in using progressive realization as a standard to implement equality and non-discrimination beyond SER is an indication that indeed the law is an instrument of transforming society. Though the scope and content of SER and its remedies have not been clearly articulated and are still progressive in nature; it is incumbent upon the state and the judicial system to guarantee that the socioeconomic rights of citizens are protected and enforced.

In a developing country like Kenya, where the need to promote the dignity of the poor, vulnerable and marginalized is of great essence and the need to balance

[103] CESCR, *General Comment no. 3*, para. 9.

the limited resources, SER remedies require to be translated and interpreted in a manner that provides tangible benefits. Some of the remedies from the courts have compelled the government to take certain measures that ensure that the SER is protected and realized, damages and compensation have been awarded, and in some instances, courts have required the government to take legislative steps that ensure SER are realized.

BIBLIOGRAPHY

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995).

African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 member States of the African Union (AU).

African Charter on the Rights and Welfare of the Child (1990). Ratified by Kenya on 25 July 2000.

Ahmed, Dawood and Elliot Bulmer. *Social and Economic Rights International IDEA Constitution-Building Primer 9, 2nd Ed*. Stockholm: International Institute for Democracy and Electoral Assistance, 2017.

Bantekas, I and Oette.L. *International Human Rights Law and Practice 2nd ed*. Cambridge: CUP, 2016.

Cahill-Ripley, A and Hendrick. *Economic, Social, and Cultural Rights and Sustaining Peace: An Introduction*. London: Friedrich-Ebert-Stiftung, 2018.

Centre for Rights Education and Awareness (CREAW) and 8 others v Attorney General & Another. Petition no. 207 & 208 of 2012, [2012] eKLR (CREAW case).

Center for Economic and Social Rights. *The Universal Periodic Review: A Skewed Agenda? Trends analysis of the UPR's coverage of Economic, Social and Cultural Rights*. New York: CESR, 2016.

Chenwi, Lilian. "Monitoring the Progressive Realisation of Socioeconomic Rights: Lessons from the United Nations Committee on Economic, Social

and Cultural Rights and the South African Constitutional Court." Research paper written for Studies in Poverty and Inequality Institute, Community Law Centre, University of the Western Cape, 2010.

Federation of Women Lawyers Kenya and Others v The Attorney General and Others, High Court Petition No. 102 of 2011.

Ferraz, Octavio Luiz Motta. "Harming the Poor Through Social Rights Litigation: Lessons from Brazil." *Texas Law Review* 89 (2011).

Government of the Republic of South Africa and Others v Grootboom and Others, 2001 (1) SA 46 (CC).

John Harun Mwau & 3 Others v Attorney General & 2 Others the Court, High Court Petition no. 123 of 2011.

John Kabui Mwai and Others v The Attorney General and 2 others, High Court of Kenya at Nairobi, Petition No. 15 of 2011.

Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others. High Court Petition No. 155A of 2011 (Kenya Society for Mentally Handicapped case).

Kondo, T, Kondo. "Socioeconomic Rights in Zimbabwe: Trends and Emerging Jurisprudence." *African Human Rights Law Journal* 17 (2017).

Landau, David. "The Reality of Social Rights Enforcement." *Harvard International Law Journal* 53, no. 1 (2012).

Liebenberg, S. *Socioeconomic rights: Adjudication under a Transformative Constitution*. Pretoria: Juta and Company Ltd, 2010.

Mathew Okwanda V Minister of Health and Medical Services & 3 others, Petition 94 of 2012.

Menell, Natasha G. "Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Afric." *Cornell International Law Journal* 49 (2016).

Merali, I & V Oosterveld. *Giving Meaning to Economic, Social and Cultural Rights*. Philadelphia: University of Pennsylvania Press, 2011.

Minister of Health and Others v Treatment Action Campaign and Others, no. 2, 2002 (5) SA 721 (CC).

Moyo, Khule Kani. *The Jurisprudence of the South African Constitutional Court on socioeconomic rights, in Foundation for Human Rights, Socioeconomic Rights: Progressive Realisation?* Johannesburg: Foundation for Human Rights, 2016.

Ngang, Carol C. "Judicial Enforcement of Socioeconomic Rights in South Africa and the Separation of Powers Objection: The obligation to Take Other Measures." *African Human Rights Law Journal* 14, no. 2 (2014).

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others, 2008 (3) SA 208 (CC).

O'Connell, Paul."The Death of Socio Economic Rights." *Modern Law Review* 74, no. 4 (2011).

PAO v. AG, High Court of Kenya, Petition No. 409 of 2009.

R v Askov [1990] 2 SCR 1199.

Ray, Brian. "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy." *Washington University Global Studies Law Review* 9, (2010).

Satrose Ayuma and 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others. High Court of Kenya, Petition No. 65 of 2010.

Schachter v Canada [1992] 2 SCR 679, [63].

Scott, Craig and Philip Alston "*Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's* Promise." *S.AFR. J. ON HUM. RTS* 16 (2000).

Schmid. E. *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*. Cambridge: Cambridge University Press, 2015.

Ssenyonjo, M. "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa." *Neth Int Law Rev* 64, (2017): 259–289.

Soobramoney v Minister of Health (Kwazulu - Natal), 1998 1 SA 765 (CC). 41.

Stein, T. "Constitutional Socio-economic Rights and International Law: You are not Alone." *PER, / PELJ* 16, no. 1 (2013).

Supreme Court Advisory Opinion, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, paras 1-2 & 27-30 (Gender Rule Advisory Opinion).

The City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties. 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).

The Constitution of Kenya 2010.

The Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013, Legislative Supplement No. 47, 28 June 2013, Kenya Gazette Supplement No. 95, Rule 3(2).

The Constitution of South Africa, 1994.

The East African Centre for Human Rights. *A Compendium on Economic and Social Rights Cases under the Constitution of Kenya* 2010. Nairobi: EACHR, 2015.

Trispiotis, I. "Socioeconomic Rights: Legally Enforcable or just Aspirational." *Opticon* 8 (2010).

UNTS. "Convention on the Elimination of All Forms of Discrimination against Women 1979." Treaty Series 1249, Entry into force 3 September 1981, https://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf.

UNTS. "Convention on the Rights of Persons with Disabilities 2006." Volume 2515, entry into force 3 May 2008.

UNTS. "UN Convention on the Rights of the Child 1989." UNTS 1577, entry into force 2 September 1990.

UNTS. "International Covenant on Civil and Political Rights, General Assembly of the UN on 19 December 1966." Res. 2200A, U.N. GAOR, 21st Sess U.N. Doc. A/RES/2200, entered into force Mar. 23, 1976, hereinafter ICCPR.

U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights. "Report on the Fifth Session, Supp. No. 3, Annex III, 10, U.N. Doc. E/1991/23." 1991.

Universal Declaration of Human Rights (UDHR) adopted 10 December 1948.

Woolman, S and H Botha. "Limitations." In *Constitutional Law of South Africa 2nd ed*, edited by S Woolman et al. Juta& Co., Original Service, 2006.

