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

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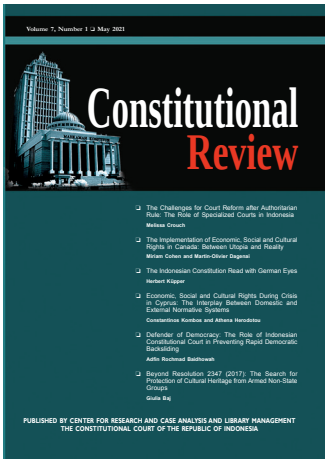
Note From Editors



Constitutional Review (ConsRev) Journal is proud to reach its seventh year of publication. Since 2015, ConsRev has sought to contribute to academic discourse on issues of constitutional law from around the globe. We strive to achieve this by publishing innovative scholarly research articles by legal experts, academics and professionals from throughout the world. Despite the challenges of the ongoing coronavirus pandemic, ConsRev is pleased to be able to publish this first issue of 2021 on time.

This issue has six articles by eight authors. The first article, **The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia**, is by Melissa Crouch, a Professor and Associate Dean (Research) at the Law School of the University of New South Wales. She examines how Indonesia's court reform after the Suharto regime has involved both institutional reform and a shift in legal culture. She draws on the work of the late Daniel S. Lev, an American political scientist and Indonesia scholar, who favored empirical study of the concept of legal culture to understand the politics of courts. Crouch notes that although specialized courts have addressed some of the issues Lev identified in Indonesia's legal system, such as judicial independence, corruption and expertise, significant challenges remain to improving the country's legal culture and general courts.

The second article, **The Implementation of Economic, Social and Cultural Rights in Canada: Between Utopia and Reality**, is co-authored by Miriam Cohen, an Associate Professor at the Faculty of Law, Montréal University, and Martin Olivier Dagenais, who is completing his master's in law at Harvard Law School. Looking at case law concerning economic, social and cultural (ESC) rights in Canada, they argue there is a disconnect with Canada's international obligation to ensure progressive realization of such rights through all available resources. The authors point out that although many ESC rights are protected by specific legislation, the Canadian Constitution's Charter of Rights and Freedom is silent on such rights. They conclude that this positive/negative dichotomy has proved to be the Achilles' heel in the full protection of ESC rights in Canada.

The third article, **The Indonesian Constitution Read with German Eyes,** is an insightful look at some of the main differences between the Indonesian and German constitutions. Authored by Herbert Küpper, a Director of the Munich Institute for Eastern European Law and Professor of the Andrássy University Budapest, the article scrutinizes the Indonesian Constitution from a German perspective. Küpper proposes that the balance between unitarianism and regional diversity is probably the most conspicuous feature of the Indonesian Constitution, designed as a compromise to accommodate the country's geographic, demographic and cultural differences. Comparing the two countries' political systems, human rights protection, religious freedom and even consistency of legal terminology, he concludes the Indonesian and German constitutional systems could both learn from each other to better face future challenges.

The fourth article is authored by Constantinos Kombos, a Law Professor at the Department of Law, University of Cyprus, and Athena Herodotou, a PhD (Law) candidate at the same university. Their article, **Economic, Social and Cultural Rights During Crisis in Cyprus: The Interplay Between Domestic and External Normative Systems**, assesses the impact of the devastating Cypriot economic crisis on the protection of ESC rights and the change in the balance between domestic and external normative systems. Specifically, they look at how the courts responded to financial austerity measure that affected people's salaries, benefits and bank deposits. The authors conclude the Supreme Court of Cyprus in some cases indicated willingness to disregard guidance from external influences and to focus instead on the idea that national constitutional protection should exceed that of the European Convention on Human Rights.

The fifth article is **Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding**, authored by Adfin Rochmad Baidhowah, a Lecturer and Researcher at the Faculty of Politics and Governance at the Centre for Government Study at the Institute of Home Affairs Governance, Indonesia. He proposes that the function of Indonesia's Constitutional Court in safeguarding Indonesia from reverting to authoritarianism has been frequently overlooked. Analyzing the Constitutional Court's discussions and rulings on elections held over 2019–2020, he finds the Court is preventing rapid democratic backsliding or even an authoritarian turn, by maintaining indicators of competitiveness, participation and accountability in elections.

The last article in this edition is by Giulia Baj, a PhD candidate in Public, European and International Law at the University of Milano-Bicocca, Italy. Her article is titled **Beyond Resolution 2347 (2017): The Search for Protection of Cultural Heritage from Armed Non-State Groups.** She looks at the limitations of the UN Security Council's Resolution 2347, which was designed to protect cultural heritage items from looting and destruction by armed non-State groups (ANSGs). Baj considers other ways to better guarantee the protection of cultural heritage from ANSGs, proposing stronger protection by States through a combined application of international humanitarian law and international human rights law.

As ever, the Editors of ConsRev hope this publication will be beneficial in giving readers new insights and understanding on constitutions, constitutional court decisions and constitutional issues. We also hope this edition could inspire law professors, scholars, judges, legal practitioners, researchers and anyone with an interest in law to explore their ability in writing articles and conducting research on constitutional issues and any related fields.

The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia

Melissa Crouch

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 001-025

Political transitions from authoritarian rule may lead to a process of court reform. Indeed, court reform has been a central pillar of the law and development movement since the 1960s. What challenges do court reform efforts face after authoritarian rule in Indonesia and to what extent can specialized courts address these challenges? In this article, I examine court reform and the establishment of specialized courts in Indonesia post-1998. I argue that we need to pay attention to the politics of court reform after authoritarian rule. Specialized courts as a type of institutional reform need to be considered together with judicial culture in order to address fundamental challenges in the courts.

Keywords: Authoritarian Rule, Corruption, Court Reform, Judicial Independence.

The Implementation of Economic, Social and Cultural Rights in Canada: Between Utopia and Reality

Miriam Cohen and Martin-Olivier Dagenais

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 026-052

Canada has been at the forefront of the recognition of human rights, including economic, social and cultural rights (ESC rights) in the international scene. As a party to the International Covenant on Economic, Social and Cultural Rights, Canada has, over the years, implemented in legislation and case-law some ESC rights such as the right to health, education and social welfare. While ESC rights were not explicitly identified in the Charter of Rights and Freedoms, which forms part of the Canadian Constitution, ESC rights in different forms have received some protection in the Canadian legal order. An analysis of the Canadian record with respect to ESC rights demonstrates the immense gap between a glorified image of Canada as an international human rights proponent (the 'utopia') and the actual implementation of internationally recognized human rights in Canada (the 'reality'). As Canada is bound to face major transformational changes to its economy and social fabric in the years to come, the Courts will have to adapt quickly and efficiently to ensure a smooth transition. This paper overviews the evolution of the case-law on ESC rights in Canada in light of its international obligations, and suggests, the relevant ESC rights jurisprudence signals a disconnect with Canada's international obligation 'requiring progressive implementation to the maximum of available resources by all appropriate means.'

Keywords: Canada, Charter of Rights and Freedoms, Comparative Constitutional Law, ESC Rights, International Human Rights.

The Indonesian Constitution Read with German Eyes

Herbert Küpper

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 053-091

The Indonesian Constitution offers many interesting insights to a German constitutional scholar. The most striking feature is the balance between the unitarian state and the natural diversity of Indonesia. In Germany, the state architecture reflects regional diversity in its federal framework, whereas Indonesia combines the unitarian state with various decentralising elements. This balance between unitarianism and regional diversity is probably the most conspicuous feature of the Indonesian Constitution and appears to be a suitable compromise between the conflicting aims of stabilising the state and the nation on the one hand and accommodating the geographic, demographic and cultural differences within the country on the other. Another striking feature is the presidential system, which is quite the opposite of the parliamentary system of the German constitution. Other points that, from the perspective of German constitutional law, invite comparison are the constitutional provisions about the legal system, Indonesia's constitutional monotheism, which is quite the opposite of the German idea of the state being strictly neutral in religious affairs, and human rights.

Keywords : German Constitution, Human Rights, Indonesian Constitution, Legal System, Unitarian State.

Economic, Social and Cultural Rights During Crisis in Cyprus: The Interplay Between Domestic and External Normative Systems

Constantinos Kombos and Athena Herodotou

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 092-123

Economic, Social and Cultural (ESC) rights have been present and active in the Cypriot legal order from the moment of its constitutional genesis. Due to the special relationship between the Constitution and the European Convention on Human Rights (ECHR), the judiciary has adopted a unique approach when interpreting the Constitution; it has been willing to engage into a comparative juridical analysis and to rely on the ECHR and the findings of the European Convention on Human Rights (ECtHR). Through this nexus with the ECHR and the streamlined approach with the ECtHR, the legal system of Cyprus has been progressive in placing social and economic rights – and to a lesser extent cultural rights – in a secure position. This traditional approach of the Cypriot courts was called into question by the 2011-2016 economic crisis, which challenged the interplay between domestic and external normative systems. The aim of this paper is to assess the impact of the recent economic crisis on the protection of ESC rights and the change in the balance between domestic and normative systems. The analysis concludes that the protection of ESC rights under the Cypriot Constitution, as formed by Cypriot case law, has been substantive and effective, while positively influenced by the extensive deployment of the comparative method. That long-standing approach has been challenged by the economic crisis and it seems that the extrovert judicial viewpoint is now partly reconsidered. The Supreme Court has indicated, albeit in specific instances, its willingness to disregard guidance from external influences and to focus instead on the idea that national constitutional protection can and should exceed that of the ECHR.

Keywords: Cyprus, ECHR, Economic Crisis, Right to Property, Social and Cultural Rights.

Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding

Adfin Rochmad Baidhowah

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 124-152

Debate on the quality and durability of Indonesia's democracy has intensified in recent years. Political scholars had generally praised the country's democratic achievements and stability in the two decades following the 1998 resignation of long-serving president Suharto. But more recently, a growing number of academics have noted that elements of Indonesia's democracy are being eroded. While the issue of Indonesia's democratic backsliding has gained considerable attention and generated much academic literature, few scholars have analyzed why Indonesia has not entered a phase of rapid backsliding or a return to authoritarianism. This article argues the role of the Indonesian Constitutional Court in the consolidation of democracy has been frequently overlooked. By using a qualitative approach involving archival research of the Constitutional Court's sessions on disputed results in Indonesia's 2019 elections, this article finds the Constitutional Court has been able to prevent rapid democratic backsliding and even a reversion to authoritarianism, by ensuring competitiveness, participation and accountability in elections.

Keywords: Democracy, Elections, Indonesia, Judicial Politics.

Beyond Resolution 2347 (2017): The Search for Protection of Cultural Heritage from Armed Non-State Groups

Giulia Baj

Constitutional Review, Vol. 7, No. 1, May 2021, pp. 153-187

One expression of cultural rights is the right to enjoy cultural heritage. However, the latter is not efficiently protected in situations of armed conflict. In many cases, armed non-State groups (ANSGs) have destroyed or looted cultural heritage items. The United Nations Security Council has intervened with Resolution 2347 (2017), welcomed by many as a milestone in the international protection of cultural heritage in conflict situations. However, this Resolution presents several limitations. The protection of cultural heritage from destruction and exploitation does not appear as the main focus, but rather as a means to fight terrorist groups. The attacks against cultural heritage are considered "war crimes", but only "under certain circumstances". The Resolution encourages States "that have not yet done so to consider ratifying" treaties on the issue in question; however, these instruments are treaties drafted and ratified by States. Problems of compliance by non-State actors, as ANSGs, arise. Hence, the capacity of the Resolution to effectively protect cultural heritage in conflicts involving ANSGs is debated. This paper analyses the text of Resolution 2347 (2017), resorting to traditional means of interpretation to highlight its limitations, and considers how a general sense of the necessity to protect cultural heritage from attacks committed by ANSGs has emerged, as demonstrated by the International Criminal Court's *Al Mahdi* case. The paper then considers other ways to guarantee the protection of cultural heritage from ANSGs. A proposal for stronger protection of cultural heritage by States through both international humanitarian law (IHL) and international human rights law (IHRL) is presented. In particular, the connection between the protection of cultural heritage, the guarantee of cultural rights and other human rights is presented, resorting to instruments of doctrine and analyzing instruments of practice. Finally, the case for the stronger international cooperation for the protection of cultural heritage is made; problems of compliance by ANSGs may persist, but the systematic destruction of cultural heritage items can be considered a violation of cultural rights, thus requiring the cooperation of all international stakeholders.

Keywords: Cultural Heritage, Cultural Rights, International Human Rights Law, International Humanitarian Law.

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The Challenges for Court Reform after Authoritarian Rule: The Role of Specialized Courts in Indonesia

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Abstract

Political transitions from authoritarian rule may lead to a process of court reform. Indeed, court reform has been a central pillar of the law and development movement since the 1960s. What challenges do court reform efforts face after authoritarian rule in Indonesia and to what extent can specialized courts address these challenges? In this article, I examine court reform and the establishment of specialized courts in Indonesia post-1998. I argue that we need to pay attention to the politics of court reform after authoritarian rule. Specialized courts as a type of institutional reform need to be considered together with judicial culture in order to address fundamental challenges in the courts.

Keywords: Authoritarian Rule, Corruption, Court Reform, Judicial Independence.

I. INTRODUCTION

Political transitions from authoritarian rule may lead to a period of judicial reform. Indeed, court reform has been a central pillar of the law and development movement since the 1960s. An agenda for court reform after authoritarian rule is often motivated by the desire to address entrenched corruption in judicial practice and enhance the independence of the courts in relation to the other branches of government.

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One common institutional reform has been the creation of specialized courts. Specialized courts are a response to several key issues common to democratizing regimes. One issue is the lack of judicial expertise and professionalism. Another issue is the need to ensure fairness and justice, which is challenged by corruption in the courts. Further issues are the lack of legal certainty, as well as inefficiency and inconsistency, in the functioning of the courts. Specialized courts respond to these concerns by seeking to enhance judicial expertise and professionalism; eliminate or reduce incentives for corruption by insulating the specialized court from the general courts; and by introducing distinct procedures to enhance efficiency, certainty and consistency. The trend towards judicial specialization can be found across jurisdictions in Asia,[1] although the Indonesian case is remarkable in the scale and breadth of areas of specialization.

In this article, I consider the challenges court reform efforts face after authoritarian rule in Indonesia and the extent to which specialized courts can address these challenges. I identify the key challenges that specialized courts are said to address, including the issue of corruption, a lack of professionalism and expertise, and legal uncertainty. I affirm socio-legal scholarship on the concept of legal culture as a way of understanding courts as institutions that work within networks of power. The work of Daniel S. Lev, a political scientist and Indonesianist, promotes the empirical study of the concept of legal culture as one means to understand the politics of courts.

I consider the extent to which specialized courts address the concerns Lev identified in Indonesia's legal system and whether judicial culture in the specialized courts is distinct from the general courts. Indonesia's contemporary judicial landscape features at least thirteen different types of courts. These include the creation of a specialized Constitutional Court, a Tax Court, a Human Rights Court, a Fisheries Court, an Anti-corruption Court and a Commercial Court, among others. I identify the common techniques adopted by specialized courts, such as appointing a majority of non-career judges to ensure judicial independence; providing specialized judicial training to enhance expertise;

[1] Pip Nicholson and Andrew Harding, *New Courts in Asia* (London: Routledge, 2010).

and introducing streamlined procedures to increase access to justice. I suggest that these courts offer the promise of enhancing professionalism and expertise, and reducing corruption, because the judges on these courts are more often ad hoc judges rather than career judges. Yet the initial set-up phase of a court is crucial to ensuring it meets these goals, and as creatures of legislation, subsequent amendment by parliament may threaten the powers, and ultimately the independence, of these courts.

II. COURTS AND LEGAL CULTURE

Law reform often focuses on the technical or institutional aspects of reform, yet consideration of legal culture is also important. Legal culture as a concept has received significant scholarly attention over recent decades. The study of legal culture spans several fields, including anthropology, comparative law, and law and society.[2] I suggest that central to the study of legal culture is the concern over power, authority and equality.[3] This is why legal culture matters for court reform during times of political transition.

The literature on legal culture focuses on debates over the meaning of the term and whether the term 'legal culture' remains useful and coherent. The work of Susan Silbey has been influential in this area.[4] Silbey attributes scholarly interest in legal culture to the shift from the study of law and society to the study of law in society, or the cultural turn.[5] Increasingly in the 1980s and 1990s, the focus on legal culture began to overlap with ideas of legal consciousness, understood as the study of public perceptions about law, and the use of law and the courts. Silbey is one example of a scholar who championed the concept of

[2] Sally Engle Merry, "What is Legal Culture? An Anthropological Perspective," *Journal of Comparative Law* 5 (2010): 40.

[3] Lawrence Rosen, *Law and Culture: An Invitation* (Princeton: Princeton University Press, 2006).

[4] Another example in the debate over legal culture is the long-standing interchange between Roger Cotterrell and David Nelken: Roger Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot: Ashgate, 2006); Roger Cotterell, "The Sociological Concept of Law," *Journal of Law and Society* 10 (1983): 241-55; David Nelken, "Towards a Sociology of Legal Adaptation," in *Adapting Legal Cultures*, eds. David Nelken and Johannes Feest (Oxford: Hart Publishing, 2001); David Nelken, "Legal Cultures," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden: Blackwell Publishing, 2003), 113-27; David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values," *Annual Review of Law and Social Science* 12 (2016): 45-62.

[5] See also Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities," *Buffalo Law Review* 53 (2005): 973-1033.

legal culture,[6] like Lev, only later to retreat on the use of the term.[7] Sally Engel Merry[8] and David Engel[9] emphasize the need to shift attention away from circular debates about the meaning of the term legal culture, and instead reaffirm its usefulness as a key concept in socio-legal research.

Merry identifies four distinct uses of the term 'legal culture'[10] and this is endorsed by other scholars such as Engel.[11] The first two ways of understanding legal culture, Merry suggests, are: (1) as the practises and ideologies within the legal system, and (2), as the public attitudes towards the law. She sees these two concepts as analogous to Lawrence Friedman's complementary ideas of internal and external legal culture. Merry's two additional approaches to legal culture are legal mobilisation and legal consciousness. Legal mobilisation refers to why and how people articulate their problems in legal terms. Legal consciousness concerns how individuals experience the law and understand its relevance to their lives. Examples of this in the context of Indonesia are Hikmahanto Juwana's study of public perceptions of the courts[12] and the Asia Foundation's citizen assessment of perceptions of justice in Indonesia.[13]

Simon Halliday and Bronwyn Morgan[14] also affirm the value in inquiries of legal culture. Like Merry, they argue that legal culture and its relation to legal consciousness remains an important field of inquiry. In this article, I am particularly concerned with the legal culture of the courts and the judiciary specifically. That is, I am referring to legal culture as the internal culture of the courts, and the practices and ideologies of the judiciary. The concept of legal culture is relevant to understanding the politics of court reform. From this basis, I turn to consider the politics of court reform in Indonesia since 1998.

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6 Susan S. Silbey, "Making a Place for Cultural Analyses of Law," *Law & Social Inquiry*, Vol. 17, no. 1 (Winter, 1992): 39-48.

7 Susan S. Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 323-68.

8 Merry, "What is Legal Culture?"

9 David M. Engel, "The Uses of Legal Culture in Contemporary Socio-Legal Studies: A Response to Sally Engle Merry," *Journal of Comparative Law* 5 (2010): 59-65.

10 Merry, "What is Legal Culture?"

11 Engel, "The Uses of Legal Culture."

12 Hikmahanto Juwana, "Courts in Indonesia: A Mix of Western and Local Character," in *Asian Courts in Context*, eds. Jiunn-rong Yeh and Wen-Chen Chang (Cambridge: Cambridge University Press, 2014), 303-339.

13 The Asia Foundation's preliminary citizen assessment of perceptions of justice (2001) in Indonesia.

14 Simon Halliday and Bronwyn Morgan, "I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination," *Current Legal Problems* 66 (2013): 1-32.

III. THE POLITICS OF COURTS: THE CONTRIBUTION OF DAN S. LEV

One way to approach the study of legal culture and the politics of court reform is to consider how the courts have changed over time. Dan S. Lev was an Indonesianist whose work offers deep analysis of the role and status of the courts under the Suharto regime. I suggest that Lev's grounded, empirical commitment to his research informed his approach to the study of legal culture and the politics of courts.

Lev was writing in the post-colonial era when Indonesia and other post-colonial states from Asia to Africa were struggling with the task of nation-building. In this light, Lev consistently called for 'problem focused research'.[15] He argued for the need for 'deep research' in a similar vein to Geertz's 'thick description'.[16] Lev had little tolerance for work that took legal text at face value or divorced from political context.[17] He saw no use for analysis of legal text if that analysis was void of context. His work encouraged empirical inquiry.[18] He modelled this approach in his own work, which was based on extended field research, interviews, media analysis, analysis of legal texts, court observation and local academic commentary.[19]

Lev's pioneering work on the Islamic courts in Indonesia was not only unusual in the field of Islamic studies (with its heavy and almost exclusive focus on the Middle East), but the Islamic Courts were a topic that had never been thoroughly considered in the context of Indonesia.[20] Likewise, there had been little attention to the courts, the prosecution, the police, and the legal profession, and the relationship between the two prior to Lev's seminal work.

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[15] Daniel S. Lev, "Islamic Courts in Indonesia: A Study in the Political Bases of Lega; Institutions," *Bulletin of the School of Oriental and African Studies* 38, no. 1 (December 2009): 224.

[16] Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973).

[17] Lev, "Islamic Courts in Indonesia," 1.

[18] Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (The Hague: Kluwer Law International, 2000), 11.

[19] Daniel S. Lev, "The Politics of Judicial Development in Indonesia," *Comparative Studies in Society and History* 7 (1965): 173-202; Lev, Islamic Courts in Indonesia, xi.

[20] Lev, "Islamic Courts in Indonesia," see also Melissa Crouch, "Islamic Law and Society in Southeast Asia," in *The Oxford Handbook on Islamic Law*, eds. Anver M. Emon and Rumee Ahmed (Oxford: Oxford University Press, 2016).

He was particularly concerned with methods that could capture legal change and continuity in new states–post–colonial Indonesia being his primary focus. Lev argued that:

> In order to understand legal systems in the midst of political transformation, we must examine them from the ground up to find out what sort of political and social space is allotted to them, what kinds of functions they are permitted to serve, encouraged to serve, and forbidden to serve.[21]

Lev was concerned with the Indonesian experience of legal change and how the space for legal institutions changed over time.[22] He sought to illuminate the evolution of local law and legal institutions, not in misleading isolation but in full consciousness of its political, economic and social settings. He was also acutely aware, and called out, the bias towards European and North American legal experience as the criteria for evaluation of other legal systems. This relates to his concern with the production of power and the 'struggle over the political and ethical dimensions of the Indonesian state'.[23] Lev devoted his career to understanding the 'intimate relationship between political and legal authority and structure'.[24] Lev advocated cross-institutional research, that is, to undertake research that understands the courts as one institution in relationship to other institutions, both state and non-state institutions. Lev supported the study of courts as part of the wider social environment and in light of connections between the judiciary and other institutions.

Lev maintained a commitment to sustained empirical research as a means of generating theory. Lev's work is primarily empirical rather than theoretical. Lev draws on Lawrence Friedman's[25] concept of legal culture (as mentioned earlier) as 'the network of values and attitudes related to law, which determines when and why people turn to law or government, and when they turn away'.[26]

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[21] Lev, "Islamic Courts in Indonesia," 2.

[22] Daniel S. Lev, "Comments on the Course of Legal Reform in Modern Indonesia," in *Indonesia: Bankruptcy, Law Reform, and the Commercial Court*, ed. Tim Lindsey (Sydney: Desert Pea Press, 2000).

[23] Daniel S. Lev, "Between State and Society: Professional Lawyers and Reform in Indonesia," in *Making Indonesia*, eds. Daniel S. Lev and Ruth McVey (Ithaca: Cornell Southeast Asia Program Publications, 1996), 319.

[24] Lev, "Comments on Judicial Reform Program."

[25] Lawrence Friedman, "Legal Culture and Social Development," *Law and Society Review* 4 (1969): 29-44.

[26] See also Lawrence Friedman, *Law and Society: An Introduction* (Englewood Cliffs: Prentice-Hall, 1977).

However, through Lev's methodology, he demonstrated the value of empirical studies for analysing the politics of courts and legal culture.

Following Friedman, Lev argues that there are two main concepts: legal system and legal culture.[27] He defines a 'legal system' as the formal processes and procedures, which include formal institutions, such as bureaucracies and the courts, and how they manage conflict and resources of authority, roles they rely upon. The legal system is legitimated and receives its authority from the political system and it is used as a tool for social management. He argues that 'legal systems are politically derivative and cannot be understood apart from political structures, interests, ideology and the conflicts they incur.[28] Lev starts with an understanding of a legal system as the 'skeleton of the modern state'[29] and the attendant calls for the rule of law as a pillar of modernization.

Lev goes on to define 'legal culture' as the values that underlie the law and legal process. This includes procedural legal values and substantive legal values, which are often polar opposites and can change over time. Lev argues that law is 'fundamentally dependent upon political reception of legal process – its habits, ideology, principles and controls–and the willing submission, within limits usually, of political leadership to legal constraint[30]'. This notion of law is heavily reliant on politics and political process. Lev considers legal culture in the context of studying patterns of change in Indonesia's legal since the 1945-59 independence revolution and in particular explores how judicial institutions relate to political processes and cultural values.[31] Institutionally, Lev sees the courts as a 'subsystem of a larger administrative apparatus'[32] and as institutional creatures with specific interests and ambitions.[33]

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[27] Daniel S. Lev, "Judicial Institutions and Legal Culture," in *Culture and Politics in Indonesia*, ed. Claire Holt (Ithaca, NY: Cornell University Press, 1972), 247.

[28] Daniel S. Lev, "Introduction," in *Legal Evolution and Political Authority in Indonesia: Selected Essays* (The Hague: Kluwer Law International, 2000), 3.

[29] Lev, "Introduction," 1.

[30] Daniel S. Lev, "Conceptual Filters and Obfuscation in the Study of Indonesian Politics," *Asian Studies Review* 29, no. 4 (2005): 345-56, 354.

[31] Lev, "Judicial Institutions and Legal Culture."

[32] Lev, "Islamic Courts in Indonesia," 122.

[33] Lev, "Politics of Judicial Development," 173.

The symbolic function of law and its relationship to authority was also of concern to Lev. He was attentive to a range of sources of authority, from state authority to religious authority. He notes 'legal systems and law are symbols, and what they are symbolic of, inter alia, is authority, not necessarily coercive authority, but social and political authority, which by its legitimacy, its social rightness, earns loyalty and a measure of compliance'.[34]

Lev also tended towards an expansive definition of law: 'law is many things, serves many functions in society, and can be usefully defined in many different ways'. He was clear that his focus was not just on formal legal structures and legal rules, although he included these in his analysis. Rather, he was concerned with both law and legal institutions in terms of 'how structures and rules are understood, variously used, manipulated, accepted, avoided and so on, along with all the informal structures and modes of action that this kind of definition implies'.[35]

In many respects, Lev's body of work was committed to exploring and explaining legal culture in Indonesia. His criticism of the broad term 'culture' came later in his career and after he had spent several decades working on legal culture in Indonesia. Lev cautioned against the dangers and misuses of culture as a grand myth.[36] He focuses on 'interest, ideology, organization and power as the primary factors that shape political orders and the legal systems they support'.[37] Further, Lev calls for restraint and sensitivity to the 'weaknesses, shortcomings and dangers of cultural analysis' and avoidance of 'oversimplification inherent' in cultural analysis.[38] Overall, Lev's work on Indonesia's courts suggests a conception of legal culture that is conscious of and attentive to power relations, while avoiding the pitfalls of a simplified cultural analysis.

34 Lev, "Islamic Courts in Indonesia," 263.
35 Lev, "Islamic Courts in Indonesia."
36 Lev, *Legal Evolution*, 5.
37 Lev, "Conceptual Filters."
38 Lev, "Conceptual Filters," 346.

IV. COURT REFORM THROUGH SPECIALIZED COURTS

The dramatic end of Suharto's authoritarian regime in 1998 ushered in two decades of law reform, which included by constitutional reforms, legislative reforms and major institutional reforms. The constitutional and political system has undergone major changes and legal reform. The courts have been restructured and imbued with new powers as part of these efforts at law reform. The judiciary has changed due to constitutional amendments designed to enhance the independence of the courts from the executive and reinforce the concept of the separation of powers in the Constitution.[39] At the same time, judges have come under renewed scrutiny with the constitutional establishment of the Judicial Commission, and the creation by law of the Corruption Eradication Commission.

The contemporary Indonesian judicial landscape includes both the general courts and specialized courts, as well as various independent accountability agencies. The post-colonial Indonesian judicial system has been influenced by a wide range of sources, both domestic and global, from international human rights norms to local understandings of Islamic law and *adat* (customary) law, as well as the persistence of the Dutch legal legacy. Two concepts are important to both the past and present legal system in Indonesia: the rule of law, *negara hukum*, and the separation of powers, *trias politika*.[40]

Taken as a whole, there are common patterns and trends in legal culture across what appear to be vastly distinct judicial institutions. I consider why a special courts strategy was adopted, that is, the problems it sought to resolve and to with what impact. What were the challenges of court reform after Suharto's authoritarian rule? And to what extent have specialized courts overcome these challenges?

To understand the problems with legal culture, specialized courts need to be considered in light of the general court system, rather than in isolation from it. Since independence in 1945, the core of the judicial system has been the

[39] Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas, 2008).

[40] Lev, "Politics of Judicial Development," 184.

Supreme Court at the apex of the general court system.[41] Below the Supreme Court is a complex network of lower courts spread across Indonesia's 34 provinces, hundreds of cities and regencies, and thousands of districts. Under Suharto's New Order, the Supreme Court and the subordinate courts were notorious for corruption. Lev was openly critical of the decline in the standards and status of the judiciary. Under Suharto, the increase in corruption within the bureaucracy, and particularly within the judiciary, is well known. In his observations on the decline in professionalism and rapid rise of corruption, Lev went as far as to label judges the 'judicial mafia'.[42] This legacy continues today and, as Rifqi Assegaf has identified, a consequence of corruption in the courts is the lack of legal certainty.[43] Despite the establishment of a Judicial Commission, its powers have been reduced and it has a strained relationship with the Supreme Court, which often fails to act upon recommendations of the Judicial Commission to discipline judges.

The reform era is characterized first by changes to the general court system through constitutional and legislative means, and then by the introduction of a growing number of specialized courts. The independence of the general court system was affirmed through constitutional reform, and the separation of powers mandated in an explicit effort to reduce executive influence over the courts. In particular, the long-held demands for judicial independence resulted in the 'one-roof reforms', in which control over court administration shifted from the executive to the judiciary. In the past, justice was administered under 'two roofs', the executive as represented by the Ministry of Justice, and the Ministry of Religion, and the judiciary as represented by the Supreme Court and Religious Courts. This meant that matters of budget allocation, appointments, discipline and court administration were subject to the influence and interference of the

41 Sebastiaan Pompe, *The Supreme Court of Indonesia: A Study of Institutional Collapse* (Ithaca: Cornell University Press, 2005).

42 Daniel S. Lev, "Between State and Society: Professional Lawyers and Reform in Indonesia," in *Making Indonesia*, eds. Daniel S. Lev and Ruth McVey (Ithaca: Cornell Southeast Asia Program Publications, 1996), 310.

43 Rifqi Assegaf, "The Supreme Court: Reformasi, Independence and the Failure to Ensure Legal Certainty," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch, (Cambridge, Cambridge University Press 2019), 31-58.

executive. From the 1960s to the 1990s, this had been one of the main causes of concern and grievance for rule of law advocates.

The post-1998 constitutional and legislative reforms changed all this and gave jurisdiction over all matters of court administration and the lower courts to the Supreme Court. The 'one-roof reform' promised a culture of judicial independence, judicial control over the budget and court administration, the absence of executive interference, and greater efficiency in the execution of justice. There was an attempt to balance this expansion of judicial power with the creation of the Judicial Commission as an accountability mechanism enshrined in the Constitution, whose mandate is explained further in legislation. Within the Supreme Court, the year 2001 marked the start of major reforms led by Chief Justice Bagir Manan.[44] The Supreme Court continues its long-term reform agenda today under the Supreme Court Blueprint 2010-2035.

The first contemporary additions to the general court system in the 1980s were the Administrative Courts based on a Dutch civil-law model, and the Religious (Islamic) Courts (which existed in a different form prior to being unified across the country). The creation of the Administrative Courts in 1986 marked the beginning of a contemporary trend to establish specialized courts.[45] Since that time, the establishment of new courts includes the Juvenile Courts in 1997; the Commercial Courts in 1999; the Syariah Courts for the province of Aceh in 2002; the Human Rights Court in 2000; the Tax Court in 2002; the Constitutional Court in 2003; the Industrial Courts in 2004; the Anti-Corruption Court in 2004 and then in 2010 the provincial Anti-Corruption Courts; the Fisheries Court in 2009 (although it did not commence until 2014); and the Small Claims Court in 2013. Many of these courts have undergone major revisions to their powers and processes since establishment, such as the 2012 reforms to the Juvenile Courts.

I suggest that these specialized courts take one of two institutional forms. Some specialized courts are a separate and independent entity. These specialized courts have their own personnel, court buildings and procedures, such as the

[44] Rifqi Assegaf, "The Supreme Court: Reformasi."

[45] Adriaan Bedner and Herlambang Perdana Wiratraman, "The Administrative Courts: The Quest for Consistency," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch, (Cambridge, Cambridge University Press 2019), 133-148.

Constitutional Court, the Administrative Courts and the Religious Courts. I call these 'independent specialized courts'. They can be said to operate independent from the general court system, although there is still an avenue of appeal from these courts to the Supreme Court, as is the case with the Administrative Courts, Military Courts and Religious Courts. Although these courts have a constitutional mandate, they still face challenges. The Constitutional Court faced significant logistical challenges in its first year of operation in terms of its premise and budget, similar to the challenges other newly-established specialized courts have faced. Similarly, both the Industrial Relations Court and the Human Rights Court failed to pay their ad hoc (non-career) judges in the first few months or years of the courts' existence.[46] This forced judges to find other sources of income out of necessity. The set-up phase of a new court, and the need to ensure support from either (or both) the Supreme Court and the executive is often crucial in establishing a specialized court that has legitimacy and long-term viability.

The second type of court are specialized courts that exist *within* the scope of another court (usually the district or provincial courts). These specialized courts use the same buildings, are often subject to the same procedure and involve career judges from the general courts. I call these '*dependent specialized courts'* in the sense that institutionally the courts are still reliant on the infrastructure, knowledge and personnel of the general court system. They do not have a separate and independent existence from the general court structure, but rather remain dependent on it. These dependent specialized courts include the Industrial Relations Courts, the Juvenile Courts, the Commercial Courts, the Anti-Corruption Courts, the Fisheries Courts, the Small Claims Courts, the Human Rights Courts, and the Tax Courts. All of these are under the general courts with the exception of the Tax Courts, which are within the Administrative Courts.. All of these are under the general courts with the exception of the Tax Court, which is within the Administrative Courts. By thinking of these courts as dependent specialized courts, it puts their function and the scope

[46] Ken Setiawan, "The Human Rights Courts: Embedding Impunity," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch (Cambridge, Cambridge University Press 2019), 287-310; Surya Tjandra, *Labour Law and Development in Indonesia* (Leiden: Leiden University Press, 2016).

of their mandate in perspective with the rest of the court system. Although its jurisdiction, mandate and powers may be distinct from the general court, the function of the court remains closely connected to the general courts. This means that they are less insulated from the problems of the general courts. In this model, support of the Supreme Court, which oversees the general courts, is crucial. Some specialized courts also have strong connections to the executive or independent agencies – for example, the Fisheries Court is closely related to the Ministry of Maritime Affairs and Fisheries, and the Anti-Corruption Court is closely related to the Anti-Corruption Commission.

Specialized courts share other common characteristics. Most specialized courts are permanent, although some have gradually expanded their location over time. Only one, the Human Rights Courts, has both permanent and ad hoc courts. After 2000, a permanent human rights court was established in Makassar, and there are provisions for its establishment in Central Jakarta, Surabaya and Medan. Ad hoc human rights courts can also be established for crimes committed prior to 2000.[47]

Most specialized courts are not specifically named in the Constitution. The legislature has the power to define the jurisdiction and powers of specialized courts. Four courts have explicit constitutional recognition: the Constitutional Court, Administrative Courts, Military Courts and Religious Courts. Specialized courts created by legislation are dependent on the goodwill of the government for their existence and the scope of their powers. Some courts have had their powers expanded and enhanced, such as the 2012 reforms to the Juvenile Courts. But other courts have had their powers reduced, such as changes to the powers of the Constitutional Court through the 2011 and 2014 amendments to the law. Further, if courts are only established by legislation and do not have a constitutional basis, they face the risk of disestablishment. This is the case with the Fisheries Court, which has been threatened with closure.[48]

[47] Mark Cammack, "Indonesia's Human Rights Court," in *New Courts in Asia*, eds. Andrew Harding and Pip Nicholson (London: Routledge, 2010).

[48] Indriaswati Dyah Saptaningrum,"The Fisheries Court: Government-Led Judicial Development," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch (Cambridge, Cambridge University Press 2019), 218-244.

Some specialized courts have a long legal history or have existed in different forms prior to their creation. This includes the Religious Courts;[49] the Tax Court that was preceded by a tribunal since 1915; and the Industrial Relations Court that was preceded by an administrative body since the 1960s. The establishment of the Syariah Courts (Mahkamah Syari'ah) in Aceh was unusual and was the result of Aceh's status as a province with special autonomy. The jurisdiction of these courts is similar to, but more expansive than, the Religious Courts in other provinces and has been covered extensively elsewhere.[50]

The location of specialized courts affects the ability of people to access the court. With 34 provinces, 514 cities or regencies, and thousands of districts, the location of a court matters for access to justice. Some courts are centralized and only exist in the capital city, Jakarta, such as the Constitutional Court and Supreme Court. The general court system exists in every township and district. Specialized courts vary in the scope of their geographic coverage. Some, like the Human Rights Court, are only intended to exist in four set locations. Other courts, like the Anti-Corruption Courts, now exist in every district court across Indonesia.[51] Regionalization is therefore an important criterion for court reform, as it aims to enhance access to justice, as the lack of local coverage has meant that courts such as the Industrial Relations Court, which only exist at the provincial level and not at the district or township level, are difficult to access.[52]

Specialized courts in Indonesia have three key characteristics: a specialized jurisdiction; a unique judicial selection and composition process, often having a majority of non-career or expert judges on the bench; and specialized investigation and determination procedures, differing from the general courts and designed to be more efficient.

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[49] Lev, "Islamic Courts in Indonesia."; Stijn Cornelis van Huis. "The Religious Courts: Does Lev's Analysis Still Hold?" in *The Politics of Court Reform: Judicial Change and Legal Culture in* Indonesia, ed. Melissa Crouch (Cambridge, Cambridge University Press 2019), 109-132.

[50] See Michael Feener, *Sharia and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia* (Oxford: Oxford University Press, 2014).

[51] Simon Butt, "Indonesia's Anti-corruption Courts and the Persistence of Judicial Culture," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch (Cambridge, Cambridge University Press 2019), 151-173.

[52] Tjandra, *Labour Law and Development*.

An important reform measure that spans both general and specialized courts is the increase in non-career, ad hoc or expert judges.[53] In Indonesia's civil law system, judges in the general court system are typically career judges selected through a process of closed recruitment.[54] While there was a history of occasional external appointments to judicial office,[55] this practice diminished under the New Order. The appointment of non-career judges then occurred with the creation of the Administrative Courts, although this recruitment option was later abolished.[56] In 2000, non-career judges were appointed to the Supreme Court and Bagir Manan became the first non-career judge to hold the office of Chief Justice. Most specialized courts have a majority of non-career judges, though the ratio of non-career to career-judges varies.

