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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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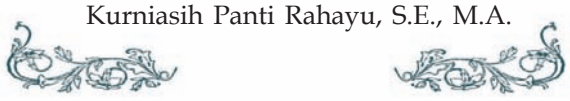

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Note From the Editors

Constitutional Review (ConsRev) is pleased to present its first issue of 2023. ConsRev is a distinguished, peer-reviewed publication published biannually under the auspices of the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. Each issue covers various topics related to constitutions, constitutional courts, their decisions, and the broader realm of constitutional law globally. Our primary objective is to provide insightful analysis and profound perspectives on legal matters by disseminating scholarly articles from esteemed academics, researchers, observers, practitioners, law professors, legal scholars, and judges from Indonesia and abroad.

This issue contains six articles by eight authors from various backgrounds. The first article, **Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses**, is written by Zsolt Szabó, an Associate Professor at the Károli Gáspár University of the Reformed Church. This article analyzes a potential theoretical framework for (judicial) remedies concerning parliamentary procedural decisions in this article. The author differentiates between various procedural rules, applicants, forums, judicial activism levels, and judicial review forms. Ultimately, the author argues that the efficacy of different remedies depends on the political climate and governmental structure. Consequently, it is recommended that countries lacking complete respect and impartiality towards the House Speaker consider establishing a permanent, independent forum, akin to a "House-Rules-Court," to address such matters.

The second article, **Democracy, Procedural and Social Rights, and Constitutional Courts in Hungary and Slovakia**, is authored by Max Steuer, an Associate Professor at O.P. Jindal Global University, Jindal Global Law School – Assistant Professor at Comenius University in Bratislava, Department of Political Science. This article presents a perspective on how Constitutional Courts (CCs) promote specific value frameworks that were achieved through an examination of the interpretations of procedural rights and social rights by two influential Constitutional Courts in Central Europe: the Hungarian Constitutional Court (HCC) and the Slovak Constitutional Court (SCC). Furthermore, the author's findings raise essential inquiries regarding the influence of public perceptions of CCs on the ability of individuals with authoritarian inclinations to mount successful attacks on these institutions. Additionally, the article explores the potential of CCs to counteract such assaults by articulating different value systems.

The third article, **Constitutional Court and the Past Conflicts in Post-Authoritarian Indonesia**, is presented by Prof. Bayu Dwi Anggono, Dean and Lecturer at the Faculty of Law, University of Jember, Indonesia, Rian Adhivira Prabowo, Lecturer at the Faculty of Law, University of Jember, Indonesia, and Yussele Nando Mardika, Researcher at the Study Center of Pancasila and Constitution (Puskapsi), Faculty of Law University of Jember, Indonesia. They examine the Constitutional Court's role as a conflict-resolution institution in addressing historical gross human rights violations in Indonesian transitional justice. They also evaluate the Court's effectiveness in resolving such social conflicts, considering the adage "justice delayed, justice denied." The authors conclude that the Court has effectively safeguarded the retroactive clause within Act 26/2000 and established a legal framework for future reconciliation efforts through legal and political policies. However, they highlight that the ultimate success of the Constitutional Court as a conflict resolution body hinges on the extent to which its decisions are translated into tangible actions.

The fourth article, **Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to a Constitution**, is discussed by Prof. Bertus de Villiers, Visiting Professor of the Law School of the University of Johannesburg (South Africa), Member of the State Administrative Tribunal of Western Australia (Australia), and Fellow of the Alexander von Humboldt Stiftung (Germany). He emphasizes the crucial importance of courts upholding the principle of separation of powers while fulfilling their transformative role. The author also presents four compelling case studies from Germany, India, Australia, and South Africa to illustrate how courts have significantly transformed their respective societies. These transformations involve the interpretation of constitutional principles such as the Bundestreue, Directive Principles of state policy, Aboriginal native title

recognition, and the adoption of Ubuntu to promote social justice. Lastly, he argues that the transformative capacity of a constitution and its judiciary does not depend on the constitution's age but rather on justices' ability to resolve disputes based on factual evidence, following the law, and with a deep understanding of the societal realities they encounter.

The fifth article, **Rethinking Amnesties and the Function of the Domestic Judge** is examined by Dr. Michail Vagias, a Senior Law Lecturer at The Hague University of Applied Sciences. He argues that the international effect of regional human rights jurisprudence has been to condition, rather than completely outlaw, the use of amnesties as a means of post-conflict peace-building. While blanket amnesties are increasingly viewed as incompatible with victims' rights, the study contends that not all are prohibited. Instead, it defends the view that the proper function of domestic constitutional courts in evaluating the constitutionality of amnesty legislation should take a different approach. Furthermore, he emphasizes the importance of monitoring the implementation of amnesties on a case-by-case basis. Finally, he suggests that Constitutional Courts should condition amnesties based on specific criteria.

The last article, **Strengths and Limitations of the Indonesian Constitutional Court's "6 Basic Principles" in Resolving Water Conflicts**, is analyzed by Mohamad Mova AlAfghani, Lecturer at Universitas Ibn Khaldun Bogor, Indonesia. The author examines the principles related to water conflict and their implementation. Additionally, he provides recommendations for the revision and expansion of these principles by Constitutional Courts, along with proposing a teleological interpretation for their effective implementation. The author's findings highlight that the principles of caring for water conflicts offer valuable normative guidance in resolving allocation disputes, safeguarding human rights, and preserving the environment. However, several limitations exist, including the principles' unclear scope, the potential conflict between users and uses, the inadequate consideration of footprint factors, and the implications for water reallocation. In conclusion, the author recommends that Constitutional Courts revise and expand the principles in future cases, employing a teleological approach. He also suggests teleologically interpreting the six fundamental principles to improve practical implementation.

The editorial team hopes this edition will be a precious and comprehensive resource for legal practitioners, readers, and researchers. Moreover, the editorial team is optimistic that this edition will play a pivotal role in fostering an intellectual environment that cultivates curiosity and encourages further research endeavors. Lastly, the Editorial of ConsRev believes that the insights and analyses presented within this edition will spark a profound interest among scholars, legal practitioners, readers, and researchers to delve into further exploration and scholarly inquiries.

Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses

Zsolt Szabó

Constitutional Review, Vol. 9 No. 1, May 2023, pp. 001-027

Parliamentary procedures are undoubtedly at the heart of (national) parliamentary sovereignty. However, in the last two decades, courts, including supranational ones (e.g. ECtHR), are increasingly getting involved in assessing the application of parliamentary rules and procedures. This increasing judicial activism highlights the importance of finding the equilibrium between the right to an effective judicial remedy, which inevitably should encompass parliamentary decisions, and the principles of separation of powers and parliamentary autonomy. This paper analyses a possible theoretical framework of (judicial) remedies against parliamentary procedural decisions, distinguishing between types of procedural rules, applicants, fora, extents of judicial activism and types of judicial review. It concludes that the different types of remedies are highly dependent on the political landscape and the government structure. It is yet advisable that a permanent, extra-parliamentary forum, a kind of "House-Rules-Court" should be established in countries, where the House Speaker does not enjoy full respect and neutrality.

Keywords: Constitutional Court; Judicial Remedy; Parliamentary Procedure; Parliamentary Sovereignty; Procedural Review.

Democracy, Procedural and Social Rights, and Constitutional Courts in Hungary and Slovakia

Max Steuer

Constitutional Review, Vol. 9, No. 1, May 2023, pp. 028-076

In democracies, individuals are free to develop their own conceptions of values, and try to persuade others of their viability. However, some of these conceptions carry greater weight than others. In particular, centralized constitutional courts (CCs) authoritatively interpret fundamental values as they are typically entrusted by constitutions to do so. This article introduces a new approach to examine how CCs advance particular value conceptions, via scrutinizing the understandings of procedural rights and social rights by the two formally most powerful in Central Europe: the Hungarian (HCC) and the Slovak (SCC) Constitutional Court. While procedural rights capture the minimum standards of equal treatment, social rights signal more robust readings of democracy which raise expectations of improved well-being. The two jurisdictions offer windows into the working of CCs operating in regimes with a history of authoritarianism—whereas Slovakia is currently a fragile democracy at best, Hungary has regressed into an illiberal regime. The article makes use of new institutionalism, where ideas articulated in the CCs' case law have a potential to influence the political regimes the CCs are located in. Using a case selection method based on keyword search, its two case studies, covering the period between the 1990s and 2017 and 77 majority opinions show how the SCC seldomly connected procedural and substantive rights to democracy, but this went unnoticed in the broader public. For the HCC, however, the absence of the connections between democracy and justice, especially when interpreting social rights, appears to have contributed to its image as distant from the public, locked in abstract legal discourses. The findings prompt questions about the impact of public perceptions of the CCs on the capacity of actors with authoritarian ambitions to launch successful assaults on the CCs, as well as on the potential of the CCs to prevent these assaults by articulating particular value conceptions.

Keywords: Contextual Analysis; Hungary; Institutionalism; Procedural and Social Rights; Slovakia.

Constitutional Court and the Past Conflicts in Post-Authoritarian Indonesia

Bayu Dwi Anggono, Rian Adhivira Prabowo, and Yussele Nando Mardika

Constitutional Review, Vol. 9, No. 1, May 2023, pp. 077-108

The fall of the New Order authoritarian regime in Indonesia was marked by the changing landscape of conflict resolution. In a more democratic setting, "*Reformasi*" regime has installed democratic institutions including the formation of the Constitutional Court. While the newly established court was celebrated as relatively successful in terms of defending human rights, its role in resolving the abused past is questionable. The new Reformasi regime inherits wounds and scars from the abuse committed by the previous iron fist regime. This paper aims to analyze the Constitutional Court's roles as a conflict-resolution body in dealing with the past gross violation of human rights in the light of Indonesian transitional justice. In that regards, this paper assesses the Court's decisions and how far it could answer the victims' call for justice. This paper found that regardless of the Court's intentions, the court's decisions still require further executive or legislative policies. The nature of the court doesn't bring instant enjoyment for the "winning" party to be benefited from the decisions. In short, the importance for the victims of past abuse of power as stated in the Court's decisions still has not been translated into justice. At the same time, this also indicates how far the Court is able to resolve this kind of social conflict: "justice delayed, justice denied." In a more Galtungian's perspectives, there is a gap between meta-conflict to be deployed into original-conflict. This paper suggests that to overcome such issues, a bridge to reconnect the two should be built. In this context, the changing regime from New Order to Reformasi should be coupled with a holistic approach of transitional justice tools and mechanisms. More importantly, to urge the delivery of justice for those who suffered.

Keywords: Conflict-Resolution; Constitutional Court; Democracy; Human Rights; Judicial Review; Modality; Post-Authoritarianism; Trajectory.

Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to a Constitution

Bertus de Villiers

Constitutional Review, Vol. 9, No. 1, May 2023, pp. 109-141

This paper reflects on the transformative role of courts to direct and change the pathway of the countries in which they serve. The paper commences with a brief discussion of what is meant by transformative constitutionalism. It takes issue with the proposition that newly created courts under post 1990-constitutions are more prone to constitutional transformation than courts under older constitutions. It shows how there have been examples where courts have transformed their societies throughout the history of courts. It also points out that courts must, regardless of their transformative role, demonstrate respect for the separation of powers since all organs of government must work together to effectively transform society. The paper then focuses on 4 case studies where courts have radically transformed their society, namely Germany through the use of Bundestreue to give content to the federal system; India where Directive Principles of state policy are used to give content to human rights; Australia where the Aboriginal native title had been recognised after 200 years of denial; and South Africa where Ubuntu is used as a life-giving word to effect social justice. The proposition put is that the transformative ability of a constitution and the judiciary serving under that constitution is not determined by the age of the constitution, but by the ability of its justices to determine disputes on the facts, in accordance with the law, and in reflection of the realities of the society in which they reside. The fault lines of society often rapture in litigation, and that is when and where judges may direct a nation into a new direction.

Keywords: *Bundestreue*; Directive Principles of State Policy; Mabo; Native Title; Socio-Economic Rights; Transformative Constitutionalism; Ubuntu.

Rethinking Amnesties and the Function of the Domestic Judge

Michail Vagias

Constitutional Review, Vol. 9, No. 1, May 2023, pp. 142-178

The award of amnesties or pardons has been used time and again to facilitate the attainment of peace after a civil war. However, this practice has been condemned by human rights and other international bodies as incompatible with the duty of states under human rights law to investigate, prosecute and punish human rights violations and the victims' rights of access to justice and to the truth. Due to this incompatibility, the function of the domestic (constitutional) judge is none other than to strike down amnesty legislation as null and void. This appears to be the prevailing narrative in contemporary human rights discourse. The present contribution takes issue with this narrative. It takes the position that the international effect of regional human rights jurisprudence has been to condition, as opposed to wholesale outlaw, the use of amnesties as a post-conflict peace-building tool. It defends the view that while blanket amnesties are increasingly considered incompatible with victims' rights today, that does not mean that all amnesties are prohibited. From this perspective, this article argues that the proper function of domestic constitutional courts in the performance of the constitutionality control of amnesty legislation should take a different shape; instead of querying whether to strike down or to uphold amnesty legislation in its entirety, Constitutional Courts should condition amnesties to criteria – such as their position as part of a broader transitional justice package including truth telling and compensation – and monitor their implementation on a case-by-case basis.

Keywords: Amnesties; Human Rights; Incompatibility; National Judge.

Strengths and Limitations of the Indonesian Constitutional Court's "6 Basic Principles" in Resolving Water Conflicts

Mohamad Mova AlAfghani

Constitutional Review, Vol. 9, No. 1, May 2023, pp. 179-220

Many parts of Indonesia are already experiencing water stress and the condition is expected to become worse by 2045, when, according to the World Bank, 67% of Indonesia's GDP will be produced in areas with high water stress. Conflict over water resources has been reported between water users and uses, such as between agriculture and drinking water, between agriculture and fisheries, and between farmers and industries. In 2015, responding to the petition to curtail private sector control over water resources, the Constitutional Court invalidated Water Law 7/2004 and introduced the 6 basic principles, that have been used as normative guidance for implementing the regulation on water resources and for resolving future water conflicts. However, the principles are ambiguous in many ways. This paper will critically examine the principles and then outline the difficulties in its implementation. The methodology employed is normative-analytical; incorporating analytical frameworks from water law and governance into constitutional adjudication. First the paper clarifies some conceptual frameworks related to water conflict and how the principles have been interpreted by regulators. The paper then explains the general categories of water conflict and where those principles would, or would not, fit. The paper then continues with a critique of the principles, in terms of their (i) unclear scope, (ii) conflation between users and uses, (iii) neglect of footprint and (iv) the implications for water reallocation. This paper finds that one of the strengths of the principles is that they provides a basic normative guidance for solving conflict in water allocation, the protection of human rights and the environment. However, these benefits come with some limitations: neglect of efficiency over perceived equity and potential restriction of reallocation of water among different users. The principles are also difficult to implement where there is conflict over water quality or spatial development. As such, the paper recommends that the Constitutional Courts revise and expand the principles in future cases using teleological approach and that in terms of implementation, the 6 basic principles should also be interpreted teleologically.

Keywords: Allocation; Conflict; Governance; Indonesia; Water.

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Judicial Control of Parliamentary Procedure: Theoretical Framework Analyses

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Abstract

Parliamentary procedures are undoubtedly at the heart of (national) parliamentary sovereignty. However, in the last two decades, courts, including supranational ones (e.g. ECtHR), are increasingly getting involved in assessing the application of parliamentary rules and procedures. This increasing judicial activism highlights the importance of finding the equilibrium between the right to an effective judicial remedy, which inevitably should encompass parliamentary decisions, and the principles of separation of powers and parliamentary autonomy. This paper analyses a possible theoretical framework of (judicial) remedies against parliamentary procedural decisions, distinguishing between types of procedural rules, applicants, fora, extents of judicial activism and types of judicial review. It concludes that the different types of remedies are highly dependent on the political landscape and the government structure. It is yet advisable that a permanent, extra-parliamentary forum, a kind of "House-Rules-Court" should be established in countries, where the House Speaker does not enjoy full respect and neutrality.

Keywords: Constitutional Court; Judicial Remedy; Parliamentary Procedure; Parliamentary Sovereignty; Procedural Review.

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I. INTRODUCTION

Parliamentary functions and procedures are at the heart of national sovereignty. The general principle, since the Bill of Rights, declares that no (domestic or international) instance may ever intervene in determining whether a parliament decision is lawful or not. However, in times of constitutional dialogues, legal harmonization and increasing judicial activism, it seems that common principles (like 'democratic debate', mentioned in multiple ECtHR-judgements) emerge even in the field of parliamentary functions. In order to safeguard democracy and the rule of law, courts tend to and should be guarantors of the principles of parliamentary procedures if another remedy is unavailable on the national level. If domestic fora are ineffective in settling procedural disputes, then supranational courts, like the ECtHR will provide a remedy if they deem it necessary. The degree of the judicial intervention (scope of review, extent of judicial activism), however, highly depends on the political-institutional circumstances, there is no "one-size-fits-all" possibility in this respect.