Constitutional Review, Volume 6, Number 1, May 2020
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev616

The Regime's Violation of the Right to Property in the West Bank, Palestine: Rawabi Project as a Case Study

Osayd Awawda*
Faculty of Law and Political Science, Hebron University, West Bank, Palestine
osayda@hebron.edu

Received: 1 April 2019 | Revised: 12 April 2020 | Accepted: 30 April 2020

Abstract

The purpose of this paper is to assess the Palestinian Constitutional Court's reasoning of its judgment in Rawabi Case, a case in which the Government's expropriation of a large area of privately-owned land was challenged before the Court. The expropriation was to transfer the ownership of that land to Bayti Real Estate Investment Company, a private company that later on built the first planned city in Palestine: Rawabi. This paper explains what implications the judgment in this case has on the relationship between the regime and other major private investors in the West Bank. The paper starts with explaining how some constitutional courts perform the function of providing credible commitments in the economic sphere, where such courts are situated in authoritarian settings. Then, it moves to the specific case of Rawabi, explaining the facts of the case and describing Rawabi's connections to the regime's interests. The paper concludes that the Constitutional Court has failed to perform its main function of upholding the Palestinian Basic Law and, in particular, protecting the right to property for the owners of the expropriated lands.

Keywords: Palestinian Constitutional Court, Rawabi Project, Right to Property, West Bank.

* Assistant Professor of Constitutional Law at the Department of Public Law, Faculty of Law and Political Science, Hebron University, Palestine. Holds a Ph.D. in Constitutional Law from Melbourne Law School, Australia. LL.M. from Melbourne Law School, Australia, and Bachelor's in Law Degree from Birzeit University, Palestine.

I. INTRODUCTION

In 2007, the Palestinian Authority held its second parliamentary elections.[1] The result was in favour of the Hamas Party by winning 74 seats out of 132. Thus, for the first time, the opposition party has a majority in the Parliament. Fatah, the party which is the inheritor of the Palestinian Liberation Organisation and the primary loser in the elections, refused to allow the new government, formed by Hamas, to take control. The situation escalated to a civil war that led Abbas, the President of the Palestinian Authority and the Head of Fatah party, to apply Article 110(1) of the Palestinian Basic Law. This Article allows the President to declare the state of emergency for thirty days in all territories controlled by the Palestinian Authority under the pretext that there is "a threat to national security caused by … armed insurrection".

Certain significant presidential decrees followed Abbas's declaration.[2] The most relevant to the topic of this paper is suspending the Parliament's powers and moving legislative authorities to the President, who practices it in the form of enacting decrees-by-law, justified by "Urgent Necessity" as the Basic Law phrases it. The President used these decrees-by-law to unconstitutionally serve substantial interests of major private corporations.

For example, in case 12-2016, also known as "Rawabi" case, some owners of 1525.348 Km^2 lands filed a direct action to the Supreme Constitutional Court ('SCC') against the Presidential Decree of expropriating these lands.[3] The Decree transferred the ownership of these lands to a private Palestinian company called "Bayti Real Estate Investment Company", to build the first Palestinian master planned-city project, known as "Rawabi City". The Constitutional Court, which in 2016 consisted of twelve judges that the President has single-handedly appointed, dismissed the case because of "lacking jurisdiction over the Presidential Decrees", disregarding Article 103 of the Basic Law that highlights the Court's

[1] "Timeline: Key events since 2006 Hamas Election Victory," Reuters, 20 June 2007, http://www.reuters.com/article/us-palestinians-timeline-idUSL1752364420070620.

[2] "Presidential Decrees Issued on June – July 2007," JMCC, 2016, Internet Archive https://web.archive.org/web/20071012102508/http://jmcc.org/goodgovern/07/eng/presidentdecrees07.htm.

[3] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016.

jurisdiction over such decrees. Importantly, the Court referred to case 9-2012, in which it pronounced the same judgment, declaring its lack of jurisdiction over Presidential Decrees.[4]

This dismissal relates to a form of corruption in public-private relationships, which is to unlawfully provide commitments in the economic sphere.[5] In this dismissal, Bayti Company, as a local investor, received a credible commitment from the regime to protect the company's interests. By offering that protection, the regime had significant gains: making a tremendous profit from taxing imported materials, and, more importantly, increasing the confidence of potential investors that their projects would also be protected, even if that required a presidential decree to expropriate privately-owned lands.

The purpose of this paper is to assess the Court's reasoning of its judgment in Rawabi Case, and what implications does this judgment have on the relationship between the regime and other major private investors in the West Bank?

The paper starts with explaining how some courts perform the function of providing credible commitments in the economic sphere, where such courts are situated in authoritarian settings. Then, it moves to the specific case of Rawabi, explaining the facts of the case and the describing Rawabi's connections with the regime. After that, because the Court referred to its judgment in case 9-2012 to justify that of Rawabi case, an assessment of the former is conducted, which will serve as a basis of the conclusion about the Rawabi Case. The assessment of case 9-2012 constitutes the bulk of this paper. Lastly, the paper concludes with explicating the effect of Rawabi Case on the rregime's commitments to prospective private investors.

---

4 See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016.

5 For more about this topic see: Krithika Ashok, Paul T. Babie, and John V. Orth, " Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, And The United States," *Fordham International Law Journal* 42, no. 4 (2019), 999; JM Baynard, "Private or Public Right? Who Should Adjudicate Patentability Disputes and is the Current Scheme Really Constitutional?" *21 Marquette Intellectual Property Law Review* 57 (2017); Gerald S Dickinson, "Federalism, Convergence, and Divergence in Constitutional Property," *University of Miami Law Review* 73 (2018): 139; Karolina M, "Protection of Private Property Expropriation," *The Scientific Journal of Bielsko-Biala School of Finance and Law* 35 (2018); Iijoong Kim and Lee H, "Constitutional Principles of Regulatory Takings: A Utilitarian Perspective," 26 *Supreme Court Economic Review* 81 (2018); N Monebhurrun, "Chronicles of International Investment Law," *Brazilian Journal of International Law* 33 (2015); Ganesh Sitaraman, "The Puzzling Absence of Economic Power in Constitutional Theory," *101 Cornell Law Review* (2016): 1445.

II. PROVIDING CREDIBLE COMMITMENTS IN THE ECONOMIC SPHERE

Because economic power is fundamental to every regime, some authoritarian regimes employ courts to serve as providers of credible commitments for investors –more importantly for foreign ones– to enhance the economic condition of the regime, with disregard of the welfare of the society.[6] A dilemma that faces these regimes is that any judicial system empowered enough to guarantee the trustworthy protection of property rights is possibly capable of standing against these regimes as well.[7] This dilemma requires regimes to give reliable promises to private investors while at the same time, avoid empowering courts in aspects that might weaken the regime. These promises can be given by establishing independent courts that can supervise and punish any violations against property rights, especially vis-à-vis the state itself and other governmental actions.[8]

However, with regard to authoritarian regimes, there is a variation in their way of utilising courts for this function. The fact of having pre-existing judicial power incentivises regimes to utilise this power rather than establishing a parallel judicial system for economic matters. For example, it is harder to utilise courts for that function in Cambodia than in post-colonial Hong Kong because judicial power is more robust in Hong Kong, which is also much more developed than Cambodia.[9]

Economic liberalisation, in its global context, has significant impacts on judicial institutions, particularly in developing countries. Encouraging judicial

---

6 See Peter Solomon, "Law and Courts in Authoritarian States," in International Encyclopedia of the Social & Behavioural Sciences (Oxford, Elsevier, 2nd edition, Vol 13), 427–34.

7 Barry R Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, & Organization* 11, no.1 (April 1995). See generally Sisay Alemahu, "The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia," *Journal of Ethiopian Law* 135, no. 2 (2008).

8 Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008), chapter 12. See generally Katie Boyle and Edel Hughes, "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights," *International Journal of Human Rights* 22, no. 1 (2018): 43.