Broadly speaking, the non-career judges constitute the majority on any bench hearing a case in a specialized court. The composition of the bench is intentional because non-career judges are perceived to be clean or at least less likely to be caught up in the trap of corrupt practices commonly perceived as inherent in the general judiciary. This has, however, not always been the case, such as the 2012 case of a non-career judge in Semarang jailed for corruption.[57] Further tensions complicate the role and independence of non-career judges. For example, in the Industrial Relations Court, some judges are selected by trade unions while other judges are selected by corporate lobby groups. Surya Chandra has pointed out that knowledge of which side a judge was appointed by creates a dilemma for these judges when it comes to deciding for or against parties in cases.[58]

There are common issues and shared problems that have arisen in the establishment of specialized courts. Many issues arise from the broader lack of professionalism, incompetence and corruption that have long been identified

[53] The terms 'non-career', 'ad hoc' or 'expert' judge are used interchangeably in this article.
[54] On judges as career judges, see Martin Shapiro, *Courts, a Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 150; Pompe, *The Supreme Court of Indonesia*.
[55] Pompe, *The Supreme Court of Indonesia*, 25.
[56] Adriaan Bedner, *Administrative Courts in Indonesia: A Socio-Legal Study* (The Hague: Kluwer Law International, 2001).
[57] Butt, "Indonesia's Anti-corruption Courts and the Persistence of Judicial Culture,", 166.
[58] Surya Tjandra, "Labour Law and Development in Indonesia" (PhD thesis, Leiden University, 2016).

with the general court system, first by Lev and then by many others since.[59] Many of the problems of establishing specialized courts arise in relation to the role and position of ad hoc judges. Given that career judges already receive a wage, payment and recognition of their role sitting on the bench of a specialized court is often not an issue. Instead, it is often the new ad-hoc judges who are delayed in receiving their wage. A failure to get paid or delays in payment may require judges to find funds from alternate means.

Another problem is that the wage of career judges as civil servants is exempt from taxation. This is a significant monetary benefit for career judges. In contrast, non-career judges, who are not classified as civil servants, must pay 15 percent tax.[60] This is a disincentive to take on the role of a non-career judge, and creates inequality between career and non-career judges.

While space for non-career judges on specialized courts is an opportunity to bring in experts from academia, business and civil society into the judiciary, this is not without difficulties. The need to offer specialized training to non-career judges is important. From the perspective of career judges, non-career judges are often perceived to lack judicial experience and are considered to be unfamiliar with court procedure and decision-making. Further, non-career judges are not subject to a rotation system, unlike career judges, and so are able to stay within one specialized court and build up knowledge over a period of time. The one issue that runs against this is that the terms of non-career judges are often only five years, so once their term is up, new candidates with the relevant qualifications are needed to staff the court.

There are common motivations for the establishment of specialized courts. Both international actors and external donors see the creation of a specialized court as a means of insulating a judicial body from the general courts, creating a body of legal precedent and enhancing certainty and consistency in decision-making. But the legal sector in Indonesia does not place high value on following court decisions, either in law school (where cases are not read) or in legal or

[59] See, e.g., Pompe, *The Supreme Court of Indonesia*.
[60] Tjandra, *Labour Law and Development*, 217.

judicial practice. The desire to circumvent the corruption endemic to the general court system and to career judges in general is a prominent reason for the creation of specialized courts.

A further reason is the recognition of new and emerging areas of law that require high levels of specialization. The creation of courts with non-career judges is a means of bringing people with expertise, such as academics or industry experts, onto the bench.

Some specialized courts, such as the Commercial Courts, are the direct result of conditionality loans imposed by external donors such as the IMF.[61] Lev notes that 'uninformed foreign pressure meant to bring about dramatic and quick improvement in legal process has little or no hope of success'.[62] He clearly had little patience for developments such as the Commercial Courts, part of a conditionality of an agreement with the IMF.[63] Other courts, like the Human Rights Court, are the result of international pressure on the Indonesian government to deal with human rights violations. In many respects, the court was established to avoid the prospect of facing an international court. This suggests the motives for establishing specialized courts are not necessarily in line with accountability and justice. The motivation for creating other specialized courts is driven by protecting domestic interests, such as the establishment of the Fisheries Court as a means of protecting Indonesia's waters from illegal fishing activities by foreign individuals or corporations.

The challenges of court reform after authoritarian rule are enormous. Specialized courts cannot address these challenges in isolation. What specialized courts have been able to do is offer creative efforts to address particular issues and facilitate the overall expansion of the court system. Lev cautions us to be realistic when it comes to judicial reform. He argues that legal reform is only likely when new political elites take legal process seriously. He also suggests that

[61] Gustaaf Reerink, Kevin Omar Sidharta, Aria Suyudi and Sophie Hewitt, "The Commercial Courts: A Story of Unfinished Reforms," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia,* ed. Melissa Crouch (Cambridge, Cambridge University Press 2019), 174-197.

[62] Lev, "Conceptual Filters," 354.

[63] See Reerink et al., "The Commercial Courts," 174-197.

the conditions and structures of political power need to be examined to ensure a firm basis for any program of legal reform. Lev argues that fundamental, deep reform can be addressed in two ways: radical and quick (but often shallow) reform, or relatively slow, gradual reform, which is more expensive and requires more sophisticated strategies over the long run. Lev does warn that fundamental reform, deep reform, takes a long time. He argues that it is only when the political elite agrees to take certain ideas or processes seriously that these reforms will be meaningful. The elite within Indonesia's legislature and executive, and to some extent the Supreme Court, have been remarkably willing to experiment with the idea of specialized courts as a mode of reform. Specialized courts have fundamentally changed the judicial landscape by popularizing the role of ad hoc judges and attempting to ensure greater expertise and independence in the judicial process.

V. CONCLUSION

Court reform after authoritarian rule involves both institutional reform and a shift in legal culture. Any attempts at judicial reform must inevitably acknowledge the pre-existing legal culture and the problems inherent in the judicial process under authoritarian rule – which may range from the capture of the courts by the executive, to corruption, to a decline in professional standards and expertise.

The challenges court reform efforts face after authoritarian rule in Indonesia include the culture of corruption, a lack of professionalism and expertise, and legal uncertainty. Like other countries that have made a transition from authoritarian rule, Indonesia has engaged in an extensive period of court reform, and in many respects these efforts remain ongoing. I have identified that specialized courts have been a key part of its court reform strategy.

Lev offers a means of understanding the challenges of court reform after authoritarian rule. He is conscious of the interconnected nature of legal and political institutions. His work identifies how legal culture in Indonesia's courts under Suharto was marked by a decline in professionalism and a rise in corruption.

In many respects, specialized courts are a deliberate effort to create judicial institutions that are independent from the general courts, and so by definition do not seek to tackle the problems of corruption within the general courts.

The judiciary in Indonesia has changed significantly over the past twenty years. Specialized courts have been set up in ways that differ from the general courts in the scope of their powers, the composition of the bench and the procedural requirements of the court. Specialized courts face common challenges, such as becoming established as a new judicial institution in the absence of support from the executive or legislature; balancing career judges with non-career judges and managing interpersonal rivalries; and becoming financially secure as a judicial institution. In addition to these challenges, there remain problems related to corruption, professionalism and competence in the courts that require long-term efforts at reform.

Court reform after authoritarian rule clearly faces significant challenges because the legacies of judicial culture are not easily overcome by institutional reform. Specialized courts do offer one strategy for reform, but it is no easy solution to issues entrenched from decades of authoritarian rule. What specialized courts have done is offer an opportunity to think creatively and reimagine judicial structures and court procedures. In particular, through the creation of non-career judges, the courts are led by experts, such as academics, who would not otherwise work in the courts. This institutional change has challenged legal culture in terms of what it means to be a judge and what is the role of the courts. Overall, Indonesia's experiment with specialized courts suggests that while these new institutions may go some way towards addressing issues of judicial independence, corruption and expertise, this must not come at the expense of addressing issues with the general courts as a whole.

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The Implementation of Economic, Social and Cultural Rights in Canada: Between Utopia and Reality

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Abstract

Canada has been at the forefront of the recognition of human rights, including economic, social and cultural rights (ESC rights) in the international scene. As a party to the International Covenant on Economic, Social and Cultural Rights,[1] Canada has, over the years, implemented in legislation and case-law some ESC rights such as the right to health, education and social welfare. While ESC rights were not explicitly identified in the Charter of Rights and Freedoms,[2] which forms part of the Canadian Constitution, ESC rights in different forms have received some protection in the Canadian legal order. An analysis of the Canadian record with respect to ESC rights demonstrates the immense gap between a glorified image of Canada as an international human rights proponent (the 'utopia') and the actual implementation of internationally recognized human rights in Canada

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[1] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 (entered into force Jan. 3, 1976, accession by Canada May 19, 1976) [ICESCR].

[2] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, (1982), being Schedule B to the Canada Act of 1982 (UK), (1982), c. 11.

(the 'reality'). As Canada is bound to face major transformational changes to its economy and social fabric in the years to come, the Courts will have to adapt quickly and efficiently to ensure a smooth transition. This paper overviews the evolution of the case-law on ESC rights in Canada in light of its international obligations, and suggests, the relevant ESC rights jurisprudence signals a disconnect with Canada's international obligation 'requiring progressive implementation to the maximum of available resources by all appropriate means.'

Keywords: Canada, Charter of Rights and Freedoms, Comparative Constitutional Law, ESC Rights, International Human Rights.

> "We are not so traditionally accustomed [...] to say that without an employment insurance law, or without an old pensions law, or laws providing for free universal education, there is no liberty ... The object of these laws is to free men and women from known and certain risks which exist in our industrialised society, and which if not insured against can destroy so much liberty among so many individuals as to make Bills of Rights to them a hollow mockery."[3]

I. INTRODUCTION

Canada has been at the forefront of the global recognition of human rights, including economic, social and cultural rights (ESC rights). As a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[4] Canada has, over the years, recognised some ESC rights such as the right to health, education and social welfare t hrough legislation and case-law. The highest level of protection for ESC rights in Canada is to recognize them as constitutional rights. While ESC rights were not identified in the Charter of Rights and Freedoms,[5] which forms part of the Canadian Constitution, ESC rights in different forms have received some protection in the Canadian legal order. However, recent decisions in Canada give grounds for concern about the future and constitutional status of ESC rights in Canada. To abide by its international law obligations, Canada has to provide greater protection for ESC rights.

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3 Francis R. Scott, "Expanding Concepts of Human Rights," in *Essays on the Constitution* (Toronto: University of Toronto Press, 1977), 357, DOI: https://doi.org/10.3138/9781487583828-027 cited in Martha Jackman, "The Protection of Welfare Rights Under the Charter," *Ottawa Law Review* 20 (1988): 257.

4 ICESCR.

5 Canadian Charter of Rights and Freedoms (1982).

This paper proceeds as follows. First, it briefly reviews the international and Canadian frameworks for the protection of ESC rights. It then discusses the interaction between fundamental constitutionally recognized rights and ESC rights, in particular the Canadian Charter of Rights and Freedoms, and recent case-law concerning ESC rights. Through an analysis of the evolution of some key cases relating to ESC rights, including recent examples, it concludes that an increased recognition of ESC rights in laws and policies is necessary to face contemporary socio-economic challenges.

II. THE INTERNATIONAL AND CANADIAN CONSTITUTIONAL FRAMEWORKS CONCERNING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CONNECTING THE DOTS

In order to fully understand the legal framework of ESC rights in Canada it is necessary to briefly examine the constitutional and international contexts in which they are embedded. Indeed, the path to full recognition of these rights in Canada is more challenging than that of many other human rights protected by the Canadian Constitution. In some respects, the struggle for such recognition is as much a tale of major legal and social advances as it is one of conflict between marginalized people in Canadian society and a government that often capitalizes on the silence of the Canadian Constitution, and in particular the Canadian Charter of Rights and Freedoms,[6] to formally recognize constitutional status to ESC rights.

First, a brief overview of Canada's international obligations explains the two current opposing paradigms with respect to ESC rights among Canadian jurists. Then, in order to shed light on how these obligations are incorporated into Canada's social and legal realities, it is important to better situate economic and social rights at the constitutional level and thereby establish the central role of the Charter throughout this whole issue.

[6] Canadian Charter of Rights and Freedoms (1982).

2.1 Canada's International Human Rights Obligations

Canada's international obligations with respect to ESC rights are found in the ICESCR, which Canada ratified in 1976.[7] Canada has not however ratified the Optional Protocol to the ICESCR concerning a complaints procedure for victims of violations of ESC rights.[8]

It is important to mention at this juncture, in order to clarify the context, that Article 11 (1) of the ICESCR recognizes the right to a certain standard of living: "The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right ..."[9]

Nevertheless, a number of Canadian constitutional law commentators were in disagreement on the question of the recognition of ESC rights in the Canadian legal order when the Charter was adopted. The debate concerned primarily the question of the existence of positive or negative obligations in relation to these rights.

A review of one of the most critical obstacles to ESC rights in Canadian law demonstrates that more must be done to move from the utopian rhetoric of recognition, to full implementation. Attaining the full and unconditional recognition of ESC rights is not a uniquely Canadian challenge but rather a global one. Although it is generally accepted that, in theory human rights are indivisible and of equal importance, the practical extent of this notion is questionable.[10] In reality, the state's treaty-based human rights obligations will often vary depending on the right at stake. It is the categorization of the latter as a civil and political right on the one hand, or an economic, social and cultural right, on the other, that will be the decisive factor.[11] This difference

7 ICESCR.
8 Martha Jackman and Bruce Porter, eds., *Introduction*, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014), 1-32.
9 ICESCR, sec. 11 (1).
10 John H. Currie et al., *International Law: Doctrine, Practice and Theory*, 2nd ed. (Toronto: Irwin Law, 2014), 609.
11 Currie et al., *International Law: Doctrine, Practice and Theory*.

in the practical development of these two types of rights can be explained in particular by the language used in the two treaties concerned, namely the International Covenant on Civil and Political Rights (ICCPR)[12] and the ICESCR. The terms used in the ICCPR are far more demanding, requiring a certain immediacy and precision that is not reflected in the ICESCR.[13]

By contrast, the ICESCR is characterized by its very gradual approach to the implementation of most of the obligations it contains, thus giving states a fairly wide margin of maneuver *prima facie*.[14] Not to mention that these rights, in contrast to civil and political rights, are subjected to a whole other dimension in relation to the availability of resources, making it all the more difficult to obtain the interest of governments to address them.[15]

It comes as no surprise that several governments have been able to take advantage of this textual vagueness to defend their low implementation record in this regard. It is precisely this argument that Canada has used when it questioned the proposal for an optional protocol to the Covenant that would create an individual petition mechanism for the ICESCR.

Thus, challenging the viability of ensuring the implementation of all rights by an adjudicative-type process, Canada addressed the very content of the rights enshrined in the treaty: "The creation of an optional protocol to the International Covenant on Economic, Social and Cultural Rights may be premature where the core requirements of those rights have yet to be defined with precision."[16] Canada went on to insist that civil and political rights could be distinguished from ESC rights, the former being much more developed and established.[17] Finally, in reviewing the progressive obligation imposed by Article 2 of the ICESCR, Canada emphasized the imprecise nature of such a duty:

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[12] International Covenant on Civil and Political Rights, Dec. 19 ,1966, 999 UNTS 171 (entered into force March 1976, accession by Canada May 19, 1976).

[13] Currie et al., *International Law: Doctrine, Practice and Theory*, 614.

[14] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013), 285.

[15] Alston and Goodman, *International Human Rights*, 316.

[16] UN Doc. E/CN.4/1998/84/Add. 1, par. 1.

[17] William A. Schabas and Stéphane Beaulac, *International Human Rights Law: Legal Commitment, Implementation and the* Charter, 3rd ed. (Toronto: Thomson Carswell, 2007), 181.

> "Moreover, the difficulty of determining the core requirements of the rights in the Covenant is greatly exacerbated by the obligation in article 2 to achieve progressively the full realization of the rights recognized in the ... Covenant".[18]

2.2 Constitutional Recognition of Fundamental Rights

In 1982, the adoption of the Canadian Charter of Rights and Freedoms gave certain rights and freedoms the highest level of protection by granting them constitutional status. With Section 52 of the Constitution Act of 1982 conferring supreme status to the Canadian Constitution and rendering ineffective legal provisions contrary to it, the rights protected by the Canadian Charter of Rights and Freedoms benefit from significant barriers that prevent federal and provincial governments from abusing them at their own discretion.[19] Indeed, the Charter can only be amended by a complex constitutional amendment procedure that requires the participation and approval of several Canadian parliaments.[20] The scope of application of the Charter is set out in its Article 32.[21] Only governments and parliaments are subjected to it and the Canadian Charter does not directly apply to the conduct of private persons.[22]

It is precisely the absence of an explicit reference to ESC rights in the Charter that is at the root of the legal uncertainty surrounding the constitutional nature of these rights in Canada.[23] As opposed to the Québec Charter of Human Rights and Freedoms,[24] which provides explicit recognition for some social rights (e.g., free public education), specific social, economic and cultural rights are not mentioned in the Canadian Charter of Rights and Freedoms, but the provisions relating to equality (Article 15) and the

[18] UN Doc. E/CN.4/1998/84/Add. 1, par. 3.
[19] Constitution Act, (1982), sec. 35, being Schedule B to the Canada Act 1982 (UK), (1982), c. 11, sec. 52.
[20] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* [Constitutional Law], 6th ed., (Cowansville: Editions Yvon Blais, 2008), 951.
[21] Canadian Charter of Rights and Freedoms, (1982), sec. 32.
[22] Brun, Tremblay and Brouillet, *Droit constitutionnel* [Constitutional Law], 977.
[23] Martha Jackman and Bruce Porter, "Socio-Economic Rights Under the Canadian Charter," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge, New York: Cambridge University Press, 2008), 209.
[24] *Charter of Human Rights and Freedoms*, RSQ, c C12, Chapter IV.

right to life, liberty and security of the person (Article 7) have provided the basis for cases relating to the recognition of ESC rights, as discussed below.

Be that as it may, the absence of express recognition of ESC rights in the Canadian Charter leads to two possible constitutional interpretations, generally put forward respectively by government actors on the one hand, and by the various organizations campaigning for the recognition of ESC rights on the other.[25] Insisting on the apparent absence of an express reference to these rights in the constitution allows governments to evade the responsibilities related to them by arguing that said absence results from a political choice by the legislator to remove these issues from the jurisdiction of the Courts and leave them exclusively in the hands of the legislatures.[26]

III. THE EVOLUTION OF ESC RIGHTS JURISPRUDENCE IN CANADA: AN OVERVIEW

It is through Section 7, which recognizes to "[e]veryone … the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", and Section 15, which refers to the right to equality, that the most important part of the debate regarding the recognition of ESC rights in the Canadian Charter has been unfolding.[27] Section 15 provides that:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Given that there is no explicit recognition of ESC rights in the Charter, in a number of cases, claimants have relied on Section 7 and Section 15.[28] The

[25] Jackman and Porter, "Socio-Economic Rights Under the Canadian Charter," 843.
[26] Jackman and Porter, "Socio-Economic Rights Under the Canadian Charter," 209.
[27] Canadian Charter of Rights and Freedoms, (1982), sec. 7, 15.
[28] For a review of relevant jurisprudence, see Jackman and Porter, "Socio-Economic Rights Under the Canadian Charter."

Supreme Court has implied in previous cases that the Charter could protect economic and social rights to some extent[29] and has recognized that it places both positive and negative duties on different levels of government. The paradigm of positive and negative rights under the Charter jurisprudence, and in particular in relation to ESC rights, has caught the attention of many human rights and constitutional scholars over the years.[30] As Martha Jackson and Bruce Porter put it:

> The problematic and now widely discredited distinction between justiciable civil and political rights and non-justiciable social rights has a number of adverse consequences for Charter interpretation, however. When they are conceived solely as negative rights, broadly framed guarantees, such as rights to life and security of the person, are whittled down to freedom from government interference and stripped of their social rights content. The effect is to disenfranchise disadvantaged groups from the protection of section 7 [...] Moreover, a negative rights framework reduces section 15– the very Charter section that was drafted to ensure substantive rather than formal equality for disadvantaged groups–to a guarantee of freedom simply from direct discrimination.[31]

Providing the examples of many countries from all corners of the world, such as Colombia, Brazil, Portugal, South Korea, South Africa and others, Ania Kwadrans argues that the "distinction between positive and negative rights has now largely been rejected by the international community and in academic circles. The justiciability of ESR has also been established through national constitutions that incorporate ESR as legally enforceable and constitutionally binding."[32] In a

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[29] Martha Jackman and Bruce Porter, "Social and Economic Rights" in *The Oxford Handbook of the Canadian Constitution,* eds. Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (Oxford: Oxford University Press, 2017), 848.

[30] Concerning the debate between positive and negative rights, see generally Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?" *Journal of Law and Social Policy* 25, (2016): 78-108; Margot Young, "Charter Eviction: Litigating Out of House and Home," *Journal of Law and Social Policy* 24 (2015): 46; Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Right Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (New York: Cambridge University Press, 2008); Cass R Sunstein, "Social and Economic Rights? Lessons from South Africa," *Constitutional Forum* 11, no. 4 (2001): 123.

[31] Martha Jackman and Bruce Porter, "Introduction, Advancing Social Rights in Canada," *Irwin Law* (November 2015): 13.

[32] Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?"*Journal of Law and Social Policy* 25 (2016): 83.

similar comparative analysis, Katharine Young draws on constitutional examples to argue that "processes of interpretation, enforcement, and contestation each reveal how economic and social interests can be protected as human and constitutional rights, and how their protection changes public law".[33]

Nevertheless, decades after the adoption of the Charter, and the broken illusion that ESC rights could make their way into a jurisprudential construction of fundamental rights recognized in the Charter, such as Articles 7 and 15, it is now clear that the "bifurcation of positive and negative rights as a simplistic solution to the separation of powers has thus seriously undermined the inclusive paradigm of social rights for which women, people with disabilities and other stakeholders fought".[34] Having overviewed the constitutional framework for the recognition of ESC rights through judicial interpretation of fundamental constitutional rights, we now turn to the examination of specific case-studies to illustrate the evolution of ESC rights in Canada.

In the *Morgentaler,*[35] *Carter*[36] and *Smith*[37] cases, the Court acknowledges that Section 7 requires that governments "refrain from adversely affecting individual physical or psychological health or security".[38] Additionally, Dianne Pothier notes, in an excerpt cited by the Court in *Vriend*, that Section 32 is "worded broadly enough to cover positive obligations on a legislature such that the Charter will be engaged even if the legislature refuses to exercise its authority".[39] A notable example of the implementation of this concept is the 1989 *Irwin Toy* case, which dealt with the compatibility between provisions of a Quebec law that prevented the broadcasting of commercial advertising directed at children under 13 years of age and the right to freedom of expression enshrined in Section 2 (b) of the Charter. In this case, the Court dismissed an attempt to include the right

[33] Katharine Young, *Constituting Economic and Social Rights: The Path to Transformation*, Abstract (Oxford: University Press, 2012), available at SSRN: https://ssrn.com/abstract=2419986. See also a more recent study by the same author: Katharine Young, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019).

[34] Jackman and Porter, *Advancing Social Rights in Canada,* Introduction, 14.

[35] R v. Morgentaler, 1 SCR 30 (1988).

[36] Carter v. Canada (Attorney General), 1 SCR 331 (2015).

[37] R v. Smith, 2 SCR 602 (2015).

[38] Jackman and Porter, "Social and Economic Rights," 851.

[39] Dianne Pothier, "The Sounds of Silence: Charter Application When the Legislature Declines to Speak," *Constitutional Forum* 7 (1996): 115.

to property in the constitution through Section 7 of the Canadian Charter on the basis that such a right had been voluntarily excluded from the Charter.[40] In doing so, the Court made sure to differentiate between economic rights in the commercial and corporate sense, and the economic rights included in various international treaties as defined, for example, in the ICESCR.[41] The Court had concluded that it would have been hasty to exclude the latter at such an early stage in the interpretative process of the Charter.[42]

This decision proved to be enlightening as to the tone that the Court has adopted with regard to the recognition of ESC rights, at times acting as guardian of said rights, and at others contributing to their fragility. Most often, it is precisely the Court's inaction and restraint that has proved damaging to such recognition rather than any positive action directed against it. As proof of this assertion, in the first two decades following this decision, most of the lower Canadian courts rejected economic and social rights claims on the basis of their alleged exclusion from Section 7 of the Charter, despite the Supreme Court's warning.[43] However, the window left ajar by the Supreme Court in relation to Article 7 was not addressed in any way until 2002.[44]

The question was raised again in *Gosselin*, a landmark decision with regard to ESC rights in Canada, which will be discussed in more detail below.[45] In this case, the Court had to consider the constitutionality of a regulation that substantially reduced the benefits of social assistance to recipients under the age of 30 who were not participating in labour market reintegration programs.[46] Thus, in short, the Court had to decide whether, in light of Section 7 of the Charter governments had a positive obligation to ensure that those in need received a sufficient amount of public welfare benefits to meet their basic needs.[47] Faithful to its usual approach, rather than deciding whether there was (or was not) such

[40] Irwin Toy Ltd v. Québec (Attorney General), 1 SCR 927 (1989), par. 1003.
[41] Irwin Toy Ltd v. Québec.
[42] Irwin Toy Ltd v. Québec.
[43] Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims," *Queens Law Journal* 19, no. 65 (1993): 75.
[44] Jackman and Porter, "Social and Economic Rights," 849.
[45] Gosselin v. Quebec (Attorney General), SCC 84 (2002).
[46] Gosselin v. Quebec.
[47] Gosselin v. Quebec.

an obligation, the Court merely indicated that in this particular case the facts did not justify the recognition of a positive obligation imposed by these rights.[48] The Court therefore indicated that such an interpretation remained possible in a future case, but that in this instance the presence of compensatory clauses based on the work accomplished and the absence of evidence of significant hardship arising from this regulation did not trigger such an obligation.[49]

In the 2005 *Chaoulli* case, the Supreme Court contended that though the Charter "does not confer a freestanding constitutional right to healthcare,"[50] the fact that medical services in the public healthcare system were delayed in the province of Quebec meant that patients' rights to life, physical and psychological security were violated.[51] The majority of the Court concluded that residents of the province of Quebec should be allowed to take out private insurance plans in order to access private medical services and that the legislation prohibiting them from doing so had to be struck down.[52] A few years later, the *Toussaint* case highlighted that much uncertainty remains with regards to challenging healthcare access as a violation of Sections 7 and 15 of the Charter. Both the Federal Court and the Federal Court of Appeal found that Toussaint's, an irregular migrant, access to healthcare was not to be funded by the Canadian government's Interim Federal Health Program despite the woman's "risk [being] significant enough to trigger a violation of her rights to life and security of the person".[53] Justice Mactavish, in the context of the *Canadian Doctors for Refugee Care* case, further noted that "the Charter's guarantees of life, liberty and security of the person do not include the positive right to state funding for health care".[54]

However, in 2011, the Supreme Court considered the *PHS Community Services (Insite)* case, whereby the plaintiffs claimed that the federal government's failure to concede an exemption to the Controlled Drugs and Substances *Act* for Insite's supervised drug injection site resulted in a violation of Section 7 and that the

48 Gosselin v. Quebec, par. 82.
49 Gosselin v. Quebec, par. 83.
50 Chaoulli v. Quebec (Attorney General), 1 SCR 791 (2005), par. 104.
51 Jackman and Porter, "Social and Economic Rights," 848.
52 Chaoulli v. Quebec (Attorney General), par. 103-104.
53 Toussaint v. Canada, FC 810 (2010), par. 61.
54 Canadian Doctors for Refugee Care v. Canada (Attorney General), FC 651, (2014), par. 571.

organization's permit should be renewed.[55] The Court concluded that "denial of access to the health services provided at Insite violates its clients' [Section 7] rights to life, liberty and security of the person".[56]

The long-term practical effect of simply suggesting that such a positive obligation could exist without ever commenting on its content is to negate that very possibility. Evidence of this is provided by the fact that the Supreme Court's approach to the recognition of ESC rights under Section 7 of the Charter remains inconclusive to this day. Such an assertion requires thus an examination of the development of ESC rights under the aegis of Article 15 of the Charter, the right to equality.

The first Supreme Court decisions that dealt with ESC rights through Section 15 of the Charter were crucial to lay the foundation for an opportunity to claim ESC rights through the Charter. The Court thus interpreted the right to equality to include essential dimensions of ESC rights and to impose positive obligations on the government to address inequalities.[57] In *Schachter*, the Court acknowledged that social assistance programs for single mothers are encouraged by Article 15 of the Charter and justified positive legal remedies for overly restrictive programs on these grounds.[58] Several lower courts followed the lead of the Supreme Court by recognizing the role of systemic discrimination on the basis of poverty and accepting it as similar to the categories of discrimination already comprised by Article 15 of the Charter.[59] Be that as it may, the Court has not explicitly recognized the positive dimension of said rights to ensure substantive equality, namely the state's obligation to provide social programs to meet the needs of people experiencing poverty.[60] The Court also failed to answer the question as to whether the social condition of poverty should be formally recognized as a prohibited ground for discrimination under Article 15.[61]

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55 Canada (Attorney General) v. PHS Community Services Society, SCC 44 (2011).
56 Canada (*Attorney General) v. PHS Community Services Society, par. 93.*
57 Jackman and Porter, *"Social and Economic Rights," 850.*
58 Schachter v. Canada, 2 SCR 679 (1992), par. 41.
59 See for example: Dartmouth/Halifax County Regional Housing Authority v. Carvery, NSJ No 96 (NCSA), (1993); Falkiner v. Ontario (Ministry of Community and Social Services), OJ No 1771 (ONCA), (2002).
60 Jackman and Porter, "Social and Economic Rights," 850.
61 Jackman and Porter, "Social and Economic Rights."

The *Auton* case from 2004 demonstrates that despite advances made by the *Eldridge* case in terms of the right to equality, where the Supreme Court concluded that the government of British Columbia had to provide sign language interpretation when administering medical services[62], there exists no automatic obligation for governments to instill specific social or health programs. As Justice McLachlin stated: "this Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner".[63] As such, the Court decided that the decision of British Columbia's government to not fund a healthcare program for autistic children did not violate their right to equality under Article 15.[64]

Although there have been strides in acknowledging that economic, social and cultural rights could be recognized as constitutional entitlements[65], there is still a long way to go. As put by Jackman and Porter: "section 15 has yet to fully deliver on its promise of substantive equality for disadvantaged groups seeking remedies not only for inequitable but for inadequate social programs and policies. The question, left open by the Supreme Court in *Irwin Toy*, of whether section 7 should be interpreted to include social and economic rights such as the right to food, housing or social security, also remains unanswered".[66]

Indeed, it is important to focus on the Supreme Court's progress in this direction and to try to illustrate what the future is likely to hold for the pursuit of the constitutional protection of ESC rights. More specifically, we will do so through Section 7 of the Charter and take as a case study the Supreme Court's decision in *Gosselin,*[67] which we briefly discussed above. Despite our conclusion that the framework proposed by the Court has shown disappointing results, considering this judgment's importance, an in-depth study of the ins and outs

[62] Eldridge v. British Columbia (Attorney General), 3 SCR 624 (1997).
[63] Auton (Guardian ad litem of) v. British Columbia (Attorney General), 3 SCR 657 (2004), par. 41.
[64] Auton (Guardian ad litem of) v. British Columbia (Attorney General).
[65] Louise Arbour, "Freedom from Want, From Charity to Entitlement" (LaFontaine-Baldwin Lecture, 2005). Accessed at: https://archive.macleans.ca/article/2005/3/14/freedom-from-want.
[66] Jackman and Porter, "Social and Economic Rights, 859.
[67] Gosselin, SCC.

of its analysis of Article 7 of the Charter is required to understand some of the possible ways to move forward.

The Court's decision in *Gosselin*, while disappointing in some respects, made significant progress in recognizing essential components of ESC rights. A brief recap of the facts is required. Louise Gosselin, as the representative of the province's under-30 social assistance recipients, sued the Government of Quebec through a class-action lawsuit.[68] She was seeking to declare unconstitutional Section 29 (a) of the Regulation respecting Social Aid.[69] The provision reduced the amount claimable as financial assistance for individuals under 30 years of age to one-third of the "basic needs amount" provided for in Article 23 of the Regulation, which allowed them to meet their most basic needs.[70] The appellant therefore claimed that the provision of the regulation violated her right to security of the person under Section 7 of the Canadian Charter, her right to be protected from discrimination on the basis of age under Section 15, and finally her right to "an acceptable standard of living" under Section 45 of Quebec's Charter of Human Rights and Freedoms.[71]

The relevant question before the Court was whether to passively block governmental actions violating the rights contained in Article 7. Alternatively, was the government also forced to ensure that it guaranteed some economic assistance to people in need to avoid for its inaction to have the effect of violating their right to life, liberty and security? A view widely supported by provincial and federal governments, would be to eliminate the possibility of recognizing any positive dimension to the right to life, liberty and security of the person.[72] This argument was based partly on the placement of Article 7 in the Charter, which would supposedly indicate that it concerns only the interaction of individuals with the administration.[73] The other facet of the argument was democratic in

[68] Gosselin, SCC.
[69] Regulation Respecting Social Aid, R.R.Q., c. A-16, r. 1, s 29 a).
[70] Gosselin, SCC.
[71] Gosselin, SCC.
[72] Peter Hogg, *Constitutional Law of Canada,* 4th ed (Scarborough: Carswell, 1997). 44.
[73] Hogg, *Constitutional Law of Canada*.

nature, i.e., to include positive obligations in Section 7 would have the effect of placing political issues under the jurisdiction of the courts.[74] We'll come back to this argument throughout our analysis to demonstrate that while the Court has justified part of its decision on the basis of democracy, other political motives may have been the driving factor.

In short, an attempt was made to limit the application of Section 7 to protection against direct state intervention that would harm the person's physical and psychological integrity. This interpretation of Section 7 was vigorously rejected in *Gosselin,* while 8 of the 9 judges of the Supreme Court concluded that it was not applicable.[75] The majority concluded that although Section 7 had so far been interpreted as a negative guarantee preventing the state from depriving citizens of the rights protected therein, this did not preclude its possible application in the future.[76] The majority subsequently mentioned that such an application would depend on the circumstances, as the present case did not allow positive obligations to be triggered.[77] Justice Louise Arbour, in dissent, went even further by affirming that such positive obligations existed in this particular case. In particular, she pointed out that by refusing to apply them in this case, the Court was going against its own case law in a previous judgment.[78]

Some might argue that such a conclusion does not give cause for celebration. However, the effect of the Court's conclusion is undeniable: it opens the door to the recognition of positive obligations for ESC rights through Article 7. It does so by making it conditional upon the presence of certain circumstances. Therefore, such circumstances must exist, or at least the Court must be receptive to their existence if the situation warrants it, which is a giant step forward in the evolution of ESC rights as constitutional obligations.

74 Hogg, *Constitutional Law of Canada*.
75 Gosselin, SCC.
76 Gosselin, SCC, par. 82.
77 Gosselin, SCC, par. 83.
78 Gosselin, SCC, par. 324.

IV. THE ACHILLES' HEELS OF ESC RIGHTS: THE JURISPRUDENTIAL CONSTRUCTION OF THE POSITIVE/ NEGATIVE DICHOTOMY

While most provinces have adopted poverty reduction plans, none of them has implemented a strong rights-based approach.[79] Most of these measures do not hold the government accountable nor do they impose positive obligations towards it. Such advances are part of a process towards a purpose that cannot be achieved overnight. The pressure exerted by anti-poverty groups is not in vain; it raises awareness among the population and governments about the difficulties faced by the poor in their everyday lives. The laws and strategies put in place by governments are also essential, they send a message that this is a key concern.

In light of this, the question arises as to how a full recognition of the positive dimension of ESC rights has not been fully realized in Canada. Over the last few decades, multiple apex courts in a variety of countries have progressively contributed to the decay of ESC rights by rendering judgments at odds with the nature of such rights.[80] Indeed, the growing popularity of neoliberalism among political elites has pressured courts into adapting judicial systems to fit this new paradigm[81]. In turn, the question of how ESC rights were to take shape within these new structures would soon arise. Indeed, as neoliberalism is founded on the premise of limited state intervention in the economy and faith in the free market, its compatibility with ESC rights is far from clear at a foundational level. Therefore, if there were to be ESC rights (or any rights for that matter) in such a system, they had to be redefined so as to coexist with the central values of neoliberalism. Although Canada has not completely deviated from this global trend, the path it has taken differs slightly. This section highlights how some of these values specifically made their way into Canadian constitutional law by identifying the methods the Courts have used to accommodate a neoliberal ideology at the expense of ESC rights.

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79 Martha Jackman and Bruce Porter, "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection," (Working Paper, University of Ottawa Faculty of Law Legal Studies no. 09, 2013), 36.

80 Paul O'Connell, "The Death of Socio-Economic Rights," *Modern Law Review* 74, no. 4 (July 2011): 532-554

81 Paul O'Connell, "The Death of Socio-Economic Rights."

Before going any further, it is important to identify some of the relevant fundamental precepts that typically underlie the neoliberal vision. As with any political ideology, its followers are often guided by common narratives, guidelines that will accompany them in their decision-making process. As judges are no exception to this, we will try to pinpoint what these narratives are and how they are exploited in a judicial setting. Such a process isn't necessarily fluid and certainly does not have to be overt or intentional. In fact, it is a lot more likely to be implicit and progressively implemented through judicial interpretation[82]. Nevertheless, the many inconsistencies that will arise from this study will demonstrate that such a bias is indeed prevalent. One of the tenets of neoliberalism that is particularly important to our analysis is the commodification of the individual's role in society.[83] In other words, the individual is to be rewarded or supported according to his or her productivity or eventual ability to be productive. Productivity is thus associated with merit; the individual is responsible for his or her own success or failure.[84] Another important facet is the idea of skepticism towards the state, which is seen as burdensome and unproductive, as opposed to the market which benefits society as a whole through its efficiency and economic prowess.[85] This phenomenon notably explains the emphasis by political elites on negative rights (which protect individual freedom) as opposed to positive rights (which typically require the redistribution of resources by the state), leaving little place for ESC rights to prosper.[86]

Based on global trends, there are usually two main ways for these transitions to occur, depending on whether or not the rights are textually provided for in the constitution.[87] In the case that they aren't, which is Canada's situation as we've discussed previously, Courts usually tend to recognize solely the negative dimension of constitutional rights and seize the opportunity to frame ESC

[82] David Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge: Cambridge University Press, 2007) 2.
[83] Paul O'Connell, "The Death of Socio-Economic Rights," 535.
[84] Lisa Philipps, "Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization," *Law and Contemporary Problems* (2000) 63: 115.
[85] Paul O'Connell, "The Death of Socio-Economic Rights," 535.
[86] Craig 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 (1992): 1, 26.
[87] Paul O'Connell, "The Death of Socio-Economic Rights," 532-554, 539.

rights in a procedural role at most.[88] As we will see, this isn't the path Canada has taken. How, then, has the Supreme Court of Canada arrived at similar outcomes without explicitly excluding the positive dimension of ESC rights, as is the case in other jurisdictions? It is in the transition from theory to practice that the Court has tacitly acted. Where the problem lies is in the assessment of the previously mentioned circumstances required to trigger positive obligations. Indeed, we argue that the Court cannot, on the one hand, impose conditions on the application of positive obligations through Article 7 of the Charter and, on the other hand, vitiate this possibility in practice. In order for the Court's postulate to stand, its approach must remain consistent when it is applied.

The assessment of evidence at trial is central in evaluating if the "circumstances" will in turn exceed the threshold necessary for the application of positive obligations to be triggered.[89] For example, the trial judge in *Gosselin* proposed an approach based on a series of biases to argue that the evidence was insufficient to justify the violation of Section 7 of the Charter. By neglecting the robust evidence proposed by Louise Gosselin regarding the harm suffered as a result of the regulation, one may wonder whether the basis of his argument reflects a legitimate analysis.