Parliaments are partisan bodies: parliamentary action is usually not triggered by a single institutional interest, but, instead, by the politically-driven interests of the various actors within its domain. Political majorities usually aim at prevailing over the minorities' room for maneuver. One possibility to push through political agendas is attempting to hold the parliamentary procedure under control – although it should be the task of fair procedures to control the actions of the political majorities. Fair procedures alone do not guarantee good decisions, but unfair procedures are more likely to result in unfair procedures.[1]

Regarding judicial control of legislation, the most widespread and accepted form is normative control, i.e. the review of the constitutionality of legislation, which appeared in the 19th century and spread throughout the world in the 20th century. Judicial control of the lawmaking procedural rules appeared as the second step, and judicial review of other parliamentary activities and procedures

[1] Angelika Nussberger, "Procedural Review by the ECtHR: View from the Court," in *Procedural Review in Fundamental Rights Cases*, ed. Janneke Gerards and Eva Brems (Cambridge: Cambridge University Press, 2017), 167.

as the third. Procedural control first appeared in lawmaking as a supplement to substantive normative control, purely procedural control as an independent competence, only emerged after that.

In this article, I look at the decisive factors influencing the way of legally controlling parliamentary procedural decisions, like the legal nature of parliamentary procedural rules. I attempt to establish a theoretical framework of procedural control mechanisms. First, the different possible solutions of the legal nature of the procedural rules is discussed. Then the appropriate fora for remedies against procedural decisions will be presented. At the end, the way and extent of judicial control will be analyzed.

II. THE LEGAL NATURE OF PARLIAMENTARY RULES: CONSTITUTIONAL PARLIAMENTS V. CONSTITUTION OF PARLIAMENTS?

A parliament is a legal body and a political institution simultaneously: the place of democratic and fair decision-making and a partisan forum for debating political issues. It must, therefore, equally provide for an orderly set of procedures, equipped with (sometimes rigid) legal safeguards. At the same time, it allows flexibility for the political actors presenting their alternative, competing opinions. It is common for all parliaments to have internal rules (rules of procedure) created by themselves, which generally ensure the satisfactory operation of these two, often conflicting functions. Parliaments should work effectively, setting and implementing their agendas, but members' and parliamentary minorities rights should also be respected.

Rules of procedure, or house rules, are internal constitutions of parliaments, determined by the parliamentary majority to ensure fair procedures, including limiting its own power. They can be considered the constitution of parliamentary work not only because it contains the basic internal rules, but also because the parliament is sovereign in its creation as a "constituent power". Many constitutions declare the autonomy of the parliament in creating its own internal rules.[2]

[2] US Constitution Article 1, section 5, para 2, German Fundamental Law Article 40, para. 2.

Like constitutions, house rules also have a few main branches of regulation. Haug states[3] house rules have three functions: procedural order, minority interests, and organizational order. This concise definition contains the two typical elements of the legal infrastructure of parliamentary operation, the house rules: organization and procedure. Despite the autonomy of the house rules - or even for the sake of it - there are constitutional criteria that the house rules must also comply with. If these are not met, it can be the basis for the action of the judicial and constitutional judges.[4]

Looking back at the history of parliaments, it can be seen that house rules often decided important questions of power. In several cases, the way was opened for dictatorships only after the guarantees of house rules were abolished (Germany, 1933, Austria, 1933). Many examples represent the phenomenon that, in the process of democratization, the democratic procedural rules become more valuable, and previously marginal issues of parliamentary procedure become of primary importance in terms of decision-making and resource distribution. This process can be witnessed in many countries of the democratized Latin-America.[5] In this process, parliaments emerge from a democratic decoration into important actors. As a result, lawmaking is no longer an unquestionable expression of the state's will, but a compromise decision, following the orderly conclusion of a multi-stakeholder democratic debate.

In a democracy, the distribution and allocation of power is primarily an institutional and regulatory matter and not a technical issue of the use of power. The rules and procedures thus basically determine the outcome of the political debate. The power (majority) required to comply with or even obstruct institutional solutions and procedures also determines the decision of political issues. The one who can achieve change is the one who controls the procedures leading to it. Control over parliamentary time and agenda setting is crucial, especially in

[3] Volker Haug, *Bindungsprobleme und Rechtsnatur parlamentarischer Geschaftsordnungen* (Berlin: Duncker und Humblot, 1994), 22.

[4] Stephen Gardbaum, "Due Process of Lawmaking Revisited," *Journal of Constitutional Law* 21, no. 1 (October 2018), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1670&context=jcl.

[5] Eduardo Alemán and Geroge Tsebelis, "Introduction," in *Legislative Institutions and Lawmaking in Latin America*, ed. Eduardo Alemán and George Tsebelis (Oxford: Oxford University Press, 2016), 5.

the legislative process. This also includes the right to propose legislation, the right to amend, and the timing (speeding up or even slowing down). All of this is also relevant in a negative sense: i.e. slowing down, or even preventing, decision-making can function as a veto in practice.

Looking at the history of parliamentary procedure, parliamentary deliberations were informal at the beginning, determined by local customs. Apart from a few common features (e.g., open-air meetings), we do not know much about how parliamentary sessions were conducted until the 15-16 centuries, when customs and ceremonies requiring special expertise became permanent and were confirmed by the monarchs. The convening of sessions (including the selection of place and time) was an important royal prerogative from the beginning—certain joint decisions of the parliament and the sovereign prescribed regularity in this, which was often neglected. The deliberations were usually not continuous: the assemblies often reconvened after a gap of many years, and regularity was a constantly recurring demand. Sessions were conducted according to custom: they usually began with the opening speech of the ruler or his representative. The closure also took place in the presence of the ruler, at which time the adopted decisions were usually confirmed, in the form of consolidated articles.

The 15-16 centuries witnessed the spread of the formation of parliamentary committees in order to facilitate the work of the assembly. In addition to legislation, the commissions also gained increasing importance in government control. At the end of the 18th century (investigative), commissions that worked specifically for this purpose were created. The "Copernican turn" of the 18-19 centuries (when parliament was no more directed by the monarch, rather, it started to instruct the kings' government and hold it to account), lead to the rise of the parliamentary form of government.

In the 19th century, the continuous, permanent sittings of parliaments, the grouping of representatives into factions, and the functioning of committees became common. All this, and especially the partisanship of the parliament (division to government and opposition) pointed towards a complexity and

mutual distrust, requiring written rules. The first written parliamentary rules of procedure (house rules) appeared in the 17th century in Sweden and Scotland.

In England, however, instead of a single set of rules, the procedure kept its customary basis. The procedure of the British House of Commons is still based on four pillars: the accepted custom and practice, the resolutions and house rules (Standing Orders), the provisions of the Speaker of the house, and the laws (statutes) adopted by the house. Many important issues, such as how questions are presented, or the order in which proposals for resolutions are submitted and accepted, is still based on customary law, compiled first by Thomas Erskine May[6] in 1844. Even the three readings' lawmaking sequence is without a written record until the present day. Like the British constitution, house rules function as a gentlemen's agreement, although the number of written permanent rules is constantly increasing. A recent research showed that Speaker's authority is not decreasing, despite the increase in parliamentary rules.[7] The centuries-old customary traditions do not contradict with parliamentary innovations: the reform of the committees system in 1979 and the establishment of the Backbench Business Committee in 2005 are good examples of procedural flexibility and renewal.

In the United States, in both houses of the Congress, there is a codified, permanent set of rules (still based on the famous *Maual* written by Thomas Jefferson). Still, in practice there are regular deviations from them, and the role of precedents is also very significant. The House of Representatives' work is much more regulated from the beginning, while the Senate allows for more freedom for its members.

It is a general rule nowadays that a country's constitution defines the legal nature and the procedure to adopt parliamentary procedural rules. The legal nature of these rules is crucial in terms of legal remedies against their disrespect. There are basically three possibilities:

6 Thomas Erskine May, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (New York City: LexisNexis, 2019), https://erskinemay.parliament.uk/.

7 Niels D. Goet, Thomas G. Fleming and Radoslaw Zubek, "Procedural Change in the UK House of Commons 1811–2015," *Legislative Studies Quarterly* 45, no. 1 (February 2020), https://doi.org/10.1111/lsq.12249.

1. Statute of parliament: in for example Austria, Czech Republic, Slovakia the rules of procedure are set out in a statute, adopted by parliament for an indefinite time period, published in the official journal. In Hungary, there is also a statute on parliament in force, but it does not cover all issues of parliamentary law, leaving room for the adoption of internal parliamentary rules. Statutes are made indefinitely, binding all successor parliaments as well. Statutory rules are rigid, in terms of changeability and consensual deviation possibilities, and their adoption requires the involvement of other state powers outside of parliament, like the head of state. In this respect, their adoption does not rely on full parliamentary autonomy.
2. Parliamentary decision/decree: in many countries, like in the UK (Standing Orders) or Italy, rules of procedure are adopted as internal parliamentary norms, and Hungary also has a set of rules on this level. These rules, not being universal legal norms, have binding effects only in internal relations, i.e., towards members of parliament, and normally cease to be in force at the end of the parliamentary term.
3. *Sui generis*: in many countries, the rule of procedure of the parliament does not fit in any of the established sources of law, rather, it is seen as an only kind-of-its–own. In Germany, it is an 'autonomous decision' (*autonome Satzung*).

In terms of justiciability, internal parliamentary rules are obviously not justiciable at the courts, only statutes or – upon a special rule – *sui generis* norms (like standing orders). Constitutional courts can, respectively, only review statutes, not parliamentary decrees, notwithstanding that many jurisdictions explicitly provide for the constitutional review of internal parliamentary rules, if their breach directly touches on a constitutional provision.

Being the ultimate interpreter of constitutional law, constitutional courts generally apply the constitution, and not the house rules. The detailedness of the constitution is therefore a crucial issue in terms of judicial powers. Concise, brief provisions on parliamentary procedure, based on which complex problems cannot be solved, can be filled with judicial activism. On the other

hand, detailed, lengthy constitutions do not entrust this to judges – here the durability of constitutional provisions is at stake. The external relations of the parliaments, their role in power sharing, and their relationship with the executive power are usually described in the constitutions of all jurisdictions. However, there are significant differences in the constitutional details of the "parliamentary constitution". Another important question is the extent to which (legal) political situations and arguments filter into judicial decisions. This can be easier when interpreting short, principled provisions, but more difficult in the case of a detailed constitution.

To sum up, the parliamentary rules in the UK are based on customary law, the continental parliamentary functions are based on comprehensive, codified house rules, leaving a narrow path only to precedents in filling legal gaps. The United States' solution is halfway between the two: there is a codified, permanent set of rules, but in practice there are regular deviations from them, and the role of precedents is very significant. The most straightforward way towards a court review is that of the statutes, because they are anyway subject to judicial interpretation. Internal parliamentary rules, on the contrary, since they do not have any legal effect on citizens, tend to remain under the parliament's jurisdiction. The judicial approach to procedural control is dependent on various factors: besides the legal competence set out in the constitution, the length of the relevant provisions of the constitution, and the system of checks and balances is also decisive.

III. FORUMS OF POSSIBLE REMEDIES AGAINST PARLIAMENTARY PROCEDURAL DECISIONS: LEGAL OR POLITICAL?

The principles of separation of powers and the rule of law are both unquestionable pillars of the prevalent constitutional canon. However, these two principles, although they presuppose each other in many respects, can come into conflict with each other - one of these conflicting areas is parliamentary autonomy. The openness of legislative debates, the equal participatory rights of members and fair procedures belong to the domain of the rule of law, while

parliamentary sovereignty is a based on the separation of powers. Resolving disputes arising from this conflict is the task of courts, interpreting constitutional principles and permanent rules.

It is obviously not enough to have rules and principles of parliamentary procedure. A forum must be enforced equally if not followed voluntarily by the actors. The answer to the question, which court has jurisdiction (if any) in parliamentary procedural disputes, varies country by country. Parliamentary sovereignty, at least in the UK, does not allow external actors to intervene. The strong and independent position of the Speaker is the only and ultimate forum to settle procedural debates within the House. The principle of the parliamentary sovereignty also prevails in countries which follow the British system, i.e. India, where the judiciary never denied the claim of the Parliament to be supreme as to its internal affairs, based on Article 122 of the Indian Constitution.[8]

On the contrary, external review is possible in Germany since 1949. In Germany, the sovereignty of the constitution (or of the constitutional court) prevails over that of the parliament. Some scholars describe the same difference when conceptualizing parliamentary sovereignty as opposite of judicial supremacy.[9] Tensions between legislative autonomy and the judicial duty to enforce constitutional requirements more frequently occur, and these tensions are often settled by (constitutional) courts, i.e. extra-parliamentary organs. In some countries, as part of judicial review of legislation, the breach of the rules of legislative procedure may lead to repealing the statute by the constitutional court (this is the case in Hungary, but not for example, in the Czech Republic).

In the UK, the home of parliamentary sovereignty, where the powers of Parliament are unlimited, there is, no relevant legislation in parliamentary law about remedies of procedural disputes between parliamentary actors. Lacking applicable law, the courts have no jurisdiction either in disputes between parliamentarians and non-parliamentarians. It is part of the parliamentary

[8] Jain, D. C., "Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislatures in India," *Journal of the Indian Law Institute* 9, no. 2 (1967): 205–22, http://www.jstor.org/stable/43949934.

[9] Liora Lazarus and Natasha Simonsen, "Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference," in *Parliament and Human Rights: Redressing the Democratic Deficit,* ed. Murray Hunt, Hayley Hooper and Paul Yowell (Oxford: Oxford University Press, 2014), 385.

sovereignty that Parliament alone is entitled to "retaliate" grievances by a contempt of Parliament, using its own internal rules (Standing Orders). In such cases, the plenary will decide on the submission of the competent committee.[10] This is based on the short provision of article 9[11] of the Bill of Rights of 1689, which declares the sovereignty of Parliament - although there is a recurrent idea to place the contempt of parliament on a statutory basis and thus open the jurisdiction of the courts.[12] However, the parliamentary committee and the plenary have the competence to "punish" for example a witness who does not appear before a committee of inquiry, and against these decisions no further remedies are available. However, such cases are normally closed without serious consequences. In practice, parliament applies its criminal powers with considerable self-restraint.

In recent decades, courts worldwide seem to give up their resistance to reviewing parliamentary proceedings.[13] The resistance first weakened in the field of lawmaking rules, since several countries order the annulment of laws adopted during the faulty procedure by way of the constitutional court, through normative control.[14] One of the reasons for the breakthrough is that the courts enforce the constitutional principles, which ultimately help meaningful deliberation of public affairs to take effect. As a result, parliamentary procedure is less and less seen as a political issue in which the courts cannot have a say. Among the control mechanisms vis-à-vis the parliament, the normative control is the most widespread in the world. In this way of control, statutes, adopted by parliament are checked against procedural rules of their adoption, based on constitutional principles. Procedural control - including the normative review of house rules - is present in many places only as a supplement to this.

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[10] Currently the *Select Committee for Standards and Privileges*, previously the ***Committee** for Privileges*.

[11] That the freedom of speech and debates or the proceedings of Parliament ought not to be impeached or questioned in any court or place out of Parliament.

[12] See the public consultation by the UK Government in 2012 on "Parliamentary Privilege" (Presented to Parliament by the Leader of the House of Commons and Lord Privy Seal by Command of Her Majesty, 2012), www.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf.

[13] Ittai Bar-Siman-Tov, "The Role of Courts in Improving the Legislative Process," *The Theory and Practice of Legislation* 3, no. 3 (September 2015): 295–313, DOI:10.1080/20508840.2015.1133169.

[14] Ittai Bar-Siman-Tov, "Semiprocedural Judicial Review," *Legisprudence* 6, no. 3 (December 2012): 271, https://doi.org/10.5235/17521467.6.3.271.

However, in parliamentary activities other than lawmaking, the attitude of the courts, has hardly changed. It seems that the courts more seriously demand compliance with the house rules if the parliamentary act in question has some kind of outcome or product (for example, in the form of a statute), having an effect on citizens' rights.

The constitutional review of parliamentary house rules is a separate issue – it has been established in continental law, but not in the common law system. The competence of the German and French constitutional courts extends to this type of normative control, and in the latter case, moreover, the constitutionality review of the house rules - in its preliminary form - is even mandatory.

Judicial attitudes and activism regarding parliamentary proceedings vary from country to country and from era to era. According to Gardbaum,[15] this historically changing context can be recorded in four scenarios:

- The classic example of the first is the period of the British Parliament between 1832-1945. The parliamentary functioning based on parties and factions had not yet solidified, independent representatives standing one by one against the government. No instance of judicial intervention existed, the sovereignty of the parliament was unbroken.
- The second scenario is that of the modern party system: factional discipline overrides individual conviction. In the case of governing parties, the goal is not to control the government, but to keep it in office at all costs. In this model, the roles are reversed: the parliament already depends on the government, since both are actually projections of the party. This is mainly the case in a two-party system, since a multi-party coalition's fusion of parliament and government is not so strong. In this situation, the role and powers of judges and constitutional judges are evaluated for the first time. This trend can be observed in the reorganization after the Second World War and in the democratization that followed 1989-90.

