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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

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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

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Note From Editors

Constitutional Review (ConsRev) is an international journal published by the Center for Research and Case Analysis of the Constitutional Court of the Republic of Indonesia. ConsRev provides media for law professors, scholars, experts, judges, legal practitioners and anyone who are interested in discussing the issue on the constitution, constitutional adjudication, and any related matters on constitutional law around the world.

During this challenging year of pandemic, the Editors can still publish the last edition of ConsRev in 2020 on time. On this volume, there are six articles on socio-economic rights themes written by excellent legal scholars affiliated with universities and institutions from five different countries, namely Germany, Indonesia, Poland, the Netherlands and the United States of America.

The lead article in this issue is written by Christoph Enders, a Law Professor and the Executive Director of the Institute for the Foundations of Law at the Faculty of Law, University of Leipzig, Germany. His article entitled "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Constitutional Jurisprudence", Enders discusses the social and economic rights in German Basic law through the analysis of the jurisprudence of the Federal Constitutional Court. He highlights that constitutional jurisprudence ought not to discredit the social system worked out by the democratically elected legislator. According to Enders, constitutional jurisprudence may simply put this system's inner consistency to the test of constitutional law.

The second article is written by Gerhard van der Schyff, an Associate Professor in the Department of Public Law and Governance at the Law School of Tilburg University, the Netherlands. He wrote an article entitled "The Urgenda Case in the

Netherlands on Climate Change and the Problems of Multilevel Constitutionalism". This article shows various incongruences and gaps in the judgments' legal grounds and reasoning. It suggests that a focus on the Constitution is needed as well in addressing such important issues. This will require long-overdue reform of the bar on constitutional review in order to stimulate a strong national legal culture based on the Constitution.

The next author is Stefanus Hendrianto, a law expert at the University of San Fransisco, the United States of America, whose article entitled "Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia". His article analyzes the development of socio-economic rights through the lenses of the right to social security and relies on two major theoretical frameworks to analyze the development of the right to social security in Indonesia.

The fourth article is authored by Maria Eva Földes, a lecturer at the European and International Law Program and member of the Research Group Changing Role of Europe at The Hague University of Applied Sciences. Her article is entitled "The Role of Constitutional Courts in Promoting Healthcare Equity: Lessons from Hungary". This article makes the readers see the exploration of whether constitutional litigation contributes to sustaining the equity element of the right to health and the discussion of the role of constitutional litigation in addressing such equity concerns.

The fifth article is written by Andy Omara, an Associate Professor of Constitutional Law at the Department of Constitutional Law, Universitas Gadjah Mada (UGM) School of Law, Indonesia. The title of his article is "Enforcing Nonjusticiable Rights in Indonesia". This article argues that it is necessary for the Court to involve in determining economic and social rights, especially when the lawmaker does not sufficiently address issues related to economic and social rights in its legislative product. The Court may fill the gaps in the protection of economic and social rights.

Finally, the last author of this edition is Kamil A. Strzępek, an Assistant Professor at Cardinal Wyszyński University in Warsaw, Poland, as well as an Assistant Lawyer at the Polish Constitutional Tribunal. His article entitled "The Relationship Between the European Convention on Human Rights and Domestic Law: A Case Study" covers the relationship between the European Convention on Human Rights and the Polish national law.

The Editors of ConsRev expect that all articles presented in this issue could give new insight and understanding on the constitution, constitutional court decisions and constitutional issues in a broader nature, particularly on the protection of socio-economic rights, to the reader of this journal.

Editors

Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court

Christoph Enders

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 190-209

The Basic Law for the Federal Republic of Germany did originally not provide for social or economic rights understood as claims to benefits. The Federal Constitutional Court (FCC) did, indeed, recognise the states obligation to protect individuals against assault by others (right to security) and further ruled that everyone has the right to use facilities provided by the state under equal conditions (right to participation). These rights, however, aim to ensure that the state uses existing means as intended. In addition, the FCC by now has recognised a "right to the guarantee of a dignified minimum subsistence". It is an original entitlement as the state is obliged to create and provide benefits for individuals in need. This new legal construction, however, misconceives the division of responsibilities between the FCC and the legislator and collides with the principle of the separation of powers.

Keywords: Claim to Benefits, Dignified Minimum Subsistence, FCC, Human Dignity, Right to Participation.

The *Urgenda* Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism

Gerhard van der Schyff

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 210-240

This contribution analyses the *Urgenda* judgments in the Netherlands which ordered the state to reduce the national emissions of greenhouse gasses by 25% by the end of 2020. In arriving at this conclusion, the courts relied heavily on international law, which was applied indirectly and directly to the case. The analysis shows various incongruencies and gaps in the judgments' legal grounds and reasoning, and suggests that a focus on the Constitution is needed as well in addressing such important issues. This will require long overdue reform of the bar on constitutional review in order to stimulate a strong national legal culture based on the Constitution.

Keywords: Climate Change, Constitutional Law, European Convention on Human Rights, International Law, The Netherlands.

Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia

Stefanus Hendrianto

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 241-281

Previous studies on the development of socio-economic rights in Indonesia heavily focus on the Constitutional Court's decisions in upholding the rights. But there is still minimum study on the political economy behind the development of socio-economic rights in Indonesia. This article will analyze the development of socio-economic rights through the lenses of the right to social security. This article relies on two major theoretical frameworks to analyze the development of the right to social security in Indonesia. The first theoretical framework is the authoritarian constitutionalism in the economic sphere. The second theoretical framework in this article is Kathrine Young's theory of the construction of socio-economic rights. This article postulates that the rights to social security has been constitutionalized but not constituted in Indonesia for several reasons. First, and foremost, the legacy of authoritarian constitutionalism that prioritizing economic growth over the fulfilment of social economic rights. The "growth" ideology has contributed to the discrepancy between the constitution and reality, in which the government merely considers protection of socio-economic rights as extra cost, which will hamper the growth of the economy. Second, the lack of philosophical and comparative analysis in the interpretation of rights to social security. Third, the transformation of the Court as a detached court in the enforcement of the rights to social security. The element of detachment is clearly seen in the Court's too much deferral to the Executive and Legislative branches in defining the scope and meaning of the right to social security. Finally, the failure of social movement to create a new narrative on injustice and the importance of rights to social security.

Keywords: Authoritarian Constitutionalism, Indonesia, Constitutional Court, Judicial Review, Right to Social Security, Social Economic Rights.

The Role of Constitutional Courts in Promoting Healthcare Equity: Lessons from Hungary

Mária Éva Földes

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 282-310

This paper explores whether constitutional litigation contributes to sustaining the equity element of the right to health. Equity entails a fair distribution of the burden of healthcare financing across the different socio-economic groups of the population. A shift towards uncontrolled private healthcare provision and financing raises equity challenges by disproportionately benefitting those who are able to afford such services. The extent to which equity is enforced is an indicator of the strength of the right to health. However, do domestic constitutional courts second-guess, based on equity, policy decisions that impact on healthcare financing? Is it the task of constitutional courts to scrutinize such policy decisions? Under what conditions are courts more likely to do so? The paper addresses these questions by focusing on the case of Hungary, where the right to health has been present in the Fundamental Law adopted in 2010 and the Constitutions preceding it. While the Hungarian Constitutional Court has been traditionally cautious to review policy decisions pertaining to healthcare financing, the system has been struggling with equity issues and successive government coalitions have had limited success in tackling these. The paper discusses the role of constitutional litigation in addressing such equity concerns. In doing so, it contributes to the discussion on the role of domestic constitutional courts in the protection of social and economic rights.

Keywords: Right to Health, Constitutional Litigation, Healthcare Equity.

Enforcing Nonjusticiable Rights In Indonesia

Andy Omara

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 311-337

A debate over which branch of government is the most appropriate institution to deal with economic and social rights is far from ended. Is it the legislature which is democratically elected or the unelected Court that should determine the enforcement of economic and social rights? Problems pertaining to the lack of legitimacy and competence often come up when the Court is involved in determining economic and social rights. These problems arise because a court is not democratically elected and is not equipped with necessary tools to deal with such a complex issue in economic and social rights. However, others believe that the Court's involvement in determining economic and social rights can strengthen democracy since the Court may enforce matter that is not sufficiently addressed by the lawmaker. This paper will address the above issue in context of Indonesia. Should the Court involve in protecting economic and social rights? If so, how far the Court can go to determine economic and social rights? This paper acknowledges that economic and social rights are a broad and complex topic. Therefore, this paper limits the discussion by analyzing four selected judicial rulings which have significant impact in the protection of economic and social rights in Indonesia i.e. the judicial review cases on Electricity Law, Water Resources Law, National Education System Law and National Budget Law. This paper argues that it is necessary for the Court to involve in determining economic and social rights, especially when the lawmaker does not sufficiently address issues related to economic and social rights in its legislative product. The Court may fill the gaps in the protection of Economic and Social rights. The Court roles in this context, however, potentially encroach the authority of other branches of governments i.e. the executive and the legislative. Therefore, the Court roles should be carefully and strategically conducted so that it does not infringe the jurisdiction of the government and the lawmakers.

Keywords: Constitutional Court, Economic, Indonesia Social Rights.

The Relationship Between the European Convention on Human Rights and Domestic Law: a Case Study

Kamil A. Strzępek

Constitutional Review, Vol. 6, No. 2, December 2020, pp. 338-365

The article is pertaining to the relationship between the European Convention on Human Rights and the Polish national law. Upon the introduction of the system of economic, social and cultural rights contained in the Constitution of the Republic of Poland of 1997, the article considers what rules determine the relationship between the application of the law by Polish courts and the European Court of Human Rights in Strasbourg. The paper concludes by showing how Polish courts and the European Court of Human Rights in Strasbourg refer to the right of property. It's one of the fundamental human rights, when they examine a case. It occurs that clauses, which limit this right, are sometimes understood in a different way by Polish courts and the European Court of Human Rights. Regarding the above, the case of Waldemar Nowakowski v. Poland of the European Court of Human Rights in Strasbourg is discussed. Furthermore, the article presents how the Polish Government executes the judgment of the European Court of Human Rights in Strasbourg delivered in the above-mentioned case.

Keywords: Constitutional Court, Doctrine of the Margin of Appreciation, Human Rights, Principle of Subsidiarity, Right to Property.

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Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court

Christoph Enders*
Faculty of Law, University of Leipzig, Germany
chenders@uni-leipzig.de

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Abstract

The Basic Law for the Federal Republic of Germany did originally not provide for social or economic rights understood as claims to benefits. The Federal Constitutional Court (FCC) did, indeed, recognise the states obligation to protect individuals against assault by others (right to security) and further ruled that everyone has the right to use facilities provided by the state under equal conditions (right to participation). These rights, however, aim to ensure that the state uses existing means as intended. In addition, the FCC by now has recognised a "right to the guarantee of a dignified minimum subsistence". It is an original entitlement as the state is obliged to create and provide benefits for individuals in need. This new legal construction, however, misconceives the division of responsibilities between the FCC and the legislator and collides with the principle of the separation of powers.

Keywords: Claim to Benefits, Dignified Minimum Subsistence, FCC, Human Dignity, Right to Participation.

* Professor of Public Law, Political and Constitutional Theory and Executive Director of the Institute for Foundations of Law at the Faculty of Law at the University of Leipzig.

I. INTRODUCTION

When the Basic Law for the Federal Republic of Germany was enacted in 1949, the inhuman despotic rule of the Nazi State had only just been defeated by the Allied powers of the Second World War. In consequence of this war that Germany had induced upon the world, the country was almost entirely destructed and suffered great economic privations. In this situation, the Basic Law, which was supposed to re-establish a liberal order in West Germany, was confronted with a twofold challenge: it had to both take stand against Germany's past while simultaneously espousing a sense of humility and sobriety.[1]

The intention of the constituent assemblies in their response hereto was to embody a clear renunciation of Nazi injustices. Due to the systematic disenfranchisement of humans under Nazi rule, the commitment to human rights was paramount for the new constitution and ranked even higher in importance than a democratic organisation of the prospective political order.[2] A man is a being vested with dignity and thus has a right to rights.[3] These rights, the Human Rights,[4] protect the freedom of everyone to lead a self-determined life, i.e. to shape one's life according to one's own ideal of happiness. The revolutionary constitutional movement of North America has described this idea as "the pursuit of happiness". Recognising and protecting this interest of the individual is, as Article 1 of the Basic Law illustrates and declares by basing the acknowledgement of human rights on the term "human dignity", the pivotal aim of the Basic Law.[5] The Basic Law thus established a State Philosophy or even

[1] See Christian Bumke and Andreas Voßkuhle, *German Constitutional Law. Introduction, Cases and Principles* (Oxford: Oxford University Press, 2019), 6 f.

[2] As shows a comparison between the initial provision of the Constitution of the German Empire of 11 August 1919 (the so-called Weimar Constitution) which declared: "Art. 1: The German Reich is a republic. State authority derives from the people." to Art. 1 of the German Basic Law of 1949.

[3] For the first time having said this probably: Jacques Maritain, *The Rights of Man and Natural Law* (London: Geoffrey Bles: The Centenary Press, 1944), 37. See also Christoph Enders, *Die Menschenwürde in der Verfassungsordnung* [Human Dignity in the constitutional order] (Tübingen: Mohr Siebeck, 1997), 501 f.; Christoph Enders, "*Freiheit und G leichheit zwischen Recht und Politik – Die Grundrechte des Grundgesetzes der Bundesrepublik Deutschland / Kebebesan dan Kesamaan antara Hukum dan Politik – Hak Asasi di Grundgesetz Republik Federal Jerman* [Freedom and Equality between Law and Politics – The Basic Rights of the Basic Law for the Federal Republic of Germany]," *Arena Hukum* 3, no. 5 (2010): 6; Christoph Enders, "Human Dignity in Germany," in *Handbook of Human Dignity in Europe*, eds. Paolo Becchi, Klaus Mathis (Cham: Springer, 2018), 288.

[4] Art. 1.2 of the Basic Law: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world".

[5] Art. 1.1 of the Basic Law: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority."

State Ideology unalterable by future amendments of the constitution[6] – very similar to the function Pancasila fulfils in the Indonesian 1945 Constitution.[7]

In its definite commitment to human rights – substantiated in the constitution by the embodiment of individual enforceable basic rights (see Article 1.3 of the Basic Law[8]) – the State Philosophy of the Basic Law evidently is based on the tradition of a constitutionalism predicated on the realisation of freedom as the fundamental legitimation of the authority for the state. This notion, however, remains an abstraction. The human individual does not exist in isolation: individuals require economic resources and financial means with which to structure their lives and sustain themselves, and to communicate with others and participate in social life.[9] For this reason, the question, whether an unmitigated recognition of each individual's "pursuit of happiness" necessitates social and economic rights guaranteeing rights to substantive means, inevitably arose already at the deliberations on the Basic Law. This elaborately discussed option was, however, explicitly rejected: in times of great economic hardship, the state should not lightly promise services that could ultimately exceed what the collective strength of the community could sustain.

Therefore, the Basic Law provides for a freedom of occupation, but does not stipulate a right to work; it includes a guarantee of the right to property and a right to equal treatment, but no right to a just supply of goods; and the Basic Law refers to the public school system, but recognises no right to education. The basic rights thus serve to protect the equal freedom of the individual and primarily defend it against arbitrariness by the state. But they do not deal with

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6 Amendments to the Basic Law "affecting ... the principles laid down in Art. 1 and 20 shall be inadmissible" according to Art. 79.3 of the Basic Law.

7 See Simon Butt and Tim Lindsey, *The Constitution of Indonesia* (Portland: Hart Publishing, 2012), 13 f., 23.

8 Art. 1.3 of the Basic Law: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Explaining the duty to uphold basic rights: Bumke and Voßkuhle, *German Constitutional Law*, 41 margin no. 36.

9 Considering the characteristic of human nature and the conditions of individual freedom, the Federal Constitutional Court stated in 1954 that "the Basic Law's conception of man is not that of an isolated sovereign individual; rather, the Basic Law has decided the tension between the individual and the community in the sense of the person's relation to and attachment to the community, without touching their intrinsic value." Federal Constitutional Court (FCC) Judgment of 20 July 1954 - 1 BvR 459, 484, 548, 555, 623, 651, 748, 783, 801/52, 5, 9/53, 96, 114/54 = BVerfGE 4, 7 (15 f).

questions of social justice and do not stipulate social and economic rights. Instead, the principle of the social welfare state determines that social justice is an aim of policy and that the state should countervail social injustices (Article 20.1 of the Basic Law).[10]

This is the textual baseline of the Basic Law. However, the jurisprudence of the FCC has in many cases modified the construction of the original provisions of the constitution. In the following analyses it will be demonstrated how the FCC in a first step systemised and structured the protection of individual freedom, which is the primary aim of the basic rights of the Basic Law (II). At the same time, the court has extended the legal effect of the basic rights and added to their function as a means of protection against the superiority of state powers and arbitrary exercise of state powers elements of rights to certain state services (III). It has recognised a dimension of the basic rights entitling the individual to measures of state protection, in particular, protection against assault by others (i.e. a right to security) and to equal (derivative) participation in public services and utilities. Above all, the FCC in 2010 recognised a right to the guarantee of a minimum subsistence derived from the constitutional provision stipulating human dignity. This right contains an individual claim directed against the state, aiming at the public services necessary to secure an individual's existence (IV). This right thus does not react to the disregard of rights by other persons, as well as this right further does not aim to ensure a fair distribution of already existing state benefits. Through this right, the constitution guarantees an immediate original entitlement to benefits that are ultimately to be concretely assessed and distributed. This development of jurisprudence is not only in direct contradiction to the considerations of the constituent assembly. It also poses the question: can such a right truly function as a justiciable claim? The answer to this question, whatever it turns out to be, is indeed confronted with the fact that adjudication by a constitutional court is subject to unique conditions and is not readily comparable with judicature in general (V).

[10] Art. 20.1 of the Basic Law: "The Federal Republic of Germany is a democratic and social federal state." Explaining the principle of the social state: Bumke and Voßkuhle, *German Constitutional Law*, 333 margin no. 1348; Gerhard Robbers, *An Introduction to German Law* (Baden-Baden: Nomos Verlagsgesellschaft, 2012), 50 margin no. 157.

II. THE BASIC RIGHTS AS THE EMBODIMENT OF A "RIGHT TO JUSTIFICATION"

The basic rights of the Basic Law primarily serve to maintain individual freedom and ensure its protection from state interference. This has been formulated by the FCC as an essential principle and has been demonstrated in numerous decisions. The individual has a legitimate interest to shape his or her life according to his or her own ideas without being unduly influenced from the outside. What the Americans refer to as "the pursuit of happiness" is recognised in the Basic Law by Article 1 as a preeminent principle of importance: a conception of human beings "as persons who can make free and self-determined decisions and shape their destiny independently".[11] The state, in contrast, recurrently finds, as is known, reasons to encroach on this freedom in favour of its own aims. Basic rights do not create absolutely insurmountable obstacles for state regulation. But because the state, even the legislator, is bound by the basic rights enshrined in the Basic Law (see Article 1.3 of the Basic Law[12]), encroachments on the freedom guaranteed by these basic rights require justification. Justified is any encroachment indispensable to protect public goods or to maintain the existence of the constitutional community. In this respect, the basic rights are an embodiment of a general "right to justification" which is laid down in Article 1 of the Basic Law.[13]

How does such a "right to justification" attain a tangible form and how can the courts deduce criteria from this notion by which to inform the process of scrutinising state actions? First of all, the FCC has addressed the issue of a tangible legal criterion by stressing the principle of proportionality that applies in every case where the state, in order to accomplish its aims, encroaches on individual freedoms.[14] This encroachment as an instrument to accomplish a

[11] FCC Judgment of 17 January 2017 - 2 BvB 1/13, para. 539 = BVerfGE 144, 20 (207, para. 539) (Unconstitutionality of the NPD).

[12] Butt and Lindsey, The Constitution of Indonesia.

[13] Enders, *Die Menschenwürde*, 430-431; see also Enders, "Human Dignity in Germany," 291; Wolfgang Forst, "*Das grundlegende Recht auf* Rechtfertigung [The basic right to justification]," in *Recht auf Menschenrechte* [Right to human rights], eds. Hauke Brunkhorst, Wolfgang R. Köhler, Matthias Lutz-Bachmann (Frankfurt am Main: Suhrkamp, 1999), 75; Christoph Möllers, "Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law," *Israel Law Review* 42, no. 2 (2009): 435.

[14] Bernhard Schlink, "Proportionality (1)," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel

particular purpose must be proportionate in relation to the aim. It must not repress individual freedom more than necessary to achieve the purpose.[15] Illustrative of this conception is a decision of the FCC ruling that a law preventing motorists from taking passengers against cost-sharing without permission of the competent authorities utilising a car sharing agency was disproportionate.[16] In the explanatory memorandum to the draft bill, the Federal Government had stated that the law was intended to enhance road safety and protection of passengers. According to the FCC, however, the required permission was not a suitable measure to enhance general road safety, because the motorist would take their drive as planned even without a passenger. Nor would the protection of passengers improve as the requirement of permission did not generate any special protection in favour of the passengers exceeding the general provisions. The encroachment – by means of the requirement of permission – is thus unsuitable to accomplish the purpose, therefore disproportionate and must be omitted as it is unnecessary.

In a further case, the FCC ruled that it was disproportionate to order the extraction of cerebrospinal fluid in order to determine the mental capacity of a defendant if the accused offence was of relatively little significance.[17] This encroachment on the physical integrity is particularly painful and holds very high risks for the health of the defendant. It was, therefore proportionate, namely appropriate and balanced, only when utilised to resolve serious crimes.

The FCC thus has established a decision-making system that, when furnished with the pertinent information, produces solutions to cases or at least structures the process of finding such solutions to a large extent.[18] The system operates (in a way digitally) by employing questions answerable only with "yes" or "no": Is a behaviour protected by basic rights (1) and did the state encroach on that

Rosenfeld, András Sajó (Oxford: Oxford University Press, 2012), 718; Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere but Here?," *Duke Journal of Comparative & International Law* 22, (2012): 291; Martin Borowski, "Absolute Rights and Proportionality," *German Yearbook of International Law* 56, (2013): 388 f.

15 See also: Giri Ahmad Taufik, "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly," *Constitutional Review* 4, no. 1 (May 2018): 66.

16 FCC Judgment of 7 April 1964 - 1 BvL 12/63 = BVerfGE 17, 306 (315 f.).

17 FCC Judgment of 10 June 1963 - 1 BvR 790/58 = BVerfGE 16, 194; Schlink, "Proportionality in Constitutional Law," 293.

18 Regarding the proportionality test outside of Germany, see Juan Cianciardo, "The Principle of Proportionality: The Challenges of Human Rights," *Journal of Civil Law Studies* 3 (2010): 177 ff.; Moshe Cohen-Eliya and Iddo Porat, "Proportionality and the Culture of Justification," *The American Journal of Comparative Law* 59 (2011): 463 ff.

behaviour with a measure (2)? If so, is this encroachment in accordance with the constitution? That is the case if there are reasons approved of by the constitution justifying the encroachment (3). Above all, the purpose of the encroachment has to be legitimate, it must not be prohibited by the constitution (a), and the chosen measure must not disproportionately encroach on the freedom considering the legitimate purpose it is intended to achieve (b). In particular, the means encroaching on the freedom must be suitable and necessary to achieve the purpose. Finally, the encroachment must also be appropriate considering the effect of the encroachment and balancing it with the purpose aimed to be achieved by the means employed. In other words: The end has to be "important enough to justify the intrusion."[19]

Such a "right to justification", construed according to a system of Yes/No questions, however, is only able to operate when freedom is presupposed as a rule, and state interference, in contrast, is defined as an exception requiring a specific justification in every individual case of an encroachment on a basic right. The burden of proof for such justifications rests with the state. Such a system of Yes/No questions derived from the notion of a right to justification, however, fails when addressing the issue of state services – an issue frequently and in many aspects arising in law. Since here the state shall not be restrained, but on the contrary, a claim to positive actions by state institutions shall be established, the reasoning with basic rights needs a different foundation. Wherever claims to state services are concerned, the argument of protecting individual freedom is insufficient because it only aims to preserve what already exists.[20] It does not give any rights to extend the legal status or provide for further material goods. Therefore, partly it was assumed that such legal cases, which are outside the scope of the system of Yes/No questions, are impossible to solve on the basis of basic rights and for that reason are not basic rights cases but require political solutions.[21] This appraisal has, however, not prevailed.

[19] Schlink, "Proportionality in Constitutional Law," 294. Explaining the principle of proportionality in detail: Bumke and Voßkuhle, *German Constitutional Law*, 60 ff. margin no. 123 ff.

[20] Ernst-Wolfgang Böckenförde, "Fundamental Rights: Theory and Interpretation [1974]," in *Constitutional and Political Theory – Selected Writings*, vol. 1, eds. Mirjam Künkler, Tine Stein (Oxford: Oxford University Press, 2017), 285.

[21] Böckenförde, "Fundamental Rights," 288 f.

III. THE RIGHT TO SECURITY AND THE RIGHT TO PARTICIPATION (IN STATE SERVICES)

3.1. Rights to Protection in the Spirit of the Right to Security

Which modes of state services can be distinguished? An essential part of the Virginia Declaration of Rights of 12 June 1776, of the United States Declaration of Independence of 4 July 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789 was the human right to security (or: safety).[22] This right was referring to an individual claim directed against the state in order to safeguard personal security against assaults by other persons. The state should by way of its institutions (courts of law, police forces) prevent such assaults and in any case of such assaults avenge them accordingly. For it is a crucial purpose of the state (a legitimation of its sovereignty) – this is illustrated here – to guarantee the security of people on its sovereign territory.

Initially, the drafts of the Basic Law also provided for such a basic right to security. This right was, however, not included in the final text of the institution. This is on the one hand presumably due to the fact that the basic right to freedom of action was not guaranteed boundlessly but explicitly merely within the limits of the rights of others (see Article 2.1 of the Basic Law[23]). On the other hand, it probably seemed self-evident that the state institutions – bound by law and the constitution (see Article 20.3 of the Basic Law[24]) – would enforce these boundaries when confronted with people infringing upon them. It may nevertheless occur that these institutions neglect and do not fully live up to their duty to protect. In this case, it is not about state institutions restraining from interference, keeping distance and doing no more than the absolute necessities, rather it is about taking positive measures to protect. Nevertheless, the FCC soon decided that the basic rights also bear significance in these instances as well. The basic rights of those who are adversely affected by the consequences of the ruthless

[22] Also in the Universal Declaration of Human Rights from 1948, Article 3: "Everyone has the right to life, liberty and security of person."

[23] Art. 2.1 of the Basic Law: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

[24] Art. 20.3 of the Basic Law: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

exercise of individual freedom of others must be adequately taken into account and ought to be protected.[25] An important application of this notion constitutes the decision of the FCC regarding abortion: The court stressed that the state in principle had to adhere to penalisation of abortion in order to effectuate sufficient protection of the unborn life – even if the pregnant women attended abortion counselling prior to this.

Since in cases pertaining to the relation of individual freedom of one individual and the individual freedom of another individual frequently two legal positions of equal importance confront – in the aforementioned example, the health and the autonomy of decision of the pregnant woman and the life of the unborn child – the system of Yes/No questions deriving from the right to justification fails. Neither legal position can as a matter of principle call for priority and set a standard. In consequence, it inevitably comes to a balancing act by means of which it must be determined whichever legal position is to experience restrictions and how significant these turn out to be. In the abortion case, the FCC argued that the pregnant woman with the birth of the child takes on burdens and experiences limitations whereas through the termination of pregnancy the unborn child loses its life; thereby its right to exist is negated entirely and the unborn child becomes – like a mere object – subject to a decision of another person.[26] The weight distribution of this balancing act is, however, not always so manifest. But the FCC has also developed criteria and rules directing the balancing act in less unambiguous cases. For example, regarding the conflict of freedom of opinion with the personality rights, the Court ruled that an expression of opinion that is qualified as hate speech or abusive criticism is not worthy of any legal protection.[27]

3.2. The Right to Participation in State Services

Whilst in these cases protective measures provided by the state through means and institutions of the law are up for debate, often a just allocation of services

[25] FCC Judgment of 15 January 1958 - 1 BvR 400/51 = BVerfGE 7, 198 (204 f.).
[26] FCC Judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 = BVerfGE 39, 1 (43); see also FCC Judgment of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 = BVerfGE 88, 203 (255).
[27] E.g. FCC Judgment of 10 October 1995 - 1 BvR 1476, 1980/91 and 102, 221/92 = BVerfGE 93, 266 (294).

in a narrower sense, which the state provides through its institutions, is at stake. What criterion ought to be applied when persons, despite meeting the general requirements to qualify for an entitlement, are precluded from its enjoyment due to lack of capacity? The right to justification does not offer a reasonable standard for this purpose, as existing possibilities of individual fulfilment are to be expanded by use of state resources, for instance by attending state-run educational institutions. For this issue the FCC again tried to establish criteria and rules to ensure a decision as just as possible when distributing services among a multitude of aspirants. Since capacities are limited and not everybody can partake, the FCC ruled that appropriate criteria are required as to who is ultimately to benefit.

Thus, the FCC ruled that in fact the freedom of occupation and the right to equal treatment stipulate a right of every German citizen to university studies of his or her choice. But this right is subject to constraints respecting the realms of possibility.[28] The state, therefore, must exhaust available capacities entirely and the legislature must establish rules governing the admission of applicants contingent on appropriate criteria, which have to permit a realistic chance of every applicant fulfilling the general requirements to partake (criteria: academic performance, waiting period, cases of hardship[29]).[30] An individual entitlement creating additional capacity at universities nevertheless does not exist.[31]

IV. THE RIGHT TO THE GUARANTEE OF A DIGNIFIED MINIMUM SUBSISTENCE

4.1. The Status of Man as a Legal Subject and Individual Entitlements

This is different in the case of the right to the guarantee of a dignified minimum subsistence. This right, which the FCC describes as a right that applies

[28] FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (332, 333); Bumke and Voßkuhle, *German Constitutional Law*, 86 f. margin no. 248.

[29] One example of such a case of hardship is the diagnosis of a disease with a regressive prognosis wherein it would be impossible for a student to finish their studies if the commencement of the studies is delayed (see Higher Administrative Court of North Rhine-Westphalia Decision of 02 July 2012 – 13 B 656/12).

[30] FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (338, 345); Bumke and Voßkuhle, *German Constitutional Law*, 87 margin no. 250.

[31] FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (334); Bumke and Voßkuhle, *German Constitutional Law*, 87 margin no. 250 and 334 margin no. 1352.

to everyone (i. e. a human right) and derives from Article 1 of the Basic Law (in conjunction with the principle of the social welfare state, Article 20.1 of the Basic Law), "ensures to each person in need of assistance the material prerequisites which are indispensable for his or her physical subsistence and for a minimum of participation in social, cultural and political life."[32] Thus, it is an immediate constitutionally rooted claim to material benefits necessary to lead a life under conditions appropriate for a human being.

The FCC notes rightly that this guarantee stipulating an original claim to state services is entirely autonomous alongside common contexts of application of the rule of human dignity which have been recognised thus far.[33] For in all other cases the status of the human being as a legal subject is concerned: according to this status human dignity consists the human being as a legal subject; hence the human being has a 'right to rights' and is an addressee of rights and obligations.[34] It follows from this notion that there is a universal right to recognition as a legal subject. In relation to state action this is first achieved by the right to justification (see above I.) that is stipulated more concisely in the form of human rights – embodied in the Basic law as the basic rights – tailored for specific areas of life, which are traditionally threatened by state power. According to Article 1 of the Basic Law, the status of humans as legal subjects shall, however, also rule over interpersonal relationships.[35] The state is therefore obliged to protect the individual against assaults by others, i.e. to guarantee by means of formation and enforcement of the legal order the unimpeded development, as embodied in the right to security (see above 3.1).[36] But the status of the human being as a legal subject forms also the basis of the right to participate in state services made available to the general public (such as kindergartens, schools and universities;

[32] FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 1).

[33] FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 2, 222).

[34] Stephan Kirste, "A Legal Concept of Dignity as a Foundation of Law," in *Human dignity as a foundation of law,* Archiv für Rechts- und Sozialphilosophie – Beihefte, vol. 137, eds. Winfried Brugger, Stephan Kirste (Stuttgart: Franz Steiner Verlag, 2013), 78; Möllers, "Democracy and Human Dignity," 434 f.

[35] See FCC Judgment of 29 July 1968 - 1 BvL 20/63, 31/66 and 5/67 = BVerfGE 24, 119 (144).

[36] FCC Judgment of 19 December 1951 - 1 BvR 220/51 = BVerfGE 1, 97 (104). The court remarks that the obligation of the state to respect human dignity aims at defending against the interference of the state and that the further stipulated obligation to protect human dignity means "protection of human dignity against violations by others" and not protection against material deprivation.

see above 3.2) according to equal criteria. In particular, it is as legal subjects, that all humans must be treated equally and are entitled to equal participation in services provided by the state.

4.2. An Own Tradition of the Right to the Guarantee of a Minimum Subsistence

In contrast, the right to the guarantee of a dignified minimum subsistence does not relate to the status of the human being as a legal subject. It is therefore accurate when the FCC refers to an "autonomous significance" of this right.[37] The dignity of the human being does not depend on social status and economic circumstance. Man is under all conceivable circumstances a legal subject. A situation of economic deprivation is not an attack targeted on the status as a legal subject. Therefore, the nature of a legal subject of having rights and obligations has no implications on the endowment with material means enabling a life under appropriate conditions. Recent research has accordingly demonstrated that the right to the guarantee of a minimum subsistence follows from a different tradition. The right to a dignified standard of living finds its historical origin in the political struggles of the working class for the improvement of their living conditions, in which the slogan of the dignified standard of living was utilised to denounce the extortionate exploitation by the ruling class and to claim a socially just economic order.[38]

By deriving the right to the guarantee of a dignified minimum subsistence directly from the term "human dignity", the FCC refers to this different tradition: there are no entitlements in a strict sense arising from the basic rights of the Basic Law. In 1949 the constituent assembly explicitly decided against such an option[39], and instead declared social justice an aim of policy by implementing the constitutional principle of the social welfare state and thereby delegated the

[37] FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 2, 222).

[38] An expression of these efforts is e. g. Article 151.1 of the Constitution of the German Reich from 11 August 1919, which stipulates: "The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured." Manfred Baldus, *Kämpfe um die Menschenwürde* [Fights about Human Dignity] (Berlin: Suhrkamp, 2016), 230-36.

[39] This option was partly realised in other constitutions, e. g. in Article 194 of Brazil's Constitution: "Social security consists of an integrated group of actions initiated by the Government and society, designed to assure rights relating to health, social security and social assistance."

concretisation of the social just endowment with material means to the legislator (Article 20.1 of the Basic Law).[40] In the term "human dignity", amenable to a plurality of interpretations, different traditions convene – not only the tradition emphasising the status of man as a legal subject that is expressed in human and basic rights. Even the right to social justice and a right to the endowment with indispensable goods can be associated with the term "human dignity". The FCC took up this different, socio-political tradition of understanding human dignity when recognising the right to the guarantee of a dignified minimum subsistence despite it being rejected by the constituent assembly.

4.3. Legal Functioning of a Right to the Guarantee of a Minimum Subsistence?

Does a right to the guarantee of a minimum subsistence in fact function? Is there a legal standard governing which material prerequisites are indispensable for a dignified standard of living that can be applied by the courts? Upon thorough consideration, the following applies not only in times of economic hardship but also in times of economic prosperity: social benefits depend on the current economic circumstances of a society and can only be granted whilst being subject to capacity constraints.[41] Needs and prospects must be balanced. The results will differ depending on the historical and economic situation. On the whole, the entitlements to social services must not exceed the limit that can be afforded by the community. As also the FCC has seen, the requisite considerations and weightings must first and foremost be assigned to the legislator as this determination concerns a value judgment: "In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social subsistence of a human being, the legislature enjoys a margin of appreciation."[42]

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[40] FCC Judgment of 19 December 1951 - 1 BvR 220/51 = BVerfGE 1, 97 (105); FCC Judgment of 17 August 1956 - 1 BvB 2/51 = BVerfGE 5, 85 (198).

[41] That social benefits depend on resources being available, but also on positive state action which may never be prescribed strictly and in detail, is also expressed by Article 2.1 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressive the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Apropos hereto see Hennie Strydom, "The Protection of Economic, Social and Cultural Rights in International Law," *Constitutional Review* 5, no. 2 (December 2019): 228 f. and 233.

[42] FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 62 = BVerfGE 132, 134 (159, para. 62).