Here we encounter our first "common narrative" as the trial judge emphasized the individual's role in securing his or her own welfare by resorting to strength of character. Commenting on the archetypal ideal citizen of a neoliberal system, Philipps writes: "The ideal citizen of neoliberal discourse is responsible to secure his or her own welfare through market activity, family resources, and, if necessary, charity, resorting to government assistance only in the most desperate circumstances. (...) The egalitarian vision of social citizenship, still incompletely realized, is being displaced by a norm of market citizenship in which inequalities are attributed to individual merit or failures, and social rights are displaced by economic rights to private property and free markets." The parallel is staggering when compared with the trial judge's vision of poverty. In particular, the trial judge

[88] Paul O'Connell, "The Death of Socio-Economic Rights."

[89] Martha Jackman, "One Step Forward and Two Steps Back Poverty, the *Charter* and the Legacy of *Gosselin*," *National Journal of Constitutional Law* 39, no. *85 (2019): 103.*

mentioned that the main cause of poverty stems from intrinsic characteristics, with external factors playing a secondary role in this regard.[90] He also stated the following "Indeed, it is constant that the human being who has developed the qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychic and even physical obstacles that could lead him into material poverty" (Authors' translation).[91] In response to his argument, the Chief Justice of the Supreme Court, writing for the majority, unreservedly supported the trial judge's conclusion in his interpretation of the evidence.[92] This enabled the Court to avoid directly addressing the question, and instead, to defer to the trial judge's assessment of the evidence. In contrast, the standard used to approve the probative value of the evidence presented by the government did not appear to have been the same as Louise Gosselin's.[93] The government, for its part, had not provided any concrete evidence that the regulation would promote the integration of young underprivileged people into the labour market in order to lift themselves out of poverty.[94] However, the Chief Justice of the Supreme Court was quick to acknowledge the likely effectiveness of the program in this regard.[95] Indeed, this strong inclination to favour assistance conditional on eventual productivity is also revealing. As Philipps writes: "Public services once associated with universal social rights are increasingly restricted, means-tested, and made more closely conditional upon efforts to engage in paid labour."[96]

The dissenting judges, by contrast, treated the evidence presented at trial with far greater rigour, which could explain the very different results that ensued.[97] Justice Arbour, for example, pointed out that many barriers prevent people experiencing poverty from doing an effective job search, considering the optimal conditions to do so often rely on financial ability.[98] Justice Lebel, for his

[90] Gosselin v. Québec (Procureur général [Attorney General]), R.J.Q. 1647 (C.S. Que.) (1992), 1670.
[91] Gosselin v. Québec, 1676.
[92] Gosselin, SCC, par. 46-47.
[93] Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*," *National Journal of Constitutional Law* 39, no. 85 (2019):104.
[94] Martha Jackman, "One Step Forward and Two Steps Back: Poverty."
[95] Gosselin, SCC, par. 43.
[96] Lisa Philipps, "Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization," *Law and Contemporary Problems* 63(2000): 116.
[97] Jackman, "One Step Forward and Two Steps Back: Poverty," 106.
[98] Gosselin, SCC, par. 392.

part, pointed out that social assistance recipients in the 1980s were not lazy but rather victims of the economic conditions that had created high unemployment in the first place.[99] The way the majority and the dissenting judges looked at the evidence sparks a sharp contrast in terms of the depth of the analysis, the former paying less attention to contextual elements. In order to render a fair decision, judges must evaluate the evidence in a neutral manner. But above all, they must not conclude in advance that the circumstances do not justify the application of positive obligations through Section 7 of the Charter by tendentiously neglecting the evidence presented by the plaintiff.

Another problem with the majority's reasoning, the result of which is equally problematic, is that it distorts the position of the complainants. Indeed, the Court refrains from answering Louise Gosselin's question precisely, namely whether in this case the regulation reducing social assistance for people under 30 years of age to one-third of the previous amount violated Article 7 of the Charter.[100]

Instead, the Court rephrases this argument as an abstract and biased position. It questions whether Section 7 of the Charter guarantees a right to an adequate amount of social assistance.[101] The way a question is asked can obviously have significant impacts on the answer. Asking the question in the abstract also significantly increases the task of the plaintiffs, especially when the evidence they have to present isn't as relevant to the amended interrogation that the Court poses. The factual evidence of this issue is once again reflected in Justice Arbour's dissent. Instead of modifying it, she answered the appellants' question as it was asked: it was clear to her that the regulation had a negative impact on the safety of those who were affected by it.[102] She therefore concluded that Section 7 had indeed been violated.[103] Under the guise of neutrality, it's clear that the Court sought to answer the question before even asking it. This is indicative of the ideological bias that such an attitude betrays. The evidence presented by complainants that their right to security was in fact violated by government

99 Gosselin, SCC.
100 Jackman, "One Step Forward and Two Steps Back: Poverty," 106.
101 Gosselin, SCC, par. 76.
102 Gosselin, SCC, par. 373.
103 Gosselin, SCC, par. 377.

action will very rarely be useful in answering the question of whether the Charter allows for any economic assistance.

One might wonder what to remember from the *Gosselin* case for years to come. In theory, one would think that the conclusion in *Gosselin* is between a success and a failure for ESC rights in that it allows for the possibility of recognizing positive obligations, but that it adopts a partisan stance against that very possibility before even answering the question. Unfortunately, time has told a completely different story in that the decision in *Gosselin* was used instead as an argument by the lower courts to reinforce the notion that Section 7 does not impose positive obligations on the Government to recognize ESC rights.[104] In our opinion, the Court has played an active role in this result.

The case of *Tanudjaja v Canada* before the Superior Court of Ontario is a good illustration of this.[105] Jennifer Tanudjaja was a homeless person who alleged that the effect of the inadequacy of the various housing and social assistance policies of the Canadian and Ontario governments had resulted in increased homelessness, violating her rights under Sections 7 and 15 of the Charter. Indeed, in this case, the trial judge went a step further by stating: "Section 7 of the Charter does not provide a positive right to affordable, adequate, accessible housing."[106] This is a highly startling statement as it is more than clear that in *Gosselin*, the Court leaves open the possibility that such a conclusion can be reached. While it is true that the question of whether such a positive obligation applied in this case remains debatable, it is most certainly false to claim that such a positive obligation cannot exist. Following a mitigated decision of the Ontario Court of Appeal, it would have been quite normal to assume that the Supreme Court would rectify the situation or at least comment on it.[107] Yet, the Court simply refused to hear the appeal. In fact, it has done the same for countless similar situations in the past years.[108] This is one important way in which the Supreme Court has differed from other apex courts around the world, while it has not

[104] Jackman, "One Step Forward and Two Steps Back: Poverty," 108.
[105] Tanudjaja v. Canada (Attorney General), ONSC 5410 (2013).
[106] Tanudjaja v. Canada (Attorney General), par. 81.
[107] Tanudjaja v. Canada (Attorney General), ONCA 852 (2014).
[108] Jackman, "One Step Forward and Two Steps Back: Poverty," 114.

itself shut down the possibility of a positive dimension to Charter rights, it has tacitly prevented it from happening through the lower courts by remaining silent.

There is one notable exception to the Court's refusal to hear appeals on poverty-related issues. The one time it did, it was to hear a complainant seeking to use Section 7 of the Charter to demand the right to have easier access to the private health system at the expense of the public one.[109] The Court proceeded with the opposite reasoning as in *Gosselin* although the principle was the same. This time, the Court did not claim that its intervention would constitute judicial interference in what was supposed to be a political matter. Indeed, as deferral to the legislative branch on questions relating to positive rights is often justified on the basis of democracy,[110] the Court was quick to intervene when it came to the question of access to the private system.

Furthermore, rather than asking whether the complainant had a right to a private health care system in the abstract, it asked whether his life, liberty and security had been violated by the effect of the law in question.[111] This suggests that there is a double standard for the Court when it comes to the recognition of positive obligations in relation to ESC rights. For the time being, it has not fulfilled its role of unambiguously resolving this issue. This abdication reflects two particularly alarming ideas. First, the practical effect of the Supreme Court's refusal to adopt a clear position on the subject by refusing to hear appeals is that of an unequivocal refusal by the lower courts to recognize positive obligations for ESC rights through Article 7, contrary to its teachings in *Gosselin*. Second, that it does not appear coincidental that such an ambiguity persists.

V. FROM UTOPIA TO REALITY: THE PATH AHEAD FOR ESC RIGHTS IN CANADA

Writing over three decades ago, Professor Martha Jackman argued that "where a community is firmly committed to a set of values, aspirations or traditions, the constitution properly interpreted, will surely come to reflect their existence."[112]

[109] Chaoulli v. Quebec (Attorney General), SCC 35 (2005).
[110] Paul O'Connell, "The Death of Socio-Economic Rights," *Modern Law Review* 74, no. 4 (July 2011): 539.
[111] O'Connell, "The Death of Socio-Economic Rights," 108.
[112] Jackman, "The Protection of Welfare Rights Under the Charter," 338.

International recognition and domestic implementation of ESC rights have come a long way in the past 30 years, and so has the evolution of the interpretation of fundamental rights in the Charter.

The words of Ran Hirschl resonates as far as the evolution of ESC rights in Canada is concerned:

> "All of the fundamentals of neoliberal social and economic thinking (such as individualism, deregulation, the commodification of public services, and reduced social spending) owe their origins to the same concepts of antistatism, social atomism, and strict protection of the private sphere that are currently enjoying dominance in the discourse of rights."[113]

It seems like most of these concepts have progressively and subtly made their way into Canadian case law. In 1986, when the Court had to decide whether or not there was a constitutionally protected right to property, its response was categorical as to the non-existence of such a right.[114] In 2021, the future of ESC rights through Article 7 of the Charter remains uncertain. It may be argued that the Court maintains the status quo because it is well aware of the gravity of excluding the positive obligations of ESC rights from constitutional protection in view of the significant advances they could foster in protecting the right to life, liberty and security. The result is that we're left with this blurry framework that seems to be highly influenced by current political and economic factors, which has worked against full recognition of the positive dimension of ESC rights as of today.

While many ESC rights are effectively protected by specific legislation, the highest level of recognition of ESC rights within Canada requires constitutional protection of those rights. As discussed, the Charter is silent as to ESC rights. Court decisions have not come as far as recognizing ESC rights through the interpretation of fundamental rights enshrined in the Charter. In the evolution of the Charter jurisprudence, some light has entered through half-closed doors in cases concerning life, liberty and security of the person (Section 7), and equality protection rights (Section 15). This paper reviewed the jurisprudential

[113] Ran Hirschl, *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2004), 147.
[114] Irwin Toy Ltd v. Québec, par. 1003.

construction of ESC rights in Canada. The positive/negative dichotomy has proved to be the Achilles' heel in full protection of ESC rights. In order to fully meet its international obligations, and lead the way in ESC rights, more needs to be done. While superficially it may seem that Canada scores high on ESC rights, the reality is far from a utopian picture.

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The Indonesian Constitution Read with German Eyes

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Abstract

The Indonesian Constitution offers many interesting insights to a German constitutional scholar. The most striking feature is the balance between the unitarian state and the natural diversity of Indonesia. In Germany, the state architecture reflects regional diversity in its federal framework, whereas Indonesia combines the unitarian state with various decentralising elements. This balance between unitarianism and regional diversity is probably the most conspicuous feature of the Indonesian Constitution and appears to be a suitable compromise between the conflicting aims of stabilising the state and the nation on the one hand and accommodating the geographic, demographic and cultural differences within the country on the other. Another striking feature is the presidential system, which is quite the opposite of the parliamentary system of the German Constitution. Other points that, from the perspective of German constitutional law, invite comparison are the constitutional provisions about the legal system, Indonesia's constitutional monotheism, which is quite the opposite of the German idea of the state being strictly neutral in religious affairs, and human rights.

Keywords: German Constitution, Human Rights, Indonesian Constitution, Legal System, Unitarian State.

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I. INTRODUCTION

It is a truism that when you compare your law with foreign law, you learn most about your own law. Thus, when I studied the Indonesian Constitution, I learnt much about German constitutionalism, for which I am very grateful. With this paper, I would like to give something back to the Indonesian legal public and share some of the thoughts a German lawyer has when reading the text of the Indonesian Constitution.[1] Insofar, I apply the comparative method: I read a foreign constitution through the lens of German constitutional doctrine. This paper concentrates on the text of the Constitution, and I deliberately leave aside a deeper analysis of the pertinent Indonesian constitutional practice. The reason is that every knowledge of the law, including constitutional law, starts with the text of the normative act. This method is valid for comparative studies as well.

With this paper, I do not want to question the choices the Indonesian Constitution makes. Indonesia is a sovereign country and free to take its own constitutional decisions. There is no point in advertising 'German solutions' for Indonesian problems. My purpose is much rather to point at some features of the Indonesian Constitution that strike a reader with a German constitutional background, to lend an Indonesian reader the external perspective on the Indonesian Constitution that a German lawyer has.[2] Both German and Indonesian constitutional cultures can learn from each other, and with this paper, I would like to contribute to Indonesian-German comparative constitutional studies.

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[1] The basis of this paper is the English translation of the consolidated version of the Constitution of the State of the Republic of Indonesia of the year 1945, including the fourth amendment, published by The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia (ed.), *The 1945 Constitution of the Republic of Indonesia, Law of the Republic of Indonesia concerning the Constitutional Court* (Jakarta: The Constitutional Court of the Republic of Indonesia, 2015). Where the English translation seemed unclear, I reverted to the original version of the Constitution, published on the website of the Constitutional Court of the Republic of Indonesia: "Undang-undang Dasar Negara Republik Indonesia Tahun 1945 [The 1945 Constitution of the Republic of Indonesia]," accessed January 28, 2021, https://jdih.mkri.id/mg58ufsc89hrsg/UUD_1945_Perubahan.pdf.

[2] A first German view on the Indonesian Constitution was presented by Karl Bünger, "Dokumente zur Entstehung der Vereinigten Staaten von Indonesien [Documents on the Creation of the United States of Indonesia]," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 13 (1950): 431–473, https://www.zaoerv.de/13_1950_51/13_1950_2_b_431_473.pdf.

The comparison of the Indonesian Constitution of 1945 and the German Constitution of 1949, the so-called *Grundgesetz* (Basic Law),[3] offers insights in many fields of constitutional law. However, this paper cannot give an overall comparison between Indonesian and German constitutional law, but concentrates on some aspects that I find most striking: the balance between the unitarian state and the natural geographic and demographic diversity of Indonesia's huge archipelago, the presidential system, the provisions on the legal system, democracy, constitutional monotheism, and human rights. Finally, I shall deal with technical issues such as the repetitiveness of some parts of the text and its terminological diversity.

This choice may appear to be rather random. There are many features in the Indonesian and German constitutions that invite and necessitate a comparative analysis. Yet, the limited space available requires a selection. I chose the topics that most strongly arouse my curiosity. At first sight, curiosity is not a scientific category. Yet, it is the – admittedly subjective – starting point for all acquisition of knowledge. In the field of comparative law, curiosity is usually aroused by 'otherness'.[4] This 'otherness' between the Indonesian and the German Constitutions is most distinct in the issues I address: the organisation of territory and diversity, the governmental system, the legal system, democracy, and the role of human rights in general and religion in particular. Their *tertium quid* comparatist is that all these issues address, in both constitutions, fundamental political self-definitions and/or solutions for actual or bygone societal conflicts. The answers in Indonesia and Germany are sometimes different and sometimes run parallel and thus invite comparison.

II. ACCOMMODATING TERRITORIAL AND DEMOGRAPHIC DIVERSITY

Indonesia's territory consists of a large number of islands, as Article 25A of the Indonesian Constitution acknowledges. These islands harbour numerous

[3] "Basic Law for the Federal Republic of Germany of 23 May 1949," Translation, accessed January 28, 2021, https://www.gesetze-im-internet.de/englisch_gg/.

[4] Uwe Kischel, *Rechtsvergleichung* [Comparative Law] (Munich: C.H. Beck, 2015), 1–27.

cultures, languages, religions, social and economic systems, ranging from the stone age to the 21st century. It is obvious that the heterogeneity of these natural features creates a unique challenge for state-building. For Indonesian constitution-makers, this probably has been the most demanding challenge.

Dutch rule had reacted to this challenge with a mixture of centralisation of power and administrative neglect of the economically less interesting parts of the colony. This mixture was typical for European colonial systems but was, naturally, no basis on which to build an independent Indonesian state. Instead, the Indonesian Constitution of 1945 creates a fine balance between centralisation and decentralisation.

2.1. The Unitarian State

First, there is the basic choice in favour of a unitarian state. In a German understanding, Indonesia with its geographical and demographic diversity would be an ideal candidate for a federal system. As a matter of fact, Indonesia became independent as the "Republic of the United States of Indonesia".[5] The federal structure was not an original idea of the Indonesian independence movement but a reaction to Dutch and American wishes, and when Indonesia in 1950 felt strong enough to ignore these international wishes, it reverted to the unitarian state. After independence, a major concern was keeping the newly created country together. In such a situation, dropping federalism if it does not have any local traditions and choosing the centralist way of a unitary state seems an expedient option. Therefore, the founding fathers of the Indonesian Constitution made the unitary state [*Negara Kesatuan*] the central feature of the new Indonesian statehood, as it is set out most prominently in article 1(1)[6] and 25A. Furthermore, the unitary state is one of the two constitutional principles that article 37(5) protects against future amendments.[7] This is in line with

[5] Charter of Transfer of Sovereignty of 27 December 1949.

[6] Articles without any further qualification are those of the Constitution of Indonesia.

[7] Comparative constitutionalism shows that quite a few 'eternity clauses' enumerate not only the articles or principles which cannot be amended, but also the 'eternity clause' itself in order to prevent that in a first step the eternity clause is changed and in a second step the protected article or principle: Peter Häberle, "Verfassungsrechtliche Ewigkeitsklauseln als verfassungsstaatliche Identitätsgarantien [Constitutional Eternity Clauses as Guarantees

the five foundational principles of Indonesia, Pancasila, as enshrined in the Preamble of the Indonesian Constitution: its third principle advocates the unity of Indonesia (*Persatuan Indonesia*).

However, the principle of the unitary state is not the ultimate word but only the starting point of balancing centralism with regionalism and decentralisation. The unity of Indonesia in Pancasila aims at keeping the country together but does not require necessarily a unitarian, let alone a hyper-centralised state. It accommodates any solution that balances regional and other diversity and the integrity of the Indonesian state.[8] Many constitutional provisions relate to this balance, putting the principle of the unity of Indonesia at the core of constitution-making as well as state- and institution-building. This is a contrast to Germany, where the strong regional identities have ceased to question the existence of the overarching German state since the 19th century. Regional identities are accommodated, at least partly, by a federal state structure which is seen as a guarantee and not as a danger for the acceptance of the German state.

2.2. Elements of Centralisation and Decentralisation in the Highest State Organs

In the state structure, we find elements of both centralisation and decentralisation. This starts at the very top, with the President. As a one-person organ[9] elected directly by the people, the President symbolises the entire Indonesian state and nation and their unity. Therefore, the

of Constitutional Identity]," in *Völkerrecht im Dienste des Menschen* [International Law Serving Man], ed. Yvo Hangartner and Stefan Trechsel (Bern: Haupt, 1986), 81–108; Bernd Wieser, *Vergleichendes Verfassungsrecht* [Comparative Constitutional Law] 2nd ed (Vienna: Verlag Österreich, 2020), 123–127. The German Grundgesetz, however, is just like the Indonesian Constitution. Art. 79(3) of the German Grundgesetz and art. 37(5) of the Indonesian Constitution forbid expressly only the change of the protected articles and principles, but not their own amendment. In Germany, it is accepted that art. 79(3), too, is exempt from amendments: Federal Constitutional Court, decision of 23 April 1991, 1BvR 1170, 1174, 1175/90, at C.II.2., available at https://www.servat.unibe.ch/dfr/bv084090.html. Accessed January 28, 2021. The same probably applies to Indonesia: Luthfi Widago Eddyono, "The Unamendable Articles of the 1945 Constitution," *Constitutional Review* 2, no. 2 (2016): 252–269.

8 Tedi Sudrajat, "Harmonization of Regulation Based on Pancasila Values Through the Constitutional Court of Indonesia," *Constitutional Review* 4, no. 2 (2018): 301–325; Ken Ward, "Soeharto's Javanese Pancasila," in *Soeharto's New Order and its Legacy: Essays in honour of Harold Crouch*, ed. Edward Aspinall and Greg Fealy (Canberra: ANU Press, 2010), 27–37.

9 The Vice President is, according to art. 4(2), a mere assistant. Therefore, the office of the Vice President does not question the one-person nature of the presidential office.

President as such is a centralising factor. However, there are some elements of decentralisation in the constitutional provisions about the President, too. For the presidential elections, article 6A(3) requires not only an absolute nation-wide majority but also a certain geographical distribution of the votes. On a comparative basis, clauses on a balanced geographical distribution are more frequent for referenda[10] than for the election of political representatives. They want to guarantee that the referendum's goal is embraced in the entire country and not only in the demographic majorities or other population centers. In Indonesia, this logic ensures that the President is the representative of the entire country and not only of one geographical part of it. Especially Java cannot convert its demographic majority easily into forcing a 'Javanese' candidate upon the country, but the candidate has to be acceptable everywhere in the country. However, this protection holds only in the first round because if there is a second round between the two most successful pairs of candidates, article 6A(4) lets a simple nation-wide majority suffice, without regional safeguards.

Parliament, too, possesses centralising and decentralising features. Due to its nation-wide elections [article 19(1)], the People's Representative Council represents the entire people in a uniform way and is therefore a centralising factor in the state architecture. This is somewhat counterbalanced by the Regional Representative Council, where every province is represented by an equal number of elected members [article 22C(1)-(2)]. The People's Representative Council of the second chambers of federal systems which are designed to give the federal units a forum in the national parliament. One possible model of the membership in such a federal second chamber is the numerically equal representation of all federal units, e.g., in the US Senate, where every state has two senators or in Switzerland, where every canton is represented by two representatives in the second chamber.

[10] A European Citizens' Initiative can be initiated by persons residing in at least seven different EU member states: Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative, see "Regulation (EU) 2019/788 of the European Parliament and of the Council," Eur-Lex, accessed January 28, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R0788&qid=1611135454353.

The federal chamber of the German parliament, the Bundesrat [Federal Council], follows a different model because the various states are granted between three and six members, according to their number of inhabitants.[11] For Indonesia, the American or Swiss idea of a numerically equal representation seems more appropriate because it favours the sparsely populated regions and prevents a possible dominance of Java with its demographic majority. In the need to balance regional diversity against a demographically, politically and economically dominant 'central' people, Indonesia is similar to India, where especially the Dravidic south, but also the Marathi, Bengal, Punjabi, Gujarati and other peoples resent the dominance of the 'Hindi heartland', which they perceive as aggressive and potentially assimilating. However, India chose for its federal chamber, the Rajya Sabha, an imperfect proportional composition similar to the German *Bundesrat*: the federal states and territories have a number of representatives weighed according to the number of inhabitants, though it does not reflect the demographic differences to their full extent. In my view, the Indonesian Regional Representative Council, with its equal number of representatives for each province, is better equipped to balance regional differences and the natural overweight of the 'Javanese heartland', and therefore is better able to preserve inter-regional and inter-ethnical peace in a country as diverse as Indonesia. It has to be noted, however, that the composition of the Regional Representative Council does not reflect the democratic principle of the equality of votes because the sparsely populated regions are over-represented. This democratic 'flaw' is accepted in many states in order to achieve other political goals such as a political accommodation of regional differences, like in the German *Bundesrat*. This 'democratic imperfection' of the second chamber is counterbalanced by a first chamber based on

[11] The scale between three and six members reflects the demographical differences only imperfectly because the number of inhabitants of the federal states ranges from 700,000 to 18 million. German doctrine qualifies it as a mixture of the federal principle (equal representation for all federal units) and the demographic principle. For more detail, see Uwe Jun, "Der Bundesrat im föderativen System Deutschlands: Vor und nach der Reform 2006 [The Federal Council in Germany's Federal System: Before and After the Reform of 2006]," in *Analyse demokratischer Regierungssysteme* [Analysis of Democratic Systems of Government], ed. K. H. Schrenk and M. Soldner (Wiesbaden: Verlag für Sozialwissenschaften, 2010), 335–358.

universal and equal ballot. Also, the European Parliament is not based on the equal weight of all votes because small member states have more seats per capita than the larger member states;[12] this is accepted because the European Parliament is not the representative of a uniform 'European people' but of the member states.

Looking at the distribution of powers between the People's Representative Council and the Regional Representative Council, all substantial powers such as legislation, control of the executive or elections of high state representatives are vested in the People's Representative Council. The powers of the Regional Representative Council concentrate on issues of regional and other diversity, which very wisely include aspects of economy and the central budget and taxes [article 22D, 23(2)]. These powers are merely consultative. The Regional Representative Council cannot take decisions of its own, and it does not even have a suspensive veto in the matters it needs to be consulted about. Insofar, it is not a 'real' second chamber and resembles most the Slovenian State Council, which, with merely consultative powers, represents regional and professional interests.[13] In Germany, the only consultative second chamber, the Senate in the federal state of Bavaria, was abolished by referendum in 1999. The *Bundesrat* may veto any bill, but may be overridden in the first chamber; its assent is necessary only in the cases enumerated in the *Grundgesetz,* mostly administrative legislation.

2.3. Regional Government and other Decentralising Factors

The strongest decentralising element in the Indonesian state architecture is probably regional government. Regional governments have a democratic basis with some sort of separation of powers [article 18(3)-(4)] and enjoy autonomy in their local and regional affairs, as article 18(2) sets out. The guarantee function of article 18(2), however, is quite weak because it does not define what "their own government affairs" [*urusan pemerintahan mereka*

[12] In the European Parliament with 705 members, the 83 million inhabitants of Germany are represented by 96 MPs and the 520,000 inhabitants of Malta by 6 MPs As a result, a Maltese vote carries ten times more weight than a German vote.

[13] Constitution of the Republic of Slovenia of 23 December 1991, arts. 96-101.

sendiri] are. This term is open to interpretation, and an aggressive central government could easily argue that most public affairs belong to the central and not to the regional government. If article 18(2) contained an open list of examples of the matters that constitute "their own government affairs", as many constitutions do in their protection clauses on the autonomy of local government, it would be more difficult for the central government or the central law-maker to interfere in regional affairs. The German example shows that also the courts can help. The constitutions of most federal states protect local autonomy with a formula similar to article 18(2), granting them the right to regulate and administer "local affairs". Numerous decisions by constitutional and administrative courts quashed federal and state laws that regulate, and executive measures that administer matters that the courts identified as local affairs, thus protecting local government against state institutions. In their wide interpretation of "local affairs", the German courts often revert to tradition. Where the tradition of local autonomy is weaker, as e.g., in Hungary, the courts take a more centralist approach: In the first thirty years of its existence, the Hungarian Constitutional Court only quashed one legal provision because it regulated a question that the court interpreted as a "local affair".[14]

In Indonesia, article 18(2) is helped by article 18(5) granting regional governments "widest autonomy" which comprises everything except what the law defines as "affairs of the Central Government". This can be read as a constitutional presumption in favour of regional powers.[15] Yet, the protection that article 18(5) affords is weak, too. If article 18(5) did not leave it to the law – and thus, indirectly, to the Central Government – to define what "Central Government affairs" [*urusan Pemerintah Pusat*] are, and if that provision itself gave an essential definition of Central Government

[14] For a comparison of the pertinent practice of the German and Hungarian constitutional courts see Herbert Küpper, *Autonomie im Einheitsstaat* [Autonomy in a Unitarian State] (Berlin: Duncker&Humblot, 2002), 185–188.

[15] Art. 30 Grundgesetz establishes a presumption in favour of the federal states: the federation may act only if the Grundgesetz itself refers a given matter to federal jurisdiction, and the states are free to exercise any competence not expressly reserved for the federation.

affairs, it would guarantee the essence of regional autonomy to a stronger degree than it does now.

Another decentralising factor in this respect is article 18a(1), 18b(1) which call for respect of regional specificities. Thus, the system of regional governments does not need be uniform throughout Indonesia but may and must accommodate regional differences. The regional government in Aceh may have structures different from those in Central Java, Maluku and/or West Papua. Similarly, in Germany, each federal state has its own system of central and local government, the homogeneity clause in article 28(1) *Grundgesetz* only demanding that state and local governments be republican, democratic, social and obey the rule of law. Until now, there has been no precedent that structures in a federal state did not conform to these principles, i.e., the diversity on the state level never jeopardised the uniformity of the basic traits. If a federal state violated one of these basic principles, the Federal Constitutional Court could intervene and, if this did not help, the state may be placed under direct federal administration, as article 37 *Grundgesetz* sets out.[16] The Indonesian Constitution does not provide for similar safeguards. The reason is that the German 'duty to homogeneity' in article 28(1) focuses on the federal states, defining a framework for their organisational autonomy. In Indonesia, on the other hand, articles 18A(1) and 18B(1) do not regulate the political space of the regional level but of central legislation.

Regional governments are strengthened by the fact that their scrutiny by the independent Financial Audit Board bears decentralised features. This Board has a decentralised structure in itself because it is present in every region [article 23G(1)], and for this reason it makes sense that the Regional Representative Council is consulted before the election of the members of the Board [article 23F(1)].

[16] Falk Schöning, *Föderale Intervention als Instrument zur Bewahrung eines Bundesstaates – Rechtsvergleichende Analyse und völkerrechtliche Legitimation* [Federal Intervention as an Instrument to Preserve a Federal State – Comparative Analysis and Legitimacy in International Law] (Baden-Baden: Nomos, 2008).

Finally, the respect for traditional societies in article 28I(3) and for *adat* (indigenous) law societies in article 18B(2) is another decentralising factor although the wording of these provisions is conditional (*not rather reluctant*). Traditional societies, which are usually vulnerable, are protected only to the extent that they are "in harmony with … civilisation", which may be bad news for stone age cultures and their traditional land rights if they are not recognised as "civilisation". Furthermore, the state "respects" "existing" *adat* societies meaning that there is no duty for the state to actively support them. Article 18B(2) suggests that the state must not actively destroy *adat* societies but may patiently wait until they find a natural end, e.g., through assimilation or social development.[17] In Germany, there are no 'traditional societies', so the problem does not arise. The constitutions of the federal states with ethnic minorities grant them special cultural rights and oblige the state to promote minority culture.

2.4. Centralising Elements

Centralising elements are the symbols of the central state (articles 35, 36A, 36B) and *Bahasa Indonesia* (article 36). Also, the idea of "Indonesia's national culture" in article 32(1) has a centralising tendency even if this national culture is interpreted as being composed of a large number of regional cultures, including traditional and *adat* societies. One of the strongest unifying effects may be the "one" (*satu*), i.e., uniform national educational system [article 31(3)] with its goal to foster "national unity" [article 31(5)]. For this very reason, the German federal system refers culture and education into the jurisdiction of the federal states, with the federation having only very limited powers in this field (article 30 *Grundgesetz).* This is to guarantee the preservation and advancement of regional cultural diversity which a decentralised school system passes on to the next generations. Culture and education are bulwarks of decentralisation in Germany, whereas they tend to contain centralising elements in the Indonesian Constitution.

[17] I Nyoman Nurjaya, "Is the Constitutional And Legal Recognition Of Traditional Community Laws Within The Multicultural Country Of Indonesia A Genuine Or Pseudo Recognition?" *Constitutional Review* 1, no. 2 (2015): 49–68.

2.5. The Balance between Centralism and Decentralisation

In sum, the central elements appear stronger than the decentralising ones. This is no surprise because that is the reality in most countries of the world. Even federal systems find that their federalism does not protect them from developing an increasingly centralist political culture.[18]

As a German, one feels inclined to propose a strengthening of the decentralising factors, an upgrading of regional government, perhaps even into some mild form of federalism.[19] From a German perspective, Indonesia with its geographical and cultural diversity would be ideal for a federal system. Germany has had quite positive experiences with decentralisation and federalism for nearly 1,000 years. German federalism is not based on ethnic differences because – leaving a few minorities and immigrants aside – the German people are ethnically quite homogeneous. There are, however, strong regional identities in Germany, and most dialects of German cannot be understood outside their region. Yet, the borders of the federal states are rarely identical with the territories of regional identities and/or dialects. Hence, German federalism is not an ideal instrument to represent regional identities and does not bear the danger of ethnic or other separatism. One positive effect of federalism – apart from an additional system of checks and balances, which is a value in itself[20] – is that cultural and economic life is not concentrated in the capital city and not even in the big cities

[18] For German federalism, the first such in-depth diagnosis was given by Konrad Hesse, *Der unitarische Bundesstaat* [The Unitarian Federal State] (Karlsruhe: C.F. Müller, 1962).

[19] Therefore, German authors who publish on Indonesia's constitutional system usually draw a positive balance of efforts to decentralise the country: Franz von Benda-Beckmann, "Verfassungsrechtspluralismus in West Sumatra: Veränderungen in staatlicher und dörflicher Verfassung im Zuge der Dezentralisierung in Indonesien [Constitutional Pluralism in West Sumatra: Changes in the Constitution of the State and of the Villages in the Course of Decentralisation in Indonesia]," *Verfassung und Recht in Übersee* [Law and Politics in Africa, Asia and Latin America] 35, no. 4 (December 2002): 494–512; Hannah Neumeyer, "Unity in Diversity or Diversity in Unity: Indonesia's Process of Political Decentralisation and its Effects on Conflicts," *Verfassung und Recht in Übersee* [Law and Politics in Africa, Asia and Latin America] 39, no. 3 (September 2006): 292–305.

[20] In a modern party democracy, federalism can work as a system of checks and balances only if the political parties, too, are federalised. For this reason, German law requires the political parties to be subdivided into federal divisions. In political reality, the state level is very strong in most political parties, and party discipline will not stop a state division of a party from criticising measures that the self-same party installs on the federal level if they feel that that measure violates the interests of their given federal state. For Indonesia, the idea of decentralised parties is advocated by Muhammad Rifqinizamy Karsayuda, "The Decentralization of Political Parties Through the Institutionalisation of the Local Political Parties," *Constitutional Review* 2, no. 1 (2016): 77–102.

only but is present everywhere in the country. So, if Indonesia, after more than seven decades of independence, feels that the central state and nation are established, well-rooted and settled to an extent that regional diversity can be given a greater weight in public and political life, then the regional governments and their nationwide representation, the Regional Representative Council, are good starting points for such a development. One idea would be to give the Regional Representative Council real powers. An example could be the federal chamber in Germany, the *Bundesrat*: It has to be consulted in all legislative projects of the first chamber (and in the election of some high-ranking state officials), but its assent is necessary only in those matters that have a special relevance for the federal states and which are precisely defined in the text of the German *Grundgesetz*. In all other matters, the *Bundesrat* can only exercise a suspensive veto; if the *Bundesrat* refuses its assent, its veto can be overruled easily in the first chamber. Strengthening the nationwide representation of the regions as a first step has the advantage that such a measure has its effects predominantly on the central level and not so much in the regions themselves and therefore does not encourage secessionist ideas.

III. THE PRESIDENT AND THE PRESIDENTIAL FORM OF GOVERNMENT

The Constitution defines Indonesia's form of government as presidential, and this special feature cannot be changed even by constitutional amendment, as article 37(5) sets out. Typologically, the Indonesian form of presidentialism belongs to the 'pure' (or, in other words, 'extreme') presidential systems because the President is not only the head of state, but at the same time the head of government. According to article 17, there are only ministers,[21] but no prime

[21] In this context, art. 17(4) is strange for a German reader because in Germany a ministry is established and terminated by an organisational act of the government. The leading case in Germany is: Judicial Review of an Order of the Prime Minister to Unite the Ministries of the Interior and of Justice, Decision of North-Rhine-Westphalia Constitutional Court no. VerfGH 11/98 (The Constitutional Court of the Federal State of North-Rhine-Westphalia), accessed January 28, 2021, https://www.vgh.nrw.de/rechtsprechung/entscheidungen/1999/990209_11-98.pdf. In a presidential system, however, the influence that art. 17(4) gives to parliament is probably an important checks and balances factor.

minister. In 'moderate' presidentialism, the executive has two power centres: the President on the one hand and the government, led by a prime minister, on the other. In the Indonesian 'pure' presidentialism, the executive is uniform and has only one centre: the President. Therefore, the Indonesian presidential form of government resembles closest the presidentialism in the US.

This choice is exactly the opposite of what the German Constitution says. In the *Grundgesetz,* the Federal President is merely a symbolic figure, the political power centres being the Parliament and the chief of the Federal Government, the so-called Federal Chancellor. After the Nazi dictatorship (1933-1945), the general interpretation was that the strong President of the interwar constitution, the so-called Weimar Constitution (1919-1933), had helped the Nazis into power.[22] In order to prevent the repetition of such a constellation, the *Grundgesetz* chooses a parliamentary system with a symbolic head of state. Indonesia after independence, on the other hand, took the same choice as many other freshly decolonised countries and entrusted a strongman with the creation of a state and a nation. After independence, this strongman was seen as a guarantee for the necessary stabilisation of the state and the nation. Both choices were well founded in their day, but were made more than 70 years ago. Both countries are wise not to let that historical choice stand in the way if today or tomorrow's needs may require a different power arrangement.

3.1. Popular and Parliamentary Election of the President

The President of the Republic of Indonesia is elected by the people [article 6A(1)], which is in line with the position of the President. An office that holds this amount of political power requires a direct popular vote for legitimacy. Therefore, in all presidential and mixed systems in the world, the President is elected by the people.

However, there seems to be a contradiction in the Indonesian Constitution. The people elect the head of state only in the event of a

[22] In Germany, there is a vast literature on the role of the President in that process. The most recent example is Heinrich August Winkler, *Wie wir wurden, was wir sind. Eine kurze Geschichte der Deutschen* [How We Became What We Are. A Short History of the Germans] (Munich: C.H. Beck, 2020), 61–85.

regular election. If extraordinary elections become necessary because both the President and the Vice-President can no longer fulfil their duties, it is not the people who elect the new President and Vice-President, but the People's Consultative Assembly [article 8(3)2], which is a sort of joint organ of the People's Representative Council and the Regional Representative Council (article 2). There is no clear reason why the power to elect is given to the people in regular elections, but to the People's Consultative Assembly in extraordinary elections. One reason may be the time factor. If the offices of both the President and the Vice-President become vacant suddenly, an election by the People's Consultative Assembly can be organised quicker than a nation-wide election. Yet, this argument is not convincing. There is no rush because article 8(3)1 provides for a caretaker presidency, which may govern the country until nation-wide presidential elections are organised.

Another argument may be made against an election by the People's Consultative Assembly. The President holds a considerable amount of power and therefore needs an impeccable democratic legitimacy. A direct election by the people creates such a legitimacy. An election by the People's Consultative Assembly, on the other hand, can provide a President only with an indirect and therefore insufficient legitimacy – even more so as the members of the People's Consultative Assembly possess various degrees of democratic legitimacy since some are elected by the people in nation-wide elections and others are elected on a regional basis. This is exactly the reason why article 54(1), (3)-(4) of the German *Grundgesetz* provides for an organ quite similar to the People's Consultative Assembly, the so-called *Bundesversammlung* [Federal Assembly], as the forum of the election of the Federal President. The *Bundesversammlung* consists of all MPs of the federal first chamber and an equal number of citizens delegated proportionally by the parliaments of the federal states; its only task is to elect the Federal President. This construction was chosen because it gives the Federal President only a weak democratic legitimation, which again is

seen as a guarantee that the Federal President remains a symbolic figure and does not develop into a political power centre.[23]

3.2. Checks and Balances in Indonesia's Presidential System

Due to the Nazi past, Germans are suspicious of presidential systems, thinking that they tend to be close to, or at least prone to lead to, dictatorship. However, an analysis of the Indonesian Constitution shows that 'pure' presidentialism, too, is not without checks and balances. The first safety belt in Indonesia is that a President cannot have more than two subsequent periods (article 7). In theory, there is the danger that a strongman, after two terms as President, may use a puppet to replace him in the office of the President, and then return to office for another two terms. One example of such a practice is Russia and the way Putin used Medvedev.[24] This danger may be reduced by allowing an absolute maximum of two terms, i.e., by dropping the "subsequently" from article 7. But even then, this theoretical danger does not stop entirely because a two-terms-maximum rule would not stop a strongman who uses several subsequent puppets as Presidents. In the end, the limitation of the number of presidential terms is an important safeguard against dictatorship, but the true guarantee is not a maximum number of terms but a political culture that does not tolerate a President to become a dictator.