[15] Stephen Gardbaum, "Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa," *Constitutional Court Review* 9, no.1 (December 2019), https://doi.org/10.2989/CCR.2019.0001.

- In the third model, a dominant party comes to power, and as a result, all political accountability ceases, the relationship of responsibility of the government-parliament relationship is also blurred. Here, the court has an even more active role against parliament: but it does not exceed its powers, since formal rules are followed by parliament.
- In the fourth case, the dominant party abuses its power. In this case, however, the court also tends to exceed its authority, based on the principle of "special situations require a special solution". This tendency is shown by the gradually strengthening activism of the South African Constitutional Court in the 2000s.

In the following part of this article, my main attempt is to create a theoretical framework for judicial remedies in parliamentary procedure, based on the second and third scenario described above. I do not only focus on courts: even if courts are empowered to judge parliamentary procedure, the 'first instance' guardian of the house rules is normally the Speaker, using disciplinary powers, often based purely on customary rules. Countries of parliamentary sovereignty do not have an external, 'second instance' forum at all. In other countries, a kind of external control is possible: major legal disputes on breaching house rules may also be resolved by (constitutional) courts. There are conflicting principles to be reconciled. In particular, the external oversight may harm the parliamentary autonomy, the internal oversight may end up in a corrupt, partisan decision. Different jurisdictions have different solutions to settle debates between constitutional bodies. The possible remedies in cases, when parliamentary procedures are disrespected, are the following:

Remedies in parliamentary law	**For external actors (citizens)**	**For internal actors (MP, factions)**
at an external forum	I.	II.
at an internal forum	III.	IV.

The above table shows the possible distinctions which can be made between an external remedy that is available against parliamentary acts, and an internal (inter-

parliamentary) remedy. In addition, another distinction can be made between legal remedies available to external persons (citizens) and parliamentarians, since parliamentary acts may affect also non-parliamentarians (if, for example, the committee report makes unlawful statements on citizens), but they may only affect matters within the parliament as well (such as the rejection of an interpellation).

3.1. Extra-Parliamentary Remedies for Extra-Parliamentary Persons (Citizens)

Courts within the UK normally do not consider themselves competent in internal affairs of the parliament, it happens nevertheless that their decisions indirectly stray into the area of parliamentary privilege. In *Stockdale v. Hansard* (1839), the court ruled that it is the duty of the courts to protect the rights of persons outside parliament, as parliamentary freedom of speech could not be unlimited. The case came about parliament's internal, own documents, above all the diary (Hansard), stating that statute is the only parliamentary act, which is binding for the courts by its very nature. As judicial independence requires, no other parliamentary document or decision affects the courts' freedom of legal interpretation.

In *Kerins v McGuinness & Ors*, the Irish Supreme Court ruled that "the privileges and immunities of the Oireachtas, while extensive, do not provide an absolute barrier in all circumstances to the bringing of proceedings concerning the actions of a committee of the Houses of the Oireachtas."[16] The case came about in 2014: Angela Kerins, chief executive of the Rehab charity was asked before the Public Accounts Committee of the Irish Parliament, the Oireachtas. During the session, the MPs rudely attacked her, being asked offensive questions, without advance notice.

The Court stated that the primary role of providing a remedy where a citizen is affected by unlawful parliamentary action, lies with the Houses themselves. The jurisdiction of a court to intervene can only arise where there has been a

[16] Kerins v. McGuinness & Ors, [2019] IESC 11.

significant and unremedied unlawful action on the part of a committee. The Court also stated that the PAC was acting outside its terms of reference when it dealt with Ms Kerins on different issues as the invitation predicted. Ireland, a country of codified constitution does not place parliamentary sovereignty in the focal point of constitutionalism. The Kerins case, despite the attention it received in both academia and politics, is rather an exception. In many countries, including Hungary, citizens cannot sue parliament or its organs simply due to their unjusticiability.

Recently, from 2005 onwards, the ECtHR became increasingly interested in assessing parliamentary procedures concerning the disputes upon Art. 8-11 of the Convention, especially if domestic fora could not settle the conflict. When assessing the limitation of human rights by legislation, the degree of 'democratic debate' during the legislative procedure serves increasingly as an argument. In determining whether the limitation concerned was appropriate, the Court examined how "deep and thorough the parliamentary debate" was, how it corresponded to a "pressing social need", whether "substantive arguments" were developed in the course of the legislation or "considerable parliamentary scrutiny", or a "meaningful engagement with the views of minority rights bearers" take place.[17] The ECtHR already gathered evidence from national parliamentary debates for more than 30 judgements. Yet, this approach is far from being consensual; its decisions concerning parliamentary procedures are unclear, their concepts need further substantiation. It is still a question, whether this judicial activity may tend to the evolution of a "common parliamentary law" of the nations, applying common standards, using common concepts.

3.2. Extra-Parliamentary Remedies for Intra-Parliamentary Persons (Mps)

Intra-parliamentary conflicts can best settled by a neutral forum outside parliament. Any intra-parliamentary forum is part of the partisan logic of the parliament, and the decisions are heavily influenced, if not determined, by the parliamentary majority.

[17] For the details of the cases see Matthew Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments," *Human Rights Law Review* 15, no. 4 (December 2015): 745–774, https://doi.org/10.1093/hrlr/ngv027.

In Germany, a continental and civil law country, there is an individual procedure at an external forum, the Federal Constitutional Court (*Bundesverfassungsgericht,* BVG) to settle parliamentary procedural disputes. The BVG in the framework of a dispute procedure between constitutional bodies (Organstreitverfahren, OSV), interprets the Basic Law to investigate if a constitutional rule is violated. The peculiarity of the regulation is that it can be initiated not only by constitutional bodies, but also by any public law subject possessing constitutional rights, like parliamentary groups or individual members.

The petitioner must prove that his rights, or the rights of the body to which he belongs, have been violated or directly threatened by the other body. A 'part of body' (organteil – eg. a group of MPs) is deemed empowered with own rights, if it can enforce it without the intention or permission of the body as a whole (eg. the parliament). Based on the above, the president of the Bundestag, any representative, the Ältestenrat (the political coordinative committee consisting of party group presidents), any standing committee, faction, but even "qualified minorities", i.e. one-third, one-quarter and one-tenth of the Members may be legitimate parties. In practice, the procedure has so far been pursued for three main purposes: the protection of parliamentary opposition rights, the protection of Parliament's rights vis-à-vis the government (mainly in foreign and security policy) and the rights and equality of political parties.

The OSV is primarily a constitutional interpretation procedure: BVG does not decide on the dispute itself, but interprets the text of the Constitution with regard to the rights and obligations of the bodies involved. Yet, it does not stop here, but either accepts the application or rejects it based on the result of the interpretation. BVG is bound to the application, reflecting on it, and finalizing the conflict remains with the disputing parties. Thus, the German legislator consciously decided to keep BVG out of political conflicts that could not be solved by legal means. In practice, the number of OSVs between 1951 and 2015 was close to one hundred and fifty, about 80 of which were closed by a substantive decision of the Second Senate, the others were either rejected or withdrawn. Thus, the OSV is proved to be an effective procedure.

Not all countries share this approach. The Hungarian Constitution does not require legal remedies against parliamentary acts (like disciplinary decisions). Since the disciplinary decisions of the Parliament - the constitutional basis of which is created by the Fundamental Law - are not considered to be judicial or administrative decisions, lack of legal remedy against such decisions does not in itself result in a breach of the constitution. Ordinary court remedies are also excluded in Hungary, since so far, the doctrine of the "inability" of parliament to be sued at courts is strictly held (no one can sue Parliament in civil or penal procedure at court).

3.3. Intra-Parliamentary Remedies for Extra-Parliamentary Persons (Citizens)

In theory, citizens, violated in their rights by MPs, could turn to the competent parliamentary committee or plenary which decide on the immunity. This could function as a quasi-remedy, where MPs could apologize the affected citizen on the House floor. But, as stated above, inter-parliamentary decisions are under political influence and mostly end up partisan.

I also briefly address the possibility that, in the event of legal violations caused by the parliament's internal bodies and MPs, it can theoretically be suggested that the parliament itself punishes them on the basis of its autonomy. However, this remains a theoretical possibility considering the judicial monopoly of stating legal responsibility. Referral of legal violations committed by MPs from an external (court) to an internal (immunity committee) forum is the path of immunity cases. Judicial control of the decisions made during the immunity procedure is excluded, so here we find a strict separation, the internal immunity and external judicial powers are complementary to each other, as they are mutually exclusive.

3.4. Intra-Parliamentary Remedies for Intra-Parliamentary Persons (Mps)

Since this paper focuses on the relationship between parliament and courts, I will touch on this point only briefly. The best example of parliament's own house-rules-court is the Speaker of the UK House of Commons. Its decisions (Speakers' Rulings) are highly authoritative and partisanship usually does not arise. This requires the integrity of the Speaker's office, which he has maintained

until now. In the Hungarian parliamentary disciplinary law, however, the internal appeal forum system, introduced in the wake of a recent ECtHR-case, cannot be considered an effective legal remedy without concern. This solution is only functional in the case of a Speaker with authority similar to that of the British one.

IV. TYPES OF JUDICIAL CONTROL OF PARLIAMENTARY PROCEDURES

When examining the judicial control of parliamentary procedures, besides legal (statutory) competences of courts, there are two decisive factors one should look at: the extent of the judicial activism, and the practice of procedural review as an individual procedure or part of other review possibilities.

4.1. Levels of Judicial Activism

I will illustrate the context-dependent dynamics of judicial activism by the changes in the practice of the South African Constitutional Court. By the 2000s, the court had broken with the general reluctance shared by most courts around the world, to review legislative processes, parliamentary rules of procedure, and the political accountability of the executive. The court's actions do not represent a violation of the separation of powers, but seek new solutions and legal remedies for the problems that arise.

In the last years, the South African Constitutional Court gradually departed from its original norm of non-intervention in legislative procedures. It has increasingly engaged in oversight of various types of legislative procedures, including the lawmaking process itself, and internal rules and mechanisms of parliament, especially that of parliamentary oversight. For example, in *United Democratic Movement v. Speaker of the National Assembly*, decided in June 2017, the Court set aside the Speaker's ruling that she had no power to call for a secret ballot on a no-confidence motion in the President. The Court held that such a decision must be supported "by a proper and rational basis and made to facilitate the effectiveness of parliamentary accountability mechanisms", which, as it held, was not the case.

As Gardbaum observes,[18] the court deviated towards the judicial review of parliamentary proceedings in three successive steps:

1. First, it established its authority to review legislation adopted in violation of the procedural rules, laid down in the constitution.
2. After that, it carried out the constitutionality examination of the internal parliamentary rules, in order to protect the constitutional rights of the MPs.
3. Finally, in an unusual way, it extended the review to an area that had not been touched before: the parliamentary control, examining whether it fulfils its constitutional obligation to control the government, and if so, how. At this phase, neither the review of norms nor that of procedural rules was the matter, but the mere application of certain rules was the subject of the investigation.

In Italy, on the contrary, the Constitutional Court walked a restrictive way, stating that the due respect for the parliament's autonomy requires that judicial control be strictly limited to those cases that result in an "obvious" violation of the constitutional prerogatives of MPs, and that such violations must be clearly identifiable already during the preliminary consideration.[19]

Similarly, the Czech Constitutional Court ruled that only the constitutionally defined rules of lawmaking can constitute a mandatory criterion for review by the court.[20] It also stated that the court's task is not to revise the parliamentary culture.[21] In addition, it also emphasized that it is necessary to balance the formal and procedural aspects of the review with the principle of legal certainty, and as a result, in many cases, where the court found the lawmaking procedure unconstitutional, it kept the law nevertheless in force.[22]

The court repeatedly stated that the annulment of a law is only possible if a constitutional norm has been violated, or if the unlawful lawmaking procedure has violated certain constitutional rights, principles or values.[23] As a result,

[18] Gardbaum, 2019.
[19] Decision of the Italian Constitution Court 17/2019.
[20] PL. ÚS 23/2004.
[21] PL. ÚS 24/2007.
[22] PL. ÚS 56/2005.
[23] PL. ÚS 26/2016.

since 2013, the Czech Constitutional Court has not annulled a single law due to violating the lawmaking procedure.

4.2. The Relation of Substantive Review to Procedural Review

When performing their constitutional duties in normative control, constitutional courts may look at the content (merit) of a law, the way it was adopted, or both. Courts are generally strict about the result of the parliamentary procedure affecting citizens' rights, but they tend to be less strict if the failures are not from the domain of the lawmaking procedure.

Interestingly, one of the first cases of the annulment of a law due to a procedural error was not in the Euro-Atlantic region, but in the Republic of South Africa, in 1951. The court handling the case established that the election law, in addition to being racially discriminatory in content, was not adopted in the prescribed manner at a joint meeting of the two parliamentary chambers with a two-thirds majority.[24] Here, the procedural error was established alongside a more serious content error - which was the defining practice for the courts of many countries for decades. This is what Bar-Siman Tov calls semiprocedural review, which is spreading worldwide.[25]

For a long time, the US Supreme Court has firmly and consistently refrained from procedural review of legislation.[26] The reason for this was the almost doctrinal interpretation of the division of powers and the refraining from interfering in the internal affairs of the Congress. The USSC did not even act on clearly unconstitutional congressional lawmaking procedures. For a long time, there was no formal judicial control of congressional proceedings, at most as part of substantive control. Not even when suspicions arose that the offices of Congress and the President colluded to pass legislation that was not passed by both houses of Congress.[27]

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[24] Harris v. Minister of the Interior, 1951 (2) SA 428 (A).

[25] Ittai Bar-Siman Tov, "The Puzzling Resistance to Judicial Review of the Legislative Process," *Boston Law Review* 91 (May 2011): 1915, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843564.

[26] Tov, "The Puzzling Resistance," 1923.

[27] OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 208 (2d Cir. 2007).

By the 2000s, a slow but decisive paradigm shift took place in the field of judicial review of congressional proceedings: the number of dissenting opinions, calling for a procedural review, grew steadily.[28] In recent years, the view that the courts must eliminate from the political decision-making mechanism those elements, that are alien to the thinking of the founding fathers who created the constitution, has spread in literature as the structuralist position.[29] As we have seen, it is very difficult to separate the purely structural and procedural issues from the substantive ones in practice. In the case of the USA, we can see the rise of procedural judicial control over Congress, mostly in theoretical works and judicial practice.[30] According to Bar-Siman Tov's observation, this trend reached the Supreme Court from the state courts through the federal courts, i.e. the paradigm shift took place bottom-up.[31] Another example for procedural review of legislation is a recent decision[32] of the Constitutional Court of Indonesia, suspending a controversial statute on procedural arguments of lacking obligatory consultations during the legislation process. However, the Court's first decision of this kind provoked the anger of the parliamentary majority, resulting in the replacement of a constitutional court justice.[33]

In Germany, the mere violation of the house rules during the lawmaking process, without violating a constitutional rule, does not lead to the law's annulment, but according to the ruling position, it remains ignored (*unbeachtlich*).[34] This is the case also in some countries of the region, like the Czech Republic or Hungary, where ommitting obligatory consultation in the preparatory phase of lawmaking do not result in an annulment by the constitutional court. Nevertheless, there have been cases in Germany where laws

[28] See eg. the dissent of Justice Stevens in Fullilove v. Klutznick (448 US 1980), judicial review should include a consideration of the procedural character of the decision-making process.

[29] Koen Lenaerts, "The European Court of Justice and Process Oriented Review," (Research Papers in Law, College of Bruges, 2012), https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_1_2012_lenaerts_final_0.pdf p.2.

[30] Clinton v. City of New York, 524 U.S. 417 (1998); United States v. Munoz-Flores, 495 U.S. 385 (1990); United States v. Lopez, 514 U.S. 549, 613-14 (1995).

[31] Tov, "The Puzzling Resistance," 1920.

[32] Decision No. 91/PUU-XVIII/2020, 25. November 2021.

[33] Zsolt Szabó, "How to Resist Political Pressure against a Constitutional Court?" *JTIBlog,* published 4 November 2022, jog.tk.hu/blog, https://jog.tk.hu/blog/2022/11/how-to-resist-political-pressure-against-a-cc#_ftn3.