However, it is not only a value judgement but ultimately a political decision. So the question is posed if legal criteria and standards to review such decisions of the legislator can exist at all. Even the FCC has conceded that the Basic Law "does not prescribe what, how and precisely when such reasoning and calculations are to be carried out in the legislative process. It allows for negotiations and for political compromise."[43] Issues amenable for compromise are typically no questions of constitutional law, which must be resolved by the application of legal criteria. They are, instead, political issues to be determined within the parameters of the constitution. Political issues, however, ought not to be decided by courts, but by the democratically legitimised legislator. As *Ernst-Wolfgang Böckenförde* already analysed: "... decisions about priorities – inevitable if resources are scarce – cease to be a matter of political discretion when it comes to the use and distribution of funds available to the state. They now become a matter of fulfilling the fundamental rights – or, more precisely, an issue of competing and conflicting fundamental rights. In formal terms that makes them a matter of the interpretation of the fundamental rights. Following this through logically, the responsibility for making those decisions would shift from parliament or the government as the agency invested with budgetary authority to the courts – and ultimately onto the FCC. A juridification of political disputes would ensue, coupled with a substantial shift of responsibility towards the judiciary."[44] Hence, the FCC has far too eagerly defied the principle of the separation of powers.[45]

In its most recent judgment regarding this issue, handed down on 5 November 2019, the FCC confirmed its previous rulings in the field of social benefits guaranteeing a minimum subsistence. However, what the court criticised was a lack of inner consistency of the applicable Second Book of the "Code of the Social Law". Refraining from backtracking its former position, the Court nevertheless changed its approach in applying the principle of proportionality for adherence by the legislator. Benefits designed to ensure a minimum subsistence "are only

[43] FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 70 = BVerfGE 132, 134 (162, para. 70).
[44] Böckenförde, "Fundamental Rights," 284.
[45] The principle of the separation of powers is laid down in Article 20.2 of the Basic Law: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies."

granted if persons cannot support themselves by their own means. In addition, the legislature may impose upon those recipients of `unemployment benefits II´ ... who are fit to work reasonable obligations to cooperate for overcoming their own need, and may impose sanctions by temporarily withholding benefits if recipients violate such obligations. However, in imposing such sanctions the legislature places an extraordinary burden on the recipients of such benefits; therefore, strict proportionality requirements apply ..."[46] The principle of proportionality, therefore limits the legislature is usually broad margin of appreciation when it comes to sanctioning a lack of cooperation by a recipient of social benefits. As the absoluteness of the dignity of man, prohibiting its balancing with other rights and principles, and proportionality are mutually exclusive concepts, there must be different considerations decisive for reaching this conclusion. In not arguing that human dignity sets a certain absolute standard of social benefits which may either be missed or attained by the legislator, the Court generally follows the legislator's conception and construes the provisions in a manner aimed at achieving more coherency to the underlying conceptualisation. Where the legislature imposes obligations on the recipients of state benefits "to cooperate in order to pursue the legitimate aim of making persons prevent or overcome their own need, in particular through paid employment, these obligations must satisfy the requirements of proportionality; thus they must be suitable, necessary and reasonable for achieving that aim ..."[47] In this way the FCC recognises that the legal relationship between the state and the recipients of state benefits established by the legislator implies the duty to take seriously into account the legal position of the individual.[48] Hence, it is not about the balancing and apportioning of social benefits according to an absolute benchmark of justice derived from human dignity. At issue are the consequences attendant upon the legal status of the individual, that parliament has to take into consideration when it decides to grant social benefits only under certain conditions and determines to implement revocations in cases of misdemeanour by the recipient.

[46] FCC, Press Release No. 74/2019 of 05 November 2019, p. 1.
[47] FCC, Press Release No. 74/2019 of 05 November 2019, p. 2.
[48] This reasoning closely resembles a proposal made by the author in 2004, see Christoph Enders, "*Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge* [The Social Welfare State between the poles of individual responsibility and care]," *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer VVDStRL* 64 (2005): 40.

V. CONCLUSION

The Basic Law did originally not provide for social and economic rights. The primary aim of the basic rights of the Basic Law is the protection against illegitimate encroachments by the state through the establishment of a "right to justification". This right is a pivotal corollary derived from the status of man as a legal subject. The FCC did indeed in the course of its jurisprudence carve out additional elements of the basic rights pertaining to entitlements, i.e. to individual rights to positive actions by state institutions (the right to security with its rights to protection, the right to equal participation in state services). These rights are based, however, on the status of the human being as a legal subject and are amenable to arguments legal in nature, notwithstanding being subject to divergent modes of argumentation.

In contrast, the right to the guarantee of a dignified minimum subsistence eludes from being subject to legal argumentation: What under the historically prevailing economic and social circumstances is needed for a human being to live a dignified life, is in many respects a question of political assessment, which in a democracy ought to be determined by the legislator. Courts cannot provide a more credible answer to this question than the legislator. Since expedient legal rules to determine the minimum subsistence level cannot exist, judges are not trained and competent enough to formulate an authoritative definition.[49] Having regard to the principle of the separation of powers, such a definition should therefore remain to be determined by the legislator. The FCC has tardily taken note of the problematic consequences caused by its jurisprudence on the right of a dignified minimum subsistence.[50]

Any self-authorisation of the Court in matters of social justice not only expands the political role of the Court, but does damage to the reputation of the democratically legitimised legislator.[51] Implementing social rights on a constitutional level – for instance, the social right to a dignified minimum

[49] Christoph Enders, "Human Dignity, Happiness and Constitutional Rights", *Boletim da Faculdade de Direito, Universidade de Coimbra* XCIV, no. II, (2018): 1210.
[50] See FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 70 = BVerfGE 132, 134 (162, para. 70).
[51] Enders, "Freiheit und Gleichheit", 18.

existence – is not a sound approach to guaranteeing the viability of a liberal order in the long term. Whoever endorses individual rights on the constitutional level should be aware of their limited justiciability and of the boundaries placed on the jurisprudential function of a constitutional court in a state based on the division of powers.

If a constitution nevertheless normalizes social rights, these boundaries ought to serve as a touchstone for a constitutional jurisprudence that is aware of its responsibility in the realization of social justice. Constitutional jurisprudence ought not to discredit the social system worked out by the democratically elected legislator, with the individual's necessarily limited entitlements (due in part to limited resources). Rather, constitutional jurisprudence may simply put this system's inner consistency to the test of constitutional law. In any case, this regulating idea can be derived from the jurisprudence of the German Federal Constitutional Court.

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The *Urgenda* Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism

Gerhard van der Schyff*
Tilburg Law School, The Netherlands
g.vdrschyff@tilburguniversity.edu

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Abstract

This contribution analyses the *Urgenda* judgments in the Netherlands which ordered the state to reduce the national emissions of greenhouse gasses by 25% by the end of 2020. In arriving at this conclusion, the courts relied heavily on international law, which was applied indirectly and directly to the case. The analysis shows various incongruencies and gaps in the judgments' legal grounds and reasoning, and suggests that a focus on the Constitution is needed as well in addressing such important issues. This will require long overdue reform of the bar on constitutional review in order to stimulate a strong national legal culture based on the Constitution.

Keywords: Climate Change, Constitutional Law, European Convention on Human Rights, International Law, The Netherlands.

I. INTRODUCTION

Usually, the constitutional law of the Netherlands, including its protection of fundamental rights, does not attract sustained comparative and international attention. This has changed with the now widely debated *Urgenda* case on

* Associate Professor at Tilburg Law School. The author would like to thank Dr. Pan Mohamad Faiz, Dr. David Nederlof, Dr. Michail Vagias, the two anonymous reviewers and Ms. Siti Rosmalina Nurhayati.

climate change. The matter has led to three judgments, the first in 2015 by the District Court of The Hague, the second in 2018 by the city's Court of Appeal and the third in 2019 by the Supreme Court.[1] The reason the case attracts so much attention, is that all three courts directed state policy on the pressing issue of climate change in very clear and precise terms. The judgments enjoined the state to reduce, by the end of 2020, annual Dutch greenhouse gas emissions by 25%, when measured against the emission levels of 1990.

The aim of this contribution is to critically discuss and assess these judgments from a legal perspective, and in particular whether they conform to the Netherlands' multilevel constitutional framework. To this end, it must be noted that the overall framework is composed of international, EU and national constitutional law components and that it operates on the basis of monism. This means that international and EU legal norms form part of the domestic order and are hierarchically superior to the Constitution. Such norms are directly applicable by the courts under qualifying circumstances.

In conducting the analysis, the United Nations legal framework on climate law is addressed first as the general background to the dispute between *Urgenda* and the state (section 2). This is followed by an outline of the dispute, as well as the Courts' findings (section 3). The attention is then turned to outlining the legal bases and arguments relied on by the Courts with a focus on the indirect and direct application of international law (sections 4 and 5). Upon analysis it will become apparent that there are noteworthy incongruences between the legal grounds on the one hand, and the legal arguments on the other (section 6). Apart from these incongruences, it will also become apparent that there is a clear *gap* in the legal grounds when it comes to applying the Constitution (section 7). While these incongruences put the judgments in doubt, filling the identified gap might provide a justification for the decisions, or at least a sounder point of departure. The reasons for the gap and the difficulty in filling it are considered too. A call will be made to rebalance the components of the country's

[1] District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA, 2015:7196; Court of Appeal The Hague, 9 October 2018 (ECLI:NL:GHDHA:2018:2610); Supreme Court, 20 December 2019 (ECLI:NL:HR:2019:2006). For the judgments, including English translations: https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda.

multilevel constitutional framework. This is necessary in order to contextualise and ground difficult questions, such as those raised by the *Urgenda* judgments, in the future (section 8).

II. UN FRAMEWORK AND GREENHOUSE GAS EMISSION TARGETS

An important anchor point in discussing the *Urgenda* case is the United Nations Framework Convention on Climate Change (UNFCCC) from 1992, to which the Netherlands is a signatory. Article 2 of the Convention explains that it seeks to achieve within a sufficient timeframe the stabilisation of greenhouse gas emissions in the atmosphere at levels that would prevent dangerous interference with the climate system. In achieving these aims, article 3 establishes a number of principles. For instance, parties to the Convention undertake to protect the climate system for the "benefit of present and future generations of humankind" on the basis of equity. They further ascribe to the precautionary principle in order to prevent and minimise the causes of climate change and limit its adverse effects, and are required to promote the right to sustainable development. Article 3 also explains that developed countries should bear a disproportionate or abnormal burden under the Convention, while the specific needs and special circumstances of developing countries should be given full consideration. This is reflected in article 4 of the Convention. According to this provision Annex I parties, which include the Netherlands and the EU, should take the lead in combatting climate change.[2]

These parties also agreed to reduce their greenhouse gas emissions individually or jointly to 1990 levels.[3] This was later expanded on by the Kyoto Protocol of 1997 to the Convention. The Protocol, which bound the Netherlands, set legally binding reduction targets leading up to 2012.[4] In 2012, the Doha Amendment to the Kyoto Protocol was agreed, according to which new binding targets were set. Under the Amendment, the EU

[2] United Nations Framework Convention on Climate Change (UNFCCC), Article 4(2)(a).
[3] United Nations Framework Convention on Climate Change (UNFCCC), Article 4(2)(b).
[4] Kyoto Protocol, Decision 1/CP.3, UN Doc FCCC/CP/1997/7/Add.1, 25 March 2008.

and its Member States agreed to jointly fulfil their commitment of a reduction of 20% by 2020.[5] The EU offered to adopt a 30% reduction, provided that other developed countries agreed to similar reductions, and developing countries contributed relative to their responsibilities and own capabilities. The offer was not taken up. The Amendment has not yet entered into force at the time of writing.

The Conference of the Parties is established in article 7 of the UNFCCC as the supreme decision-making body of the Convention, entrusted with monitoring its implementation and that of any related legal instruments adopted by the Parties. Several Conferences have been held to date, usually referred to as Climate Conferences. It was for instance during the Climate Conference in Qatar that the Doha Amendment was agreed in 2012. Especially noteworthy also is the Bali Conference of 2007, which adopted the Bali Action Plan.[6] This Plan was drafted in part as a response to and in recognition of the Fourth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC). The IPCC is a scientific body and intergovernmental organisation established under the auspices of the United Nations which assesses the science related to climate change.[7] In its Fourth Assessment Report published in 2007, the IPCC explained that "a 1 to 2°C increase in global mean temperature above 1990 levels (about 1.5 to 2.5°C above preindustrial) poses significant risks to many unique and threatened systems including many biodiversity hotspots".[8] The Report is reflective of a general consensus in climate science and beyond that the increase in mean global temperature should not exceed 2°C.[9] According to science, there would be a reasonable chance of keeping the mean global temperature in check if the concentration of greenhouse

5 Doha Amendment, Decision 1/CMP.8, UN Doc FCCC/KP/CMP/2012/13/Add.1, 28 February 2013.

6 Bali Action Plan, Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2008.

7 See Judgment 2015 of District Court of The Hague, paras. 2.8-2.10 (District Court of The Hague 2015); Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 4 (Court of Appeal The Hague 2018).

8 Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.), "*Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*" (An Assessment Report of Intergovernmental Panel on Climate Change (IPCC) 2007), 19.

9 See Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 3.5. (Court of Appeal The Hague 2018).

gasses in the atmosphere does not exceed 450 parts per million in the year 2100.[10] This has been referred to as the "450 scenario". According to the Report, this scenario would require a reduction in greenhouse gas emissions by Annex I parties of between 25% to 40% by 2020 relative to their 1990 emission levels.[11] By 2050 a reduction of between 80% to 95% would have to be achieved.

A number of Climate Conferences since have reiterated the case for urgent action and have referenced the need for states to follow the recommendations in the Fourth Assessment Report.[12] Parties have been encouraged to raise their ambition, and Annex I parties in particular to take the lead in drastically reducing their greenhouse gas emissions. Increasingly, mention is also made of aiming at an upper rise of the global mean temperature of only 1.5°C, as opposed to 2°.[13] In this regard, article 2(1)(a) of the 2015 Paris Conference's Agreement seeks to enhance the implementation of the UNFCCC by keeping the increase in the global temperature to "well below" 2°C and "pursuing efforts to limit temperature increase to 1.5°C above pre-industrial levels".[14]

III. LEGAL DISPUTE AND DECISIONS

Urgenda, which is a contraction of "urgent" and "agenda", is a foundation established in the Netherlands by notarial deed in 2008 functioning as a citizens' platform.[15] The foundation arose from the Dutch Research Institute for Transitions (Drift) which concerns itself with sustainability transitions at Erasmus

[10] Judgment 2018 of Court of Appeal The Hague, 9 October 2018, para. 3.5. (Court of Appeal The Hague 2018).

[11] B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds.), "*Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*" (An Assessment Report of Intergovernmental Panel on Climate Change (IPCC) 2007, Cambridge University Press), 776.

[12] For an overview, see Judgment 2018 of Court of Appeal The Hague, 9 October 2018, paras. 11, 51 (Court of Appeal The Hague 2018).

[13] Decision of Cancun Climate Conference, 1/CP.16, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011 (Cancun Climate Conference, 2011).

[14] Decision of Paris Agreement 1/CP.21, UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016 (Paris Agreement 2016).

[15] Judgment 2015 of District Court of The Hague paras. 2.1-2.2 (District Court of The Hague 2015); Judgment 2018 of Court of Appeal The Hague, para. 3.1 (Court of Appeal The Hague 2015).

University Rotterdam.[16] According to article 2(1) of its by-laws, the "purpose of the Foundation is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands".[17] In bringing the case, *Urgenda* acted on its own behalf and that of 886 individuals who authorised it to represent their interests.[18]

The dispute between *Urgenda* and the state did not concern the fact that the state had to "mitigate" the problem of climate change. "Mitigation" in this context refers to reducing greenhouse emissions, as opposed to only "adaptation" or dealing with its consequences.[19] The crux of the dispute concerned the pace at which mitigation had to take place.[20] In this regard, both parties accepted that the country's greenhouse gas emissions would have to be reduced by 80-95% by 2050, when compared to 1990 levels. This mirrored the Fourth Assessment Report of the IPCC.

In reaching the end target, the Netherlands initially pursued a policy of reducing the country's greenhouse gas emissions in 2020 by 30%, relative to 1990.[21] In other words, a target higher than the Fourth Assessment Report's minimum 25% reduction, but below its upper recommendation of 40%. After 2011 the Netherlands adjusted its policy to a target of 20% by 2020, which was in line with the goal of the EU.[22] In meeting the common EU target, this meant that the Netherlands had to reduce greenhouse gas emissions by 2020 for the ETS sector by 21%, and for the non-ETS sector by 16%, relative to 2005.[23] For 2030,

16 Judgment 2015 of District Court of The Hague, para. 2.1 (District Court of The Hague 2015); "About Drift," Drift for Transition, https://drift.eur.nl/about/.

17 Judgment 2015 of District Court of The Hague, para. 2.2 (District Court of The Hague 2015).

18 Judgment 2015 of District Court of The Hague, para. 2.4 (District Court of The Hague 2015).

19 Judgment 2015 of District Court of The Hague, para. 2.8 (District Court of The Hague 2015).

20 Judgment 2015 of District Court of The Hague, para. 4.32 (District Court of The Hague 2015).

21 Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 19 (Court of Appeal 2018); Judgment 2015 of District Court of The Hague, paras. 2.71-2.72 (District Court of The Hague, 2015). This was in accordance with the Government's "New Energy for the Climate Work Programme of the Clean and Sustainable Project" from 2007.

22 Judgment 2018 of Court of Appeal The Hague, para. 20 (Court of Appeal 2018).

23 Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 17, 20 (Court of Appeal 2018). The European Emissions Trading System (ETS) refers to energy-intensive companies in the EU only being allowed to emit greenhouse gasses in exchange for emission allowances. Emission allowances can be bought, sold and stored. The amount of gasses such companies are allowed to emit is reduced annually, achieving a reduction of 21% in 2020, relative to 2005. See Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814.

the European Council committed the EU and its Member States to a binding reduction of at least 40%, building up to an 80% reduction in 2050 that would conform to the "450 scenario" in preventing irreversible climate change.[24]

Urgenda disagreed with the Netherlands' revised target of reducing greenhouse gas emissions by at least 20% in the EU context by the end of 2020, relative to the 1990 levels. As a consequence, the Foundation brought ten claims before the District Court in The Hague. Requesting inter alia, that the Court rule with immediate effect that:

> " (6) *principally:* the State acts unlawfully if it fails to reduce or have reduced the annual greenhouse gas emissions in the Netherlands by 40%, in any case at least 25%, compared to 1990, by the end of 2020 (...)."[25]

Essentially, *Urgenda*'s main claim was designed to keep the Netherlands to the greenhouse gas reduction range recommended in the Fourth Assessment Report. On 24 June 2015, the Court passed judgment, ordering:

> "(...) the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990 (...)."[26]

The state appealed the judgment to the Court of Appeal in The Hague.[27] *Urgenda* for its part did not appeal any of its rejected claims, which meant that a reduction of greenhouse gas emissions of *more* than 25% by 2020 relative to 1990 levels was not at issue.[28] On 9 October 2018, the Court of Appeal upheld the judgment of the District Court, and also declared the judgment provisionally enforceable as the District Court had done.[29] As a consequence, the state was acting unlawfully by not pursuing a more ambitious path in reducing greenhouse gas

[24] Judgement 2019 of Supreme Court, para. 2.1 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 18 (Court of Appeal 2018); Judgment 2015 of District Court of The Hague, paras. 2.66-2.68 (District Court of The Hague 2015). See European Council (23 and 24 October 2014)-Conclusions, EUCO 169/14, conclusion 2.1; Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, referring to the 40% target in recitals 2 and 5.

[25] Judgment 2015 of District Court of The Hague, para. 3.1 (District Court of The Hague 2015).

[26] Judgment 2015 of District Court of The Hague, para. 5.1 (District Court of The Hague 2015).

[27] Judgment 2018 of Court of Appeal The Hague, paras. 30-33 (Court of Appeal 2018).

[28] Judgment 2018 of Court of Appeal The Hague, paras. 3.9, 27 (Court of Appeal 2018).

[29] Judgment 2018 of Court of Appeal The Hague, paras. 76 (Court of Appeal 2018).

emissions.[30] The state appealed the Court of Appeal's judgment to the Supreme Court, which rejected the appeal on 20 December 2019.[31]

IV. LEGAL GROUNDS: INTERNATIONAL LAW INDIRECTLY AND DIRECTLY APPLIED

Although their judgments achieve the same outcome, the District Court followed a different route than the Court of Appeal and the Supreme Court in establishing that the state had a duty of care in respect of the environment. The main ingredients used in this regard were *private law* (the Dutch Civil Code) and elements from the country's multilevel constitutional framework. Elements from this framework comprised *international law* (especially the UNFCCC and the European Convention on Human Rights (ECHR)), *EU law* and the *Constitution*. A mixture of these legal grounds can be found in the judgments with an emphasis on international law in constructing the state's duty of care.

The District Court held that in not reducing greenhouse gas emissions more, the state was acting unlawfully according to article 6:162 on torts in the Civil Code.[32] The Court of Appeal also noted this ground in its judgement, but focussed on the application of the ECHR, as did the Supreme Court.[33] The District Court by comparison did not allow *Urgenda* to rely on the Constitution, international law or EU law, at least not *directly*.[34] Instead, as is explained below, the District Court used these sources *indirectly* for inspiration in deciding that a duty of care rested on the state in respect of the environment, and that it had not been fulfilled to the standard required by private law.

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30 Judgment 2018 of Court of Appeal The Hague, paras. 76 (Court of Appeal 2018).

31 Judgement 2019 of Supreme Court, para. 9 (Supreme Court 2019). In doing so, the Court followed the advice given it by the Deputy Procurator General and the Advocate General (ECLI:NL:PHR:2019:1026).

32 For the provision in English see http://www.dutchcivillaw.com/legislation/dcctitle6633.htm. On the question of comparable equivalents to this route in other jurisdictions, see Josephine van Zeben, "Establishing a Government Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" *Transnational Environmental Law* 4, no. 2 (2015): 339, 349-352. On aspects of tort law doctrine, see Marc Loth, "Climate Change Liability After All: A Dutch Landmark Case," *Tilburg Law Review* 21, no. 1 (2016): 5, 9-10, 25-29.

33 Judgement 2019 of Supreme Court, para. 5 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 39, 46-53 (Court of Appeal 2018).

34 Judgment 2015 of District Court of The Hague, paras. 4.44, 4.52 (District Court of The Hague 2015).

In deducing such a duty the District Court referred to the clear wording of article 21 of the *Constitution*, which provides that the state must "keep the country habitable and [...] protect and improve the environment".[35] This approach is in line with Dutch courts' practice of applying constitutional rights indirectly to private law by distilling the principle underlying a right, instead of applying any structural elements such as limitation provisions directly to a case.[36] Although the Court's analysis started with the Constitution, very little attention was subsequently paid to this ground, as the Court turned to EU law and international law next.

In gauging its value, the District Court noted the increased role of *EU law* in protecting and caring for the environment.[37] Article 191 of the Treaty on the Functioning of the EU (TFEU) was highlighted, which outlines that the EU shall contribute to preserving, protecting and improving the quality of the environment. EU law can sometimes operate directly in the Netherlands's legal order, which means that the courts (and executive) would be bound to apply it. This monism is not governed by national constitutional rules, as opposed to international law such as the ECHR, but falls under the autonomous rules of the EU itself. As the EU environmental rules were not directly applicable according to EU law, the District Court did not apply them as such.[38] The Court of Appeal also took note of article 191 TFEU, but did not apply this provision directly either.[39] The Supreme Court also refrained from applying EU law directly.

The question concerning the indirect application of *international law* was more complicated and a source of division between the District Court on the one hand, and the Court of Appeal and the Supreme Court on the other. In understanding the judgments' reasoning, it must be understood that international law norms (i.e. non-EU norms) can be relied upon before courts (and the

35 Judgment 2015 of District Court of The Hague, paras. 2.69, 4.36 (District Court of The Hague 2015).

36 A.J. Nieuwenhuis, M. den Heijer and A.W. Hins, *Hoofdstukken grondrechten* [Fundamental Rights Chapters] (Nijmegen: Ars Aequi Libri, 2017), 162-165.

37 For a critical appraisal of the judgment's use of EU law, see Roy Suryapratim and Edwin Woerdman, "Situating Urgenda v the Netherlands within Comparative Climate Change Litigation," *Journal of Energy & Natural Resources Law* 34, no. 2 (2016)): 165, 174-177.

38 Judgment 2015 of District Court of The Hague, para. 4.44 (District Court of The Hague 2015).

39 Judgment 2018 of Court of Appeal The Hague, para. 16 (Court of Appeal 2018).

executive) in the Netherlands if such norms were intended to bind natural or legal persons in addition to the state, and are sufficiently clear to warrant application.[40] The direct application of international law is regulated in articles 93 and 94 of the Constitution.[41] In applying these provisions, the rule of thumb holds that first generation or classical rights can be applied directly by courts, while second generation or social rights cannot.[42] The thinking behind this rule being that classical rights are intended to be applied in individual cases and are clear enough to do so, while social rights are often too vague or not directed at persons. Also, international norms must be written in order to be directly applicable, which means that the unwritten nature of international customary law excludes it from such application.[43]

In deciding the application of international law, *all* three Courts did not apply the *UNFCCC* directly. The District Court found that such norms could not be relied on by *Urgenda* as they were not binding on persons.[44] This is in accordance with the rule of thumb, as such norms essentially guarantee interests akin to social rights. In trying to persuade the bench that the Netherlands had to act to prevent climate change beyond its borders, the claimant also relied on the international "no harm principle", which holds that a state cannot engage in activities on its territory damaging to other states.[45] This rule too was found to be binding between states alone.[46] This consideration was unnecessary though,

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40 See M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen and R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat* [Democratic rechtsstaat principles] (Deventer: Kluwer, 2017), 359-360.

41 They provide: Article 93: "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published." Article 94: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons." Source of translation: https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008. See also Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

42 Burkens et al., *Democratische rechtsstaat*, 144. On classical and social rights, see Nieuwenhuis et al., *Hoofdstukken grondrechten*, 25-27.

43 Supreme Court, 6 March 1959 (ECLI:NL:HR:1959:131); Supreme Court, 18 September 2001 (ECLI:NL:HR:2001:AB1471). Viewed from the perspective of art. 38(1) of the Statute of the ICJ, written sources such as international conventions are covered by art. 94 of the Constitution, but not unwritten sources such as international custom or general principles of law.

44 Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

45 Judgment 2015 of District Court of The Hague, para. 4.39 (District Court of The Hague 2015).

46 Judgment 2015 of District Court of The Hague, para. 4.42 (District Court of The Hague 2015).

because as an example of customary international law, the rule would have been incapable of direct application.

A marked *difference* though arose between the Courts, as the District Court denied the direct applicability of articles 2 and 8 of the *ECHR*, the rights to life and respect for private and family life respectively. In arriving at its decision, the District Court held that *Urgenda* did not qualify as a "victim" in the sense of article 34 ECHR as the provision did not allow public interest litigation.[47] Only "victims" are capable of bringing cases before the European Court of Human Rights (ECtHR) according to the provision. According to the District Court the two ECHR rights could therefore only have an indirect bearing on the case in applying private law. However, as the Court of Appeal pointed out, the victim requirement is a rule of international procedure which governs access to the ECtHR and does not replace national procedure which governs access to Dutch courts.[48] This meant that the directly applicability of articles 2 and 8 ECHR had to be determined in accordance with articles 93 and 94 of the Constitution.

As articles 2 and 8 ECHR concerned classical rights and there was no reason to disregard the rule of thumb, the Court of Appeal and the Supreme Court applied them *directly*, as opposed to the District Court. These rights consequently formed the backbone of the higher courts' judgments in defining the state's duty of care in respect of the environment. The Courts' reliance on these rights will be explored more in the sections to follow. It may be noted already that according to the Court of Appeal and the Supreme Court article 2 ECHR was applicable to environmental situations that could "affect or threaten" or pose a "real and immediate risk" to the right to life, and that article 8 ECHR applied in the event environmental situations impacted individuals' private and family life.[49] In addition, the Supreme Court observed that states had a duty under article 1 ECHR to secure the Convention's rights to everyone within their

[47] Judgment 2015 of District Court of The Hague, para. 4.45 (District Court of The Hague 2015).
[48] Judgment 2018 of Court of Appeal The Hague, para. 35 (Court of Appeal 2018).
[49] Judgement 2019 of Supreme Court, paras. 5.2.2.-5.2.3, 5.6.2-5.6.4 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 40 (Court of Appeal 2018).

jurisdictions, and that article 13 ECHR required states to provide "an effective remedy" in the event such rights were violated.[50]

In making sense of the legal grounds employed by the Courts, their refusal to apply international law directly to the domestic context accords with the Dutch order's rules in this regard, but as the Court of Appeal and the Supreme Court showed this refusal should not extend to the ECHR.

V. LEGAL ARGUMENTATION: REVIEWING THE DUTY OF CARE

The way in which the three Courts applied the legal grounds they identified in reviewing the state's duty of care can be described as ground-breaking and activist. The question addressed in the *Urgenda* matter was far from mundane. At issue was not a typical vertical relationship concerned with vindicating an individual's classical rights by preventing the state from acting in order to protect clearly defined interests, such as prohibiting censorship of expression. Instead, the case concerned public interest litigation aimed at enforcing social rights through positive state action in ensuring a healthy environment. While some jurisdictions still doubt or resist this type of judicial review, these judgments not only embraced it, but did so wholeheartedly.[51]

In truly appreciating the *scope* of the decisions, the epithet "social rights" would need to be understood broadly. This is because the *Urgenda* case essentially embellished the typical objective of second generation rights, understood as advancing equality by improving people's living conditions in an *intra-generational* context, by adding an *inter-generational* dimension. The willingness of the District Court to factor in the interests of future generations illustrates this point.[52] And although the Court of Appeal limited its enquiry to the consequences of climate change on the current generation, a position echoed by the Supreme Court, the ultimate implication of its order was to prevent irreversible climate change

[50] Judgement 2019 of Supreme Court, paras. 5.2.1, 5.5.1-5.5.3 (Supreme Court 2019).

[51] See generally Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence: Emerging Trends in International and* Comparative *Law*, ed. Malcolm Langford (Cambridge: Cambridge University Press, 2008), 3-45.

[52] Judgment 2015 of District Court of The Hague, para. 4.56 (District Court of The Hague 2015).

affecting future generations too.[53] The real effect was to cast the protection of the environment as a third-generation or "solidarity" right to sustainable development. In other words, people could not be allowed to meet their current needs in a way that would compromise the ability of future generations to meet their own, as the Brundtland Report defined sustainable development in 1987.[54]

Adding to the ground-breaking nature of the judgments is the fact that a right to sustainable environmental development was not only recognised at law, but also duly enforced. The "polycentric" aspect of the case, the fact that a judgement deals with a matter that has an effect well beyond the immediate parties, did not deter the courts. Lon Fuller explained polycentric cases as being "many centred" in that pulling on one part of the spider's web creates new centres of tension somewhere else along its pattern of lines.[55] This is clearly at issue in the *Urgenda* case, given the range of interests and parties affected by the decision to reduce greenhouse gas emissions in the country by 25% by 2020. Polycentric cases, Fuller argued, are better suited for solution by *managerial direction* or *contract*, than *adjudication*.[56] As an element of contract he pointed to the striking of "political deals" in achieving an "accommodation of interests" in settling polycentric problems. However, the judgments rejected as satisfactory the accommodation of interests that the Netherlands achieved when it agreed to a common EU-wide reduction of 20%, which was itself the product of international negotiation in the context of the Kyoto Protocol. Instead of deferring to political bargaining and inter-state accommodation, the Courts favoured adjudication as the most appropriate solution.

In addition to not preventing judicial review from taking place, polycentric concerns did not temper the *intensity* of the Courts' review either. All three Courts exercised what can only be described as strict scrutiny in finding that the state was in breach of its duty of care to protect the environment. The fact

[53] Judgement 2019 of Supreme Court, para. 4.7 (Supreme Court 2019), Judgment 2018 of Court of Appeal The Hague, para. 37 (Court of Appeal 2018).

[54] Judgment 2015 of District Court of The Hague, para. 2,3 (District Court of The Hague 2015).

[55] Lon L. Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92, no. 2 (1978): 395. See Langford, "Justiciability," 36.

[56] Fuller, "Forms and Limits," 399-400.

that the case was without precedent, and that a ready-made legal framework was lacking in solving it, did not temper the Courts in holding the state to account.[57]

In conditioning the state's duty of care, the Courts emphasised the importance of the *precautionary principle*. The principle as it pertains to the environment is expressed in article 3(3) UNFCCC and article 191(2) TFEU, and has been recognised by the ECtHR.[58] The Court of Appeal and the Supreme Court gave particular attention to the precautionary principle in the context of the ECHR. The Court of Appeal explained that negative and positive obligations issue from articles 2 and 8 ECHR. The Court noted that the ECHR required concrete measures by the state to prevent future violations of these rights. Future violations, it explained, meant that a protected interest was not yet infringed, but that an infringement was imminent because of an act, activity or natural event meeting a "minimum level of severity".[59] The Supreme Court noted similarly that where a "real and immediate risk" arose, something which could also develop over time, the state had to take precautionary measures to protect these rights even if was not entirely sure that the threat would materialise.[60] In fulfilling its duty to prevent such infringements the state had to observe "due diligence", but not in a manner that implied an "impossible or disproportionate burden" for the state.[61] This meant the state had to take reasonable and concrete actions within its powers to prevent imminent threats. The Court of Appeal emphasised that this applied to public and non-public threats, which included industrial activities which it noted were dangerous by their very nature.[62]

In assessing whether the state had indeed fulfilled its duty of care, the three Courts described the nature and seriousness of climate change. The District Court summarised its enquiry as one into "the nature and extent of the damage ensuing from climate change, the knowledge and foreseeability of this damage and the chance that hazardous climate change will occur".[63] In

[57] In this regard, see Judgment 2015 of District Court of The Hague, para. 4.53 (District Court of The Hague 2015).
[58] ECtHR, *Tătar v. Romania*, Application no. 67021/01, 27 January 2009, para. 120.
[59] Judgment 2018 of Court of Appeal The Hague, para. 41 (Court of Appeal 2018).
[60] Judgement 2019 of Supreme Court, paras. 5.2.2, 5.3.2 (Supreme Court 2019).
[61] Judgement 2019 of Supreme Court, paras. 5.3.3-5.3.4 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, para. 42 (Court of Appeal 2018).
[62] Judgment 2018 of Court of Appeal The Hague, para. 43 (Court of Appeal 2018).
[63] Judgment 2015 of District Court of The Hague, paras. 4.64-4.65 (District Court of The Hague 2015).

this regard, it was made clear that the state could be held responsible for the collective emission of greenhouse gasses in the country, even though it did not cause them directly, as it had the power and duty to regulate these emissions.[64] The Court concluded that the risks of serious climate change were very high, that the state had known of the problem since 1992 and therefore had a serious duty of care to mitigate the problem expeditiously.[65] "Prevention is better than the cure" the Court held as it rejected the state's counter-arguments.[66] "Carbon leakage" was no defence, the idea that a Dutch reduction in emissions would be neutralised by other EU states, thereby not reducing the block's emissions as a whole.[67] The state's argument that it was bound to respect the EU's collective effort to reduce emissions by 20% by 2020 was interpreted as being a minimum requirement, meaning the state could be ordered to do more.[68] The argument that reductions in the Netherlands were negligible on a global level failed to convince too, as did the argument that a reduction would mean an unequal playing field for Dutch businesses in having to compete with foreign businesses not subjected to similar constraints.[69] Apart from evaluating arguments dealing with the merits of reducing greenhouse gas emissions, the Court defended its own function against the background of the separation of powers. The state had namely argued that this doctrine prevented the Court from issuing an order that it had to do more in combatting climate change than it had already planned. The Court explained that it would not enter the political domain or seek such support for its decisions, but that did not rule out that its decisions might have political implications.[70]

In holding it responsible and capable to act, the Court of Appeal and the Supreme Court joined the District Court in rejecting the state's arguments.[71]

64 Judgment 2015 of District Court of The Hague, para. 4.66 (District Court of The Hague 2015).
65 Judgment 2015 of District Court of The Hague, para. 4.65 and 4.73. (District Court of The Hague 2015).
66 Judgment 2015 of District Court of The Hague, para. 4.66 (District Court of The Hague 2015), Judgment 2015 of District Court of The Hague, para. 4.76 (District Court of The Hague 2015).
67 Judgment 2015 of District Court of The Hague, para. 4.81 (District Court of The Hague 2015).
68 Judgment 2015 of District Court of The Hague, para. 4.80 (District Court of The Hague 2015).
69 Judgment 2015 of District Court of The Hague, paras. 4.78, 4.82 (District Court of The Hague 2015).
70 Judgment 2015 of District Court of The Hague, paras. 4.94-4.102 (District Court of The Hague 2015).
71 Judgement 2019 of Supreme Court, paras. 2.3.2, 7.5.3 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 54-58, 60-62 (Court of Appeal 2018).

The Supreme Court was clear about the fact that the reduction target of 25% could be relayed to the Netherlands as such and did not refer to a collective benchmark for Annex I states as a group. It was also unconvinced, as was the Court of Appeal, that an increased reduction would place a disproportionate burden on the state.[72] As to the separation of powers, the Court of Appeal and the Supreme Court amplified the District Court's findings, explaining that the state was not ordered to enact legislation of any kind, thereby leaving the manner of the reduction to the state's discretion.[73] The Supreme Court acknowledged that the country's constitutional dispensation entrusted decision-making about the reduction of greenhouse gas emissions to the legislature and executive.[74] This, though, had to be understood against the background of the courts' duty to apply ECHR rights in cases before them, the protection of which formed an essential part of the democratic *rechtsstaat*.[75]

By the time the case reached the Court of Appeal and the Supreme Court, the serious nature of climate change had only become more pronounced. The Supreme Court feared that a "tipping point" could be reached, leading to abrupt and far-reaching climate change.[76] Analysis showed that the problem was more concerning than revealed by the figures at first glance.

Forecasts at the time of the Court of Appeal's judgment predicted a reduction of emissions in the EU of between 26% and 27% in 2020, in relation to 1990.[77] Pertaining to the Netherlands, the forecast was that the country would reduce its greenhouse gas emissions by 23% by 2020.[78] Accounting for the margin of uncertainty, this figure could range from 19% to 27%.[79] This was certainly more optimistic than at the handing down of the District Court's judgment in 2015, when the prediction was that the country would only achieve a reduction of 14%

[72] Judgement 2019 of Supreme Court, paras. 2.3.2, 7.5.3 (Supreme Court 2019).
[73] Judgement 2019 of Supreme Court, paras. 8.2.4, 8.2.6 (Supreme Court 2019); Judgment 2018 of Court of Appeal The Hague, paras. 42, 73-74 (Court of Appeal 2018).
[74] Judgement 2019 of Supreme Court, para. 8.3.3 (Supreme Court 2019).
[75] Judgement 2019 of Supreme Court, para. 8.3.3 (Supreme Court 2019).
[76] Judgement 2019 of Supreme Court, paras. 4.2, 7.2.10 (Supreme Court 2019).
[77] Judgment 2018 of Court of Appeal The Hague, para. 18 (Court of Appeal 2018).
[78] Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).
[79] Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).

to 17% by 2020 in relation to the base year.[80] Based on the later predictions, the state stood a reasonable chance of achieving a reduction in the range requested by *Urgenda*.