Another important factor in the system of checks and balances is the discharge procedure. In a parliamentary system, the head of government depends on parliament, and if parliament no longer supports her or him, it may replace one prime minister with another one. The President of the Republic of Indonesia, who is elected by the people and not by parliament, does not owe political responsibility to parliament, at least not in the sense that parliament has the power to terminate the President's office for political reasons. Nevertheless, there has to be a mechanism to react to possible

[23] Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland* [Constitutional Law of the Federal Republic of Germany] 7 vols., 1st/2nd ed (Munich: C.H. Beck, 1978–2001), 179–201.

[24] There are more examples in political practice, e.g., Yugoslavia's dictator of the 1990s, Milosevic, who, after two terms as President, jumped to various offices, having puppets on the President's seat.

political abuse of power by the President.[25] The Indonesian Constitution created such a control mechanism in the form of the discharge procedure (articles 7A-7B).

The Indonesian discharge procedure is a combination of political and legal elements. The legal element consists in the reasons for the discharge: a discharge procedure requires proof of a violation of law in the form of treason, corruption, bribery, other felonies or disgraceful acts, or that the President no longer meets the legal requirements for that office, e.g., if she or he lost Indonesian citizenship. The political element is the decision by parliament whether or not to act on the President's misbehaviour, initiating the discharge procedure. Even if it is proven that there is a reason for discharge, the Constitution does not make a discharge procedure compulsory, but leaves the decision to the political discretion of the People's Representative Council. One weak element is the reason of a "disgraceful act" [*perbuatan tercela,* articles 7A, 7B(1), (5)]. It is very vague, and that may make it open to abuse. A parliament that wants to get rid of the President may identify some minor fault in the President's behaviour as a "disgraceful act". The vagueness of the term makes it difficult for the Constitutional Court, too, to give it solid contours. On the other hand, a "disgraceful act" is, in its vagueness, open to changes in the social values of the society so that a behaviour which was deemed acceptable in 1945 may appear disgraceful today – or vice versa.

The Indonesian Constitution aptly distributes the powers to discharge a President among political and legal institutions. The decision whether to initiate a discharge procedure is a political one and therefore in the hands of a pre-eminently political organ: the People's Representative Council [article 7B(1)]. The examination whether the grounds for a discharge can be proven is of a legal nature and therefore given to a judicial institution:

[25] If a president is elected by the people, the logical way to terminate the president's term would be a recall by the people. The constitutions of some German federal states have provisions on recalling the government by way of referendum, but in political practice, there never has been a recall referendum, not even an initiative for such a referendum.

the Constitutional Court [articles 7B(1)-(5), 24C(2)[26]]. Comparatively, some constitutions involve the Supreme Court; the examination whether a president committed a criminal offence requires expertise in criminal rather than constitutional law, and this expertise can be found in the Supreme rather than the Constitutional Court.[27] Finally, the decision to remove the President from office is again a highly political one. However, this decision is not given to the People's Representative Council but to the People's Consultative Assembly in which the representatives of the People's Representative Council – and thus the central level – have a majority of at least three-fourth [article 22C(2)]. By setting the political decisions about the initiation of the procedure and about the discharge on two at least partly different organs, the Indonesian Constitution separates the function of the 'accusation' (People's Representative Council with a two-thirds majority) from the function of the 'judge' (People's Consultative Assembly with a two-thirds majority in the presence of at least three-fourth of all members), which is a requirement of natural justice. Article 7C makes sure that the President cannot paralyse the discharge procedure.

In sum, the Indonesian discharge procedure is a balanced system of checks and balances composed of both legal and political decisions, which are settled on the appropriate organs. As a result, the threshold to remove a President from office is high. Given that the President is to guarantee the stability of the entire Indonesian state, the choice to make her or his removal from office difficult is quite understandable. All presidential forms of government do not allow to remove the chief of the executive easily, as the example of the US shows. During the more than 200 years of American history, several impeachments were started, but none was ever successful.[28]

[26] Art. 61 *Grundgesetz*.

[27] Examples are the discharge procedure against the President in Russia, Romania and Moldova for high treason (Russia, Romania), a serious crime (Russia) or any criminal act (Moldova).

[28] Arguably, the impeachment procedure against President Nixon in 1974 would have been successful, but Nixon resigned before the completion of that procedure. Insofar, the initiation of the impeachment procedure had achieved its goal: to remove from office a president who had abused his power.

There are two points where the system of checks and balances concerning the President might be improved: the declaration of war and the state of emergency. The President declares war with the approval of the People's Representative Council [article 11(1)]. There is no rule for the case that the People's Representative Council can no longer convene, as may happen in the case of a sudden attack. Article 22 grants the President special powers "in the event of a compelling exigency". This term is very vague, compared to many other constitutions that define more precisely the situations in which special powers are granted. However, it is not easy to define these situations in a way which on the one hand is precise enough to prevent abuse and on the other hand is sufficiently flexible to deal with all sorts of unforeseen and unforeseeable situations. Another point requires more precision. Article 22(3) states that an emergency government regulation that fails to obtain the approval of the People's Representative Council "must be revoked" [*harus dicabut*]. The verb "must" (*harus)* together with the patient-focus verb "*dicabut"* suggests that a separate act of revocation is necessary, but article 22(3) does not define who is obliged to revoke, nor what happens if the revocation does not take place. It would be much easier if an emergency government regulation not endorsed by the People's Representative Council ceased to be valid from the moment of the 'no' in parliament, without the necessity of any further act of revocation. A rewording of article 22(3) could guarantee such an automatism.

IV. THE LEGAL SYSTEM

The Indonesian Constitution does not have a comprehensive regulation of the legal system, the sources of law and their hierarchy. Just like the German *Grundgesetz* and many other constitutions, the Indonesian Constitution presupposes the existence of a hierarchy of sources of law[29] and contains rules on only some aspects.[30]

[29] Especially art. I of the Transitional Provisions.

[30] Comparative constitutional law shows us that usually constitutions after a universal change of system find it necessary to introduce a comprehensive regulation of the hierarchy of the sources of law. A good example are

To start with, for a '*Rechtsstaat*' – this German word is a more appropriate translation of "*negara hukum*" in articles 1(3), 28I (5) than the English 'rule of law' is – the existence of a good legal system with a well-defined system of sources of law is essential. In a '*Rechtsstaat*'/'*negara hukum*', all relevant questions are regulated by the law, and the law is binding upon all. This is the essence of *'Rechtsstaat'/'negara hukum'*. This central role of the quality of the legal system for the '*Rechtsstaat*'/'*negara hukum*', however, does not mean that all details of the legal system must be dealt with on the level of the Constitution. As both the Indonesian and the German constitutions show, it is very well possible to entrust the appropriate organs, first of all the legislature, with the creation and improvement of the legal system without formulating many constitutional preconditions.

For the smooth operation of the hierarchy of sources of law, a judicial norm control is crucial. Indonesia chose a wise way to distribute the powers for this norm control. The Constitutional Court reviews formal laws against the Constitution [article 24C(1)], whereas the Supreme Court controls whether sub-legal pieces of legislation are in harmony with laws [article 24A(1)]. Other states concentrate all forms of norm control with the Constitutional Court, as e.g., Hungary did for quite a while (1990-2012).[31] The Indonesian way is better because it attributes every court its proper function. The Constitutional Court, whose task it is to adjudicate on the Constitution, can do just that when examining whether a law is in harmony with the Constitution. In these cases, the standard of scrutiny is the Constitution, and the Constitution is exactly what the Constitutional Court specialises in. On the other hand, the standard of scrutiny of sub-legal pieces of legislation is not the Constitution but laws, and the ultimate interpreter of laws is the Supreme Court. Hence, in each case the Constitutional Court and the Supreme Court are awarded the tasks they do best.[32]

the post-socialist constitutions: Since they do not want to continue the socialist system of sources of law, but strive to establish a new system, they deal with this question in detail.

[31] Constitution of the Republic of Hungary, § 32/A (valid between 23rd October 1989 and 31st December 2011).

[32] On this division of labour between constitutional and supreme courts in a comparative perspective, see Herbert Küpper and Attila Vincze, eds., *Verfassungsgerichte und Obergerichte in Mitteleuropa* [Constitutional Courts and Supreme Courts in Central Europe] (Frankfurt/M.: Peter Lang, 2018).

In connection with the Constitutional Court, it is surprising for a German reader that article 24C(5) does not require legal knowledge from a member of the Constitutional Court. In Germany, every judge, including Constitutional Justices, is required to hold a degree in law. However, there are more countries where a formal law degree is not always necessary for a judicial function (e.g., Switzerland) or for a post in a supreme or constitutional court (e.g., United Kingdom). Furthermore, article 24C(5) allows "statespersons" [*negarawan*] to be a member of the Constitutional Court. In Germany, we are quite reluctant to allow politicians to become judges at the Constitutional Court. Our experience is that (an ex-) politician finds it hard to develop the neutrality that is required to scrutinize a measure, e.g., a law, which she or he may have contributed to enact. In order to prevent such conflicts of interest, in Germany we usually observe a non-official cooling period.

Another astonishing point for a German reader is to find that there is no rule on international law. There is, of course, article 11 on international treaties. But the Indonesian Constitution is silent about the domestic role of general (customary) international law. Article 25 of the German *Grundgesetz* declares that "the general rules of international law are a part of federal law", and as such, they "prevail over statutes and create immediate rights and duties for the inhabitants of Germany". In 1949, after the end of the Nazi dictatorship, this incorporation of the general rules of international law into the domestic German legal system, in the rank below the Constitution, but above statute, was seen as a guarantee against future dictatorships. For the same reason, practically all post-socialist constitutions of Eastern Europe define in some way or other the role of international law as a domestic source of law. Today, with dictatorship not being a problem of actuality, the German clause is interpreted as a guarantee of an open and internationally integrated Germany, which is an important aspect for a country with an economy heavily reliant on exports.

V. DEMOCRACY

The Indonesian presidential system is based on democracy. At the same time, democracy is one of the five principles of Pancasila. Consequently, article 1(2) states people's sovereignty. A German reader notices two striking features about Indonesian democracy.

5.1. Direct Democracy

First, there is no mention of direct democracy. Given that the fourth principle of Pancasila defines democracy as a representative one, it is not surprising that the Indonesian Constitution concentrates on representative democracy. It is open to debate, however, whether Pancasila and the Indonesian Constitution actively forbid direct democracy or simply do not deal with the question, leaving it to the law-maker to decide. The German *Grundgesetz* is rather silent on direct democracy as well, and for many years there have been robust discussions about the introduction of referenda on the federal level. After 1945, the standard argument was that referenda contributed to the decline of the democracy in the Weimar period (1919–1933) and were a plebiscitarian instrument in the hands of the Nazi dictators (1933–1945). Recent research shows that the facts are not this simple.[33] In the federal states and on the local level, the situation is completely different, and the people quite often can decide questions of state legislation or in local affairs. So far, the German experiences with direct democracy have been positive rather than negative. One reason is a very precise pertinent legislation. Every federal state has its own system. This makes Germany a big laboratory for different forms of direct democracy, where gradually best practices can evolve.

5.2. Party Monopoly

Second, several provisions on the candidates for political office monopolise the nomination of candidates in the hands of political parties:

[33] The most comprehensive analysis is given by Peter Neumann, *Sachunmittelbare Demokratie* [Direct Democracy] (Baden-Baden: Nomos, 2009).

President and Vice-President [articles 6A(2), 8(3)2] and the members of the national and regional parliaments [article 22E(3)]. On the other hand, parties are banned from the elections of the members of the 'second chamber', the Regional Representative Council, where candidates must be individuals [article 22E(4)]. The latter may help the Regional Representative Council to be a true representation of regional interests and not be dominated by political parties. As far as the President, the Vice-President, the People's Representative Council and the regional parliaments are concerned, the reason for the party monopoly is not obvious. The result of this rule is that there cannot be any independent candidates and therefore no independent Presidents or MPs.

It is true that in Germany, where we do not have a formal party monopoly, independent candidates are not too frequent, and they are voted into office even less frequently, but at least there is the theoretical possibility. If the people wish to be represented by someone who does not belong to any party, then why should this democratic wish be limited by rules that favour partyism?

VI. ONE AND ONLY GOD AS A BASIS FOR THE STATE

In Indonesia, the belief in a "one and only God" [*Ketuhanan Yang Maha Esa*] is the first principle of Pancasila and as such the basis for the sovereignty of the people (Constitutional Preamble) as well as of the state [article 29(1)]. These two provisions seem to suggest that monotheism is compulsory in Indonesia. Such an interpretation would be in conflict with the freedom of religion as set out in articles 28E(1)-(2), 28I(1) and 29(2). In Indonesia, there are many followers of non-monotheist religions like traditional societies with their animism, Hindus or the adherents to the various Chinese religions,[34] and of course there are persons who choose not to believe at all (negative freedom

[34] As a result of the pertinent debates in Indonesia, Confucianism was adopted as a religion acceptable in the light of Pancasila in the early 21st century.

of religion).[35] These groups may be alienated if monotheism is forced upon them, which would violate their freedom of religion.

This conflict can be avoided if the references to a "one and only God" are interpreted as symbolical, as the Indonesian discussion shows.[36] A non-compulsory interpretation is aided by article 9(1), which allows for the President-elect to choose between a religious oath or a non-religious pledge. This shows that the individual may choose and that nobody is forced to follow a belief in a "one and only God". On the other hand, national education has to aim at "enhancing faith and piety" [article 31(3)]. Just like the references to a "one and only God", this compulsory educational goal has the potential to alienate certain populations and individuals. In a society as diverse as Indonesia's, it is always dangerous to make beliefs and values of one part of the people (even if it is the majority) compulsory for everybody. Therefore, the Pancasila values of an inclusive "one and only God" have been used to fight back Islamist assertions that all Indonesians must obey (orthodox) Islamic rules.[37]

This is also the German experience. Germany is a country with long-standing religious heterogeneity. In the past, religious differences triggered long, violent and very destructive wars and civil wars in our country. Therefore, a social norm has evolved in the course of the centuries that religious affiliation is a private matter and that religion is to be kept out of public life. The state in particular is expected to be religiously neutral and to observe strict equality when dealing with religious communities. We see this as a guarantee for the religious peace within German society, and it has worked well during the last two centuries. Given this mindset, the German *Grundgesetz* does not mention any belief, and it mentions "God" only once: in the Preamble in connection

[35] On negative freedom of religion, non-believers and Pancasila see Matti Justus Schindehütte, "Zivilreligion als Verantwortung der Gesellschaft. Religion als politischer Faktor innerhalb der Pancasila Indonesiens [Civil Religion as Societal Responsibility. Religion as a Political Factor within Indonesia's Pancasila]" (Doctoral diss., University of Hamburg, 2006), https://ediss.sub.uni-hamburg.de/handle/ediss/1358#page=151, accessed January 28, 2021.

[36] One might interpret the monotheism of the Indonesian Constitution as the ideological underpinning of the principle of the unitarian state. In general, monotheist religions and world views tend to be centralist because they advocate the idea that there is only one truth, whereas polytheism accepts the existence of many truths and therefore tends to favour diversity.

[37] Yance Arizona, "The Return of Pancasila: Political and Legal Rhetoric Against Transnational Islamist Imposition," *Constitutional Review* 5, no. 1 (2019): 164–193.

with the German people's "responsibility before God and mankind". Apart from that, the *Grundgesetz* guarantees individual freedom of religion and the legal status of the religious communities.

The German concept of a state neutral in religious matter must not be confused with the French *laïcité* [secularism], which provides for a strict separation between the state and the religious communities. In Germany, the state may – and is expected to – cooperate with the churches. Religious neutrality means equidistance, not a total lack of contact. Article 7 *Grundgesetz* and the church-related articles of the Weimar Constitution that Article 140 *Grundgesetz* incorporates elaborate on this special concept. The state must not decide on questions of religion and faith – and therefore must not advocate ideas such as a "one and only God", it must not interfere in the internal affairs of the religious communities, and it must treat all religious communities equally; the latter does not prevent the state from taking into account natural differences such as the number of believers. As a result, religion may be taught in state schools but only to pupils who (or whose parents) accept religious instruction; persons teaching religion in state schools and universities are to be approved of by the relevant religious community (the state only controls whether they fulfil the pertinent legal requirements); labour disputes between the religious community and its priests and other religious staff are not heard by the courts of the state but by ecclesiastical courts; the state collects church taxes on behalf of the churches because this is considered to be a pragmatic solution.[38] However, these privileges are enjoyed only by the churches that the state incorporated under public law. In principle, any church may apply for incorporation; if the state refuses the church can seek, and will obtain, relief from the Federal Constitutional Court.[39]

[38] The religious communities define their respective taxes as a percentage of the income tax. Since the state collects the income tax, it possesses all the necessary data for collecting the church tax as well, and if the religious community asks the state to collect them. The state will comply, keeping a certain percentage of the collected church tax to reimburse its expenses.

[39] Jehovah's Witnesses were refused incorporation because government said they were overly critical of the institution state and therefore did not deserve the privileges of incorporation. The Federal Constitutional Court ruled that Jehovah's Witnesses fulfilled the constitutional requirements for incorporation and therefore were entitled to be incorporated: Federal Constitutional Court, decision of 19 December 2000, 2 BvR 1500/97, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2000/12/rs20001219_2bvr150097.html. Accessed January 28, 2021.

This traditional system does not work without problems. The incorporation procedure sometimes forces the state to get involved in the inner organisation of a religious community,[40] the requirement of a minimum size as a precondition for incorporation discriminates against sects, and Muslim communities find it difficult to conform to the requirements of a certain inner organisation, shaped on the Christian churches, as a prerequisite of incorporation.[41] In the light of the decisions of the European Court of Human Rights on the privileges of incorporated churches in Greece,[42] it is highly doubtful whether the German system with its privileges for religious communities incorporated under public law is in conformity with the individual freedom of religion. Nevertheless, the German tradition of an equidistant cooperation between the state and the churches has prevented religious tensions for more than a century.

Given these German experiences with the private nature of religious matters and with the beneficial effect of a neutral state, the Indonesian allusions to a "one and only God" appear problematic to a German reader. From a German perspective, we would fear that these allusions in the Constitution would divide society, instead of uniting it.

VII. HUMAN RIGHTS

The Indonesian Constitution contains an impressive catalogue of human rights. Many things can be said about the human rights in the Indonesian Constitution, but I would like to limit my comments to two provisions and one more general observation.

[40] The most frequent constellation is when existing unitary Jewish communities split into two or more and the new communities request incorporation. The state then has to decide whether the new formation is "Jewish" in a religious sense. The leading case is the decision of the Federal Administrative Court of 27 July 2017, 6 B 40.17, re Jewish communities in the federal state of Saxony-Anhalt.

[41] The example of Austria, which has a similar legal status for religious communities, shows that it is possible for Islamic communities to organise themselves in conformity with the requirements for incorporation. In Austria, the Muslim community was incorporated as early as in 1911.

[42] The leading cases are Kokkinakis v. Greece, 25 May 1993, 14307/88; Holy Monasteries v. Greece, 9 December 1994, 13092/87; Manoussakis et al. v. Greece, 26 September 1996, 18748/91.

7.1. Powers to Protect Human Rights

First, article 28I(4) identifies the government as the principal organ to protect human rights.[43] In Germany, the executive is, historically, the target of human rights, i.e., human rights were granted so that the individual had a defence against the executive power. German administration and government are obliged to observe the human rights, but the judicial branch is entrusted with their final protection.[44]

7.2. Everybody's Duty to Respect Everybody Else's Human Rights

Second, article 28J(1) obliges everybody to respect everybody else's human rights. If we take this provision literally, we very soon arrive at a state of impossibility. When I take a job, this job is no longer available to another person. Therefore, when I make use of my right to work, I limit or even violate the other person's right to work [articles 27(2), 28D(2)]. When I choose my marital spouse, in order not to discriminate against anybody [articles 27(1), 28D(1), 28I(2)], I would have to take (at least) one spouse of every sex, of every race and ethnic group, of every religion etc. Obviously, such an interpretation of article 28J(1) is absurd.[45]

The solution seems to lie in the interpretation of the verb "respect" [*menghormati*] in article 28J(1). To respect other persons' human rights does not mean to avoid every infringement. My mere existence touches upon other individuals' human rights: the air I breathe is no longer available to

[43] Zezen Zaenal Mitaqin, "The Strong State and Pancasila: Reflecting Human Rights in the Indonesian Democracy," *Constitutional Review* 2, no. 2 (2016): 159–188.

[44] Some scholars criticise that this creates an unhealthy overweight of the judicial branch over the political branches, a mischief which they describe as 'Richterstaat' [judges' state]. Most recently on this, see Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* [The Secret Revolution from the Rule of Law to the Rule of the Judges] 2nd ed (Tübingen: Mohr Siebeck, 2016). Indonesia has experienced a similar discussion since the establishment of its Constitutional Court: Mirza Satria Buana, "Legal-Political Paradigm of Indonesian Constitutional Court," *Constitutional Review* 6, no. 1 (2020): 36–66; Björn Dressel and Tomoo Inoue, "Megapolitical Cases before the Constitutional Court in Indonesia since 2004," *Constitutional Review* 4, no. 2 (2018): 157–187; Rosa Ristawati and Radian Salman, "Judicial Independence vis-à-vis Judicial Populism," *Constitutional Review* 6, no. 1 (2020): 110–132.

[45] On the problem of constitutional clauses that oblige everybody to respect everybody else's human rights in a comparative perspective, see Herbert Küpper, *Einführung in die Verfassungssysteme Südosteuropas* [Introduction into the Constitutional Systems of South East Europe] (Vienna/Berlin: Verlag Österreich/Berliner Wissenschaftsverlag, 2018), 689–692.

my fellow citizens. To "respect" my fellow citizens' human rights much rather means that I behave in a way that everybody's human rights prevail in the best way possible, without unduly limiting my own human rights. There are several dogmatic ways to solve this dilemma. The European Convention of Human Rights resorts to the harmonisation of individual human rights through a regulation necessary in a democratic society. In the Indonesian Constitution, article 28I(5) opens the avenue to this argument. For a German constitutional lawyer, however, the recipe for the delimitation of the spheres of individual freedom is given in article 28J(2). In German constitutional doctrine, parliament has to harmonise conflicting human rights through legislation. Where the human rights of two or more individuals collide, e.g., because the respect for my fellow citizens' human rights would result in the limitation of my own human rights, the law has to draw the line between the human rights of the individuals. Ideally, the law allows as much as possible of both colliding rights. The technique to do so is called "practical concordance" [*praktische Konkordanz*].[46] Given the priority of the law in the realisation of human rights, the duty to respect everybody else's human rights, as is laid down in article 28J(1) of the Indonesian Constitution, is not so much a direct constitutional duty of every individual but much rather a commission to parliament to enact laws that define the degree to which everybody is obliged to respect everybody else's rights. The law-maker draws, in the various laws, the delimitation between colliding human rights. If everybody observes these laws, everybody's human rights can prevail to the extent possible in a society.

[46] The term was coined by Richard Bäumlin, *Staat, Recht und Geschichte. Eine Studie zum Wesen des geschichtlichen Rechts, entwickelt an Grundproblemen von Verfassung und Verwaltung* [State, Law, and History. A Study on the Essence of the Historical Law, Developed on the Basic Problems of the Constitution and Public Administration] (Zurich: EVZ, 1961), 30, and introduced into mainstream doctrine by Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* [Basic Traits of the Constitutional Law of the Federal Republic of Germany] (Munich: C.H. Beck, 1967). The first decision of the Federal Constitutional Court to adopt both the term and the concept was the decision of 17 December 1975, 1 BvR 63/68, https://www.servat.unibe.ch/dfr/bv041029.html. Accessed January 28, 2021. A good summary of the evolution of the *praktische Konkordanz* is given by former Constitutional Justice Wolfgang Hoffmann-Riem, "Praktische Konkordanz im Verfassungsrechtsdenken von Konrad Hesse, [Practical Concordance in Konrad Hesse's Thinking about Constitutional Law]" *Archiv des öffentlichen Rechts (AöR)* 144, no. 3 (2019): 467–489.

7.3. Social Rights and the Social State

Since the end of the 19th century, creating, maintaining and widening a state-run welfare system has been one of the cores of political life in Germany, and the "*Sozialstaat*" [social state] forms a part of the political and cultural identity of Germany. Astonishingly, the *Grundgesetz* is not very outspoken about this important feature of political culture. In objective law, article 20(1) *Grundgesetz,* in its enumeration of the basic principles of the state, includes the social state (next to democracy and federalism); these principles cannot be modified by constitutional amendments [article 79(3)]. The federal states, too, need to be social (as well as republican and democratic) states, as the so-called 'homogeneity clause' in article 28(1) sets out, and Germany may only participate in the European Union as long as that union bears a social (as well as democratic, rule-of-law and federative) character [article 23(1)]. On the subjective side, the German *Grundgesetz* practically grants no social human rights.[47] The right to education is, if any, spelled out very indirectly article 7, and there certainly is no basic right to work, to housing or to health care. When the *Grundgesetz* was drafted and enacted in 1948/49, a quite universal consensus held that the basic rights of the *Grundgesetz* should be limited to rights enforceable in court, and social rights were not considered to be enforceable, but deemed "to promise more than the state can keep".[48] Despite a lively debate, which started in the 1980s, this can still be considered the majority opinion of German politics[49] as well as constitutional doctrine.[50] The only exception is a subjective right

[47] The constitutions of some federal states grant some social rights, most frequently in the field of education and labour. For details, see Anke Klose, *Soziale Grundrechte in den Landesverfassungen* [Social Basic Rights in the Constitutions of the Federal States] (Frankfurt/M.: Peter Lang, 2003).

[48] Georg Brunner, *Die Problematik der sozialen Grundrechte* [The Problems of the Social Basic Rights] (Tübingen: J.C.B. Mohr, 1971).

[49] The German federal parliament is debating on a motion to include children's rights into the Grundgesetz. In principle, this aim is endorsed by most political parties, but there is strong disagreement whether this should happen in the traditional form of 'defensive' civil rights or whether they should include a social dimension.

[50] A recent overview of the arguments in this debate is given by Christoph Enders, "Social and Economic Rights in the German Basic Law?" *Constitutional Review* 6, no. 2 (2020): 190–209; Diego Schalper, *Der Schutz der sozialen Grundrechte unter besonderer Berücksichtigung der Rechtslage in der Bundesrepublik Deutschland und in der Republik Chile* [The Protection of the Social Basic Rights with Special Regard to the Legal Situation in the Federal Republic of Germany and the Republic of Chile] (Frankfurt/M.: Peter Lang, 2019). The state of the all-European debate is documented by Julia Iliopoulos-Strangas, *Soziale Grundrechte in den "neuen" Mitgliedstaaten der Europäischen Union: Zugleich eine Einführung in die mitgliedstaatlichen Allgemeinen Grundrechtslehren* [Social Basic Rights in

to the very minimum necessary to survive and lead a societal existence: the Federal Constitutional Court has interpreted the guarantee of human dignity in article 1(1) *Grundgesetz* to include an individual subjective right against the state to a monthly payment of that minimum amount.[51]

In Indonesia, social justice is the fifth principle of Pancasila and as such is reflected in the Preamble of the Indonesian Constitution. Insofar, the political starting point in Indonesia and Germany is similar: social justice is a central part of the political culture, and the state is seen as one – or the – institution to achieve this goal. In objective law, the high value of social justice is reflected in the fact that the Indonesian Constitution dedicates a separate chapter to social justice, combined with the national economy (chapter XIV). In this chapter, article 34 sets out in more detail the social obligations of the state. From a German perspective, this would be a constitutional definition of the social state.

Unlike the German *Grundgesetz*, the Indonesian Constitution translates this goal into subjective human rights, too. Such rights are, e.g., the right to pursue one's living in articles 28A and 28/C, the right to work in articles 27(2) and 28D(2), the right to prosperity, residence, a healthy environment and health care in article 28H(1) as well as to social security in article 28H(3), the right to education in article 31(1), or the child's right to protection in article 28B(2). By their dogmatic nature, some of these rights are traditional civil rights designed not to give the bearer an enforceable claim against the state but the power to fight off interventions by the state, other rights are rights to equal access to certain positions. These rights are not problematic in the perspective of the traditional German perception of social rights, as described above.

the "New" Member States of the European Union: An Introduction into the General Theory of Basic Rights of the Member States] (Baden-Baden: Nomos, 2019).

[51] First in its decision of 18 June 1975, 1 BvL 4/74, https://www.servat.unibe.ch/dfr/bv040121.html. Accessed January 28, 2021. The most recent leading case concerns the social aid reform: decision of 9 February 2021, 1 BvL 1/98, 1 BvL 3/09 and 1 BvL 4/09, available at the website of the Federal Constitutional Court https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/02/ls20100209_1bvl000109.html. Accessed January 28, 2021.

For traditional German constitutional doctrine, the truly social rights, i.e., the rights that grant the individual a claim to demand certain goods or services from the state, are difficult to handle. Given the wording of the respective provisions, truly social rights appear to be for instance the right to work and the ensuing livelihood in articles 27(2) and 28D(2), the rights enshrined in article 28H, the right to education in article 31(1) or children's right to protection in article 28B(2). A German constitutional lawyer would ask two questions: (a) who is the addressee of these rights, i.e. whose obligation is to fulfil the claims arising from those rights?, and (b) which is the procedure in which the owner of the rights can oblige the addressee to fulfil their obligation?

The answer to question (a) is quite simple. The right to education is directed against the state, as article 31(3)–(5) sets out in detail. The other social rights, as any human right, oblige the state, and the state is responsible for their enforcement, as article 28I(5) makes clear. In the case of children's rights, the parents may be obliged, next to the state, but in the end the state is responsible.

The answer to question (b) is less simple. The constitutional way to put the social rights into reality is legislation, as article 28I(5) sets out. But what happens if the state does not enact the pertinent laws, or if they are insufficient and provide the individual with less than the constitutional right promises? Can I, as a private individual, sue the state with the aim of obliging it to build houses or create jobs? Or can I sue the state for employment or shelter for myself? The Indonesian Constitution does not contain any mechanisms – other than the political mechanism of voting into power a party that promises to fulfil the constitutional promises[52] – that individuals may use in order to enforce their social rights. In many West European countries such as France, Great Britain, the Netherlands, or Nordic countries, political mechanisms count as a sufficient guarantee.

[52] In practice, Indonesia's authoritarian constitutionalism in the economic sphere seems to be the – extra-legal – mechanism to create social justice. For further detail, see, Stefanus Hendrianto, "Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia," *Constitutional Review* 6, no. 2 (2020): 241–281.

German constitutional doctrine, however, would consider a right without a legal enforcement mechanism as defective and the law granting such a right as a *lex imperfecta*.[53]

This German focus on judicial enforceability can be explained by a look at the German past.[54] The Weimar Constitution (1919–1933) enumerated many social rights without providing for an enforcement mechanism. After 1945, this was interpreted as one reason why so many citizens were disappointed with democracy and voted for the Nazis. Under the Nazi dictatorship, the citizen was reduced to a mere object of state power with no means of protection against the state. Given these historical experiences, the described consensus arose after 1945: all legal positions that the *Grundgesetz* grants must be enforceable, which *eo ipso* led to the conclusion that promises which could not be made enforceable, such as social rights, should remain outside the *Grundgesetz*.

VIII. TECHNICAL ISSUES

8.1. The Repetitiveness of the Indonesian Constitution

Some questions are regulated by identical rules in several articles. Such repetitions are especially frequent with regard to human rights. To name some examples, everybody's freedom of association, assembly and expression is set out in article 28 as well as in article 28E(2), (3). Everybody's right to life is enshrined in articles 28A and 28I(1), and the freedom from torture in articles 28G(2) and 28I(1). Both articles 27(3) and 30(1) guarantee every citizen's right to participate in the defence of the country. Other repetitions differentiate between the right of everybody and the right of every citizen, such as equal treatment and freedom from discrimination [everybody: articles 28D(1), 28I(2); citizens: article 27(1)], the right to work and a decent remuneration [everybody: article 28D(2); citizens: article 27(2)] or the right to acquire education [everybody: article 28C(1); citizens: article

[53] On the Indonesian discussion about enforcing social rights the political or the legal way see Andy Omara, "Enforcing Nonjusticiable Rights in Indonesia," *Constitutional Review* 6, no. 2 (2020): 311–337.

[54] See 7.1.

31(1)]. Another repetition differentiates between everybody's and inhabitants' freedom of religion, belief and conscience [everybody: articles 28E(1)-(2), 28I(1); inhabitants: article 29(2)]. Finally, the individual aspects of citizenship are not repeated but dispersed over several articles [articles 26, 28D(4) and 28E(1)], which makes it necessary to read all these provisions together when dealing with citizenship.

Repeating the same or nearly the same rule in different articles of a constitution is not a bad thing in itself. It is in stark contrast, however, to the legislative technique of the German *Grundgesetz* and German laws in general, which very carefully avoid repetition and instead contain a large number of cross-references. Setting out the same rule in several appropriate places, as the Indonesian Constitution does, may make it easier to understand and to interpret the text, especially for citizens without a legal background. In Germany, there is widespread criticism against the described legislative technique, culminating in the Civil Code: the large number of cross-references makes that piece of legislation difficult to understand even for a trained lawyer.[55] On the other hand, there is the danger of inner contradictions. Especially amendments have to be very careful to introduce the same changes in all the places where one and the same rule is set out. This requires a high degree of legislative circumspection.

8.2. Terminological Questions

Various provisions of the Indonesian Constitution deal with institutional independence, and they use in sum five different expressions for this independence. The Preamble describes the independence of the state from colonial rule with the term "*kemerdekaan*", and the same term is used to describe some human rights, i.e., the freedom of association, assembly and expression in article 28, the freedom of thought and conscience in article 28I(1), and the freedom of religion in article 29(2). Not "*kemerdekaan*", but "*merdeka*" qualifies the judicial power in article 24(1). The term "*mandiri*"

[55] A good example of the criticism is Wolfgang Kallwass and Peter Abels, *Privatrecht* [Private Law] 24th ed (Munich: C.H. Beck, 2021), 21–29.

describes the status of the Election Commission [article 22E(5)], of the Financial Audit Board [article 23E(1)],[56] of the Judicial Commission [article 24B(1)] and of the economy [article 33(4)]. There are two more terms of European origin. Regional governments enjoy "*otonomi*" [articles 18(2), (5), (6), 22D(1), (2), (3)], and the Central Bank is given "*independensi*" in article 23D.

In German constitutional theory, as well as in the practice of the Federal Constitutional Court, one word should always mean the same thing throughout the entire text of the constitution, and on the other hand, two different terms should mean something different. If we apply this German doctrine to the Indonesian Constitution, "*kemerdekaan*", "*merdeka*", *"mandiri*", "*otonomi*" and "*independensi*" all mean something different. One way of differentiating them might be the subject of the freedom, e.g., "otonomi" is a special word for the status of the regional governments. Another differentiation may concern the degree of freedom; in this case, constitutional interpretation would have to bring these terms or at least some of them into a hierarchy of freedom.

There is one terminological difference which may cause problems. The courts and judges are *"merdeka",* whereas the watchdog of judicial independence, the Judicial Commission, is "*mandiri*". Does the watchdog enjoy more or less autonomy or freedom that the object of its guarantees? Since the independence of every single judge as well as of the judiciary on the whole is one of the core values of *'Rechtsstaat'/'hukum negara*', "*merdeka*" must denote the highest possible degree of non-interference. Besides, it is questionable if a Judicial Commission whose members are not elected by the judiciary but appointed by the executive and legislative branches [article 24B(3)] can be truly independent from these two branches and guarantee the judicial branch's independence. On the other hand, many states in South and South East Europe make rather negative experiences with their

[56] A material guarantee of that autonomy is that the members of the Board may elect their own leadership according to art. 23F(2).

judiciary-elected judicial councils because they try to enforce conformity and thus exercise undue pressure on the individual judge's independence.[57]

IX. SOME FINAL REMARKS

The Indonesian Constitution is a remarkable and very rich document. My previous remarks cannot but scratch on the surface and draw the attention to some points that strike a reader from a different constitutional and legal culture.

On the basis of this constitutional document, Indonesia has lived for more than seven decades in independence. Germany's *Grundgesetz,* too, has seen seven decades of peaceful and stable development and has also mastered the fundamental challenge of reuniting the two German states in 1990. My wish is that both constitutional systems take the chance and learn from each other to face the challenges of the future, among which are, inter alia, demographic questions, globalisation, the digital revolution and climate change. The more we learn from each other, the better are we equipped to make the proper choices.

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[57] Küpper, *Einführung*, 610–614.

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Economic, Social and Cultural Rights During Crisis in Cyprus: The Interplay Between Domestic and External Normative Systems

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Abstract

Economic, Social and Cultural (ESC) rights have been present and active in the Cypriot legal order from the moment of its constitutional genesis. Due to the special relationship between the Constitution and the European Convention on Human Rights (ECHR), the judiciary has adopted a unique approach when interpreting the Constitution; it has been willing to engage into a comparative juridical analysis and to rely on the ECHR and the findings of the European Convention on Human Rights (ECtHR). Through this nexus with the ECHR and the streamlined approach with the ECtHR, the legal system of Cyprus has been progressive in placing social and economic rights – and to a lesser extent cultural rights – in a secure position. This traditional approach of the Cypriot courts was called into question by the 2011-2016 economic crisis, which challenged the interplay between domestic and external normative systems. The aim of this paper is to assess the impact of the recent economic crisis on the protection of ESC rights and the change in the balance between domestic and normative systems. The analysis concludes that the protection of ESC rights under the Cypriot Constitution, as formed by Cypriot case law, has been substantive and effective, while positively influenced by the extensive deployment of the

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comparative method. That long-standing approach has been challenged by the economic crisis and it seems that the extrovert judicial viewpoint is now partly reconsidered. The Supreme Court has indicated, albeit in specific instances, its willingness to disregard guidance from external influences and to focus instead on the idea that national constitutional protection can and should exceed that of the ECHR.

Keywords: Cyprus, ECHR, Economic Crisis, Right to Property, Social and Cultural Rights.

I. INTRODUCTION

The 1948 Universal Declaration of Human Rights (UDHR) articulated, for the first time, civil, cultural, economic, political and social rights and freedoms for all human beings. However, the subsequent adoption of two separate, legally binding international covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), gave rise to the debate on whether human rights are 'relative', 'universal' or 'relatively universal'.[1] The initial conception of economic, social and cultural rights (ESC rights) as positive rights, demanding State intervention and susceptible to the progressive realization through the use of all appropriate means,[2] led to their description as 'second generation' rights.[3] The persistence of this categorization of human rights into civil and political (i.e., the 'first generation' rights) and ESC was not only detrimental to the quality of the latter set of rights but also undermined the 'universality and practical implementation of all human rights'.[4] However, this division does longer stands correct, and the international community has recognized that the two sets of human rights are 'universal, indivisible and interdependent and interrelated' and must be treated 'globally in a fair and equal manner, on the same footing, and with the same emphasis'.[5]

[1] See Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford: Hart, 2009), 4.

[2] ICESCR, Article 2; UN Committee on Economic, Social and Cultural Rights, General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant), 2 February 1990, E/1990/23.