[34] Volker Epping and Christian Hillgruber, *Kommentar zum Grundgesetz* [Commentary to the German Fundamental Law] (München: Beck, 2009).

have been struke down - in part - for procedural reasons, for example after the adoption of the immigration law in 2002, due to violations of the voting rules in the Bundesrat. [35] And in 2010, due to irregularities (inadequate preparation) experienced during the adoption of the law on social benefits, the Federal Constitutional Court decided to pronounce it unconstitutional, in addition to its content being unconstitutional.[36]

1. Sole procedural review at lawmaking

In *Kwantski v. The Knesset*, [37] the Israeli Supreme Court annulled an omnibus financial law in its 2017 decision, as the procedure violated the right of the deputies to discuss the bill in its details, since they only received the final version shortly before the vote.[38] This was the first case in the history of Israeli parliamentarism, when the Supreme Court annulled a law solely due to a procedural error, the adoption of which did not otherwise violate a formal rule of procedure, but "only" limited the possibility of a meaningful debate. Before submitting the opposition motion, the house speaker was inclined to repeat the vote, but he did not support the appeal to the court. In the case of the decision, which is also intended to be indicative, some speak of a new era in which the Supreme Court strengthens democracy with an activist turn.[39]

2. Mixed review at lawmaking (the procedural review only being additional)

This is the most common way of courts taking in consideration the legislative procedural failures. As part of their general examination in the merit, they often look at the procedure, but only condemn it, if there are already

[35] 106 BVerfGE 310, 2002.

[36] Hartz IV' Decision, BVerfGE, Judgment of the First Senate of 09 February 2010 - 1BvL 1/09 - paras. (1-220), 2010

[37] HCJ 10042/16 (2017).

[38] Ittai Bar Siman Tov, "In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation," *I CON NECT blog*, 13 December 2017, http://www.iconnectblog.com/2017/12/in-wake-of-controversial-enactment-process-of-trumps-tax-bill-israeli-sc-offers-a-novel-approach-to-regulating-omnibus-legislation/.

[39] Yaniv Roznai, "Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset," *IACL-AIDC Blog* May 17, 2019, https://blog-iacl-aidc.org/2019-posts/2019/5/17/constitutional-paternalism-the-israeli-supreme-court-as-guardian-of-the-knesset.

enough arguments against the law in the merits. Procedural failures may serve also as an additional argument if the law seems controversial from a constitutional point of view.

3. Single or mixed procedural control in other procedures than legislation (eg. parliamentary scrutiny procedures)

Courts are normally more indulgent with parliamentary procedural errors, if there is no product at the end of the procedure, affecting rights and obligations of the citizens. They definitely seem to be more strict at lawmaking procedures. In theory, judicial control of parliamentary scrutiny can be considered in two aspects (again applying the system presented earlier with regard to external and internal forums and applicants).

On the one hand, it is justified that the actors of the scrutiny procedure (eg. MPs asking questions, political groups requiring inquiry committees) be endowed with constitutional rights in order to defend their rights at (constitutional) courts. On the other, persons outside the parliament (citizens, natural and legal persons alike) whose rights have been violated by parliamentary scrutiny, should be able to start the (ordinary) court process, based on the general principle providing remedy against all state decisions. They could equally seek legal remedies against possible sanctions and coercive measures applied by the investigative committee, as we saw in the Kerins case.

This possibility is open in Germany and Austria. Especially the 2014 reform of the rules of procedure in Austria, following the German example, needs a mention. The changes opened up constitutional court competences in the following fields, related to parliamentary scrutiny:

a) legal disputes about the admissibility of investigation committees upon minority request;
b) matters concerning the adequacy of conflicts related to the scope of the basic procedure for taking evidence of the Rules of Procedure Committee;

c) disputes related to the existence of an objective relationship between the request for the taking of additional evidence or the subpoena of a witness and the subject of the inquiry committee's investigation;
d) competence issues related to conflicts between the Parliament and other state bodies (inter-agency conflicts, following the German example).

V. CONCLUSION

From the international overview, we can draw the conclusion that in continental, and even in some commonwealth jurisdictions, there is a legitimate claim of courts to judge whether parliamentary procedures are lawful (constitutional, fair, etc.). The only country, where parliament's privilege to be its (and its members') own judge is untouched, is the UK. It is not possible there to call a court in cases of grievances caused by the Parliament or MPs to citizens. But in the UK, the respected and independent position of the Speaker guarantee the fair judgement. Either way, parliamentary decisions, even on internal procedural matters, need to be provided with effective remedy. This is what also the ECtHR case law tells us.

However, the extent of the procedural review is highly dependent on the political culture and the government structure. As seen in the case of South Africa, courts tend to be more activist if there is a political turn against checks and balances. In the absence of a 'House-Rules-Court', a supranational forum, mainly the ECtHR, may become the most robust control body of the national parliaments' procedures. Several complaints concerning parliamentary law have been admitted by ECtHR so far. The Court will probably continue to influence the operation of the national parliaments in the future.[40]

The theoretical framework of (judicial) remedies against parliamentary procedural decisions, distinguishes between types of procedural rules, applicants, fora, extents of judicial activism and types of judicial review. The different types of remedies depend highly on the political landscape and the government's

[40] Csaba Erdős, *Hungarian Parliamentary Law under the Control of the Strasbourg Court; Legal studies on the contemporary Hungarian Legal System* (Győr: Széchenyi István University, 2014), 29.

structure. This article examined the external, judicial enforcement tools more thoroughly, which are either projections of internal political disputes or forums for settling legal violations suffered by external legal citizens. Courts of several countries are increasingly accepting lawsuits from legal entities outside the parliament, disputing parliamentary decisions.

Due to the partisan nature of all parliamentary bodies, no internal House-Rules-Court can be created within parliament in Hungary or other continental countries. However, if the sovereignty of Parliament is not unlimited, constitutional courts are suitable for acting as House-Rules-Court in a German-type dispute settlement procedure between constitutional bodies, if the constitutional and legislative environment is appropriate for this. The advantage of this would be to provide remedy against the decisions of the parliament which are not of legislative nature.

If national jurisdictions do not establish an effective House-Rules-Court of their own (as the constitutional courts would undoubtedly accept as such), the ECtHR may be acting as such. While going slightly against parliamentary sovereignty and its autonomous procedures, this approach can protect human rights and common principles of parliamentary law like democratic debate. In our view, some control over parliamentary procedures is inevitable, but it should preferably remain within the scope of national sovereignty. This is why an impartial House-Rules-Court should be created, possibly at the constitutional court.

Parliamentary law is one of the last, fearfully guarded relics of national sovereignty worldwide. Every state is proud of its parliamentary traditions and considers them to be its internal affairs. Until recently, there was no supranational, international influence or integration pressure in parliamentary proceedings. However, it cannot be denied that, like in the case of courts, there is a spontaneous, voluntary learning process between parliaments, especially embedded in the process of democratization. Regardless of this, fundamental principles can be identified that are common to all parliaments, and their enforcement is the key to fair parliamentary functioning. There can be such principles - which should

be followed in all deliberative bodies - the majority decides, but let the minority be heard, only one topic can be discussed at a time, the pre-agreed discussion rules must be followed, and so on.

Based on this, in principle, the idea of a common parliamentary law (*Ius Commune Parlamentiensis/Ius Gentium Parlamentaris*) and a world-level house rules court acting on this basis could be proposed, on the basis of which the adopted house rules of individual national parliaments could be brought before a forum operating on the basis of globally accepted rules or principles or legal disputes based on them. For now, this idea is far from reality, and its necessity can be questioned, but some signs of international judicial forums are showing interest in parliamentary proceedings. However, until there is no World Constitutional Court, these remain speculations of lawyers for international conferences.

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Democracy, Procedural and Social Rights, and Constitutional Courts in Hungary and Slovakia

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Abstract

In democracies, individuals are free to develop their own conceptions of values, and try to persuade others of their viability. However, some of these conceptions carry greater weight than others. In particular, centralized constitutional courts (CCs) authoritatively interpret fundamental values as they are typically entrusted by constitutions to do so. This article introduces a new approach to examine how CCs advance particular value conceptions, via scrutinizing the understandings of procedural rights and social rights by the two formally most powerful in Central Europe: the Hungarian (HCC) and the Slovak (SCC) Constitutional Court. While procedural rights capture the minimum standards of equal treatment, social rights signal more robust readings of democracy which raise expectations of improved well-being. The two jurisdictions offer windows into the working of CCs operating in regimes with a history of authoritarianism—whereas Slovakia is currently a fragile democracy at best, Hungary has regressed into an illiberal regime. The article makes use of new institutionalism, where ideas articulated in the CCs' case law have a potential to influence the political regimes the CCs are located in. Using a case selection method based on keyword search, its two case studies, covering the period between the 1990s and 2017 and 77 majority opinions show how the SCC seldomly connected procedural and substantive rights to democracy, but this went unnoticed in the broader public. For the HCC, however, the absence of the connections between democracy and justice, especially when interpreting social rights, appears to have contributed to its image as distant from the public, locked in abstract legal discourses. The findings prompt questions about the impact of public perceptions of the CCs on the capacity of actors with authoritarian ambitions to launch successful assaults on the CCs, as well as on the potential of the CCs to prevent these assaults by articulating particular value conceptions.

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I. INTRODUCTION

> "The theoretical assumption that constitutional courts, through their power to render a final decision, may pacify social conflict—by translating political conflicts into the language of the law and thereby neutralizing them—was put to the test"[1]

Centralized constitutional courts (CCs) fulfil several key functions in modern democracies. They resolve conflicts[2] such as competence disputes, competing rights claims, but also deeper contestations between fundamental values,[3] not through issuing punishment[4] but primarily the authoritative pronouncements of the community's values.[5] Depending on the jurisdiction, CCs have been entrusted with a broad variety of powers that revolve around the authoritative interpretation and application of the Constitution.[6] A wide range of subjects, including individuals,[7] may engage in interpretation of constitutional values. Yet, only that of the CCs is binding in the given polity, and its override by other actors triggers a transformation of the constitutional order as a whole[8] into one which can no longer accommodate a CCs.

While some CCs have formally been operating in non-democratic regimes, at the start of the 2000s, a great deal of optimism surrounded the performance

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1 László Sólyom, "The Constitutional Court of Hungary," in *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions*, ed. Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (Oxford: OUP, 2020), 392. Sólyom was the first President of the Court (1990 – 1998).

2 Martin Shapiro, *Courts: A Comparative and Political Analysis*, New edition (Chicago; London: University of Chicago Press, 1986). The variations in the role of courts in different cultural settings cannot be satisfactorily explored here. See, for instance, Robert L. Kidder, "Courts and Conflict in an Indian City: A Study in Legal Impact," *Journal of Commonwealth Political Studies* 11, no. 2 (1973): 121–39, https://doi.org/10.1080/14662047308447182.

3 Jimly Asshiddiqie, "Universalization of Democratic Constitutionalism and The Work of Constitutional Courts Today," *Constitutional Review* 1, no. 2 (2016): 2, https://doi.org/10.31078/consrev121.

4 Adeoye O. Akinola and Ufo Okeke Uzodike, "Ubuntu and the Quest for Conflict Resolution in Africa," *Journal of Black Studies* 49, no. 2 (2018): 108, https://doi.org/10.1177/0021934717736186.

5 Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven: Yale University Press, 2009).

6 Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart Publishing, 2015); Alec Stone Sweet, "Constitutional Courts," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2013), 815–29.

7 For the US context of how interpreting the Constitution means to be an American, see Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010).

8 Cf. Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: OUP, 2016), 195–204.

of CCs, using these powers of constitutional interpretation for the advancement of democratic consolidation.[9] In Central Europe in particular, CCs symbolized the 'beacon of hope', after decades of authoritarian rule which distorted the conceptions of legality and the rule of law in the academic and popular discourse.[10] The Slovak CC was particularly celebrated, because, unlike its other regional counterparts, it 'grew up' within a semi-authoritarian regime under PM Vladimír Mečiar, who called the Court to be a 'sick element on the political scene'.[11] Soon, however, this optimism began to flounder: several scholars have increasingly objected towards what they considered excessive judicial activism, championing 'judicial self-restraint',[12] and questions have been raised to what extent CCs make a difference for the development of their political regime in the first place. The decline of democracy in several countries in the region after 2010 has exacerbated this trend.[13] In particular, in Hungary the CC has been considered as captured because of all judges gradually having been replaced by nominees of the governing political party. This was accompanied by curtailing the CC's formal powers, notably the *actio popularis,* allowing every Hungarian citizen to submit an abstract constitutional review claim.[14] These measures were expected to end the perceived 'activist' heritage, allegedly championed by the 'towering judge' of the Hungarian CC in the 1990s, President László Sólyom.[15]

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9 Herman Schwartz, "Surprising Success: The New Eastern European Constitutional Courts," in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Jay Diamond, and Marc F. Plattner (Boulder, CO: Lynne Rienner Publishers, 1999), 195–216.

10 Paul Blokker, "The (Re-)Emergence of Constitutionalism in East Central Europe," in *Thinking Through Transition: Liberal Democracy, Authoritarian Pasts, and Intellectual History in East Central Europe After 1989*, ed. Michal Kopeček and Piotr Wcislik (Budapest: Central European University Press, 2015), 139–67; Michal Kopeček and Ned Richardson-Little, "Introduction: (Re-)Constituting the State and Law during the 'Long Transformation of 1989' in East Central Europe," *Journal of Modern European History* 18, no. 3 (2020): 275–80, https://doi.org/10.1177/1611894420924944.

11 Darina Malová, "The Role and Experience of the Slovakian Constitutional Court," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (The Hague: Springer, 2010), 355.

12 Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): 1346–1406, https://doi.org/10.2307/20455656.

13 James Dawson and Seán Hanley, "The Fading Mirage of the 'Liberal Consensus,'" *Journal of Democracy* 27, no. 1 (2016): 20–34, https://doi.org/10.1353/jod.2016.0015.

14 Katalin Kelemen and Max Steuer, "Constitutional Court of Hungary," in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford: OUP, 2019), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e802.

15 Gábor Attila Tóth, "Chief Justice Sólyom and the Paradox of 'Revolution under the Rule of Law,'" in *Towering Judges: A Comparative Study of Constitutional Judges*, ed. Rehan Abeyratne and Iddo Porat, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2021), 255–74, https://doi.org/10.1017/9781108879194.

The possibility of CCs 'abuse',[16] capture[17] or successful 'assault'[18] on CCs raises the question to what extent they matter in safeguarding and promoting democracy, including via resolving value conflicts. This article contributes to the study of the CCs' impact on political regimes by analysing SCC[19] and HCC[20] cases selected through its connection between democracy as a key concept and two particular issue areas, procedural and social rights. The analysis proceeds by, *firstly*, introducing the institutionalist perspective that informs the novel approach to examine the role of ideas as indicators for judicial self-perceptions. *Secondly*, it discusses the significance of procedural and social rights particularly for the post-communist CCs such as the ones in Hungary and Slovakia, as articulations of their conceptions of justice and proxies for their democracy-protecting potential. *Thirdly*, it presents the analysis of majority opinions, encompassing the dominant interpretations on the bench. The analysis shows how, with a few exceptions, justice articulated through procedural and social rights became separated from democracy in both CCs' reasoning, and how both CCs tend to favor a deferential standpoint in these areas. The deferential standpoint is especially prevalent in recent case law of the HCC, signaling the Court's attribution of wider policy leeway even to an illiberal government, thus incapacitating itself in acting as an influential voice in the public contestation over justice in cases signaling value conflicts in the society. The conclusion discusses selected limitations of the analysis and calls for further comparative research that takes the conceptions of key political concepts presented by the CCs seriously.

II. THEORETICAL AND CONCEPTUAL POINTS OF DEPARTURE

> "A political system with equal suffrage, in which the majority distributes everything to itself with no concern whatever for the fate of some racial

[16] Pablo Castillo-Ortiz, "The Illiberal Abuse of Constitutional Courts in Europe," *European Constitutional Law Review* 15, no. 1 (2019): 48–72, https://doi.org/10.1017/S1574019619000026.

[17] Tomasz Tadeusz Koncewicz, "The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux," *Review of Central and East European Law* 43, no. 2 (2018): 116–73, https://doi.org/10.1163/15730352-04302002.

[18] Bojan Bugarič and Tom Ginsburg, "The Assault on Postcommunist Courts," *Journal of Democracy* 27, no. 3 (2016): 69–82, https://doi.org/10.1353/jod.2016.0047.

[19] 63 opinions in total (59 majority opinions. 3 concurrences, 1 dissent).

[20] 30 opinions in total (18 majority opinions, 6 concurrences, 6 dissents).

> or other minority, will not count as an unjust democracy [...], but as no democracy at all."[21]

Extensive scholarship exists on the role of centralizes CCs as Guardians of the Constitution,[22] departing from the debate between continental European jurists, Hans Kelsen and Carl Schmitt, in the early 20th century. Kelsen's views have generally prevailed, with modern constitutional review modeled on Kelsenian premises.[23] With the spread of constitutional review,[24] more and more concerns were voiced in relation to its counter-majoritarian character, which may allegedly constrain or even undermine democracy understood via expressions of majority will.[25] While important, this discussion has somewhat obscured data-driven analyses on how particular ideas as developed by the CCs might constrain or fuel their capacity to protect democracy. This article argues for an institutional perspective to remedy that gap, and applies it on procedural and social rights jurisprudence as areas where CCs are particularly important as conflict-mediators.