In analysing these figures though, the Court of Appeal noted that more recent scientific calculations revealed that there was actually a *higher* concentration of greenhouse gasses in the atmosphere than previously thought.[81] The real threat to the climate was therefore more serious than had been assumed in the past. If older estimates about the level of greenhouse gasses present in the atmosphere had been correct, which apparently they were not, a reduction by the Netherlands of only 17% in relation to 1990 would have achieved more in real terms, than the later forecast reduction of 23% in the context of a greater concentration of gasses.[82]

The scale of the threat posed by climate change, taken together with the measures necessary to mitigate the risk, led all three Courts to conclude that the state had to do more within the scope of its powers to combat the problem. This close and intense scrutiny of the state's policy on climate change resulted in it having to pursue a reduction of 25% by 2020, as advised in the IPCC's Fourth Assessment Report from 2007.

VI. EVALUATION: INCONGRUENCIES BETWEEN LEGAL GROUNDS AND LEGAL ARGUMENTATION

The proportionality exercises conducted by the District Court, Court of Appeal and Supreme Court were sincere and well-argued attempts at defining the duty of the Netherlands in addressing the pressing problem of climate change. In this regard, the judgments covered the four criteria found across jurisdictions in cases with budgetary implications by delineating the state's duty of care, establishing its contribution to the violation, weighing the violation's seriousness and determining the manageability of the state carrying out the

[80] Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018).
[81] Judgment 2018 of Court of Appeal The Hague, para. 21 (Court of Appeal 2018); Judgement 2019 of Supreme Court, para. 2 (Supreme Court 2019).
[82] Judgement 2019 of Supreme Court, para. 2 (Supreme Court 2019).

court's order.[83] However, *noteworthy incongruences* become apparent between the Courts' arguments and the legal grounds on which they are based. These incongruences pertain not only to the legal sources used by the Courts in arriving at their judgments, but also pertain to the intensity of the judicial review based on such sources.

Attention is turned first to the use of the Civil Code by the *District Court* in deciding the lawfulness of the state's policy. What is remarkable is that the Court put so much emphasis on international climate norms in judging whether the state was acting as required under its duty of care to protect the environment.[84] The relevant norms were not directly applicable as the Court rightly explained, as they could only serve to indirectly infuse the private law test for unlawfulness.[85] Yet, the Court's extensive reliance on such norms could easily have been mistaken for their direct application. International climate norms were used not only to construct the state's duty of care, but also to substantially narrow down the state's discretion in fulfilling that duty. The practical effect was essentially to downplay or even erase the distinction between international law norms that are directly applicable by domestic judges in accordance with articles 93 and 94 of the Constitution, and norms which are not.[86] In this way the very function of these two provisions in making a distinction between international law which binds the state only, as opposed to international law which also applies to individuals, was made redundant.

This conclusion is compounded by the fact that the District Court also made no distinction between *written* and *unwritten* international norms. In infusing its private law enquiry, the Court relied on international norms derived from treaties in the same breath as the unwritten "no harm" principle found

[83] Langford, "Justiciability", 37.

[84] Compare K.J. de Graaf and J.H. Jans, "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change," *Journal of Environmental Law* 27, no. 3 (2015): 517, 525.

[85] See section 4 of this contribution.

[86] Compare Leonard Besselink, "*De constitutioneel meer legitieme manier van toetsing: Urgenda voor het Hof Den Haag* [Constitutionally More Legitimate Review. Urgenda in The Hague District Court]," *Nederlands Juristenblad*, no. 41 (2018): 3079, 3081-3081, who notes and questions the reliance placed on non-binding international norms by the District Court, extending this criticism to the role such norms played in the Court of Appeal's judgment. He explains that the difference between the two judgments is a formal rather than a material one.

in customary international law.[87] As explained in discussing the legal grounds, it is standard judicial practice in the Netherlands that such unwritten norms do not qualify for direct applicability in the domestic order.[88] While the direct applicability of written international law could still be allowed under articles 93 and 94 of the Constitution, the "no harm" principle would have been excluded from such application. Yet, the District Court placed both written and unwritten sources on a par with each other without giving further thought to each's ideal weight in the equation.

The sum of these points leads to the curious situation that the *indirect* route of applying international law allowed the Court to achieve *more* than it would have been able to, had the route of *direct* application been followed. Instead of enabling judges to apply international law, the requirements for the direct applicability of such law in the Constitution actually turned into an impediment when compared to the District Court's generous approach to indirect applicability. In this regard it is important to note that the purpose of this observation is not to question the indirect applicability of international law to private law in principle. The practice is to be encouraged as a way of recognising the presence of international law in the country's monist legal order, as well as the high regard in which such law is held. Rather the indirect application of such law, also given its inability to have been applied directly, should arguably have restrained the intensity of the District Court's review. The Court could for instance have given more weight to the state's arguments and existing legal commitments in the context of its EU membership.

As explained, the *Court of Appeal* and the *Supreme Court's* decisions rested on the direct applicability of the ECHR, in particular article 2 on the right to life and article 8 on the respect for private and family life.[89] This was undoubtedly correct, as opposed to the District Court's refusal to accept the direct applicability of these rights. Again though the legal arguments advanced might be said to be incongruent when compared with the legal basis relied on by the Courts.

[87] Judgment 2015 of District Court of The Hague, paras. 4.42-4.43 (District Court of The Hague 2015).
[88] See section 4 of this contribution.
[89] See section 4 of this contribution.

When applying international law directly, the general position of courts in the Netherlands is that the limits set by international courts in interpreting such law are not to be exceeded.[90] The Supreme Court in *Urgenda* confirmed this position, when it explained that judges must follow ECtHR judgments or interpretative methods in determining the meaning of ECHR provisions.[91] This was also noted in discussing the nature of the effective national remedy to be provided according to article 13 ECHR.[92] The effect is that the ECHR as duly interpreted and applied by the ECtHR becomes a *maximum* norm and not a *minimum* norm when guiding courts in the Netherlands.

Although the ECHR does not protect the right to a healthy environment as such, as the Supreme Court also observed, the rights it does protect can be invoked because of "environmental degradation".[93] It is open to discussion though whether the ECtHR would have conducted a review of articles 2 and 8 ECHR as strict as the Court of Appeal and the Supreme Court had done.[94] For instance, the ECtHR's contribution to regional integration and sustainable development has as recently as 2015 been described as "not major" and its case law as not having resulted in progressive environmental policies, the harmonisation of environmental standards, or the explicit recognition of the complete integration of economic, social and environmental considerations in contributing to sustainable development.[95] States are usually also held to account by the ECtHR to the extent that they failed to adhere to domestic environmental standards.[96] In addition,

[90] Supreme Court, 10 August 2001 (ECLI:NL:HR:2001:ZC3598); Nieuwenhuis et al., *Hoofdstukken grondrechten*, 229-231.

[91] Judgement 2019 of Supreme Court, para. 5.6.1 (Supreme Court 2019), referring to Supreme Court, 16 December 2016 (ECLI:NL:HR:2016:2888), para. 3.3.3.

[92] Judgement 2019 of Supreme Court, para. 5.5.3 (Supreme Court 2019).

[93] See the discussion by Jonathan Verschuuren and Werner Scholtz, "Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe," in *Regional Environmental Law*, eds. Jonathan Verschuuren and Werner Scholtz (Cheltenham: Edward Elgar, 2015), 382-383; Judgement 2019 of Supreme Court, para. 5.2.3 (Supreme Court 2019).

[94] See Ingrid Leijten, "The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease," *VerfassungsBlog*, 19 October 2018, https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/. Ingrid Leijten, "Human Rights v. Insufficient Climate Action: The Urgenda Case", *Netherlands Human Rights Quarterly* 37, no. 2 (2019): 112, 118 explains that efforts are needed "to ensure that human rights 'fit' climate change."

[95] Verschuuren and Scholtz, "Contribution of the Case Law," 384-385.

[96] Verschuuren and Scholtz, "Contribution of the Case Law," 383. This captures the idea of social rights as standstill norms which guarantee a level of protection relative to what a state has achieved or committed itself to. On this idea, see Burkens et al., *Democratische rechtsstaat*, 145.

the scope of the ECtHR cases relied on by the Supreme Court was not on the same national or global scale as in the *Urgenda* case, but was often localised to mudslides in a particular area, health and environmental threats issuing from a gold mine or pollution caused by a specific steelworks.[97] This raises questions as to whether the ECtHR precedents relied on matched the facts sufficiently in order to support the outcome of the case. And while in some of the ECtHR cases there was hardly any state action to speak of, the Dutch state could not be accused of a complete dereliction of duty, which would have required the Courts to act as surrogates.[98] The state acted by working successfully towards the goal of an EU-wide 20% reduction of greenhouse gas emissions by 2020. In this sense there was arguably "a legislative and administrative framework designed to provide effective deterrence against threats to the right to life" in article 2 ECHR, as required in *Öneryildiz v. Turkey*.[99] The conclusion that the Netherlands did not fail in its positive obligations could in all likelihood also be applied to article 8 ECHR. This is because the ECtHR takes articles 2 and 8 ECHR largely together in the context of activities that can endanger the environment, as the Supreme Court also noted.[100]

Amplifying the state's commitment is its recognition, with *Urgenda*, of the need for an overall reduction of 80% to 95% of emissions by 2050 in order to prevent serious and irreversible climate damage. The state also did not pursue a policy of only mitigation, in other words of addressing the consequences of climate change, but it also recognised and acted upon the need to address the problem by actively reducing greenhouse gas emissions. Moreover, by the time the Court of Appeal handed down its judgment in 2018 a new national government had been formed which committed itself to a reduction of 49% of

[97] ECtHR, *Budayeva v. Russia*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008; ECtHR, *Tătar v. Romania*, Application no. 67021/01, 27 January 2009; ECtHR, *Cordella v. Italy*, Application nos. 54414/13 and 54264/15, 24 January 2019.

[98] ECtHR, *Budayeva v. Russia*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, paras. 147-158.

[99] ECtHR, *Öneryildiz v. Turkey*, Application no. 489393/99, 30 November 2004, para. 89. Consider also, Roel Schutgens, "*Urgenda en de trias: Enkele staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter* [Urgenda and the Trias: Some Constitutional Notes on a Much-discussed Climate Case]," *Nederlands Juristenblad*, no. 33 (2015): 2270, 2272.

[100] Judgement 2019 of Supreme Court, para. 5.2.4 (Supreme Court 2019); ECtHR, *Brincat v. Malta*, Application no. 60908/11, 24 July 2014, para. 102.

emissions by 2030.[101] Given this context it is not unthinkable that the ECtHR would have recognised the efforts taken by the state as sufficient in discharging its responsibilities under the ECHR. A more stringent level of review would then have been left to the discretion of the national authorities.

Were the ECtHR though to adopt a level of scrutiny as intense as that of the Court of Appeal and the Supreme Court, it would imply a similar level of strict scrutiny for other states in addition to the Netherlands. This would have far-reaching polycentric implications, as a "hard" and uniform third generation right to sustainable development would emerge across the Council of Europe, leaving states limited room for independent manoeuvre. Such a level of scrutiny is contentious though, as the right to a healthy environment is only deduced from the ECHR and might not be included in its text anytime soon given the lack of political agreement on this point. Yet, strictly enforcing such a right could require all Annex I countries which are party to the ECHR, of which there are more than 35, to enforce the greenhouse gas emission recommendations in the Fourth Assessment Report of the IPCC. Although the Supreme Court pointed to *international* consensus on reducing emissions by 25% by the end of 2020 as part of its "common ground" analysis in holding the Netherlands to this reduction, the perceived common ground across the *Council of Europe* might be open to doubt.[102] This is because the EU, which comprises 27 Council of Europe members, chose to pursue a minimum reduction of only 20% after its earlier offer of 30% was not taken up by other states in the context of the Doha Amendment. The effect is to question the reliance placed on such a common ground by the Supreme Court, and consequently the strict level of scrutiny derived from it.

The purpose here is not to argue that a reduction of 25% should not have been ordered under any circumstances, but rather to question whether the ECtHR would have arrived at the same conclusion as the Supreme Court. Given that an expectation of such congruence underscored the Supreme Court's judgment, it was regretful that the Court chose not seek an advisory opinion from the ECtHR

[101] Judgment 2018 of Court of Appeal The Hague, para. 3.7 (Court of Appeal 2018).
[102] Judgement 2019 of Supreme Court, paras. 5.4.1-5.4.3, 7.2.11 (Supreme Court 2019).

in accordance with Protocol No. 16 of the ECHR.[103] This would have given the ECtHR an opportunity to clarify the principles and framework to be applied to such an important and novel case.

VII. EVALUATION: GAPS IN THE LEGAL FRAMEWORK

In addition to the discussed incongruences, a noteworthy *gap* can be identified in the legal grounds relied on by the District Court, Court of Appeal and Supreme Court. In analysing the judgments, it becomes apparent that there is no real *Constitution-based voice* in grounding the balancing exercises conducted by these Courts. This is illustrated by the District Court's indirect reliance on international law, and the Court of Appeal and the Supreme Court's direct application of such law. The voices in evidence are either derived from international law, or national private law.

Any references to the Constitution, as the prime example of national public law, are only made in passing and not essential to the Courts' arguments. For instance, while the District Court opened its construction of the state's duty of care in respect of the environment by reference to the corresponding social right in article 21 of the Constitution, it quickly moved on to discuss the impact of international law in this regard. The role of the constitutional right was otherwise quite limited. The Constitution fared no better in the judgment of the Court of Appeal where it was not even mentioned, while the Supreme Court's reference to the Constitution was primarily limited to explaining its role in the direct application of the ECHR.[104] From a comparative perspective such a near constitutional silence is certainly striking. For instance, the case law from other jurisdictions evidences an important role for their respective Constitutions in questions related to social issues.[105]

[103] Judgement 2019 of Supreme Court, para. 5.6.4 (Supreme Court 2019).

[104] Judgement 2019 of Supreme Court, paras. 5.6.1, 8.2.1, 8.2.4, 8.3.3 and 8.2.1. (Supreme Court 2019).

[105] On South Africa, see Pierre de Vos and Warren Freedman, eds., *South African Constitutional Law in Context* (Oxford: Oxford University Press, 2014), 667. On Colombia and Brazil, see David Landau, "Judicial Role and the Limits of Constitutional Convergence in Latin America," in *Comparative Constitutional Law in Latin America*, eds. Rosalind Dixon and Tom Ginsburg (Cheltenham: Edward Elgar, 2017), 235-238, 247.

The near absence of the Constitution from the judgments in the *Urgenda* case can at best be explained as the consequence of article 120 of the Constitution. This provision provides that: "The constitutionality of Acts of Parliament (...) shall not be reviewed by the courts." The effect is to establish a *strict* separation of powers between the legislature on the one hand, and the courts on the other. Courts are to apply the Constitution, but are barred from establishing the constitutionality of acts of parliament, as this function is reserved solely for the legislature.

Admittedly, the *Urgenda* case did not involve the review of an act of parliament, or an order enjoining the state to adopt such an act. Yet the bar on review has a pervasive effect well beyond its textual confines by minimising the role and importance of the Constitution in general. The bar dates from 1848 and has survived all attempts at reform. Recently an amendment bill which would have allowed the judicial review of classical rights guaranteed in the Constitution came to lapse during its second reading, meaning that the bar will again stay intact.[106] The lack of success in changing the bar on judicial review is paradoxically matched by the calls for it to be reconsidered. For instance, at roughly the same time the attempt at reforming the bar failed in 2018, the State Commission on the Parliamentary System advised the government to relax the bar in order to ensure sufficient legal protection in the country.[107] This call too is unlikely to result in reform as the government rejected the recommendation.[108]

The primary reasons for the provision's resistance to reform are the difficult constitutional amendment procedure on the one hand, and the role of treaty review in the country's multilevel order on the other.[109] As the *Urgenda* case illustrates, courts can rely on international law either indirectly or directly in checking the public exercise of power, which has led to treaty review attempting

[106] *Parliamentary Papers II*, 2018/2019, no. 10, item 8.

[107] Staatscommissie Parlementair Stelsel, *Lage drempels, hoge dijken. Democratie en rechtsstaat in balans* [Democracy and the Rule of Law in Equilibrium] (Amsterdam: Boom, 2018), 195-216.

[108] *Parliamentary Papers I*, 2019/2020, 34430, T, p. 9. Compare Burkens et al., 202-204; Gerhard van der Schyff, "Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far," *German Law Journal* 11, no. 2 (2010): 275; Gerhard van de Schyff, "The Prohibition on Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform," *German Law Journal* 21, no. 5 (2020): 884.

[109] For the amendment procedure, see art. 137 of the Constitution.

the role which constitutional review might fulfil in other jurisdictions. As a consequence the ECHR can be described as the Netherlands' *de facto* bill of rights given its frequent application by the country's courts.[110] In understanding this situation it must be noted that it is not the product of design or clear intent, but probably that of coincidence. While courts laboured under the bar on reviewing the Constitution, the large body of international law generated after the Second World War came to be increasingly applied by the same courts because of the country's monist legal system which opens up the national legal order to international law. Far from substituting the function of constitutional review in a satisfactory way though, a concerning contradiction has arisen. This is because the country's legal system is based on *political constitutionalism*, regarding the role of the Constitution, while also embracing *legal constitutionalism*, regarding the role of international law. This simultaneous reliance on opposing strands of constitutionalist thinking does not make for an easy or happy co-existence.

These contradictory positions have led to the Constitution, as an important national source of law, being overshadowed by a near automatic and far-reaching reliance on the judicial enforcement of international law.[111] A constitutional drought of sorts has occurred in that the country's public law culture has increasingly been equated with international law. This is not a mere formal or superficial issue either. The *Urgenda* judgments show that in rendering effective legal protection courts have had to stretch the realms of possibility in applying international law both indirectly and directly, while neglecting the Constitution.[112] Ideally, courts in the Netherlands should have been able to develop and rely on a strong Constitution-based culture in reviewing state action or inaction in important fields such as climate policy. This approach would arguably have resulted in a sounder and more credible legal basis in the *Urgenda* case, as opposed to the current over-reliance on international law. The aim though should not be to exclude international law from the equation, but to allow article 21 of the Constitution

[110] See also Burkens et al., *Democratische rechtsstaat*, 358-359.

[111] Compare Ernst M.H. Hirsch Ballin, *De Grondwet in politiek en samenleving. Rechtsstaatlezing 2013* [The Constitution in Politics and Society: Rechtsstaat Lecture 2013] (The Hague: Boom Lemma, 2013), 9-13.

[112] See also De Graaf and Jans, "The Urgenda Decision," 525 who ask whether specific constitutional provisions have "lost their meaning".

to fulfil a prominent role. However, the effect of the bar on judicially reviewing acts of parliament has been to limit case law on the Constitution, which in turn has negatively impacted on the country's constitutional culture in general.

VIII. ON JUDICIAL DESTABILISATION AND CONSTITUTIONAL REFORM

The idea of creating a "destabilisation branch" of government has been mooted in rethinking the traditional separation of powers. The purpose of such a branch would be to intervene in the event structures become ossified by not adapting quickly enough to a changing environment.[113] When the idea is applied to the *Urgenda* case, the three Courts involved, although not forming a new or special branch of government, did arguably act as "destabilisation" agents by interrupting state bureaucracy on the issue of climate change. Settled patterns of state thinking and decision-making were questioned and overturned by these Courts, much as a special destabilisation branch might do. The effect of their intense scrutiny of the state's policy in reducing greenhouse gas emissions was to fundamentally question the conventional setting of the separation of powers in the Netherlands. The Courts were not deterred by the notion that the *separation* of powers requires standard deference on the part of unelected courts when faced by clearly formulated government policy and action. The radical nature of these judgments is confirmed by some commentaries which speak of the need to maintain a clear separation of powers which would preclude courts from moving too far into the political domain.[114]

The modern reality though is more complex and demanding than relying on traditional maxims about the separation of powers and the settled role of the courts. Democratic theory has come to show that classic arguments about the courts being undemocratic, thereby casting doubt on the function of judicial

[113] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2018), 123-124 discussing the constitutional use of Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987).

[114] Consider especially Schutgens, "Urgenda en de trias," 2270; Lucas Bergkamp, "Het Haagse klimaatvonnis: Rechterlijke onbevoegdheid en de negatie van het causaliteitsvereiste [The Hague Climate Judgment: Judicial Incompetence and the Negation of Causality]," *Nederlands Juristenblad*, no. 33 (2015): 2278, 2287. Consider also Besselink, "Meer legitiem," 3081, and Leonard Besselink, "Naschrift [Postscript]," *Nederlands Juristenblad*, no. 9 (2018): 606; L.F.M. Besselink, "Machtenscheiding in de Urgenda-zaak [Separation of Powers in Urgenda]," *Tijdschrift voor Constitutioneel Recht* 11, no. 2 (2020): 128, 130, 150.

review, need to be revisited. Pierre Rosanvallon explains that today "electoral democracy" is reinforced or buttressed by "indirect powers", to which the power of judgment belongs.[115] This power has a place in the "general grammar of democratic action" and is "yet another way of regulating the political system in a democracy".[116] In this scheme a recourse to the courts can itself be viewed as a way of allowing people to make themselves heard, in addition to "episodic democracy" through the ballot box. It is also in this context that pressing situations may and do arise which require the destabilisation of everyday decision-making and political bargaining. In the process mainstays such as the separation of powers and the role of the courts might have to be reinterpreted and reconfigured in meeting real needs. There is definitely a case to be made for courts acting as agents of destabilisation in this way.

In principle, therefore, an argument can be made in support of the three Courts' intervention in the *Urgenda* case. However, as the analysis has shown, the judgments are open to criticism in the way they approached the matter. Even challenging state action in the cause of exceptional situations, such as climate change, cannot result in near free-floating balancing exercises by courts. The function of destabilisation, too, is in need of *predictability* if it is to be repeated in future and justified for the present. Otherwise, the act of destabilisation would miss the mark and mean little more than instability. The very fact that the District Court departed from national private law in judging the state's policy, whereas the Court of Appeal and the Supreme Court emphasised public international law, illustrates the lack of and need for predictability in this regard. In addition, the *overstretching* of judicial power in the application of international law also became apparent. This is because of the District Court's blurring of the constitutional distinction between the direct and indirect application of such law. To this can be added the doubts about whether the strict scrutiny of the

[115] Pierre Rosanvallon, *Counter-democracy. Politics in an Age of Distrust* (Cambridge: Cambridge University Press, 2008), 8. See too Rob van Gestel and Marc Loth, "Voorbij de trias politica: Over de constitutionele betekenis van 'public interest litigation [Past the Trias Politica: Constitutional Meaning and Public Interest Litigation]," *Ars Aequi* 68, (2019): 6.

[116] Rosanvallon, *Counter-democracy*, 247.

state's policy by the Court of Appeal and the Supreme Court would have been repeated by the ECtHR.

As explained in the previous section, the lack of a *national constitutional voice* in the Netherlands lies at the root of such difficulties with the *Urgenda* judgments. For too long the *irreconcilable dichotomy* between legal constitutionalism, expressed by treaty review, and political constitutionalism, expressed by the bar on constitutional review, has been allowed to simmer. The consequence of which has been considerable outsourcing to international law and an overreliance on private law. The polycentric questions raised in these judgments about the enforcement of essentially third generation rights should have benefitted from the moorings of a strong national-based constitutional culture in tandem with the country's international obligations. Instead, the bar on the constitutional review of acts of parliament has resulted in the strange case of the missing Constitution where one is needed for exercises in deliberation and justification, and even destabilisation.

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Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia

Stefanus Hendrianto*
University of San Fransisco, the United States of America
shendrianto@usfca.edu

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Abstract

Previous studies on the development of socio-economic rights in Indonesia heavily focus on the Constitutional Court's decisions in upholding the rights. But there is still minimum study on the political economy behind the development of socio-economic rights in Indonesia. This article will analyze the development of socio-economic rights through the lenses of the right to social security. This article relies on two major theoretical frameworks to analyze the development of the right to social security in Indonesia. The first theoretical framework is the authoritarian constitutionalism in the economic sphere. The second theoretical framework in this article is Kathrine Young's theory of the construction of socio-economic rights. This article postulates that the rights to social security has been constitutionalized but not constituted in Indonesia for several reasons. First, and foremost, the legacy of authoritarian constitutionalism that prioritizing economic growth over the fulfilment of social economic rights. The "growth" ideology has contributed to the discrepancy between the constitution and reality, in which the government merely considers protection of socio-economic rights as extra cost, which will hamper the growth of the economy. Second, the lack of philosophical and comparative analysis in the interpretation of rights to social security. Third, the transformation of the Court as a detached court in the enforcement of the rights to social security. The element of detachment is clearly seen in the Court's

* Stefanus Hendrianto studies the Indonesian constitutional system from a comparative, philosophical, historical, and theoretical perspective. Currently, he is an affiliate scholar at the University of San Francisco. He holds a Ph.D. degree from the University of Washington School of Law in Seattle, and an LLM from Utrecht University in the Netherlands, in addition to his LLB degree from Gadjah Mada University, Indonesia. He is the author of Law and Politics of Constitutional Court: Indonesia and the Search for Judicial Heroes (Routledge, 2018).

too much deferral to the Executive and Legislative branches in defining the scope and meaning of the right to social security. Finally, the failure of social movement to create a new narrative on injustice and the importance of rights to social security.

Keywords: Authoritarian Constitutionalism, Indonesia, Constitutional Court, Judicial Review, Right to Social Security, Social Economic Rights.

I. INTRODUCTION

The establishment of a new constitutional court, i.e. the Indonesian Constitutional Court and the inclusion of socio-economic rights were among the outcomes of the constitutional reform in Indonesia. But these two pivotal inclusions Constitutional Court do not automatically resolve the issues of growing income and wealth inequality in Indonesia. While the last four administrations (Wahid, Megawati, Yudhoyono and Widodo) have advocated for the social safety net policies, the government has been struggling to deal with the issue of wealth and income inequality in recent decades.

The current President Joko Widodo, commonly known as Jokowi, has made increasing the welfare of citizens and addressing social inequality key priorities of his presidency. The Jokowi administration has advocated the social safety net policies, the National Health Insurance-Healthy Indonesia Card, and the educational program through the Smart Indonesia Program. Nevertheless, these policies do not seem to have been implemented in the context of the fulfillment of socio-economic rights. At the same time, the Constitutional Court has not been successful in defining the scope and meaning of socio-economic rights, and it often defers to the Executive and Legislative branches of government to give the normative meaning of the rights. The civil society and people organizations also have limited success in claiming socio-economic rights, and the Jokowi administration has mostly hijacked their agenda.

This article will analyze the development of socio-economic rights through the lenses of the right to social security. The right to social security deserves attention because it is not only aimed to extend benefits to citizens, but also to advance social and economic rights through complex social policies. In other

words, the government's policies on social security and the Court's decisions on the issues are the miniature of the struggle to constitute the socio-economic rights in the Indonesian political and legal system. Moreover, with a major objective to universalize health insurance and pensions in Indonesia, the Indonesian government has an ambitious attempt to deliver particular forms of social economic protection on a national scale.

1.1. The Authoritarian Constitutionalism in the Economic Sphere Framework

This article relies on two major theoretical frameworks to analyze the development of socio-economic rights in Indonesia. The first theoretical framework is the authoritarian constitutionalism in the economic sphere. Michael Albertus and Victor Menaldo argue that one key function of authoritarian constitution is to consolidate a new distribution of power, which includes economic power.[1] To accomplish this goal, an authoritarian regime can use constitution to weaken or destroy some sources of political and economic power of certain group and distribute those sources to a new autocratic coalition.[2] According to Albertus and Menaldo, there are two features of political economy of authoritarian constitution: first, authoritarian constitutionalism can enable a dictator to co-opt threats to his rule and create stronger property rights protection for his array of supporters. Second, authoritarian constitutionalism usually linked to higher private investments rates, so that the regime can generate financial resources to sustain their rule.[3] These features suggest that authoritarian constitutionalism can also have other consequences beyond serving the regime's political interest.

Before jumping into the discussion, a few caveats and clarifications are necessary about the authoritarian constitution and authoritarian constitutionalism. Constitutionalism is not necessarily applicable to all states that have written constitutions, even if such constitution contains

[1] See Michael Albertus and Victor Menaldo, "The Political Economy of Autocratic Constitutions," in *Constitutions in Authoritarian Regimes*, ed. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press, 2014), 53.
[2] Albertus, "The Political Economy," 58.
[3] Albertus, "The Political Economy," 54.

institutional arrangement and individual rights. For example, the 1982 Constitution of People's Republic of China (hereinafter "PRC") contains the Fundamental Rights and Duties of Citizens, but the PRC was fully authoritarian. In this article, I define the authoritarianism in a general term, in which the dictator or the autocrat usually makes all decisions that both formally and practically cannot be challenged.

Mark Tushnet has described two other versions of non-liberal constitutionalism: the "mere" rule of law constitutionalism and authoritarian constitutionalism.[4] The "mere" rule-of-law constitutionalism implies "the decision maker conforms to some general procedural requirements and implements decisions through, among other things, independent courts, but the decision maker is not constrained by any substantive rules regarding, for example, civil liberties."[5] In general, the system under the mere rule of law constitutionalism satisfies the minimum core of the rule of law requirement; the government is limited by law, but it may alter the laws whenever it discovers a problem. The government usually respond to the law after it encounter some obstacles and it alters the laws according to the procedural requirement.[6]

Some characteristic of the authoritarian constitutionalism according to Tushnet are the following: the regime is controlled by a domination party; the regime does not arrest political opponents arbitrarily, but it may impose a variety of sanctions; the regime allow reasonable open discussion and criticism of its policies; the regime operates reasonably free and fair elections; the dominant party is sensitive to public opinion and alters its policies to response to public views; there is a mechanism to ensure that the amount of dissent does not exceed the level it regard as desirable.[7]

Drawing from Tushent's formulation, this paper tries to analyze some characteristic of constitutionalism in Indonesia. In the case of Indonesia,

[4] Mark Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," in *Constitutions in Authoritarian Regimes*, ed. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press, 2014).
[5] Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100, no. 2 (January 2015): 391, 396.
[6] Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," 39.
[7] Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," 45.

Soeharto's New Order regime (1966 – 1998) was operating under the framework of absolutist constitutionalism, in which General Soeharto made the decision alone and his decision can't be challenged formally and practically. The New Order regime manipulated the election with fraud and intimidation in a systematic way. Moreover, the regime arrested political opponents arbitrarily and it does not allow any dissents.

There are two features of political economy of New Order regime: first, Soeharto protected the economic interest of his main allies, i.e., the military and conglomerates; second, the regime encourage private foreign investment (in addition to the oil revenues) with the hope for stimulating economic activity and therefore economic growth, and, eventually sustaining their rule.[8] The emphasis on economic growth was also coupled with social programs in the education and health care sector, and primary in the agriculture sector, with the emphasis on food security.[9] Nevertheless, the emphasize on economic growth will trump the social programs, as those programs will depend upon the flow of foreign investments.[10] Based on the combination of two features of political economy of the New Order regime, one can label the regime as the authoritarian-crony capitalist regime.

Authoritarian-crony capitalism was put to halt in 1998 after the fall of Soeharto. Nevertheless, from 1999 to 2014, there was no new political-economic system that emerged or consolidated to replace the New Order's authoritarian – crony capitalism. This period was a period of contestation between many new political forces and the old one.[11] In the realm of

[8] See Richard Robison, *Indonesia: The Rise of Capital* (North Sydney, NSW, Australia: Allen & Unwin, 1986).

[9] For an analysis on the New Order Regime and Food Security policy, please see Jamie Davidson, "Then and Now: Campaigns to Achieve Rice Self-Sufficiency in Indonesia," *Bijdragen tot de Taal-, Land- en Volkenkunde* 174 (2018): 188–215.

[10] For a detailed analysis on the role of investments and economic growth during the New Order regime, please see Rizal Mallarangeng, "Liberalizing New Order Indonesia: Ideas, Epistemic Community and Economic Policy Change, 1986 – 1992," (PhD diss., the Ohio State University, 2000). See also Rizal Mallarangeng, *Mendobrak Sentralisme Ekonomi Indonesia* [Breaking the Economic Centralism in Indonesia] (Jakarta: Kepustakaan Populer Gramedia, 2002), 1986-1992.

[11] For an excellent analysis of the political economic in the post New Order period, please see Vedi R. Hadiz and Richard Robison, "The Political Economy of Oligarchy and the Reorganization of Power in Indonesia," in *Beyond Oligarchy: Wealth, Power and Contemporary Indonesian Politics*, ed. Michael Ford and Thomas B. Pepinsky (Ithaca, New York: Southeast Asia Program, Cornell University, 2014).

constitutionalism, there was a series of constitutional reforms that took place from 1999 to 2002. The constitutional reforms have generated a new constitutionalism that stand in between a "mere-rule" of constitutionalism and authoritarian constitutionalism. The dominant party system has gone, and the new regime has run reasonably fair and free election. While, the government does not arrest political opponent arbitrarily, it still imposes a variety of sanctions against the opposition and political dissidents. Moreover, the government still ensured that the amount of dissent does not exceed the level that it regards as tolerable.

The rise of Jokowi in 2014, however, restored the authoritarian constitutionalism in the economic sphere, in which Jokowi emphasize infrastructure and economic growth, with a clear focus towards making it easier for foreign investors to invest in Indonesia.[12] While the military has (partially) retreated from the political and economic arena, President Jokowi and his allies in different political parties still maintain a cozy relationship with large number of private conglomerates. Consequently, the Jokowi administration could not mobilize significant scale of capital from Indonesia a by increasing taxes for the private conglomerates. As his administration cannot impose taxes for the private conglomerates, Jokowi then has to use the same playbook as Soeharto, which is to rely on foreign investment. Indeed, Jokowi has been advocating social security policies, but the priority of his administration is about the economic growth. The "growth" ideology, however, has contributed to the discrepancy between the constitution and reality,[13] in which it merely considers the protection of socio-economic rights as the extra cost that will hamper the growth of the economy.

[12] For a detailed analysis of the political economy of Jokowi's administration, please see Max Lane, "Amidst Indonesia's Nationalist Atmospherics: The Changing Politics of Jokowi's Economics," *ISEAS Perspective*, no. 64 (2015).

[13] The core argument in this article was inspired by the analysis of the co-relation between neoliberalism and socio-economic rights in South Korea. Please see Joo-Young Lee, "Neoliberal Developmentalism in South Korea and the Unfulfilled Promised of Economic and Social Rights," in *Economic and Social Rights in a Neoliberal World,* ed. Gillian Macnaughton & Diane F. Frey (Cambridge University Press, 2019).

1.2. Young's theory on constituting socio-economic rights

The second theoretical framework in this article is Kathrine Young's theory of the construction of socio-economic rights.[14] Young's theory clarifies the Indonesian Constitutional Court's approach to judicial review. Like many newly established constitutional courts, the Indonesian Constitutional Court are still struggling to develop legal or doctrinal approach to decisions. Therefore, one must take many other factors into account in understanding the Court. Young postulate three crucial elements for the construction of socio-economic rights: interpretation, enforcement and contestation. First, the methods of interpreting social and economic rights are achieved through a combination of philosophical and comparative legal analysis.[15] For instance, there is a trend among the judges in different jurisdictions to refer to the notion of human dignity or the "minimum core" created by the United Nations of Economic, Social and Cultural Rights.[16]

This article argues that the constitutional guarantee of socio-economic rights and the ratification of the International Covenant on Economic Social and Cultural Rights have failed to be constituted as part of legal and social norms in Indonesia. The Constitutional Court decisions on the socio-economic rights, especially on the right to social security, are neither based on the concept of minimum core nor the human dignity. Moreover, the Court did not interpret the socio-economic rights in light of the notion of individual rights, in which the rights holder can demand the enjoyment of the ensured rights. Instead, the Court has interpreted socio-economic provisions as obligation on the state to ensure citizens would enjoy social security benefits. The bottom line is that there is lack of philosophical and comparative analysis in the Court's interpretation of rights to social security.

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[14] Katharine Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2014).

[15] Young, *Constituting Economic*, 27-31.

[16] Young, *Constituting Economic*, chapter 2 and 3. The Courts in South Africa, India, Germany, and Canada are examples among many domestic courts that draw on the concept of human dignity in their decisions. In the meantime, the Colombian Constitutional Court is the exemplar of the domestic court that chose to accept a minimum core requirement.