[3] Karel Vašák, "A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to The Universal Declaration of Human Rights," *UNESCO Courier* 11 (1977): 29-32.

[4] Abdullahi Ahmed An-Na'im, "To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights," in *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, eds. Yash P. Ghai, Jill Cottrell (London: Interights, 2004), 7.

[5] UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para 5.

This paper aims at assessing the impact of the recent economic crisis in Cyprus on the protection of ESC rights and the interplay of domestic and external normative systems. In terms of structure, the second part of this paper determines the status of ESC rights in the Cypriot legal order and ascertains their secure position from the moment of the genesis of the Constitution, with an effective and progressive human rights structure that safeguards the respect for and protection of ESC rights. Unfortunately, this statement does not hold true in relation to the right to take part in cultural life, as the Constitution fails to recognize the cultural rights of any other group other than the Greek-Cypriot and Turkish-Cypriot communities. The third part then examines the content of the ESC rights protected under the Cypriot Constitution, in light of Cypriot case law. This part demonstrates the traditional willingness of the judiciary to engage in a comparative juridical analysis and to rely on external influences, in order to safeguard ESC rights. The final part then assesses the recent approach of the judiciary towards the protection of ESC rights following the exceptional economic crisis that devastated the Cypriot economy.

The unprecedented bail-in and the strict conditionality imposed by international lenders had a negative impact on economic and social rights, with substantial social protection cuts and reforms. Recent case law indicates the focus of jurisprudence was placed solely on the salaries, pensions and benefits of employees and pensioners of the public and wider public sector, despite the detrimental effects of the crisis on the private sector as well. Nevertheless, the existing case law suggests that the judiciary focused on the right to property and, notwithstanding the initial failure to protect the said right, the Cypriot courts went beyond their traditional approach by disregarding guidance from other external influences and by developing their own understanding for the benefit of human rights protection.

Specifically, the Cypriot courts had to decide two intertwined issues. First, whether the salaries, pensions and benefits of employees and pensioners of the public and wider public sector are protected under Article 23 of the Constitution and Article 1 of the First Protocol to the ECHR (protecting the right to property).

Second, whether the limitation of such rights on the ground of public interest is compatible with the said normative provisions. Cypriot courts found that the right of property, as envisaged in the Constitution, is afforded greater protection than that of Article 1 of the First Protocol to the ECHR. This is the case because the limitations imposed by the former provision are stricter than the latter; consequently, limitations on the ground of public interest that may be compatible with the First Protocol, are incompatible with the Constitution and thus the relevant legislation is unconstitutional. It is therefore submitted that the Cypriot courts endorsed a new rights-based approach centred on the idea that national constitutional protection can and should exceed that of other external influences.[6] It is further submitted that this approach is also in line with the Cypriot courts' constitutional duty not to subject the fundamental rights and liberties found in the Constitution to any other limitations or restrictions than those provided therein and with their international obligation under Article 53 of the ECHR not to interpret the instrument in such a way as to limit or derogate from any of the fundamental rights and freedoms which may be ensured under the laws of the contracting parties.

II. ESC RIGHTS IN THE CYPRIOT LEGAL ORDER

2.1. The Genesis of the Constitution and the Inclusion of ESC Rights

The Republic of Cyprus was established as an independent and sovereign State on 16 August 1960. The 1960 Constitution established a unitary yet bi-communal State, comprised of the Greek-Cypriot and the Turkish-Cypriot communities. The Constitution has been described as 'probably the most rigid', 'the most detailed' and 'the most complicated' in the world,[7] due to its historical origin and bi-communal character.[8] Despite this general

[6] For a general assessment of the constitutional effects of the economic crisis, see Constantinos Kombos, "Constitutional Review and the Economic Crisis: In the Courts We Trust?" *European Public Law* 25, no. 1 (2019): 105-133; Constantinos Kombos, "Constitutional Review and the Economic Crisis: In the Courts We Trust? - Part Two," *European Public Law* 25, no. 2 (2019): 229-248.

[7] Stanley Alexander De Smith, *The New Commonwealth and Its Constitutions* (London: Stevens, 1964), 285.

[8] Regarding the history, nature and idiosyncrasies of the Constitution of Cyprus, see generally Criton C. Tornaritis, *Cyprus and its Constitutional and Other Problems* (Nicosia, 1980), 43-66.

constitutional complexity, the provisions on human rights enshrined in Part II of the Constitution (Articles 6-35) constitute a notable exception by adopting clear and comprehensive provisions.[9]

Specifically, the 1960 Constitution of Cyprus followed the example of many post-war constitutions and adopted a holistic approach by guaranteeing not only civil and political rights but also ESC rights[10] exercised within the framework of public interest and the common good.[11] It must be pointed out that the Constitution does not endorse a specific economic, social or political ideology. It adopts a neutral position by striking a careful balance between liberalism (e.g., with freedom of choice for engaging in the individual's preferred commercial and professional activities) and protectionism (e.g., by providing a safety net to maintain social cohesion and equalitarian justice).[12]

2.2. International protection of ESC Rights in the Cypriot Legal Order

In addition to the constitutional human rights protection, Cyprus has ratified several international human rights treaties. Upon their necessary ratification pursuant to Article 169 of the Constitution, international treaties obtain an elevated status that gives them priority over ordinary domestic laws, but not over the Constitution.[13] Subsequently, if a national court identifies an inconsistency between any domestic law and a ratified international treaty, it is obliged to refuse to implement the former.[14]

The most influential human rights instrument in the Cypriot legal order is undoubtedly the European Convention on Human Rights (ECHR), ratified in 1962. This influence may be attributed to the fact that Articles 2-14 of the ECHR and its First Protocol served as the prototypes for drafting Part

9 Constantinos Kombos, "Social Rights in the Republic of Cyprus," in *Social and Economic Rights as Fundamental Rights*, ed. Krzysztof Wojtyczek (Utrecht: Eleven International Publishing, 2016), 60.

10 See *Kontos v Republic* (1974) 3 CLR 112; *Apostolou a.o v Republic* (1984) 3 CLR 509; *Hadjisavva v Republic* (1972) 3 CLR 174.

11 Criton C. Tornaritis, "The Social and Economic Rights Under the Law of the Republic of Cyprus," in *Mélanges Marcel Bridel* (Lausanne, 1968), 2.

12 Kombos, "Social Rights in the Republic of Cyprus," 61.

13 See *Kantara Shipping Limited v Republic* (1971) 3 CLR 176.

14 Alecos Markides, "The Republic of Cyprus," in *Constitutional Law of 10 EU Member States: The 2004 Enlargement*, eds. Kortmann, C. *et al.*, (Deventer: Kluwer, 2006), 1-63.

II of the Constitution.[15] As a result, Cypriot courts turn to the interpretation of the ECHR provisions given by the European Court of Human Rights (ECtHR) not only when interpreting the ECHR, but also when interpreting the corresponding constitutional provisions.[16]

Additionally, Cyprus ratified the European Social Charter. However, it has not ratified the whole Charter and has yet to ratify a number of important provisions. Contrary to the judicial approach towards the ECHR and the ECtHR, and despite being a party to the Charter since 1967, Cypriot courts failed to adequately develop jurisprudence based on the European Social Charter or the relevant decisions of the European Committee of Social Rights. However, in the limited case law of the Cypriot courts dealing with the Economic Social Charter, it was recognized that "by the ratification of the European Social Charter a duty is imposed upon the contracting States to take steps for the implementation of such provisions".[17]

On a universal level, Cyprus ratified the ICCPR, along with its two optional protocols, and the ICESCR. Unfortunately, Cyprus has not yet signed the 2013 Optional Protocol to the ICESCR. Moreover, concerning labour law and worker rights, the International Labour Organization (ILO) has influenced the Cypriot legal order to a great extent. Specifically, Cyprus is a member of the ILO and has ratified 57 conventions and four protocols, including all eight fundamental conventions of the ILO.

It should be mentioned that in 2004 Cyprus acceded to the European Union (EU). Consequently, human rights in Cyprus are also protected under the Charter of Fundamental Rights of the EU, which is legally binding on all member States when implementing EU law, by virtue of the Treaty of Lisbon.[18] Consequently, human rights in Cyprus receive the protection of

[15] See Article 5 of the Treaty concerning the Establishment of the Republic of Cyprus between the United Kingdom, Greece, Turkey and Cyprus, Cmnd 1252; UNTS vol. 382, 16 August 1960.

[16] Constantinos Kombos, *The Impact of EU Law on Cypriot Public Law* (Athens: Sakkoulas, 2015), 38-46; Achilles C. Emilianides, *Constitutional Law in Cyprus* (Alphen aan der Rijn: Wolter Kluwer Law and Business, 2013), 149. See also, *Fourri a.o v Republic* (1980) 2 CLR 152; *Costa v Republic* (1982) 2 CLR 120; *Cyprus Sulphur and Copper Company Ltd a.o. v Pararlama Ltd* (1990) 1 CLR 1051.

[17] *Demetriou a.o. v Republic* (1985) 3 CLR 1853.

[18] Machteld Inge van Dooren, "The European Union and Human Rights: Past, Present, Future," *Utrecht Journal of International and European Law* 26, no. 70 (2009): 47-52; Tawhida Ahmed, Israel de Jesús Butler, "The European

the supreme law of the Republic, the Constitution, which should be in accordance with EU law.[19]

III. ESC RIGHTS UNDER THE CYPRIOT CONSTITUTION: THE TRADITIONAL JUDICIAL APPROACH

3.1. ESC Rights Protected under the Constitution of Cyprus

The Constitution of Cyprus provides for several ESC rights, beyond civil and political rights. These ESC rights include the right to a decent existence and social security (Article 9), the right to free education (Article 20), the right to form and join trade unions (Article 21(2)), the right to property (Article 23), the right to practice any profession or to carry on business (Article 25) and the right to strike (Article 27). Moreover, it is submitted that the right to take part in cultural life is indirectly recognized by the Constitution, but only for the Greek-Cypriot and Turkish-Cypriot communities. The following analysis aims at exemplifying the influence of external normative systems to the interpretation of the constitutionally protected ESC rights.

3.1.1. The Right to a Decent Existence and Social Security

Article 9 of the Constitution provides that "[e]very person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance". The reference to 'decent existence', rather than, for instance, to the more usual 'adequate standard of living', is relatively unique. Article 9 may be characterized as the backbone of the social policy of the State and as cardinal for the establishment of a social welfare system with a relatively dense social safety net. The Supreme Court held that "Article 9 has the effect of placing social rights on an equal footing with political rights, both fundamental under the Cyprus Constitution, as well as the [UDHR]".[20]

Union and Human Rights: An International Law Perspective," *European Journal of International Law* 17, no. 4 (2006): 771-801; Sionaidh Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon," *Human Rights Law Review* 11, no. 4 (2011): 645-682.

[19] Constitution of Cyprus, Article 179.

[20] *Apostolides a.o. v Republic* (1982) 3 CLR 928.

In order to fulfil its obligations under Article 9, Cyprus enacted the 2010 Social Insurance Law, regulating the Cypriot social protection scheme, and providing a number of benefits.[21] In terms of social assistance, the guaranteed minimum income (GMI) scheme was introduced in 2014 in the Cypriot legal order.[22] Other laws further provide for family allowances,[23] whereas the general health system (GHS) introduced in 2017 offers healthcare services to all persons who live in the areas controlled by the Republic.[24]

The relevant case law suggests that Article 9 creates substantive obligations and has a justiciable and autonomous nature.[25] However, the fulfilment of these substantive obligations can only be judicially scrutinised after State organs undertake action in order to attempt to comply with the said provision.[26] Therefore, there can be no *in abstracto* judicial intervention; compliance with Article 9 can only be made in the specific context that a legislative act had created and on a case-by-case basis.[27] In this sense, Article 9 does not establish an actionable right for the provision of benefits that would bring about an adequate standard of decent existence.[28]

Article 9 is a partial reflection of Article 25(1) of the UDHR. Comparing the two texts, it is evident that the Cypriot Constitution fails to provide a definition of 'decent existence' or at least a measuring criterion. Is 'decent existence and social security' a synonym of 'adequate standard of living'? Does the former include the right to food, water, clothing, health or housing, similar to the latter? The Cypriot courts have not elaborated on a definition of 'decent existence'. Tornaritis argues that Article 9 generates an obligation to "create and maintain such conditions of living, of work

[21] The Social Insurance Law (59(I)/2010), as amended.

[22] Guaranteed Minimum Income and Social Benefits Law (109(I)/2014), as amended.

[23] For instance, there are the marriage grant, birth grant, funeral grant, maternity allowance, child allowance, single-parent allowance, student grant, mother allowance and financial assistance to multi-child families.

[24] See General Healthcare System (Amending) Law (74(I)/2017).

[25] *Papaphilippou v Republic* (1960-1961) 1 RSCC 62.

[26] Andreas Loizou, *Σύνταγμα Κυπριακής Δημοκρατίας* [*The Constitution of the Republic of Cyprus*] (Nicosia: 2001), 50-51. See also, *Katsaras a.o. v Republic* (1973) 3 CLR 145, *Pelidi a.o v Republic*, Recourse Nos. 1650/1999 and 789/2000, 15 June 2001; *Hadjisavva v Republic* (2006) 4 CLR 677; *Kaoulas v Republic*, Case No. 407/2009, 18 March 2011.

[27] Kombos, "Social Rights in the Republic of Cyprus," 64-6.

[28] Costas Paraskeva, *Κυπριακό Συνταγματικό Δίκαιο: Θεμελιώδη Δικαιώματα και Ελευθερίες* [*Cypriot Constitutional Law: Fundamental Rights and Liberties*] (Athens: Nomiki Vivliothiki, 2015), 116-7.

and of health as to enable every person to enjoy a standard of living adequate for the health and well-being of himself and his family".[29] This interpretation is supported by the second clause of Article 9 laying down practical steps for the implementation of this right; i.e., passing legislation for the protection of a specific class of beneficiaries (i.e., workers), for the assistance of the poor (without defining the composition of that class or the criterion for it), and for the establishment of a social insurance system. Indeed, Article 9 can be interpreted as having an umbrella effect, thus protecting the rights to health, food, housing and water, which are essential for safeguarding a person's decent living,[30] despite the absence of their direct reference in the Constitution.

3.1.2. The Right to Education

Article 20 of the Constitution safeguards the right to free and compulsory primary education.[31] However, this right is subject to those formalities, conditions or restrictions that are necessary and are based on grounds set out in Article 20(1). It is noteworthy that the Cypriot Constitution affords broad and extensive protection, especially in comparison to corresponding Article 2 of the First Protocol to the ECHR.

Case law indicates that parents are under an obligation to take all necessary measures to safeguard the continuous education of their children; any omission by the parents entails their liability, as such education is obligatory under Article 20 of the Constitution, as well as Article 28 of the on the Rights of the Child.[32] Additionally, the right to education refers to the liberty of parents to choose between public and private education for their children, not to the right to choose the specific public school they will attend, which is in accordance with Articles 9 of the ECHR and Article 13 of the ICESCR.[33]

[29] Tornaritis, *The Social and Economic Rights*. See also Emilianides, *Constitutional Law in Cyprus*, 174.
[30] For a detailed analysis of Article 9, see Kombos, "Social Rights in the Republic of Cyprus," 62-6.
[31] See *Constantinides v Republic* (1967) 3 CLR 483.
[32] *Karagiorgi v Papadopoulou*, App. No. 153/2009, 25 September 2009.
[33] *Theodoulidou v Republic* (1989) 3 CLR 2605.

In *Kallenou v Republic*, the Court relied on Article 20 of the Constitution, as well as Article 2 First Protocol to the ECHR and Article 13 of the ICESCR, and concluded that the State may impose the necessary restrictions in the interest of ensuring the quality of the education, provided that the essence of the right is not nullified.[34] Similarly, in *Alpha and the Omega Evangelical Educational Foundation Ltd v Republic*, the Supreme Court held that legislative measures setting the level of tuition fees for private schools, may be implemented for protecting public interests, the rights of others and the quality of the right to education.[35] What was interesting in this case, was the Court's reference to Article 2 of the Protocol to the ECHR, the ECtHR's *Belgian Linguistic case* and Article 13(3) ICESCR for reaching its decision.

In conclusion, Article 20 has been affected by external influences and has a dual effect; on the one hand, it establishes a social duty for individuals for compulsory education and, on the other hand, it creates a responsibility for the State to safeguard the quality and unrestricted substantive access to educational facilities on the island.[36]

3.1.3. The Right to Join Trade Unions

The right to form and to join trade unions is explicitly protected under Article 21(2) of the Constitution, in the context of the right to freedom of peaceful assembly and association with others. No person shall be compelled to join any association or to continue to be a member, as Article 21(2) protects both the right to join, as well as the right not to join a trade union, placing emphasis on free choice as a higher value than that embedded in organized action in the form of trade union membership.[37] Moreover, the existence and the proper and unhindered functioning of trade unions of civil servants is also protected under this provision.[38]

[34] *Kallenou v Republic* (1990) 3 CLR 1601.
[35] *The Alpha and the Omega Evangelical Educational Foundation Ltd v Republic* (No 1) (1990) 3 CLR 286.
[36] See *Attorney-General v Monali* (1995) 2 CLR 207; *Constantinou a.o. v Republic* (1994) 4 CLR 761.
[37] *Pancypriot Trade Union for Nurses (PASYNO) v Republic* (No 1) (1994) 4 CLR 174.
[38] *Iordanou v Republic* (1967) 3 CLR 245.

Additionally, the Supreme Court stressed an imposed "*syndicat unique obligatoire*" (compulsory single union) should be avoided and that there should exist a guarantee for the "*pluralisme syndical*" (trade union pluralism).[39] The Court paralleled again the protection afforded by the Constitution to the protection under the ECHR, specifically Article 11(1), and the relevant ECtHR case law.[40] Finally, Article 21(2) has also been influenced by other external normative systems, beyond the ECHR. In *Cypriot Shipowners Union* case, the Supreme Court noted that Article 21(2) should be interpreted in the light of the ratified international conventions, such as Article 8 ICESCR, Article 22 ICCPR, Article 11 ECHR and Articles 14 and 15 ILO Convention No. 87.[41]

3.1.4. The Right to Work

As already mentioned above, the protection of workers is regulated under Article 9 of the Constitution. In addition, Article 25 further safeguards the right of every person to practice any profession or to conduct any trade or business and enables the individual to take a direct part in social life, without arbitrary interference from State power. Article 25(2), however, sets formalities, conditions and restrictions on such free selection of profession and business, with the State reserving the power to regulate it in the interests of others and of the general public. Such limitations must be theme specific and cannot be based on a generalized intention to safeguard public interest at large.[42]

3.1.5. The Right to Strike

Article 27 of the Constitution explicitly recognizes and guarantees the right to strike as a fundamental, inalienable and autonomous human right, the core of which cannot be negated.[43] In *Organisation of Crushed*

[39] *Iordanou v Republic* (1967) 3 CLR 245.
[40] *National Union of Belgian Police v Belgium,* Merits, just satisfaction, App No 4464/70 (A/19), (1979-80) 1 EHRR 578; *Swedish Engine Drivers' Union v Sweden,* Judgment, Merits, App No 5614/72 (A/20), [1976] ECHR 2.
[41] *Cypriot Shipowners Union a.o. v Registrar of Trade Union a.o.* (1988) 3 C.L.R. 457.
[42] Tornaritis, *Cyprus and its Constitutional*, 13.
[43] *Sidiropoulos a.o. v Ship "Panagia Myrtidiotissa"* (1987) 1 CLR 564, 573; *Panagia Myrtidiotissa (the ship) v Sidiropoulou a.o.* (1998) 1 CLR 1000, 1012-1013.

Stone case, the Supreme Court drew guidance from a number of external sources[44] and interpreted the concept of 'strike' as the workers' collective abstention from their duties, with the aim of exercising pressure, primarily to their employers, in order to safeguard and promote their collective interests.[45] Nevertheless, the right to strike is not absolute but may be regulated by law for those grounds set out in Article 27(2). Yet, no such law has been promulgated. Limitations are incidentally imposed via a number of legislative acts,[46] whereas other laws impose certain conditions that must be met in order to call a lawful strike.[47] Members of the armed forces, the police and the long-defunct gendarmerie are prohibited from resorting to strike action.[48]

The Constitution explicitly safeguards the right to strike. Nevertheless, this right is closely intertwined with the freedom of speech and expression (Article 19 of the Constitution) and the freedom of peaceful assembly (Article 21 of the Constitution), as they ensure the effective protection of worker and trade union rights.[49] It can be argued that the right to strike is also connected with Article 9 of the Constitution, imposing a substantive and positive obligation to the State to offer legislative protection to workers.[50]

3.1.6. The Right to Take Part in Cultural Life

Beyond the right to education, which is essentially a cultural right, the Cypriot Constitution contains no specific provisions expressly protecting the right to participate in cultural life. Nevertheless, it may be argued that the respect and protection of such rights are – to some extent – inherent in the Constitution, but only in relation to the Greek-Cypriot

[44] The Court drew from the Greek Constitution and jurisprudence, Halsbury's Laws of England, Article 6 European Social Charter and Article 8 ICESCR.

[45] *Organisation of Crushed Stone and Sand Industrialists v Protection of Competition Commission* (1992) 4 CLR 711, 718-722.

[46] See, for instance, Criminal Code, Article 64 (Cap. 154).

[47] See, for instance, Trade Union Law, Annex I, Article 14(d) (by virtue of Article 18) (Law No. 71/1965) and Civil Aviation Law, Article 4(6) (Law No. 213(I)/2002).

[48] Constitution of Cyprus, Article 27(2). See also, Police Law, Article 55 (Law No. 73(I)/2004).

[49] Paraskeva, *Cypriot Constitutional Law*, 441.

[50] See further Kombos, "Social Rights in the Republic of Cyprus," 62-6; Tornaritis, *The Social and Economic Rights*.

and Turkish-Cypriot communities. Particularly, the Constitution is based on bi-communalism and recognizes the Greek community (comprising all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share Greek cultural traditions or who are members of the Greek-Orthodox Church) and the Turkish community (comprising all citizens of the Republic who are of Turkish origin and whose mother tongue is Turkish or who share Turkish cultural traditions or who are Muslims).[51] Due to the need for coexistence between these two different cultural traditions, the Constitution does not regulate their cultural rights, but delegates to the Greek and the Turkish Communal Chambers the competence to exercise legislative power in relation to all educational, cultural and teaching matters.[52] Following the suspension of the operation of the Communal Chambers after the events of 1963-1964, cultural matters have been conferred to the Ministry of Education and Culture.

The Cypriot Constitution fails to recognize the right of groups other than Greek-Cypriots and Turkish-Cypriots to take part in cultural life. Specifically, while the Constitution recognizes the existence of only three minority groups (namely Armenians, Maronites and Latin Roman Catholics), these groups were obliged to associate themselves with one of the two communities on the island.[53] This constitutionally rigid classification of all citizens into the two dominant communities violates international human rights standards[54] and has been characterized as a violation of their cultural rights (i.e., the right of everyone to choose his or her own identity, the right to identify or not with one or several groups and to change that choice, and the right to participate or not participate in a given group).[55]

[51] See Constitution of Cyprus, Article 2(1) and (2).
[52] See Constitution of Cyprus, Article 87(1)(b).
[53] See Constitution of Cyprus, Article 2(3).
[54] See Committee on the Elimination of Racial Discrimination, Concluding observations on the 17th-22nd periodic reports of Cyprus, adopted by the Committee at its 83rd session, UN Doc. CERD/C/CYP/CO/17-22, (23 September 2013) para. 14.
[55] See also, Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth opinion on Cyprus, Doc. ACFC/OP/IV(2015)001, (18 March 2015), paras. 11-5; Nikolas Kyriakou and Nurcan Kaya, "Minority rights: solutions to the Cyprus conflict," *Minority Rights Group International*, (2011).

Notwithstanding the above, cultural rights may be incidentally protected through the freedom of movement (Article 13), freedom of thought, conscience and religion (Article 18), freedom of speech and expression (Article 19), the right to education (Article 20), freedom of peaceful assembly (Article 21) and the right to non-discrimination and equality before the law (Article 28).[56]

3.2. The Right to Property: A Hybrid Right?

The right to property poses a difficulty in its classification under the traditional dichotomy of civil and political rights and ESC rights.[57] The intrinsic tension between the right to property as civil liberty and its social function can be seen in the negotiations of international human rights instruments. The right to property is explicitly protected under Article 17 of the UDHR, notwithstanding the controversy caused both prior and after its adoption.[58] The ICESCR and ICCPR, however, remain silent and do not safeguard the right.[59] At the regional level, the right to property appears in Article 1 of the First Protocol to the ECHR and Article 17 of the Charter of Fundamental Rights of the EU. The social function of the right to property is increasingly recognized by regional bodies as a means of survival, advancing the rights to food, housing and social security.[60]

Turning now to the Cypriot legal order, the right to property is safeguarded by Article 23 of the Constitution, consisting of 11 paragraphs. Article 23(1) stipulates that "[e]very person, alone or jointly with others, has the right to

[56] Report of the Special Rapporteur in the field of cultural rights on her mission to Cyprus, UN Doc. A/HRC/34/56/Add.1, (2 March 2017), para. 8.

[57] On the duality of the right to property, see Allan Rosas, "Property Rights," in *The Strength of Diversity: Human Rights and Pluralist Democracy*, eds. Allan Rosas, Jane Helgesen and Diane Goodman (The Hague: Martinus Nijhoff, 1992), 133-157.

[58] See Gudmundur Alfredsson, "Article 17" in *The Universal Declaration of Human Rights: A Commentary*, eds. Eide, A *et al.* (Oslo: Scandinavian University Press, 1993), 255-262. See also, Catarina Krause and Gudmundur Alfredsson, "Article 17," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, eds. Gudmundur Alfredsson and Asbjørn Eide (The Hague: Martinus Nijhoff, 1999), 359-378.

[59] Note however that property appears in Article 2(1) ICCPR and Article 2(2) ICESCR as part of the non-discrimination clause.

[60] See Christophe Golay and Ioana Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective* (Montreal: Rights and Democracy, 2010). See also, Rhoda E. Howard-Hassmann, "Reconsidering the Right to Own Property," *Journal of Human Rights* 12, no. 2 (2013): 180-197.

acquire own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right". However, the constitutionally protected right to property is not absolute. Article 23(2) prohibits deprivations, restrictions or limitations of the right, except those provided for in Article 23(3). Accordingly, deprivations, restrictions or limitations are lawful when they are imposed by law and are absolutely necessary for the interest of the public safety or the public health or the public morals or the town and country planning or the development and utilization of any property to the promotion of the public benefit or for the protection of the rights of others.

The rest of the provisions of Article 23 regulate issues of compulsory acquisition and requisition, which gave rise to rich and extensive case law,[61] as well as matters of vakf (waqf) movable or immovable property and the movable and immovable property belonging to the episcopal see, monastery, church or any other ecclesiastical corporation.[62] The economic crisis brought the first three paragraphs of Article 23 to the forefront of human rights protection against the numerous cuts and reforms introduced by the State in order to meet strict conditionality requirements and secure timely lending. Specifically, the Cypriot courts used the right to property to bypass the pragmatist emergency approach in favour of a rights-based approach, through the strict adherence to the national constitutional protection of the right, which exceeds that of other international instruments.

IV. PROTECTING ESC RIGHTS IN THE POST-CRISIS ERA: TOWARDS A NEW RIGHTS-BASED APPROACH?

4.1. The Background of the Economic Crisis and the Unprecedented Bail-In

Cyprus acceded to the European Monetary Union in 2008. The first signs of recession of the Cypriot banking sector appeared in 2009; however, the government failed to take measures necessary to prevent the crisis or to

[61] See for instance, *Stavridi a.o. v Republic* (1992) 3 CLR 303, *Karaolis v Ministry of Interior* (2004) 3 CLR 76.

[62] See, for instance, *Holy Temple of Chryseleousis Strovolou v Republic* (1989) 3 CLR 3074; *Holy Bishopric Paphos v Republic* (1987) 3 CLR 1371.

prepare for the danger. By 2011, Cyprus was unable to maintain fiscal stability, and by June 2012, the government submitted a request for stability support to the European Stability Mechanism (ESM) and the International Monetary Fund (IMF). On 16 March 2013, the Eurogroup agreed to an unprecedented 'bail-in' for €10 billion.

According to the agreement, the ESM and IMF would provide financial assistance to Cyprus, but the amount could not be used for the needed recapitalization of the two largest banks on the island (Laiki Bank and Bank of Cyprus), which was estimated at €5.8 billion. Cyprus would have to recapitalize them using its own means. Specifically, and according to the agreement, Laiki Bank would have to be dissolved, levying all uninsured deposits (i.e., deposits larger than €100,000),[63] whereas 47.5% of uninsured deposits in the Bank of Cyprus would also have to be levied.[64] In this manner, the small-scaled Cypriot economy was viewed as the ideal opportunity to depart from the established practice of bailouts and use 'bail-in' as a new EU banking resolution tool, with minimal contagion capacity in the event of failure.

4.2. The Influence of the Economic Crisis on ESC Rights

On 30 April 2013, the House of Representatives implemented the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) into legislation subjecting Cyprus to strict conditionality.[65] According to the MoU, Cyprus had to undertake profound changes in its economic and social policies and to implement significant structural reforms to support its fiscal consolidation efforts. Significant cuts were introduced in public finances, as well as in social benefits, thus affecting social security schemes, pensions, healthcare and public assistance.

[63] On the issue of insured deposits, see Directives 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes and 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay.

[64] The bail-in was based on Decrees Nos. 103 and 104 of 29 March 2013, adopted by the Central Bank of Cyprus, acting as the Resolution Authority.

[65] The MoU was ratified by the House of Representatives with Financial Assistance Facility Agreement (Ratifying) Law (1(III)/2013).

Indicatively, and in relation to old-age benefits, legislation introduced scaled reductions in statutory pensions, stricter eligibility conditions and provided for automatic adjustment of the statutory retirement age every five years.[66] The government employees' pension scheme (GEPS) was also affected by the various reform initiatives with, for instance, the increase of the contribution rate for the GEPS. Moreover, the 2014 introduction of the GMI scheme led to a dramatic fall in the number of eligible beneficiaries of social assistance, mostly attributed to the high rejection percentage (63%) of the applications due to assets and deposits that exceeded the statutory threshold.[67]

The cuts and reforms introduced as austerity measures had an impact on both the private and public sectors. And while one would expect that the constitutionality of these measures would have undergone judicial scrutiny by now, this is not the case. The following section of this paper assesses the approach of the Cypriot courts towards these cuts and reforms and their impact on ESC rights.[68] However, two preliminary observations are in place: first, the economic crisis did not have an impact on cultural rights; thus, the discussion will focus on economic and social rights. Second, the relevant case law is primarily focused on Article 23 of the Constitution, and not Article 9 relating to decent existence and social security.

4.3. Human Rights Protection in the Aftermath of an Unprecedented Crisis: Developing a New Rights-Based Approach?

The assessment of the legality of the social protection cuts and reforms adopted as austerity measures in Cyprus is relatively limited. The relevant case law relates mostly to the salaries, pensions and benefits of employees

[66] See Social Insurance Law, as amended.

[67] Consideration of Reports: Reports Submitted by the States Parties in accordance with Articles 16 and 17 of the Covenant, Sixth periodic report of Cyprus (Doc. No. E/C.12/2016/SR.53), Committee on Economic, Social and Cultural Rights (59th session), 22 September 2016, para 33.

[68] On the conceptual framework for dealing with socio-economic rights see David Bilchitz, "Socio-Economic Rights, Economic Crisis, and Legal Doctrine," *International Journal of Constitutional Law* 12, no. 3 (2014): 710-739.

and pensioners of the public and wider public sector.[69] What is interesting in the case of Cyprus, is the aforementioned tendency of the domestic courts to confine their reasoning to the violation of the right to property (Article 23 of the Constitution). Arguments brought before the courts in connection with breaches of other constitutionally protected rights were downplayed by the courts, having already found laws unconstitutional by virtue of Article 23. A rare exception to this is the first case decided in connection to the constitutionality of particular austerity measures, where the Court reached a peculiar and ambiguous result. This ambiguity exists to this day.

4.3.1. The Right to Property under Judicial Scrutiny

The only competent venue for examining the constitutionality of cuts and reforms in social protection benefits, salaries or pensions is the Administrative Court, via a recourse pursuant to Article 146 of the Constitution.[70] Particularly, the constitutionality of a law can be incidentally examined following a recourse against a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority, filed by people whose legitimate interests were adversely and directly affected by such reforms.[71]

The first decision issued in relation to austerity measures was *Charalambous v Republic*.[72] The case concerned a 2011 law,[73] obliging public officials, employees and pensioners to pay 2.5-3.5% of their monthly salary or pension as 'special contributions' for five years.[74] The applicants (public officials and employees) claimed that their salary - an asset and

[69] Other relevant case law relates to reductions of judges' remunerations and pensions, where these were found unconstitutional, in breach of Articles 158(3), 153(12) and the separation of powers; see *Fylactou a.o. v Republic* (2013) 3 CLR 565.

[70] See the *Pancyprian Organization of Large Families a.o. v Attorney-General*, App. No. 6914/12, 22 March 2017.

[71] It should be noted that the Administrative Court was established in January 2016, though the amendment of Article 146 of the Constitution (see the Eighth Amendment of the Constitution Law (Law No. 130(I)/2015) and the Establishment and Operation of an Administrative Court Law (Law No. 131(I)/2015)). Prior to this amendment all recourses were filed before the Supreme Court.

[72] Joined cases nos 1480/2011 a.o. (11 June 2014).

[73] Special Contribution for Officials, Employees and Pensioners of the Public Sector and Wider Public Sector Law (112(I)/2011).

[74] Special Contribution for Officials, Employees and Pensioners of the Public Sector and Wider Public Sector (Amending) Law (184(I)/2012).

a property right - was unlawfully restricted in violation of the principle of equality (Article 28 of the Constitution), of tax equality (Article 24 of the Constitution), of the right to enter into a contract (Article 26) and of the right to property (Article 23 of the Constitution and Article 1 of the First Additional Protocol to the ECHR). The respondents submitted that the limitation was based on the grounds of public interest or public benefit, since the cuts were necessary and aimed at the reduction of public expenditures, in order to deal with the fiscal challenges of the Cypriot economy.

The majority decision of the Supreme Court rejected the application. First, the majority found no violation of the principle of equality, recognizing State discretion during such an exceptional crisis, in accordance with the ECtHR case law.[75] Particularly, the majority held that the principle of equality must be balanced with the economic situation and fiscal policy in place at the time, and that the State has the discretion in times of extreme economic crisis to take measures targeting specific groups of the population (i.e., employees and pensioners of the public sector) without necessarily violating the principle of equal treatment.[76] In relation to Article 26, the Court very briefly mentioned that the said provision was not breached, since it guarantees the freedom to conclude a contract, not the rights created under the contract.

As for the right to property, the majority held, with an extensive reference to ECtHR case law, that it only applies to existing property.[77] It may extend to the right to acquire property in the future, provided there is a pecuniary right that is legally enforceable for payment. In this sense, the civil servants' income or salary was found to constitute a property

[75] *Koufaki and ADEDY v Greece*, Appl. Nos. 57665/12 and 57657/12, 7 May 2013; *Andrejeva v Latvia [GC],* no. 55707/00, ECHR 2009.

[76] See Constantinos Kombos and Stéphanie Laulhé Shaelou, "The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation," in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. Anneli Albi, Samo Bardutzky (The Hague: Springer, 2019), 1396.

[77] *Marckx v Belgium,* 13 June 1979, §50 Series A no. 31; *Vilho Eskelinen ao. v Finland [GC],* no. 63235/00, §45 ECHR 2007-II; *Tushaj v Albania*, App. No. 13620/10, [2013] ECHR 49, para. 21; *Zelca a.o. v Romania*, App. No. 65161/10, [2011] ECHR, para. 18.

right protected under Article 23 of the Constitution; however, it did not guarantee any right to a salary of a particular amount.[78] The majority further indicated that the right to property is not an absolute right, but may be limited for those reasons expressly provided in paragraph 3. Moreover, it recognized that Article 23(3) does not provide for a limitation of the right to property for consolidating the public finances as a ground of public benefit. 'Public benefit' in the context of Article 23(3) is clearly linked with the imposition of restrictions or limitations to the right to property for development and utilization purposes; it is not connected with the need to overcome an unprecedented crisis, as with the case under examination.

Nevertheless, the majority somewhat ambiguously proceeded to state that the relatively small special contribution rates of 2.5-3.5% of the monthly salary, did not amount to an arbitrary intervention to the right to property, as it did not neutralize the right nor affect the core of the right to a salary. Consequently, the applicants' argument that the special contribution violated Article 23 of the Constitution was also rejected by the Court. It is respectfully submitted that the Supreme Court erred in *Charalambous*. While the finding that the limitation of the right to property on the general grounds of public interest or benefit is not allowed under the Constitution stands correct, the subsequent examination of the effect of such impermissible constitutional limitation and the finding in favour of its constitutionality can only be described as controversial.[79]

Four months later, in *Koutselini-Ioannidou v Republic*,[80] the Supreme Court examined the constitutionality of another 2011 law, abolishing the

[78] On this issue, the Court referred to the following ECtHR case law: *Azinas v Cyprus*, no. 56679/00, 20 June 2002; *Koufaki and Adedy v Greece*, 57665/12 and 57657/12, 7 May 2013; *Tushaj v Albania*, App. No. 13620/10, [2013] ECHR 49, para. 21; *Stummer v Austria* [GC], no. 37452/02, §82-83 ECHR 2011; *Kanakis a.o. v Greece*, no. 59142/00, 23 October 2003; *Juhani Saarinen v Finland*, Case No. 69136/01, 28 January 2003; *Andrejeva v Latvia [GC]*, no. 55707/00, §77 ECHR 2009; *Stec a.o. v the United Kingdom (dec.) [GC]*, nos. 65731/01 and 65900/01, ECHR 2005-X; *Da Conceiçã Mateus and Santos Januário v Portugal*, nos. 62235/12 and 57725/12, 8 October 2013; *Valcov a.o. v Bulgaria*, Appl. No. 2033/04, 8 March 2012, para. 84; *Panfile v Romania*, no. 1390/2011, 20 March 2012, paras. 15 and 18.

[79] Cf. the three dissenting judges' approach, who found the contested legislation in breach of Articles 23, 24, 26 and 28 of the Constitution.

[80] Joined cases nos. 740/11 and others, 7 October 2014.

phenomenon of multiple pensions and suspending the payment of pensions when a person reached the pensionable age, yet he/she continued to hold a public position or office.[81] The applicants claimed that the said legislation breached Articles 23 and 28 of the Constitution, as well as Article 1 of the First Protocol. The respondents argued that the contested legislation did not result in the deprivation of property rights; rather, it was a temporary suspension. Alternatively, the respondents supported that if there was a deprivation of the right to property, it was justified on the ground of public interest or public benefit.

Regarding pension as a property right, the majority of the Supreme Court held that pensions are protected under Article 23 of the Constitution when the employer undertakes to pay a pension under their employment contract and once the person reaches the retirement age.[82] The Supreme Court proceeded to analyze the relationship between Article 23 of the Constitution and Article 1 of the First Protocol, holding that the latter allows limitations on the ground of public interest, whereas the former does not. By referring to *Charalambous*, the Court reaffirmed that the limitation of the right to property on the ground of the development and utilization of property for the promotion of the public benefit, found in Article 23(3), is not identical but stricter than the limitation of the right on the ground of public interest, found in Article 1 of the First Protocol. Therefore, the Cypriot Constitution affords greater protection to the right to property than the ECHR and its First Protocol.

The majority ruled that the contested legislation did not amount to a mere suspension of the right, but essentially to the loss of the right to pension. Moreover, the limitations imposed to the right to property were based on the constitutionally impermissible grounds of public interest or public benefit. Thus, the majority found the contested legislation in

[81] Pensions of State Officials (General Principles) Law (88(I)/2011).