2.1 The Value of Institutionalist Theory[26]

The core of institutionalist theorizing as applied in this article is to examine the interpretations of key political concepts in the expressions of particular actors (in this case, CC judges) as a proxy for understanding their self-perception that might constrain or facilitate the CC capacities to safeguard democracy. This reading, unlike a considerable portion of existing scholarship, does not take the 'counter-majoritarian' role of the CCs for granted;[27] instead, CCs might well support majoritarian preferences, at the expense of minority protection. Some

[21] Ronald Dworkin, "Equality, Democracy, and Constitution: We the People in Court," *Alberta Law Review* 28, no. 2 (1989): 339–40.

[22] See, e.g. Hans Kelsen and Carl Schmitt, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans. Lars Vinx (Cambridge: CUP, 2015).

[23] E.g. Mauro Cappelletti, "Judicial Review in Comparative Perspective," *California Law Review* 58, no. 5 (1970): 1038–40.

[24] Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).

[25] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Second edition (New Haven: Yale University Press, 1986).

[26] For a slightly more detailed discussion, see Max Steuer, "Authoritarian Populism, Conceptions of Democracy, and the Hungarian Constitutional Court: The Case of Political Participation," *The International Journal of Human Rights* 26, no. 7 (2022): 5–7, https://doi.org/10.1080/13642987.2021.1968379.

[27] Cf. Luís Roberto Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies," *The American Journal of Comparative Law* 67, no. 1 (2019): 109–43, https://doi.org/10.1093/ajcl/avz009.

scholars pursuing this approach categorize it as 'constructivist'[28] or 'discursive'[29] institutionalism; others retain the traditional institutional point of departure, but highlight the significance of the embedding of political institutions (which encompass CCs in this reading) in a regime context.[30] The present approach is furthermore compatible with 'public law institutionalism', interested in 'causal processes' (the starting point of which might be particular readings of political concepts, such as democracy or justice) that may lead to 'transformative moments' and 'responses of political institutions, actors and voters to the challenges these processes throw up.'[31]

In short, in accordance with the call for research 'that identifies actual patterns in legal and political discourse and their consequences, testing their significance versus that of other structural contexts'[32], the institutionalist approach is capable to uncover the shifting conceptions of key political concepts in the case law of the CCs, with the capacity to shed light on how these conceptions might have correlated with the (dis)empowerment of the CCs during the moments of democratic consolidation or, on the contrary, erosion of democracy.

2.2 Conceptions of Democracy in Relation to Procedural and Social Rights

Procedural and social rights are rarely the entry point to examine institutional impacts on democracy, particularly in relation to CCs. Rather, the typical entry points are elections,[33] which are at the centre of 'minimalist' approaches to democracy, where purely free and fair political contestation satisfies the requirements of a democratic regime. As Shugarman puts it, *'[j]udicial power*

[28] Colin Hay, "Constructivist Institutionalism," in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder, R. A. W. Rhodes, and Bert A. Rockman (Oxford: Oxford University Press, 2008), 56–74.

[29] Vivien A. Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse," *Annual Review of Political Science* 11, no. 1 (2008): 303–26, https://doi.org/10.1146/annurev.polisci.11.060606.135342.

[30] Cornell W. Clayton and David A. May, "A Political Regimes Approach to the Analysis of Legal Decisions," *Polity* 32, no. 2 (1999): 233–52, https://doi.org/10.2307/3235284.

[31] Rogers M. Smith, "Historical Institutionalism and the Study of Law," in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford: OUP, 2008), 50, https://doi.org/10.1093/oxfordhb/9780199208425.001.0001.

[32] Rogers M. Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," *The American Political Science Review* 82, no. 1 (1988): 106, https://doi.org/10.2307/1958060.

[33] Jay Krehbiel, "Elections, Public Awareness, and the Efficacy of Constitutional Review," *Journal of Law and Courts* 7, no. 1 (2019): 53–79, https://doi.org/10.1086/699241; Adfin Rochmad Baidhowah, "Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding," *Constitutional Review* 7, no. 1 (2021): 124–52, https://doi.org/10.31078/consrev715.

and judicial independence [...] can be defended simultaneously as guardians of democracy and guardians against too much democracy'.[34] The latter reading sees constraints on majority will as restrictions of democracy. Yet, once one goes beyond a *minimalist perspective, the tension vanishes*, as democracy obtains more attributes than majority will only. In relation to the CCs, focusing purely on elections would be nonsensical given that the very justification for CCs is based on the separation of powers *beyond* elections.[35] Empirical studies adopting more robust readings of democracy have so far been limited.[36]

A more robust conceptualization of democracy needs to account for more than the CCs' capacity to protect elections and other, majoritarian forms of decision making. It also needs to go beyond issues of competence disputes,[37] or the protection of basic personal and political rights, which are summarized by the Dworkinian thesis of 'rights as trumps'.[38] There is no doubts that the latter are essential for a democracy; as Burton puts it, to the extent democracy is often equated with 'majority government', 'when applied to class and ethnic minorities such government is experienced as unjust, not in the social good, a denial of human rights, and, furthermore, a major source of conflict.'[39] While these rights may also conflict, forming the basis of serious 'constitutional dilemmas',[40] the competence of CCs to address these conflicts is less frequently challenged than it is the case with social rights, where the very competence of the CCs to adjudicate is often questioned.[41] In the Central European post-communist context,

[34] Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge, Mass: Harvard University Press, 2012), 143.

[35] Writing at the heyday of democratic consolidation in Central Europe, two eminent Hungarian scholars connected constitutional adjudication to the separation of powers, or 'limiting government'. András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: CEU Press, 1999), 239, 242. János Kis, *Constitutional Democracy* (Budapest: CEU Press, 2003), 194–202, 235–36.

[36] For the application of a so-called "middle-ranged" conception, see Sascha Kneip, "Constitutional Courts as Democratic Actors and Promoters of the Rule of Law: Institutional Prerequisites and Normative Foundations," *Zeitschrift Für Vergleichende Politikwissenschaft* 5, no. 1 (2011): 131–55, https://doi.org/10.1007/s12286-011-0096-z.

[37] Andy Omara, "The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review," *Constitutional Review* 3, no. 2 (2018): 189–207, https://doi.org/10.31078/consrev323; Kálmán Pócza, ed., *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe* (London: Routledge, 2018).

[38] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978).

[39] John Burton, "Conflict Resolution as a Political Philosophy," *Interdisciplinary Peace Research* 3, no. 1 (1991): 65, https://doi.org/10.1080/14781159108412733.

[40] Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007).

[41] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012).

social rights are nevertheless particularly important and usually constitutionally enshrined, not least given the legacies of the previous, state socialist regime.[42]

The reason for focusing on procedural and social rights in relation to democracy is because they offer a window into CCs' conceptions of *justice.* Both procedural and social rights are tied closely to the 'essential idea of law as an institution that mediates competing, even incompatible and antagonistic, claims to a stable political order under the regulative, though inherently contested idea of justice.'[43] These claims for justice are a source of value conflicts which (constitutional) courts, as adjudicative institutions[44] are expected to address. It is difficult to operate with the concept of justice in any empirical analysis, since when it comes to the constitutional dilemmas mentioned above, it always depends on the perspective employed. As Dworkin put it with reference to individuals, '*we do not follow shared linguistic criteria for deciding what facts make a situation just or unjust*.'[45] Because justice at the level of individuals is interpreted so differently, it may seem useful prioritize a social conception of justice whereby it denotes '*social happiness [...] guaranteed by a social order*.'[46] Yet this exclusively collective perspective on justice is precisely one that may result in support of unrestrained majoritarianism in which the majority governs at times without any consideration for minority rights.[47] A rigid procedural view of justice where everything that meets the standards of due process or legality[48] is just is also unsatisfactory as there is no guarantee that particular legal norms are in accordance with what is perceived to be just.

To bridge these two conflicting views, justice, for the purpose of examining the CCs' understandings of democracy in relation to it, can be conceptualized

[42] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Second edition (Dordrecht: Springer, 2014), 253.

[43] Ulrich K. Preuß, "Judicial Power in Processes of Transformation," in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 349.

[44] See, for example, Austin Sarat and Joel B. Grossman, "Courts and Conflict Resolution: Problems in the Mobilization of Adjudication," *American Political Science Review* 69, no. 4 (1975): 1200–1217, https://doi.org/10.2307/1955281.

[45] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 73.

[46] Hans Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science (Collected Essays)* (New Jersey: The Lawbook Exchange, Ltd., 2000), 2.

[47] Cf. Kelsen, *What Is Justice?* 4.

[48] Agustín Ruiz Robledo, "Due Process," in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford, New York: Oxford University Press, 2022).

through legal certainty, except a few rare cases where legal certainty would be contradictory to justice to such an extent, that it would have to be sidelined for a just decision.[49] Normally, legal certainty remains a desirable goal because it improves the trust of the actors in the legal framework at play in the country. Legal certainty also concerns the clarity of the 'message' of the CC, and modification of its self-developed doctrines only with an understandable justification acceptable by the legal community as well as other actors (such as the media). Following Roux's[50] qualified feedback loop theory, the CC has to win 'the hearts' of the political actors in the society so that its democratic potential is fully realized. Consequently, its decisions must clearly show how the particular decision was fair to all parties involved and even how it can contribute to a 'better life'. Obviously, visions of 'good life' are often significantly different among the society, nevertheless, the court should be expected to speak up with a clear voice when the alternative vision is rejected by the vast majority of the society. For instance, there may be various understandings of to what extent redistribution in the society is just, but the vast majority of the society can be reasonably expected to accept that having a third of the total population dying on the streets of hunger would be unjust, and there is a duty of some minimal care. In many cases, the example will not be as obvious, and thus the context affecting the perceptions of society members at a given point in time must not be ignored.

An argument illustrating the importance of the courts' role in underpinning perceptions of justice is made by Sandel. Referring to Rawls, Sandel presents one approach to justice (from an individual perspective) as looking at a controversy at hand and its various solutions as if they were presented by the Supreme Court in its reasoning.[51] This approach is supposed to enhance the chance for a neutral assessment that the courts are expected to do. This picture of the Supreme Court's (or any court's) reasoning is idealized, but for the purpose of this conceptualization it is sufficient to point to the embedded understanding

[49] Cf. Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1–11, https://doi.org/10.1093/ojls/gqi041.

[50] Theunis Roux, "Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years," *Journal of Southern African Studies* 42, no. 1 (2016): 9–11, https://doi.org/10.1080/03057070.2016.1084770.

[51] Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2010), 248.

of the association between courts and justice (as a chance for neutral, objective assessment) that stems from it.

2.3 A Note on the Selection of Cases and Judicial Decisions

The Visegrad region has received global attention due to erosion of democracy in Hungary and Poland, which also negatively affected the operation of constitutional courts in these countries.[52] While the Polish Constitutional Tribunal continues to face a crisis in terms of the legitimacy of the appointed judges, the Hungarian CC judges were appointed in an at least formally legal manner, thus enhancing the potential but also the responsibility of the Hungarian CC to counter the erosion of democracy as opposed to its Polish counterpart. While the Court lost its competence to review *actio popularis* petitions, it has gained the competence to review constitutional complaints by private persons which should, at least in theory, strengthen its authority vis-à-vis other courts in the judicial system.[53] In contrast, Slovakia is sometimes considered as free from such pressures on democracy.[54] The Slovak CC, while wielding considerable formal powers that are recognized as a condition for effective confict resolution,[55] is rarely studied,[56] even in comparative collections. The Czech CC, established, similarly to the CC in Slovakia, after the dissolution of the Czech and Slovak Federal Republic in 1993, is a more common object of analysis.[57] Moreover, unlike the CC in Slovakia, its history does not contain a period comparable to

[52] E.g. Lech Garlicki, "Constitutional Court and Politics: The Polish Crisis," in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 141–63; Gábor Halmai, "A Coup Against Constitutional Democracy: The Case of Hungary," in *Constitutional Democracy in Crisis?*, ed. Mark A. Graber, Sanford Levinson, and Mark Tushnet (Oxford: OUP, 2018), 243–56.

[53] Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (2007): 67, https://doi.org/10.1093/icon/mol044.

[54] Licia Cianetti and Seán Hanley, "The End of the Backsliding Paradigm," *Journal of Democracy* 32, no. 1 (2021): 66–80, https://doi.org/10.1353/jod.2021.0001.

[55] Julio Ríos-Figueroa, *Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2016), 201, https://doi.org/10.1017/CBO9781139942157.

[56] For an overview of the formal powers of the Court, see Max Steuer, "Constitutional Court of the Slovak Republic," in *Max Planck Encyclopedia of Comparative Constitutional Law*, ed. Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (Oxford: OUP, 2019), https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e803.

[57] E.g. David Kosař and Ladislav Vyhnánek, "The Constitutional Court of Czechia," in *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions*, ed. Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (Oxford: Oxford University Press, 2020); Zdeněk Kühn, "The Constitutional Court of the Czech Republic," in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 199–236.

the 'Mečiar' era in Slovakia (1994-1998), where a semi-authoritarian government made considerable efforts to dismantle the bourgeoning democratic regime. The combination of these factors makes the case studies of Hungary and Slovakia particularly useful to better understand the relationship between the CCs' conceptions of democracy and justice as articulated in case law on procedural and social rights.

The cases themselves are selected via keyword search from the full population of decisions. This method transcends the usual limitations posed by the types of proceedings or the judicial composition of the court. The key concept for selection is 'democracy', with the decisions referring to democracy in the context of procedural and social rights being analyzed in this article. This way, it is possible to extract the 'idea of democracy' as introduced by the CCs themselves, although it does mean that several 'canonical cases' as reproduced in works based on case selection using the judgment of Hungarian constitutional experts (available particularly for Hungary)[58] are not included. Majority opinions are a point of focus here, as they carry central weight for the outcome of the judicial case. The analysis is structured according to the main eras of both the CCs, starting with the 1990s, continuing with the early 2000s (2007 as the end of the mandate of most 'second generation' constitutional judges in Slovakia, and 2010 as the year marking the adoption of the new Constitution in Hungary) and concluding with the remaining period until 2017.

III. THE HCC'S AND SCC'S CONCEPTIONS OF DEMOCRACY IN RELATION TO PROCEDURAL AND SOCIAL RIGHTS – MAJORITY OPINIONS

> "[C]itizens need to [...] accept that anything [...] intolerant, and hence infringing the rights of other citizens—will eventually be judged by state institutions, courts in particular".[59]

[58] András Jakab and Johanna Fröhlich, "The Constitutional Court of Hungary," in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich (Cambridge: Cambridge University Press, 2017), 394–437; Fruzsina Gárdos-Orosz and Kinga Zakariás, eds., *Az Alkotmánybírósági gyakorlat I–II. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020 [The Practice of the Constitutional Court I–II. 100 Constitutional Court Decisions of Principal Importance 1990–2020]* (Budapest: Orac, 2021).

[59] Jan-Werner Müller, "Citizens as Militant Democrats, Or: Just How Intolerant Should the People Be?," *Critical Review* 34, no. 1 (2022): 88, https://doi.org/10.1080/08913811.2022.2030523.

Müller's claim above underscores the key role courts play in addressing societal disagreements about the meanings of values. Yet, courts themselves are composed of people, and as such can be expected to have their own value conceptions. The formulation of values in their respective constitutions may be significant for what they emphasize in their case law. However, the role of the text should not be overestimated. As Sajó puts it when discussing constitutional courts packed with government loyalists: *'[g]overnment-friendly adjudication comes easy when loyalist judges can apply a constitution that was tailor-made for illiberalism. The task is not significantly more difficult where the constitution is neutral, as it should be*.'[60] With this caveat in mind, both the Hungarian and the Slovak Constitution, emphasize the significance of democracy in their text. Article 1 of the latter establishes that '*the Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not linked to any ideology, nor religion*.' The Hungarian Fundamental Law (adopted in 2011) also nominally retains a prominent space for democracy, including in Article B) (1): '*Hungary shall be an independent, democratic rule-of-law State*.' In fact, the term 'democracy' appears more frequently in the 2011 Fundamental Law than in its predecessor, hence retaining ample interpretive 'playing ground' for the HCC.[61] Less conducive to a robust reading of democracy, however, are references to the concept in the Preamble ('National Avowal') of the Fundamental Law. This endorses more exclusionary, nationalist readings of the value, even though its role is primarily a symbolic one.[62]

This section presents the results of the analysis for two CCs in their conceptions of democracy in relation to procedural and social rights. The former, while predominantly addressing issues associated with a fair trial,[63] include

[60] András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021), 184, https://doi.org/10.1017/9781108952996.