9 Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia," in Beyond democracy in Cambodia, ed. Joakim Ojendaland Mona Lilja (Nias Press, 2009), 70-100. See generally Adèle Cassola, Amy Raub and Jody Heymann, "Do Constitutions Guarantee Equal Rights across Socioeconomic Status? A Half Century of Change in the World's Constitutions," *Journal of International & Comparative Social Policy* 32, no. 3 (2016): 235.

reform is the most comprehensible example of those impacts, because courts are the best forums to encounter governmental attempts of expropriating investors property.[10] All WTO members are required to provide judicial, or quasi-judicial, forums in matters related to trade and investment, besides bilateral treaties that assure investors access to the impartial dispute resolution process.[11] The World Bank, as an example, gives ample financial support for judicial reform projects in developing countries, since it is a major economic risk for authoritarian regimes, particularly in developing countries, not to make available –for investors– courts that are predictable and efficient.[12]

In the context of authoritarian regimes, providing these credible commitments does not mean that such regimes will undertake a broad-based economic growth, because that type of growth would weaken their dominance, especially when this sort of growth involves demands of complete independence for courts.[13] Saudi Arabia is a typical example of an authoritarian regime that does not aim for the economic growth of that sort, because it is a resource-rich country, and investments are expected to continue regardless of the economic growth in it. It highlights how resources avaibility affects the capabilities and desires of regimes' leaders to employ courts in this function. Nevertheless, a regime with a desperate need for foreign investors might disregard such calculations, and temporarily provide courts with independent competences, that are sufficient to those investors, until the economy develops, then the regime will deprive the courts of these competencies to protect its interests again.[14]

[10] See Nathan Jensen, "Political Risk, Democratic Institutions, and Foreign Direct Investment," *The Journal of Politics* 70, no. 4 (2008), 1040-52. See generally Danwood Mzikenge Chirwa, "A Full Loaf Is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi," *Journal of African Law* 2 (2005): 207.

[11] Bernhard Zangl, " Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO," *International Studies Quarterly* 52, no. 4 (2008), 825-54. See generally Oliver Hailes, "The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler," *New Zealand Journal of Public and International Law* 15, no. 2 (2017): 229.

[12] Matthew Stephenson, "Judicial reform in developing economies: Constraints and opportunities," in Annual World Bank Conference on Development Economics-Regional 2007: Beyond Transition (2007), 311-28.

[13] See generally Peter Solomon, "Judicial Power in Authoritarian States: the Russian experience," in Rule by Law: The Politics of Courts in Authoritarian Regimes (2008), 261-82.

[14] Tom, Rule by Law. See generally Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights, Cambridge Studies in European Law and Policy* (Cambridge University Press, 2018).

III. CASE 12-2016 "RAWABI CITY"

This case is about lands' expropriation for private investors.[15] Some owners of the expropriated land filed a direct action to Constitutional Court against the Presidential Decree of expropriating their lands in the West Bank.[16] They claimed that according to Article 21(2) of the BL, expropriation is only permissible for public interests. The Article declares that:

> Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial ruling.

They highlighted the fact that in this decree, the ownership of this land was transferred to a private company called "Bayti Real Estate Investment Company," which is jointly owned by Qatari Diar Real Estate Investment Company and Massar International, to build the first Palestinian master planned-city project, known as "Rawabi City."[17] According to Al-Monitor agency, the city is "designed to include 6,000 housing units and accommodate a population of up to 25,000. The prices of the units range from USD 65,000 to 110,000."[18] Based on these facts, the plaintiffs argued that there is no public interest in expropriating these lands, which means that the BL Article mentioned above does not justify the contested presidential decree.[19]

In response to this case, the SCC dismissed the case on the grounds of lacking jurisdiction over the Presidential Decree of expropriation and asserted

---

[15] For various studies about the Palestinian legal system, see Osayd Awawda, "Armed Resistance in Gaza Strip against Israeli Occupation: Legitimate Requirement to Achieve Self-Determination," *IUP Journal of International Relations* 12, no. 1 (2018); Osayd Awawda, "Funding Palestinian NGOs: A Trojan Horse against Liberation?" *IUP Journal of International Relations* 12, no. 3 (2018); Osayd Awawda, "Palestinian Workers in Israeli Settlements: Their Status and Rights," *IUP Journal of International Relations* 12, no. 2 (2018); Osayd Awawda, "Reforming the Indirect Tax Sector in Palestine: Justifications and Avenues," *IUP Journal of International Relations* 13, no. 2 (2019).

[16] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 2.

[17] "About Bayti," 2008, http://www.rawabi.ps/bayti/about_bayti.php.

[18] Ramy Jabbar, "Qatar Funds Rawabi, New-Look Palestinian City," *Al-Monitor*, 2015, http://www.al-monitor.com/pulse/culture/2014/02/rawabi-revolution-palestine-clans-family-units.html#ixzz4wgLRkpvw. The US$850 million investment project is largely being financed by Qatar. It is estimated that the city will provide 3,000 to 10,000 permanent jobs, and accommodate a population of 40,000 residents.

[19] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 3. See Howard Chitimira, "An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013," *Journal of African Law* 171, no. 2 (2017).

that such decree falls under the jurisdiction of the HCJ.[20] In this assertion, the Court relied on its judgment in a previous case, case 9-2012. Thus, it is vital to analyse the judgment of the latter case, and then use that analysis to explain the judgment in Rawabi Case.

IV. CASE 9-2012 "DAHLAN'S PARLIAMENTARY IMMUNITY"

In 2011, the Palestinian President ordered the General Prosecutor to file a case in the Court of Corruption Crimes against Dahlan,[21] who is a Palestinian Member of Parliament and the main rival of the President in the Fatah party.[22] The President believed that Dahlan was forming a coalition against him within that party, so the President wanted to prevent that.[23] The Court refused to try Dahlan on the basis that he enjoys parliamentary immunity, according to Article 53(1) of the BL.[24] This Article states that:

> [Legislative] Council Members may not be questioned in civil or criminal proceedings due to opinions they express, facts they mention, their voting in Council sessions or committee meetings, or because of any action they undertake outside the Council in the course of performing their parliamentary duties.

To deprive Dahlan of his immunity, the President issued a Decree-by-Law No. 4 of 2012 on 2 January 2012, to lift the parliamentary immunity from Dahlan,[25] claiming that this lifting was necessary pursuant to Article 43 of the BL:

> The President of the [PA] shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law.

---

[20] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 4. See generally Pedro Felipe De Oliveira Santos, "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-Economic Rights," *Washington University Global Studies Law Review* 3 (2019): 493.

[21] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014.

[22] He is still a member as there have been no parliamentary elections in the WB since the Coup.

[23] Dahlan's attempt to form a coalition.

[24] "Exiled Abbas rival sentenced to three years in absentia over corruption," *Middle East Eye*, 2016, http://www.middleeasteye.net/news/exiled-abbas-rival-sentenced-three-years-absentia-over-corruption-1844523482.

[25] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 2.