[82] This conclusion was based on *Apostolakis v Greece*, on the opinions of several ECtHR judges in *Azinas v Cyprus*, and on the Cypriot case law *Filippou v Republic* (2010) 3 CLR 241, *Gregoriou v Republic* (1992) 4 CLR 1239, *Pavlou v Republic* (2009) 3 CLR 584.

breach of Article 23 and refrained from analyzing the violation of Article 28, having already found the legislation unconstitutional.[83]

Following these two decisions, the constitutional limitations to the right to property remained in ambiguity. The two approaches adopted by the Supreme Court in *Charalambous*, on the one hand, and *Koutselini-Ioannidou*, on the other hand, resulted in two fundamentally different results for the protection of human rights. In *Charalambous*, the Court found that a 'public interest' or 'public benefit' limitation was not permissible under the Constitution; yet, the contested legislation was found constitutional since the reduction of the salary did not amount to a substantial or arbitrary intervention to the right to property. In *Koutselini-Ioannidou,* the Court implicitly formulated a two-step approach by first examining whether the limitation is permissible under Article 23(3) of the Constitution and then proceeding to examine the substance and legality of such limitation, only if the limitation is permissible. Unfortunately, the exact relationship between *Charalambous*/*Koutselini-Ioannidou* has not been explicitly resolved by courts.

Nevertheless, the subsequent case law of lower courts silently yields in favour of *Koutselini-Ioannidou*. In November 2018, the Administrative Court examined the constitutionality of pension reductions of public and wider public sector employees, by virtue of a 2012 law.[84] Specifically, in *Avgousti v Republic*,[85] the applicants claimed that the contested restriction of the right to property was based on the impermissible ground of public interest, thus infringed Article 23(3) of the Constitution and Article 1 of the First Protocol. The Court applied the *Koutselini-Ioannidou* approach for assessing the constitutionality of the limitation of the right to property (including the right to pension) by examining the permissibility of the limitation under Article 23(3). The Court reaffirmed that limitations on property rights for the consolidation of public finances on the grounds of

[83] Cf. dissenting judges' opinion who found the legislation in conformity with the Constitution.
[84] Law 168(I)/2012.
[85] *Avgousti a.o. v Republic*, Joined Cases Nos 898/2013 a.o. (27 November 2018).

public interest or public benefit are not permissible under Article 23(3). Thus, the Court did not proceed to examine the substance of such limitation and declared the relevant provisions unconstitutional. It is important to note that, the Republic appealed the decision of the Administrative Court due to its potentially catastrophic economic repercussions, and the appeal is awaiting adjudication.

On 29 March 2019, the Administrative Court issued three significant decisions on the constitutionality of laws imposing different forms of cuts and reforms to the salaries of employees of the public and wider public sector, with significant potential economic implications. In the first decision, *Nicolaidi v Republic*,[86] the Court was called to determine whether the 2012 legislative reductions in the salaries of the applicants (employees of the public and wider public sector) violated Article 23.[87] The Administrative Court found that salaries fall within the definition of 'property' of Article 23 and, therefore, are constitutionally protected. The Court found the contested legislative provisions unconstitutional since the limitation imposed on the salaries of the applicants was justified on the grounds of public interest or public benefit, which are not permissible under the Constitution. Having found the provisions unconstitutional, the Court did not proceed to examine the rest of the claims of unconstitutionality based on Articles 9, 24, 26 and 28.

In *Koundourou v Republic*,[88] the second decision issued on the same day, the Administrative Court examined the constitutionality of the non-concession of the indexation increases and increases in salaries until 2016,[89] adopted on the ground of public interest in order to prevent any further deterioration of the public finances and to secure the correct functioning of the public service. The Court first affirmed that the increases in salaries and

[86] Joint Cases Nos 98/2013 a.o. (29 March 2019).

[87] Reduction in Remunerations and Pensions of Officials, Employees and Pensioners of the Public Service and of the Wider Public Sector Law (168(I)/2012). This was the same legislation assessed in *Avgousti*, but this case focused on salaries, rather than pensions.

[88] Joint Cases Nos 611/2012 a.o. (29 March 2019).

[89] Non-Concession of Increases in Salaries and of Indexation Increases of Officers and Employees' Salaries and of Pensioners' Pensions of the Public and Wider Public Sector Law (192(I)/2011).

indexation increases are part of the employees' gross salary and fall within the definition of property. The failure of granting them on the ground of public interest constitutes an impermissible deprivation. Therefore, this legislation was also found unconstitutional. Finally, in *Filippou v Republic*[90] the Court examined the constitutionality of cuts of the gross salary of these employees, as a contribution to the Consolidated Fund of the Republic,[91] with the aim of restraining the expenses of the public sector occupational pension scheme (GEPS). The Court held that the limitation of the right to property, which was also based on the ground of public interest, was not permissible under the Constitution. Thus, the amending law was deemed unconstitutional.[92]

In conclusion, these four recent decisions of the Administrative Court relating to the constitutionality of austerity measures reaffirmed that the approach of the legislature to adopt laws limiting the right to property of employees of the public and wider public sector on the grounds of public benefit or public interest was unconstitutional. In fear of having to compensate employees and pensioners of the public and wider public sector with more than two billion euros, the Republic filed appeals against *Avgousti*, *Nicolaidi*, *Koundourou* and *Filippou*. Thus, the constitutionality of these social protection cuts and reforms introduced through legislation to meet the strict conditionality requirements is at the time of writing still pending before the Supreme Court.

4.3.2. The Right to Property: Constitutional vs. ECHR Protection

The above analysis of the Cypriot case law in relation to austerity measures and their impact on the right to property demonstrates the willingness of the judiciary to bypass the pragmatist emergency approach in favour of a rights-based approach. In particular, the judicial approach

[90] Joint Cases Nos 1713/2011 a.o. (29 March 2019).

[91] Retirement Benefits for Employees in the Public and Wider Public Sector Law (113(I)/2011). This Law was abolished and replaced with the Retirement Benefits of Employees in the Public and Wider Public Sector, including the Local Authorities Law (Provisions of General Implementation) (216(I)/2012).

[92] See also the relevant case law in *Spiridaki v Republic*, App No 830/2017 (28 June 20019), *Petridi v Republic*, App No 320/2015 (29 July 2019), which reaffirm *Charalambous*, *Koutselini-Ioannidou*, *Avgousti* and *Nicolaidi*.

to this case law, with the exception of *Charalambous*, indicates that the national constitutional protection of the right to property can and should exceed that of the ECHR.[93] This understanding was first reached in *Koutselini-Ioannidou* (although it was also briefly mentioned as *obiter* in *Charalambous*), where the Supreme Court explicitly stated:

> "Article 23 of the Constitution provides greater protection than Article 1 of the First Protocol to the ECHR. While Article 1 allows for the restriction of property rights, for reasons of public benefit, Article 23(3) of the Constitution does not include the public interest or public benefit in the permissible grounds for limiting the right to property. [...] It is one thing to limit one's property right for public interest purposes (which is not provided for in Article 23) and another thing to limit one's right for the development and utilization of one's property to promote the public benefit (which is provided)."[94]

This abstract has been cited in all relevant subsequent case law.

This finding of the Supreme Court is indeed remarkable and is reinforced by *Christodoulidou v Republic*,[95] where more than 200 applications were rejected due to the reliance on Article 1 of the First Protocol and the absence of a claim based on Article 23 of the Constitution. In particular, in *Christodoulidou,* the Administrative Court delivered its decision on the constitutionality of reductions and abolitions of shift and overtime allowances of 211 applicants working as firefighters, nurses and police officers.[96] All applicants argued that these measures should be declared in breach of Articles 9, 24 and 28 of the Constitution, as well as Article 1 of the First Protocol. The failure to raise any claims on the grounds of Article 23 prohibited the Administrative Court from adjudicating on

[93] For the approach of the ECtHR towards austerity measures, see Ioanna Pervou, "Human Rights in Times of Crisis: The Greek Cases before the ECtHR, Or the Polarisation of a Democratic Society," *Cambridge Journal of International and Comparative Law* 5, no. 1 (2016): 113-38; Nikolaos Papadopoulos, "Austerity Measures in Greece and Social Rights Protection under the European Social Charter: Comment on CSEE v. Greece Case, Complaint No. 111/2014, European Committee of Social Rights, 5 July 2017," *European Labour Law Journal* 10, no. 1 (2019) 85-97; Dimitrios Kagiaros, "Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?," *European Public Law* 25, no. 4 (2019): 535-58.

[94] Translation by the authors.

[95] *Christodoulidou a.o. v Republic,* Joined Case Nos 441/2014 a.o. (12 November 2018).

[96] The 2014 Budget Law (52(II)/2013).

whether the contested legislation violated the constitutionally protected right to property.

When examining the alleged violation of Article 1 of the First Protocol, the Court held that the intervention to the right to property, through the reduction and abolition of allowances, was justified on the ground of public interest and was necessary and appropriate to achieve cost savings and a balanced budget for government expenditure. Additionally, the Court found that the 25% reduction in shift allowances and 33.3% in the overtime allowance was not a disproportionate restriction on their salaries as property rights, taking into account the financial benefit resulting from that restriction and the fact that a variety of other cuts in the salaries, allowances and pensions of all categories of civil servants and public pensioners ensured the saving of millions and reduced the budget deficit. As a result, the Court found that the reductions and abolition of specific allowances did not violate Article 1 of the First Protocol.[97] It is submitted that if a claim were raised based on Article 23 of the Constitution, the outcome of this case would have been different.

In conclusion, the Supreme Court of Cyprus seems to have approached the different levels of domestic and international protection of human rights successfully (again with the exception of *Charalambous,* which can only be regarded as being decided *per incuriam*), in accordance with its constitutional and international duties. First, it complied with its responsibilities under Articles 33 and 35 of the Constitution and refused to subject the fundamental rights and liberties found in Part II of the Constitution to any other limitations or restrictions than those provided therein. Specifically, Article 33 envisages that fundamental rights and liberties guaranteed by Part II shall not be subjected to any other limitations or restrictions than those provided in the Constitution,

[97] The Court also rejected the claim of violation of Article 9 as vague, general and without any evidence that would enable judicial review. For purposes of completeness, it should be noted that seven of the applications were successful on the basis of the principle of equality, due to the arbitrary distinction between nurses of the same category and the absence of any study justifying such distinction.

whereas such limitations and restrictions shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed. Article 35 imposes an imperative obligation to all State authorities and organs (legislative, executive and judicial) to respect, protect and fulfil the fundamental rights and liberties of Part II. Thus, the judiciary secured, within the limits of its competence, the efficient application of the provisions of Part II of the Constitution and complied with its own precedent by holding that Article 23 may only be restricted on the express basis of the Constitution.[98] Second, it complied with its international obligations deriving from Article 53 of the ECHR.[99] Article 53 provides that the ECHR cannot be interpreted in such way as to limit or derogate from any of the fundamental rights and freedoms which may be ensured under the laws of the contracting parties. In other words, the ECHR establishes minimum standards, allowing national authorities to apply a higher level of protection. A higher level of protection which the Cypriot courts correctly applied, in the benefit of human rights protection.

V. CONCLUSION

In general, ESC rights have been present and active in the Cypriot legal order from the moment of its constitutional genesis and have been reinforced with Cyprus's participation in all significant international and regional instruments promoting and safeguarding the protection of ESC rights. The judiciary's approach towards the protection of the constitutionally envisaged ESC rights has always conformed with the approach of the ECtHR, due to the historical and unique connection that the Cypriot Constitution and the ECHR have had. The above analysis of ESC rights under the Constitution, such as the right to decent existence and social security (Article 9), the right to education (Article

[98] See *Aloupas v National Bank of Greece* (1983) 1 CLR 55.

[99] On Article 53 of the ECHR, see Catherine Van de Heyning, "No Place Like Home—Discretionary Space for the Domestic Protection of Fundamental Rights," in *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts*, eds. Patricia Popelier, Catherine Van de Heyning and Piet Van Nuffel, (Cambridge: Intersentia, 2011), 65, 71-78.

20), the right to join trade unions (Article 21(2)), the right to work (Articles 9 and 25), the right to strike (Article 27) and the right to property (Article 23), indicates the traditional interplay between domestic and external normative systems, as the judiciary has interpreted the constitutional text with recourse to comparative assessments and reliance on external influences (particularly on the ECHR and the ECtHR case law). However, the traditional streamlined approach and the reliance on external influences have shifted to a certain extent in favour of the domestic normative system and human rights protection (or at least in relation to the right of property), as a result of the detrimental social and economic consequences of the severe economic crisis that affected the island in an unprecedented manner.

This new approach of dismissing guidance from external influences and developing a purely domestic understanding of a constitutionally envisaged human right for the benefit of human rights protection was based on the idea that national constitutional protection can and should exceed that of the ECHR, by virtue of their different content and scope of respective limitations. Specifically, the Cypriot courts held that salaries, pensions and benefits of employees and pensioners of the public and wider public sector are safeguarded as property rights under Article 23 of the Constitution and Article 1 of the First Protocol to the ECHR. However, when assessing the permissibility of the cuts and reforms to salaries, pensions and benefits, the judiciary recognized that the right to property as envisaged in the Constitution affords greater protection than Article 1 of the First Protocol to the ECHR since the limitations imposed by the former provision are stricter. As a result, and regardless of the compatibility with the First Protocol to the ECHR of limitations imposed on the right to property on the rather general ground of public interest, such limitations are incompatible with the constitutional text, and thus the relevant legislation is null and void.

It is sincerely hoped that this rights-based approach will not be overturned by the upcoming final decisions of the Supreme Court on the pending appeals filed against *Avgousti*, *Nicolaidi*, *Koundourou* and *Filippou*, where the use of the 'police powers' of the State may be attempted to be used, as an exception

clause allowing derogation from rights beyond those constitutionally provided, for reversing this new rights-oriented approach.[100] Moreover, what is further at stake in the pending appeals is the compliance of Cypriot courts with their constitutional duty not to subject the fundamental rights and liberties found within the Constitution to any other limitations or restrictions than those provided therein and their compliance with their international obligation under Article 53 of the ECHR to use the treaty as setting minimum standards and not to interpret it in such way as to limit or derogate from any of the fundamental rights and freedoms which may be ensured under the laws of the contracting parties. Nevertheless, hoping that the approach is not reversed could prove to be mere wishful thinking.

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[100] See *Aloupas v National Bank of Greece* (1983) 1 CLR 55.

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Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding

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Abstract

Debate on the quality and durability of Indonesia's democracy has intensified in recent years. Political scholars had generally praised the country's democratic achievements and stability in the two decades following the 1998 resignation of long-serving president Suharto. But more recently, a growing number of academics have noted that elements of Indonesia's democracy are being eroded. While the issue of Indonesia's democratic backsliding has gained considerable attention and generated much academic literature, few scholars have analyzed why Indonesia has not entered a phase of rapid backsliding or a return to authoritarianism. This article argues the role of the Indonesian Constitutional Court in the consolidation of democracy has been frequently overlooked. By using a qualitative approach involving archival research of the Constitutional Court's sessions on disputed results in Indonesia's 2019 elections, this article finds the Constitutional Court has been able to prevent rapid democratic backsliding and even a reversion to authoritarianism, by ensuring competitiveness, participation and accountability in elections.

Keywords: Democracy, Elections, Indonesia, Judicial Politics.

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I. INTRODUCTION

Following the 1998 downfall of authoritarian president Suharto after more than three decades in power, Indonesia undertook four constitutional amendments over 1999–2002. In the ensuing years of this reform era, Indonesia began to consolidate its status as a democratic country. In 2009, political scientist Larry Diamond praised the country's democratic stability, as he considered there were no obvious threats to its democracy.[1] In recent years, however, scholars have shown evidence that elements of democracy in Indonesia are experiencing regression. The level of electoral competitiveness has declined, at least insofar as there have been increasingly higher electoral thresholds and fewer presidential candidates.[2] Also concerning was the rise of a populist challenge in the figure of Prabowo Subianto during the presidential election campaigns in 2014 and 2019, indicating that Indonesia is susceptible to 'authoritarian-populism'.[3] Regression was also evident in President Joko Widodo's mobilization of state resources in the 2019 election, while religious polarization has caused public tension and conflict.[4] Additionally, the quality of participation in democracy has decreased due to the government's use of the Electronic Transactions and Information Law, the Blasphemy Law and the Criminal Code to limit political opposition. This was evidenced by the arrests of government critics, who had sought to '*ganti presiden*' (change the president), and by the dissolution of the pro-caliphate Islamic organization Hizbut Tahrir Indonesia by issuing a Government Regulation in lieu of law without judicial process.[5]

Despite the empirical evidence confirming a level of democratic erosion, Indonesia is still acknowledged as being within the ranks of electoral democracies

[1] Larry Diamond, "Indonesia's Place in Global Democracy," in *Problems of Democratisation in Indonesia: Elections, Institutions, and Society*, ed. Edward Aspinall and Marcus Mietzner (Singapore: Institute of Southeast Asian Studies, 2010), 21-52.

[2] Mietzner, "Authoritarian Innovations in Indonesia," 1-16.

[3] Eve Warburton and Edward Aspinall, "Explaining Indonesia's Democratic Regression: Structure, Agency and Popular Opinion," *Contemporary Southeast Asia* 41, no. 41 (August 2019): 257.

[4] Edward Aspinall and Marcus Mietzner, "Indonesia's Democratic Paradox: Competitive Elections amidst Rising Illiberalism," *Bulletin of Indonesian Economic Studies* 55, no. 3 (November 2019): 295; Thomas Power, "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline," *Bulletin of Indonesian Economic Studies* 54, no. 3 (December 2018): 307.

[5] Aspinall and Mietzner, "Indonesia's Democratic Paradox."

and is not sliding rapidly into authoritarianism.[6] Nevertheless, there have been few empirical studies into why Indonesia is not shifting rapidly into authoritarianism or experiencing swift democratic backsliding. More specifically, there has been little examination of how Indonesia's democracy is being safeguarded to prevent rapid backsliding.

Existing studies seem insufficient to explain the deterrents against rapid backsliding. Instead, political scholars have devoted much energy to discussing illiberal developments in Indonesian politics. On the one hand, some political scholars note that elections remain competitive because the incumbent president's re-election in 2019 was not by a vast margin, despite the mobilization of state resources, although this competitiveness resulted in societal polarization and increasing illiberalism.[7] On the other hand, Stott argues that Indonesia has made considerable progress in democratic consolidation, noting the military's removal from politics, a flourishing civil society, media freedom and the growth of political parties.[8]

These explanations contribute greatly to the discussion on the quality of Indonesian democracy, yet the function of the Constitutional Court has been frequently overlooked as one of the notable components of the issue. In this article, I acknowledge that Indonesia is experiencing democratic backsliding, while also arguing the Constitutional Court serves as a bastion of democracy to prevent rapid backsliding. The Constitutional Court has become a crucial player in Indonesian politics, as it functions to adjudicate election disputes and ensure election law is in line with the Constitution. Most notably, since its establishment in 2003, the Constitutional Court has been categorized as an 'agent of democratization'[9] with a high degree of independence.[10]

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6 Edward Aspinall and Marcus Mietzner, "Southeast Asia's Troubling Elections: Nondemocratic Pluralism in Indonesia," *Journal of Democracy* 30, no. 4 (October 2019): 115.

7 Aspinall and Mietzner, "Southeast Asia's Troubling Elections."

8 David Adam Stott, "Indonesia's 2019 Elections: Democracy Consolidated?" *The Asia-Pacific Journal* 17, no. 6 (March 2019): 16-17.

9 Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (December 2010): 397-424.

10 Bjoern Dressel, "Governance, Courts and Politics in Asia," *Journal of Contemporary Asia* 44, no. 2 (February 2014): 264.

The fact that an independent constitutional court can prevent or deter democratic backsliding is not a new concept or theory, and is not restricted to Indonesia. Gibler and Randazzo have proved that independent judiciaries have positive and significant effects on preventing the possibility of democratic backsliding. They used a statistical analysis of 163 countries over 1960–2000 with a dataset of judicial checks on politics and military, regime history, and wealth. Among the underlying findings of their analyses are: (i) well-established independent judiciaries, during economic and military crises, can prevent the political executive from using a crisis to gain greater or entrenched power (authoritarian); and (ii) judiciaries can use their checks and balances function through the annulment of executive decisions, thereby favoring participatory democracy as well as minority and human rights.[11]

Unlike previous research, which used statistical analysis, this article draws on recent data from legal challenges to the results of Indonesia's April 2019 simultaneous legislative and presidential elections. It also analyses how Indonesia's Constitutional Court has prevented the rapid backsliding of democracy, particularly in its handling of 251 legal challenges to the 2019 election results. This prevention of backsliding is examined in relation to Waldner and Lust's three indicators of democratic quality: competition, participation and accountability.[12] All 251 of the election disputes involved competitiveness and accountability, while two also involved participation.

Arguments in this article confirm that due to its independence, the Constitutional Court was able to prevent democratic backsliding by countering: (i) efforts to limit participation in elections; (ii) efforts to make elections less competitive; and (iii) efforts to loosen accountability for electoral violations, such as by state organizations.

I develop these arguments in three sections. First, I briefly review existing literature to identify the degree of the Constitutional Court's independence.

[11] Douglas Gibler and Kirk Randazzo, "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding," *American Journal of Political Science* 55, no. 3 (July 2011): 696-704.

[12] David Waldner and Ellen Lust, "Unwelcome Change: Coming to Terms with Democratic Backsliding," *Annual Review of Political Science* 21, no. 1 (May 2018): 93-113.

Next, I identify the concepts and debates on the causal mechanism of an independent judiciary in preventing democratic backsliding. Finally, to show this causal mechanism in its empirical realm, I outline how the Constitutional Court prevents rapid democratic backsliding and a return to authoritarianism, within the indicators of competitiveness, participation and accountability.

II. INDONESIA'S DEMOCRATIC QUALITY

2.1. From Emerging Democracy over 1997–2004 to Stable and Stagnant Democracy over 2004–2014

In 1997, Indonesia was severely impacted by the Asian financial crisis. This triggered a political crisis, causing Suharto to resign in May 1998, which marked the beginning of Indonesia's transition from an authoritarian era to a democratic era.

To pave the way for Indonesia to become a democratic country, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) conducted a series of comprehensive amendments to the Constitution 1945 – the highest law in Indonesia. The amendments were designed with the aim of preventing a return to authoritarian leadership and to ensure the principles of democracy would be implemented.

The constitutional amendments were a fundamental element toward developing Indonesian democracy after more than three decades of authoritarian rule under Suharto's administration. To ensure that democracy would function, the constitutional amendments included three major elements of reform: (i) improving the function of state agencies to conduct checks and balances on the executive, legislature, and judiciary; (ii) ensuring direct elections of the president, vice president, governors, mayors, regents, the People's Representative Council, and the Regional Representative Council; and (iii) assuring freedom through protecting human rights.

In 2004, Indonesia held its first direct popular election for President and Vice President, giving every Indonesian citizen with a national identity card

the right to vote. Previously, the President and Vice President were elected by the MPR. The 2004 presidential election was won by Susilo Bambang Yudhoyono, who was re-elected in 2009 for a second five-year term.

During the 2004–2014 decade of Yudhoyono's presidency, several political scientists argued that Indonesia had achieved stable democracy. Diamond praised Indonesia's 'stable democracy' and 'relatively liberal democracy', in which there were no 'obvious threats or potent anti-democratic challenges on the horizon'.[13] In reaching this conclusion, he conducted a comparative analysis between Indonesia and other countries. On the variable of democracy and governance, his comparative analysis used indicators of political rights and civil liberties, voice and accountability, state quality (comprising government effectiveness and regulatory quality), rule of law, and corruption control.[14] Diamond found that from 1998 to 2008, Indonesia's score on all indicators increased steadily, better than other older democracies such as Thailand, the Philippines, India, Bangladesh, Argentina, Brazil, Mexico, South Africa and Turkey, all of which had experienced a reduction in at least one of the indicators. Indonesia's most striking progress among the indicators was that of political rights and civil liberties. On Freedom House's 1–7 scale (where 7 is "least free" and 1 is "most free"), Indonesia received a score of 7.5 in 1997 and improved to 2.3 in 2009.[15]

Moreover, Aspinall, Mietzner, and Tomsa acknowledged positive signs of Indonesia's democracy, by arguing that in this 2004–2014 period, Indonesia did not experience major political disruptions.[16] Direct elections (in which every registered citizen has the right to vote for a provincial governor, regent and mayor) were implemented. The military, which had been involved in politics during the Suharto era, was kept outside the political fray. The Corruption Eradication Commission received high support from the state to eradicate elite-level corruption.

[13] Diamond, "Indonesia's Place in Global Democracy," 21-52.
[14] Diamond, "Indonesia's Place in Global Democracy."
[15] Diamond, "Indonesia's Place in Global Democracy."
[16] Edward Aspinall, Marcus Mietzner and Dirk Tomsa, *The Yudhoyono Presidency: Indonesia's Decade of Stability and Stagnation* (Singapore: Institute of Southeast Asian Studies, 2014), 1-21.

Similarly, other political scholars also noted that Indonesia was a democracy. These scholars, however, described Indonesia's democratic status with negative adjectives. Slater pinned Indonesia's democracy as 'delegative' or 'collusive' due to the existence of political cartels.[17] 'Consolidated' but 'patrimonial' were the terms used by Webber to describe Indonesia's democracy because of the country's weak rule of law and limited capacity for effective governance.[18] Indonesia's quality of democracy was deemed low because political faults which existed before 2004 still occurred in subsequent local government elections.[19]

Some scholars argued Indonesia's democracy had become stagnant, evidenced by little change to long-standing issues in political party life; continuing impunity of violent anti-democracy groups;[20] repression of government critics; appointment of elite politicians to the Election Commission (*Komisi Pemilihan Umum*, KPU), which affected the commission's independence;[21] and limited changes to weak rule of law.[22]

2.2. Democratic Regression, 2015-2021

Joko Widodo, popularly known as Jokowi, was elected president in July 2014 and sworn-in three months later, upon the completion of Yudhoyono's second term as president. Jokowi did not come from Indonesia's political or military elite, a fact that prompted hopes he would initiate progressive reforms. Nevertheless, signs of democratic backsliding remained and even increased, especially after high tensions in the period surrounding Jakarta's 2017 gubernatorial election. Power argues that Jokowi made an 'authoritarian

[17] Dan Slater, "Indonesia's Accountability Trap: Party Cartels and Presidential Power after Democratic Transition," *Indonesia* 78, no. 1 (October 2004): 64.

[18] Douglas Webber, "A Consolidated Patrimonial Democracy? Democratization in post-Suharto Indonesia," *Democratization* 13, no. 3 (July 2006): 396.

[19] Marcus Mietzner, "Indonesia and the Pitfalls of Low-Quality Democracy: A Case Study of the Gubernatorial Elections in North Sulawesi," in *Democratisation in Post-Suharto Indonesia*, eds. Marco Bunte and Andreas Ufen, (London and New York: Routledge, 2009), 124-149.

[20] Dirk Tomsa, "Indonesian Politics in 2010: The Perils of Stagnation," *Bulletin of Indonesian Economic Studies* 46, no. 3 (November 2010): 309.

[21] Greg Fealy, "Indonesian Politics in 2011: Democratic Regression and Yudhoyono's Regal Incumbency," *Bulletin of Indonesian Economic Studies* 47, no. 3 (November 2011): 333.

[22] Dave McRae, "Indonesian Politics in 2013: The Emergence of New Leadership?" *Bulletin of Indonesian Economic Studies* 49, no. 3 (December 2013): 290.

turn' by manipulating security and law enforcement institutions for pragmatic political purposes and by making a systematic effort to weaken and suppress political opposition ahead of the 2019 presidential election.[23] He states that this authoritarian turn stemmed from the polarizing events surrounding the 2017 Jakarta gubernatorial election, in which the national political elite cleaved into an Islamist bloc versus a pluralist nationalist bloc. Ahead of the election, Jakarta's governor was Basuki Tjahaja Purnama, a Chinese Christian, popularly known as Ahok and a close ally of Jokowi. His political opponents, allied with Prabowo, had also aligned themselves with Islamist groups in order to attack Ahok for blasphemy against Islam. A study by Mietzner and Muhtadi examined the depth of intolerance of Indonesians toward racial and religious minorities before, during and after the 2017 Jakarta election.[24] Using a series of surveys, they found the 2017 anti-Ahok protests had increased the level of intolerance among Indonesian Muslims. This intolerance, initially against a religious minority in the government, then spread against all religious minorities in the larger public space, even cultural-religious events and the activities of minorities. Mietzner and Muhtadi's 2018 survey revealed that 30.7 percent of Indonesian Muslims were very intolerant toward religious and ethnic minorities, and that the LGBT community was the least liked social group in Indonesia. Even supporters of Nahdlatul Ulama, Indonesia's largest Islamic organization, which is famous for its pluralist stance, were found to be generally no more tolerant than other Indonesian Muslims.[25]

Against this backdrop of rising religious intolerance and polarization, Jokowi responded with measures that raised questions over his reformist credentials. Aspinall and Mietzner confirmed that Jokowi mobilized the state apparatus for his campaign ahead of the 2019 presidential election.[26] Heightened religious polarization influenced voting behavior and played

[23] Power, "Jokowi's Authoritarian Turn," 307.
[24] Marcus Mietzner and Burhanuddin Muhtadi, "The Mobilisation of Intolerance and Its Trajectories: Indonesian Muslims' Views of Religious Minorities and Ethnic Chinese," in *Contentious Belonging: The Place of Minorities in Indonesia*, ed. Greg Fealy and Ronit Ricci (Singapore: Institute of Southeast Asian Studies, 2019), 1-18.
[25] Marcus Mietzner and Burhanuddin Muhtadi, "The Myth of Pluralism: Nahdlatul Ulama and The Politics of Religious Tolerance in Indonesia," *Contemporary Southeast Asia* 42, no. 1 (April 2020), 58-84.
[26] Aspinall and Mietzner, "Southeast Asia's Troubling Elections," 115.

a role in post-election violence.[27] In Indonesia's 2019 legislative election, personalization further weakened the political parties.[28] Thus, for instance, the problem of political corruption persisted as a legacy of Suharto's authoritarian era.[29]

This democratic backsliding was due to several factors. First, there are the three factors of 'political structures, elite agency, and public attitudes'.[30] In terms of political structures, Warburton and Aspinall have described how the transition from Suharto's authoritarian era (pre-1998) to the reform era (post-1998) was continually occupied by the same political elites.[31] The interests of the Suharto era elites were structurally preserved in the reform era's democracy and decentralization. The reform era can be viewed as a blend of reform demands from non-elites and accommodation of the elites' interests.

On the phenomena of elite agency, Warburton and Aspinall note that elites and leaders have narrowed the space for electoral competition and damaged the principles of checks and balances in Indonesia's democracy.[32] Yudhoyono's presidency defended his status quo with a lack of progress in democracy. Jokowi and his former rival Prabowo both implemented illiberal acts in their presidential campaigns and political actions.

Furthermore, Mietzner has shown that the Jokowi government fought 'illiberalism with illiberalism' by pursuing a strategy of criminalization against populist opposition figures and groups deemed to have violated the law, yet Jokowi also endeavored to persuade some opposition figures to join his administration through patronage-oriented accommodation.[33] This was the main reason why the government's efforts to protect democracy become a threat to democracy. Mietzner also showed that illiberal strategy has been

[27] Aspinall and Mietzner, "Southeast Asia's Troubling Elections."
[28] Aspinall and Mietzner, "Southeast Asia's Troubling Elections."
[29] Aspinall and Mietzner, "Southeast Asia's Troubling Elections."
[30] Warburton and Aspinall, "Explaining Indonesia's Democratic Regression," 257.
[31] Warburton and Aspinall, "Explaining Indonesia's Democratic Regression."
[32] Warburton and Aspinall, "Explaining Indonesia's Democratic Regression," 257.
[33] Marcus Mietzner, "Fighting Illiberalism with Illiberalism: Islamist Populism and Democratic Deconsolidation in Indonesia," *Pacific Affairs* 91, no. 2 (June 2018): 261-282.

used by all Indonesian political elites – 'the executive, elites as a collective, and opposition'.[34] This illiberal strategy is mainly focused on narrowing competitiveness in elections, mobilizing people by using narratives of identity politics, and executive efforts in concentrating and maximizing power.

On public attitudes, Warburton and Aspinall note that polling shows Indonesians have maintained high levels of support for democracy in the two decades since Suharto's fall.[35] However, Indonesians showed low support for liberal values. Most Indonesians believe democracy is only meant to distribute socio-economic programs fairly, rather than to protect human rights and freedoms.

A second factor behind democratic backsliding is the deep polarization between Indonesians since Jakarta's divisive 2017 gubernatorial election. Warburton and Muhtadi explain that politicians have sought to exploit high economic inequalities in Indonesia to influence voters.[36] While notions of inequality have become more widespread during the Jokowi presidency, supporters of the political opposition are more likely to view the income gap as unfair, compared to Jokowi's supporters.[37] Polarization also tends to be driven by religious issues, as Indonesia's political parties share similar positions on economic issues but have differing political ideologies when it comes to religious issues.[38] Support for Islam has a strong correlation with populist attitudes, but it has not had a positive effect on Indonesia's democracy; rather, it has contributed to posit setbacks.[39]

Moreover, values of democracy among Indonesians are low. Neither the elites nor the public are a bulwark for the defense of liberal values; on

[34] Marcus Mietzner, "Authoritarian Innovations in Indonesia: Electoral Narrowing, Identity Politics, and Executive Illiberalism," *Democratization* 27, no. 6 (December 2019): 1-16.

[35] Warburton and Aspinall, "Explaining Indonesia's Democratic Regression," 257.

[36] Eve Warburton and Burhanuddin Muhtadi, "Politicizing Inequality in Indonesian Elections," *Brookings*, April 8, 2019 https://www.brookings.edu/blog/order-from-chaos/2019/04/08/politicizing-inequality-in-indonesian-elections/.

[37] Burhanuddin Muhtadi and Eve Warburton, "Inequality and Democratic Support in Indonesia," *Pacific* Affairs 93, no. 1 (March 2020): 31.

[38] Fossati, Diego et al., "Ideological Representation in Clientelistic Democracies: The Indonesian Case," *Electoral* Studies 63, no. 6 (February 2020): 1-12.

[39] Diego Fossati and Marcus Mietzner, "Analyzing Indonesia's Populist Electorate: Demographic, Ideological, and Attitudinal Trends," *Asian Survey* 59, no. 5 (October 2019): 769.

the contrary, the general public is less liberal than legislators.[40] Declining support among the public for democratic values is mainly influenced by the cues from political parties and their leaders[41]. Low education levels might also contribute to this condition. Warburton et al. found the political elites were far more educated than voters, as 78 percent of voters came from the working class, whereas 86.6 percent of the elites were professional class.[42]

III. JUDICIAL INDEPENDENCE AND DEMOCRATIC BACKSLIDING

3.1. The Independence of Indonesia's Constitutional Court

Indonesia's Constitutional Court was established in 2003. It has five authorities: (i) to review whether laws are in line with constitution, (ii) to decide on the dissolution of political parties, (iii) to decide on disputes of authority between state institutions, (iv) to decide on impeachment cases against the president and/or the vice president, and (v) to decide on disputed election results.

Evidence of the Constitutional Court's level of independence has been recorded by political and legal scholars. Political scholars assess the Constitutional Court's independence by analyzing the effect of its institutional design on its performance. Mietzner points out that to exercise its powers, the Court is equipped with budgetary autonomy, a slim bureaucratic structure, and a multiple-track appointment for its nine judges.[43] This institutional setting provides space for the Constitutional Court to play its role independently. Mietzner also notes Ginsburg and Stephenson's argument that diffuse and competitive politics contribute to the independence of Indonesia's Constitutional Court.[44]

[40] Aspinall, Edward et al., "Elites, Masses, and Democratic Decline in Indonesia," *Democratization* 27, no. 4 (October 2019): 1-22.

[41] Diego Fossati, Burhanuddin Muhtadi and Eve Warburton, "Why Democrats Abandon Democracy: Evidence from Four Survey Experiments," *Party Politics* 1, no. 1 (February 2021): 1-13.

[42] Warburton, Eve et al., "When Does Class Matter? Unequal Representation in Indonesian Legislatures," *Third World* Quarterly 1, no. 1 (March 2021): 1-24.

[43] Mietzner, "Authoritarian Innovations in Indonesia," 1-16.

[44] Mietzner, "Authoritarian Innovations in Indonesia."; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003), 90-105; Matthew Stephenson,

Similarly, Dressel has classified Indonesia's Constitutional Court as having a high degree of 'judicial activism', along with the constitutional courts of South Korea and the Philippines, where the courts have a high level of '*de facto* independence' – structural, institutional, and behavioral – and a high level of involvement in mega-political cases.[45] Moreover, by drawing on an analysis of informal judicial networks, Dressel and Inoue found little statistical evidence that appointment trajectory and work background have influenced the decision-making of the Indonesian Constitutional Court's judges, suggesting the Court's independence is actually higher than is perceived by the public.[46]

Meanwhile, legal scholars have reviewed the Constitutional Court's independence by using contextual analysis of its decision-making. Most of the Constitutional Court's judges are Muslim, which might be thought to influence their decisions. Rather than impair the objectivity of the judges' decision-making, their Islamic background encourages them to uphold the Constitution.[47] For instance, in a review of the Blasphemy Law, the Constitutional Court decided to maintain the law, which means the state retains its authority to forbid any person to blaspheme any religion, thereby upholding protection of religious values.[48]

In addition, the Constitutional Court's performance is influenced by the leadership and intellectual capacity of its chief justice.[49] Given that courts were a second-class institution in Suharto's authoritarian era, Jimly Asshiddiqie – the first chief justice of the Constitutional Court – demonstrated through his actions that the Constitutional Court was worthy of being on

"When the Devil Turns…: The Political Foundations of Independent Judicial Review," *Journal of Legal Studies* 32, no. 1 (2003): 59.

45 Bjoern Dressel, "Governance, Courts and Politics in Asia," 264.

46 Bjoern Dressel and Tomoo Inoue, "Mega Political Cases before the Constitutional Court of Indonesia since 2004: An Empirical Study," *Constitutional Review* 4, no. 2 (December 2018): 157-187.

47 Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law* 16, no. 2 (March 2016): 1.

48 Melissa Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7, no. 1 (May 2012): 1.

49 Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 74-89.

the same level as the president. His intellectual capacity pushed the Court to be involved in economic and political reforms.

Jimly, who led the Court from 2003 to 2008, was committed to upholding human rights, evidenced by the Court's decision to rehabilitate the political rights of former members of the banned Indonesian Communist Party (PKI). Human rights activists had protested an article in the Election Law banning former members of PKI and its affiliated organizations from running for local and national elections. The Constitutional Court ruled the article unconstitutional and that former members of PKI and its affiliates must be treated without discrimination.[50] In another decision, the judges ruled that Local Election Commissions (*Komisi Pemilihan Umum Daerah,* KPUD) should not report to local parliaments, as such a move would jeopardize their independence.

Under Jimly's leadership, the Constitutional Court was described as 'activist' and 'active', while under his successor, Mahfud MD (who was chief justice from 2008–2013), the Court was deemed 'brave'.[51] Much academic literature from foreign legal scholars was used to support the Court's decisions under Jimly. Under Mahfud, the Court shifted toward substantive justice, rather than the procedural justice that had marked Jimly's tenure.

The Constitutional Court's independence is also indicated in how it annuls laws. The Court conducts constitutional interpretation as the indicator to assess whether a law is unconstitutional or not, rather than following the private preferences of the judges.[52] The Constitutional Court's methodologies for interpreting cases of constitutionality are: (i) 'textual interpretation', which is used to make decisions toward 'the meanings of the constitutional provisions' in the current context; (ii) 'original intent interpretation', which seeks to articulate the intention of the constitutional drafters; (iii) 'pragmatic interpretation', which analyzes the effect of a constitutional provision in

[50] Susi Dwi Harijanti and Tim Lindsey, "Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court," *International Journal of Constitutional Law* 4, no. 1 (January 2006): 149.