Young's second dimension of constituting social rights is the process of enforcement of the rights. Young explains that there are two wrong models of enforcement; first, judicial usurpation, which occurs when the judiciary interprets the rights by assuming control of the political system, and, second, the abdication models, in which the judiciary decline to protect constitutional rights.[17] Apart from these wrong models, Young posited five different typologies of judicial review in socio-economic rights adjudication. First, *deferential review*, in which the court defer the substantial interpretation of socio-economic rights to the elected branches.[18] Second, *conversational review*, in which the Court engages in the interbranch dialogue to resolve the scope and meaning of rights.[19] In the third model, *experimental review*, the court seeks to engage the stakeholders – government, interest groups and political parties in providing immediate steps toward solution of the enforcement of socio-economic rights.[20] A fourth type of review is *managerial review*, which occurs when the court is not only prescribe the substantive content of the right and its remedies, but also involve in the ongoing supervision of the detailed plans of the implementation of the remedies.[21] Finally, *preemptory review*, which involve rigorous scrutiny of government legislation and the court might overturn the legislation and followed by the issuance of remedies in the form of positive obligation.[22]

In the context of right to social security in Indonesia, this article argues that the Court has failed to engage in a meaningful review of the rights. The Court gives to the Executive and Legislative branches too much leeway in defining the scope and meaning of the right to social security. One of the major recurring issues raised before the Court is the issue of mandatory participation in the social security program. In the last decade, the Court had consistently deferred to the Executive and Legislative branches to determine

17 Young, *Constituting Economic*, 134.
18 Young, *Constituting Economic*, 143 -147.
19 Young, *Constituting Economic*, 147 -150.
20 Young, *Constituting Economic*, 150 -155.
21 Young, *Constituting Economic*, 155 – 162.
22 Young, *Constituting Economic*, 162 – 166.

the existence of mandatory participation in the social security program. Nonetheless, the Court had defined the obligation for the employers to charge the premium to their employees could be understood as a social security tax. For the Court, such tax is necessary for the government to maintain the national insurance system. Indeed, the compulsory participation is a delicate issue, yet the Court should be more proactive in finding a balance between government's reliance on the compulsory premium and individual citizens who want to keep their own doctor. In sum, the Court has chosen a deferential model and decide that the decision-making authority on right to society security is placed on the elected branches of government.

Finally, Young posits that the legal meaning of socio-economic rights is the product of social movements.[23] She believes that social movements are instrumental in constituting socio-economic rights through contestation, mobilization, agitation, articulation and insistence upon the fundamental importance of socio-economic rights. For Young, through constitutional contestation, social movements are capable to create a new "constitutional culture" in three different ways.[24] First, the movement is successful in creating a new constitutional vision; second, the movement provides an alternative presentation of the orthodoxies that exclude socio-economic rights; finally, the movement engages in framing the injustice, by creating a new narrative about injustice that form a new consciousness and support for socio-economic rights.

This article posits that the social movements in Indonesia has contributed to the creation of the new narrative on the rights to social security prior to the adoption of the law. Indeed, the advocacy group under the banner of Social Security Action Committee has mobilized and pushed for the adoption of social security legislation. Nevertheless, the social movements have stop short because it does not continue the contestation by litigation in the Constitutional Court. Most of the claimants that came before the

[23] Young, *Constituting Economic*, 223-225.
[24] Young, *Constituting Economic*, 23-234.

Court on right to social security are individual workers or political activists that has a different constitutional vision.

In sum, this article postulates that the rights to social security has been constitutionalized but not constituted in Indonesia for several reasons. First, and foremost, the legacy of authoritarian constitutionalism that prioritizing economic growth over the fulfilment of socio-economic rights. Second, the lack of philosophical and comparative analysis in the interpretation of rights to social security. Third, the Court has transformed itself as a detached court in the enforcement of the rights to social security. The element of detachment is clearly seen in the Court's too much deferral to the Executive and Legislative branches in defining the scope and meaning of right to social security. Finally, the failure of social movement to create a new narrative on injustice and the importance of rights to social security.

II. CONSTITUTIONL GUARANTEE OF SOCIAL AND ECONOMIC RIGHTS IN INDONESIA

2.1. The Second Amendment

The Second Amendment of the 1945 Constitution in the year of 2000 adopted a lengthy provision of Bill of Rights. Nevertheless, despite its impressive results, there was no significant philosophical debate on the idea of human rights.[25] A plausible explanation for the lack of debate was because the Bill of Rights in the Second Amendment was based on the Human Rights Law.[26] Presumably, the drafters believed that they had discussed the issue during the passing of the Human Rights bill, and, therefore, they could quickly move to adopt those provisions without any further debate.[27]

But, looking back at the drafting of the Human Rights bill, one can question the commitment of the drafters in entrenching the Bill of Rights in the top hierarchy of constitutional values. The then Minister of Justice

[25] See Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002* (Jakarta: Kompas Book Publishing, 2008), 217 - 221.

[26] Law No. 39 of 1999 on the Human Rights.

[27] For instance, Muhammad Ali from PDIP argued the protection provided in the Human Rights Law and the MPR decree on human rights was more than enough. See Indrayana, *Indonesian Constitutional Reform*, 217.

Muladi stated that the Government had selected those rights from the Universal Declaration of Human Rights (UDHR), which did not conflict with the spirit of the nation, the 1945 Constitution, and the Pancasila.[28] For example, the Second Amendment recognizes the right to choose a religion but does not include the right to change one's religion. Thus, the Bill of Rights in the Second Amendment has been customized in a manner considered to be reflective of the spirit of authoritarian constitutionalism.

The Second Amendment guarantees a catalog of socio-economic rights. But the Socio-Economic rights provision in the new Constitution is somewhat limited. The Second Amendment only provides a single primary provision on socio-economic rights in Article 28H, which are included the rights to housing, healthy environment, medical care,[29] and the right to social security.[30] In addition, the Fourth Amendment, in 2002, stipulates that "every citizen has the right to education"[31] and it required an education budget of 20% of the national budget.[32] There is a contrast between the Indonesian Second Amendment and the Universal Declaration of Human Rights (UDHR). In the UDHR, at least six provisions explicitly guarantee socio-economic rights, including the right to food, clothing, housing, medical care, education, and leisure.[33] The provision of the socio-economic rights in the Indonesian Constitution is not as comprehensive as the UDHR.

Indonesian ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2005[34] long after the adoption of the Second Amendment. While the ratified international treaties have the same effect as domestic law,[35] the language of socio-economic rights in the ICESCR has not been part of the common vocabulary in the political and legal discourse

[28] Nadirsyah Hosen, "Reform of the Indonesian Law in Post-Soeharto Era (1998 -1999)" (Ph.D. diss., the University of Wollongong), 243.
[29] The 1945 Constitution of the Republic of Indonesia, Art 28H (1).
[30] The 1945 Constitution of the Republic of Indonesia, Art 28H (3).
[31] The 1945 Constitution of the Republic of Indonesia, Art 31 (1).
[32] The 1945 Constitution of the Republic of Indonesia, Art 31 (4).
[33] The Universal Declaration of Human Rights, Art 22-27.
[34] The United Nations recorded that Indonesia formally ratified the Covenant on Feb 23, 2006. Nevertheless, Indonesia adopted the Covenant into domestic law on October 28, 2015.
[35] The Covenant was adopted into Law No. 11 of 2005.

in Indonesia. First, the Committee on Economic, Social and Cultural Rights has emphasized on the notion of "minimum essential levels of each of the rights",[36] which related to essential foodstuffs, primary health care, basic shelter and housing, and the basic forms of education.[37] But one could not find the language of "basic needs" or "minimum core requirements" in the Indonesian Constitutional Court's jurisprudence. Second, the preamble of the ICESCR acknowledges that the rights enshrined in the documents derive from the inherent dignity of the human person.[38] But the concept of "human dignity" is largely absent from the vocabulary of the Indonesian Constitutional Court.[39]

2.2. Article 33

A part of constitutional provision that related to the debate on socio-economic rights is Article 33 on economic clause. Article 33 stipulates: (1) the economy shall be structured as a common endeavor based upon the family principle; (2) Branches of production that are important to the state, and that affect the common good, are to be controlled by the state; and (3) the earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest prosperity of the people.[40] The constitutional reform process left the original version of the Article 33 untouched, but also added a new provision which states that "the organization 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."[41]

[36] UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Annex III, UN Doc. E/1991/23 (1990) ["General Comment No.3").

[37] UN Economic and Social Council (ECOCOS).

[38] International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

[39] The term "human dignity" can be translated in a rough way as "*manusia yang bermartabat*." The term "*manusia yang bermartabat*" appears in Article 28H (1) on the right to Social Security and article 34 (2), which mandated the government to establish social security policy. Nevertheless, in the Court's jurisprudence on the right to social security, the Court never develop what is the meaning of the term "*manusia yang bermartabat*" within the context of right to social security.

[40] The 1945 Constitution of the Republic of Indonesia, article 33 (1), (2), (3). The English translation of article 33 is my translation.

[41] The 1945 Constitution of the Republic of Indonesia, article 33 (4).

Article 33 is not supposed to be part of the provision of the Socio-Economic rights, but in reality, the Court has often conflated the notion of socio-economic rights with state control over natural resources under Article 33.[42] Instead of defining socio-economic rights as individual rights, the Court has consistently granted privileges to the State to control natural resources in the name of protecting of socio-economic rights.[43] Moreover, the Court relied heavily on the notion of a state's duty to fulfill citizens' rights. The Court repeatedly ruled that the state has a duty to fulfil socio-economic rights, but the Court was rarely upholding socio-economic rights as positive rights, entitling the rights holder to demand that enjoyment of the rights be ensured.[44] In sum, the Court has often interpreted socio-economic provisions with the communitarian element, which stressed the role of the state to ensure citizens enjoy their rights.

III. SOCIAL SECURITY POLICIES AND SOCIO-ECONOMIC RIGHTS IN INDONESIA

3.1. The Wahid and Megawati Administration

The contagion from the Thai Baht crisis in July 1997 triggered an economic crisis, which spread rapidly across Southeast Asia. The value of Indonesian rupiah fell by 85 percent in one year; domestic, domestic prices skyrocketed by 78 percent, and the national poverty rate increased from 15 percent in mid-1997 to 33 percent by the end of 1998.[45] The economic crisis, eventually, became one among many factors that accelerated the

[42] See Stefanus Hendrianto, "The Divergence of A Wandering Court: Socio-Economic Rights in the Indonesian Constitutional Court," *The Australian Journal of Asian Law* (University of Melbourne)16, no. 2, Article 5 (2016).

[43] Hendrianto, "The Divergence of," 9-10, 14 -15.

[44] According to a traditional approach, social economic rights require from the state to act positively (positive rights), imposing on the state duties to provide goods or services such as work, housing, health care, education, welfare, and social security. Nevertheless, the debate on socio-economic rights reveals that socioeconomic rights have a negative articulation, such as protecting the weakest members of society, like the poor or workers or marginalized. For further analysis of various philosophical and legal approaches on the nature of socioeconomic rights please see Jorge M. Farinacci-Fernós, "Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach," *Hasting Int'l and Comp Law Review* 41, no.1 (2018).

[45] See Sudarno Sumarto and Samuel Bazzi, "Social Protection in Indonesia: Past Experiences and Lessons for the Future" (MPRA Paper No. 57893, SMERU Research Institute, University of Muenchen, March 18, 2011).

fall of Soeharto's New Order regime. The acute economic crisis posed a huge challenge for the government to reduce the poverty rate. Surprisingly, during the period of recovery from the crisis under the Wahid-Megawati administration (1999 – 2001), the poverty incidence declined by approximately 1.3% per year.[46] The trend continued when Megawati took over the Presidency after the removal of Wahid from office, in 2001. The poverty rate was around 18.2% in 2002 and fell to 16.7%, when Megawati left office in 2004.[47]

In March 2001, the Wahid administration established a Task Force to design a National Security System.[48] But Wahid was removed from office in July 2001, and Megawati took over the presidency, and she continued to push for the National Social Security System.[49] Megawati was interested in the program for re-election purposes as her party relied on electoral support from the workers and urban poor. On January 26, 2004, the Megawati administration submitted the bill on the National Social Security System (*Sistem Jaminan Sosial Nasional* or SJSN) to the House of Representatives (*Dewan Perwakilan Rakyat* – DPR), but DPR did not pass the bill until September 29, 2004.[50] By that time, Megawati already lost her-election bid to Susilo Bambang Yudhoyono.

Megawati signed the bill on her last day in office, October 19, 2004. The preamble of the general elucidation of the SJSN declares that the Law was passed to fulfil the mandates of Articles 28H and 34 of the Constitution. Article 28H (3) says that everyone shall have the right to social security, and art 34(2) says that the state shall develop a system of social security

[46] See Arief Anshory Yusuf and Andy Sumner, "Multidimensional poverty in Indonesia: How Inclusive has Economic Growth been?" (Working Paper No. 2017/09, ANU College of Asia & Pacific, June 2017).

[47] See Mudrajad Kuncoro, Tri Widodo and Ross McLeod, "Survey of Recent Developments," *Bulletin of Indonesian Economic Studies* 45, no. 2 (2009): 151 -76.

[48] In March 2001, Vice President Megawati Instructed her secretary to establish the Working Committee on National Security system based on the Decision of the Secretary of the Vice President No. 7 of 2001 (Kepseswapres, No. 7 Tahun 2001, 21 Maret 2001 jo. Kepseswapres, No. 8 Tahun 2001, 11 Juli 2001). When Megawati became President, she elevated the status of the Working Committee into an official government's team to prepare the bill on the National Security system (*Tim Sistem Jaminan Sosial Nasional* -Tim SJSN - Keppres No. 20 Tahun 2002, 10 April 2002).

[49] For a more detailed analysis of the development of social security policies in Indonesia, please see Dinna Wisnu, "Governing Insecurity in Indonesia and the Philippines: The Politics of Social Protection Reform," (Working Paper for 2nd Joint Symposium KSEAS and CSEAS, Kyoto University Japan, October 27 – 29, 2011).

[50] Law No 40 of 2004 on the National Social Security System (*Sistem Jaminan Sosial Nasional*) – SJSN Law.

for all of the people. Moreover, the Preamble also referred to the Universal Declaration of Human Rights and the International Labor Organization that provide a safety net for workers. Despite the fact that the right to social security was the basis of the enactment of the SJSN Law, the Law does not explicitly recognize the right to social security,[51] but instead, it narrowly defines the rights as five different forms of socials insurance, which include health insurance, old-age savings, worker pensions, work-accident insurance, and death benefits.[52]

3.2. The Yudhoyono Administration

The Yudhoyono administration, however, did little to implement the benchmark legislation of his predecessor, partly because the SJSN would have large fiscal consequences that had not been anticipated by Megawati administration. Nevertheless, the Yudhoyono administration adopted a populist approach through his pro-poor policies. From 2005 to 2008, the budget for poverty alleviation increased by 283%; most of the expenses have been in the form of subsidies to compensate for the impact of the increase of gasoline price. It was estimated 19.5 million households received an unconditional cash transfer from the government.[53] The Yudhoyono administration also promised to provide health insurance for the poor even though the SJSN law had been passed. Nevertheless, the rate of poverty reduction was only 0.5% per year in the Yudhoyono first term of office; the poverty rate was around 16.0% in 2005 and then fell to 15.4% in 2008.[54]

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[51] See Surabhi Chopra, "Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia," *Indiana Journal of Global Legal Studies* 22 (2015): 573, 611.

[52] The SJSN version of the social security is quite narrows because it only recognizes one type of social security, that is social insurance. Theoretically, social security takes three main forms: First, *social insurance*, which is a form of social security generated from contributions by the individual earner, the employer and sometimes also by the state, generally paid out for a period of time to meet certain contingencies. Second, *social transfers*, which can be non-contributory and financed through the tax system. Universal schemes may be available to all residents or to all members of certain groups such as the elderly. Third, *social assistance*, which is a form of social security for qualifying groups facing poverty or life-cycle circumstances requiring support. It is generally targeted at such groups, usually by way of a means test. See Peter Townsend, "Social Security and Human Rights," in *Building Decent Societies: Rethinking the Role of Social Security in Development*, ed. Peter Townsend (Basingstoke: Palgrave Macmillan, 2009); see also ILO (International Labour Organization), *Social Security for Social Justice and a Fair Globalization* (ILC. 100/VI) (Geneva: International Labour Office, 2011).

[53] See Eunsook Jung, "Campaigning for All Indonesians: The Politics of Healthcare in Indonesia," *Contemporary Southeast Asia* 38, no. 3 (2016): 476 -94, 482.

[54] See Kuncoro, Widodo, and McCleod, "Survey of Recent Development," 166.

The SJSN Law required the government to establish the Social Security Administrative Body (*Badan Penyelenggaran Jaminan Sosial* – BPJS) to administer the National Social Security System, within five years after the enactment of the Law. The Yudhoyono administration, however, missed the five years deadline in 2009. During his second term of presidency, Yudhoyono again did not show any sign that he wanted to implement the SJSN Law. It was only after some pressure from the NGOs that Yudhoyono passed the 2011 Law on Social Security Administrative Body (hereinafter the "BPJS Law"). In a nutshell, the Law establishes two social security administrative bodies, the Healthcare BPJS (BPJS *Kesehatan*), to administer health insurance and the Labor BPJS (BPJS *Ketenagakerjaan*) to administer old-age savings, worker pensions, work-accident insurance, and death benefits. Interestingly, the Preamble of the Elucidation of the BPJS Law stated that the Law was enacted to implement the Constitutional Court Decision No.7/PUU-III/2005 that mandated the implementation of the National Security System in Indonesia. I will explain in the latter part of the paper about the Court's decision.

The BPJS Law tasked BPJS Health to implement the National Health Insurance Programme (*Jaminan Kesehatan Nasional* - JKN) on January 1st, 2014. The Yudhoyono administration did comply with the mandate, and the JKN was officially launched on January 1st, 2014. President Yudhoyono stated that after the JKN, no more Indonesian people should be living without health coverage. The President stated that from now on, the poor could get treatment free of charge at Community Health Centres and hospitals by using the JKN coverage, managed by the BPJS.[55] Nevertheless, President Yudhoyono did not have a chance to enjoy the success of the JKN because he had to leave office in October 2014 because of the presidential term limit was due.

[55] "There should be No More Indonesians without Health Coverage: SBY," *The Jakarta* Post, December 31, 2013, available at_https://www.thejakartapost.com/news/2013/12/31/there-should-be-no-more-indonesians-without-health-coverage-sby.html.

3.3. The Jokowi Administration

Joko Widodo, who succeeded Yudhoyono, proposed various populist program during his campaign. Jokowi, adopted a similar scheme to his program when he was the Governor of Jakarta, in which he offers the Indonesian Smart Card (*Kartu Indonesia Pintar* - KIP), and the Indonesian Health Card (*Kartu Indonesia Sehat* – KIS). Jokowi also determined to issue the Prosperous Family Card (*Kartu Keluarga Sejahtera*). Jokowi envisioned that his Health Card should be distributed via Health BPJS. But the distribution of the Health Card has created confusion, whether the JKN and KIS should be combined into one scheme.[56]

The JKN was not a product of Jokowi administration, and, therefore Jokowi has been reluctant to fully support the program. One of the biggest problems for the JKN is that the fund is constantly in deficit because it spending more money to cover the cost of the treatment than it receiving in contributions.[57] In October 2018, Jokowi publicly criticized the Director of the Health BPJS for turning to the President to bail out the deficit.[58] In his public rebuke, Jokowi said the Director of BPJS should fixed the management of the JKN instead of depending on the state budget. A few months after Jokowi made his public rebuke, the Ministry of Health issued a new ministerial decree that places caps on medical procedures covered by JKN and imposing co-payments for hospital care. While the Ministerial Decree aims to curb the deficit, it does not offer a solution to its dependency on the state budget.[59] The bottom line is that the JKN

[56] There are several differences between JKN and KIS; under JKN, one has to enroll in the program and pay the premium, while KIS will be given and assigned by the government and free of charge as the government will cover all of the cost. KIS was explicitly designed for low income and poor families, while the JKN is a compulsory program all of the citizens. KIS shall be applied to every health clinic or hospital, while JKN is limited to registered clinic or hospital. For a more detailed analysis of the differences between JKN and KIS, please see Zahry Vandawati, Hilda Yunita Sabrie, Widhayani Dian dan Rizky Amalia, "Aspek Hukum Kartu Indonesia Sehat, "The Legal Aspect of Indonesian Health Card," *Yuridika* 31, no. 3 (September-December 2016).

[57] See Ade Prastyani, "Who'll Pay for Indonesia's National health insurance?" New Mandala, published February 28, 2019, https://www.newmandala.org/wholl-pay-for-indonesias-national-health-insurance.

[58] "President Rebukes Minister, State Insurer over Health Insurance Deficit," *The Jakarta Post*, Oct 17, 2018. https://www.thejakartapost.com/news/2018/10/17/president-rebukes-minister-state-insurer-over-health-insurance-deficit.html.

[59] By the time of the writing of this article, there are several events that took place concerning the tug of war between the Jokowi administration and the BPJS. On Oct. 30, 2019, Jokowi signed the Presidential Regulation No. 75/2019, doubling the premium for the first-class and second-class service while increasing the premium for the third-class service by 64 percent. In February 2020, the Supreme Court, however, has granted a judicial

still does not receive payment contributions from most citizens who are unresponsive in contributing to the program. The issue of contribution will then become a significant issue in the Constitutional Court, which I will analyse in the following section of the article.

IV. INEFFECTIVENESS OF THE COURT'S DECISIONS IN UPHOLDING THE RIGHT TO SOCIAL SECURITY

4.1. The First Wave of the Constitutional Court Litigations on the Right to Social Security

Only within four months following the enactment of SJSN, the Law was challenged in the Constitutional Court. In the *SJSN I* case,[60] a few managers of the provincial-level Public Health Insurance Administering Body challenged the provision that required the government to establish the Social Security Administrative Body (*Badan Penyelenggaran Jaminan Sosial* – BPJS).[61] They did not raise the right to social security, but rather, they framed their argument in the context of relation between the central and regional government. The claimants argued that the SJSN Law violated the Constitution because it authorized the central government to regulate social security issues.[62] They argued that the social security issue should fall under the jurisdiction of regional governments instead of the central government[63] Interestingly, the central government invoked the right to social security (art 28H) as the justification for the establishment of BPJS.[64]

The Court held that the SJSN Law was compatible with the art 34(2) of the Constitution, which requires the state to develop a national security

review of Presidential Regulation no. 75/2019 on health care security, effectively revoking the policy to increase the premiums for the Health Care and Social Security Agency (BPJS Kesehatan). On May 5, 2020, President Jokowi defied the Court's decision and issued Presidential Regulation (Perpres) No. 64/2020 on health insurance, which raised the premiums for BPJS Kesehatan.

60 Judicial Review of Constitutional Court Law, Decision No 007/PUU-III/2005 (hereinafter the *SJSN I* case) (The Constitutional Court of the Republic of Indonesia 2005).

61 SJSN Law, 2004, Art 5.

62 The *SJSN I* case, 2005, 19.

63 The 1945 Constitution of the Republic of Indonesia, Art 18 and 18A.

64 The *SJSN I* case, 2005, 47.

system for the citizens.[65] The Court also ruled, however, that the authority to administer the Social Security System lies not only on the central government but also on regional governments. Therefore, the SJSN may not prevent regional governments from developing social security systems as subsystems of the National Social Security System.[66]

Although the Executive invoked the right to social security in its oral argument, the Court did not address the issue in its judgment. The Court held that the SJSN was following the art 34(2) of the Constitution, which requires the state to develop a national security system for the citizens.[67] The Court also ruled, however, as already mentioned above, that the authority to administer the Social Security System lies not only on the central government but also on regional governments. The Court's ruling thus has no significant impact on socio-economic rights in Indonesia because it does not recognize a right to social security. Indeed, there is a constitutional guarantee of rights to social security in art 28H (3), but the Court decided the case merely on the grounds of the state must develop a social security system (art 34).

In sum, the decision is too simplistic because it cognizant of the dichotomy between positive article of socio-economic rights on the one hand (article 34), and negative socio-economic rights on the other (article 28H §3). This issue is related to the vertical-horizontal dichotomy, while socio-economic rights are normally adopted in vertical way, to impose on the state duties to provide goods for citizens, the socio-economic rights also have horizontal articulation, that is to protect citizens against private powerful economic forces. While the issue is not really at stake in this case, the Court must be aware of the dichotomy, especially as the Court must deal with the similar issues in the subsequent cases.

65 The *SJSN I* case, 2005, 263.
66 The *SJSN I* case, 2005, 264-65.
67 The *SJSN I* case, 2005, 263.

The issue of mandatory participation in the program began to arise in the *SJSN II* case.[68] Several individual citizens and political activists challenged a provision in the SJSN Law, which provides that a member of the National Security program must pay the contribution, which based on certain percentage of their income.[69] The Law states further that every employer must collect the contribution from their employees and send the fees to the BPJS.[70] The claimants argued that the Constitution guarantees the rights to social security, and, therefore, the government must cover all the costs for healthcare services instead of imposing fees on the citizens. The Court held that the Constitution never specify a model for the social security system.[71] The Court ruled that it is within the domain of the Executive and Legislative branches of government to pick any model of social security system, as long as it aims to empower the poor and the marginalized. The Court ruled further that the lawmakers have chosen the social insurance system, which was funded by a combination of the insurance premium and social subsidy through tax revenue.[72] The Court opined that while the social insurance system has its flaws, but it is within the domain of the executive and legislative branches to pick up such a system. In the end, the Court rejected the claimant's argument entirely.

In the *SJSN III* case,[73] a few political activists under the banner of Social Security Advocacy Team challenged the constitutionality a provision in the SJSN Law, which provides that the national health program shall be based on the principle social insurance and equity.[74] The claimant argued that the social insurance system requires the citizens to pay the premium to claim their rights. The claimants posited that the right to social security, in essence, means the citizens should enjoy their rights without any cost. The

68 Judicial Review of Constitutional Court Law, Decision No 50/PUU-VIII/2010 (the *SJSN II* case).
69 Art 17 (1)
70 Art 17 (2).
71 The *SJSN II* case, Para. 3.14.3
72 The *SJSN II* case, Para. 3.14.5
73 Judicial Review of Constitutional Court Law, Decision No. 51/PUU-IX/2011 (hereinafter the *SJSN III* case).
74 The SJSN Law, Art 19 (1).

claimants asked the Court to scrutinize the case because the violation of socio-economic rights is hard to be proven, especially in comparison with the violation of civil and political rights, which are more palpable.[75] The Court rejected the claimant's petition on the ground that the merit of the case was pretty much the same as the previous case, and so the Court's holding in the *SJSN II* case shall be applied to this case.

The Court's momentous decision on the right to social security is in the *SJSN IV* case,[76] which involves the constitutionality of the workers' participation provisions of the SJSN Law. The SJSN Law provides that employers must register their employees as participants in a social security program, under which they would be entitled to receive the benefits bestowed by the program.[77] Some labour unions went to the Court and argued that the SJSN Law had curtailed those rights, as the fulfilment of social security rights would be dependent upon the employers' good faith in registering their employees in the program.[78]

The Court ruled that the provision was unconstitutional as long as it was interpreted as a way to eliminate workers' rights to register in the social security program when their employers failed to register them.[79] It ruled that the provisions should be interpreted as follows: employers must register their employees as participants in a social security program, but workers have the right to register in a social security program if their employers fail to register their employees with the Social Security Administrative Body'.[80] Moreover, the Court seemed to move a step ahead in addressing the scope and meaning of rights to social security. In its judgment, the Court ruled that the provision was contrary to art 28H(3), which guarantees the right to social security because the employers could refuse to register their employees in the Social Security Program.[81] The Court held further that the State has

[75] The *SJSN III* case, 65.
[76] Judicial Review of Constitutional Court Law, Decision No. 70/PUU-IX/2011 (the *SJSN IV* case).
[77] The SJSN Law, art 13(1).
[78] The *SJSN IV* case, 2011, 7.
[79] The *SJSN IV* case, 2011, 44.
[80] The *SJSN IV* case, 2011, 44.
[81] The *SJSN IV* case, 2011, 40.

a responsibility to provide human rights protections, including rights to social security. In sum, the Court ruled that the SJSN Law does guarantee a right to social security, but at the same time, it held that social security is a state obligation instead of an individual right.

The nature of the *SJSN IV* case signified that almost by definition right to social security is horizontal in nature. The case explains the fact citizens operate against private employers; thus, the citizens, especially the weak and marginalized, need some protection against those private powerful corporations. This fact is crucial in the effort to change our view that socio-economic rights are merely a laundry list for the government to provide some goods or entitlements to citizens. Nevertheless, the Court had missed the opportunity to widen the scope of right to social security and instead it merely declaring that state has responsibility to give citizens what they are entitled to receive.

4.2. The Second Wave of the Constitutional Court Litigations on the Right to Social Security

After a long delay, finally, President Yudhoyono implemented a new health care program through Law Number 24 of 2001 on the Social Security Administrative Body (*Badan Penyelenggara Jaminan Sosial* – BPJS – hereinafter BPJS Law). One of the key provisions of the BPJS Law states that employers must periodically register themselves and their employees as the Participant to the BPJS (hereinafter the "participation provision").[82] The Law also imposes a penalty for employers who fail to register their employees periodically to BPJS. Moreover, the Law also stipulates that employers must charge a premium and–submitted the premium collection to BPJS.[83]

Not long after the enactment of the BPJS Law, the claimant in the *SJSN IV* case came back to the Court and challenged the "participation provision" in the BPJS Law because it is similar to the SJSN Law. In the *SJSN Law IV* case, the Court held the SJSN Law was conditionally unconstitutional if

[82] Law No. 24 of 2011, the Social Security Administrative Body Law, Art 15.
[83] Law No. 24 of 2011, the Social Security Administrative Body Law, Art 19.

the "participation provision" was interpreted as a way to eliminate workers' rights to register in the social security program when their employers failed to register them. The similar provision, however, reappeared in the exact wording in BPJS Law. In the *BPJS Law I* case, the claimant asked the Court to declare the "participation provision" unconstitutional. The Court accepted the argument and held that the "participation provision" in the BPJS Law was conditionally unconstitutional, and it must be interpreted that workers have the right to enroll themselves in the social security program if their employer fails to enroll them in the BPJS.

In the *BPJS Law II* case,[84] the claimants are several workers and labor unions who challenged BJPS Law and posited that the government had deprived their rights to health care and the right to social security through the enactment of the Law. The claimants raised the general quality health care under the BPJS and argued that the Law deprived their rights to enroll in a different program that provides better health care service than the BPJS. In their petition, the claimants invoked both the right to health care (article 28H section 1) and the right to social security (article 28H section 3).

The Court held that based on article 28H (3) the citizens has right to social security, which means that the state has a responsibility to develop a program that guarantees the fulfillment of that right, including a national insurance program.[85] The Court held further that the BPJS was developed to fulfill the constitutional mandate of right to health care (article 28H), under which the government must guarantee the health care service for the citizens who could not afford to pay the services. The Court then explained that for those who have higher income and want to enjoy a better health care service they are free to upgrade the health care service and payout of the pocket.[86] Thus, the government never deprive the rights of its citizen who want to enjoy a particular health care service. Concerning the premium, the Court held that the obligation for the employers to charge the premium

[84] Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014 (hereinafter the *BPJS Law I* case).
[85] Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 200.
[86] Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 204.

to their employees could be construed as a social security tax.[87] The Court explained that if the government does not impose such tax, then some people would refuse to pay the premium, which could jeopardize the national insurance system. The Court then rejected the claimant's petition entirely. In short, the Court acknowledged that BPJS Law does guarantee a right to social security and also right to health care, and its holding gives a stronger affirmation that the state must fulfill the social security rights.

The issue of compulsory participation in the BPJS Law did not die quickly. In the *BPJS Law V* case,[88] a few members of the Union of the State Electricity Company (*Serikat Pekerja* – PLN) challenged a provision in the BPJS Law, which provided that the participation in the national social security program is compulsory.[89] The claimants posited that they had received excellent health care insurance from the State Electricity Company, but the BPJS Law has deprived their excellent health care services, and instead, they have to enroll in the BPJS program that provided worse health services than their previous insurance. The Court rejected the petition and ruled that the Court has considered the subject matter in the *BPJS Law II* case, therefore the Court's previous decision shall be applied to this case.

The latest case that related to the compulsory nature of BPJS is the *BPJS Law VI* case, in which an individual continued to challenge the compulsory nature of the BPJS program. The claimant challenged the provision, which provided that "everybody, including a foreigner, who has been employed for at least six months in Indonesia, must enroll the Social Security system."[90] The claimant argued that she already has her private insurance, but now she has to enroll in the National Health Insurance program. While the claimant admits that the Law let her keep her private insurance, nonetheless, she argued she has to pay extra fees for her participation in the BPJS. The claimants argued that her private insurance provides a better converge and

[87] Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 210.
[88] Judicial Review of Constitutional Court Law, Decision No. 47/PUU-XIV/2016 (hereinafter the *BPJS V* case).
[89] The BPJS Law, Art 4 (g).
[90] The BPJS Law, Art 14.

so she will rely on her private insurance instead of the BPJS. Moreover, the claimant argued that she could not file two separate claims to BPJS and her private insurance, as the BPJS would presume that her private insurance has covered her. The Court ruled that crux of the matter of this case is dual enrollment in two different insurance programs instead of the constitutionality of a statue. The Court opined that it is a blessing that the claimant can enjoy her private insurance and while her contribution to National Health Insurance system will be enjoyed by other poor and marginalized people who are in much-needed health care services than the claimant. So, the Court rejected the claimant's argument.

In sum, the Court's decisions related to the right to social security have focused on the compulsory nature of the program. But, the Court has not been able to define the scope and meaning of the rights. So far, the Court's decisions have been focusing on reaffirming that the State has an obligation to guarantee the right to social security to the citizens.

V. EVALUATING THE LEGACY OF AUTHORITARIAN CONSTITUTIONALISM AND ITS IMPACT ON THE SOCIAL SECURITY POLICY

Almost twenty years have passed since the adoption of the Socio-economic rights in the Indonesian Constitution. The socio-economic rights, however, has not contributed a lot in fulfilling the promise of poverty alleviation by the Indonesian government. Three different administration has ruled the country since the adoption of the socio-economic rights, but none of these administrations have any drive to fulfill the promise of socio-economic rights. While each administration has launched different populist programs, the socio-economic rights have not played an important role in those programs. The exclusion of the socio-economic rights from the political and economic discourse in Indonesia can be understood through the legacy of authoritarian constitutionalism /authoritarian-crony capitalist regime.

As mentioned earlier, there are two main characteristics of the authoritarian capitalist regime in Indonesia: first, the regime protects the economic interests of its allies; second, the regime aims to foster economic growth by relying on private foreign investment. At the same time, the economic growth was also coupled with social programs with the final objective of sustaining the regime.

While Indonesia has moved beyond the authoritarian system and adopted a "mere" rule of law constitution, with the direct presidential election, but in reality, the post-New Order governments continue to apply the same playbook like Suharto's New Order regime. Considering that Megawati did not serve the full term, and she inherited the administration after the removal of Wahid, this paper will focus its analysis on the Yudhoyono and Jokowi administration.

5.1. The Yudhoyono Administration

Yudhoyono came to power during the early 2000s global commodity boom, and therefore, his administration immediately attracted capital-investments in natural resources extraction.[91] These investments drove the Indonesian GDP, but it failed to generate jobs for millions of young people entering the market every year. The GDP growth rose steadily in the first three years of Yudhoyono's administration and reached its peak at 6.3% in 2007 before falling to 6.1% in 2008 and then 4.4% in the first quarter of 2009 when the country was affected by the global financial crisis.[92] At the same time, labor-intensive manufacturing also declined during the Yudhoyono administration. When he came to power in 2004, the labor-intensive manufacturing sector was around 28%, and it dropped a level of 24% by the time he left office in 2014).[93] One of the consequences of the "growth" policy is that there is a certain percentage of the Indonesian workforces trapped in jobs in the informal sector.

[91] For an excellent summary of political economy under the Yudhoyono administration, please see Marcus Mietzner, "Reinventing Asian Populism: Jokowi's Rise, Democracy and Political Contestation in Indonesia," *East-West Center Policy Studies,* no. 72 (2015).

[92] Kuncoro, Widodo, and McCleod, *Survey of Recent Developments*, 166.

[93] Mietzner, "Reinventing Asian Populism," 14.

Yudhoyono also promised to fulfill his commitment to the poor through his social justice program. As mentioned earlier, Yudhoyono did not prioritize a national security policy, though he did introduce some pro-poor policies. In 2005, Yudhoyono administration introduced Health Insurance for the Poor (*Asuransi Kesehatan Masyarakat Miskin* – Askeskin). In 2008, the government replaced the Health Insurance for the Poor with People's Health Insurance (*Jaminan Kesehatan Masyarakat* – Jamkesmas). It was reported that around 75 million people were enrolled in the pro-poor insurance program. Apart from this program, Yudhoyono also introduced the Hope for Family Program (*Program Keluarga Harapan* – PKH) in 2007, under which the government will grant some cash to the family, as long as the mother went for regular check-ups during pregnancy and the children (aged 7 -15) stayed in school.[94]

Despite his pro-poor policies, Yudhoyono never made any explicit reference to the socio-economic rights in the Constitution. First, and foremost, the priority of the Yudhoyono administration is on economic growth. When he ran for re-election in 2009, one of Yudhoyono's campaign promises was to reach an economic growth of 7% per year.[95] In his State of the Union address in 2012, Yudhoyono made it clear that economic growth was one of the priorities of his administration.[96] In his address, Yudhoyono promised that his administration would launch the BPJS health, and by 2019, all citizens would enjoy the National Health Insurance. But the fact of the matter was that the total spending on health care was relatively low; in 2012, the government only allocate 3% of the GDP. Interestingly, Yudhoyono referred to the UN Millennial Development Goal, but he neither

[94] "Program Keluarga Harapan: Two Case Studies on Implementing the Indonesian Conditional Cash Transfer Program" (The Pro-Poor Planning and Budgeting Project, Working Paper No. 5, June 2008).

[95] "*15 Janji Duet SBY-Boediono* [15 Promises of Duo SBY-Boediono]," *Detik.com*, July 4, 2009, available at https://news.detik.com/pemilu/1159103/15-janji-duet-sby-boediono.