In response, Dahlan filed a case before the SCC on 18 December 2012, objecting to that Decree-by-law and demanding the Court to declare it unconstitutional based on violations of Article 53(1) of the Basic Law mentioned above, and Article (96) of the Parliament's Rules of Procedure, which sets the legal steps to lift the parliamentary immunity of Parliament members.[26] It stipulates that:

> 1. A request for waiver of immunity shall be submitted in writing by the General Prosecutor to the President, accompanied by a memorandum containing the type, place, time, and evidence necessary to take legal action. 2. The President shall transfer the request for lifting immunity to the Legal Committee and inform the Parliament accordingly. 3. The Committee shall examine the request and submit its report to the Parliament. The Parliament shall take its decision to lift the immunity by a minimum two-thirds majority vote. 4. A member whose immunity has been lifted and has not been suspended shall have the right to attend meetings and committee meetings and to participate in the debate and vote.[27]

Dahlan's counsel filed his case as direct, original action because the Decree-by-law seemed to aggrieve Dahlan.[28] The General Prosecutor responded to the case, claiming that the Court lacks jurisdiction over this Decree-by-law.[29] The Court approved this claim and dismissed the case, declaring that it lacks jurisdiction over that Decree-by-law.[30]

4.1. Assessment of the Court's Reasoning

The SCC started its reasoning by acknowledging that Dahlan has access to the SCC since in the direct action, any person aggrieved by the application of a specific legislative provision that seems inconsistent with the BL has the right to file a direct case.[31] As that Decree-by-law aggrieves Dahlan, then filing such a

---

[26] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 3.

[27] *المجلس التشريعي الفلسطيني: النظام الداخلي* [The Palestinian Legislative Council: Rules of Procedure] http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2000&MID=14227.

[28] Fathi Fikry, "2012/6 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20 (July 2013): 171, 172.

[29] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 6.

[30] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

[31] Fat'hi Fikry, " التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6 [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20 (July 2013): 171, 172.

case is lawful according to Article 27(1) of the Law of the Supreme Constitutional Court (LSCC).

After confirming Dahlan's lawful access, the Court moved to Article 24(1) of the LSCC, which stipulates in its first paragraph what legislative matters the Court has jurisdiction over:

> The Court shall exclusively have jurisdiction over the constitutionality of laws and regulations.

The Court started applying the above Article by first classifying the Decree-by-law, i.e., identifying its legal nature, whether it has the elements of a Decree-by-law and thus should be dealt with as a "law" for the purposes of this Article, or it lacks certain elements that make the Decree-by-law de facto not a law.[32]

The Court explained that according to legal jurisprudence and judicial principles, to be considered a law, a legislative text, the contested Decree-by-law in this case, must be "general and abstract," i.e., it must not address its subjects by their names, or other distinctive personal characteristics;[33] rather, addressing them must be by the legal description of these subjects.[34] For example, if the President issues a Decree-by-law, and it addresses a minister in the government by his name, not by his legal description of being a minister, then that Decree-by-law lacks the element of being "general and abstract," which leads to consider it de facto not a Decree-by-law, but an administrative decree, even if the President gives it the former title.[35] The same also applies in the case of laws that the Parliament enacts, if they lack that element, then they are de facto parliamentary orders, not laws.[36]

Fathi Fikry, a professor of Constitutional law in Egypt, provides a similar explanation in his commentary on this case:

---

[32] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9.

[33] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9-10.

[34] Al-Mur Awad, Judicial Review of the Constitutionality of Laws in its Primary Features (Cairo: 2003), 307.

[35] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9.

[36] Abd Al-Aziz Saliman, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6 [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20, (July 2013): 181, 186-8.

> It is important to highlight that all general legal rules are subject to judicial oversight by the Constitutional Court, whether it is a law issued by the PLC, a decree-by-law issued by the executive authority officials in events stipulated in the constitution, or regulation issued by executive officials. The common element between all these legal sources is the characteristic of being general and abstract, which means that they must not address individuals by their names.[37]

According to its explanation, the Court asserted that the legal nature of this Decree-by-law is not a law and that it is de facto a presidential, administrative decree since it addresses Dahlan personally as a distinctive individual, not by referring to his legal description.[38] From that assertion, the Court concluded that this Decree is, in fact, not a law, and thus it does not fall under the categories of 'laws and regulation' that the above Article mentions.[39] Therefore, the Court lacks jurisdiction over this Decree, because its legal nature is, in fact, an administrative decree, and as a result, falls under the jurisdiction of the HCJ.[40] Accordingly, the Court dismissed the case on the form.[41] It is noteworthy that after the dismissal, Dahlan's counsel challenged the Decree in the HCJ, two years after its date of issue.[42] Expectedly, the HJC dismissed the case on form pursuant to Article 284 of the Civil and Commercial Procedure Law, which stipulates that:

The time limit for presenting a summons to the HCJ is sixty days from the date the contested administrative decision is published or notified to the interested party.[43]

To begin with, the bottom line of the Court's argument consists of two propositions: First, this Decree-by-law is de facto a presidential decree, and presidential decrees are neither laws nor regulations; second, according to Article

---

[37] Fat'hi Fikry, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6" [Comment on SCC Judgment in Case No. 6 of the Year 2012," *العدالة والقانون* [Justice and Law] 20 (July 2013): 171-173.

[38] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

[39] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

[40] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

[41] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

[42] See محكمة العدل العليا الفلسطينية [the Palestinian High Court of Justice], No. 230-2014, 4.

[43] Civil and Commercial Procedure Law No 2 of 2001 (Palestine) http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849.

24(1) of the LSCC, the Court has jurisdiction only over laws, which decrees-by-law is part of and regulations. Therefore, it lacks jurisdiction over presidential decrees, and subsequently, this Decree.

To analyse this judgment, it is critical to highlight that the first proposition is correct; Dahlan was addressed by his name, and hence the Decree lacks the element of being "general and abstract," therefore, it is not a law.[44] However, it is vital to assert that a serious reservation can be raised against the second proposition, making it unlikely to be correct, and concludes that the Court does have jurisdiction over this Decree.

Notably, the Court referred to Article 24 of the LSCC to highlight the boundaries of its jurisdiction and erroneously disregarded Article 103(1)(a) of the BL. The latter Article, according to usual English translation, states that:

> A High Constitutional Court shall be established by law to consider: (a) The constitutionality of laws, regulations, and other enacted rules.[45]

The Arabic text of that Article may have a more plausible interpretation. If translated literally, paragraph (a) says The constitutionality of laws, bylaws or regulations, and others. The reader of this article would be confused by the meaning of the word "others," because there are no legal rules in the Palestinian legal system outside "laws, bylaws, or regulations," which are both mentioned before that word.[46] Stated differently, including the word 'others' at the end of the article, demonstrates that the BL extends the jurisdiction of the SCC beyond what is stated before that word. Hence, the critical question is what "others" consist of?

To answer that, it is required to look for hints from other articles that discuss the same matter in the Palestinian legal system, which also helps to maintain coherence and cohesion between legal texts.[47] In the BL, there are no

---

[44] Abd Al-Aziz Saliman, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6 [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 188.

[45] Italicised by the Author.

[46] Omar Hamzah Al-Turkomaniy, "*القضاء الدستوري في فلسطين وفقاً لقانون المحكمة الدستورية العليا رقم (3) لسنة 2006* [the Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006]" (Master of Public Law Thesis, Al-Azhar University, 2010), 84-5.

[47] Abu Sawi, Mahmoud, " الرقابة على دستورية القوانين في فلسطين [the Judicial Review of Laws' Constitutionality in Palestine]" (The Arab association of constitutional law, 2009), 13.

such articles, as this matter was discussed only once in Article 103, which makes it necessary to refer to other laws as means of finding a proper explanation of that word.[48] The LSCC does contain such an article, which is Article 25(2), that helps to interpret the word 'others' in the BL because that is the most plausible interpretation of Article 103(1)(a) since there is no mention of this matter in other laws.[49] Thus, utilising this Article of the LSCC does lead to the best-possible, coherent understanding of both articles with the least degree of inconsistency between both laws.[50] Article 25(2) states that:

> Upon the pronouncement on the unconstitutionality of any law, decree, by law, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, by law, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.