[51] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), 61-62.

[52] Fritz Edward Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1, no. 1 (May 2015): 1-12.

practice; (iv) 'proportionality interpretation', which is about justifying limits on fundamental democratic rights; and (v) 'structural interpretation', which focuses on 'the clause and its relation to the whole text'.[53]

3.2. Judiciary and Democratic Backsliding

Judicialization of politics, a concept in which judges contribute to public policy-making through their judicial reviews,[54] has positively impacted the state's performance in terms of governance and democracy. In terms of good governance, Dressel's comparative study of Japan, Singapore, South Korea and Thailand presented empirical evidence on how the institutional, behavioral and structural conditions of courts influence their handling of mega-political cases. Courts with a high degree of independence and involvement in mega-political cases could ensure good governance.[55] Another issue of governance from the rule of law aspect is when courts (subject to institutional processes) protect the 'popular interest'.[56]

Scholars have debated whether the judicialization of politics strengthens democracy. For instance, Mietzner makes the point that some of the Indonesian Constitutional Court's decisions on election rules have not always increased electoral competitiveness, as legislators can subsequently take measures leading to less competitiveness.[57] In addition, Horowitz states that more than three-quarters of the world's countries in 2005 had some form of judicial review for constitutionality, including many undemocratic regimes.[58]

While the debate focuses much on the single dimensional spectrum of whether or not courts play a role in strengthening democracy, few see how judicialization of politics contributes to preventing democratic backsliding, given the global trend among third-wave democracies facing backsliding.

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53 Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology," 1-12.

54 Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), 1-13. and Rachel Sieder, Line Schjolden and Alan Angell, *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005), 1-20.

55 Bjoern Dressel, "Governance, Courts and Politics in Asia," 264.

56 Lisa Hilbink, "Assessing the New Constitutionalism," *Comparative Politics* 4, no. 2 (January 2008): 227-245.

57 Marcus Mietzner, "Authoritarian Innovations in Indonesia," 1-16.

58 Donald Horowitz, "Constitutional Courts: A Primer for Decision-Makers," *Journal of Democracy* 17, no. 4 (October 2006): 125-130.

One study which proves that courts can prevent democratic backsliding is from Gibler and Randazzo, who focus on the role of courts in: deterring abuse of executive power in times of military and economic crises, demanding the executive be accountable for what they do, and protecting minority rights.[59] While that study was a significant contribution to the field of judicialization of politics and democratic backsliding, more current phenomena and empirical methods of analysis are needed, particularly for the Indonesian context. For instance, Gibler and Randazzo's study uses data from 1960–2000, at which time Indonesia had not yet implemented judicialization of politics, as its Constitutional Court was not created until 2003. In addition, their study relies on statistical data of world's countries to examine the effect of courts in preventing democratic backsliding, which does not unpack the dynamics of how courts deter regime reversals. The relationship between judicial systems, politics and law is dynamic and fluid, so the degree of judicial involvement varies between countries and even within a country over time.[60] Therefore, empirical analysis of how Indonesia's Constitutional Court actually prevents rapid backsliding of the democracy is useful.

The Constitutional Court can deter rapid democratic backsliding in two ways. First, established judiciaries are likely to deter all concerned parties – candidates and state election organization bodies – from eroding competitiveness, participation and accountability in elections. The judiciary can do this by upholding the electoral principle known in Indonesia by the acronym '*Luber Jurdil*' (*langsung*, *umum*, *bebas*, *rahasia*, *jujur* and *adil* – direct, public, free, confidential, honest and fair). If this principle is implemented, parties will be less likely to risk taking political strategies that could bring their legality into question. Second, the Constitutional Court deters backsliding by overtly checking all concerned parties in regard to election disputes, as the Court favors free and fair elections.

[59] Gibler and Randazzo, "Testing the Effects of Independent Judiciaries," 696-704.
[60] Bjoern Dressel, "Governance, Courts and Politics in Asia," 263.

3.3. Deterring Rapid Democratic Backsliding or Even Authoritarianism

A 'modern consolidated democracy' requires five interacting arenas to enable such consolidation to occur, namely: (i) lively civil society created by freedom of communication and association; (ii) political society supported by free and inclusive electoral contestation; (iii) rule of law with the existence of constitutionalism; (iv) state apparatus with rational-legal bureaucratic norms; and (v) economic society with an institutionalized market.[61] When a country faces democratic regression, the quality of these arenas will erode. Waldner and Lust conceptualize democratic backsliding as a series of incremental elements that gradually undermine the quality of democracy, especially in regard to free, inclusive and competitive elections. Specifically, they note that backsliding involves: limiting electoral participation without explicitly abolishing the universal norms of democracy; making elections less competitive without completely undermining electoral mechanisms; and erasing accountability, such as a violations by state apparatus.[62]

As explained in the previous section of this article, several scholars have showed how the elements of democracy, as identified by Linz and Stepan, have been eroding in Indonesia. Nevertheless, it is in the arena of free and inclusive electoral contestation that Indonesia's Constitutional Court is able to best deter rapid democratic backsliding or even a revival of authoritarianism. Election law in Indonesia requires that elections must be direct, public, free, confidential, honest and fair. Through its decisions on disputed election results, especially its annulments of results deemed invalid, the Constitutional Court can discourage electoral manipulation, un-inclusive participation, and procedural violations.

3.3.1. Competitiveness

This section illustrates the Indonesian Constitutional Court's decisions that promote free and fair elections. The Constitutional Court's role is most

[61] Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), 3-15.
[62] Waldner and Lust, "Unwelcome Change: Coming to Terms with Democratic Backsliding," 93-113.

vividly illustrated by its rulings on election lawsuits. In April 2019, Indonesia held its first simultaneous elections for the local, provincial and national legislative assemblies, as well as regional representatives, and for the president and vice president. After the Election Commission (KPU) announced the results of the 2019 elections, 251 lawsuits from losing electoral candidates were submitted to the Constitutional Court. There were 250 cases from the legislative elections and one from the presidential election.[63]

The 250 lawsuits from legislative candidates included allegations of electoral fraud by rival candidates and the KPU, as well as procedural errors and inaccurate counts by the KPU. To ensure that elections are free and fair under Indonesian law, the Constitutional Court has the authority to adjudicate such lawsuits and alter election results if evidence provided by the plaintiffs is credible and proven.

Drawing on evidence provided by the plaintiffs, the Constitutional Court rejected 238 of the lawsuits because they were not supported by credible evidence of fraud, manipulation or inaccuracies, while 12 were granted because they were supported by credible evidence of electoral fraud or inaccurate counting and procedural errors.

One of the lawsuits, submitted by a candidate for a local legislature in Central Sulawesi Province, resulted in the Constitutional Court ordering a re-vote. KPU was ordered to hold the re-vote at Polling Station 1 in Bolobia Village, Sigi District, because the C7 form (an official form listing voter attendance at a polling station) had been lost and the ballot box contained no list of voters.

Re-counts were ordered at five locations because the Constitutional Court found KPU had conducted administrative violations. The five locations were: Trenggalek District and Surabaya City, both in East Java Province; North Sumatra Province; Arfak Mountains District in West Papua Province; and Bekasi City in West Java Province. The administrative violations in those

[63] "The Constitutional Court's Decisions on the 2019 Election Disputes," The Election Commission of the Republic of Indonesia, accessed October 15, 2020, https://jdih.kpu.go.id/putusan-pengadilan-mk.

locations included discrepancies in results between C1 forms (individual polling station vote tabulation forms), DA1 forms (for recording vote counts of multiple polling stations under a single sub-district), and DAA1 forms (for recording vote counts of multiple polling stations under a single village/urban village administration or *desa*/*kelurahan*). In some cases, administrative violations had caused candidates to be denied legitimate victory until recounts were conducted.

In Trenggalek, the Indonesian Democratic Party of Struggle (PDIP) saw its number of votes increase by 18 as a result of the recount, which was approved by all parties. In Surabaya, Golkar Party candidate Agoeng Prasodjo had originally lost by one vote to his Golkar colleague Aan Ainur Rofiq, who had received an additional 30 votes because of a data entry error on the DAA1 form. As a result of the recount from three polling stations, Agoeng emerged victorious. It was a different scenario in North Sumatra, where Robert Lumban Tobing, a candidate of Gerindra Party, argued his number of votes had declined from 3,971 to 2,135 because of a tabulation error in the DA1 form. After the Constitutional Court ordered a recount, Robert's number of votes actually declined to 1,684. At a village polling station in Arfak Mountains District of West Papua, 30 votes won by National Awakening Party (PKB) candidate Goliat Manggesuk had been moved to Prosperous Justice Party (PKS) candidate Yeskiel Toansiba. After a recount was ordered, PKS still ranked higher than PKB. In Bekasi District, the National Democratic Party (NasDem) argued its votes from three polling stations in Telagamurni Village had been incorrectly tabulated between the C1 and DAA1 forms. The Court responded by ordering a recount.

In the six other granted lawsuits, the Constitutional Court invalidated or revised certain election results. In Banda Aceh City, Aceh Province, the KPU was found to have committed an administrative violation because votes had been transferred from one Golkar Party candidate to another at Tibang Village. Four votes received by candidate Maulidawati had been transferred to candidate Kasumi Sulaiman, enabling the latter to defeat a rival party's

candidate by one vote. The Court invalidated a KPU decree on that election's outcome and ordered KPU to reinstate Maulidawati's four votes.

In Bintan District, Riau Islands Province, the Constitutional Court adjudicated separate lawsuits involving Golkar Party and PKS. In one case, a Golkar Party candidate, Amran, was initially recorded as receiving a winning majority of 34 votes at Polling Station 12 in Sungai Lekop Village. He complained his votes were reduced to 24 on a subsequent data form and then reduced further to 16 during a recount. The Constitutional Court ordered KPU to present the ballot box in question and found that several ballots for Amran had been punched twice, so that his actual tally was just 11 votes. The PKS dispute involved a complaint from PDIP that a PKS candidate's votes had been inflated when polling station data was tabulated at a district level. The Court discovered an error in the recording of votes and therefore corrected the vote tally.

In Riau Province, an internal dispute occurred between rival candidates from Gerindra Party: Nyanyang Haris Pratamura and Asnah. Nyanyang complained the KPU had denied him 13 votes, leaving him with 7,521 votes, and that Asnah had received 26 additional votes, giving her a narrow victory with 7,523 votes. The Constitutional Court examined all evidence and the actual ballot tallies, finding Nyanyang's votes had been undercounted and Asnah's had been overcounted. Hence Nyanyang emerged victorious with 7,529 votes.

In West Kalimantan Province, a local KPU official was found to have violated procedures by not providing copies of DAAI forms for 19 villages. This case resulted in the Constitutional Court correcting the number of votes won by Gerindra Party candidate Hendri Makaluasc from 5,325 to 5,384 votes.

All petitioners involved in the 2019 legislative election disputes accepted the Constitutional Court's decisions without significant protests, indicating the public and electoral candidates alike trusted the Court had made evidence-based decisions.

The lawsuit from losing presidential candidate Prabowo Subianto was more challenging, not only because it involved more allegations and demands than the legislative candidates' individual lawsuits, but also because of high tensions between supporters of Jokowi and Prabowo. Upon completing the vote count, the KPU declared Jokowi had won the 2019 election by 55.5 percent to 44.5 percent. Prabowo claimed the result was illegitimate, accusing Jokowi and his team of structured, systematic and massive electoral fraud. The six allegations made by Prabowo's legal team against Jokowi were: (i) manipulation of voting results, as Prabowo believed he should have received 52 percent of votes and Jokowi 48 percent; (ii) Ma'ruf Amin, Jokowi's vice-presidential running mate, had not resigned as chairman of the Syariah Supervisory Council at two state-owned banks, Bank Syariah Mandiri and BNI Syariah, whereas by law, he should have resigned from the positions after accepting the vice-presidential nomination; (iii) campaign donations were manipulated, as Jokowi's campaign received donations of Rp19.5 billion in funds and Rp25 million in goods, whereas on April 12, 2019, Jokowi's wealth was only Rp6.1 billion; (iv) Jokowi's team and the KPU had manipulated voter data; (v) some votes and voter lists had been doubled to 22.03 million, which correlated with 'additional votes illegally given' to Jokowi-Ma'ruf; (vi) KPU's vote-counting system had been manipulated so results were invalid, and C7 forms of voter attendance in many areas were lost; and (vii) Jokowi abused his powers over the bureaucracy and state-owned enterprises to achieve his victory.

Examining the evidence provided by Prabowo's team, the Constitutional Court decided the first six claims were not supported by credible evidence and the last claim had already been handled by the Elections Supervisory Agency (Bawaslu).[64] Thus, the Court rejected the Prabowo team's lawsuit outright and declared the presidential election result legitimate. The Court also confirmed the presidential election was competitive and held freely

[64] "Disputes Over the Result of the Presidential and Vice-Presidential Election of 2019, by Prabowo et al.," The Constitutional Court of the Republic of Indonesia, accessed October 15, 2020, https://mkri.id/public/content/persidangan/putusan/putusan_mkri_5390.pdf.

and fairly without structured, systematic, and massive electoral fraud. The Court's decision was received by Prabowo and his team without significant protests. The Court's decision not only deterred unfree and unfair elections in Indonesia, but also helped to de-escalate a situation that could have caused chaos or even a coup, as Prabowo's supporters had previously staged violent riots that led to destruction of public facilities and deadly clashes with police. After the Court's decision, however, the protests ceased and Prabowo met with Jokowi for reconciliation.

Therefore, there is no doubt the Constitutional Court can deter rapid democratic backsliding or even a return to authoritarianism by preventing one of Waldner and Lust's indicators of democratic backsliding: making elections less competitive.

3.3.2. Participation

In addition to deterring rapid democratic backsliding by upholding valid election results and rejecting spurious claims of cheating, the Constitutional Court has also acted to prevent the emergence of Waldner and Lust's second indicator of democratic backsliding: limiting participation. For Waldner and Lust, limiting participation in elections is an obvious indication of regression in the quality of democracy. In this case, the Court's verdicts deterred the limitation of participation in elections.

In the 2019 simultaneous elections, the Constitutional Court prevented some 4 million Indonesians from being denied the right to vote because they lacked an electronic identity card (e-KTP). Amid concerns over the accuracy of the official electoral roll of voters, the KPU had maintained that people not on the roll could vote if they showed their e-KTP. However, not all Indonesian people have an e-KTP (which is compulsory on turning age 17 or marriage) as it can take three months to obtain the e-KTP.[65] The Constitutional Court therefore made an annulment (No. 20/PUU-XVII/2019)

[65] Ryana Umasugi, "Almost 3 Months Since Applying for e-KTP, But Still on the Waiting List," *Kompas*, published November 24, 2018, https://megapolitan.kompas.com/read/2018/11/24/06470001/-sudah-hampir-3-bulan-urus-e-ktp-masih-masuk-daftar-tunggu--?page=all.

that possession of an e-KTP was the only administrative requirement for someone to be able to vote at a polling station. The Court decided that a person could use their 'letter of statement of e-KTP' – a letter issued by the government to show that a person's e-KTP is being processed.

In 2015, the Constitutional Court issued a decision (No. 135/PUU-XIII/2015) that gave mentally disabled people right to vote. This decision resulted in 54,295 mentally disabled people being registered on the electoral roll for the 2019 simultaneous elections.[66]

The Constitutional Court's decisions are important for the development of Indonesia's democracy. By reducing some of the limitations on public participation in elections, the Court has maintained inclusiveness in terms of people who can vote. This inclusiveness saw the 2019 simultaneous elections have the highest national voter turnout in Indonesia's electoral history, namely 80.9 percent.[67]

3.3.3. Accountability

The last indicator of Waldner and Lust to analyze democratic backsliding is the regression of accountability, particularly regarding the organization authorized to hold an election. Elections can become chaotic and cause conflict when the election organizer is not neutral.

In this area, the Constitutional Court has played crucial roles through its annulments of results where fraud or procedural violations occurred, as such actions deter accountability regression of the KPU. This was evident in the Court's granting of 12 lawsuits that challenged results in the 2019 legislative elections. Most of the cases involved losses of vote tabulation forms or discrepancies in data between forms. Such intense scrutiny of electoral procedures and conduct is crucial because organizers sometimes violate

[66] "The Progressive Role of the Constitutional Court in Protecting the Voting Right of the Mentally Disabled and its Influence on Increasing Voter Participation in Elections," The Constitutional Court of the Republic of Indonesia, accessed October 15, 2020, https://www.mkri.id/public/content/infoumum/penelitian/pdf/hasilpenelitian_105_Laporan%20Penelitian%20Kompetitif%20Jember.pdf.

[67] "Indonesia Sees Record Turnout in Historic Election, Braces for Fallout," Jakarta Globe, accessed October 15, 2020, https://jakartaglobe.id/context/indonesia-sees-record-turnout-in-historic-election-braces-for-fallout.

procedures or even break the law, as seen when a KPU commissioner was jailed in 2020 for taking bribes from a PDIP politician.[68] The Constitutional Court's decisions that remedied the KPU's work can prevent the negative consequences that come from weak implementation of election management. In Papua Province's Asmat District, a disputed local election result caused a riot in which four people were shot dead in May 2019.[69] In the absence of an independent constitutional court overseeing election challenges, there is strong possibility riots could occur elsewhere if there is no avenue for appealing disputed results.

IV. CONCLUSION

This article illustrates the Constitutional Court has played a crucial role in deterring rapid backsliding of Indonesia's democracy or even in thwarting a return to authoritarianism. Through its powers to resolve disputed election results, review the constitutionality of laws, and correct state institutions, the Constitutional Court has been able to discourage unfree and non-inclusive elections, and prevent electoral violations. By doing so, the Court ensured that Indonesia did not move into Waldner and Lust's three indicators of democratic backsliding: restricting participation without explicitly abolishing the norms of universal democracy; making elections less competitive without entirely undermining electoral mechanisms; and loosening accountability by eroding the norms of punishment and answerability for electoral violations.

The presence of the Constitutional Court, which ensures that Indonesia does not move into the three indicators of democratic backsliding, answers the question of why Indonesia has not reverted to authoritarianism. Specifically, the Court functions as a safeguard to democracy by exercising powers that can prevent rapid democratic backsliding and a return to authoritarianism.

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[68] Ghina Ghaliya, "Former KPU commissioner gets six years in prison for election bribery," *The Jakarta Post*, published August 24, 2020, https://www.thejakartapost.com/news/2020/08/24/former-kpu-commissioner-gets-six-years-in-prison-for-election-bribery.html.

[69] "Riot in Protest of Local Election Result in Asmat, Four People Allegedly Shot Dead," Seputar Papua [Papuan newspaper], accessed October 15, 2020, https://seputarpapua.com/view/6985-rusuh_protes_hasil_pileg_di_asmat_empat_orang_tewas_diduga_tertembak.html.

This article has sought to contribute to the debate on Indonesia's democratic condition by explaining the conditions and the institution that have prevented Indonesia from shifting rapidly into authoritarianism. While empirical evidence has confirmed a degree of democratic erosion, Indonesia is still acknowledged as a country within the ranks of electoral democracies and is not shifting rapidly into authoritarianism. Moreover, this article complements previous research on the Constitutional Court's role amid the political fray of the post-Suharto era. In preventing Indonesia from experiencing rapid democratic backsliding, the Court has signified its presence as an 'agent of democratization'.

In showing the Constitutional Court's independence and prevention of uncompetitiveness, limited participation, and unaccountability in elections, this article has adopted Gibler and Randazzo's statistical evidence on an independent constitutional court acting as a deterrent to the likelihood of democratic backsliding. In doing so, this article has explained how the Constitutional Court prevents rapid democratic backsliding or even authoritarianism. I conclude by giving credit to the Indonesian Constitutional Court for its role in countering actions that can undermine Indonesia's democratic achievements.

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Beyond Resolution 2347 (2017): The Search for Protection of Cultural Heritage from Armed Non-State Groups

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Abstract

One expression of cultural rights is the right to enjoy cultural heritage. However, the latter is not efficiently protected in situations of armed conflict. In many cases, armed non-State groups (ANSGs) have destroyed or looted cultural heritage items. The United Nations Security Council has intervened with Resolution 2347 (2017), welcomed by many as a milestone in the international protection of cultural heritage in conflict situations. However, this Resolution presents several limitations. The protection of cultural heritage from destruction and exploitation does not appear as the main focus, but rather as a means to fight terrorist groups. The attacks against cultural heritage are considered "war crimes", but only "under certain circumstances". The Resolution encourages States "that have not yet done so to consider ratifying" treaties on the issue in question; however, these instruments are treaties drafted and ratified by States. Problems of compliance by non-State actors, as ANSGs, arise. Hence, the capacity of the Resolution to effectively protect cultural heritage in conflicts involving ANSGs is debated. This paper analyses the text of Resolution 2347 (2017), resorting to traditional means of interpretation to highlight its limitations, and considers how a general sense of the necessity to protect cultural heritage from attacks committed by ANSGs has emerged, as demonstrated by the International Criminal Court's *Al Mahdi* case. The paper then considers other ways to guarantee the protection of cultural heritage from ANSGs. A proposal for stronger protection

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of cultural heritage by States through both international humanitarian law (IHL) and international human rights law (IHRL) is presented. In particular, the connection between the protection of cultural heritage, the guarantee of cultural rights and other human rights is presented, resorting to instruments of doctrine and analyzing instruments of practice. Finally, the case for the stronger international cooperation for the protection of cultural heritage is made; problems of compliance by ANSGs may persist, but the systematic destruction of cultural heritage items can be considered a violation of cultural rights, thus requiring the cooperation of all international stakeholders.

Keywords: Cultural Heritage, Cultural Rights, International Human Rights Law, International Humanitarian Law.

I. INTRODUCTION

This paper analyzes the most significant aspects of UN Security Council Resolution 2347 (2017) (hereinafter, the Resolution). The Resolution deplores and condemns the unlawful destruction of cultural heritage. Its potential to provide effective protection, however, is impaired by some elements of the Resolution itself. In fact, the destruction of cultural heritage is not condemned because of its intrinsic disvalue, but rather as part of wider, unlawful plans; in particular, unlawful plans of terrorist groups. The potential to be a general condemnation of the acts of destruction of cultural heritage is diminished by the use of generic terms and the too frequent reference to specific terrorist groups, such as Da'esh and Al-Qaida. In this sense, it has to be noted that "terrorist groups" are just one of the several subcategories of armed non-State groups (hereinafter, ANSGs). Indeed, the term is used to refer to such a vast and heterogeneous group of entities that it is not possible to provide an accurate definition.[1] Some ANSGs have legal personality (albeit limited) such as insurgents and belligerents during an armed conflict;[2] others do not. Some of

[1] See, e.g., Wendy Pearlman and Kathleen Gallagher Cunningham, "Non-state Actors, Fragmentation, and Conflict Processes," *Journal of Conflict Resolution* 56, no. 1 (February 2012): 3–15, https://doi.org/10.1177/0022002711429669; Ulrich Schneckener, "Spoilers or Governance Actors?: Engaging Armed Non-State Groups in Areas of Limited Statehood" (SFB Governance working paper series, 21, 2009). https://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp21/index.html; Margaret S Busé, "Non-State Actors and Their Significance," *Journal of Conventional Weapons Destruction* 5, no. 3 (2001).

[2] See, e.g., Katharine Fortin, "The Law on Belligerency and Insurgency, and International Legal Personality," in *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press), accessed September 21, 2020, https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198808381.001.0001/oso-9780198808381-chapter-4.

them are bound by certain rules of international law, in particular international humanitarian law (hereinafter IHL),[3] others are not. More doubts have been expressed regarding the possibility to bind ANSGs to respect other branches of international law, including international human rights law (hereinafter, IHRL). Even the UN practice has been unclear on the topic, referring to conduct against human rights committed by ANSGs as "violations", but also as "abuses".[4] Despite this unclarity regarding both the identification of ANSGs and their obligations under international law, all ANSGs, during a conflict, can attack cultural heritage – and at times have done so.

The Resolution encourages States to adopt measures to reinforce international cooperation to protect cultural heritage; nonetheless, claims of state sovereignty were made even during the meeting in which the Resolution was voted upon. Thus, the Resolution lacks clarity. The protection of cultural heritage is strictly connected to the effective enjoyment not only of cultural rights, but also of other rights and freedoms. Therefore, the integration of IHL with IHRL should be pursued, to enhance the international cooperation among States aimed at safeguarding cultural heritage.

First, the Resolution is analyzed, resorting to the means of interpretation of UN Security Council resolutions, taking into consideration the guidelines provided by the International Court of Justice in its *Namibia* Advisory Opinion[5] and the doctrine on the topic.[6] Hence, the interpretation takes into account the

[3] International Committee of the Red Cross, "Geneva Conventions on the Law of War," August 12, 1949, 75 No. 973, United Nations Treaty Series; "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," June 8, 1977, vol. 1125 (p. 609), United Nations Treaty Series, https://treaties.un.org/doc/Publication/UNTS/Volume%201125/v1125.pdf. In particular, Common Article 3 to the Geneva Conventions regards "armed conflicts not of an international character", whereas Article 1 of the Additional Protocol II, more explicitly, regards armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

[4] In this regard, see Aristotle Constantinides, "Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council," *Human Rights & International Legal Discourse* 4, no. 1 (2010): 89–110.

[5] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (International Court of Justice June 21, 1971).

[6] Efthymios Papastavridis, "Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis," *International and Comparative Law Quarterly* 56, no. 1 (January 2007): 83–118, https://doi.

text the Resolution, the UN Charter provisions, and the previous resolutions recalled in it. The terms of the Resolution are interpreted in accordance with their ordinary meaning, considering the circumstances of its adoption, its object and purpose.

This analysis highlights both the strengths and weaknesses of the Resolution. In particular, the insufficient clarity regarding its binding or non-binding nature, and the restricted attention to one particular type of ANSGs (namely terrorist groups) are underlined. Then, the theoretical possibilities to bind ANSGs to respect cultural heritage are analyzed. As the framework for the effective protection of cultural heritage in current armed conflicts results is unclear and chaotic, and ultimately insufficient in practice, the case is made for the strengthening of international cooperation based not only on the provisions of the Resolution, but also on the rules of IHRL.

II. RESOLUTION 2347 (2017) AND THE PROTECTION OF CULTURAL HERITAGE

2.1. Resolution 2347 (2017): Strengths

The Resolution has been welcomed as a milestone in the protection of cultural heritage in case of armed conflict. The Resolution deals with one case of threat to international peace and security, whose removal constitutes one of the purposes of the United Nations (UN).[7] In fact, the fourth preambular paragraph of the Resolution reaffirms "that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed".[8] The following paragraph emphasizes:

"the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts, notably by terrorist

org/10.1093/iclq/lei151; Michael C. Wood, "Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law* 2, (1998): 73–96.

7 Article 1, "Charter of the United Nations," signed on June 26, 1945, *https://treaties.un.org/doc/Publication/UNTS/No%20Volume/Part/un_charter.pdf.*

8 Preamble, United Nations Security Council (hereinafter UNSC), Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

groups, and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States".[9]

The Resolution highlights how a threat to international peace and security can include also attacks on cultural heritage. However, no explicit reference to Chapter VII of the UN Charter is made; this unclarity leaves doubts regarding the binding or non-binding nature of the Resolution.

The looting and smuggling of cultural heritage as a means to illicitly finance terroristic activities is stressed. The Resolution highlights how the destruction of items of cultural heritage can threaten cultural diversity, exacerbate conflict and impede its end. All this considered, the Resolution declares that these attacks to cultural heritage may, under certain circumstances, constitute war crimes.[10] In the light of such considerations, a series of measures is addressed to Member States of the UN, in order to develop cooperation among States, international organizations and agencies. In fact, the Resolution

> "requests Member States to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance originating from a context of armed conflict, notably from terrorist groups, including by prohibiting cross-border trade in such illicit items".[11]

It also "urges Member States to introduce effective national measures at the legislative and operational levels"[12] and "to develop, including, upon request, with the assistance of UNODC,[13] in cooperation with UNESCO[14] and INTERPOL[15] as appropriate, broad law enforcement and judicial cooperation

9 Preamble, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
10 Par. 4, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017). See, also, UNSC, "7907th meeting", S/PV.7907 (March 24, 2017), in which it is stated: "what we are witnessing is, in many cases, war crimes. This is not just wanton pillaging and vandalism; this is a matter of international peace and security".
11 Par. 8, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
12 Par. 9, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
13 Acronym, United Nations Office on Drugs and Crime.
14 Acronym, United Nations Educational, Scientific and Cultural Organization.
15 Contraction, International Police; full name International Criminal Police Organization.

in preventing and countering all forms and aspects of trafficking in cultural property and related offences".[16] Private stakeholders should be involved as well; in fact, the Security Council "calls upon Member States (...) to consider (...) engaging museums, relevant business associations and antiquities market participants"[17] in the adoption of measures necessary to prevent and counter the trafficking of cultural properties.

The involvement of different stakeholders other than States and the request of international cooperation have been positively welcomed; in fact, as affirmed by one of the members of the Security Council, the "universalization of the international framework to protect cultural heritage is crucial".[18] Despite the positive elements contained in the Resolution, and the follow-up actions undertaken by States and stakeholders,[19] in the years following the adoption of the Resolution there has not been a dramatic decrease in the international trafficking of cultural heritage items.[20] All things considered, the Resolution has not yet had the desired results. Hence, it is useful to continue the analysis of its text, in search of possible shortcomings.

2.2. Resolution 2347 (2017): Weaknesses

The Resolution has been widely welcomed as an important step in the protection of cultural heritage in case of armed conflicts. However, this aspect does not clearly appear by reading the whole text of the Resolution. The destruction of cultural heritage in the event of armed conflict is condemned several times; however, the Security Council does not focus on the destruction of cultural heritage *per se*. Rather, it appears that the

[16] Par. 11, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
[17] Par. 17 (g), UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
[18] UNSC, "7907th meeting", S/PV.7907 (March 24, 2017).
[19] See, e.g., INTERPOL, "Protecting Cultural Heritage through Interagency Cooperation. WIESBADEN, Germany – International Experts on the Illicit Trade of Cultural Property Have Met to Boost Interagency Cooperation Both at the National and International Level," September 23, 2019, https://www.interpol.int/News-and-Events/News/2019/Protecting-cultural-heritage-through-interagency-cooperation.
[20] INTERPOL, "The Issues - Cultural Property," accessed October 20, 2020, https://www.interpol.int/Crimes/Cultural-heritage-crime/The-issues-cultural-property. It has to be noted, however, that since it is an illicit trade, it is not possible to know the exact number of items involved and the monetary value of the trade.

Resolution, through the declaration of the unlawfulness of the destruction of cultural heritage, condemns the acts of ANSGs primarily, terrorist groups in particular. In fact, the Security Council notes "with grave concern the involvement of non-state actors, notably terrorist groups, in the destruction of cultural heritage".[21] It has to be noted that the Resolution refers to "non-state actors", which is a general term used to refer to entities that are not States but are relevant in the international scenario.[22] However, interpreting the provision as a whole, it is clear that it refers to ANSGs, as it discusses terrorist groups and the destruction of cultural heritage during armed conflicts. Once clarified that the Resolution discusses, in particular, the problem of ANSGs, the interpretation of this term in accordance with its ordinary meaning remains difficult. In fact, the term ANSGs refers to such a wide and heterogeneous list of entities that there is not a precise and commonly accepted definition. To show the difficulty in defining these entities, it is sufficient to recall one of the many attempts: ANSGs are "organizations with less than full international recognition as a government, who employ a military strategy".[23]

Thus, the term and its synonyms have been used to refer to a variety of actors, from insurgents, to militias, rebel groups, national liberation movements, warlords.[24] Terrorist groups, multiple times recalled in the Resolution, are just one of the many sub-categories constituting ANSGs; in particular, these are the groups that resort to violent means to spread terror in such a pervasive way that their means define their nature.[25] In

[21] Preamble, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

[22] See International Law Association, "Johannesburg Conference on Non State Actors" (Report of Conferences, International Law Association, 2016); Graham Evans and Jeffrey Newnham, *The Penguin Dictionary of International Relations* (Penguin Group USA, 1998); Florence Gaub, "State Vacuums and Non-State Actors in the Middle East and North Africa," in *The Frailty of Authority Borders, Non-State Actors and Power Vacuums in a Changing Middle East*, ed. Lorenzo Kamel (Roma: Edizioni Nuova cultura, 2017), 51–66.

[23] Busé, "Non-State Actors and Their Significance."

[24] See, example, Annyssa Bellal, "What Are 'Armed Non-State Actors'? A Legal and Semantic Approach," in *International Humanitarian Law and Non-State Actors*, ed. Ezequiel Heffes, Marcos D. Kotlik, and Manuel J. Ventura (The Hague: T.M.C. Asser Press, 2020), 21–46, https://doi.org/10.1007/978-94-6265-339-9_2; Richard H. Shultz, Douglas Farah, and Itamara V. Lochard, "Armed Groups: A Tier-One Security Priority" (INSS Occasional Paper , USAF Institute for National Security Studies, 2004); Brian McQuinn and Fabio Oliva, "Preliminary Scoping Report - Analyzing and Engaging Non-State Armed Groups in the Field" (United Nations System Staff College, n.d.).

[25] See Shultz, Farah, and Lochard, "Armed Groups."

this sense, it is useful to recall the IHL definition of acts of terrorism: "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".[26] It has to be noted, however, that also other types of ANSGs can resort – and have resorted – to terroristic means;[27] therefore, the identification of a terrorist group is particularly complex. However, the Resolution just mentions other "non-state actors" involved in armed conflicts[28] and then focuses on terrorist groups only. Doing so, the Resolution does not duly consider several other types of ANSGs, which are equally involved in armed conflicts and the destruction and exploitation of cultural heritage.

Not only, the Resolution does not refer to terrorist groups in general, but Al-Qaida and Da'esh in particular.[29] Like the majority of UN Security Council resolutions, the Resolution is not self-contained, and in fact, it refers to several previous resolutions; thus, they have to be taken into consideration during interpretation.[30] The Security Council "encourages Member States to propose listings of ISIL, Al-Qaida and associated individuals, groups, undertakings and entities involved in the illicit trade in cultural property to be considered by the 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee".[31] These resolutions establish a sanction regime based on lists

[26] "Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)."

[27] See Schneckener, "Spoilers or Governance Actors?"

[28] Preamble, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

[29] The Security Council noted "with concern that the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities are generating income from engaging directly or indirectly in the illegal excavation and in the looting and smuggling of cultural property", recalled its condemnation "of any engagement in direct or indirect trade involving ISIL, Al-Nusra Front (ANF) and all other individuals, groups, undertakings and entities associated with Al-Qaida" and condemned in particular the activities of looting and pillage "committed by ISIL, Al-Qaida and associated individuals, groups, undertakings and entities". The strongest reference to these particular situations can be found in paragraph 8, which states that "in particular items illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, and recalls in this regard that States shall ensure that no funds, other financial assets or other economic resources are made available, directly or indirectly, by their nationals or persons within their territory for the benefit of ISIL and individuals, groups, entities or undertakings associated with ISIL or Al-Qaida in accordance with relevant Resolutions". UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

[30] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971; Wood, "Interpretation of Security Council Resolutions."

[31] Par. 10, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

of individuals and entities associated with these two ANSGs; consequently, the simple unlawful trafficking in cultural heritage is not enough to be listed, as the subjects involved in illicit trade in cultural property must also be associated with ISIL or Al-Qaida. It appears, again, that the protection of cultural heritage is functional to the wider fight against terrorism, in particular against a few specific terrorist groups.

The link between attacks on cultural heritage in armed conflicts and these groups is thus twofold. On a practical level, the trafficking of cultural heritage items provides illicit financing for their activities; on a more theoretical level, their destruction can demoralize a people, constituting an advantage during a conflict. However, after reading the Resolution, taking into consideration also the previous resolutions mentioned in its Preamble,[32] its main topic appears to be the fight against terrorism, which "constitutes one of the most serious threats to international peace and security".[33] The destruction of cultural heritage is condemned because its smuggling and looting is an illicit way to finance terrorism; the fact that it can consist of a violation of human rights in itself is not duly highlighted.[34]

The Resolution mostly consists of generic provisions. Cooperation among UN Member States and the relevant UN entities aimed at preventing the illicit trafficking of cultural heritage is encouraged; however, States are generally asked to "take appropriate steps", "take preventive measures", and "introduce effective national measures" to safeguard their cultural heritage.[35] Out of 23 paragraphs, only paragraph 17 presents a list of specific concrete actions that should be undertaken, e.g., establishing national archives of cultural heritage and databases and contributing to the INTERPOL Database

[32] The resolutions recalled are 1267 (1999), 1373 (2001), 1483 (2003), 1546 (2004), 2056 (2012), 2071 (2012), 2085 (2012), 2100 (2013), 2139 (2014), 2170 (2014), 2195 (2014), 2199 (2015), 2249 (2015), 2253 (2015) and 2322 (2016), as well as its Presidential Statement S/PRST/2012/26; Preamble, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017). On the necessity to read and connect multiple resolutions in order to understand them, see Wood, "Interpretation of Security Council Resolutions."

[33] Preamble, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

[34] Kristin Hausler, "Cultural Heritage and the Security Council: Why Resolution 2347 Matters," *QIL–Question of International Law. QIL, Zoom-In* 48 (2018): 5–19.

[35] Parr. 8, 9, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

of Stolen Works of Art – while recalling, again, that the illegal trafficking of cultural property is caused "notably by terrorist groups".[36]

The majority of these measures are not binding. The Security Council "invites", "encourages", and "urges" in most of the paragraphs of the Resolution. Paragraph 19 of the Resolution presents the possibility to entrust to peacekeeping operations the protection of cultural heritage; even though enthusiastically acclaimed as a step forward in international protection of cultural heritage, this paragraph is quite limited. In fact, it

> "affirms that the mandate of United Nations peacekeeping operations, *when specifically mandated by the Security Council* and *in accordance with their rules of engagement*, may encompass, *as appropriate*, assisting relevant authorities, *upon their request*, in the protection of cultural heritage from destruction" (emphasis added).[37]

Considering also how no reference is made to Chapter VII of the UN Charter, even though the Resolution states multiple times that it is dealing with a threat to international peace and security, the measures adopted appear neither particularly precise, nor explicitly binding.

The praised protection of cultural heritage appears weak and the Resolution unclear. Analyzing the meeting records as an interpretation tool,[38] the purpose of providing stronger international protection to cultural heritage through international cooperation seems narrowed by claims to respect state sovereignty. During the meeting which led to the adoption of the Resolution, in fact, it was affirmed:

> "the key role is to be played by each individual State in the protection of its own cultural heritage. Efforts to protect cultural heritage during armed conflict must respect the provisions of the Charter of the United Nations and be pursued strictly in line with international law. The importance of respecting a state's sovereignty is also key, as is respect for the principle of non-interference in the internal affairs of States".[39]

[36] Par. 17, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
[37] Par. 19, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).
[38] See Papastavridis, "Interpretation of Security Council Resolutions."
[39] UNSC, "7907th meeting", S/PV.7907 (March 24, 2017).

The generalized claims to national sovereignty,[40] typical of the current international scene, affects also cultural heritage. In fact, "a number of cultural heritage issues lie within the core of State sovereignty and refer to the defense of statehood in the global world against real and imagined threats to cultural State identity."[41]

III. ANSGs AND SHORTCOMINGS IN CULTURAL HERITAGE PROTECTION IN ANSAs PERSPECTIVE

3.1. The Hague Convention, the Second Protocol of 1999 and their Deficiencies

Resolution 2347 (2017) contains a series of provisions addressed to States in order to more effectively protect cultural heritage in case of armed conflicts. However, even these measures have severe shortcomings, related in particular to the nature of current conflicts. In fact, in 2018, 51 non-international armed conflicts took place, while the international ones were only 18;[42] 4 new non-international armed conflicts broke out.[43] The diffusion of non-international armed conflict is significant also for another aspect; as these conflicts involve at least one dissident armed force or other organized armed groups, ANSGs are included in the majority of current conflicts. Their relevance in the protection of cultural heritage, therefore, must not be underestimated.