[61] Kelemen Katalin, "Van még pálya: A magyar Alkotmánybíróság hatásköreiben bekövetkező változásoról [There Is Playing Ground Left: On the Changes in the Competences of the Hungarian Constitutional Court]," *Fundamentum* 15, no. 4 (2011): 111–22.

[62] Katalin Miklóssy and Heino Nyyssönen, "Defining the New Polity: Constitutional Memory in Hungary and Beyond," *Journal of Contemporary European Studies* 26, no. 3 (July 3, 2018): 329, https://doi.org/10.1080/14782804.2018.1498775; Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples: The Global Origins of Constitutional Preambles," *George Washington International Law Review* 46, no. 2 (2014, 2013): 327–28, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11414&context=journal_articles.

[63] Zdeněk Kühn, "Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement," *The American Journal of Comparative Law* 52, no. 3 (2004): 561, https://doi.org/10.2307/4144478.

references to democracy in the context of corruption prevention, that undermines justice in the polity in question.[64] Furthermore, procedural and social rights are linked to two forms of equality, political and social, and thereby connect the substantive requirements of democratic output performance with the need for procedural justice, especially in criminal law cases which have a significant impact on the life of the individual. The analysis focuses on the majority opinions which create the legally binding canon of the CCs.[65] It uncovers the tendency to avoid a relationship between democracy and justice in the majorities' reasonings.

3.1 Hungary: Social Rights on the Margins

Has the HCC made connections between democracy and justice approached via procedural and social rights in its case law? The following analysis, which includes broader readings of democracy than those focusing on procedural rules of lawmaking, elections and referenda,[66] considers the periods in the 1990s, early 2000s and the post-2010 constitutional changes (until 2017). The early decisions of the HCC were pivotal in laying down the interpretations of fundamental constitutional principles, and referred to frequently since.[67] However, this is where the discrepancy between engaging with procedural and social justice and doing so in connection to democracy comes to the fore. The HCC may have enacted progressive readings of social welfare, but some of the pivotal cases as identified by experts do not feature references to democracy.[68] In fact, this is in line with the focus of the Court on justifications grounded in legal certainty rather

[64] See, for example, Herlambang P Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 318–19, https://doi.org/10.1177/0067205X221107404.

[65] A discussion of separate opinions is provided in Appendix 2.

[66] Cf. Nóra Chronowski, Boldizsár Szentgáli-Tóth, and Emese Szilágyi, eds., *Demokrácia-dilemmák – Alkotmányjogi elemzések a demokráciaelv értelmezéséről az Európai Unióban és Magyarországon* [Democracy Dilemmas – Constitutional Law Analyses About the Interpretation of the Principle of Democracy in the European Union and in Hungary] (Budapest: ELTE Eötvös Kiadó, 2022). They list four areas, including European Union integration and freedom of speech, which amounts to a broader reading of democracy, yet still omitting output-based considerations (social rights in particular).

[67] Zoltán Pozsár-Szentmiklósy, "Precedents and Case-Based Reasoning in the Case Law of the Hungarian Constitutional Court," in *Constitutional Law and Precedent: International Perspectives on Case-Based Reasoning*, ed. Monika Florczak-Wątor (London: Routledge, 2022), 109–10.

[68] Gábor Halmai and Nóra Chronowski, "The Decline of Human Dignity and Solidarity through the Misuse of Constitutional Identity: The Case of Hungary since 2010," in *Human Dignity and Democracy in Europe: Synergies, Tensions and Crises*, ed. Bedford Daniel et al. (Cheltenham: Edward Elgar Publishing, 2022), Section 1; Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing, 2003), 146–47.

than democracy more broadly, and in protecting only the minimum standard, permeating a discourse on sufficiency rather than on progressive development.[69] In the 1990s, three cases dealt with areas where there is a potential for (both procedural and redistributive) justice to arise in the reasoning. In 1992, the Court declared the institute of the 'protest of illegality' to be unconstitutional.[70] The institute, a remnant of the previous regime as the prosecution could have appealed against *final* judgments, was invalidated by the Court referring to the 'right to self-determination in civil judicial proceedings.' At the same time, the reference to democracy is only a single scarce one, linked to Art. 2 (§1) of the Constitution. The Court identifies the principle of the rule of law in the same article and goes on to discuss that, leaving democracy aside.[71] A similar way of reasoning can be observed in the other two cases—the one concerning the Compensation Act dealing with the compensation for unlawfully confiscated property during the state socialist regime[72] and the one on the adoption of implementing measures prescribed by law by the Minister of Defense on the status of the members of armed forces.[73] Clearly, the rule of law (understood as legal certainty combined with a number of additional principles elaborated upon by the HCC) trumped democracy in this period when discussing cases pertaining to justice in property relations and during legal proceedings.

Post-2000 we can observe two cases on these issues with at least scarce mentions of democracy.[74] In a case concerning delegation of some decision-making competences to the National Interest Reconciliation Council (*Országos Érdekegyeztető Tanács*), decided in 2006, the HCC linked social dialogue and interest representation to democracy. For the Court, the involvement of this Council is desirable for the realization of 'the constitutional principle of democracy', in addition to the informed discussion on public matters, which it locates in Art. 61

[69] Cf. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Massachusetts: Belknap Press: An Imprint of Harvard University Press, 2018).

[70] 9/1992 [I. 30] AB.

[71] 9/1992 [I. 30] AB, 6.

[72] 15/1993 [III. 12] AB.

[73] 479/E/1997.

[74] Also in this period, one decision in which only the petitioner refers to democracy can be identified (731/B/2006. AB, the HCC referred to its earlier declaration here that the Preamble of the Constitution does not have legal validity and Art. 2 [§ 1], which does not refer to social rights).

(§1) of the Constitution.[75] Therefore, omitting legal regulations enshrining such involvement options amounts to unconstitutionality by legislative omission. The decision, that is relevant for the participatory dimension of democracy as well, has been referred to as the cornerstone for improvement of social dialogue.[76] At the same time, in a decision that followed in 2008, the HCC did not take up the argument for democracy presented by the petitioner who, among others, claimed that the required public consultation requested by Hungarian legislation as an expression of an element of 'direct democracy' did not properly take place.[77] So whereas the Court did engage with the substantive arguments related to the development of the healthcare system, it was comfortable with reasoning that '*the popular sovereignty principle is not violated [...] by the sponsor of the bill not having satisfied the public consultation requirement stipulated by the Act on the creation of laws*.'[78] The Court's judgment does formally contain declarations of unconstitutionality but only of a few specific provisions based on rule-of law considerations. The whole reasoning is hardly straightforward and so its broader message is rather negative in terms of a more extensive conceptualization of democracy intertwined with (in this case social) justice. This is underlined by the fact that it has only been mentioned in international scholarship in terms of the procedural aspect or its third, property rights-related, aspect[79] as well. The mixture of procedural and substantive concerns led to a convoluted decision which, while not departing from the Court's previous case law, paid only limited attention to the overreaching principles surrounding the case (especially in terms of the connection between the rule of law and other principles).

[75] 40/2005 [X. 19.] AB, 15.

[76] Erzsébet Berki and László Neumann, "Draft Laws on National and Sectoral Social Dialogue Submitted to Parliament | Eurofound," February 28, 2006, https://www.eurofound.europa.eu/publications/article/2006/draft-laws-on-national-and-sectoral-social-dialogue-submitted-to-parliament.

[77] 109/2008 [IX. 26.] AB, 5, 14.

[78] 109/2008 [IX. 26.] AB, 14. See also Zoltán Szente, "The Interpretive Practice of the Hungarian Constitutional Court: A Critical View," *German Law Journal* 14, no. 8 (2013): 1603; Enyedi Krisztián, "Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court]," *Fundamentum* 12, no. 3 (2008): 116–18.

[79] Zoltán Szente and Fruzsina Gárdos-Orosz, "Judicial Deference or Political Loyalty? The Hungarian Constitutional Court's Role in Tackling Crisis Situations," in *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*, ed. Zoltán Szente and Fruzsina Gárdos-Orosz (New York: Routledge, 2018), 97.

In the area of procedural rights and criminal justice, the HCC decided a case in 2001 on the '*reformatio in peius*' principle.[80] Referring to the 1992 case on the 'protest of illegality' as an example of principles defending the rights of the accused, it declared that '*reformatio in peius*' is part of the Hungarian constitutional order; nevertheless, the applicant's interpretation of them in this case would amount to making effective execution of justice impossible because it would apply the principle also in instances where the appellate proceeding emerges due to a procedural error of the first instance court. However, the whole discussion on how legal regulations must enable the achievement of material truth in criminal proceedings revolve around the principle of the rule of law, and the case qualified itself for the analysis here only through the reference to Art. 2 (§1) of the Constitution.[81] A similarly scarce mention is in a longer decision (24 pages) that struck a balance between liberty and security by declaring the possibility of secret background checks on convicts before their release in prison (including possible surveillance measures and apartment raids without a court warrant) unconstitutional.[82] The "auxiliary" argument with democracy is only slightly more tailored to a case decided soon after on the relationship between the state prosecution and private legal practice. The Court invalidated the practice of replacing the state prosecution with private service in case of delays in the proceeding caused by the prosecution. One of its arguments was an essentially "militant democratic" one, asserting that 'the attorney general and the prosecution service has a constitutional obligation – among others – to protect the interests of the Republic of Hungary, to prosecute actions affront to or threatening democracy and to ensure and protect legality.'[83] The same argument was presented in a later decision generally praised for addressing, most notably, an unconstitutional possibility for the judge to execute certain tasks on behalf of one of the parties in the dispute.[84]

[80] The principle, in short, prohibits the imposition of a more severe punishment by an appellate court in case of an appeal coming from the indicted.

[81] 286/B/1995 AB, 2.

[82] 47/2003 [X. 27.] AB, 8; see also "Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court]," *Fundamentum* 7, no. 3–4 (2003): 186–87.

[83] 42/2005. [XI. 14.] AB, 13.

[84] 72/2009 [VII. 10.] AB, 6, see also M. Tóth Balázs, "Az unortodox büntetőpolitika az Alkotmánybíróság előtt [The Unorthodox Penal Policy Before the Constitutional Court]," *Fundamentum* 16, no. 1 (2012): 87–88.

Post-2010 the evidence indicates the Court paying attention to the link between democracy and (procedural and social) justice even more rarely. A reference to the earlier case concerning social dialogue[85] places a newer majority decision referring to its understanding of democracy through social dialogue under consideration in this dataset. In this instance, the Court primarily invalidated a provision that exempted governmental office-holders from the protection from ending a labor relationship without justification on the employer's side.[86] Furthermore, it contained a procedural dimension through the objection of the sponsor (a group of MPs rather than the executive) not having engaged in a conciliation *(egyeztetés)* process with the representatives of the concerned group of employees. Finally, in 2015, the Court did not take up the argument of a petitioner who claimed that 'it is essential for the functioning of democracy' that it is allowed to publish information about an ongoing (i.e. without a final verdict) anti-monopoly proceeding (*versenyfelügyeleti eljárás*) by the defendant.[87] The petition was not evaluated on the merits since for the Court the legislation restricts the admissibility of the constitutional complaints for cases when constitutional rights-provisions, rather than other constitutional provisions are alleged to have been violated by the petitioner. Such reasoning is based on a restrictive interpretation of the 'constitutional significance' of the petitions.[88]

3.2 Slovakia: The Troubling Legacy of the 1990s, and Coming to Terms

How did the Slovak CC connect democracy to the wider concerns for societal order and its well-being? The dataset in this area includes a few remarkable standpoints presented by the Court's plenary or one of its senates.

Only one key case from the first Court can be included into this category: the controversial 1999 decision concerning the Mečiar amnesties, whereby the SCC had to determine (through its abstract interpretative competence of the Constitution) whether Mečiar as the Prime Minister exercising some of the President's competences at the time of this office being vacant, including the

[85] 40/2005 [X. 19.] AB.
[86] 8/2011 [II. 18.] AB, 15.
[87] 3171/2015 [VII. 24.] AB.
[88] Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court in Transition — from Actio Popularis to Constitutional Complaint," *Acta Juridica Hungarica* 53, no. 4 (2012): 314, https://doi.org/10.1556/AJur.53.2012.4.3.

competence to grant amnesties, was eligible to grant such an amnesty. The case was politically salient because the two amnesties granted by Mečiar (the second one 'correcting' the first)[89] concerned the possible crimes that had occurred during the compromised referendum in 1997, and perhaps even more blatantly, the crimes related to the kidnapping of the first Slovak president's son as a means to cease his activities undermining Mečiar's authority, as well as the related murder of a policeman who declared openness to testify in the case. In this case,[90] the SCC acknowledged that '*in a society with all attributes of a democratic one there is a political climate [...] which has an escalated relationship to certain crimes. A prior interest in a democratic society undoubtedly is the interest in uncovering, convicting and punishing all crimes.*' Regardless of this remarkable reference on the interest in achieving justice in the society by punishing wrongdoers, the Court adopted a narrow procedural approach stressing the President's unconditional competence and the legal certainty of those who were relieved from prosecution and/or punishment by the amnesty. Without more evidence it would be too far to assume that the Court did not apply its own reflection on the interest of punishment of crimes in a democracy because its background assumption was that the Slovak society at that time could not be considered democratic. However, unless this assumption was at play, a discrepancy emerges between the link made by the SCC between democracy and justice in terms of uncovering committed crimes, and the right of potential wrongdoers to unconditionally 'hide' behind an amnesty. This is only strengthened when the Court cites legal philosopher Gustav Radbruch in the conceptual understandings of pardons and amnesties being a 'recognition of the world around us not being just the world of law, but that there are also other values which sometimes need protection against the law.'[91] The first senate managed to turn away from this reasoning in the very same case, by preventing further investigation even provided that potential perpetrators discovered in this process would be exempt from punishment.

[89] In its ruling, the SCC then declared that it is not permitted for the acting President to issue any 'corrections' on an amnesty decision issued previously. This spurred the debate that, in fact, the second amnesty presenting such a correction should have been disregarded by state institutions engaged in the respective criminal proceedings.

[90] I. ÚS 30/99.

[91] I. ÚS 30/99, 25.

The second Court leaves three messages broadly linked to the relationship between democracy and justice. *Firstly*, in two cases it brought to the fore the concept of 'the level of democracy in the criminal procedure of the state', for which the main indicator is the right to defence.[92] Here, the Court was able to invalidate the decisions of lower courts on textual interpretation of the law and so avoid difficult questions pertaining to special circumstances of individuals or a more general link between defence and judicial independence.[93] *Secondly*, in rejecting a complaint on the actions of the public administration and general courts, it pointed out the legitimacy of these institutions in a democracy, where 'the public interest in the exercise of public power of those who created it cannot be ignored, obviously, under the condition of fulfilment of fundamental rights and freedoms'.[94] This case displays features of textualist interpretation too by not positing the requirement by law towards the general courts to comprehensively answer each objection of the petitioner. *Thirdly*, in the case concerning prosecution of abuse of notarial powers the SCC at one point linked democracy at the domestic level to 'acceptance of the Slovak Republic as full-blown member of the global family of democracies', the condition for which should be an existence of strategy against corruption as '*an expression of genuine will to eliminate this negative phenomenon which has a destructive impact and [...] weakens the trust of an ordinary citizen in justice guaranteed by the state and its authorities*'.[95] However, this thesis is raised in an unclear connection to an explanatory statement of the proposal for the Notarial Act, and therefore it is not made explicit whether the SCC accepted it as its own position as well. In sum, also given the small number of cases, significant leeway in this area is left for the Mazák's Court successor to specify and elaborate on.

The first observation of the caseload of the SCC's third term pertaining to broader justice considerations is its diversity. More than in any other dimension, the ideas of democracy are multifaceted and not necessarily related or even

[92] III. ÚS 41/01, 16, III. ÚS 163/03, 15.
[93] After all, the right to defence may not be the ultimate indicator of democracy in the criminal procedure if e.g. it is combined with manifestly biased judges who hear, but do not listen to any arguments of the defenders.
[94] I. ÚS 105/06, 17.
[95] PL. ÚS 1/04, 23.

consistent with each other. The petitioners' references not reflected by the judges contribute to this outcome, regardless of whether they appear in cases declaring unconstitutionality,[96] affirming rulings of lower courts or decisions of other state organs,[97] rejections/affirmances of constitutionality[98] or by other actors in other types of proceedings.[99] The Court's image emerges as one to which petitioners turn with their grievances, trying to retell their personal stories (more or less) through the existing legal framework or challenging the framework itself in *de facto actio popularis* complaints in order to gain satisfaction before the bench. The latter is especially pertinent in the argument made in a series of cases according to which a party to a proceeding before a Slovak general court should have the right to oblige that court to submit a claim for constitutional review to the SCC in case the petitioner presents arguments in favor of certain legislative provisions being in violation of the Constitution. The petitioner, supportive of an evolutionary jurisprudence, asked the Court to turn away from restrictive formalism, 'realize the problem and via a change of case law create space for strengthening the elements of democracy in the Slovak Republic'.[100] In all these cases, the second senate argued that such a step would achieve 'the correction of the constitution in a way that the party to the proceeding in front of a general court would become a "privileged subject", while the general court would become "her postman"'.[101] Choosing the term 'correction of the constitution' raises eyebrows as it signals the Court's implicit acceptance of the deficit in the limits of the subjects entitled to submit petitions for constitutional review of legislation.