According to this Article, a decree, in its original meaning as not having the element of being "general and abstract", might be pronounced unconstitutional, which affirms that it, a fortiori, does fall under the jurisdiction of the Court. Since a decree is neither law, by law, nor a regulation, and yet falls under the SCC jurisdiction, then it is part of what the word "others" refer to. This conclusion is necessary because it maintains coherence between this Article and that of the BL. Abeer Dirbas, a researcher at the Palestinian Institution of Law, agrees with this conclusion, she affirms that by reading the BL articles and the LSCC, it becomes clear that the BL expands the jurisdiction of the SCC to include laws, bylaws, regulations, presidential decrees, decrees-by-law, and executive orders.[51] Furthermore, Mahmoud Abusawi, a Palestinian constitutional jurist, also agrees with this conclusion, asserting that the BL includes presidential decrees, decrees-by-law, and executive orders in the jurisdiction of the LSCC, contrary to the LSCC, which is in a lower degree in the hierarchy of Palestinian

---

[48] "A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority" (A compilation by the International Bar Association's Human Rights Institute, 2009), 16.

[49] Abeer Dirbas, " الرقابة القضائية على الدستورية في فلسطين [Judicial Review of Constitutionality in Palestine]," in *التشريعية في فلسطين الحالة* 2007-2012 [the Legislative Status in Palestine 2007-2012] (Institute of Law - Birzeit University, 2012), 285, 310.

[50] Zeed Al-Kailany, " *الطعن في دستورية القوانين: دراسة مقارنة* [Appealing in the Constitutionality of the Laws: Comparative Study]" (Master of Public Law Thesis, An-Najah University, 2012), 27-9.

[51] Abeer Dirbas, " الرقابة القضائية على الدستورية في فلسطين ," 285, 309.

legislation when compared to the BL.[52] Thus, since the BL is superior to the LSCC, a contradiction between both laws results in upholding the BL's Articles and thus confirm the LSCC to suit the BL. Such confirmation of this case takes the form of expanding the SCC' judication beyond Article 24(1) of the LSCC, to include what Article 103(1) of the BL mentioned.

Additionally, the International Bar Association, in its commentary on the LSCC, affirmed that:

> The experts overwhelmingly agree that the LSCC provisions on jurisdiction ... must be harmonised with Article 103 of the Basic Law to ensure consistency and to avoid redundancy and confusion. Some experts mention that it would be particularly helpful in Article 24, subparagraphs 1 and 2, to quote directly from the Basic Law.[53]

This affirmation demonstrates how the LSCC reduces the jurisdiction of the Court, as expressed in the BL.

Moreover, and one of the key hints that the word "others" encompass presidential decrees, is the SCC judgment in the case 1-2006. In this case, Parliament members from the Fatah party submitted a case against the constitutionality of the newly-elected Parliament's decisions.[54] The contested decisions were made in the first session by the Hamas majority to annul the decisions that the previous Parliament has made in its last session.[55] The defendant, who represented the Hamas Parliament members, argued that the SCC lacks jurisdiction over decisions made by the Parliament because these decisions are neither laws nor regulations.[56] In response, the SCC declared, by referring to Article 103 of the BL, that the word "others" include all actions that directly relate to the provisions of the BL and might directly contravene it.[57] This

---

[52] Abu Sawi, Mahmoud, " الرقابة على دستورية القوانين في فلسطين [the Judicial Review of Laws' Constitutionality in Palestine]" (The Arab Association of Constitutional Law, 2009), 13.

[53] "A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority," (the International Bar Association's Human Rights Institute, 2009), 16.

[54] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 1. A full translation of the Court's judgment in this case is available at: <http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112>.

[55] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 6.

[56] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 3.

[57] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 5.

declaration was a consensus between the judges, even those who dissented in the final judgment.[58]

By this analysis, it can be concluded that according to Article 103 of the BL, which overrules Article 24(1) of the LSCC, and in light of Articles 25(1) and 25(2) of the LSCC, the Court does have jurisdiction over presidential decrees, which are not required to have the element of being general and abstract, such as this Decree. Therefore, the Decree of lifting Dahlan's immunity falls under the Court's jurisdiction. Hence, there is a substantial indication that the SCC has failed in applying the legal texts related to its jurisdiction, particularly that of the BL. Importantly, the jurisdiction of constitutional courts in authoritarian regimes should include executive actions if these courts want to be effective in departing from authoritarianism. Other courts might use the excuse of "political question" or "act of sovereignty" to escape clashes with the regime.

Such failure leads to infer that its reasoning was erroneous and mainly neglectful as it completely disregarded Article 103 of the BL and other Articles of the LSCC. That disregard resulted in leaving the inconsistency between the BL and the LSCC without solving, which is, in fact, the task of the SCC, as it is required to maintain the superiority of the BL over all other legal texts. In his commentary on this case, Fathi Fikry avows that "the Court did wrongly decide on the issue of lacking subject-matter in this case."[59]

This disregard by the SCC raises a vital inquiry: was this disregard unintentional? If yes, then this can be a major concern regarding the bench's adequacy; a judge failing to apply the BL rules when addressing the SCC jurisdiction is rather substantial incompetence of that judge.[60] If the answer is no, then the concern is even greater, because it asserts on the ill intention of such a bench, and justifies characterising its judges as lacking integrity.[61]

---

[58] Dissident Opinion of Chief Justice Hammad, and Judges Gizlan, Nasirudeen, Takrory, and Tanjeer, " العليا الفلسطينية بصفتها محكمة دستورية المحكمة [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 8."

[59] Fathi Fikry, "A Commentary to the SCC Judgment in Case No. 6 of the Year 2012," *Justice and Law Journal, Palestine*, 175.

[60] Fahid Abū al-Athm Nusūr, *القضاء الدستوري بين النظرية والتطبيق* [Constitutional Judiciary: Between Theory and Practice] (Dar Al-Thaqafah, 2016), 419, 431.

[61] Nusūr, *القضاء الدستوري بين النظرية والتطبيق* [Constitutional Judiciary: Between Theory and Practice].

Before moving to the dissenting opinion, it is noteworthy that the Court did not discuss the second claim by Dahlan's counsel, which relates to the President's authority to lift parliamentary immunity. The Court considered the issue of jurisdiction as a primary matter. Since it declared lacking jurisdiction over the Decree, it did not discuss that authority, as being secondary to jurisdiction. Nevertheless, Article 96 of the Parliament's Rules of Procedure mentioned above clearly states that a request to lift immunity must be submitted from the Parliament's Legal Committee. Two-thirds of the Parliament members must approve it to become valid. This article implies that the President does not have the competence to lift Dahlan's immunity; rather, it is the exclusive, non-delegable competence of the Parliament.[62] A counter-argument to this analysis may refer to Article 43 of the BL mentioned earlier, which provides the President with the competence of issuing Decrees-by-law in states of necessity.[63] This counter-argument may proceed by claiming that such competence may allow the President to overrule Article 96. However, such an argument is based on a fallacious understanding of Article 43. Article 43, according to many Palestinian jurists, does not allow the President to violate already-set rules;[64] rather, it only allows him to enact new rules that would be necessary to fill a legislative vacuum and face an imminent danger that threatens Palestine, without violating what was already regulated by the Parliament.[65]

---

[62] Abd Al-Aziz Saliman, " التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6 [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 184.

[63] Abd Al-Aziz Saliman, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6 [Comment on SCC Judgment in Case No. 6 of the Year 2012]," *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 187.