The Resolution "encourages the Member States that have not yet done so to consider ratifying the Convention for the Protection of Cultural

[40] See Paul B. Richardson, "Sovereignty, the Hyperreal, and 'Taking Back Control,'" *Annals of the American Association of Geographers* 109, no. 6 (November 2, 2019): 1999–2015, https://doi.org/10.1080/24694452.2019.1587283; Macer Hall, "Boris Johnson Urges Brits to Vote Brexit to 'Take Back Control,'" *Daily Express*, June 20, 2016, https://www.express.co.uk/news/politics/681706/Boris-Johnson-vote-Brexit-take-back-control; Satur Ocampo, "Duterte's Odd Defense of Philippine Sovereignty," *Bulatlat*, April 22, 2018, https://www.bulatlat.com/2018/04/22/dutertes-odd-defense-philippine-sovereignty/; Will Pavia, "Amazon Rainforest Belongs to Brasil Not Mankind, Bolsonaro Tells UN," *The Times*, September 25, 2019, https://www.thetimes.co.uk/article/amazon-rainforest-belongs-to-brazil-not-mankind-bolsonaro-tells-un-2j2f55l2j.

[41] Andrzej Jakubowski, "Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level," *Questions of International Law* 48 (2018): 21–44.

[42] Alessandro Mario Amoroso *et al.*, "The War Report: Armed Conflicts in 2018" (A Paper, Geneva Academy of International Humanitarian Law and Human Rights, 2019).

[43] Amoroso, "The War Report."

Property in the Event of Armed Conflict of 14 May 1954 and its Protocols, as well as other relevant international conventions".[44] This request presents critical issues, besides the scarce number of ratifications and accessions following the Resolution (in particular, the Second Protocol currently has only 82 State Parties).[45] First, the Resolution encourages ratification of the Convention, which was adopted in 1954. This temporal element is significant, as the characteristics of warfare of that period are very different from the ones of modern conflicts. In the 1950s, wars were perceived as events between States only, thus of international nature. World War II was an event of recent history.[46] The provisions of the Hague Convention, therefore, are principally meant to apply in times of international conflicts.[47]

Article 19 of the Hague Convention provides for the application of the Convention in case of armed conflicts not of an international character;[48] however, no definition of this type of conflict is provided, leaving ample space for interpretation.[49] It has been stated that "non-international

[44] Par. 7, UNSC, Res. 2347, U.N. Doc.S/RES/2347 (March 24, 2017).

[45] After the Resolution, 5 States have ratified and accessed the Hague Convention, bringing the number of State Parties to 133. 5 States have accessed and ratified the First Protocol as well, bringing the number of State Parties to 110, whereas 10 States have accessed and ratified the Second Protocol, which now has 82 State Parties. Lists available at unesco.org, last accessed October 27, 2019. Moreover, considering recent events, it is important to underline that neither Syria nor Iraq are Parties to the second Protocol, and Afghanistan's accession occurred in 2018. Despite the follow-up actions undertaken by international agencies and other stakeholders, States have not been equally receptive.

[46] Reference to the events occurred in the first part of the 19th Century can be found already in the Preamble of the Hague Convention: "The High Contracting Parties, recognizing that cultural property has suffered grave damage during recent armed conflicts (...)". "Convention for the Protection of Cultural Property in the Event of Armed Conflict", signed on May 14, 1954, *United Nations Treaty Series* no. 249, 215, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280145bac.

[47] The priority given to international conflicts appears, e.g., in Article 18, "Application of the Convention", which states that: "1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them. 2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Art. 18, "Convention for the Protection of Cultural Property in the Event of Armed Conflict", signed on May 14, 1954, *United Nations Treaty Series* no. 249, 215.

[48] "In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property". Art. 19.1, "Convention for the Protection of Cultural Property in the Event of Armed Conflict", signed on May 14, 1954, *United Nations Treaty Series* no. 249, 215.

[49] It has been noted that vagueness itself has been considered a characteristic of the Hague Convention, to the detriment of the efficacy of its provisions. See Eric A. Posner, "The International Protection of Cultural Property: Some Skeptical Observations," *Chicago Journal of International Law* 8, no. 1 (n.d.): 213–32.

armed conflicts are distinct from international armed conflicts on the one hand (...) and internal disturbances and tensions on the other",[50] thus implying a minimum threshold to be reached. The difference with internal tensions has been pinpointed also in commentaries on Common Article 3 (hereinafter CA3) to the Geneva Conventions, and confirmed in Article 1.2 of the Additional Protocol II to the Geneva Conventions (hereinafter APII); differences in the elements necessary to identify such conflicts can be found also in the principal instruments of IHL. However, the Commentary of the International Committee of the Red Cross (hereinafter ICRC) of 2016 on CA3 highlights how this Article and the APII have different material fields of application. Paragraph 394 of this Commentary, in fact, reads that "it is widely accepted that non-international armed conflicts in the sense of CA3 also comprise armed conflicts in which no State party is involved",[51] whereas "Additional Protocol II does not apply to such conflicts".[52] Given these unclarities and gaps, Article 19 of the Hague Convention cannot be considered as an effective safeguard of cultural heritage in case of non-international armed conflicts, as its material field of application is unclear.

The Resolution, however, refers also to the Protocols to the Hague Conventions. The Second Protocol to the Hague Convention is particularly interesting, as it was opened to ratification in 1999, after the events occurred during the conflict in the former Yugoslavia, aiming to update the provisions of the Hague Convention to modern conflicts.[53] However, in the Protocol of

[50] Dieter Fleck, *The Handbook of International Humanitarian Law* (Oxford and New York: Oxford University Press, 2013).

[51] International Committee of the Red Cross (Hereinafter ICRC), "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary of 2016. Article 3: Conflicts not of an international character," International Committee of the Red Cross, accessed August 22, 2020, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC. Such position is confirmed also by the Statute of International Criminal Court, which considers armed conflicts not of an international nature those conflicts in which "there is protracted armed conflict between governmental authorities and organized armed groups or between such groups", Art. 8, "Rome Statute of the International Criminal Court", signed on July 17, 1998, *United Nations Treaty Series*, vol. 2187, No. 38544.

[52] ICRC, "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary of 2016. Article 3: Conflicts not of an international character," International Committee of the Red Cross, accessed August 22, 2020, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC.

[53] See Art. 22 "Second Protocol the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict", signed on March 26, 1999, United Nations Treaty Series no. 2253, 172, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800076dd2. In particular, Art. 22.2 is identical to Art. 1.1 of the Additional

1999, the unclarity regarding the wording "conflicts not of an international character" still persists. Article 22 of this instrument states that it "shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties" and specifies that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature". Surely, this corresponds with APII; however, no definition of what does constitute a non-international armed conflict in given.

3.2. ANSGs and Conventional Law: Ineffective Safeguard

The Hague Convention and its Second Protocol are conventional instruments. They are binding on the State Parties; however, in the current scenario it is of particular importance to assess whether they are binding for ANSGs as well or not. Article 19 of the Hague Convention states that "each party to the conflict shall be bound to apply"[54] the provisions of the Convention itself related to cultural property. Since "party" is written without the capital "P", it is suggested that it refers not only to States but also to the ANSGs taking part in the conflict, eventually binding the latter as well.[55] Also, the Second Protocol uses both the terms "party" and "Party". However, an interpretation in the light of the object and the purpose of the treaty[56] leads to the application of the provisions of the Second Protocol to States and ANSGs.[57]

This expansion of the recipients of the Convention would ensure a stronger protection of cultural heritage; ANSGs, however, are often not

Protocol II to the Geneva Conventions, thus excluding situations of internal disturbances and tensions, isolated and sporadic acts of violence from the scope of application. The definition of internal conflict by exclusion of certain situations is, therefore, the same. The threshold to be reached to apply the Second Protocol, therefore, is the same required to apply the rules of IHL.

54 Article 19, "Convention for the Protection of Cultural Property in the Event of Armed Conflict," signed on May 14, 1954, *United Nations Treaty Series* no. 249, 215.

55 Patty Gerstenblith, "Beyond the 1954 Hague Convention," in *Cultural Awareness in the Military: Developments and Implications for Future Humanitarian Cooperation* (Springer, 2014), 83–99.

56 Art. 32(b), "Vienna Convention on the Law of Treaties", opened for signature May 23, 1969, *United Nations Treaty Series* no. 1155, https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf

57 Jean-Marie Henckaerts, "The Protection of Cultural Property in Non-International Armed Conflicts," in *Protecting Cultural Property in Armed Conflict*, ed. Nout van Woudenberg and Liesbeth Lijnzaad, International Humanitarian Law Series, v. 29 (Leiden; Boston: Martinus Nijhoff Publishers, 2010), 81–93.

keen to comply with the obligations of conventional provisions. Problems of compliance lie in the perceived injustice, for ANSGs, to be bound by conventional rules they had no part in the elaboration of, and to respect conventions ratified by the State they are fighting against. It has been noted, in fact, that "ANSAs [Armed Non-State Actors] perceive the international legal system as biased and privileging States".[58]

Different theories have been proposed to apply conventional instruments of international law to ANSGs. The two main theories which provide a legal basis are the so-called effective sovereignty argument and the domestic legislative jurisdiction argument. However, these theories are not generally accepted. It has been argued, in fact, that these arguments do not take into appropriate consideration the strong contrast between ANSGs and States, which consider themselves as opponents, and the qualitative difference between an ANSG and the sum of its members. The effective sovereignty argument claims that ANSGs are obliged to respect international obligations derived from conventional instruments ratified or accessed by the State they are fighting against, as a successor State would do. The domestic legislative jurisdiction argument claims that an international treaty, binding a State, is necessarily binding for its nationals as well. The criticisms regard the fact that the former takes for granted the fact that the ANSG claims to represent the State, which is not always the case; the latter does not consider that an ANSG might be comprised also by persons who are not nationals of the State the ANSG is fighting against. Given these considerations, the application to ANSGs of the conventional instruments which are binding for the State in which they are located is not generally accepted, and problems of compliance to the conventionally established rules persist.

All that considered, it appears that the ratification of the Hague Convention and its Protocols, encouraged in Resolution 2347 (2017), is

[58] Ashley Jackson, "In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action," (Geneva: Geneva Call, May 2 https://www.genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf.016),

surely aimed at involving more strongly Member States of the UN in the protection of cultural heritage in the event of armed conflict, but is not probably sufficient. The protection offered by conventional instruments recalled in Resolution 2347 (2017) cannot currently be considered as an effective means to protect cultural heritage in any conflict. In particular, these have strong problems of compliance regarding their respect by the ANSGs. The involvement of States in the protection of cultural heritage from the attacks that may occur during armed conflicts is therefore necessary. It is the "primary responsibility of States to protect their cultural property"[59] and "failure to achieve that goal is the result not of a lack of existing international instruments, but rather of States' will to abide by their commitments and obligations",[60] which include not only rules of IHL, but also of IHRL.

IV. PROTECTING CULTURAL HERITAGE THROUGH THE INTEGRATION OF IHL AND IHRL

4.1. The Link between Cultural Heritage and Cultural Rights

It is true that Rule 38 of the customary IHL rules studied by the ICRC establishes that "[e]ach party to the conflict must respect cultural property. [...] Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity",[61] thus binding both States and ANSGs. Despite these customary and conventional provisions, cultural heritage is still looted and destroyed. IHL rules alone cannot provide the most effective protection to cultural heritage in case of current armed conflicts. It is therefore suggested to supplement IHL with IHRL to afford a stronger protection, as the respect by States of IHRL has acquired, since the end of World War II, such a general recognition that some provisions of the Universal Declaration of

[59] UNSC, "7907th meeting", S/PV.7907 (March 24, 2017).
[60] UNSC, "7907th meeting", S/PV.7907 (March 24, 2017).
[61] International Committee of the Red Cross, "Rule 38. Attacks Against Cultural Property," *IHL Database. Customary IHL* (blog), accessed October 23, 2020, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule38.

Human Rights, the milestone in the codification of human rights, are nowadays considered customary law.[62]

Cultural heritage is strongly linked to human rights, cultural rights in particular; indeed, it can be considered as a necessary means for their realization, as those include the right to enjoy and participate in cultural life. Moreover, cultural rights are key components for the fulfillment of other human rights; the protection of cultural heritage, therefore, is an important resource to guarantee their effective enjoyment.

Cultural heritage can be broadly defined as the *corpus* of material signs, proofs of the history and culture of a certain community, handed on by the past, whose value is so significant that it must be considered fundamental for the whole mankind. Tangible cultural heritage refers to those items (such as, but not only, monuments) of outstanding universal value,[63] whose deterioration impoverishes the heritage of all nations of the world.[64] Intangible cultural heritage has recently been recognized[65] and consists in the practices, representations, knowledge and skills recognized as part of cultural heritage by a community.[66]

Cultural rights are mentioned in different instruments. Article 27 of the Universal Declaration of Human Rights (UDHR) enshrines the right of everyone to "participate in the cultural life of the community".[67] The Preamble of the International Covenant on Economic, Social and Cultural

[62] Hurst Hannum, "The UDHR in National and International Law," *Health and Human Rights* 3, no. 2 (1998): 144–158, https://doi.org/10.2307/4065305.

[63] Art. 1, "Convention Concerning the Protection of the World Cultural and Natural Heritage", opened for signature November 16, 1972, *United Nations Treaty Series* no. 1037, p. 151, https://treaties.un.org/doc/Publication/UNTS/Volume%201037/volume-1037-I-15511-English.pdf.

[64] Preamble, "Convention Concerning the Protection of the World Cultural and Natural Heritage", signed on November 16, 1972, *United Nations Treaty Series* no. 1037, p. 151, https://treaties.un.org/doc/Publication/UNTS/Volume%201037/volume-1037-I-15511-English.pdf.

[65] The chronological distance between the global recognition of tangible and intangible cultural heritage is evidenced, first, by the gap of several decades between the two conventions protecting them. The former, in fact, is enshrined in the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, whereas the latter is recognized in the UNESCO "Convention for the Safeguarding of the Intangible Cultural Heritage" of 2003.

[66] Art. 1, "Convention for the Safeguarding of the Intangible Cultural Heritage," opened for signature October 17, 2003, *United Nations Treaty Series* no. 2368, 3, https://treaties.un.org/doc/Publication/UNTS/Volume%202368/v2368.pdf.

[67] Art. 27.1, United Nations, *Charter of the United Nations*, signed on 24 October 1945.

Rights (hereinafter, ICESCR) recognizes that freedom of human beings can be achieved only if everyone can enjoy economic, social and *cultural* rights (emphasis added).[68] Article 15 of the same Covenant recognizes the right of everyone to "take part in cultural life"[69] and the necessity of "the conservation, the development and the diffusion of science and culture"[70] in order to "achieve the full realization of this right".[71] More recently, General Comment No. 21 (2009) of the Committee on Economic, Social and Cultural Rights has underlined how the right of everyone to participate in cultural life is the basis for the enjoyment of the other cultural rights of the ICESCR. The same general comment mentions that, in order to ensure the right to take part in cultural life, the access to cultural goods and their preservation are required. Cultural life has been defined in the same document as a "broad, inclusive concept encompassing all manifestations of human existence", characterized by a dynamic nature as it is a "living process (...) with a past, a present and a future", created by the interactions of individuals and communities.[72] In the General Comment, a definition of "to take part" has been provided as well. This right is divided into three main components: participation in, access to and contribution to cultural life. In particular, "access to" is defined as "the particular right of everyone (...) to know and understand his or her own culture and that of others through education and information (...) and to benefit from the cultural heritage and the creation of other individuals and communities".[73]

[68] Preamble, "International Covenant on Economic, Social and Cultural Rights," opened for signature December 16, 1966, *United Nations Treaty Series* no. 993, 3, https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf.

[69] Art. 15.1.a, "International Covenant on Economic, Social and Cultural Rights," opened for signature December 16, 1966, *United Nations Treaty Series* no. 993, 3, https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf.

[70] Art. 15.2., "International Covenant on Economic, Social and Cultural Rights," opened for signature December 16, 1966, *United Nations Treaty Series* no. 993, 3, https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf.

[71] Art. 15.2., "International Covenant on Economic, Social and Cultural Rights," opened for signature December 16, 1966, *United Nations Treaty Series* no. 993, 3, https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf.

[72] Committee on Economic, Social and Cultural Rights, "General Comment No. 21 Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)" (United Nations Economic and Social Council, December 21, 2009).

[73] Committee on Economic, Social and Cultural Rights.

Thus, the preservation of both tangible and intangible cultural heritage appears necessary to guarantee the respect of cultural rights, as the possibility to enjoy and participate in cultural life, its availability and accessibility, which are vital components of cultural rights, can be severely impaired by the destruction of cultural heritage, both tangible and intangible. Intangible cultural heritage has a constantly changing nature, as it is actively transformed by people who enjoy it, inheriting it from ancestors and transmitting it to future generations; the destruction of intangible cultural heritage, therefore, constitutes a serious threat to the enjoyment and participation in cultural life, protected by cultural heritage. Tangible cultural heritage is strictly linked to cultural rights as well. In fact, preservation of cultural items allows participation in cultural life, which is part of cultural rights; the relationship between the enjoyment of these rights and cultural heritage has already been recognized in internationally adopted instruments, such as in the already mentioned Article 15.2 of the ICESCR. Moreover, cultural heritage – both tangible and intangible – has a symbolic nature. Its protection positively influences cultural diversity and cultural identity, guaranteed as cultural rights.

The protection of cultural heritage, therefore, is necessary to ensure the enjoyment of cultural rights, since the possibility to benefit from intangible and tangible cultural heritage integrates the right to participate in cultural life and to benefit from culture and arts. On the other hand, its destruction can be considered an indirect violation of cultural rights.

4.2. The Italian Experience in Constitutional Protection of Cultural Heritage and Cultural Rights in Non-Conflictual Contexts

The strict link between cultural heritage, human rights and individual and collective conscienceof a nation has been reaffirmed also outside of conflictual situations. In this sense, it is useful to recall the protection of cultural heritage guaranteed, in Italy, at the constitutional level. Indeed, Article 9 of the Italian Constitution not only promotes culture and scientific and technological research, but also "safeguards natural landscape and the

historical and artistic heritage of the Nation".[74] This provision is one of the fundamental principles of the Constitution, thus is considered central in the Italian legal system. In fact, it has been recognized that being heirs of a vast cultural heritage is an integral part of the collective national conscience (and, in fact, the article refers to the heritage of the "Nation"). As the former president of the Italian Republic, Ciampi, said,

> "It is in our artistic heritage, in our language, in the Italian creativity that the heart of our identity resides [...]. The 'Italy' inside each one of us is expressed in the humanistic culture, figurative art, music, architecture, poetry and literature of a single people."[75]

The primary role of the protection of cultural heritage has been affirmed also by the Italian Constitutional Court. In sentence 151/86 of 1986, the Court explicitly declared the primacy of the aesthetic-cultural value, which cannot be subordinate to any other since, due to Article 9 of the Constitution, it acquires a primary role. Thus, economic reasons cannot prevail, but rather the aim of protecting the cultural heritage should be the basis of decisions of an economic nature.[76]

The protection of cultural heritage is disciplined also in another article of the Italian Constitution, in particular in Article 117. The latter, reformed in 2001, establishes the distribution of competences between the State and the Regions and, in particular, declares that "the State has exclusive legislative powers in [...] protection of [...] cultural heritage", whereas "concurring legislation applies to [...] enhancement of cultural and environmental properties, including the promotion and organization of cultural activities".[77] The discipline is complemented by the Code of Cultural

[74] Art. 9, "Constitution of the Italian Republic", 1948. Discussing the protection of cultural heritage in case of armed conflicts, it has to be recalled that the Italian Constitution was drafted in the immediate aftermath of World War II. Even in a post-war scenario, the Constituent Assembly thought it was necessary to enshrine the protection of landscape and cultural heritage, elements facilitating the unification of the Italian people (it should be remembered that Italy was unified less than a century earlier).

[75] Carlo Azeglio Ciampi, Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d'oro ai benemeriti della cultura e dell'arte [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the delivery of the Gold Medals for Culture and Arts merit], May 5, 2003.

[76] Corte Costituzionale Italiana [Italian Constitutional Court], Sent. 151/86 A. Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality], No. 151/1986 (June 27, 1986).

[77] Art. 117, "Constitution of the Italian Republic", 1948.

Heritage and Landscape, which provides a more specific regulation of the subject. However, the shared competence between the State and the Regions has raised doubts regarding the distribution of competences. Addressing the issue, the Constitutional Court reiterated the unifying value of cultural heritage. In particular, the Court compared the protection of cultural heritage with the protection of the environment, as both are regulated by the Article 117.3(s) of the Italian Constitution. In this sense, it stated that like the protection of the environment, the protection of cultural heritage is a task, and in its exercise the State has the power to establish uniform standards of protection, valid in all the Regions and "non-derogable".[78]

Also, in its sentence 194/2013, the Court referred to Article 1.2 of the Code of Cultural Heritage and Landscape, which declares that "the protection and enhancement of cultural heritage contributes to the preservation of the collective national memory and its territory and to promote the development of culture".[79] For the Court, this article implies that, on one hand, cultural heritage is an intrinsically common heritage, thus it cannot be arbitrarily divided; and, on the other hand, that it is by nature varied and mutable.[80] In conclusion, the Court declared that to identify, conserve and protect cultural heritage it is necessary for these actions to be unitarily exercised. Hence, this competence has to be given to the State, whereas the Regions have competence in disciplining the enhancement and fruition of cultural heritage.[81] Therefore, even though protection and valorization are connected issues, the former is given to the State, in order to provide the most adequate procedures to protect cultural heritage and a protection policy that considers Italian cultural heritage's role in unifying the Italian people.

[78] Corte Costituzionale Italiana [Italian Constitutional Court], Sent. 232/2005. Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality], No. 232/2005 (June 16, 2005).

[79] Italian Republic, Article 1.2, D. Lgs. 42/2004. Cultural Heritage and Landscape Code (Codice dei beni culturali e del paesaggio), Article 1.2, Legislative Decree No 42 of 2004 on Official Gazette of the Italian Republic No 45 of 2004, translated by the Author.

[80] Corte Costituzionale Italiana [Italian Constitutional Court], Sent. 194/2013 Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality] (July 17, 2013).

[81] Corte Costituzionale Italiana.

In the complex issue of the distribution of competences within the Italian legal system, the individuation of cultural heritage items and their protection is left primarily to the State, whereas specific and detailed regulations are given to Regions. Hence, the discipline implements Article 9 of the Constitution, taking also into consideration how an adequate protection of cultural heritage allows not only the enjoyment of cultural rights, but also the complete development of a collective national identity.

4.3. The Destruction of Cultural Heritage as an Attack on Human Rights and Human Dignity

The destruction of cultural heritage undermines the possibility to effectively enjoy cultural rights, in particular the right to participate in cultural life and to enjoy culture. The undermining of these rights should not be underestimated. Even though cultural rights, together with economic and social rights, have long been considered as less necessary than civil and political rights,[82] it has been recognized that they are all components of the wider category of "human rights". Moreover, it has been affirmed that, even though this category can be divided into different subcategories, is cohesive and homogeneous. Cultural rights, therefore, are not independent from neither economic and social rights, nor from civil and political ones and *vice versa*.[83] Economic, social cultural rights were already included in the UDHR. Also, the absence of a hierarchy among the different categories of human rights was declared in 1993, in the Vienna Declaration and Programme of Action of the World Conference on Human Rights, which states that "all human rights are universal, indivisible, and interdependent and interrelated"[84] and – more explicitly – that "the international community

[82] This is due also to the attitude towards them of some governments, which has so been described: "certain governments' challenges to economic and social rights, as well as some countries' ambivalence towards them". Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context* (Oxford: Oxford University Press, 2000).

[83] See Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 33*, Geneva, 2008, https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf.

[84] World Conference on Human Rights, "Vienna Declaration and Programme of Action," adopted June 25, 1993, https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf. The relation between the destruction of cultural heritage and the undermining of human rights is clearly stated in several reports of the Special Rapporteurs in the field of Cultural Rights and in the field of Human Rights, as well as in Resolutions of the Human Rights Council. The latter has repeatedly affirmed the position that "cultural rights are an integral part of human rights,

must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[85] This declaration is not surprising, since cultural rights (including the enjoyment and participation to cultural life, which is effective only allowing the enjoyment of cultural heritage) have significant effects on different human rights, such as the freedom of expression, thought, opinion and religion.[86]

Second, it has been emphasized how the destruction of cultural heritage serves the purpose of facilitating the consolidation of "monolithic world views" and the "enmity toward 'the other'", threatening the principle of equality, which is at the base of the enjoyment of all the human rights. In fact, artistic freedom – which results in the protection of cultural heritage from destruction – includes "the right to freedom of opinion, and freedom of thought, conscience and religion, as art is also a means of expressing a belief".[87] Thus, "the implementation of human rights must take into consideration respect for cultural rights".[88] In fact, the latter "are a key to the overall implementation of universal human rights",[89] as they provide "important opportunities for the realization of other human rights",[90] in particular of "the rights to freedom of opinion and expression, freedom of thought, conscience and religion, as well as the economic rights of the people who earn a living through tourism related to such heritage, the right to education and the right to development".[91] The relation between cultural

which are universal, indivisible, interrelated and interdependent"; United Nations Human Rights Council, 25th session, "Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity" (UN Doc, April 15, 2004), U.N. Doc. A/HRC/RES/25/19, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/136/10/PDF/G1413610.pdf?OpenElement.

85 World Conference on Human Rights, "Vienna Declaration and Programme of Action", adopted June 25, 1993, https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf.

86 Freedoms enshrined in the articles 18 and 19 of the International Covenant on Economic, Social and Cultural Rights.

87 Human Rights Council, 34th session, "Report of the Special Rapporteur in the field of cultural rights," January 16, 2017, U.N. Doc. A/HRC/34/56, https://undocs.org/en/A/HRC/34/56.

88 Par. 46, Human Rights Council, 34th session, "Report of the Special Rapporteur in the field of cultural rights," January 16, 2017, U.N. Doc. A/HRC/34/56, https://undocs.org/en/A/HRC/34/56.

89 Par. 5, Human Rights Council, 31st session, "Report of the Special Rapporteur in the field of cultural rights," February 3, 2016, U.N. Doc. A/HRC/31/59, https://undocs.org/A/HRC/31/59.

90 Par. 5, Human Rights Council, 31st session, "Report of the Special Rapporteur in the field of cultural rights," February 3, 2016, U.N. Doc. A/HRC/31/59, https://undocs.org/A/HRC/31/59.

91 Par. 51, Human Rights Council, 31st session, "Report of the Special Rapporteur in the field of cultural rights," February 3, 2016, U.N. Doc. A/HRC/31/59, https://undocs.org/A/HRC/31/59.

heritage and rights internationally recognized – not only cultural, but also economic, social, civil and political – has been stated and confirmed. Therefore, cultural heritage must be protected not only for its intrinsic historical and artistic value, but also for its "crucial value for human beings in relation to their cultural identity".[92]

The importance of cultural heritage goes beyond the rights so far listed; in fact, it has been declared that the role of cultural heritage as a resource of cultural identity is so relevant that its intentional destruction "may have adverse consequences on human dignity and human rights".[93] Cultural heritage is, in fact, a key component of the personal development of individuals. Without the possibility to experience cultural heritage, both tangible and intangible, the possibility for people to fully develop, both as individuals and as part of communities (from the local level, to the global one), is impaired. This possibility of full development, therefore, is undermined by the destruction of cultural heritage.[94] The connection between cultural rights, development of personality and human dignity is enshrined also in the UDHR; its Article 22, in fact, states that "everyone, as a member of society, has the right to (...) cultural rights indispensable for his dignity and the free development of his personality".[95] As cultural rights cannot be fully enjoyed without the possibility to have access to cultural heritage, the connection between the protection of cultural heritage and the respect of human dignity emerges as functional but evident.

Cultural heritage has to be considered a necessary element for the realization of several human rights and human dignity; thus, cultural heritage must be respected as part of a wider obligation to respect human rights.

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92 Par. 53, Human Rights Council, 31st session, "Report of the Special Rapporteur in the field of cultural rights," February 3, 2016, U.N. Doc. A/HRC/31/59, https://undocs.org/A/HRC/31/59.

93 UNESCO, "Declaration concerning the Intentional Destruction of Cultural Heritage", September 29, 2003, *Records of the General Conference, 32nd session* no. 1, 187, https://unesdoc.unesco.org/ark:/48223/pf0000133171.page=68.

94 See Preamble, "Charter of the United Nations."

95 Art. 22, "Charter of the United Nations."

4.4. Returning to Human Rights to Enhance the Protection of Cultural Heritage

As exposed above, the protection of cultural heritage is linked to the safeguard of several human rights. As a result, its protection from destruction due to cultural cleansing and from looting and smuggling to finance illicit activities is a key component in the effective enjoyment of several human rights. It is possible, therefore, to integrate IHL with IHRL in order to protect cultural heritage more effectively.

The necessity to protect cultural heritage and cultural rights in events of conflict has lately been proven by the conviction for war crimes of Ahmad Al Faqi Al Mahdi, guilty of having destroyed, in 2012, monuments and buildings – not military objectives – in Timbuktu, some of which were listed in the UNESCO World Heritage List.[96] Even though this case dealt with individual international criminal responsibility, this conviction shows a trend in the public conscience. Having started with the attacks on cultural heritage during the conflict in the former Yugoslavia,[97] it is still developing towards considering the deliberate destruction of cultural heritage as a serious breach of IHL rules. In fact, even though crimes against property (as the crimes committed by Al Mahdi) are considered as usually less grave than the ones against persons, the symbolic nature and importance for Malian culture of the sites destroyed make the attacks committed by Al Mahdi of particular gravity and importance.[98]

Nonetheless, the IHL does not appear to be sufficient to bind ANSGs to respect cultural heritage. The integration of the rules of IHL with the

[96] International Criminal Court Trial Chamber, Prosecutor v. Ahmad Al Faqi Al Mahdi Case No. ICC-01/12-01/15 (International Criminal Court 2016).

[97] UNSC, "Final report of the United Nations Commission of Experts established pursuant to security council resolution 780 (1992). Annex XI: destruction of cultural property report", U.N. Doc. S/1994/674/Add.2 (December 28, 1994).

[98] As the summary of the judgement, released by the International Criminal Court, states, "the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed". International Criminal Court, "Summary of the Judgment and Sentence in the Case of The Prosecutor v. Ahmad Al Faqi Al Mahdi," 2016.

rules of IHRL would provide a stronger protection for cultural heritage. It is widely recognized that IHRL has to be applied at all times,[99] even in case of conflicts, as they are inherent rights of all human beings. In fact, it has been pointed out that human rights are "an intrinsic part of the legal rules governing wars and other emergency situations".[100] Regarding the obligation to respect human rights also in the event of armed conflicts, already 20 years ago the Institute of International Law noted that "in the last fifty years, the principles of the United Nations Charter and of human rights law have had a substantial impact on the development and application of international humanitarian law".[101] More recently, the Human Rights Council has acknowledged that "human rights law and international humanitarian law are complementary and mutually reinforcing".[102]

Starting from the UDHR in 1948, human rights have progressively become precepts for States, which must act in conformity to them and protect them. Human rights are guaranteed not only in international matters (regarding the relations between States), but also in internal ones.[103] The worldwide recognition of IHRL in its essential aspects could constitute valid help in the protection of cultural heritage. In particular, the link between the protection of cultural heritage and the obligation to guarantee the effective enjoyment of human rights should be remembered by States when adopting the measures addressed to them by the Security Council through the Resolution.

[99] See, e.g., the International Court of Justice "Advisory Opinion on Legality of the threat or use of nuclear weapons" (International Court of Justice Reports, 1996), 226.

[100] Hans-Joachim Heintze, "On the Relationship between Human Rights Law Protection and International Humanitarian Law," *Int'l Rev. Red Cross* 86 (2004): 789–814, https://doi.org/10.1017/S156077550018040X.

[101] Institut de Droit International, "The Application of International Humanitarian Law and Fundamental Human Rights," *Armed Conflicts in which Non-State Entities are Parties*, 1999.

[102] HRC Res. 9/9, U.N. Doc. A/HRC/RES/9/9 (September 18, 2008).

[103] Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity," *Michigan Journal of International Law* 25, no. 4 (2004): 1209–28.

V. CONCLUSION

The majority of ongoing armed conflicts are of non-international nature. Thus, they include at least one ANSG. However, attempts to bind ANSGs to respect cultural heritage have proven unfruitful. Cultural heritage items are still illegally sold to finance ANSGs' activities activities and destroyed for strategic reasons. On a legal level, the main reason for this limitation is that the majority of ANSGs are not considered full subjects of international law. On a practical level, normally ANSGs do not want to comply to obligations in whose formation they did not participate. Consequently, international conventional instruments are not effective in filling the gap left by the non-recognition of the subjectivity and accountability of ANSGs.

Resolution 2347 (2017) has been received as a step forward in the protection of cultural heritage in case of armed conflicts. Certainly, it aims at strengthening the international cooperation among States, international organizations, agencies and other stakeholders, in order to enhance the protection of cultural heritage against the threats of terrorist groups in armed conflicts. Considering the difficulties in binding ANSGs to respect cultural heritage during armed conflicts, international synergies among States and different stakeholders become fundamental. However, a thorough analysis conducted applying the means of interpretation of UN Security Council resolutions leads to the conclusion that Resolution 2347 lacks sufficient clarity, is too focused on the fight against terrorism and, ultimately, does not clearly bind States. Today, the latter often invoke the principle of state sovereignty, claiming that they will protect the cultural items they feel as their own national emblems, thus impairing the effective implementation of rules protecting cultural rights, particularly when treaties do not establish effective monitoring mechanisms. Despite these shortcomings and the difficulties in providing a legally and theoretically solid reasoning for binding ANSGs to the respect of international rules and overcoming the claims of national sovereignty, the international cooperation and the involvement of different actors included in the Resolution

have to be welcomed and put into practice. This necessity is based not only on the obligations of IHL, but also IHRL. In fact, besides illicitly financing the activities of ANSGs, the destruction and looting of cultural heritage impair the effective enjoyment of different human rights wherever they occur and, ultimately, undermine the human rights of all mankind.

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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.

Guideline

1. Manuscripts should be written in English.
2. The authors who are not native speakers of English need to seek the assistance of a native speaker to proofread their articles before submitting them to the committee.
3. Manuscripts submitted must be original scientific writings and do not contain elements of plagiarism.
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5. The length of the manuscripts including foornotes are around 8,000-10,000 words.
6. Manuscripts are written in A4 paper, 12 point Times New Roman, 1.5 space and written in standard and correct grammatical language.
7. Main headings, sub-headings, and sub-sub-headings of the article should be numbered in the manuscript with the following example:
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   2. Main Heading
      2.1. Sub-heading
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8. The following is the structure of the journal:
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   - Title of manuscripts should be specific and concise in no more than 10 words or 90 hits on the key pad which describes the content of the article comprehensively.
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- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.
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IV. Keywords

- Preceded by the word "Keyword" in bold style (Keywords).
- Font: Times New Roman, font size: 12, alignment: justify, lower case.
- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

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The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

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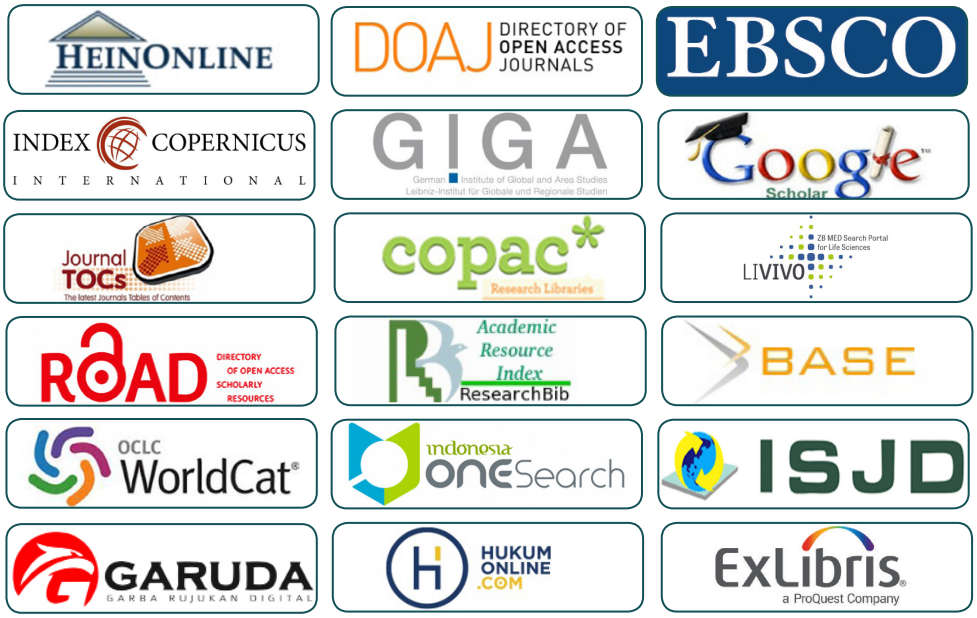

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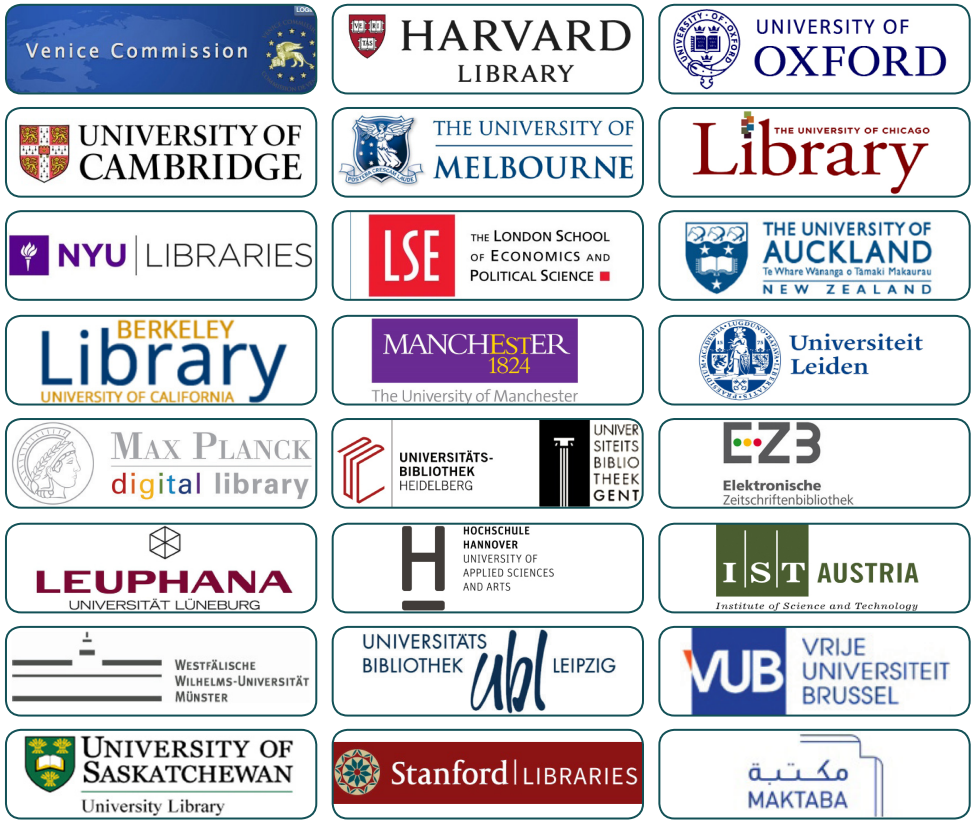


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