[96] "*Inilah Isi Pidato Kenegaraan Presiden SBY* [President SBY' State of Union Address]," *BeritaSatu.com*, August 16, 2012, available at https://www.beritasatu.com/nasional/66461/inilah-isi-pidato-kenegaraan-presiden-sby; see also "The State Secretariat Summary on the President's State of the Union Address," available at https://www.setneg.go.id/baca/index/pidato_kenegaraan_presiden_dalam_sidang_bersama_dpd_dan_dpr.

mentioned the constitutional provision on socio-economic rights nor the UN Convention on Socio-Economic Rights in his speech.[97]

5.2. The Jokowi Administration

Jokowi, came to power with the charisma of a man of action; thus, he became the antidote of Yudhoyono, who is known as a "thinking general" who put emphasize on many pompous speeches.[98] While Jokowi secured the presidency with his persona as a pragmatic and down-to-earth leader, in essence, his economic policies have not many differences with his predecessor. Like his predecessor, Jokowi has also been emphasizing the "growth" ideology.[99] In his 2014 campaign, Jokowi vowed to accelerate the GDP growth to reach 7% by the end of his first term. Although Jokowi managed to achieve a stable growth at 5% each year in his first term, nonetheless, his economic performance had fallen short of his promises. During his re-election campaign, Jokowi promises a more modest 5.5 percent growth for 2020. Jokowi has been under increased pressure to show that he was managing the economy well.

Apart from his emphasis on economic growth, Jokowi's economic strategy has also focused on the investment in infrastructure. At first, Jokowi's infrastructure strategy is a counterstrategy to his predecessor; under Yudhoyono's rule, Indonesia only spent around 4% of the GDP on infrastructure. But Jokowi is also hoping that his infrastructure strategy will be translated into manufacturing gains, which eventually will lead to economic growth. Thus, Jokowi began his administration by setting out a plan to spend 32% of the GDP by addressing infrastructure needs in the form of new roads, railroads, airports, seaports, and power stations.[100] But this infrastructure strategy has not yet been translated

[97] While this fact does not necessarily mean that the Yudhoyono administration denies socio-economic rights, the absence of reference to constitutional provision and the UN Convention on Socio-Economic rights signify that Indonesian political lexicons lacks a vocabulary for expressing normative and moral concepts that Indonesian legal culture after the fall of New Order regime have put emphasis on constitutional rights, which include socio-economic rights (as opposed to the non-rights legal culture under the New Order regime).

[98] For an excellent analysis of the rise of Jokowi, please see Mietzner, "Reinventing Asian Populism," 23-28.

[99] For an excellent analysis of the economic growth under Jokowi's administration, please see Timothy Cheston, "Indonesia and the Quest for 7% Growth: Overpromise or Underperformance?" (ATLAS of Economic Complexity -Center for International Economic Development at Harvard University), available http://atlas.cid.harvard.edu/stories/indonesia.

[100] Cheston, "Indonesia and the."

into manufacturing gains. At the same time, Jokowi's infrastructure strategy has resulted in significant loses in manufacturing exports in high-value sectors as the government did not make considerable investments in developing electronics and machinery industries.[101] In short, Jokowi's has been pressured by his promise of economic growth, the moderate pace of his infrastructure strategy, and the stagnant manufacturing exports.

Jokowi's economic strategy, which emphasizes on the growth ideology and infrastructure strategy, has overshadowed the promise of socio-economic rights. In 2014, Jokowi ran for presidency based on the programs so-called *Nawacita*, a Sanksrit term for nine programs. One of these nine programs include the improvement of the quality of life,[102] but the language of socio-economic rights is nowhere to be found in these nine programs.[103] The crux of the matter is Jokowi's priority on the economic growth and infrastructure strategy depends upon capital accumulation, which marginalized labor and social security because those elements could undermine growth and competitiveness. Jokowi has indeed improved the healthcare budget significantly during his first term in office,[104] but the improvement of the healthcare budget does not translate into an improvement of social security.

As mentioned earlier, Jokowi was quite reluctant to support the National Health Insurance Program (JKN) because it was not his project, but instead, he prefers to support his program known as the Indonesian Smart Card. BPJS Healthcare that oversees the JKN program has suffered deficits in five of the six years since it opened its business in 2014.[105] In 2019, it was predicted that

[101] Cheston, "Indonesia and the."

[102] The *Jakarta Post*, "Jokowi-Kalla Hawkish on Economic Policies," May 21, 2014. Available at https://www.thejakartapost.com/news/2014/05/21/jokowi-kalla-hawkish-economic-policies.html.

[103] Again, the "missing language of rights" and to be precise, the "missing language of socio-economic rights" in Indonesian political discourse does not automatically mean that the inexistence of these rights. Nevertheless, an increasing emphasis on individuals' rights in the Indonesian political dialogue is a necessary concomitant to the rights enshrined in the text of the constitution. While Jokowi may not deny the existence of rights, at the very least, his *Nawacita* does not frame the issue within the context of socio-economic rights. Such formulations will ultimately lead to unsatisfying social political arrangements.

[104] The government plans to spend IDR 132 trillion on healthcare in 2020, double the amount in 2015. But apparently, the focus of the healthcare program will be stunting prevention and reducing the maternal mortality rate.

[105] Shotaro Tani and Ismi Damayanti, "Indonesia Struggles to Pay for Huge Universal Health Care Program," *Nikkei Asian Review,* (August 2019), available at *https://asia.nikkei.com/Economy/Indonesia-struggles-to-pay-for-huge-universal-health-care-program.*

the deficit is set to balloon nearly $2 billion. As Jokowi administration has been reluctant to bail out the BPJS, the BPJS has announced its plan to raise the premium and removed 5.2 million people from the list of beneficiaries. In short, the Jokowi administration was reluctant to support the social security program. All of Jokowi's populist policies were only to serve his vote-getting priorities as evidence through greater spending on energy subsidies, and village fund program and three "magical" cards (the Smart Card – *Kartu Indonesia Pintar*, Pre-Employment Card – *Kartu Pra-Kerja*, and Cheap Food Card – *Kartu Sembako Murah*).

Jokowi's economic policies had also brought some negative implication on the social security system. Since the New Order period, manufacturing has become the main driving factor of economic growth. But as Jokowi's infrastructure policy had failed to boost the manufacturing industry, the growth in manufacturing had slowed significantly in recent years. As the manufacturing industry is shrinking, the informal sector workers continue to dominate Indonesia's workforce (58% of a total of 73.98 million workers). The workers from informal sectors were not automatically enrolled in the JKN program, because the Law prescribed that it is the employers who must register their workers. Thus, it is estimated that around 40 million workers in the informal sector are missing from the JKN enrollment.[106]

In sum, the socio-economic rights have not become adopted social and political norms. The last two administrations did not include the protection of socio-economic rights as part of their rhetoric. While they have launched different pro-poor policies, those policies are directed into vote-getting instead of the fulfillment of socio-economic rights. The "growth" ideology of both Yudhoyono and Jokowi administration consider that social security as costs that undermine growth; strengthening progressive taxation is also considered to hinder business activities and economic growth. At the same time, the government has been struggling to boost the participation from the working population to pay health premiums for the national insurance program. Indeed, the participation in the

[106] Prastyani, "Who'll pay for," *New Mandala*.

national insurance program has become one of the main issues that has been litigated a lot in the Indonesian Constitutional Court.

VI. THE FAILURE TO CONSTITUTE THE RIGHT TO SOCIAL SECURITY

The Indonesian Constitutional Court has significantly contributed to the democratic process in Indonesia by providing an avenue for the citizens to defend their rights. Nevertheless, the Court has not been successful in conducting a meaningful review of socio-economic rights. The Court's decisions in the series of the right to social security cases are the exemplar of the Court's failure to engage a meaningful review of socio-economic rights. Part of the problem is that the Court had missed to recognize the horizontal nature of socio-economic rights, especially right to social security. Not all sources of oppression and threats to individual liberty come from the government. Powerful private interests also affect the individual liberty. In the context of right to social security, the Court could not envision that right to social security is also meant to shield against or create an entitlement opposable to non-governmental actors. Instead of the Court merely prescribed the mandate for the government to develop a social security program.[107] Moreover, the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind. Under the current arrangement, the Court fails to move from the traditional work-related formulation of social security to broader inclusion of causes of poverty, especially for millions of workers who have no access to formal employment, and thus, they have no access to government sponsored social insurance.

6.1. The Devoid of substance and meaning of the Court's decision on Social Security

Overall, the Court's decisions in the cases of rights to social security reflects the lack of philosophical and comparative knowledge of the judges.

[107] If many political rights are easily enforced because of their negative character, like with their socioeconomic counterparts, political and civil rights can also come in the positive and horizontal variety. See Farinacci-Fernós, "Looking Beyond the," 42.

Historically, social security is a central feature of the modern welfare state that emerged from late-nineteenth century Europe.[108] The most detailed elaboration of the right to social security by a United Nations treaty body is General Comment No. 19 on the Right to Social Security produced, in 2007, by the Committee on Economic, Social and Cultural Rights (CESCR), which is responsible for the ICESCR. While a full examination of the international law on the right to social security is not possible in this paper, I would like to give a brief overview of the right to social security. The right to social security encompasses the right to access and maintain benefits, whether in cash or in a different kind of support to protect citizens from the following predicament: (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.[109]

In the past several decades, the welfare state arrangements have become more limited in Western Europe, especially in the time of austerity when the states have gone extra miles in limiting social security.[110] Indonesian just started its ambitious project to provide social insurance to the citizens, and, consequently, all the constitutional stakeholder must learn and re-learn from the experience of the developed countries in ensuring the right to social security. Indonesia does not need only the fundamental rights-based recognition on the social security but also the arrangements to ensure that a minimum level of social security protection is at all times guaranteed.

In almost two decades of the Constitutional Court's existence, one can hardly find any reference to the International Covenants on Economic, Social and Cultural Rights despite the Indonesian has ratified the covenants. Apart from the Constitution, the Covenant should be appropriately cited in the Court's decisions, especially considering that the legislature has ratified the

[108] Townsend, 52.
[109] The CESCR General Comment No. 19, para. 2.
[110] See Ingrid Leijten, "The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection," *German Law Journal* 16, no. 1 (2015): 23.

Covenant into Indonesian Domestic Law. Moreover, one could not find the language of "basic needs" or "minimum core requirements" in the Indonesian Constitutional Court's decisions either. The Committee on Economic, Social and Cultural Rights has emphasized on the notion of "minimum essential levels of each of the rights,"[111] which related to essential foodstuffs, primary health care, basic shelter and housing, and the basic forms of education."[112] Many international experts on human rights have drawn the connection between the material protection necessary for the right to life and the rights to water, health, water, and housing.[113] Nevertheless, the language of "basic needs" or "minimum core requirement" or "right to life" are mostly absent from the Indonesian Constitutional Court decisions.

The preamble of the International Covenant on Civil and Political Rights acknowledges that the rights enshrined in the documents derive from the inherent dignity of the human person.[114] At the domestic level, many courts have linked the notion of human dignity and the protection of socio-economic rights. Nevertheless, the concept of "human dignity" is also largely absent from the vocabulary of the Indonesian Constitutional Court. The term "human dignity," however, does not have a prominent place in the Indonesian Constitution. Therefore, it is not a surprise that the concept was mostly absent from the Court's jurisprudence. Moreover, the Court appears to be unaware of such a concept, and there is no attempt from the judges to borrow such language and apply it in the Court's jurisprudence.

6.2. A Detached Court

The Court's decisions in the right to social security also reflect the general trend in the Court's approach, in which the Court relied zheavily on the notion of a state's duty to deliver social security benefits. Most of the Court's decisions in the social security related cases were framed in

[111] UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Annex III, UN Doc. E/1991/23 (1990) ["General Comment No.3"].
[112] UN Economic and Social Council (ECOSOC).
[113] Young, *Constituting Economic and Social Rights*, 35 -39.
[114] International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

the context of article 34, which provided the State's obligation to develop a system of social security for all of the people. As explained earlier in this article, the Court has failed to understand the negative – positive and vertical-horizontal dichotomies of socio-economic rights. The Court merely see the right to social security as the positive rights, in which the State has duty to provide social security. Nevertheless, almost by definition, socio-economic rights aim to protect weaker and vulnerable groups in the society.[115] Therefore, socio-economic rights have a negative articulation that aims protect the weakest members of society, like the poor or workers, against powerful private economic forces or even the state.

Moreover, the Court was leaving the scope and meaning of the right to social security to the legislative and executive branches of government. As mentioned earlier, neither the SJSN Law or the BPJS Law explicitly recognize the right to social security. The fact of the matter is that the Laws define the rights to social security more narrowly as five different forms of socials insurance, which include health insurance, old-age savings, worker pensions, work-accident insurance, and death benefits.

In recent years, the Court has taken a non-interventionist approach,[116] but the Court should be more active in defining the scope of the rights to social security. For instance, there is an issue of whether the livelihood assistance is included in the rights to social security. In the past, the Yudhoyono administration provided an unconditional cash transfer from the government, and, the Jokowi administration provided many different cards, such as the Cheap Food Card. But it was not clear whether those assistances as part of the social security rights. The issue is that livelihood assistance has not been considered as part of the social security, but rather

[115] See Farinacci-Fernós, "Looking Beyond the," 39. Many scholars simply see socioeconomic rights only as positive or vertical rights. This view is most likely to be influenced by the U.S.-centered view, which view the negative political rights opposable to the state are the norm, and, therefore, socio-economic rights are merely positive rights. See Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, "Introduction," in *Consequential Courts: Judicial Roles in Global Perspectives*, eds., Diana Kapiszweski, Gordon Silverstein & Robert A. Kagan (Cambridge Univ. Press, New York, 2013), 17.

[116] Stefanus Hendrianto, *Law and Politics of Constitutional Court: Indonesian and the Search for Judicial Heroes* (Milton: Routledge, 2018).

as vote-getting strategy for politicians. At this moment, there is no clarity on the status of livelihood assistance, which include the minimum necessary for basic living expenses.

In short, there is a gap between the Constitutional recognition of socio-economic rights and their protection in the Constitutional Court. Instead of defining the scope of the rights to social security, the Court repeatedly ruled that the state must fulfill rights to social security. Thus, the Court has interpreted socio-economic provisions as an obligation for the state to ensure citizens enjoy their rights.

6.3. The lack of support structures for the Court.

As mentioned earlier, Kathrine Young argued that one of the critical dimensions of constituting socio-economic rights is the contestations of social movements.[117] The social movements contribute to the entrenchment of socio-economic rights can take place in several ways: first, the social movement may counter the current obstacles to socio-economic rights present in the law through "the disturbance of orthodoxies and the framing of injustice."[118] Second, the social movement may provide a new narrative about rights, constitutions, and treaties, a new narrative that helps to bridge the gap between the formal recognition of rights and its protection in daily lives.[119]

The failure of the Indonesian Constitutional Court to engage socio-economic rights, especially the right to social security, is linked to the weak of social movements in advocating the right to social security in the Indonesia Constitutional Court.[120] Most of the claimants in social security

[117] Young, *Constituting Economic, Social Rights*, 291.
[118] Young, *Constituting Economic, Social Rights*, 291.
[119] Young, *Constituting Economic, Social Rights*, 291.
[120] Despite the flaws, the adoption of Socio-economic rights in the Second Amendment has paved the way for citizens to demand the fulfillment of those rights through judicial review in the newly established constitutional court. The 2003 Constitutional Court Law allows individual citizens to file a claim before the Court, but in theory, the claimants can only challenge statutes in an abstract way rather than to solve a concrete constitutional case. Most of the claims related to socio-economic issues invoked third-party or large groups standing, in which the petitioner inserted constitutional claims on behalf of public interests or injury that suffered by a large group of citizens or class. For a detailed analysis of the role of public interest litigation in the Indonesian Constitutional Court, please see Dominic Nardi, Jr., "Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia's Constitutional Court" (Michigan: Ph.D. Thesis-University of Michigan, 2018).

cases are individual workers or political activists. But the influence of the civil society and people organization in the social security litigation has been limited. The lack of support structure from the civil society is quite surprising considering that the civil society was heavily involved in pushing the government to implement the SJSN Law. An Advocacy group under the banner of the Social Security Action Committee (*Komite Aksi Jaminan Sosial*, KAJS) was at the forefront of the struggle to pressure the government to implement the SJSN Law.[121] The KAJS advocacy was successful in prompting the Executive and Legislative branches to pass the BPJS Law that created the JKN. The launching of the JKN might be seen as the victory for the KAJS and eventually led them to stop the battle. But the advocacy must not stop with the launching to JKN because they must ensure the sustainability of the program, and more importantly, they should help the Court to define the meaning and scope of the rights to social security.[122]

VII. CONCLUSION

The pattern of prioritizing economic growth and reliance on foreign investment for infrastructure will remain central to Jokowi's presidency. This approach will continue to generate a contradiction with his pro-poor policies because the Jokowi administration will refuse to impose a progressive tax on the rich to finance the JKN as it will be considered hampering economic growth. At the same time, the administration will continue to prioritize the magical card program and to show lukewarm support for the National Health Insurance program. Above all, the pro-poor policies were not framed within the rhetoric of the socio-economic rights.

The Constitutional Court has not taken any interventionist approach in the litigation related to the rights to social security. The socio-economic rights jurisprudence in the Indonesian Constitutional Court is not based on the notion

[121] For a detailed analysis of the role of KAJS please see Dinna Wisnu, *Governing Insecurity*; see also Jung, *Campaigning for All Indonesians*.

[122] The KAJS leading activist Surya Tjandra was recently named as the Deputy Ministry of Agrarian Affairs and Spatial Planning in the Jokowi's second administration.

of individual rights, in which the rights holder can demand enjoyment of the right to be ensured. Instead, the Court has interpreted socio-economic provisions as an obligation on the state to ensure citizens enjoy their rights. The absence of robust jurisprudence on socio-economic rights in Indonesia will allow the posture of socio-economic rights to remain at a low level. Until there is a breakthrough in the Constitutional Court or a decisive constitutional moment, the socio-economic rights in Indonesia will remain to be constitutionalized but not constituted in Indonesia.

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The Role of Constitutional Courts in Promoting Healthcare Equity: Lessons from Hungary

Mária Éva Földes*
The Hague University of Applied Sciences, The Hague, The Netherlands
e.m.foldes@hhs.nl

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Abstract

This paper explores whether constitutional litigation contributes to sustaining the equity element of the right to health. Equity entails a fair distribution of the burden of healthcare financing across the different socio-economic groups of the population. A shift towards uncontrolled private healthcare provision and financing raises equity challenges by disproportionately benefitting those who are able to afford such services. The extent to which equity is enforced is an indicator of the strength of the right to health. However, do domestic constitutional courts second-guess, based on equity, policy decisions that impact on healthcare financing? Is it the task of constitutional courts to scrutinize such policy decisions? Under what conditions are courts more likely to do so? The paper addresses these questions by focusing on the case of Hungary, where the right to health has been present in the Fundamental Law adopted in 2010 and the Constitutions preceding it. While the Hungarian Constitutional Court has been traditionally cautious to review policy decisions pertaining to healthcare financing, the system has been struggling with equity issues and successive government coalitions have had limited success in tackling these. The paper discusses the role of constitutional litigation in addressing such equity concerns. In doing so, it contributes to the discussion on the role of domestic constitutional courts in the protection of social and economic rights.

Keywords: Right to Health, Constitutional Litigation, Healthcare Equity.

* Lecturer at the European and International Law Program and member of the research group Changing Role of Europe of The Hague University of Applied Sciences, former assistant professor at the University of Vienna, Austria, Institute for European Integration Research and former post-doctoral researcher at Tilburg University, The Netherlands, Department of European and International Public Law and Tilburg Law and Economics Center. She holds a PhD and an MA degree from Central European University, Hungary and an MA degree from the University of Leuven, Belgium.

I. INTRODUCTION

Equity in access to healthcare is an essential element of the right to health[1] and an indicator of healthcare systems' performance.[2] It means that access to healthcare is based on medical need rather than ability and/or willingness of patients to pay for healthcare services and goods.

Health and healthcare-related rights are stipulated in many domestic constitutions around the world. A study that reviewed the entire corpus of contemporary national constitutions and constitutional documents (195 in total), concluded that 69% of them contained provisions on healthcare.[3] The findings also revealed that the status and strength of such provisions differed across the countries: only 41% of the contemporary domestic constitutions contained a justiciable right to healthcare, i.e., an individual right enforceable via domestic courts and subject to legal remedy. The remaining 28% stipulated healthcare as a non-binding aspirational goal and/or principle guiding the design and implementation of state policies.

Much has been written about the factors that influence the constitutional entrenchment and justiciability of the right to health. Country features such as legal tradition and regional location,[4] and healthcare system features such as organization and the financing model,[5] have been found relevant for the inclusion of a judicially enforceable right to health in the constitution of a country. Studies have identified a link between the financing model of the healthcare system and the impact of health rights litigation on equity. Adopting a comparative law and healthcare system approach, such research has shown that healthcare systems financed predominantly through social health insurance are more likely to have a judicially enforceable right to health compared to tax-funded systems.[6] However,

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1 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 14, The Right to the Highest Attainable Standard of Health, UN Doc. No E/C.12/2000/4 (2000).

2 World Health Organization, "The world health report" : 2000 : Health systems : improving performance. World Health Organization, 2000. https://apps.who.int/iris/handle/10665/42281 (last accessed on 14 November 2019).

3 Courtney Jung, Ran Hirschl and Evan Rosevear, "Economic and Social Rights in National Constitutions," *American Journal of Comparative Law* 62, no. 4 (2014): 1043-1098.

4 Jung, Hirschl, and Rosevear, "Economic and Social."

5 Colleen M Flood and Aeyal Gross (eds.), *Comparative Health Rights at the Public/Private Divide* (Cambridge: Cambridge University Press, 2014).

6 Flood and Gross, *Comparative Health Rights*.

scoping reviews conclude that evidence concerning the impact of health rights litigation on equity remains inconclusive in the context of a shortage of systemic comparative analysis of within-country or cross-country cases.[7]

This paper intends to contribute to the discussion on equity in healthcare by focusing on the related role of domestic Constitutionazl Courts. The focus of the analysis will be on the element of healthcare financing, with equity understood as entailing a fair distribution of the healthcare financing burden across the different socio-economic groups of the population.

The paper addresses these issues by drawing some lessons from the case of Hungary. Hungary has been chosen as a country with a system of social health insurance, a financing model that has been found in the above-cited literature as linked to a judicially enforceable right to health at domestic level.[8] Having ratified the relevant international instruments on social and economic rights, Hungary has committed itself to respect, protect, and fulfill equity as an essential element of the right to health. As an EU Member State, it has committed itself to safeguard equity in healthcare as a fundamental value shared by all European countries. Nevertheless, the Hungarian healthcare system has been struggling with persistent equity challenges although the public scheme includes a statutory right to full cost coverage for most services provided within its framework. In the context of the equity challenges, the paper examines whether the financing model of social health insurance is linked to a judicially enforceable right to health, and whether health-rights litigation has been conducive to equity in the Hungarian case. Health-related rights have indeed been incorporated in successive domestic constitutions of Hungary and natural and legal persons have repeatedly invoked these rights to challenge government measures with an equity impact. Analyzing the jurisprudence of the Hungarian Constitutional Court, the paper explores the justiciability of the health rights stipulated in the constitution and the role of constitutional litigation in safeguarding equity in healthcare.

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7 Tatiana Andia and Everaldo Lamprea, "Is the Judicialization of Health Care Bad for Equity? A Scoping Review," *International Journal for Equity in Health* 18 (2019): 61-67.

8 Flood and Gross, *Comparative Health Rights*.

The paper starts with an overview of the concept of equity as enshrined in the international human rights regime. Related political commitments of European Union Member States are also outlined. The discussion then moves to the link between the financing model of the healthcare system and the role for and impact of health rights litigation on equity. Findings of studies adopting a comparative law and healthcare system approach are reviewed towards this end. Afterwards, the paper zooms into the case of Hungary. Following a brief overview of the country's healthcare system with focus on the financing model, the analysis proceeds to the health-related provisions of the successive Hungarian constitutions and their interpretation by the Constitutional Court. Relevant decisions delivered by the Constitutional Court between mid-1990s and 2018 will be reviewed towards this end.

It is important to note that, apart from constitutional litigation, several other mechanisms have been put in place in Hungary to enforce the statutory health-related rights guaranteed within the public, compulsory system of social health insurance. One such mechanism is the Equal Treatment Authority, a state agency with a mandate to investigate and sanction violations of the non-discrimination rule in healthcare. Another is the system of patients' rights representatives who work in healthcare facilities operating in the public system. They address patients' complaints, assist them with information provision, and advise them on rights enforcement.[9] Yet another mechanism is the Office of the Commissioner for Fundamental Rights (Ombudsman's Office), which investigates citizens' complaints and may initiate general or specific measures for redress. Hospital ethical committees and supervisory councils are also present in the system. Contribution of these various mechanisms to health equity has been discussed elsewhere[10] and is beyond the scope of the analysis included in this

[9] On the establishment and responsibilities of patients' rights representatives in the Hungarian system, see Judit Sándor, "Ombudspersons and Patients' Rights Representatives in Hungary," in *Protecting Patients' Rights? A Comparative Study of the Ombudsman in Healthcare*, ed. Stephen Mackenney and Lars Fallberg (CRC Press, 2002), 55-76.

[10] For further discussion on the role fulfilled by these mechanisms in the system, see Mária Éva Földes, "Addressing Equity in Health Care at the Public-Private Intersection: The Role of Health Rights Enforcement in Hungary," in *The Right to Health at the Public/Private Divide: A Global Comparative Study*, ed. Colleen M. Flood and Aeyal Gross (Cambridge: Cambridge University Press),229-232, 2014.

paper. Instead, this paper focuses specifically on the constitutional complaint mechanism and the justiciability of the health-related constitutional provisions.

The analysis ends with conclusions on the role of Constitutional Courts with focus on the following points: Should Constitutional Courts second-guess, based on equity, state action on healthcare financing? Is it the role of Constitutional Courts to perform a corrective function if state action is not conducive to equity? In doing so, the paper intends to contribute to the broader discussion on the role of domestic constitutional courts in the protection of social and economic rights.

II. EQUITY IN THE INTERNATIONAL HUMAN RIGHTS REGIME AND ON THE EUROPEAN AGENDA

The CESCR General Comment No. 14[11] on the normative content of Article 12 of the International Covenant on Economic, Social and Cultural Rights[12] conceptualizes equity as part of economic accessibility/ affordability of healthcare. The latter is an essential element of the right to the highest attainable standard of health enshrined in the Covenant. This element requires that payment for healthcare services, goods as well as services related to the underlying determinants of health, is affordable to everyone. Importantly, equity requires that lower-income households and socially disadvantaged groups in general, do not pay proportionately more of their income for health services and goods than higher-income households do. State Parties to the Covenant must respect, protect, and fulfill equity in healthcare regardless of the financing and organizational model of their domestic healthcare system.

Equity is also present in commitments made by European Union Member States to safeguard the fundamental values and principles of European healthcare systems. The health ministers in the Council of the European Union endorsed the shared value of equity, defined as equal access ensured according to need and regardless of ability to pay.[13] All EU Member States have committed themselves

[11] UN Committee on Economic, Social and Cultural Rights (CESCR).

[12] International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 22001 (XXI), U.N. GAOR, 21st Sess., Supp. No 16, U.N. Doc A/6316, 993 U.N.T.D. 3 (1996).

[13] Council of the European Union, "Council Conclusions on Common Values and Principles in European Union Health Systems", *Official Journal* C-146/1-3: 2006.

to achieve equity in healthcare regardless of the financing and organizational features of their respective domestic systems. Adopted in the form of Council Conclusions, this joint commitment was a response to case law developments in the field of cross-border healthcare that threatened to diminish the political control of national governments over decisions concerning the mechanisms used to finance and deliver healthcare services and goods.[14] Although the Council Conclusions lack a legal enforcement mechanism, they constitute commitments with political weight that have proven effective in paving the way for initiatives on patient rights in cross-border healthcare, quality of care, cross-country cooperation in rare diseases, and health.[15]

In 2017, the equity agenda received a fresh impetus with the inter-institutional proclamation and signature of the European Pillar of Social Rights.[16] Equity is enshrined in the Pillar through the commitment of EU Member States to ensure everyone's right to timely access affordable preventive and curative healthcare of good quality, and everyone's right to affordable long-term care services of good quality.[17] The implementation of the Pillar is primarily left to the national governments and the social rights set forth therein serve as a reference framework for country-level healthcare reforms. While the Pillar does not contain directly enforceable rights, EU institutions have committed themselves to further its implementation through a number of instruments including action to update, complement, and better enforce relevant EU law.[18]

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[14] On the political responses to the cross-border care case law, see Dorte Sindbjerg Martinsen, "Conflict and Conflict Management in the Cross-border Provision of Healthcare Services," *West European Politics* 32, no. 4 (2009): 792-809; Mária Éva Földes, "Health Policy and Health Systems: A Growing Relevance for the EU in the Context of the Economic Crisis," *Journal of European Integration* 38, no. 3 (2016): 295-309; Mária Éva Földes, "Member State Interests and European Union Law: The Case of Health Policy and Health Systems," in *Between Compliance and Particularism: Member State Interests and European Union Law*, ed. Márton Varju (Springer, 2019), 213-232, 221).

[15] See, for a discussion of such impact, Scott Greer, Nick Fahy, Sarah Rosenblum, Holly Jarman, Willy Palm, Heather A. Elliott and Matthias Wismar, "Everything You Always Wanted to Know about European Union Health Policies but were Afraid to Ask," 2nd edition (World Health Organization, Health policy series 54, 2019).

[16] European Parliament, Council of the European Union and European Commission. Proclamation of the European Pillar of Social Rights at the at the Social Summit for Fair Jobs and Growth in Gothenburg in Sweden on 16 November 2017. See "European Pillar of Social Rights," European Parliament, access 6 November 2019, https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

[17] Eurpean Parliament, Council of the. See Principles 16 and 18 of the European Pillar of Social Rights, respectively.

[18] European Commission, Establishing a European Pillar of Social Rights, 26.4.2017, COM (2017), 250 final.

As shown above, equity has found its place in international and European commitments. However, the proof of the pudding is in the eating: is equity also present in national level commitments? Is it an element of a judicially enforceable right to health entrenched as such in domestic constitutions? And, what factors make this more likely to happen? The following part of this paper reviews the findings of research exploring the relevance of one particular factor: the financing model of the domestic healthcare system.

III. THE ROLE AND IMPACT OF THE RIGHT TO HEALTH: RELEVANCE OF THE FINANCING MODEL OF THE HEALTHCARE SYSTEM

Research adopting a comparative law and healthcare system approach has revealed a link between the financing model of the healthcare system and the role for the right to health and health rights litigation at domestic level. A global comparative study carried out to explore this link[19] categorized countries into three "baskets" based on their financing model and specifically, the differential roles envisaged for public and private financing. These three baskets included, respectively: (1) countries (mostly high-income) that aimed at universal healthcare coverage and relied on public, tax-based financing as a defining characteristic of the system; (2) social health insurance/managed competition systems in (mostly high-income) countries that also aimed at universal healthcare coverage and were predominantly financed through mandatory health insurance via non-profit, public or for-profit, private sickness funds, and (3) public/private systems in a number of (predominantly) middle-income countries. The latter category included countries that either lacked universal healthcare coverage or had a two-tier system where an impoverished, publicly funded scheme existed alongside a privately financed scheme accessible only to those people who could afford such private payments.[20]

[19] Flood and Gross, *Comparative Health Rights*.

[20] "Public" in this category meant systems funded by tax finance as well as those partially funded by mandatory social health insurance or mandatory private insurance. See Colleen Flood and Aeyal Gross, "Litigating the Right to Health: What Can We Learn from a Comparative Law and Health Care Systems Approach," *Health and Human Rights* 16, no. 2 (2014): E62-72.

Although no causal relation was proven, findings revealed disparate roles for the right to health and health rights litigation within the three categories outlined above. Specifically, it was found that healthcare systems financed predominantly through social health insurance were more likely to have a judicially enforceable right to health within the public scheme, compared to tax-funded healthcare systems. Arguably, the design and structural features of social health insurance as a financing model, provide the necessary preconditions for health rights litigation. One such feature is the possibility to base individual claims on insurance contracts concluded between financiers and individuals. Another feature is the entrenchment of health-related rights and a basic "health basket" in statutes and the use of formal decision-making processes to establish the content of this health basket, guaranteed to everyone within the public scheme as part of a contract of insurance. The financing model of social health insurance is argued to be in itself conducive to a stronger role for the right to health and health rights litigation within the system. (This is in comparison with tax-financed public systems, which were found to usually not have a judicially enforceable right to publicly funded healthcare, with some notable exceptions like in Canada[21]). Furthermore, a constitutional right to healthcare was introduced in middle-income countries with two-tier systems where a publicly funded but under-resourced scheme co-existed with a privately financed scheme solely affordable to a small part of the population. In these countries, social and economic rights were included in the constitution as part of the agenda to remedy the retrogressive effects of gross inequities existing in the society.[22]

A number of studies have explored the impact of health rights litigation on equity. Although scoping reviews concluded that evidence on such impact was inconclusive due to the shortage of systematic comparative analysis of within-

[21] Colleen Flood, "Litigating Health Rights in Canada: A White Knight for Equity?" in *Comparative Health Rights at the Public/Private Divide*, ed. Colleen Flood and Aeyal Gross (Cambridge: Cambridge University Press, 2014), 79-106.

[22] Colleen Flood, "Litigating Health Rights." See also Colleen Flood and Aeyal Gross, "Introduction: Marrying Human Rights and Health Care Systems: Contexts for a Power to Improve Access and Equity," in *Comparative Health Rights at the Public/Private Divide*, ed. Colleen Flood and Aeyal Gross (Cambridge: Cambridge University Press, 2014), 1-18.

country or cross-country cases,[23] some findings are noteworthy. A quantitative study conducted in Brazil concluded that judicialization of healthcare did not benefit the most disadvantaged parts of the population but on the contrary, it facilitated the concentration of health resources in municipalities with higher socioeconomic status.[24] Other studies revealed that the impact of health rights litigation changed over time. In this respect, a recent shift towards more regressive effects has been found for example, in case of access to pharmaceutical products.[25] Some commentators warned about the negative impact of overusing health rights litigation to reinforce specific individual claims (e.g., for high-priced health services and goods), on state efforts to achieve the broader solidarity and fair distribution goals of public health systems.[26] Concerns have been voiced about undue distortions in the allocation of public funds in favor of the wealthier groups of the population who have the resources to litigate and enforce individual claims to expensive treatments.[27]

As shown by the studies outlined above, a focus point of the current debate is the link between the financing model of the healthcare system and the role of the right to health and health rights litigation at domestic level. Another question is the impact of health rights litigation on equity. The following parts of this paper contribute to this debate by examining these questions in the case of Hungary. To this end, it is first necessary to discuss the financing model of the Hungarian healthcare system and point out the challenges to equity. Afterwards, the analysis moves to the right to health in the public, mandatory healthcare system. The health-related provisions of the successive Hungarian constitutions are discussed next as interpreted by the Hungarian Constitutional

[23] Andia and Lamprea, "Is the Judicialization," note 8. *See also* Claudia Marcela Vargas-Pelaez, et al., "Judicialization of Access to Medicines in Four Latin American Countries: A Comparative Qualitative Analysis," *International Journal for Equity in Health* 18 (2019): 68.

[24] Luciana De Melo Nunes Lopes, Lopes et al., " "(Un)Equitable Distribution of Health Resources and the Judicialization of Healthcare: 10 Years of Experience in Brazil," *International Journal for Equity in Health* 18 (2019): 10.

[25] Claudia Marcela Vargas- Palaez et al., "Right to Health, Essential Medicines, and Lawsuits for Access to Medicines - A Scoping Study," *Social Science & Medicine* 121 (2014): 48-55.

[26] Everaldo Lamprea, "Colombia's Right-to-Heath Litigation in a Context of Health Care Reform," in *Comparative Health Rights at the Public/Private Divide*, ed. Colleen Flood and Aeyal Gross (Cambridge: Cambridge University Press, 2014), 131-158; Everaldo Lamprea. "The Judicialization of Health Care: A Global South Perspective," *Annual Review of Law and Social Science* 13 (2017): 431-449.

[27] Flood and Gross, *Comparative Health Rights*.

Court. The analysis continues with a discussion on the impact of health rights litigation in the Hungarian context and draws some broader conclusions on the role of Constitutional Courts in promoting the equity agenda in healthcare.

IV. THE HUNGARIAN HEALTHCARE SYSTEM

Hungarian legislation provides for a social health insurance system with compulsory membership. Opting-out of the public, compulsory system is not allowed but individuals may purchase additional, voluntary, private health insurance. The public scheme aims at universal coverage and provides a statutory right to full cost coverage for most healthcare services provided within its framework. Subsidized goods include prescription medicines in outpatient care and medical devices.[28]

4.1. The Financing Model

The Health Insurance Fund (hereafter: The Fund) was created in 1993 as a single public fund operating nationwide and originally separated from the central government budget. Financing for this Fund is sourced from employers and employees whose contributions are calculated as percentages of salary income and additional income. Parliamentary Act LXXX of 1997 on Persons Entitled to Social insurance Services and Private Pension and the Financing of These Services[29] regulates the contribution rates and the entitlement conditions within the public scheme. It also sets an obligation for the government to cover, from taxes, the shortfall in the revenues of the Fund. Furthermore, Parliamentary Act LXXXIII of 1997 on Services of Compulsory Health Insurance[30] stipulates an obligation for the Hungarian state to take responsibility for ensuring healthcare irrespective of the revenues stemming from social health insurance – which has meant, in practice, a

[28] For the overview of the organization and financing of the Hungarian healthcare system and the analysis of the politics of healthcare reforms, see Földes, "Addressing Equity in," note 11.