The Court did not always stay silent on the relationship to, or consequences of, the issue in question on democracy. In a few but notable cases it strengthened the guarantees for due process employing ideas of democracy. *Firstly*, invoking the 'expert-based legitimacy' argument of courts operating in the 'normative

[96] PL. ÚS 30/2015, 5, II. ÚS 467/2010, 4, IV. ÚS 317/2013, 7.
[97] II. ÚS 88/09, II. ÚS 148/07, 3, IV. ÚS 369/2011, 2, IV. ÚS 38/2012, 3, I. ÚS 81/2012, 2 II. ÚS 266/2011, 11, I. ÚS 2/2016, 8, II. ÚS 585/2015, 10, II. ÚS 699/2014, 5, I. ÚS 110/2012, 23, II. ÚS 592/2014, 6, II. ÚS 296/2017, 4, I. ÚS 469/2014, 3, IV. ÚS 488/2013, 5, IV. ÚS 75/2014, 2, I. ÚS 188/2017, 3, III. ÚS 374/2017, 7.
[98] PL. ÚS 10/09, 5, PL. ÚS 3/03, 41-42, 82.
[99] I. ÚS 138/2012, 6-7, also I. ÚS 139/2012, 6, I. ÚS 353/2010, 5-6, I. ÚS 352/2010, 6, I. ÚS 98/2012, 6, I. ÚS 99/2012, 6, and III. ÚS 140/2012, 5.
[100] II. ÚS 417-422/2010, 3, II. ÚS 424/2010, 3.
[101] II. ÚS 417-422/2010, 7, II. ÚS 424/2010, 7.

space of law and factual space of democracy' in an individual complaint from the ministry of justice, it declared the violation of this right of the state because of judges deciding on so-called anti-discrimination lawsuits of their colleagues who themselves had been parties to such lawsuits.[102] The Court went on to focus on the 'feeling of legal security of individuals in a free society [which is] co-created with the feeling of justice, the need for narration, storytelling about it and in the belief that in the society and especially the judiciary there is still justice'.[103] This decision, however, came from two judges only (Kohut, Mészáros), with judge Ľalík penning a dissent. *Secondly*, in two cases finding a violation in the criminal procedure as conducted by general courts, the first senate 'resurrected' the thesis of the second Court that the right to defence is indicative of the 'level of democracy in the criminal procedure'.[104] As in previous cases with 'notorious' democracy arguments, this was used in a number of cases with an opposite verdict as well.[105] *Thirdly*, it brough the Supreme Court 'back on track' when invalidating a disadvantageous reading of a state socialist piece of legislation for the petitioner. Here, it took inspiration from the ECHR again by reproducing a statement from a concurring opinion that 'democratic States can allow their institutions to apply the law – even previous law, originating in a pre-democratic regime – only in a manner which is inherent in the democratic political order (in the sense in which this notion is understood in the traditional democracies)'.[106]

Last but not least, the invalidation of the so-called Mečiar amnesties[107] emerges as a bold move of the Court rather than as a last step in an incremental process of constructing the meaning of democracy. Indeed, the Court offers a substantive definition of a democracy under the rule of law. It enlisted seven principles falling under this definition, the principles of prohibition of abuse of powers (arbitrariness), popular sovereignty (democracy) in connection with the

[102] II. ÚS 16/2011, 35.
[103] II. ÚS 16/2011, 35.
[104] I. ÚS 217/2013, 15, I. ÚS 394/2014, 14, I. ÚS 355/2015, 13, I. ÚS 620/2016, 9, I. ÚS 419/2016, 17, III. I. ÚS 574/2015, 5.
[105] I. ÚS 139/2016, 6, I. ÚS 288/2016, 6-7.
[106] IV. ÚS 294/2012, 21. See also Streletz, Kesslerand Krenz v. Germany, 22 March 2001 (Application Nos. 34044/96, 35532/97 and 44801/98), concurring opinion of judge Levits, point 8).
[107] PL. ÚS 7/2017.

principle of the protection of human rights,[108] separation of powers, democratic legitimacy, transparency and public accountability of the exercise of public power, legal certainty and protection of the citizen trust in the legal order, and justice. This is clearly a substantive list that gets close to a multidimensional conceptualization of democracy. However, the decision remains more of an 'anomaly'[109] than a new standard-setter for the understanding of democracy in Slovakia, which continues to be based primarily on minimalist readings.

The case of the SCC's reception and responses to claims for substantive and procedural justice is a window into the full-blown potential of the CCs to connect with their petitioners as well as to lay the groundwork for a powerful and coherent rationale behind the idea of democracy that they can later employ to resist traditional as well as more innovative[110] authoritarian pressures.

IV. CONCLUSION

> "Law seems to have two basic and intimately connected tasks: to solve conflicts and to foster conformity to legal rules. The conflict-solving function has left the most distinctive marks upon the structure of legal thinking and upon the occupational role of the professional jurist"[111]

This article has explored how, through studying conceptions of democracy featured in centralized CC decision making may advance the understanding of their potential and limits in addressing societal value conflicts. The empirical analysis has focused on procedural and social rights in relation to democracy, as these are important indicators for how the CCs conceive of the contested relationship between democracy and justice, the divergent views of the latter being a core source of value conflicts. Hungary's and Slovakia's CCs have been studied as those which have faced or continue to face non-democratic regime contexts, thus allowing to review the conceptions of democracy their judges

[108] The fact that these are listed as interrelated principles underlines the inherent relationship that the SCC (at least in this decision) sees between them.

[109] Max Steuer, "The Slovak Constitutional Court on Amnesties and Appointments of Constitutional Judges: Supporting Unrestrained Majoritarianism?," *Diritti Comparati*, March 26, 2018, http://www.dirittocomparati.it/slovak-constitutional-court-amnesties-appointments-constitutional-judges-supporting-unrestrained-majoritarianism/.

[110] See, Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," *Governance* 26, no. 4 (2013): 559–62, https://doi.org/10.1111/gove.12049.

[111] Vilhelm Aubert, "Courts and Conflict Resolution," *Journal of Conflict Resolution* 11, no. 1 (1967): 40, https://doi.org/10.1177/002200276701100104.

adopted over time in a region where procedural and social rights are particularly important, albeit contested, due to the legacies of the pre-1989 undemocratic regime. The discussion of the separate opinions included in Appendix 2 elucidates the ideational conflicts that may have occurred between the judges, furthering the results of the analysis of majority opinions.

The analysis has identified, contrary to expectations based on the generally positive assessment of the Slovak CC in the 1990s, the lack of attention to procedural and social rights in relation to democracy in this period; yet, this deficit did not seem to prevent its constraining influence to further autocratization by the government of Prime Minister V. Mečiar. The same neglect towards considerations of procedural and social rights in the Hungarian case, however, appears to have contributed to the sidelining of the HCC as a core reference point for public pro-democracy sentiments as a result. Today, even if Hungarians would like to speak up against the regime, they would not find much 'ammunition' in the recent judgments of the HCC for their voice to be amplified by legal legitimacy.[112] With both Courts largely advocating 'stepping out of the ring' of defending a substantive account of democracy as articulated by procedural and social rights, the Hungarian CC has paid a higher price for this path in terms of serving as a point of reference for democratic actors struggling against autocratization. In addition, the internal struggles over the meaning of democracy at the two CCs manifested particularly through the advocation for a more deferential CC *versus* a substantive account of justice (see also Appendix 2).

The present approach aspires to be applicable to examine conceptions of democracy by centralized CCs operating (or having operated) in a democratic regime. Further comparative research offers promising ways forward, with Central European CCs constituting relevant cases of countries with very similar trajectories post-1989 (when most CCs in the region were established) but differences in recent developments of their political regimes. At the same time, the approach faces several limitations. *Firstly*, the qualitative contextual analysis may, to a greater

[112] On CCs as generators of legal legitimacy, see Richard H. Fallon Jr., *Law and Legitimacy in the Supreme Court* (Cambridge: Belknap Press: An Imprint of Harvard University Press, 2018).

extent, be influenced by the researcher's normative preferences. The situation of cases into an established body of scholarship decreases this risk. *Secondly*, the keyword search may omit important cases which pertained to democracy in their broader academic and societal reflection, albeit not in their wording. To overcome this, the selection of cases through keyword search may be corroborated with an examination of main commentaries and/or textbooks in constitutional law in the country with the court under study. Expert interviews might be conducted to further corroborate the data. Acknowledging these limitations, the article points to the significance of CCs openly engaging with key political concepts, as an avenue to advance their voice in the public contestation about the meanings of fundamental values that are embedded in, but also shape the practice of democracy.

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APPENDIX

APPENDIX 1: ADDITIONAL INFORMATION ON SELECTED CASES UNDER STUDY

The purpose of this appendix is to provide more details on the cases referred to in the empirical analysis. The analysis aims to be comprehensive without consulting it as well, yet, it sheds more light on the sorts of issues in which considerations of the relationship between justice and democracy arose.

A. HUNGARY

- 9/1992 [I. 30] AB: The institute of the 'protest of illegality'. This institute allowed for selected decisions deemed unlawful to remain in force if so decided by a special chamber of the Supreme Court.[1]
- 15/1993 [III. 12] AB: Compensation for unlawfully confiscated property. Here, the Court referred to democracy through the Preamble of the Constitution, pointing out the task of transition to a state under the rule of law realizing parliamentary democracy and social market economy. Implicitly it can be seen that this transition served as a justification for approving partial compensatory measures but the abstract notion of constitutionality is the explicit way how the Court approached this issue.[2] A dissenting judge criticized the universal principle highlighting some particularities of different legal relationships put together by the majority, and the need to pay attention to these differences due to legal continuity with the previous regime even though 'the power-holders did not have a *democratic* authorization for the exercise of power'.[3] Methodologically, this type of reference also shows that when democracy

[1] László Sólyom and Georg Brunner, eds., *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press, 2000), 200–208; see also Dupré, *Importing the Law in Post-Communist Transitions*, 85.

[2] On the legal reasoning of the case (the introduction of the novatio principle loosely building on Roman law by the HCC, see Renáta Uitz, "Constitutional Courts and the Past in Democratic Transition," in *Rethinking the Rule of Law After Communism*, ed. Adam Czarnota, Martin Krygier, and Wojciech Sadurski [Budapest: Central European University Press, 2005], 248–51; on the consequences of the HCC's decision making in this area, Anna Gelpern, "The Laws and Politics of Reprivatization in East-Central Europe: A Comparison," *University of Pennsylvania Journal of International Law* 14, no. 3 [1993]: 315–72345-346.

[3] 15/1993 [III. 12] AB, 20.

appears in an adjective form, the reference tends to be even more scarce or superficial than when it is used as a noun.

- 479/E/1997, 3: Implementing measures prescribed by law on the status of armed forces. The reference to democracy appeared as a reference to the constitutional provision, while further only the argument that delayed implementation of a duty does not necessarily constitute a violation of the rule of law and hence unconstitutionality by legislative omission was discussed.
- 109/2008 [IX. 26.] AB, 5, 14: Development of the healthcare system. From the two separate opinions only one (joined by two justices) referred to the 'democratic legitimation' requirement of the advisory bodies (but not to democracy as such) in an argument that portrayed the issuance of the ministerial decree regulating the practical aspects some healthcare-related questions (such as the number of state-funded beds in hospitals in various regions of the country) as a bureaucratic, administrative matter, and therefore argued for rejection of the petitions challenging the constitutionality of this decree also on the basis of the missing democratic legitimation of the advisory bodies having a role in deciding over these questions.[4]
- 42/2005. [XI. 14.] AB, 13: Private actors replacing prosecutorial services in case of delays. The case had another dimension in asserting the power of the HCC to invalidate normative decisions of the HCC.[5] From this perspective (related more to separation of powers than justice perceptions) the observation holds that the Court did not recognize a need to justify this review power from a democracy perspective. This could imply a certain 'self-confidence' of the Court in not having to present decisions such as this one to the broader public in an approachable manner.
- 8/2011 [II. 18.] AB, 15: Labor law protection for government employees. The scholarly commentary on this case places its significance rather into the

[4] 109/2008. [IX. 26.] AB, 42-43.

[5] de Visser, *Constitutional Review in Europe*, 117; Szente, "The Interpretive Practice of the Hungarian Constitutional Court," 1612.

context of newly created individual complaint procedure in the Hungarian constitutional system and its effectiveness given that the *pro futuro* declaration of unconstitutionality by the HCC in this case resulted in a group of individuals against whom the provisions were applied before they had been declared unconstitutional. In later decisions, the Court refused to quash judicial decisions that applied this provision on the basis that the constitutional complaint cannot be used just to achieve the invalidation of the application of a concrete legal provision.[6]

- 3142/2015 [VII. 24.] AB, 17: Exempting permanent residents from local property tax. Dissenting opinion of Judge Pokol: '[One problem with this understanding of equality] is that it takes away too much freedom of legislation (in this case: of local governance) and the democratic legislating majority gets to a large extent under the control of the constitutional judges, which can erode the foundations of democracy and the democratic state of law.' Actually, in the first part of the dissent, Pokol makes a case for a more extensive understanding of the constitutional complaint procedure which seems at odds with his generally restrictive view on constitutional judging. However, he does not consider a democracy perspective in this part of the reasoning (and he would have rejected the particular complaint against the local tax exemption under assessment here upon a material review).
- 3073/2015 [IV. 23.] AB, 17: Selective attribution of social benefits to politically prosecuted individuals. The larger number of dissenting opinions in this case was caused by another, procedural question being discussed, namely whether the HCC was eligible to review the case on the merits, taking into account the Art. 37 (sec. 4) of the Constitution that restricts the Court's competence to rule on several matters related to public finance. The majority ruling exercises a material review that upholds constitutionality, while some judges (such as judge Varga) would not have engaged in a material review in the first place. For judge Dienes-Oehm, the provision was not applicable to

[6] Naszladi Georgina, "Az Alkotmánybíróság legutóbbi döntéseiből [From the Latest Decisions of the Constitutional Court]," *Fundamentum* 17, no. 1 (2013): 76.

the negligible impact of the extension of the governmental decree to a longer period on public finance (spending). Hence, the strength of the declaration of the need to treat the whole period of anti-democratic regimes similarly in these dissents is blurred by the limited view of the Court's competence (in addition to the problematic reference to the National Avowal and the negligence of the undemocratic nature of the pre-1944 period in Hungary).

B. SLOVAKIA

- Additional relevant cases during the Court's second term (2000 – 2007). Besides those discussed, the Court did not directly react to some of the petitioners' claims about the meaning of democracy, at times with a very brief justification based on procedural grounds in general (on a decree of the ministry of education which extended the list of matriculation subjects for high school students,[7] on the prosecutorial oversight over the legality of the decision of the public administration,[8] on the insufficiency of the assistance in material need,[9] on the types of evidence required for decision making of a general court in a civil law case in connection with the need to sufficiently demonstrate the causal link between the violation and the exact procedural right the violation of which has been alleged[10]). In one case, it did rule in favor of the petitioner (on the invalid firing of a soldier[11]).
- PL. ÚS 30/2015: Unconstitutionality of a provision in the Act on civil procedure that required a deposit for the court fees from the claimant upon the request of the defendant. The reason for unconstitutionality was the retroactive application of the provision. The Court noted that an exception to this principle could occur if the interference was in order to uphold 'fundamental constitutional principles or higher principles of justice, morality and decency [...]'[12], as a small 'preface' to its 2017 amnesty decision.

7 PL. ÚS 5/05, 3.
8 I. ÚS 112/06, 6.
9 I. ÚS 38/01, 2.
10 IV. ÚS 21/06, 2.
11 II. ÚS 50/01, 3.
12 PL. ÚS 30/2015, 37.

- II. ÚS 467/2010: A demand for just satisfaction for excessive delays in proceedings comparable to the levels in 'developed democracies'.
- IV. ÚS 317/2013: In this case, the SCC did not find procedurally permissible to rule on the merits of the case, and it again emphasized its practice to prohibit the connection of various challenges that fall under different types of procededings into one.[13] This practice enhances the certainty and predictability of the SCC's decision making, at the same time it limits the access to court with the types of proceedings serving as a 'gatekeeper' to access it.
- II. ÚS 88/09: According to the petitioner, demanding the declaration of violation of their rights for delays in proceedings, 'The Act on the Constitutional Court [...] is a constraint for democracy and the state under the rule of law, and contradicts the meaning of the Convention, which implies that the parties in the proceedings are not obliged to use such means for increasing its speed [...] which are generally not considered efficient enough'.[14]
- II. ÚS 148/07: The complainant was dissatisfied with the obligation to be represented by a practicing attorney before the SCC, considering the option for self-representation to be 'a big invention of real democracy as opposed to our consistently persisting totality and our corrupt rotten justice.' The Court categorized some other statements of the complainant as upsetting the decency of expression and classified the case as abuse of the right to petition.
- IV. ÚS 369/2011: A complaint that claimed for a legal guarantee of the right to an employment. The fact that general courts did not identify such a right was for the petitioner 'an abnormal state of democracy and the state under the rule of law [which] is unacceptable and unsustainable, so this constitutional complaint must follow and afterwards, if the situation demands it, the whole affair will again go beyond on justice [sic!] totally lawless state!'