[64] Newar Bdair and Asem Khalil, "State of Necessity" (Working Paper, Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018), 6; Mohammad Al-Laham, " *القرارات بقوانين الصادرة عن رئيس السلطة الوطنية الفلسطينية والآثار القانونية المترتبة عليها* [Decrees-by-Law Issued by the President and Their Legal Impact]" (Masters in Law Thesis, The Islamic University - Gaza, 2015), 42; Abu-Hanood, Hussain, Sami Jabarin and Tariq Toukan, " قراءات قانونية في القرارات بقوانين الصادرة عن الرئيس وفقاً لحالات الضرورة [Legal Readings in Decrees-by-Law Issued by the President in States of Necessity]" (The Palestinian Initiative for the Promotion of Global Dialogue and Democracy - MIFTAH, 2008), 39.

[65] Newar Bdair and Asem Khalil, "State of Necessity" (Working Paper, Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018), 6; Mohammad Al-Laham, " *القرارات بقوانين الصادرة عن رئيس السلطة الوطنية الفلسطينية والآثار القانونية المترتبة عليها* [Decrees-by-Law Issued by the President and Their Legal Impact]," (Masters in Law Thesis, The Islamic University - Gaza, 2015), 42; Abu-Hanood, Hussain, Sami Jabarin and Tariq Toukan, "قراءات قانونية في القرارات بقوانين الصادرة عن الرئيس وفقاً لحالات الضرورة [Legal Readings in Decrees-by-Law Issued by the President in States of Necessity]" (The Palestinian Initiative For The Promotion Of Global Dialogue and Democracy - MIFTAH, 2008), 39.

To summarise the majority's opinion, the Court justified its lack of jurisdiction by referring to Article 24 of the LSCC, while disregarding Article 103 of the BL. The loophole in Article 24(1) of the LSCC was a result of the last-minute changes to the Article by the previous Fatah Parliament. This loophole has created the contradiction between this Article and that of the BL and another contradiction between Article 24 and 25 of the LSCC itself, as shown above.

4.2. The Regime's Influence and Gains

The fact that the Chief Justice, namely Farid Al-Jallad at the time of this case, who was also the Head of the HJC, was appointed single-handedly by the President, and that the President has the authority to remove him, raises the possibility that Al-Jallad was seeking to maintain his tenure through showing loyalty to the President. Observations about this possible practice by the Chief Justice provides further support for the argument that lack of balance between state powers in appointment and removal procedures to the HJC and the HCJ opens room for such undue consideration of interests by public officials in the judiciary, the Chief justice himself in this case.

The regime made significant political gains by the Court's judgment. After the dismissal, the Court of Anti-Corruption accepted the General Prosecutor's case against Dahlan, and pronounced him guilty of corruption, sentencing him to three years in prison and a fine of USD 15,000,000.[66] Recently, a report claims that the President is seeking Interpol's help to arrest Dahlan, who currently resides in the United Arab Emirates, on the basis of this latter judgment.[67]

This result of the Court's judgment relates to one function of courts in authoritarian regimes: controlling administrative agents and maintaining elite cohesion. Dahlan, which reports showing that he made considerable efforts

[66] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014. Marius Pieterse, "Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa," *Stellenbosch Law Review* 3, no.1 (2003).

[67] "Palestine to Seek Dahlan's Arrest Through Interpol, Officials Say," *Middle East Eye*, 2017, http://www.middleeasteye.net/news/palestine-seek-dahlans-arrest-through-interpol-officials-say-2362338o. See generally Manisuli Ssenyonjo, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa, The Influence of the International Covenant on Economic, *Social and Cultural Rights in Africa," Netherlands International Law Review* 64 (2017), 259-289.

to form his own coalition within the Fatah party and be subsequent of the President, is now "a fugitive from justice."[68] Labeling Dahlan as such allowed the President to prevent the former from holding a legitimate position inside the Fatah party, and facilitated dismissing Dahlan's allies from the PA on the pretext of 'terminating disloyal, misdemeaning Fatah members'.[69]

Based on this analysis, the SCC declaration of lacking jurisdiction over de facto presidential decrees, which include Decrees-by-law that lacks the element of being 'general and abstract', allowed the President to use this Court in maintaining his elite cohesion within the Fatah party. Importantly, the SCC upheld this declaration in another case, and performed other functions in favour of the regime, as the following part explains.

V. CONCLUSION

As the analysis of Dahlan's case showed, by dismissing Rawabi Case on the claim that the SCC lacks jurisdiction over presidential orders, the SCC disregarded Article 103 of the BL that highlights the Court's jurisdiction over such orders, since they fall under the meaning of the word 'others' mentioned in that Article. This disregard raises the same concerns about the judges; was the disregard unintentional or, more worrying, ill-intended. It is not plausible that it was unintentional since the BL is the foundational text in the Palestinian legal system, that every constitutional judge is aware of. The BL allowed the SCC to review what falls beyond laws and regulations, namely presidential orders. The jurisdiction over these orders is also apparent in other Articles of the LSCC. Therefore, it is likely that the majority of judges were aware of that but chose to avoid it, which indicates their lack of integrity in both cases.

This dismissal permitted the regime to provide credible commitments in the economic sphere to private investors. In this dismissal, Bayti Company, as a

[68] محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014, 3. Paul O'Connell, "The Death of Socio-Economic Rights," *Modern Law Review* 74, no. 4 (2011): 532.

[69] See especially Adnan Abu Amer, "Dahlan Encouraged to Form Palestinian Party outside Fatah," Al-Monitor, 2018, https://www.al-monitor.com/pulse/originals/2018/03/uae-request-dahlan-form-new-party-dissociated-from-fatah.html. See Igor Vila, "Constitutional Court Protection of Economic and Social Rights During the Economic Crisis," *Pravni Zapisi* 66, no. 1 (2014).

local investor, received a credible commitment from the regime to protect the company's interests.[70]

By offering that protection, the regime had significant gains: making a tremendous profit from taxing imported materials, and, more importantly, increasing the confidence of potential investors that their projects would also be protected, even if that required a presidential decree to expropriate privately-owned lands.[71] This protection is an example of corruption, but a unique form of corruption, which is based on unconstitutional actions by the regime itself, supported by the misapplication of the law by the Constitutional Court.

BIBLIOGRAPHY

"A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority." Compilation by the International Bar Association's Human Rights Institute, 2009. https://www.musawa.ps/uploads/531e645946fd2307c0f5ba0dc798d225.pdf.

"About Bayti." 2008. http://www.rawabi.ps/bayti/about_bayti.php.

Abrams, Elliot. "Rawabi: The New City in The Palestinian Territories." Council on Foreign Relations, 2016, https://www.cfr.org/blog/rawabi-new-city-palestinian-territories.

Abu Sawi, Mahmoud. " The Judicial Review of Laws' Constitutionality in Palestine." The Arab Association of Constitutional Law, 2009.

Abu Amer, Adnan. "Dahlan Encouraged to Form Palestinian Party Outside Fatah." *Al-Monitor*, 2018. https://www.al-monitor.com/pulse/originals/2018/03/uae-request-dahlan-form-new-party-dissociated-from-fatah.html.

[70] See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 4. See generally Daniel McDougall, "The Vibe of the Thing': Implementing Economic, Social and Cultural Rights in New Zealand," Mata Koi: Auckland University Law Review 21 (2015): 86.

[71] Elliot Abrams, "Rawabi: The New City in The Palestinian Territories, Council on Foreign Relations", 2016, https://www.cfr.org/blog/rawabi-new-city-palestinian-territories.