[29] Act LXXX of 1997 on Persons Entitled to Social Insurance Services and Private Pension and the Financing of These Services (1997. évi LXXX. törvény a társadalombiztosítás ellátásaira és a magánnyugdíjra jogosultakról, valamint e szolgáltatások fedezetéről) (Hung.).

[30] Act LXXXIII of 1997 on Services of Compulsory Health Insurance (1997. évi LXXXIII. törvény a kötelező egészségbiztosítás ellátásairól) (Hung.).

yearly injection of tax-based resources due to the chronic shortfall in the Fund's revenues.

The system was struggling over two decades with the challenges of strengthening social health insurance. The Fund was constantly facing revenue shortage issues and successive government coalitions had limited success in meeting these challenges. After 2010, the national government launched a centralization process including the integration of the Fund into the central government budget.

Although social health insurance is still dominant as a financing model, the Hungarian system has been shifting towards a more mixed model with elements of tax-based financing and notably, a growing share of private, out-of-pocket financing. The OECD estimated that in 2018, Hungary spent 6,6% of its GDP on healthcare, which is below the OECD36 average of 8,8%.[31] In 2017 (the latest year for which comparative data are available on health expenditure by type of financing), 61% of total health expenditure was financed by compulsory social health insurance, 8% by government schemes, 2% by voluntary health insurance schemes, and 27% by out-of-pocket payments.[32] The share of out-of-pocket payments is higher than the OECD36 average of 21%.

4.2. Persisting Challenges to Equity

The Hungarian healthcare system is designed to ensure financial protection of the population through the public, compulsory, social health insurance scheme with universal application. However, as shown by the OECD figures indicated above, the share of private, out-of-pocket financing of healthcare is significant at population level. Out-of-pocket payments constitute a regressive way of healthcare financing because they impose disproportionately higher burdens on low income groups who are thus more likely to face the risk of unmet medical need.

[31] OECD, *Health at a Glance 2019: OECD Indicators* (Paris: OECD Publishing, 2019), 153, https://doi.org/10.1787/4dd50c09-en.

[32] OECD, *at a Glance 2019, 157.*

Apart from private financing, private provision of healthcare has also been on the raise. In 2013-2015, the total capacity of licensed, privately financed outpatient care exceeded that of the publicly funded.[33] Private, for-profit healthcare providers operate alongside the public, compulsory, social health insurance scheme. This poses equity challenges because a shift towards uncontrolled private healthcare provision and financing disadvantages low income groups.

The share of Hungarian households with catastrophic healthcare expenditure has been high and on the rise: in 2014, it reached 21,6%. Catastrophic healthcare expenditure as a healthcare system performance indicator, generally refers to out-of-pocket spending for medical treatment that exceeds a certain share of a household's income and threatens the household's financial ability to meet its subsistence needs.[34] Data show that such expenditure is most common among the two lowest income quintile groups of the Hungarian population.[35] Although unmet need in healthcare is relatively low at population level (it affected 7% of the total population in 2014), the risk of unmet need among disadvantaged groups exceeds manifold the population average.[36]

One should also mention the persistence of informal (illicit) fees charged in the public, compulsory, social health insurance scheme. Studies have documented that patients regularly pay such fees although they should be able to access healthcare free of charge at the point of delivery, based on their statutory rights. Such illicit fees are most common in hospital care and certain forms of outpatient care, and government measures have had limited success so far in tackling them.[37] Informal payments remain widespread

[33] OECD, *Health at a Glance 2019,* 25.

[34] For the definition of this indicator, *see* Sharifa Ezat and Yasmin Almualm, "Catastrophic Health Expenditure among Developing Countries," *Health Research Policy and Systems* 4, no. 1 (2017).

[35] National Healthcare Services Center. *Health System Performance Assessment 2013-2015* (Állami Egészségügyi Ellátó Központ, *Magyar Egészségügyi Rendszer Teljesítményértékelési Jelentése 2013-15*) (December 2016), 25, https://mertek.aeek.hu/jelentes-2013-15.

[36] National Healthcare Services Center, *Health System Performance*, 26.

[37] Petra Baji, Petra Baji, et al.,"Informal Payments for Healthcare Services and Short-Term Effects of the Introduction of Visit Fee on These Payments in Hungary," *The International Journal of Health Planning and Management* 27, no. 1 (2011): 63-79.

and pose serious threats to equity. A study examining the distribution of the burden of informal payments across income groups concluded that Hungarian people with low income paid proportionally more for publicly provided healthcare through informal payments (compared to those with higher income).[38] Informal payments persisting in the Hungarian public scheme have been ranked among the most regressive in international comparison.[39]

V. THE RIGHT TO HEALTH IN THE HUNGARIAN SYSTEM

Health-related guarantees have been present in the Hungarian Constitution since 1949, with various status and strengths. The constitution in force between 1949 and 1989, i.e., during the years of state-socialism, only stipulated a workers' right to health, derived from the right to work and with content focused on occupational health and safety.[40] This constitution was substantially amended in 1989 marking the transition from state-socialism to democracy.[41] The amendments introduced a number of health-related provisions including the right to the highest attainable level of physical and mental health (Article 70/D), the right to social security (Article 70/E), and the right to a healthy environment (Article 18).

The current constitution, named Fundamental Law of Hungary, was adopted in 2011 and came into force in January 2012.[42] Although the Fundamental Law also contains a right to health, the "highest attainable" element was removed from its formulation. The current Article XX contains a "right to physical and mental health", guaranteed to everyone.[43] It also includes an obligation for

[38] Agota Szende, Anthony Johr Culyer, "The Inequity of Informal Payments for Health Care: The Case of Hungary," *Health Policy* 75, no. 3 (2006): 262–271.

[39] Szende and Culyer, "The Inequity."

[40] The Constitution of the People's Republic of Hungary, Act XX of 1949 (1949. évi XX. törvény, a Magyar Népköztársaság Alkotmánya) (Hung.), adopted on 18 August 1949.

[41] Act XXXI of 1989 on the amendment of the Constitution (1989. évi XXXI. törvény az Alkotmány módosításáról) (Hung.), adopted on 23 October 1989, in force until 31 December 2011.

[42] The Fundamental Law of Hungary (Magyarország Alaptörvénye), adopted on 25 April 2011, in force since 1 January 2012.

[43] The Fundamental Law of Hungary, Article XX (Magyarország Alaptörvénye).

the Hungarian state to "promote the effective application" of this right. The state must fulfill this obligation "through an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organizing safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring the protection of the environment".[44] Furthermore, the Fundamental Law contains a right for everyone to a healthy environment, a related prohibition of transport of pollutant waste into the territory of Hungary for the purpose of disposal, and an obligation for anyone who cause damage to the environment, to restore it or bear the cost of restoration.[45] It also stipulates entitlement to assistance in case of illness, maternity, invalidity, disability and other risks outside the individual's control, in conditions further specified at the statutory level.[46] The nature and extent of social measures are determined at the statutory level, and the Fundamental Law includes a requirement for the legislator to take into account "the usefulness to the community of the beneficiary's activity" when making such determinations. It is noteworthy that, unlike the previous constitution in force until 2011,[47] the current Fundamental Law no longer includes a right to social security. The rights' language has been replaced by a weaker language of aspirational goals set for the state. Accordingly, the state should "strive to provide social security to all of its citizens", implemented through a system of social institutions and measures. This change has reduced the possibilities to invoke this provision during litigation, since social security is no longer formulated as a legally enforceable fundamental right.

The scope and content of the right to health within the framework of the public scheme is further determined at the statutory level. Parliament defines the benefit package at the level of broad categories, in acts with national application. Parliamentary Act CLIV of 1997 on Health[48] sets forth a catalogue of health-related

44 The Fundamental Law of Hungary, Article XX.
45 The Fundamental Law of Hungary, Article XXI.
46 The Fundamental Law of Hungary, Article XIX.
47 *See* The Hungarian Constitution in force between 1989 – 2011, Article 70/E.
48 Act CLIV of 1997 on Health (1997. évi CLIV. törvény az egészségügyről) (Hung.).

individual rights, minimum standards and procedures as well as enforcement mechanisms. Noteworthy are the right to healthcare, a corresponding duty for the state to ensure access to healthcare for everyone including low-income (and other vulnerable) groups, and a number of patients' rights in the public health system such as the right to information, confidentiality, redress in cases of harm, personal data protection, and the prohibition of discrimination.[49] Parliamentary Act LXXXIII of 1997 on Services of Compulsory Health Insurance[50] defines the in-kind and cash benefits included in the health basket, regulates exclusion/inclusion of services at the level of broad functional categories, sets the referral rules, the contracting rules, and the payment methods. Decrees of the central government and ministerial decrees determine the health benefit package at more detail by regulating, e.g., the extent of the subsidy granted for prescription medicines and medical devices and the inclusion/exclusion of benefits in the health basket.[51] The government covers from the central budget the cost of healthcare provided in the public, mandatory system for certain vulnerable groups defined at the statutory level.

As noted in the introduction to this paper, besides constitutional litigation, individuals can also use other mechanisms to enforce their statutory health-related rights guaranteed within the public, compulsory system of social health insurance. Further discussion of these various mechanisms is beyond the scope of this paper. Instead, the following section turns to the constitutional complaint mechanism and the justiciability of the health-related constitutional provisions.

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[49] See, for further discussion of patients' rights in the Hungarian healthcare system, Mária Éva Földes, "Revisiting Patients' Rights to Information in an Enlarged Europe: A review of the Romanian and Hungarian Regulatory Framework in the Light of European Union Rules," *Orvostudományi Értesítő (Bulletin of Medical Sciences)* 83, no. 2 (2010): 134-139.

[50] Act LXXXIII of 1997 on Services of Compulsory Health Insurance (1997. évi LXXXIII. törvény a kötelező egészségbiztosítás ellátásairól) (Hung.).

[51] See Ministerial Decree No 32/2004 (IV. 26) on Criteria for Inclusion in Social Insurance Coverage of Authorized Medicinal Products and Food Supplements and on Changing Inclusion or Coverage (32/2004. (IV. 26.); Ministerial Decree No 14/2007 (III. 14.) on Inclusion in Social Insurance Coverage of Medical Aids and Coverage of Their Prescription, Supply, Reparation and Borrowing (14/2007. (III. 14.).

VI. JUSTICIABILITY OF THE HEALTH-RELATED CONSTITUTIONAL PROVISIONS: THE JURISPRUDENCE OF THE HUNGARIAN CONSTITUTIONAL COURT

The Hungarian Constitutional Court (hereafter: The Court) has interpreted the scope and content of the health-related constitutional provisions on several occasions. This section provides an overview of the Court's relevant jurisprudence and draws conclusions on the justiciability of these provisions. Justiciability requires that two conditions are met: (1) the constitutional provision serves as a basis for taking the state to court for its failure to fulfill its related obligations, and (2) natural and legal persons have legal recourse to ensure the fulfillment of their constitutional rights (usually through a mechanism for judicial review, set forth in the constitution).[52] The following section elaborates on these two conditions in the Hungarian context starting with remarks on the second one.

6.1. Curtailing *Locus Standi* for Natural and Legal Persons

Some remarks are due on recent changes in *locus standi* for natural and legal persons in Hungary. Between 1989 and 2012, any natural or legal person, *without legal interest*, was able to submit a petition to the Court requesting the constitutional review of a legal norm (*ex post* norm control).[53] Natural and legal persons have made extensive use of this possibility and frequently turned to the Court to challenge legal norms including those related to healthcare organization, financing, and delivery. Their access to the Court was, however, significantly curtailed in 2012 with the adoption of the Fundamental Law currently in force. The Fundamental Law introduced new rules on *ex post* review and reserved the right to initiate such proceedings to the Government, the Commissioner for Fundamental Rights (Ombudsman), the president of the Curia, the General Prosecutor, and one-quarter of the members of Parliament. Preliminary norm control (*ex ante* review) can only be initiated by Parliament, the President of the Republic, or the

[52] See Jung, Hirschl and Rosevear, "Economic and Social,"

[53] Act XXXII of 1989 on the Constitutional Court (*1989. évi XXXII. törvény az* Alkotmánybíróságról) (Hung.), in force until 31 December 2011.

Government (e.g., for the constitutional review of international agreements prior to their ratification).

Starting with 2012, natural and legal persons have been able to make use of the constitutional complaint mechanism only in concrete cases when their rights enshrined in the Fundamental Law were violated. At present, as a general rule, they can initiate such proceedings when their fundamental rights are infringed upon by a judicial decision and there are no other legal remedies available at national level (or all other remedies have been exhausted). The Court then reviews the judicial decision itself - not the law -, and may decide to annul it. The Court also admits cases where fundamental rights are directly violated, meaning, not by a judicial decision but by the application of an unconstitutional law, and there is no other legal remedy available. In such cases, the Court reviews the contested law and the legal consequence of the ruling can be annulment or termination of application.

6.2. Justiciability of the Constitutional Provision on Health

The Court delivered a landmark ruling on health-related rights in 1996,[54] when it was asked to scrutinize the rules set forth in Parliamentary Act LXIII of 1996 on the obligation of healthcare delivery and rules of territorial financing (hereafter: the 1996 healthcare financing act).[55] This act was adopted as a component of a reform package that intended to consolidate social health insurance, i.e., the financing model (re)introduced in Hungary after the fall of the state-socialist system. A number of petitioners including natural and legal persons, argued that the entire law was unconstitutional in itself because the new financing model violated the fundamental right to health, guaranteed to everyone as an individual constitutional right. Other petitioners contested certain provisions of the act including the specific payment mechanisms set forth therein and the powers conferred upon the Health Insurance Fund. The submissions reflected, in essence, the

[54] Alkotmánybíróság (AB) [Constitutional Court], MK. 1996. (105) 54/1996. (XI. 30.) (Hung.).

[55] Act LXIII of 1996 on the Obligation of Healthcare Delivery and Rules of Territorial Financing (1996. *évi XXXII. törvény* az egészségügyi ellátási kötelezettségről és a területi finanszírozási normatívákról) (Hung.).

dissatisfaction of petitioners with the state's withdrawal from the promises of free healthcare for all and the shift towards social health insurance as the new model of healthcare financing and basis of entitlements. The submissions embodied the petitioners' attempt to turn down these healthcare system reforms via constitutional litigation.

The Court addressed these complaints taken together in its Decision 54/1996.[56] In this ruling, it provided a comprehensive interpretation of the health-related provisions of the constitution in force at that time including Article 70/D on the right to the highest attainable physical and mental health, Article 70/E on the right to social security, and the constitutional protection of property. In essence, it argued that the constitutionality of the 1996 healthcare financing act could not be reviewed solely on the basis of Article 70/D on the right to health. As ruled by the Court, this provision, although it used a rights language, did not constitute a justiciable individual right. It merely formulated a responsibility for the state to ensure the functioning of a system of healthcare institutions and organize medical care. The state was at liberty to fulfil this responsibility as it saw fit, and within the limits of the capacity of the national economy. Article 70/D merely referred to the obligation of the state to create an economic and legal environment conducive to the fulfillment of the right to health.[57] The ruling made it clear that the Court was only willing to establish, in an abstract manner and in general terms, a minimum threshold to be guaranteed by the state. Failure to guarantee this necessary minimum could in principle lead to unconstitutionality, for example, in the extreme case of complete lack of a system of healthcare institutions and medical treatment on certain territories of the country. Beyond such extreme situations, fulfillment of state responsibilities in healthcare could not be assessed via constitutional review.[58]

[56] Act LXIII of 1996 on the Obligation of Healthcare Delivery and Rules of Territorial Financing (1996. *évi XXXII. törvény* az egészségügyi ellátási kötelezettségről és a területi finanszírozási normatívákról) (Hung.).

[57] *See also* Alkotmánybíróság (AB) [Constitutional Court], MK. 1995. 56/1995. (IX. 15.) (Hung.), at para. 260.

[58] Alkotmánybíróság (AB) [Constitutional Court], 1996, at para. 186.

As argued by the Court, "the constitutional right to the highest attainable physical and mental health could not be interpreted, in itself, as a legally enforceable individual right". Instead, this constitutional provision formulated a state responsibility, which included an obligation for the legislature to establish individual rights in certain areas of physical and mental health. In the view of the Court, the state enjoyed wide discretion in determining the financing model of the system and deciding on the entitlements and payment mechanisms. Its arguments can be further outlined as follows: Healthcare can be organized and financed in many different ways and the state is free to decide to alter the financing mechanisms and/or introduce an entirely new financing model. Nobody can claim a right to a certain model. Constitutional review is not the appropriate tool to assess the suitability of a system to guarantee healthcare entitlements. Unconstitutionality of the financing model can only be determined in extreme situations when it is unquestionable that the model is inherently unsuitable to fulfill the necessary minimum of state responsibilities. Thus, the financing model, the payment mechanisms, the functioning of the institutions and the organization of healthcare, cannot be contested via constitutional complaints as they fall outside the scope of the Constitution and constitutional review (save in extreme situations).

In subsequent decisions, the Court has repeatedly confirmed its reluctance to review the financing choices of the state on the basis of the constitutional provision on health. It did so when dismissing a submission that challenged co-payments such as flat-rate visit fees and hospital daily fees, charged in the public scheme.[59] Flat-rate co-payments constitute an equity issue because they are regressive and usually associated with an increased risk of unmet medical need.[60] Nevertheless, the Court refused

[59] Alkotmánybíróság (AB) elnöki végzés [Decision of the President of the Constitutional Court], MK. 2007. 179/I/2007. (IV. 6.) (Hung.).

[60] Gregoire Mercier, Jenica Pastor, Valerie Clément, Ulysse Rodts, Christine Moffat and Isabelle Quéré, "Out-of-Pocket Payments, Vertical Equity and Unmet Medical Needs in France: A National Multicenter Prospective Study on Lymphedema," *PLoS ONE* 14, no. 5 (2019): e0216386. https://doi.org/10.1371/journal.pone.0216386.

to second-guess the introduction of such co-payments and dismissed the submission arguing that the constitution did not guarantee free healthcare.

Recently, the Court confirmed its restrictive interpretation of the right to health in a ruling delivered in 2018.[61] In this case, a group of 25 petitioners (natural and legal persons) made yet another attempt to use the constitutional complaint mechanism against the financing rules set in the public scheme by challenging a related government decree.[62] The Court dismissed the submission and reiterated that the health provision of the Fundamental Law stipulated a constitutional responsibility for the state the fulfillment of which would not be reviewed by the Court save in extreme cases when a minimum threshold is not reached.[63] To date, the Court did not provide further guidance for the establishment of this minimum threshold; it merely repeated its earlier example discussed above (i.e., the total lack of healthcare institutions and medical care on certain territories of the country). It did, however, add further clarifications to the state responsibilities stemming from the constitutional provision on health: it established that the state had the duty to ensure that each Hungarian citizen insured within the public scheme had effective, *de facto* access to primary care by being assigned to a general practitioner. This is a basic constitutional duty of the state, and general practitioners contracted within the public scheme are indispensable for fulfilling it.

It is thus clear that the right to health, set forth as such in successive Hungarian constitutions, has not been interpreted by the Court as a judicially enforceable individual right. Instead, the Court has interpreted it as a state responsibility the fulfillment of which is *not to be assessed via constitutional review* - save in extreme circumstances when the state fails to meet a minimum threshold not fully defined by the Court to this date.

[61] Alkotmánybíróság (AB) [Constitutional Court], MK. 2018. 3197/2018. (VI. 21.) (Hung.).

[62] Petitioners challenged Government Decree No 43/1999. (III. 3.) on Detailed Rules Concerning the Financing of Healthcare Services from the Health Insurance Fund (Az *egészségügyi szolgáltatások Egészségbiztosítási Alapból történő finanszírozásának részletes szabályairól szóló* 43/1999. (III. 3.) Korm. Rendelet) (Hung.).

[63] Alkotmánybíróság (AB) [Constitutional Court], 2018, at para. 20.

6.3. The Right to Healthcare Derived from the Constitutional Provision on Social Security

While the Court ruled that the constitutional provision on the right to health did not constitute a legally enforceable individual right, it simultaneously held that *the right to healthcare exercised within the public, compulsory social health insurance system did constitute a real individual (fundamental) right*. However, the constitutional basis of this individual right was not the health article of the constitution but the one on social security and the constitutional protection of property. If the element of social insurance plays a determining role, reduction or termination of service provision should be reviewed in the light of property protection.[64]

As interpreted by the Court, the constitutional article on social security unconditionally requires that nobody is left without healthcare due to the shortfall in the financing of the Health Insurance Fund. Thus, the financing model of the healthcare system is only constitutional if the state effectively covers from the central government budget, the costs of healthcare services and goods guaranteed at statutory level when those costs exceed the revenues of the Fund. Therefore, the system is only constitutional if it guarantees the effective exercise of right to healthcare within the public, compulsory scheme, based on the constitutional right to social security.

It is noteworthy that the Court has only talked so far about the right to healthcare as a right present within the framework of the public, compulsory scheme. It interpreted the right to healthcare as a right "purchased" via the payment of insurance contributions, which must be guaranteed by the state in accordance with the requirements of the constitutional protection of property. Thus, the right to healthcare is conditional on the fulfillment of entitlement conditions. The legislative freedom of and choices made by the state will not be subjected to constitutional scrutiny unless they lead to violations of the right to healthcare exercised via social health insurance and/or violations of the right to property.

[64] See also Alkotmánybíróság (AB) [Constitutional Court], MK. 1995. 43/1995. (VI. 30.) (Hung.), at para. 195.

Although the Court upheld the right to healthcare as an individual, judicially enforceable right based on the social security article of the constitution, it nevertheless adopted a cautious approach when reviewing state decisions on the basis of this provision. It did so when being asked to review the constitutionality of the limits drawn to the subsidy of certain medical goods provided within the public, compulsory scheme.[65] Putting forward cost-containment arguments, it dismissed the submission and held that it was at the discretion of the state to draw limits to the health basket provided within the public, compulsory scheme. It also held that the constitution did not set forth any state obligation to fully subsidize a treatment.

What conclusions can we draw from this jurisprudence? A right to healthcare enforceable within the public, compulsory scheme was inferred by the Court from the constitutional right to social security. This right to healthcare constitutes an individual right that is judicially enforceable within the public scheme. This is in line with the findings of commentators who argue that features of social health insurance such as existence of insurance contracts, are conducive to a stronger role for the right to health. However, one should note that the Court has interpreted this right to healthcare as confined to the public scheme and as a "purchased right" conditional on fulfillment of membership conditions. Also, the Court has been reluctant to second-guess state decisions on payment rules such as flat-rate co-payments officially charged in the public scheme despite their regressive character from the perspective of equity. Moreover, the former constitutional right to social security was replaced by a weaker provision in the current Fundamental Law. This new social security provision no longer speaks of rights and merely sets an aspirational goal for the state. It remains to be seen how the Court will interpret this provision and whether it will still infer from it a judicially enforceable right to healthcare.

[65] Alkotmánybíróság (AB) [Constitutional Court], MK. 2003. 517/B/2003. (XII. 12.) (Hung.). See also Földes, "Addressing Equity in," note 11, 226.

VII. CONCLUSION: EQUITY IN HEALTHCARE – WHAT ROLE FOR CONSTITUTIONAL COURTS?

As outlined at the beginning of the paper, studies have found that countries adopting social health insurance as a financing model are more likely to have a judicially enforceable right to health. The case of Hungary does not fully support this finding. The constitutional right to health has not been interpreted by the Hungarian Constitutional Court as a justiciable individual right. The constitutional right to social security was used by the Court as the basis of affirming the existence of a judicially enforceable, individual right to healthcare, however, this right was confined to the public, compulsory scheme.

The Hungarian Constitutional Court has repeatedly confirmed its view according to which, constitutional review is not an appropriate tool for assessing the suitability of a system to guarantee healthcare entitlements (save in extreme situations, i.e., when it is unquestionable that the model is inherently unsuitable to fulfill the necessary minimum of state responsibilities). This approach is particularly concerning because, as a result, policy decisions impacting on the distribution of the financial burden across the population groups cannot be contested via constitutional review.

Health-related rights set in the constitution should, however, make it possible – and indeed, encourage – constitutional scrutiny of such policy decisions and in particular, they should enable the review of regressive policies in healthcare financing. Regressive financing policies can lead to serious equity challenges. They result in the unfair distribution of the financing burden to the disadvantage of the most vulnerable socio-economic groups. They are associated with disproportionately higher prevalence of unmet medical need among these groups. The equity component of the right to health is meant to prevent such outcome and Constitutional Courts should use it to turn down regressive policies. This is a corrective function that Constitutional Courts should be willing and equipped to perform if state action is not conducive to equity.

Furthermore, it is the duty of Constitutional Courts to examine whether a state's actions are in line with its human rights commitments including its commitment to fulfill the right to health and equity in access to healthcare as its core element. All individuals should benefit from these state commitments, including those most in need. Similarly, all individuals seeking healthcare should be able to do so in an equitable manner, including those who obtain medical treatment in the public scheme as well as those who obtain it at private facilities operating in the country. Especially in the context of emerging two-tier systems with under-funded public schemes and private schemes operating in parallel, constitutional litigation should serve as an effective tool for challenging the resulting redistribution and access problems.

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Enforcing Nonjusticiable Rights In Indonesia

Andy Omara[*]
Universitas Gadjah Mada School of Law, Yogyakarta, Indonesia
andy.omara@mail.ugm.ac.id

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Abstract

A debate over which branch of government is the most appropriate institution to deal with economic and social rights is far from ended. Is it the legislature which is democratically elected or the unelected Court that should determine the enforcement of economic and social rights? Problems pertaining to the lack of legitimacy and competence often come up when the Court is involved in determining economic and social rights. These problems arise because a court is not democratically elected and is not equipped with necessary tools to deal with such a complex issue in economic and social rights. However, others believe that the Court's involvement in determining economic and social rights can strengthen democracy since the Court may enforce matter that is not sufficiently addressed by the lawmaker. This paper will address the above issue in context of Indonesia. Should the Court involve in protecting economic and social rights? If so, how far the Court can go to determine economic and social rights? This paper acknowledges that economic and social rights are a broad and complex topic. Therefore, this paper limits the discussion by analyzing four selected judicial rulings which have significant impact in the protection of economic and social rights in Indonesia i.e. the judicial review cases on Electricity Law, Water Resources Law, National Education System Law and National Budget Law. This paper argues that it is necessary for the Court to involve in determining economic and social rights, especially when the lawmaker does not sufficiently address issues related to economic and social rights in its legislative product. The Court may fill the gaps in the protection of Economic and Social rights.

[*] Andy Omara is an Associate Professor of Constitutional Law at Department of Constitutional Law, Universitas Gadjah Mada (UGM) School of Law, Yogyakarta, Indonesia. He graduated from Universitas Gadjah Mada (S.H.), University of Melbourne (MPub&IntLaw.) and University of Washington (Ph.D.).

The Court roles in this context, however, potentially encroach the authority of other branches of governments i.e. the executive and the legislative. Therefore, the Court roles should be carefully and strategically conducted so that it does not infringe the jurisdiction of the government and the lawmakers.

Keywords: Constitutional Court, Economic, Indonesia Social Rights.

I. INTRODUCTION

Whether economic and social rights are judicially enforceable has been questioned since the introduction of two sets of rights: civil and political rights and economic, social and cultural rights.[1] Judicially enforceable or commonly called justiciability refers to the ability to claim a remedy before an independent body when a violation of a right has occurred or is likely to occur.[2] It means the extent to which a matter is suitable for judicial determination.[3] Justiciability implies access to mechanisms that guarantee recognized rights.[4] Justiciable rights allow right-holders a legal course of action to enforce them, whenever the duty-bearers do not comply with their duties.[5]

There is opinion that civil and political rights (e.g. right to vote, right to form association) are justiciable whereas economic and social rights (e.g. right to education, right to health, right to clean water) are not.[6] This essentially means that civil and political rights can be judicially enforced, while economic and social rights cannot. This assertion does not reflect comprehensive perspectives.

[1] "Key concepts on ESCRs-Are economic, social and cultural rights fundamentally different from civil and political rights?" United Nations Human Rights, Office of the High Commissioner, accessed January 27, 2020, https://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx. Universal Declaration of Human Rights of 1948 also contained economic social and cultural rights; international covenant on economic social and cultural rights was adopted in 1966 and entered into force in 1976. See also Graig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," *University of Pennsylvania Law Review* 141, no.1 (November 1992): 18.

[2] International Commission of Jurist (ICJ), "Court and The Legal Enforcement of Economic Social and Cultural Rights: Comparative Experience of Justiciability" (A Report, International Commission of Jurist Publisher, 2008), 6.

[3] Scott and Macklem, "Constitutional Ropes", 17.

[4] Scott and Macklem, "Constitutional Ropes", 17.

[5] Scott and Macklem, "Constitutional Ropes", 17.

[6] While the ESC Rights are grounded in UDHR, ICESCR and CRC (particularly on right to education) there are different attitude on how countries address the right to education. See Jody Heymann, Aleta Sprague and Amy Raub, *Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide* (Oakland: University of California Press, 2020), 201-202.

In practice, whether or not economic and social rights are justiciable is a matter of choice. Some countries constitutions such as the US Constitution and the Ireland Constitution[7] recognize economic and social rights as non-justiciable while other country constitutions such as the Constitution of the Philippines considers economic and social rights as justiciable rights.[8]

In line with justiciable and non-justiciable rights category, this paper will specifically examine the justiciability of economic and social rights in Indonesia. Does the amended Constitution of Indonesia acknowledge economic and social rights as justiciable rights? If so, to what extent the involvement of the Constitutional Court in protecting these rights? The paper will examine the roles of the Constitutional Court in deciding economic and social rights cases. In doing so, the paper will analyse judicial review cases on ES rights determined by the Indonesian Constitutional Court. The paper argues that while there are no explicit constitutional provision states that economic and social rights justiciable, the Constitutional Court, through its decisions, determine that economic and social rights are justiciable. The Court rulings play significant roles in protecting economic and social right, particularly when the government reluctant to enforce such rights. However, it may potentially create problems if the Court is lack of necessary information and competence.

Part II will briefly describe the development on the justiciability of economic and social rights and clarify the misconception about the dichotomy between justiciability of civil and political rights and economic and social rights. Part III will discuss the jurisprudential development of the justiciability of economic and social rights. Part IV will discuss different approaches adopted by some countries, including Indonesia in protecting of economic and social rights. Part V will specifically analyse the Indonesian Constitutional Court's approach in protecting economic and social rights. The analysis will be conducted through a careful examination of four Constitutional Court rulings, i.e. Court decision on Electricity Law, Water Resources Law, National Educational System Law

[7] Article 45 of the 1937 Ireland Constitution, Directive Principles of Social Policy.
[8] Article VII of the 1987 Philippines Constitution. The duty of court of justice to settle actual controversies which are legally demandable and enforceable.

and National State Budget Law. Three different models on the protection of ES rights such as judicially enforceable rights, a tool to test the reasonableness of government policy-making and non-justiciable policy guidelines will be used to indicate the Court approach.[9] These models can appropriately explain the Indonesian Court attitude in settling judicial review cases related to ES Rights. Finally, Part VI will provide–conclusion.

II. THE DEVELOPMENT OF THE JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS

In the past, economic and social rights were not taken seriously and were subordinated to civil and political rights.[10] Few states included economic and social rights in their constitution and legislation to make these rights is enforceable.[11] Some scholars also perceived that economic and social rights are non-justiciable rights.[12] In his article on *Against Positive Rights,* Cass Sunstein argued that inserting social rights in the new constitution of post-communist European States 'was a large mistake'.[13] The government should not be forced to interfere the free market. Besides, there is also an opinion which believe that social rights are unenforceable by courts because they lack bureaucratic and policy tools.[14]

In the 1970s, jurisprudence on justiciability of economic and social rights started to grow. In 1972, for instance, the German Constitutional Court granted the right to free choice of an occupation in the universities.[15] In the same year, the European Commission of Human Rights emphasized the importance of the

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

[10] Justice Richard J. Goldstone, "Foreword," in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in Developing World,* ed. Varun Gauri and Daniel M Brink (Cambridge: 2008), vii.

[11] Goldstone, "Foreword," vii.

[12] Galligan use the term "unsuited for adjudication" to explain "non-justiciable". See D.J. Galligan "Review Work: Discretionary Powers: A Legal Study of Official Discretion," *The Cambridge Law Journal* 46, no. 3 (November 1987): 241, https://www.jstor.org/stable/4507090.

[13] Cass R. Sunstein, "Against Positive Rights, in Western Rights? Post-Communist Application," in *Comparative Constitutional Law*, ed. Andrass Sajo (New York: Foundation Press, 1996) 1483.

[14] Sunstein, "Against," 1483.

[15] Numerus Clausus I Case (1972), 33 BverfGE 303. see also Malcolm Langford, "The Justiciability of Social Rights: from Practice to Theory" in *Social Rights Jurisprudence: Emerging Trends In International And Comparative Law* ed. Malcolm Langford (Cambridge: 2008), 6.

state to respect the individual's home.[16] A decade later, the Indian Supreme Court ordered the municipality to fulfill the right to water.[17] Since then the justiciability of economic and social rights overgrew in countries which witnessed democratic revolutions (South Africa, Eastern Europe, Latin America) and countries inspired by the Indian experiences (South Asian Countries).[18]

The development on the justiciability of ES rights also changed the direction of the scholarly debate. The dynamic expansion of economic and social rights in practice has altered the opinion that ES rights are not justiciable. This includes Cass Sunstein who asserted that, after witnessing the South African Constitutional Court rendered a decision on *Grootboom* case, the constitutional court approach stands as a powerful rejoinder to who have contended that socio-economic rights do not belong in a constitution.[19] While there is a significant change concerning to the justiciability of ES rights, debate on whether economic and social rights are judicially enforceable still far from ended.

III. VARIOUS INTERPRETATIONS REGARDING ECONOMIC AND SOCIAL RIGHTS AND PROBLEM OF THEIR JUSTICIABILITY

A debate over justiciability cannot be separated from the doctrine of separation of powers. The principle of separation of powers suggests that the duty of the judiciary merely interpret and apply the law. A judicial institution does not make laws. The law-making function is in the hand of the legislative.

The question is how far the court can interpret the law? Should the court consistently loyal to the texts of the laws, or can the court interpret the law beyond the texts? How if the court interpretation alters the meaning of the law created by the legislature? Is the court the right avenue to resolve matters which impact public policy such as how the government should allocate the funding for education?

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[16] Case 4560/70. See also Case 5727/72 and Langford, "The Justiciability," 6.
[17] Langford, "The Justiciability," 6.
[18] Langford, "The Justiciability," 8.
[19] *Government of the Republic of South Africa v. Grootboom and others* 2000 (11)BCLR 1169 (CC). See also Bertrand G. Ramcharan, *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials, The Raoul Wallenberg Institute Human Rights Library 22*, (Boston: Martinus Nijhoff, 2005), 297-336.

The justiciability of economic and social rights focuses on the issue of whether a court is the right avenue to enforce such rights. Three conceptions often used to argue that economic and social rights are non-justiciable rights. First, the nature of economic and social rights is different from civil and political rights.[20] Second, the problem of legitimacy which essentially questions the court legitimacy in dealing with economic and social policy.[21] The third is about the court institutional capacity in resolving issues related to economic and social rights.[22] The following part will examine these three different conceptions and prove that such notion mislead.

Are economic and social rights different from civil and political rights? There are perception that economic and social rights are positive rights which require intense involvement of the state to fulfil these rights.[23] Civil and political rights, on the other hand, are negative rights which prevent the state's participation in the enjoyment of these rights. Since economic and social rights are perceived as positive rights, the involvement of the executive is the most appropriate avenue, not the involvement of the court. This is because the court has neither "purse nor sword."[24] The State specifically the government and the legislature are the institutions which have the purse and the sword to implement ES rights. It possesses the necessary state apparatus and funding to implement ES rights. While this view sounds good, it can be misleading. Both civil political rights and economic and social rights are positive and negative rights to a certain extent.[25] This is because the enforcement of both categories of rights needs states involvement. To implement ES rights and CP rights, the state often involves ensuring that these rights are fully implemented. On

[20] Langford, "The Justiciability" 30.
[21] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012),152.
[22] Langford, "The Justiciability," 211.
[23] Langford, "The Justiciability," 30.
[24] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Company, 1962). See also Kevin J. Mitchell, "Neither Purse nor Sword: Lessons Europe Can Learn om American Courts' Struggle for Democratic Legitimacy," *Case Western. Reserve. Journal of. International Law* 38 (2007): 653.
[25] Aoife Nolan, Bruce Porter and Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" (A CHRGJ Working Paper No. 15, 2020), 17, https://www.researchgate.net/publication/228275150_The_Justiciability_of_Social_and_Economic_Rights_An_Updated_Appraisal/link/574089c108ae298602eba445/download.

the other hand, when the people have enjoyed these rights, the state cannot interfere the enjoyment of these rights.

In addition, economic and social rights are often viewed as vague and resource-dependent.[26] They are perceived as vague because economic and social rights are difficult to be measured. Right to the highest attainable standard of health, for instance, is difficult to be measured when it is considered fulfilled. While it may be true that it is difficult to measure the fulfilment of ES rights quantitatively, there are specific criteria such as treatment and control to an epidemic, infant mortality and environmental hygiene to measure its fulfilment.[27] Some civil and political rights such as the right to liberty and the right to human dignity can also be vague as they are difficult to be quantitatively measured.[28]

Regarding to resource-dependent, the realization of economic and social rights such as the right to housing often demands significant financial resources and budget allocation. As it requires substantial financial resources, the realization of economic and social rights should be the government domain and not the judiciary.

Considerable financial resource is also required to implement civil and political rights. To implement right to vote in a general election, for example, significant funds is also needed. So, both civil and political rights and economic and social rights can be very resources dependent in particular circumstances.

Is it appropriate for a court to deal with economic and social rights? This question is related to two principles: the legitimacy and separation of power. Is a court legitimate to deal with economic and social policy? Judges are lack of democratic legitimacy. This is because they are not directly elected by the people.[29] Economic and social policy should be the domain of elected representative of the people and not the province of a less democratic institution.[30] While it may be true that economic and social right should be the domain of

[26] Bickel, *The Least Dangerous.* See also Mitchell, "Neither Purse Nor Sword."
[27] Bickel, *The Least Dangerous.* see also Mitchell, "Neither Purse Nor Sword."
[28] Nolan, Porter, Langford, "The Justiciability," 17.
[29] King, *Judging Social Rights*, 152-3.
[30] King, *Judging Social Rights,* 152-3.

elected representative of the people, however, the judiciary has significant role to enhance democratic governance by reviewing the government decisions.[31] The democratic legitimacy of judicial review is to ensure that the majoritarian decision making does not violate the right of minorities.

In addition, there is an assertion that the involvement of the judiciary in dealing with economic and social right is violating separation of powers.[32] This is because formulating and executing economic and social policy is the domain of the executive. The work of the court is to enforce the law and not to develop or to execute the social policy. If the court involves in developing or executing policy, it, therefore, violates the separation of powers.

While adopting separation of powers is important, such a principle should be implemented together with other principles such as the rule of law and constitutional supremacy. The role of the court, based on the rule of law and constitutional supremacy, is to ensure all right are subject to effective remedy and provisions in the constitution are consistently applied.[33]

Does a court have the capacity to protect economic and social rights? Protecting economic and social rights is often closely related to formulating policy on economic and social rights. The important question is whether the court is the right institution to formulate such policy. This question is related to the assertion that judges lack comprehensive information and necessary expertise in settling cases related to economic and social rights.[34] This is because court rulings are largely based on the evidence presented in the court proceedings. There is a possibility that there are other important factors that are not presented before the courts. Unfortunately, the court does not consider factors beyond what presented before the Court. As a result, courts are not sufficiently informed when adjudicating economic and social rights.[35]

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31 King, *Judging Social Rights*, 152-3.
32 King, *Judging Social Rights*, 169.
33 Richard Bellamy, *Political Constitutionalism: A Republican Defence Of The Constitutionality of Democracy*, (Cambridge: 2007), 53.
34 King *Judging Social Rights*, 248.
35 Nolan, Porter, Langford, "The Justiciability," 17.

When deciding cases related to economic and social rights, the expertise of the judges is not necessarily dealing with the nature of the policy rather it is about the expertise of judges to review the policy of the government against the requirement of the law, such expertise which already embedded in every judge.[36]

Furthermore, the problem of polycentric often become the reason why the court should not adjudicate economic and social rights. Polycentric is a situation where a judicial decision will have a complex impact that will extend beyond the parties and the factual situation before the court.[37] The court is not the proper avenue to make polycentric decisions because adjudication is more adversarial process which applies solely to disputing parties.[38] Besides, there is limitation regarding the types of evidence presented before the court.

In fact, in some cases, the judiciary may provide better consideration of the competing rights of those who do not have access to political decision-making process.[39] It may address an impact of policies that were not foreseen by the government and may reveal alternative remedies that were not considered by the legislature or executive.[40]

IV. VARIOUS APPROACHES IN PROTECTING ECONOMIC AND SOCIAL RIGHTS: SOME COUNTRIES EXPERIENCES

Different countries may adopt different approaches to protecting economic and social rights. The first approach believes the fulfilment of economic and social rights is in the hand of the government. It is the government's responsibility –not the judiciary to fulfil these rights. In other words, economic and social rights are not judicially enforced. This approach is commonly called a non-justiciable rights approach because these rights cannot be defended before judicial institution. It is the government duty to guarantee the enjoyment of these rights through issuing public policies.

[36] Nolan, Porter, Langford, "The Justiciability," 17.
[37] King, *Judging Social Rights,* 189.
[38] King, *Judging Social Rights,* 189.
[39] King, *Judging Social Rights,* 165.
[40] King, *Judging Social Rights,* 165.

The second approach to a certain extent is contradictory with the first approach in a way that based on this approach the judicial institutions such as the supreme court or the constitutional court is the most appropriate avenue to defend economic and social rights. This approach is called as justiciable rights as the judicial institution can enforce these ES rights.

The Hungarian Constitution,[41] for instance, explicitly mentions that economic and social rights are justiciable. Article 70 K of the Hungarian Constitution stipulates: "Claims arising from infringement on fundamental rights, and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law." The phrase "...can be brought before a court of law" guarantees economic and social rights, as part of fundamental rights, are justiciable. South Africa Constitution also guarantees that ES rights have been the subject of full judicial proceedings before the South African Constitutional Court.[42]

Third, other country constitution such as the Philippines Constitution does not expressly declare that ES rights to be justiciable. The Philippines Constitution states that social justice and human rights provisions are intended to be directive principles to guide government policy and only judicially considered if enacted in legislation.[43] The Supreme Court of the Philippines, however, have held ES rights to be justiciable.[44] The judicial approach in the Philippines can be categorized into judicially enforceable rights as the courts have the final say.[45]

Fourth, the Canadian and the UK Constitutions adopt other different models. Canada's Charter of Rights adopts notwithstanding clause. This means the Charter of Rights permits parliament or a provincial legislature to adopt legislation to

41 Constitution of the Republic of Hungary, Article 70 K.

42 South Africa Constitution 1996 Part II.B.3.b.

43 Article XIII of The 1987 Philippines Constitution states that social justice and human rights provisions are intended to be directive principles to guide government policy and only judicially considered if enacted in legislation.

44 The Philippines Supreme Court, in *Oposa v Factoran GR,* has held that the rights to a balanced and healthful ecology are judiciable without enacting legislation. In certification of the Constitution of the Republic of South Africa judgment, the Court declared that socio-economic rights are clearly justiciable rights in Diane A. Desierto, "Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa," *Asian Pacific Law and Policy Journal* 11, no 138 (2009): 151.

45 Mark Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations," *Chicago. Journal. International Law* 3, no. 2 (2002): 449, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1442&context=cjil.

override Section 2 of the Charter (containing fundamental rights) and Sections 7 to 15 of the Charter (containing the right to life, liberty and security, freedom from unreasonable search and seizure the right to equality etc.). This limitation should be expressly mention in the law and not subordinate legislation.[46]

UK Courts interpret statutes to be consistent with the European Convention on Human Rights if they can lawfully do so. In case the statute is inconsistent with the Convention, the Court will state that the statute is incompatible with the Convention.[47] In such situation, the government is authorized to response in various ways such as modifying, introducing or doing nothing.[48] The possibility of the government to respond and revise the court's constitutional rulings makes this approach as a weak form of judicial review[49] as the government response and not the court decisions is the final judgement.

Fifth, India and Ireland adopt another different method. India and Ireland have included economic and social rights in their constitutions that are expressly stated to be not justiciable.[50] They act as guiding principles which mean that these principles guide the court in interpreting statutes of the legislature. This type of judicial review is classified as super weak form review.[51]

In summary, the approaches on the determination of economic and social rights can be broadly categorized into three main models namely: judicially enforceable rights, a tool to test the reasonableness of government policy-making and non-justiciable policy guidelines. These three models also reflect types of judicial review i.e. the strong-form judicial review, weak form of judicial review (as explained by Mark Tushnet)[52] and super-weak form of judicial review.[53]

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46 Laurence Brosseau and Marc-Andre Roy, "The Notwithstanding Clause of the Charter" (A Background Paper, Library of Parliament, 7 May 2018), https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf accessed 27 January 2020. Notwithstanding Clause is mentioned in Section 33 of the Canadian Charter of Rights and Freedoms.

47 Tushnet, "State Action," 449.

48 Tushnet, "State Action," 449.

49 Tushnet, "State Action," 449.

50 The Indian Constitution, Article 37 and The Ireland Constitution, Article 45.

51 Mark Tushnet, "State Action,"453.

52 Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009).

53 Venning, "Determination of Economic," 102. See also Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (2007): 402.

V. JUDICIAL APPROACH OF ECONOMIC AND SOCIAL RIGHTS IN INDONESIA

The year 1999 marked a great socio-political movement in Indonesia-called *reformasi*. The *reformasi* was followed by substantial amendments of the 1945 Indonesian Constitution. The amended Constitution introduced two new judicial institutions namely Judicial Commission (*Komisi Yudisial*) and Constitutional Court (*Mahkamah Konstitusi*) and added another representative institution, i.e. Regional Representatives Council (*Dewan Perwakilan Daerah*) beside the already existing People Representative Council (The DPR).

The amended Constitution also embodies a liberal democratic system with some degree of separation of power and a swathe of economic, social and cultural rights.[54] The new Constitution inserted a new, specific Chapter on Human Rights. The Human Rights Chapter provides comprehensive provisions on civil-political rights, economic social and cultural rights and the right to development. Concerning provisions on economic and social rights, the new Constitution mentions the right to improve one's welfare,[55] the right to a healthy environment and receive medical care[56] and social security.[57] Also, the state shall prioritize the budget for education to a minimum of 20 per cent of the state budget.[58]

Under Article 33, the economy shall be organized as a common endeavor, sector of production important for the country and which affect the life of the people shall be under the power of the state and, in particular, the land, water and natural riches shall be controlled by the state and shall be utilized for the greatest benefit of all people. While there are more provisions regarding economic and social rights, there is no provision which explicitly states that such rights are justiciable.

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54 Tim Lindsey, "Devaluing Asian Values, Rewriting Rule of Law" in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US,"* ed. Randall Peerenboom (London, New York: Routledge Taylor and Francis Group, 2004), 296, 31.

55 The amended 1945 Indonesian Constitution, Article 28 C.

56 The amended 1945 Indonesian Constitution, Article 28 H (1).

57 The amended 1945 Indonesian Constitution, Article 28 H (3).

58 The amended 1945 Indonesian Constitution, Article 31 (4).

This Part will examine the justiciability of economy and social rights in Indonesia post the 1999-2002 constitutional amendments. The author acknowledges that economic and social rights are vast topics. It is not possible to analyze all the court rulings regarding economic and social rights in this paper considering that the Court decided over a thousand constitutional review cases so far. Therefore, this paper will focus on analyzing four constitutional court decisions, in which in the author's opinion, have significant impact in protecting economic and social rights. The four Constitutional Court decisions are the judicial review of Law on Electricity,[59] judicial review of Law on Water Resource,[60] judicial review of Law on National Educational System[61] and judicial review of Law on National Budget.[62] In examining these four constitutional court rulings, this Part will utilize the three judicial approaches mention above i.e. judicially enforceable rights, a tool to test the reasonableness of government policy-making and non-justiciable policy guidelines.[63] These three models in the author's opinion, can be used as a method to explain the Court's approach in deciding cases related to ES rights.

5.1. Judicial Review of Law No 20/2002 on Electricity: Judicially Enforceable yet Lack of Consideration?

Petition for judicial review of Law on Electricity[64] was filed by groups of people (consisted of NGO's and Human rights advocates) who argued that substances contained in some provisions of the Law were inconsistent with Article 33 of the Constitution. Article 33 paragraph (3) of the Constitution stipulates "Land, waters and the natural resources contained therein shall be utilized for the greatest well-being of the people."

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

60 Judicial Review of Education System Law, Decision of Constitutional Court No 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

61 Judicial Review of National Budget Law, Decision of Constitutional Court No 011/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

62 Judicial Review of National Budget Law, Decision of Constitutional Court No 012/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

63 Dennis Davis, "Socio-Economic Rights: Has the Promise of Eradicating the Divide between First and Second Generation Rights Been Fulfilled?" in *Comparative Constitutional Law*, eds Rosalind Dixon and Tom Ginsburg (Cheltenham: Edward Elgar Publishing, 2011), 519, 528.

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

The petitioners contended that the provisions of the Law which were being challenged before the Court had reduced or even eliminated State's control over natural resources stipulated in Article 33 of the Constitution. That was because the Law opened the possibility of privatization in the electricity sector.[65] In this regard, the petitioners questioned 'the roles of state to control' natural resources for the greatest well-being of the people. The petitioners also concerned that the creation of this law was based on the idea of the privatizing and liberalizing economic sector, which is actually the main feature of the free market economy.[66]

The Court declared that state control, as stated in Article 33, should be interpreted that the state had the power to control important sectors of production. The state also had a duty to protect ES rights, including the electricity sector in order to provide social justice by ensuring the availability, even distribution and affordability of important products.[67] In this case, the Court broadly interpreted the phrase "shall be under State control" into five categories namely the power of the state to make policy (*mengadakan kebijakan*), to manage (*tindakan pengurusan*), to regulate (*pengaturan*), to participate (*pengelolaan*) and to supervise (*pengawasan*) important sectors of production for the greatest well-being of the people.[68] The Court believed that the right to electricity was important for the public in general. Therefore, the Court declared that private ownership of the electricity sector was not in line with the people's best interests.[69] The Court found the provisions that introduce the concept of competition and unbundling was in contradiction with Article 33 (2) of the Constitution.[70] The Court even went further by declaring that the Law had no longer

[65] Law of the Republic of Indonesia No. 20/2002 on Electricity, Article 8(2).
[66] Law of the Republic of Indonesia Article 16 of Electricity Law.
[67] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2011), 330.
[68] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 334.
[69] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 349.
[70] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 349.

possessed its legally binding power in its entirety.[71] That was because the provisions that had been declared unconstitutional were "the heart and soul" of the Law. Hence, if the losing of legally binding power were applied only to those provisions that had been declared unconstitutional, such an approach would lead to legal uncertainty.[72]

Prior to the decision, the Court had heard the government's arguments emphasizing that State-owned enterprise (PLN) could not fulfil the electricity demand.[73] According to the government, competition will create more opportunity for other enterprises to provide electricity in a more efficient and transparent way. The Court also considered other countries experience in regard to privatisation.[74] The failure of privatisation, however, was more convincing, so the Court concluded that privatisation often fails to guarantee the availability, the affordability and even distribution of electricity. The legal reasoning of the Court was very general and unpersuasive.

The electricity case illustrates that the Constitutional Court conducted a strong judicial review, as the Court invalidated the legislative statute entirely. This case also shows that the right to electricity had been considered as an important production sector, as stated in Article 33. Therefore, it can be impliedly deduced that in the opinion of the Court that this right is judicially enforceable.

In this case, the Court also entered the area of policy-making. It invalidated in its entirety the product of a democratically elected parliament and ordered the revival of the previous law. The Court has gone beyond the South African 'reasonableness of government policy test'.[75] The Court also did not provide balanced consideration regarding privatisation policy decision. While the Court considered the experience of countries where

[71] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 350.

[72] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 350.

[73] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 337.

[74] Judicial Review of Electricity Law, Decision of Constitutional Court No 001-021-022/PUU-I/2003 (The Constitutional Court of the Republic of Indonesia 2003), 186-7.

[75] South African Constitutional Court decision on *Grootboom.*

privatisation failed, it did not consider other countries experience where privatisation worked well. The Court did not sufficiently consider data showing the poor performance of the existing state own company. In this case, the Court did not sufficiently show its ability to deal with complex issues such as privatisation. The Court seems to lack of institutional competence to determine complex issues.

5.2. Judicial Review of Law No. 7/2004 on Water Resource: Judicially Enforceable yet Going Too Far?

The 2004 Water Resource Law decentralizes water sector management and allows participation from private sectors.[76] The Law acknowledges the importance of Article 33 of the Constitution, which clearly stipulates that water shall be under the state control and shall be utilized for the greatest well-being of the people. The Law determines that water for daily need is not subject to a fee or license.[77] The government has the power to issue a license to exploit water to community and business, but in doing so, it must consider the water management scheme.[78]

Several NGOs and individuals filed petitions to the Constitutional Court. The petitioners stated that the Water Law was in contradiction with Article 33 (2) of the Constitution.[79] The petitioners claimed that the Law had changed the social function of water into commercial purpose (profit oriented).[80] The Law would potentially disregard the people's right to water. As a result, the purpose of Article 33 (2) 'the water shall be utilized...for the greatest well-being of the people' would never be satisfied.

In its ruling, the Court declared that the Water Resource Law had fulfilled the right to water as stated in the Constitution.[81] This was because

[76] Law of the Republic of Indonesia, Article 11 of Law on Water Resource.
[77] Law of the Republic of Indonesia, Article 7 of Law on Water Resource.
[78] Law of the Republic of Indonesia, Article 9, 11 of Law on Water Resource.
[79] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).
[80] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005), 541.
[81] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005), 495.

the government, through its power to grant a permit, still hold power to control the important sector of production. As to the meaning of "state's control," the ruling referred to the previous court decision (i.e. judicial review on Electricity Law) that interpreted state control into five different activities such as: policy making, maintaining, managing, granting permits and supervising.[82] Accordingly, the Court rejected the petitions and maintained the constitutionality of the Law. Nevertheless, although the Court rejected petitions, it did not overrule the whole arguments of the petitioners. The Court acknowledged that the Law might be interpreted in such a way so as to make it contradictory to the Constitution.

But, instead of declaring the Law unconstitutional, the majority of justices was of the opinion that the Law should be considered conditionally constitutional.[83] This means that the constitutionality of the Law was subject to a certain condition. The Law would only be considered constitutional as long as its application was in line with the Court's interpretation elaborated in this decision. Consequently, if (in the future) there is allegation that the Law has been applied differently, the constitutionality of the Law could be reviewed for second time before the Court. The Court provided a test of the reasonableness of the government policy by elaborating all necessary conditions that should be fulfilled to maintain the constitutionality of the Water Resources Law. The court guidance in this case includes: private providers must fulfil the right to water; private providers do not charge an expensive fee to people for their daily need and small-scale farming; the determination of price must be consulted with the community; the government must prioritize its responsibility to provide drinking water.[84]

The Court's ruling on the Water Resources Law illustrates several important features: first, the Court does not automatically invalidate

[82] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005), 495.

[83] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005), 495.

[84] Judicial Review of Water Resources Law, Decision of Constitutional Court No. 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005), 493-494.

the Law. The Court's approach, in this case, is different from the Court approach in Electricity Law where the Court nullify the Law in its entirety. In Water Resources Law case, the Court refrain itself from nullifying the Water Resources Law. The Court, instead, provides conditions that should be fulfilled by the government to determine the constitutionality of the Law. While the Court approach, in this case, seems softer compared to the Court approach in Electricity Law, the Court actually directs the government and the lawmaker regarding the principles that they should insert in the regulations derived from this Law. Second, this decision asserts that the right to water is judicially enforceable.

The Court further provides guidance for the government in issuing the implementing regulations. Such guidance, to a certain extent, has entered policy making, which is the domain of the legislature as the lawmaker. Finally, this case shows a new approach used by the Court. The Court introduces a new type of decision, namely conditionally constitutional. The conditionally constitutional decision is not in line with the 'final and binding' nature of the Constitutional Court decision since a conditional decision opens a possibility that the Law can be submitted again to the Court for further review.

In 2013, a petition for judicial review of Water Resources Law was submitted again by Groups of the people and individuals. The petitioners claimed that the Law had allowed monopoly. It also tended to regulate water for commercial interests.[85] The petitioners also claimed that the Law had reduced the responsibility of the state to fulfil the need of water.[86] The government responded that the Law aimed to improve the accessibility of community to water. The Law, according to the government, had also sufficiently protected the right to water and prevented the privatisation. The government further stated that from 2010 up to 2015, there was a

[85] Judicial Review of Water Resources Law, Decision of Constitutional Court No 85/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013), 28.

[86] Judicial Review of Water Resources Law, Decision of Constitutional Court No 85/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013), 31.

significant increase from 34 municipalities to 116 municipalities that get the clean water programs.[87]

In reaching the decision, the Court examined seven implementing regulations that had been issued by the government since the Court decision in 2004. In the decision, however, the Court did not explain in which specific part of the seven implementing regulations contradicted with Court guidance. The Court in very general nature declared that the implementing regulations were not in line with the guidance of the court stated in its previous decision.[88] The Court then invalidated the Law on Water Resources for its entirety because based on the consideration that the invalidated provisions were 'the heart' of the Law.[89]

This decision shows the Court tendency to adopt strong form of judicial review approach as the Court invalidated not only particular provisions of the Law but the Law in its entirety. The Court once again entered the policy making by invalidating in its entirety the product of a democratic institution. The Court re-imposed the old law, namely Law 11/1974. The Water Resources Law decision shows justiciability of the constitutional provisions concerning important sectors. The Court can decide matters related to Article 33 of the Constitution. In this case, the Court had acted beyond its constitutional jurisdiction. The Court jurisdiction is to review an act against the Constitution. But as can be seen in this case, the Court reviewed the Law by scrutinizing whether implementing regulations derived for this Law consistent with the court's guidance as reflected in the ruling. In other words, the constitutionality of the Water Resources Law depended on whether the implementing regulations satisfied the Court guidance. One may question the finality of the Constitutional Court decision as this exact same Law has been reviewed in the past by the same Court. But the Court

[87] Judicial Review of Water Resources Law, Decision of Constitutional Court No 85/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013), 80.

[88] Judicial Review of Water Resources Law, Decision of Constitutional Court No 85/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013), 138-9.

[89] Judicial Review of Water Resources Law, Decision of Constitutional Court No 85/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013), 143.

decisions, in this case, is actually a consequence of the Court previous decision which provide a conditional decision.

Six years after the invalidation of the Water Resource law, a new law concerning water resources was finally introduced on October 15, 2019.[90] This newly enacted law implements the Court's previous decisions on judicial review of Water Resource Law. It contains the right to water, water management, water licencing system and criminal sanctions in case there is a violation against the provisions of this law. So far, there is no petitions submitted to the Court requesting judicial review regarding the existence of this new law.

5.3. Right to Education: Judicial review of Law on National Education System and the 2005 State Budget Law.

In judicial review of Law on National Education System, the petitioner claimed that elucidation of Article 49 of the National Education System Law violated Article 31 (4) of the Constitution.[91] That was because the elucidation stated that the allocation of 20 percent of the State Budget to the educational sector could be conducted gradually. The petitioners argued that Article 31 (4) of the Constitution implied that the government's obligation to allocate at least 20 percent could be done gradually.[92] Therefore, the petitioners believed that the elucidation of Article 49 was contradictory to the Constitution. The petitioners also argued that Article 49 was not in line with the nature of elucidation, i.e. explaining the norm of the Law provisions and not adding new norms. The Court agreed with the petitioners' arguments and declared that the obligation of the government as required by the Constitution could not be deferred. The Court granted the petition in part by striking down the elucidation for being repugnant to the Constitution.

[90] Law of the Republic of Indonesia , No. 17 of 2019 on Water Resource.

[91] Judicial Review of National Education System Law, Decision of Constitutional Court No. 011/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

[92] The Constitution of the Republic of Indonesia, Article 31 (4): The state shall prioritize the budget for education to a minimum of 20% of the State Budget and the Regional Budget to fulfill the needs of implementation of national education.

The petitioners of the National Education System Law filed a similar petition to the Constitutional Court. In this case, the petitioners challenged the 2005 Law on National State Budget, which allocated 7 percent to the educational sector.[93] The Court ruled that the 2005 Law on National State Budget violated the Constitution because it failed to meet the 20 percent requirement of State Budget that must be allocated for the education sector.

Nevertheless, the Court further considered that if the whole Law be unconstitutional, then the entire law would lose its legally binding power. In a such situation, the Court took into account two possible consequences. First, the government should reformulate the state budget so as to meet the minimum allocation of 20 percent of the State Budget for education sector as required by the Constitution. If such reformulation was conducted, there would be a reduction in the budget allocation for other sectors. This might create legal uncertainty in budgetary and financial administration in the country.

Second, according to the Constitution, invalidation of State Budget Law would oblige the government to use the previous year's state budget.[94] Unfortunately, in this case, the previous year's state budget for the educational sector was lower than the allocation for the educational sector in the current National State Budget.

In reaching the decision, the Court used 'categorical - proportionality approach'.[95] The Court categorically determined whether Article 31 (4) of the Constitution has been infringed. The Court then determined whether such infringement was justified. In doing so, the Court proportionally considered and weighed the above consequences and possibilities. The Court declared that Article 31 (4) had been violated. The Court decided that the 2005 National Budget Law violated the Constitution. However, it was not necessary to declare the Law should lose its legally binding power entirely. That was because by

[93] Judicial Review of State Budget Law, Decision of Constitutional Court No. 012/PUU-III/2005 (The Constitutional Court of the Republic of Indonesia 2005).

[94] The 1945 Constitution of the Republic of Indonesia, Article 23 (3).

[95] Stephen Gardbaum, "The Structure and Scope of Constitutional Rights," *in Comparative Constitutional Law 388*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar, 2011).

doing so would create problems both in budgetary and financial administration and the possibility to have a lower budget allocation for the education sector. As a result, the Court declared the Law is inconsistent with the Constitution but it does not invalidate the Law entirely. The approach shows the Court careful consideration in deciding case which have a significant impact to the government and the people at large. The Court strategically decides this case with the expectation that the government will follow the Court ruling.

In the following year, a similar petition submitted to the Court claiming that the 2006 National Budget Law violated Article 31 (4) of the Constitution[96] as there was only 9.1 percent of State Budget allocated for education sector. The petitioners argued that the government did not demonstrate good faith to fulfil both the provision in the Constitution as well as the decision of the Constitutional Court in the previous case.[97] Constitutional Court declared that the 2006 State Budget to be null and void. The consequence was that the government and the parliament should adjust the 2006 State Budget during the midyear adjustment of the state budget, to comply with the constitutional provision.[98]

Based on these two rulings, the Court provided a guideline for future cases. In case that state budget does not reach 20 percent allocation for education sector, the State Budget Law will be considered violates the Constitution. The Court, however, will consider the legal impact in examining those future cases. The Court will take into consideration the national economic condition and policies of the government and the parliament in reaching the decision.[99]

In this case, the Court continued using the proportionality principle to decide the case concerned. The Court considers whether the means employed by the government to promote its conflicting public policy are justified.

[96] Judicial Review of National State Budget Law, Decision of Constitutional Court No. 026/PUU-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006).

[97] Judicial Review of National State Budget Law, Decision of Constitutional Court No. 026/PUU-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006), 46-7.

[98] Judicial Review of National State Budget Law, Decision of Constitutional Court No. 026/PUU-IV/2006 (The Constitutional Court of the Republic of Indonesia 2006), 95.

[99] There is an incremental change in the allocation to educational sector. In 2004 there was 6.6 percent, 7 percent in 2005, 8.1 percent in 2006, 9.1 percent.

VI. CONCLUSION

The paper has shown that economic and social rights in Indonesia are judicially enforceable. This can be seen from the decisions of the Constitutional Court in judicial review cases of Electricity Law, Water Resource Law, National Education System Law and National Budget Law mentioned above in which the Court determined the constitutionality of these laws. The four cases of the judicial review showed how the Constitutional Court addressed economic and social rights issues. The Court which has the power to determine the constitutionality of legislative statutes may declare a provision of such statutes unconstitutional and lose their legally binding power if the Court finds they are inconsistent with or contrary to the Constitution.

In practice, however, the Court does not always "invalidate" the provisions of a statute even if the Court finds that such provisions are not in line with the Constitution. The Court, in some cases, refrains itself from "invalidating" the law even though the Court is of the opinion that the law is in contradiction with the Constitution. The Court, in such cases, will first take into account the possible impact of a decision which is invalidating a law –in terms of declaring a law or some provisions of a law unconstitutional and lose their legally binding power. The Court's decision on judicial review of Law on State Budget shows the Court tendency to consider potential negative consequences that may be involved if the Law declared losing its legally binding power. As a result, the Court does not automatically declare the National Budget Law is losing its legally binding power in spite of the fact that some provisions of the Law have been found contradictory to the Constitution. The Court instead suggests the lawmaker to fulfill its constitutional obligation, namely fulfilling 20 percent budget allocation for education at once.

In some other cases, as can be seen in judicial review of Law on Electricity and to some extent the judicial review of Law on Water Resources, the Court does not adequately consider other significant factors that may have significant impacts when the Court is reaching its decisions. The Court rulings in these two

cases mentioned- above declare the Law was unconstitutional in its entirety or declared the Law conditionally constitutional. These two types of decisions have a significant impact because when the Court declared the Law unconstitutional in its entirety, the Court dismissed the legislative statute. When issuing conditional decisions, the Court direct the legislative by providing guidance that should be followed by the lawmakers when drafting the law. The Court in these two instances essentially goes beyond its constitutional jurisdiction. The Court has entered policy making function of the legislature. These types of court decisions can be beneficial or destructive depending how the Court exercise these powers. The adoption of these two approaches can be very beneficial particularly when exercising these powers, the Court is equipped by necessary competence and ample knowledge regarding the matters. the court decision may convey the voice of the minority, which may not be heard in the legislative process. In other words, the minority voice may be defended through the judicial process.

On the other hand, this significant power can be destructive if the Court does not use it appropriately. The use of this power without proper competence, knowledge and consideration may not only lead to the tensions with other branches of government but also negatively impact the people at large.

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The Relationship Between the European Convention on Human Rights and Domestic Law: a Case Study

Kamil A. Strzępek*
Cardinal Stefan Wyszyński University (UKSW), Warsaw, Poland
k.strzepek@uksw.edu.pl

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Abstract

The article is pertaining to the relationship between the European Convention on Human Rights and the Polish national law. Upon the introduction of the system of economic, social and cultural rights contained in the Constitution of the Republic of Poland of 1997, the article considers what rules determine the relationship between the application of the law by Polish courts and the European Court of Human Rights in Strasbourg. The paper concludes by showing how Polish courts and the European Court of Human Rights in Strasbourg refer to the right of property. It's one of the fundamental human rights, when they examine a case. It occurs that clauses, which limit this right, are sometimes understood in a different way by Polish courts and the European Court of Human Rights. Regarding the above, the case of *Waldemar Nowakowski v. Poland* of the European Court of Human Rights in Strasbourg is discussed. Furthermore, the article presents how the Polish Government executes the judgment of the European Court of Human Rights in Strasbourg delivered in the above-mentioned case.

Keywords: Constitutional Court, Doctrine of the Margin of Appreciation, Human Rights, Principle of Subsidiarity, Right to Property.

* Assistant Professor at Cardinal Wyszyński University in Warsaw, Poland.

I. INTRODUCTION

The first part of this article presents an extensive system of economic, social and cultural rights in the Constitution of the Republic of Poland of 1997 (hereinafter: the Constitution), as well as how Polish courts interpret these rights. This part of the article aims to familiarize a reader with the system of economic, social and cultural rights in Poland, as well as to indicate the presence of the right to property in the system of rights and freedoms in Poland and to present the interpretation of this right.

The next part of this article presents relations connecting Polish courts with the European Court of Human Rights in Strasbourg (hereinafter: the ECHR) in terms of the principle of subsidiarity and the doctrine of the margin of appreciation.

The last part of this article presents a case study, i.e. the case of *Waldemar Nowakowski v. Poland* examined by the ECHR, which shows a different interpretative approach of Polish courts and the ECHR to the right to property. The case concerns the violation of Article 1 of Protocol No. 1 to The European Convention on Human Rights due to confiscation of the applicant's collection of antique weapon by domestic courts. The article also presents, on the example of the case of *Waldemar Nowakowski v. Poland*, how the Polish government executed the judgment of the European Court of Human Rights in Strasbourg delivered in the above-mentioned case.

With regard to constitutional law, the basic method is the analysis of the existing law (dogmatic method). The legal phenomenon, which is the subject of this article, i.e. the relation between the application of the law by Polish courts and the ECHR is described with the help of analysis of the case-law of Polish courts and the ECHR (mainly the case of *Waldemar Nowakowski v. Poland*). For this reason, references to literature have been kept to a minimum, and the article itself was not intended to constitute a collection and description of the current views on the subject matter of this article.

II. THE CONSTITUTION

The work on the preparation of the current Polish Constitution began in 1989. This was due to political changes that began in Poland in the late 1980s. The Constitution of the Polish People's Republic of 22 July 1952, being still in force in the 1980s, ceased to meet the needs of changes in Polish society and state.

The Sejm of the Republic of Poland of the first term (1991 – 1993) adopted on 23 April 1992 the Act on the procedure for preparing and adopting the Constitution of the Republic of Poland (hereinafter: the Act). The Act established a constitutional commission that was to deal with the preparation of the final version of the new constitution. The Act also specified that the new constitution would be adopted by the National Assembly, i.e. the combined chambers of the Sejm of the Republic of Poland and the Senate of Poland, and then it would be adopted by the Nation by means of a constitutional referendum. The Act granted the constitutional commission, a group of 56 members of the National Assembly and the President of the Republic of Poland, the right to submit drafts of the new constitution.

On 17 October 1992, the Sejm of the Republic of Poland adopted the Constitutional Act on mutual relations between the legislative and executive authority of the Republic of Poland and on local government. It regulated the basic political system of the state. This act was in force until 16 October 1997, i.e. until the entry into force of the new Constitution of the Republic of Poland of 1997.

Works on the text of the new Polish constitution ended in early 1997. On 2 April 1997, the Constitution was adopted by the National Assembly. On 25 May 1997, a referendum took place, in which the people voted by the majority of 52.71% of the votes in favor of the Constitution. The turnout in the referendum was 42.86%. On 17 October 1997, the Constitution of the Republic of Poland entered into force. The Constitution consists of a solemn preamble and 243 articles, which are contained in 13 chapters (in some of the subsections have

been separated). The introduction to the Constitution sets out priority values for Polish society. These include freedom, solidarity, social dialogue, reliability and efficiency of public institutions, respect for and strengthening of civil rights. Individual chapters are entitled: I) Republic; II) Freedoms, Rights and Duties of Man and Citizen; III) Sources of Law; IV) Sejm and Senate; V) the President of the Republic of Poland; VI) Council of Ministers and Government Administration; VII) Local Government; VIII) Courts and Tribunals; IX) State Control and Law Protection Bodies; X) Public Finance; XI) States of Emergency; XII) Amendment of the Constitution; XIII) Transitional and Final Provisions.

III. ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND FREEDOMS IN THE CONSTITUTION – GENERAL ISSUES

When it comes to characterizing the system of rights and freedoms in the Constitution, one should first refer to Article 31 of the Constitution, which contains the so-called limitation clauses. The first of these clauses refer to the horizontal application of the law, i.e. to the application of the law in relations between individuals. In such horizontal application of the law, a limitation on the executing of rights and freedoms by an individual is the execution of rights and freedoms by other individuals. Everyone (citizens and foreigners) is obliged to respect the freedoms and rights of others. When executing his/her rights and freedoms, the individual must be mindful of the freedoms and rights of other individuals. This clause should be taken into account by common (civil) courts when resolving disputes between individuals. This provision applies to horizontal relations, i.e. relations between individuals. There are not many such provisions in the Constitution, since most of them refer to vertical relations, i.e. relations between public authorities and individuals.

The remaining limitation clauses refer to vertical relations, i.e. relations between public authorities and individuals. First, it should be stated that in these types of relations, restrictions on the execution of constitutional freedoms and rights can be established only by the legislative authority and only in the

form of an act. Second, restrictions can be established if they are necessary in a democratic state. Third, restrictions should pursue legitimate aims such as public safety or order, environmental protection, protection of public health and morality, protection of the freedoms and rights of others. This provision sets the limits for the interference of public authority in the sphere of constitutional rights and freedoms of the individual.

Since the content of Article 31 paragraph 3 of the Constitution concerns the limitation of freedoms and rights, it must be treated as an exemption, because it narrows the scope of application of freedoms and constitutionally guaranteed rights. This provision applies to all constitutional freedoms and rights, regardless of whether specific provisions separately specify the conditions for limiting a given right and freedom. The sense of requiring a statutory form of restrictions on freedoms and rights is obvious. It ensures the participation of parliament in shaping the legal situation of the individual, and proclaims the openness of the decision-making process, protects against hasty and ill-considered measures, as well as allows to maintain government legislative activity. Article 31 paragraph 3 of the Constitution permits the establishment of restrictions on the execution of freedoms and rights only under the condition that it is necessary to achieve one of the six aims listed therein. Undoubtedly, it is primarily public authorities that are responsible for ensuring public security, public order, environmental protection, protection of public health and morality, protection of the freedoms and rights of others. Therefore, bearing the responsibility for achieving these aims, take advantage of the limits on the rights and freedoms of individuals due to these aims.

IV. ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND FREEDOMS IN THE CONSTITUTION

Economic, social and cultural rights and freedoms are contained in Chapter II of the Constitution entitled "The freedoms, rights and obligations of persons and citizens". The discussed economic and cultural rights and freedoms embrace the following: 1) the right to ownership, other property rights and the right of

succession (Article 64); 2) the freedom to choose and to pursue occupation, as well as to choose the place of work (Article 65); 3) the right to safe and hygienic conditions at work; the right to statutorily specified days free from work (Article 66); 4) the right to social security (Article 67); 5) the right to health protection (Article 68); 6) aid to disabled persons (Article 69); 7) the right to education (Article 70); 8) the right of the family to special assistance from public authorities (Article 71); 9) protection of the rights of the child (Article 72); 10) the freedom of artistic creation, scientific research, the freedom to teach and to enjoy the products of culture (Article 73); 11) ecological security and environmental protection (Article 74); 12) satisfying housing needs (Article 75); 13) consumer protection (Article 76).