Abu-Hanood, Hussain, Sami Jabarin and Tariq Toukan, "Legal Readings in Decrees-by-Law Issued by the President in States of Necessity." The Palestinian Initiative for the Promotion of Global Dialogue and Democracy - MIFTAH, 2008.

Alemahu, Sisay. "The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia." *Journal of Ethiopian Law* 135, no. 2 (2008).

Al-Kailany, Zeed. "Appealing in the Constitutionality of the Laws: Comparative Study." Master of Public Law Thesis, An-Najah University, 2012.

Al-Laham, Mohammad. "Decrees-by-Law Issued by the President and Their Legal Impact]." Masters in Law Thesis, The Islamic University - Gaza, 2015.

Al-Turkomaniy, Omar Hamzah. "the Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006." Master of Public Law Thesis, Al-Azhar University, 2010.

Ashok, Kritika, Paul T. Babie and John V. Orth. "Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, And The United States." *Fordham International Law Journal* 42, no. 4 (2019): 999.

Awad, Al-Mur. *Judicial Review of the Constitutionality of Laws in its Primary Features*. Cairo: 2003, 307.

Awawda, Osayd. "Armed Resistance in Gaza Strip against Israeli Occupation: Legitimate Requirement to Achieve Self-Determination." *IUP Journal of International Relations* 12, no. 1, (2018).

Awawda, Osayd. "Funding Palestinian NGOs: A Trojan Horse against Liberation?" *IUP Journal of International Relations* 12, no. 3 (2018).

Awawda, Osayd, "Palestinian Workers in Israeli Settlements: Their Status and Rights." *IUP Journal of International Relations* 12, no. 2 (2018).

Awawda, Osayd, "Reforming the Indirect Tax Sector in Palestine: Justifications and Avenues." *IUP Journal of International Relations* 13, no. 2 (2019).

Baynard,JM. "Private or Public Right? Who Should Adjudicate Patentability Disputes and is the Current Scheme Really Constitutional?" 21 *Marquette Intellectual Property Law Review* 57 (2017).

Bdair, Newar and Asem Khalil. "State of Necessity." Working Paper, Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018.

Boyle, Katie and Edel Hughes. "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights." *International Journal of Human Rights* 22, no. 1 (2018): 43.

Brizeit University, Institute of Law. "Civil and Commercial Procedure Law No. 2 of 2001 (Palestine)." http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849.

Cassola, Adèle, Amy Raub and Jody Heymann. "Do Constitutions Guarantee Equal Rights across Socioeconomic Status? A Half Century of Change in the World's Constitutions." *Journal of International & Comparative Social Policy* 32, no. 3 (2016): 235.

Chirwa, Danwood Mzikenge. "A Full Loaf Is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi." *Journal of African Law* 2 (2005): 207.

Chitimira, Howard. "An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013." *Journal of African Law* 2 (2017):171.

Court of Corruption Crimes (Palestine), No. 22-2014.

Dickinson, Gerald S. "Federalism, Convergence, and Divergence in Constitutional Property." *University of Miami Law Review* 73 (2018): 139.

Dirbas, Abeer. "Judicial Review of Constitutionality in Palestine." In *2007-2012* "*the Legislative Status in Palestine 2007-2012.*" *Institute of Law - Birzeit University, 2012.*

Dissident Opinion of Chief Justice Hammad, and Judges Gizlan, Nasirudeen, Takrory, and Tanjeer. "Supreme Court of Palestine in its capacity of a Constitutional Court" No. 1-2006."

Fathi, Fikry, "A Commentary to the SCC Judgment in Case No. 6 of the Year 2012." *Justice and Law Journal*, Palestine.

Fathi, Fikry. "Comment on SCC Judgment in Case No. 6 of the Year 2012." "*Justice and Law" 20 (July 2013): 171.*

Felipe Oliveira De Santos, Pedro. "Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-Economic Rights." *Washington University Global Studies Law Review* 2 (2019): 493.

Ginsburg, Tom and Tamir Moustafa. Rule by Law: *The Politics of Courts in Authoritarian Regimes*. Cambridge University Press, 2008.

Hailes, Oliver. "The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler." *New Zealand Journal of Public and International Law* 15, no. 2 (2017): 229.

Jabbar, Ramy, "Qatar Funds Rawabi, New-Look Palestinian City." Al-Monitor, 2015, http://www.al-monitor.com/pulse/culture/2014/02/rawabi-revolution-palestine-clans-family-units.html#ixzz4wgLRkpvw.

Kim, Iijoong and Lee H. "Constitutional Principles of Regulatory Takings: A Utilitarian Perspective." 26 Supreme Court Economic Review 81 (2018).

Leijten, Ingrid. *Core Socio-Economic Rights and the European Court of Human Rights, Cambridge Studies in European Law and Policy*. Cambridge University Press: 2018.

Jensen, Nathan. "Political risk, democratic institutions, and foreign direct investment." *The Journal of Politics* 70, no. 4 (2008).

JMCC. "Presidential Decrees Issued on June – July 2007." 2016, Internet Archive https://web.archive.org/web/20071012102508/http://jmcc.org/goodgovern/07/eng/presidentdecrees07.htm.

Stephenson, Matthew. "Judicial reform in developing economies: Constraints and opportunities." In *Annual World Bank Conference on Development Economics-Regional 2007: Beyond Transition*, 2007.

M, Karolina. "Protection of Private Property Expropriation." *The Scientific Journal of Bielsko-Biala School of Finance and Law* 35 (2018).

Mc Dougall, Daniel. "The Vibe of the Thing': Implementing Economic, Social and Cultural Rights in New Zealand." *Mata Koi: Auckland University Law Review* 21 (2015): 86.

Middle East Eye. "Exiled Abbas rival sentenced to three years in absentia over corruption." 2016. http://www.middleeasteye.net/news/exiled-abbas-rival-sentenced-three-years-absentia-over-corruption-1844523482.

Middle East Eye. "Palestine to Seek Dahlan's Arrest through Interpol, Officials Say." 2017. http://www.middleeasteye.net/news/palestine-seek-dahlans-arrest-through-interpol-officials-say-23623380.

Monebhurrun, N. "Chronicles of International Investment Law." *Brazilian Journal of International Law* 33 (2015).

Nusūr, Fahid Abū al-Athm. "Constitutional Judiciary: Between Theory and Practice." Dar Al-Thaqafah, 2016, 419.

O'Connell, Paul. "The Death of Socio-Economic Rights." *Modern Law Review* 74, no. 4 (2011): 532.

Pieterse, Marius. "Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa." *Stellenbosch Law Review* 3, no.1 (2003).

Reuters. "Timeline: Key events since 2006 Hamas Election Victory." 20 June 2007, http://www.reuters.com/article/us-palestinians-timeline-idUSL17523644200706 20.

Saliman, Abd Al-Aziz. "Comment on SCC Judgment in Case No. 6 of the Year 2012." "Justice and Law" 20 (July 2013): 181.

Solomon, Peter. "Law and Courts in Authoritarian States". In *International Encyclopaedia of the Social & Behavioural Sciences*. Oxford, Elsevier, 2nd edition, Vol. 13.

Solomon, Peter. "Judicial Power in Authoritarian States: the Russian experience." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*. 2008.

Sitaraman, Ganesh. "The Puzzling Absence of Economic Power in Constitutional Theory." *101 Cornell Law Review* (2016): 1445.

Ssenyonjo, Manisuli, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa, The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa." *Netherlands International Law Review* 64 (2017): 259-289.