4.1. The Right to Property, Other Property Rights and the Right of Succession

Pursuant to Article 64 of the Constitution:

> 1. Everyone shall have the right to property, other property rights and the right of succession. 2. Everyone, on an equal basis, shall receive legal protection regarding property, other property rights and the right of succession. 3. The right to property may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

In the judgment of 29 July 2013, the Constitutional Tribunal stated:

> (...) pursuant to Article 64 (1) of the Constitution everyone has the right to property, other property rights and the right of succession. The said provision expresses an individual right encompassing the freedom to acquire, dispose of and retain property (...). It introduces the guarantee not only of acquiring property, but also of disposing of it (...). The right to dispose of a thing (*ius dispositivum*) signifies the possibility to freely retain ownership of a specified thing by its owner as long as this reflects his/her wish, and to freely transfer property right to another person of the individual's choice under individually accepted conditions (...).[1]

The aforementioned provision is to be understood as a general systemic rule, recognition of private ownership, not only as one of the fundamental

[1] The Decision No. SK 12/12 (the Constitutional Tribunal of Poland, 29 July 2013): 11.

institutions of the Polish economic order, but also as one of the fundamental values, on the basis of which the Polish social and legal order is established.[2]

Article 64 of the Constitution indicates aside ownership, also "other property rights" and "the right of succession". Other property rights embrace rights, which have a financial asset, and which may constitute an element of individuals' property and realize a specific property interest. In the light of the case law of the Constitutional Tribunal, "other property rights" encompass *inter alia* allowance in lieu of paid annual leave not taken or entitlement to a claim based on unjust enrichment. The right of succession is a property right; nonetheless, in the light of Article 64 (1) and (2) of the Constitution, it constitutes an independent institution, i.e. it does not fall within the scope of ownership, nor within the scope of other property rights. The constitutional guarantee of the said right has above all a negative meaning and, in particular, it prohibits the legislator from abolishing that institution or from substantially restricting the circle of statutory heirs, as well as from depriving anyone of the capacity to succeed, as well as it prohibits the state from arbitrarily taking over (other subjects of public law) the property of the deceased. In other words, the legislator has no possibility to deprive elements of property of the deceased of the status of private property.[3]

4.2. The Right to Safe and Hygienic Conditions of Work; The Right to Paid Holidays

In accordance with Article 66 of the Constitution:

> 1. Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute. 2. An employee shall have the right to statutorily specified days free from work as well as annual paid holidays; the maximum permissible hours of work shall be specified by statute.

[2] Lech Garlicki and Marek Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. A Commentary]* (Warszawa: Wydawnictwo Sejmowe, 2016), 589.

[3] Garlicki and Zubik, *Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland]*, 589.

The right to safe and hygienic conditions of work is a typical social right, aimed to protect safe and hygienic conditions of work, whereas its scope *ratione personae* embraces everyone who performs work. This means that the subject of review may encompass all provisions determining the conditions of work in the light of the constitutional standards. The aforementioned provision also places an obligation on the employer to introduce regulations that conform to the constitutional standards.

The right to statutorily specified days free from work as well as annual paid holidays is a constitutional guarantee of the right to rest. The said right is specified in the Labour Code.

4.3. The Right to Social Security

Pursuant to Article 67 of the Constitution:

> 1. A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute. 2. A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute.

This provision concerns the right to social security, i.e. every citizen who is not able to perform work as a result of a disease or invalidity, is entitled to receive cash and non-cash benefits, specified by statute. Above all, cash benefits paid on account of incapacity for work, as well as broadly understood social assistance (e.g. courses, trainings, essential clothing, meals) are concerned.

Moreover, the said provision stipulates that unemployed citizens have the right to social security, that is, to cash and non-cash benefits received by persons who have been involuntarily unemployed. The scope and form of the said aid is specified by statute.

The aforementioned provision is directed at public authorities, which are obliged to establish social security system and to maintain the said

system, so as to implement the constitutional guarantees of social security on a continuous basis.

4.4. The Protection of Health

In accordance with Article 68 of the Constitution:

> Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute. 3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. 4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment. 5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.

The indicated provision gives everyone the right to use the health care system, the aim of which is to eliminate and prevent conditions other than the highest attainable standard of health of the human body. The said right is exercised by means of non-cash benefits (in particular treatment and rehabilitation). The provision contained in Article 68 (2) of the Constitution refers to "equal access to health care services". This right corresponds with the obligation of public authorities to establish public health care system and to ensure the effectiveness thereof. The state is obliged to ensure funds in the state budget to finance public health care system. Special health care is ensured to children, pregnant women, handicapped people and persons of advanced age. Besides, public authorities are obliged to support the development of physical culture, which is to be understood as preventive health care.

4.5. Aid Provided to Disabled Persons

Pursuant to Article 69 of the Constitution: "Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication".

The Constitution imposes an obligation on public authorities to provide aid to ensure subsistence, adaptation to work and social communication. The definition of "disability" should be contained in a statute which should refer to international regulations in that regard. However, there is no doubt as to the fact that disability refers both to limitations of physical and mental functions. In practice, aid provided to disabled persons embraces both material (e.g. cash benefits) and immaterial assistance (e.g. professional courses, charge-free access to public transport). The obligation to provide aid to disabled persons may also be fulfilled by means of the institutions of legal incapacitation and finally of a guardian.

4.6. The Right to Education

In accordance with Article 70 of the Constitution:

> 1. Everyone shall have the right to education. Education to 18 years of age shall be compulsory. The manner of fulfilment of schooling obligations shall be specified by statute. 2. Education in public schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education. 3. Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute. 4. Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organizational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute. 5. The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute.

The above-mentioned provision refers to the possibility and obligation (to 18 years of age) to acquire knowledge (education), in an organised, regular and continuous manner. Education leads to obtaining certificates, which entitle to continue education or to perform a certain profession in

the country, and in many cases also abroad. The said provision relates to public schools – administered by public authorities and in principle free of charge, and to non-public schools (private). Pedagogical supervision of the latter is provided by public authorities. The educational cation system is regulated by a statute. Public authorities are obliged to ensure equal access to education for everyone, including also by means of material assistance (financial aid granted on the basis of income).

4.7. The Right of the Family to Assistance from Public Authorities

In accordance with Article 71 of the Constitution:

> The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent - shall have the right to special assistance from public authorities. 2. A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.

The aforementioned provision concerns two issues. Firstly, the obligations of public authorities in relation to the "family". Secondly, assistance, related to childbirth, provided to a mother.

The following are recognised as a relevant feature of a family community from the legal point of view: close and lasting relationships between family members of emotional, economic and financial character. Public authorities have an obligation to "take into account the good of the family" in their social and economic policy. What could serve as an example of the violation of the aforementioned provision is a situation where the legislator misinterprets the constitutional provision indicating a specified objective or task of public authorities, in particular, if the legislator, while enacting a statute, applied such measures which could not lead to the attainment of that objective.[4] Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent -

[4] The Decision of the Constitutional Tribunal of Poland Number K 11/00, dated 4 April 2001 : 31.

may receive special assistance from public authorities. Such assistance must therefore exceed the scope of the regular form of "taking into account of the good of the family".

Article 71 (2) of the Constitution concerns the situation of a mother, and thus it is linked with the principle of maternity protection. Benefits, which may be accorded to mothers, are specified by statute and mothers may apply for the said benefits within the scope specified by statute. It is noteworthy that the said provision refers to every mother, not only to the mothers finding themselves in difficult material and social circumstances. The aforementioned provision embraces also mothers – foreigners.

4.8. Protection of The Rights of the Child

In accordance with Article 72 of the Constitution:

> 1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, as much as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Ombudsman for Children's Rights shall be specified by statute.

The said provision regulates a number of issues: 1) it imposes an obligation on public authorities to ensure protection of the rights of the child, which is related to "everyone's" right to demand protection of a child against particularly drastic infringement of those rights; 2) it establishes the principle of the superior role of parents in guardianship and the subsidiary role of public authorities in that regard; 3) it recognises the child as the subject of rights and obligations, and the procedural rights of a child arising therefrom; 4) it provides for the requirement to establish the office of the Ombudsman for Children's Rights.

The content of the obligation of public authorities – to ensure protection of the rights of the child – is not specified. The legislator is vested with the responsibility for the indication of specific tasks and forms of activity of public authorities. Everyone has the right to demand from organs of public authority to protect the child against the above-mentioned problems. This is a special kind of *actio popularis*, because in order to make such a demand, it is not necessary to indicate a specific legal interest or a specific relation to a given child. The responsible public authority should examine and reply to a "demand". The legislator is obliged to specify the said procedure. Public authorities have a special obligation to provide assistance to a child deprived of parental care. Article 72 (3) of the Constitution imposes on every organ of public authority and on every person responsible for a child, the obligation to consider and, insofar as possible, give priority to the views of the child in the course of establishing the rights of a child. The said obligation is directed both at organs of public authority as well as parents of a child. Article 72 (4) envisages the establishment of the office of the Ombudsman for Children's Rights. Granting the Ombudsman, the status of a constitutional organ is an exceptional solution from the perspective of other legal systems, in which the sole basis for the functioning of the Ombudsman for children's rights is constituted by statutes.

4.9. The Freedom of Artistic Creation, Scientific Research, the Freedom to Teach and to Enjoy the Products of Culture

In accordance with Article 73 of the Constitution: "The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone". The said provision concerns a number of issues: 1) the freedom of artistic creation; 2) the freedom of scientific research and the freedom to teach; 3) the freedom to enjoy the products of culture.

The freedom of artistic creation embraces the freedom to create works of art without interference by public authority with the process of the creation of such work. The freedom of artistic creation also encompasses the

freedom to publicly exhibit works of art. It is arguable whether the products of every artistic creation enjoy the freedom to be publicly exhibited to an indefinite number of recipients. In particular, this concerns "works of art" which may violate e.g. the rights and freedoms of others.

The freedom to teach embraces the liberty to conduct scientific research and to educate. What is concerned is the freedom to make findings on the basis of the criterion of truth, which then may be verified and assessed. Everyone may freely choose the subject of research, the research method and the manner of presenting research results. The content of the freedom to teach is to ensure the liberty to systematically impart scientific knowledge to other persons. The freedom to teach is realised in particular at the university level. However, public authorities may shape the curriculum and may establish eligibility requirements for teachers.

The freedom to enjoy the fruits of culture refers to providing access to the products of artistic creation of others. Everything, which has been legally created and made available to the public, should be available to "everyone". The restriction of the freedom to enjoy the fruits of culture may arise from e.g. the necessity to protect the morale of persons under 18 (children).

4.10. Ecological Security and Protection of the Environment

In accordance with Article 74 of the Constitution:

> 1. Public authorities shall pursue policies ensuring the ecological security of current and future generations. 2. Protection of the environment shall be the duty of public authorities. 3. Everyone shall have the right to be informed of the quality of the environment and its protection. 4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.

Public authorities have a number of obligations related to environmental protection: 1) pursuing policies ensuring the ecological security of current and future generations; 2) providing information concerning the quality of the environment and its protection; 3) supporting the activities of citizens

to protect and improve the quality of the environment. The realisation of the said obligations takes place both at the level of legislation by means of enacting appropriate provisions, as well as at the level of the application of law by means of issuing individual decisions.

The scope *ratione personae* of the right to be informed, as referred to in Article 74 (3), encompasses everyone, i.e. both a citizen of the Republic of Poland, as well as a foreigner. The obligation to provide information is directed at public authorities.

4.11. Satisfying the Housing Needs

In accordance with Article 75 of the Constitution:

> 1. Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen. 2. Protection of the rights of tenants shall be established by statute.

The said provision imposes an obligation on public authorities to satisfy the housing needs of citizens, in particular to combat homelessness, promote the development of low-income housing and support activities aimed at acquisition of a home by each citizen. The aforementioned obligation should be realised both by means of enacting appropriate provisions, as well by means of issuing individual decisions implementing the aforementioned provisions contained in Article 75 of the Constitution. As regards the enactment of the law, the authorities have an obligation, in particular, to enact law on the protection of the rights of tenants.

4.12. Consumer Protection

In accordance with Article 76 of the Constitution: "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute".

The said provision indicated the obligation of public authorities to protect the following goods: health, privacy, safety, as well as to protect

against dishonest market practices in relations in which consumers (persons who enter legal actions with traders), users and hirers are one of the parties. The said obligation is implemented, in particular, by means of enacting appropriate statutes aimed at the protection of the aforementioned goods. Aside from the legislature, also the authorities, adjudicating on the individual situation of consumers, may be recognised as the addressees of the said provision.

V. RELATIONS BETWEEN THE POLISH LEGAL SYSTEM AND THE SYSTEM OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

In a situation of convergence of national and international competences, i.e. when both national and international entities can perform the same specific activity, there is a need to refer to the principle of subsidiarity.[5] The general question of whether these competencies can be exercised differently (but not arbitrarily) at national and international level should be answered in the affirmative, and this is due to the very essence of the principle of subsidiarity, which – in the opposite case – would be superfluous. The subsidiarity principle does not apply to exclusive competences reserved only for one entity.

The principle of subsidiarity, understood as above, applies to the relations between the ECHR and the courts of the States – parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) – which rule on human rights and freedoms. In international human rights law, there is an inherent tension between the affirmation of the universal, material vision of human dignity and respect for the diversity and freedom of human cultures.[6]

P.G. Carozza stated that subsidiarity requires:

> First, that local communities be left to protect and respect the human dignity and freedom represented by the idea of human rights whenever

[5] Sabino Cassese, "Ruling Indirectly. Judicial Subsidiarity in the ECtHR" (A seminar paper at European Court of Human Rights, 2015),10, https://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf.

[6] Paolo Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97 (2003) : 38.

> they are able to achieve those ends on their own; (...). Second, subsidiarity supports the integration of local and supranational interpretation and implementation into a single community of discourse with respect to the common good that the idea of human rights represents. And third, to the extent that local bodies cannot accomplish the ends of human rights without assistance, the larger communities of international society have a responsibility to intervene. Insofar as possible, however, the *subsidium* of the larger community should be oriented toward helping the smaller one achieve its goal without supplanting or usurping the latter society's freedom to pursue its own legitimate purposes.[7]

In the Convention, a kind of respect for the state authorities – parties to this act, was expressed by requiring the exhaustion of the domestic remedies before lodging an application with the ECHR. This is to ensure mutual and correct interaction between national and conventional legal orders.[8] The principle of subsidiarity understood in this way was formally expressed in Article 35 of the Convention, which provides as follows: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. (...)." At the same time, in accordance with Article 13 of the Convention, States – parties to the Convention are obliged to provide everyone, whose rights and freedoms as set forth in the Convention are violated, an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The subsidiarity principle was strengthened by Protocol 15 to the Convention, on the basis of which the following sentence has been added to the Introduction to the Convention:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

7 Carozza, "Subsidiarity as a", 57.
8 Cassese, "Ruling Indirectly," 4.

It is said that the above paragraph is, *inter alia*, a response to a significant number of cases before the ECHR.[9]

In my opinion, the principle of subsidiarity, understood as exhaustion of the domestic remedies before lodging an application with the ECHR, is a principle of subsidiarity in terms of procedure. On the substantive side, however, the doctrine of the margin of appreciation sets out the subsidiarity principle. The principle of subsidiarity has therefore in my opinion two dimensions: procedural and substantive.

It seems clear that national authorities, in particular the courts, are in a better position to determine facts of a particular case, to take evidence in the case, or to determine which provisions of law to apply. There are, however, situations in which the ECHR is ready to grant a broad (broader) scope of freedom to national authorities, referring to the doctrine of the margin of appreciation formed in the case law of the ECHR. At the same time, in my opinion, it is a substantive aspect of the subsidiarity principle. The margin of appreciation doctrine was created by the ECHR in its case law. It refers to "(...) the breadth of deference or error the Court will allow national bodies before it will declare a violation of one of the substantive guarantees under the Convention".[10] For the record, it should be noted that for the first time the ECHR referred to the doctrine of the margin of appreciation in its judgment of 7 December of 1976 in the case of *Handyside v. The United Kingdom*, in which we read:

> The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted. These observations apply, notably, to Article 10 para. 2 (art. 10-2). In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals

[9] Marisa Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights," *International Journal of Constitutional Law* 15 (April 2017): 394.

[10] Carozza, "Subsidiarity as a," 61.

> varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements (...).[11]

The doctrine of the margin of appreciation causes a lively discussion among representatives of science.[12] The advocates of this doctrine indicated, among other things, e.g.: 1) that the scope of violations of the Convention rights and freedoms where the doctrine of the margin of appreciation can be applied, is limited;[13] 2) that the doctrine of the margin of appreciation may be appropriate, in particular in cases where there is a reasonable doubt as to whether the State – party to the Convention violated the rights or freedoms of the Convention, due to a somewhat better understanding of the circumstances of the case by national courts;[14] 3) the ECHR even in such a case as the one in point 2, using the so-called proportionality test, may confirm the decisions of national authorities.[15] The opponents of the doctrine of the margin of appreciation point out, among other things, that e.g. the idea that States Parties to the Convention have a margin of appreciation in fulfilling their human rights obligations, and that these human rights obligations should correspond to the level of diversity

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11 Decision of the European Court of Human Rights Number 5493/72, Handyside v. the United Kingdom (European Court of Human Rights, 7 December 1976), 17.

12 See Andreas Follesdal and Nino Tsereteli, "The Margin of Appreciation in Europe and Beyond," *The International Journal of Human Rights* (2016): 1055 - 1057, https://doi.org/10.1080/13642987.2016.1258856; Dimitrios Tsarapatsanis, "The Margin of Appreciation as an Underenforcement Doctrine," in *Human Rights Between Law and Politics. The Margin of Appreciation in Post-National Contexts*. *Modern Studies in European Law*, ed. Petr Agha (Hart Publishing, 2017); Andreas Follesdal, "Appreciating the Margin of Appreciation," in *Human Rights: Moral or Political*, ed. A. Etinson (Oxford: Oxford University Press, 2018); Georg Letsas, "The Margin of Appreciation Revisited A Response to Follesdal", in *Human Rights: Moral or Political*, ed. A. Etinson, (Oxford: Oxford University Press, 2018); Andreas von Staden, "The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review," *International Journal of Constitutional Law* 10, no. 4 (October 2012): 1028, https://doi.org/10.2139/ssrn.1969442; Oddný Mjöll Arnardóttir, "Rethinking the Two Margins of Appreciation," *European Constitutional Law Review* (December 2016): 28; Stefan Graziadei, "Democracy v. Human Rights? The Strasbourg Court and the Challenge of Power Sharing," *European Constitutional Law Review* (December 2016): 54-84, https://doi.org/10.1017/S1574019616000043; Amrei Müller, "Domestic authorities' Obligations to Co-Develop the Rights of the European Convention on Human Rights", *The International Journal of Human Rights* (October 2016): 1058-1076, https://doi.org/10.1080/13642987.2016.1242301.

13 Andreas Follesdal, "Appreciating the Margin of Appreciation," in *Human Rights: Moral or Political*, ed. A. Etinson (Oxford: Oxford University Press, 2018), 269.

14 Follesdal, "Appreciating the Margin," 269.

15 Follesdal, "Appreciating the Margin," 269.

between States Parties to the Convention, is trivial or misleading.[16] There are also opinions saying that it is necessary to distinguish between the issue of establishing (the literal wording of the so-called limitation clauses) and the issue of applying the law.[17]

VI. THE RIGHT TO PROPERTY – THE CONFRONTATION OF THE POLISH LEGAL SYSTEM WITH THE SYSTEM OF THE CONVENTION: A CASE STUDY

6.1. The Case of Waldemar *Nowakowski v. Poland* (application no. 55167/11)

The case originated in an application against the Republic of Poland lodged with the Court under Article 34 of the Convention by a Polish national, Mr. Waldemar Nowakowski (hereinafter: the applicant), on 22 August 2011.[18] The applicant complained about an alleged breach of his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the Convention.[19]

The circumstances of the case were as follows.

The applicant was a veteran of the Polish Resistance during the Second World War and a former professional officer of the Polish Army. His veteran status on the grounds of his involvement in the underground Scouts movement during that war was recognized by an administrative decision given on an unspecified date by the Director of the Veterans' Office. For the last fifty years, the applicant collected antique arms and weapons from the period of the Second World War and earlier.

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16 Letsas, "The Margin of," 295.

17 D. Tsarapatsanis, "The Margin of," 71-88.

18 Decision of European Court and Human Rights No. 55167/11, Waldemar Nowakowski v. Poland (European Cour and Human Rights 24 July 2012): 2.

19 Article 1 of Protocol no. 1 to the Convention: "Every natural or legal person in entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

On 7 and 8 July 2008, the police searched the applicant's home and summer cottage. They confiscated the applicant's collection, which at that time numbered 199 pieces.

On 16 July 2008 the Director of the Warsaw Uprising Museum (hereinafter: the Museum) in Warsaw issued a statement for the purposes of an investigation against the applicant which had been instituted immediately after the search and seizure. He stated that, the applicant had been cooperating with the Museum as a specialist in old weaponry and that on a number of occasions he had lent certain pieces of his collection for the purposes of their being exhibited at the Museum. He stated that the applicant's expertise was highly valued by the Museum.

On 18 November 2010, the Warszawa Wola District Court discontinued the criminal proceedings against the applicant concerning charges of illegal possession of arms, contrary to Article 263 Section 2 of the Criminal Code. The court first listed 171 pieces of the applicant's collection, the oldest of them produced in 1889. The court acknowledged that no criminal intent to use the arms to anyone's detriment could reasonably be ascribed to the applicant. However, he must have known that the possession of arms without a permit was unlawful. The court concluded that the offence was minor in nature and discontinued the criminal proceedings against the applicant, referring to Article 17 paragraph 1 (3) of the Criminal Code. At the same time, the court decided to apply Article 100 of the Criminal Code in conjunction with its Article 39 and to confiscate 171 pieces of the collection. The court, explaining why it decided to avail itself of its discretionary power to confiscate the entire collection, stated that dividing up the collection by returning to the applicant those pieces which had already been put out of action would seriously diminish its value. It noted that the collection should, because of its historical interest, be handed over to an institution capable of securing appropriate storage and display conditions for it.

By a decision of 22 February 2011, the Warsaw Regional Court upheld the first-instance decision. It fully endorsed the reasoning of the lower

court. It further noted that the confiscation of the collection should not lead to its destruction. The State authorities should be well aware of the historical value of the collection. On 16 March 2011, the Warszawa Wola District Court invited the Warsaw Uprising Museum to indicate whether they would be interested in the applicant's collection. On 28 June 2011, the Director of the Museum replied, indicating that the Museum wished to take certain pieces selected by a Museum's expert.

The applicant complained to the Court that the confiscation of his collection had breached his right to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention. Article 1 of Protocol No. 1 to the Convention comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognizes that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule.

The Court held that it was not in dispute between the parties that the confiscation order had amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. It remained to be determined whether the measure was covered by the first or second paragraph of that Convention provision.

The Court noted that the confiscation of the applicant's property was ordered pursuant to Article 100 of the Criminal Code in conjunction with its Article 39. It therefore accepted that interference was prescribed by law. Furthermore, assuming that the interference complained of pursued

a legitimate aim in the general interest, within the meaning of Article 1 of Protocol No. 1 to the Convention, the Court had to examine whether a proper balance had been struck between that aim and the applicant's rights. In this connection, the Court reiterated that, where possessions are confiscated, the fair balance depends on many factors, including the owner's behavior. It must have therefore determined whether the Polish courts had regard to the applicant's degree of fault or care

The Court noted that Article 100 of the Criminal Code did not oblige the courts to order the forfeiture of the collection. It only conferred on them a discretionary power to do so when discontinuing criminal proceedings. The courts decided to avail themselves of that power.

The ECHR stated that the first-instance court noted that the applicant was a 77 year old war veteran, had fought in the Warsaw Uprising, was a retired professional officer of the Polish Army and was a law-abiding citizen with no criminal record. The Court further stressed that the domestic courts were aware of these circumstances. However, they still decided to confiscate the collection. The applicant's personal circumstances did not therefore have any practical impact on the confiscation order. The Court was therefore of the view that the domestic courts failed to take into account the applicant's personal situation and characteristics.

The Court could not but note that the applicant started his collection approximately fifty years ago. The domestic court acknowledged this fact in its decision. The authorities had never taken any interest in the collection before July 2008 when they searched the applicant's home and summer cottage. The Court further observed that the domestic court was aware that not all the pieces of the collection could still be used as weapons as the applicant had taken measures to disable them. The domestic courts failed to consider any alternative measures which could have been taken in order to alleviate the burden imposed on the applicant, including by way of seeking registration of the collection.

Having regard to the above, the ECHR found that the applicant had been deprived of his property, losing the collection of considerable historical and financial value. Therefore, Poland violated Article 1 of Protocol No. 1 to the Convention.

The Court was of the view that in the circumstances of the case the most appropriate form of redress of the violation found would be the restitution to the applicant of those elements of the collection which could be lawfully restored to him. Moreover, the Court accepted that the applicant undoubtedly suffered distress and anxiety. It therefore awarded him EUR 4,000 in respect of nonpecuniary damage.

6.2. The Execution of the Case of *Waldemar Nowakowski v. Poland* by the Polish Government

The obligation to execute (implement) the ECHR's judgments by the Member States of the Council of Europe results from Article 46 of the Convention. The Committee of Ministers of the Council of Europe, which is the sole decision-making body of the Council of Europe, supervises the execution of judgments of the ECHR. It consisted of the Member States' foreign ministers.

In order to ensure the best implementation of judgments of the ECHR, on 19 July 2007, the Prime Minister of Poland appointed the Inter-Ministerial Team for the ECHR (hereinafter: the Team). The team acts as an advisory body to the Prime Minister. The tasks of the Team include developing government opinions on communicated cases and judgments of the ECHR, analyzing compliance with the Convention of major draft legal acts, as well as presenting appropriate proposals. At the meetings of the Team, problems arising from communicated complaints and judgments issued by the ECHR are analyzed. The Team may make proposals for appropriate actions. It is also a forum where particularly significant problems are discussed regarding the compliance of the proposed statutory changes with the Convention, which may be related to laws or practices in Poland.

The Team supervises the execution of judgments and decisions of the ECHR against Poland based on documents and information on the execution of judgments and decisions submitted by relevant ministers on their own initiative or at the request of the minister competent for foreign affairs, and analyses possible problems related to their implementation. The Team performs the task, in terms of supervising the implementation of the ECHR judgments and decisions, in particular on the basis of an action plan presented by the minister competent because of the content of the violation found in the ECHR judgment, containing information on required measures, i.e.: 1) individual measures, in other words measures to ensure that a violation of the Convention will be terminated and that the applicant will be placed, as far as possible, in the same position as he enjoyed before the violation of the Convention; 2) general measures, i.e. measures concerning law or practice aimed at ending the violation of the Convention and preventing new, similar violations of the Convention in the future. The action plan should also include a deadline for implementing individual or general measures.

As regards the judgment in the case of *Waldemar Nowakowski v. Poland*, the following individual measures were taken, of which the Polish government informed the Committee of Ministers in its report of 2 September 2015. On 26 November 2013, the Warsaw Court of Appeal re-opened the criminal proceedings against the applicant and remitted the case to the first-instance court. The Government had submitted to the domestic court their amicus curiae in the applicant's favour.

On 13 February 2014 the Warsaw District Court, having regard to the Court's principal judgment of 24 July 2012, annulled the decision to confiscate the collection. The court noted that the applicant had fulfilled applicable administrative formalities necessary for running a private museum. In particular, he had obtained a relevant permit of the Ministry of Culture and National Heritage. It further confirmed the applicant's ownership of the collection. The collection was returned to the applicant on 9 April 2014.

Regarding general measures, the Polish government stated that the ECHR did not criticized a legal framework governing confiscation as contained in the Polish Criminal Code, but rather its application in the specific circumstances of this particular case. In the government's opinion, the publication of the above judgment will be sufficient measure to prevent future similar violations. In the government's view, no further individual measures are necessary in this case and the general measures adopted will be sufficient to conclude that Poland fulfilled its obligations under Article 46 paragraph 1 of the Convention.

In its resolution of 14 September 2015, the Committee of Ministers, exercising its powers pursuant to Article 46 paragraph 2 of the Convention, stated as follows:

> Having examined the action report provided by the government indicating the measures adopted in order to give effect to the judgment including the information provided regarding the payment of the just satisfaction awarded by the Court. Having satisfied itself that all the measures required by Article 46, paragraph 1, have been adopted, declares that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and decides to close the examination thereof.[20]

VII. CONCLUSION

In the Polish legal order, primarily in the Constitution, there exists a significant number of economic, social and cultural rights and freedoms. They are clarified in the course of proceeding in a specific case. The right to property is one of the fundamental rights. The practice of applying the law by Polish courts and the ECHR shows that a different approach to the interpretation of the right to property (and other rights as well) occurs. Nevertheless, the Polish government implement judgments and decisions of the ECHR by means of individual and general measures. At the same time, it should be stated that a

[20] Resolution of the Committee of Ministers of the Council of Europe of 14 September 2015, https://hudoc.echr.coe.int/eng#{"itemid":["001-158387"]}.

different interpretation of the law at domestic and international level is not completely prohibited. In a way, its theoretical justification is the principle of subsidiarity and the doctrine of the margin of appreciation.

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Biography

Christoph Enders is a University Professor at the Chair of Public Law, Political and Constitutional Theory and Executive Director of the Institute for the Foundations of Law at the Faculty of Law, University of Leipzig, Germany. His habilitation treatise took place in the Fields of Public Law, Philosophy of Law and State. Professor Enders is a member of the Association of the German Constitutional Law Professors and of the Working Committee for "History, Methodology and Dogmatics of Public Law". Previously (2008-2014), he was a judge in subsidiary office at the Higher Administrative Court of Saxonia in Bautzen (Sächsisches OVG). He was Project Manager of the German-Academic-Exchange-Service (DAAD) Project "Exploring Legal Cultures" and actually is the Project Manager of the DAAD Project "Law and Culture" (within the context of the programmes "Academic Dialogue with the Islamic World" and "Subject-Related Partnerships with Institutions of Higher Education in Developing Countries"). Since 2014, he is Deputy Member of the PIGD-Ethics Commission at the State Chamber of Physicians Baden-Württemberg.

Gerhard van der Schyff is an Associate Professor in the Department of Public Law and Governance at the Law School of Tilburg University in the Netherlands. He holds PhDs in Law from Antwerp University and Leiden University and teaches and publishes on the topic of comparative and European constitutional law and fundamental rights.

Stefanus Hendrianto studies the Indonesian constitutional system from legal, comparative, philosophical, historical and theoretical perspective. In recent years, he served as a visiting professor at Santa Clara University School of Law and a guest scholar at the Kellogg Institute for International Studies at the University of Notre Dame. Currently, he is a scholar at Boston College, School of Theology and Ministry. He holds a Ph.D. degree from University of Washington School of Law in Seattle, and an LLM from Utrecht University in the Netherlands, in addition to his LLB degree from Gadjah Mada University, Indonesia. He is the author of Law and Politics of Constitutional Court: Indonesia and the Search for Judicial Heroes (Routledge, 2018). His work has been published in the Notre Dame Journal of Law, Ethics and Public Policy, Washington International Law Journal, the Australian Journal of Asian Law, Journal Law and Method, and several edited book volumes

Maria Eva Földes, PhD is lecturer at the European and International Law Program and member of the research group Changing Role of Europe at The Hague University of Applied Sciences. She earned her PhD degree at the Central European University, Budapest, Hungary. Prior to joining The Hague University, she worked as post-doctoral researcher at Tilburg University, The Netherlands, Department of European and International Public Law and TILEC – Tilburg Law and Economics Center. She also worked as assistant professor at the University of Vienna, Austria, Institute for European Integration Research. Her research interests are focused on health policy and healthcare governance in the EU as well as the right to health in international law and in a comparative perspective.

Andy Omara, S.H., (Universitas Gadjah Mada), MPub&IntLaw., (University of Melbourne), Ph.D. (University of Washington) is an Associate Professor of Constitutional Law at Department of Constitutional Law Universitas Gadjah Mada (UGM) School of Law, Yogyakarta Indonesia. Currently, he is the Chief of Department of Constitutional Law. He teaches Constitutional Law, Comparative Constitutional Law, Judicial Review, The Presidency, Law and Politics, and the Judiciary in both undergraduate and graduate programs in UGM. His research interests include Law and Politics, Constitutional Court and Economic and Social Rights Protection, and Judicial Review. He publishes articles in both accredited national journals and international journals. He can be reached at andy.omara@mail.ugm.ac.id.

Kamil A. Strzępek (ORCID number is: 0000-0001-9277-6057), is an Assistant Professor at Cardinal Wyszyński University in Warsaw, Poland. Kamil teaches courses in Public International Law, European Union law and human rights law both in Polish and English language. He holds PhD degree from University of Warsaw, Poland. He held positions at the Supreme Administrative Court in Poland and the European Court of Human Rights in Strasbourg. Currently he works as an Assistant Lawyer at the Polish Constitutional Tribunal.

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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.

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The manuscripts have to be submitted online. Authors need to create an account to submit their manuscripts.

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1. Manuscripts should be written in English.
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3. Manuscripts submitted must be original scientific writings and do not contain elements of plagiarism.
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6. Manuscripts are written in A4 paper, 12 point Times New Roman, 1.5 space and written in standard and correct grammatical language.
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   2. Main Heading
      2.1. Sub-heading
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- Preceded by the word "Keyword" in bold style (Keywords).
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The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

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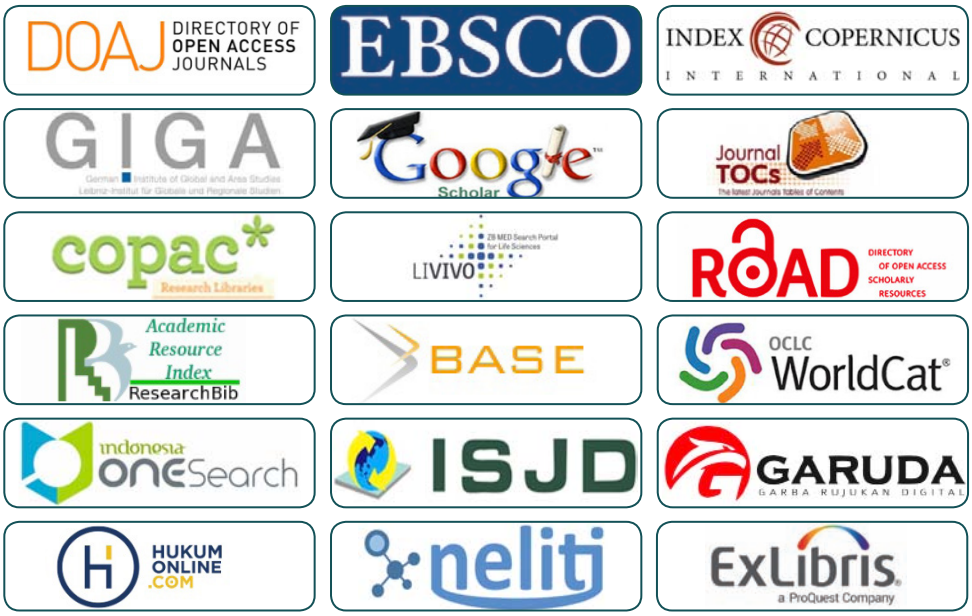

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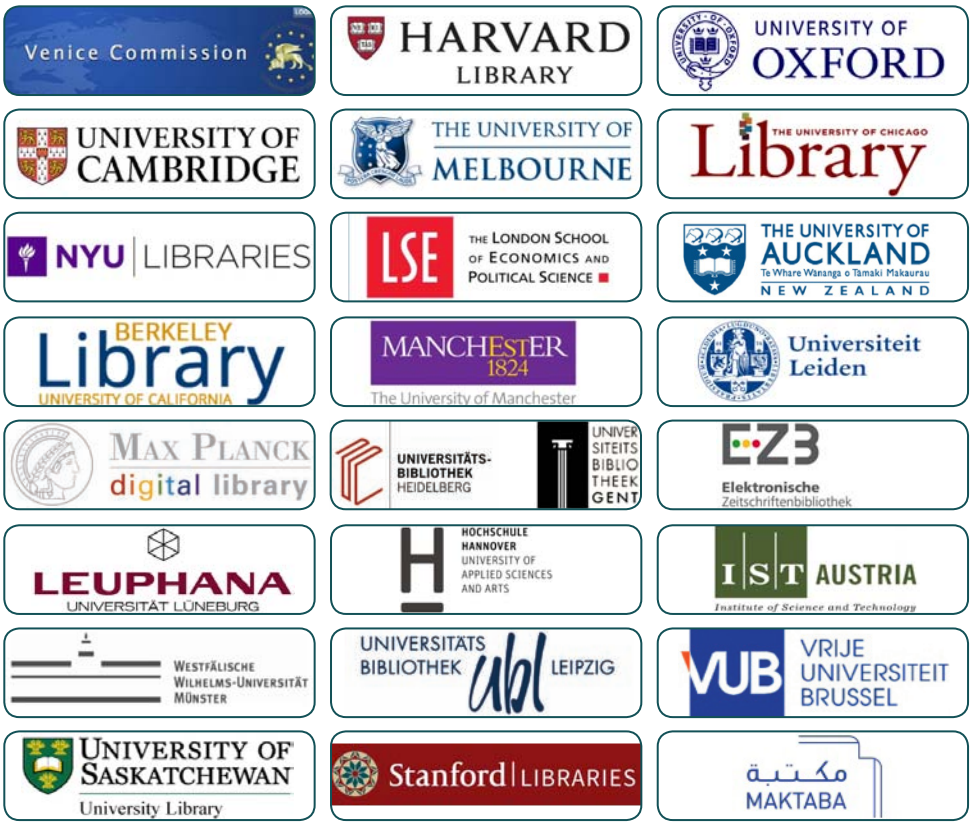


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