Supreme Court of Palestine in its capacity of a Constitutional Court, No. 1-2006, 1. A full translation of the Court's judgment in this case is available at: http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112.

Supreme Court of Palestine in its capacity of a Constitutional Court, No. 12-2016.

Supreme Court of Palestine in its capacity of a Constitutional Court, No. 6-2012.

Supreme Court of Palestine in its capacity of a Constitutional Court, No. 1-2006.

The Palestinian Legislative Council: Rules of Procedure," http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2000&MID=14227.

The Palestinian High Court of Justice," No. 230-2014.

Un, Kheang. "The Judicial System and Democratization in Post-Conflict Cambodia." In *Beyond democracy in Cambodia*, edited by Joakim Ojendaland Mona Lilja. Nias Press, 2009.

Vila, Igor. "Constitutional Court Protection of Economic and Social Rights During the Economic Crisis." *Pravni Zapisi* 66, no. 1 (2014).

Weingast, Barry R. "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development." *Journal of Law, Economics, & Organization* 11, no. 1 (April 1995).

Zangl, Bernhard. "Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO." *International Studies Quarterly* 52, no. 4 (2008).

Biography

Svetlana Karamysheva graduated with honours from the Law faculty of St. Petersburg State University (2005). She was a long term exchange student at the Faculty of Medical Law, University Paris 8 Sorbonne (2004). Within the period of 2006-2012 she worked as a legal counsellor at the Legal department of the Charter Court of St. Petersburg. From 2012 - pres. She works at the Department of International Relations and Research of Constitutional Review Practice of the Constitutional Court of the Russian Federation. The sphere of expertise and scientific field of here include comparative constitutional law with the special aspects to French and Belgian legal systems, constitutional justice and implementation of decisions of constitutional judiciary. She participated in a number of scientific events in the field of her interests both in Russia and abroad (including the events under the aegis of AACC).

Mirza Satria Buana is an Assisant Professor at Faculty of Law, Lambung Mangkurat University, South Kalimantan, Indonesia. He teaches courses in human rights, legal pluralism and constitutional law. He holds an LLM from School of Law, Islamic University of Indonesia and a PhD from TC Beirne School of Law, University of Queensland, Australia. He has a strong interest with socio-legal methodologies. He has published several scholarly articles, books, and chapters with leading publishers in Indonesia, Australia and Southeast Asian, in the areas of constitutional law, human rights and legal pluralism.

Yurii Sheliazhenko is a Research Associate of the Faculty of Law at KROK University, where he obtained the Master of Laws degree in 2016. He teaches courses in constitutional and human rights, comparative and international law, legal theory and history.

Rosa Ristawati, has been a lecturer at the Faculty of Law, Airlangga University, Surabaya, Indonesia, from 2006 – until now. She teaches courses in Indonesian Constitutional Law, Comparative Constitutional Law, Constitutional Theory, and State Theory. She holds Bachelor of Law from Airlangga University, Indonesia, LL.M from RuG Groningen University, the Netherlands, and PhD from Maastricht University, the Netherlands. On December 2017, she defended her PhD dissertation on "Modelling the executive powers in the Indonesian Constitution" in Maastricht University the Netherlands. Her research interest is on the area of contitutional Law and comparative constitutional law

Radian Salman is a lecturer at the Faculty of Law, Airlangga University, Surabaya, Indonesia. He teaches courses in Constitutional law, Comparative Constitutional Law, and Legal Drafting. He holds Bachelor of Law from Airlangga University, Indonesia, Master of Law from Utrecht University, the Netherlands, and Doctor of Law from Airlangga University. His expertise and research interests are Court and the Constitution, Judicial Review and Constitutional Court, Constitutional Interpretation, Election Law, and Legislative Drafting.

Jennifer Gitiri is an Advocate of the High Court of Kenya and a Senior State Counsel at the Office of the Attorney-General and Department of Justice, Kenya. She holds a Master of Laws (LLM) in Comparative Constitutional Law from the Central European University, a second LLM in Public International Law from the University of Nairobi, an Advanced Masters course in International Human Rights Law from the University of Oslo, a Post Graduate Diploma in Law from the Kenya School of Law and a Bachelor of Laws (LLB) from the University of Nairobi. In 2018, she was awarded the Head of State Commendation by the President of the Republic of Kenya for her outstanding service.

Osayd Awawda is an Assistant Professor of Constitutional Law at Hebron University, Palestine. He teaches Public International Law, Research Methods, and Introduction to Juridical Sciences. He holds an LLB from Birzeit University, an LLM and a PhD from Melbourne Law School, Australia. His PhD thesis' title was: "The Palestinian Supreme Constitutional Court: A Critical Assessment of its Independence under the Emergency Regime of the West Bank". He participated in multiple conferences and published several papers that discussed legal challenges present in Palestine in various fields such as: tax law, labour law, international humanitarian law, and judicial practice.

Subject Index

Name Index

AUTHOR GUIDELINE

The Constitutional Review Journal is a medium intended to disseminate research or conceptual analysis on constitutional court decisions all over the world. The journal is published twice a year in May and December. Articles published focuses on constitutions, constitutional court decisions, and topics on constitutional law that have not been published elsewhere. The journal is aimed for experts, academicians, researchers, practitioners, state officials, non-governmental organizations, and observers of constitutional law.

Board of Editors of the Constitutional Review Journal invite those who are interested to submit articles based on the criteria above and the manuscript submitted must conform to author guidelines as stated below.

Submission

The manuscripts have to be submitted online. Authors need to create an account to submit their manuscripts.

Guideline

1. Manuscripts should be written in English.
2. The authors who are not native speakers of English need to seek the assistance of a native speaker to proofread their articles before submitting them to the committee.
3. Manuscripts submitted must be original scientific writings and do not contain elements of plagiarism.
4. Submitted manuscripts have not been published elsewhere. The manuscripts are also not under consideration in any publishers.
5. The length of the manuscripts including foornotes are around 8000-10.000 words.
6. Manuscripts are written in A4 paper, 12 point Times New Roman, 1.5 space and written in standard and correct grammatical language.
7. Main headings, sub-headings, and sub-sub-headings of the article should be numbered in the manuscript with the following example:
   1. Main Heading
   2. Main Heading
      2.1. Sub-heading
         2.1.1. Sub-sub-heading
8. The following is the structure of the journal:
   I. Title
   - Title of manuscripts should be specific and concise in no more than 10 words or 90 hits on the key pad which describes the content of the article comprehensively.
   - It is typed by using Times New Roman 16, alignment: center text, upper case.

II. Identity

The identity covers the author's name, affiliation, and e-mail address.

III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.
- Font: Times New Roman, font size: 12, alignment: justify, space: 1.5, margin Margin: Normal.
- Total words: No more than 350 words.

IV. Keywords

- Preceded by the word "Keyword" in bold style (Keywords).
- Font: Times New Roman, font size: 12, alignment: justify, lower case.
- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

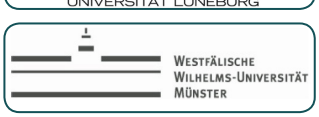
V. Body

The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/aim of the article.
- **Method:** It is an optional section for articles which are based research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
- **Conclusion:** This section is the most important section of your article. It cotains the overall explanation of your article. It should be clear and concise.
- **Reference:** Our reference uses The Chicago Manual of Style (CMS). Consult to: http://www.chicagomanualofstyle.org

Constitutional Review indexed by:

Constitutional Review can also be found on the following library database:



ISSN 2460-0016