[13] IV. ÚS 317/2013, 15.
[14] II. ÚS 88/09, 3.

- IV. ÚS 38/2012: For this petitioner, requesting the return of court fees, 'one pays for her mistakes, which should apply in a democracy and the state under the rule of law as well.'
- I. ÚS 81/2012: Another preliminary proceeding where the petitioner 'rushed' to the SCC although had the case pending before another institution (criminal proceeding at the stage of prosecutorial action) as well. Some of these 'early-born' petitions indicate a distrust towards general courts in favor of the SCC.
- II. ÚS 266/2011: Reproduced claim on judicial independence in democracy from the regional court ruling. The case concerned a Jehovah's witness who refused to deliver his military service in 1957 and demanded the annullment of the charges since 2010. Quoting another case, the SCC found the restriction of the freedom of conscience and hence the criminal charge acceptable even when ordered by 'old law' of the state socialist regime, as this duty is not in itself 'exclusively socialist and antidemocratic' in the Court's view and does not produce 'unbearable injustice'.[15]
- II. ÚS 2/2016: The Supreme Court referred to democracy in the criminal procedure and explained that while the objection of the petitioner towards the format of the hearings of certain witnesses was valid, these witnesses' statements did not affect the lower court rulings and so the procedural shortcoming does not amount to a violation of a constitutional right. The case illustrates a fruitful dialogue between the decisions of the general courts and that of the SCC (which, obviously, is more likely to manifest in case the former stand on convincing and coherent grounds).
- II. ÚS 699/2014: The same references as in the previous case,[16] made by the Supreme Court.
- I. ÚS 110/2012: A reference to lower court ruling emphasizing the danger of corruption to democracy in a case of a physician accepting bribe.
- II. ÚS 592/2014: For the petitioner in this case, the lower courts rulings were a 'mocking of democracy'.

[15] II. ÚS 266/2011, 15.
[16] II. ÚS 2/2016.

- II. ÚS 296/2017: A claim for damages for the delay of proceedings that, however, was mainly caused by the slow pace of the petitioner's actions.
- I. ÚS 469/2014, 8: The SCC here rejected a challenge on the bias against former attorney general Dobroslav Trnka who as attorney rejected a complaint of an individual who had earlier filed a criminal action against him. The Court adopted a textualist reading by declining to acknowledge as the right to launching a criminal procedure as part of the right to due process.
- IV. ÚS 488/2013: The petitioner claimed damages for the non-execution to right to financial compensation in the procedure for the protection of personality, which, however, was lapsed by then.
- IV. ÚS 75/2014: A struggle for regaining the legal title to a flat, whereby the petitioner '[could] not understand how it is possible that if one obtains a valuable item in the conditions of democracy, it belongs to someone else!'
- I. ÚS 188/2017: A traffic law complaint that alleged insufficient justification of the general court decisions.
- III. ÚS 374/2017: A complaint of a former minister of justice related to freedom of expression; here, the Court grappled mainly with the question of the composition of the decision-making panel as some judges were found to be biased in this case.
- PL. ÚS 10/09: A regional court questioning the prohibition of membership in political parties for members of armed forces. The SCC found this legislative restriction legitimate and hence constitutional. Two judges submitted separate opinions, however.
- PL. ÚS 3/03: The specifics of this case is that it deals with the right to free competition placed into the context of independence of a regulatory body, so-called Recyclation Fund. The Court remained with a textualist reading and did not declare its violation, which may signal certain commitment to environmental protection. Judge Orosz dissented as to the part of the composition of the Recyclation Fund which has largely been determined by

the will of employer association's representatives that are unlikely to have environmental protection as their key priority.

- I. ÚS 138/2012, also I. ÚS 139/2012, I. ÚS 353/2010, I. ÚS 352/2010, I. ÚS 98/2012, I. ÚS 99/2012, and III. ÚS 140/2012: Six negative and one partially negative decision on charges of bias against SCC judges in cases where Štefan Harabin, former minister of justice and controversial president of the Supreme Court, was one of the parties. The reference is mentioned in a responses of one of them (judge Orosz) on his critical remarks towards Harabin when Orosz had been an MP. In one of the cases, judge Orosz was found to be possible to be viewed as biased and hence excluded from the proceeding.[17]
- PL. ÚS 7/2017, dissent of Judge Gajdošíková: Judge Gajdošíková was slightly more critical of some phrases used in the majority decision, for instance the one admitting that there can be 'other opinions' on the subject matter, which in her perspective is natural in a democratic society while the CC's opinion is special because it is the independent body established for the review of constitutionality.[18]
- Additional separate opinions. While the amnesty decision (discussed above) is central for assessing the relationship between democracy and justice in the SCC separate opinions, one more seprate opinion (from the Court's second term) could be included here. Judge Bröstl established a connection between the right of deputies to interpellation of cabinet ministers and the accountability of the executive to the legislature, which may manifest in a vote of no-confidence if the parliamentary majority does not consider the executive accountable any longer.[19] While the majority decision was based on technical considerations of the separation of powers, the dissenting judge adopted a more material, accountability-based perspective that is arguably

[17] See also Lukáš Lapšanský, "Ochrana hospodárskej súťaže podľa článku 55 ods. 2 Ústavy Slovenskej republiky [The Protection of Economic Competition According to Art. 55 Sec. 2 of the Constitution of the Slovak Republic]," in *Aktuálne trendy v oblasti práva hospodárskej súťaže*, ed. Jozef Vozár and Ľubomír Zlocha (Bratislava: Ústav štátu a práva SAV, 2017), 40–43.

[18] PL. ÚS 7/2017, 10.

[19] PL. ÚS 9/04.

closer to the citizenry in times when the executive has often better sources of information and more resources than the legislature. This is underscored by the fact that even with a no-confidence vote, the parliament may exercise only its control powers at a symbolic level, it cannot change e.g. an executive policy developed by the respective cabinet (which does not have legislative status).

APPENDIX 2: ANALYSIS OF SEPARATE OPINIONS

Altogether, 16 separate opinions have been found to refer to procedural and social rights in relation to invoking democracy. The tendency of the majority opinions not to refer openly to justice considerations or (to a lesser extent) different justice considerations clashing with each other is brought up in a few separate opinions. At the same time, some of these are also in conflict with each other, leaving the question of democracy largely as a footnote to other, more specialized ideas.

A. HUNGARY: CONTESTATIONS OF THE MAJORITIES' VIEWS

The first separate opinion comes from no earlier than 1999 when judge Kiss, discussing a decision on pensions-related legislation, complained about the lack of the HCC's attention to democracy considerations in its case law.[20] The merely three days between the validity of the provisions affecting the pension levels and their entering into force prevented the possibility of the constituency affected by the Act to become familiar with them. In Kiss's view, this 'gives them a reason to believe that they are objects, rather than subjects of the legal regulation. [...] In the term democratic rule of law state democracy—as the value component *(érték elem)* – is closely related to the rule of law, therefore increased attention needs to be paid on securing it as well'.[21] Democracy considerations should have mattered in the material sense too as the respective constitutional provisions (Art. 2 § 1) contains 'a decision making mechanism based on a wide deliberation *(egyeztetés)*' and besides the right to raise suggestions and express opinions freely,

[20] 39/1999 [XII. 21.] AB., 32.
[21] 39/1999 [XII. 21.] AB., 30.

it entails the right to an agreement.[22] This standpoint favorable to deliberative democracy and social justice makes a rare appearance in the case law and has gone unnoticed. A few years later, the majority adopted a position closer to this standpoint by strengthening the requirements for consultation of draft bills but did not apply Kiss's reasoning in the process. Moreover, its change of practice including some of its interpretive choices in the process made it vulnerable to criticism of 'judicial activism' resulting in unpredictable decision making practice.[23]

Before 2010, only a couple of separate opinions can be categorized here and none brings a major enrichment to democracy considerations. A concurrence of judge Kukorelli, referring to a book by the Court's first president, László Sólyom, raised the issue of the risk of 'state capture' by lobbyists and corporate organizations in case the status of these various organizations is not legally regulated alongside clear procedural rules for their official participation in lawmaking: 'The road to the "stato syndicalisto e corporativo" is paved by democracy's good intentions'.[24] In other words, it does not make the state more democratic just if special fora are created for participation of interest groups, so argues Kukorelli.[25] One year later, a dissent of judge Bihari (joined by judge Kiss) pointed to the earlier, separation of powers-related case of the HCC,[26] to argue for unconstitutionality of the act on individual physician licenses due to the absence of consultation of the draft bill with the Chamber of Physicians and hence the violation of the cooperative principle in 'the [complex system of] constitutional democracy'.[27]

After 2010, judge Pokol appears as most vociferous in discussing democracy in separate opinions, always using it to justify the shrinking of the Court's powers. Firstly, in 2011, he talked about the 'stiffing' of the society by having unconstitutionalities by legislative omissions restricting the 'short-term reactions

[22] 39/1999 [XII. 21.] AB., 32.
[23] Halmai Gábor, "Államszervezeti és hatásköri aktivizmus? Három ügy az Alkotmánybíróság előtt [State Organization and Competence Activism? Three Cases Before the Constitutional Court]," *Fundamentum* 8, no. 1 (2004): 100–108.
[24] 40/2005 [X. 19.] AB, 22.
[25] 40/2005 [X. 19.] AB, 22.
[26] 62/2003 [XII. 15.] AB.
[27] 29/2006. [VI. 21.] AB, 21.

and learning mechanisms of political democracy stemming from them'.[28] Secondly, in a decision concerning the Act on taxation, he argued for lowering the constitutional status of the equality principle to a narrowly construed notion of equality before the law as otherwise there would be an 'unacceptable burden' to the 'freedom to legislate of the majority [...] in a political democracy – democratic state of law'.[29] A very similar argument of his was present in a later ruling on the permissibility of exempting permanent residents who own a property from local property tax.[30] Besides connecting democracy to majority rule in the parliament and restricting the role of the Court, he also pointed towards the Court to need to bow before direct democracy *as defined* by the parliament. He did so in a concurrence concerning the public voting on the introduction of the same pension-related benefits to men as the legislator granted to women, which the Court quashed on the grounds of the subject falling into the area that cannot be decided by public voting. While the judge agreed with the wide-ranging negative budgetary implications that a positive public vote in this case could have had, and hence with the unconstitutionality of the vote, he acted as a 'speaker for majoritarian democracy' (as opposed to fundamental, including social rights-based reasoning) in budgetary issues.[31] Fourthly, he outlined the case for a restrictive understanding of the prohibition of retroactivity, as the Court's majority and previous practice in his view unduly limited the 'substance of political democracy', that is, the possibility of the majority emerging from the 'cycles of shifts in public opinion' to legislate and change some elements of the legal order, with the prohibition of retroactivity applying only to 'legal certainty' pertaining to 'past legal developments'.[32]

Besides judge Pokol, four other judges made use of democracy in their separate opinions but not in a fashion significantly different from Pokol. In

[28] 83/2011 [XI. 10.] AB, 17-18.
[29] 3/2014 [I. 21.] AB, 23-24.
[30] 3142/2015 [VII. 24.] AB, 17.
[31] 28/2015 [IX. 24.] AB, 17.
[32] 30/2014 [IX. 30.] AB, 33. As a couple of other decisions, this one also contained a procedural matter of the locus of the constitutional dimension in reviewing complaints against decisions of general courts Fruzsina Gárdos-Orosz, "Alkotmánybíróság 2010 – 2015 [The Constitutional Court 2010 – 2015]," in *A magyar jogrendszer állapota* [The State of the Hungarian Legal System], ed. András Jakab and György Gajduschek (Budapest: MTA Társadalomtudományi Kutatóközpont, 2016), 459–63, https://jog.tk.mta.hu/a-magyar-jogrendszer-allapota-kotet.

the 'governmental office-holders' case of 2011, judge Bihari concurred to the judgment and his final argument exemplified the 'separation thesis' between democracy and the rule of law. Indeed, he argued that in a 'multiparty democracy' it is constitutionally permissible to adopt special requirements towards governmental office-holders (an argument that would alone oppose the declaration of unconstitutionality in the case). At the same time, the violation of 'legal certainty' and 'fundamental rights' enshrined in the Constitution can give grounds to unconstitutionality and hence the obligation of the Court to quash the provisions in question.[33] In such a framing, democracy rarely (if at all) can justify unconstitutionality. Only in the 2014 'taxation' decision, judge Bragyova argued for a more extensive ruling on unconstitutionality as, in addition to the majority, he saw several provisions of the act to blur the distinction between private and public domain (the taxation belonging to the latter), with one private person entitled to sue another private person for missing tax obligations in a civil procedure. '[One of the substances of] political democracy, as opposed to feudalism, [is] the distinction between private and public power'.[34] A year later in a decision that upheld a governmental decree that provided for social benefits to those politically prosecuted in the period from 1945 to 1963 or in relation to the 1956 uprising but not in another periods of undemocratic regimes which still have living witnesses, judge Dienes-Oehm objected towards this practice as the period from 1963 to 1989 cannot be considered to be a 'value system and system of requirements [characteristic for] political democracies'.[35] Consequently, leaving this period out amounts to unconstitutionality by legislative omission. Last but not least, in the same decision judge Varga argued in a similar manner for the whole period of 1944 to early 1990 referring to the dates determined by the Constitution's 'National Avowal'.[36]

In conclusion, the connection between democracy and justice was not among the strengths of the HCC, even compared to its Slovak counterpart (after the

[33] 8/2011 [II. 18.] AB, 47.
[34] 3/2014 [I. 21.] AB, 21.
[35] 3073/2015 [IV. 23.] AB, 17.
[36] 3073/2015 [IV. 23.] AB, 21.

SCC's 2017 "amnesty decision"). This is surprising given the Court's assessment as "activist" from earlier periods could give rise to the assumption that at least in a certain era, it had adopted an extensive, maximalist understanding of democracy that entailed substantial attention to justice understood not only through equality before the law but also social guarantees of the good life. Of course, the analysis here does not disprove that the HCC had paid attention to these issues, but it does prove that when doing so, it (with some exceptions discussed above) did not discuss democracy in the process, thus (un) intentionally contributing to the separation between democracy and the rule of law. While according to Sajó[37], the Court's early social rights jurisprudence may be criticized with an outcome-based perspective on the basis of its prioritization of the widespread middle class instead of the most vulnerable members of the society, this is rarely done because the Court's position is essentially one that had been supported by the majority of the society. This jurisprudence is thus unlikely to have triggered a perception of an "unjust Court" among the majority of the (informed part) of the society. Still, the missing association between democracy and the Court's decision making competence (and hence, legitimacy) in these areas certainly played into the rhetoric based on a "People's notion of justice" by Hungarian Prime Minister Viktor Orbán[38], in his declared effort to build a majoritarian democracy not "hindered" by checks and balances. In this interpretation, regardless of what approach to democracy the Court chooses, its very existence if coupled with strong review powers is considered as a scarf on the democratic regime. This view is well exemplified in some of the more recent majority and separate opinions, including the ones where the concept of democracy is "hijacked" to justify restrictions on equality or an almost unlimited majoritarian right to legislate.

[37] Andras Sajo, "Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court," in *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* ed. Roberto Gargarella, Theunis Roux, and Pilar Domingo (London: Routledge, 2006), 83–105; see also Mária Éva Földes, "The Role of Constitutional Courts in Promoting Healthcare Equity: Lessons from Hungary," *Constitutional Review* 6, no. 2 (2020): 299–301, https://doi.org/10.31078/consrev624.ed. Roberto Gargarella, Theunis Roux, and Pilar Domingo (London: Routledge, 2006

[38] Oliver W. Lembcke and Christian Boulanger, "Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court," in *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, ed. Gábor Attila Tóth (New York: Central European University Press, 2013), 296.

B. SLOVAKIA: THE 2017 AMNESTY DECISION CENTRE-STAGE

The amnesty decision is basically the only one that features prominent discussions between the judges invoking the concept of democracy in relation to justice. Five judges submitted four separate opinions to this decision.[39] The single dissent, joined by judges Brňák and Ľalík, criticized virtually all aspects of the majority decision. With respect to the understanding of democracy, it framed the majority decision as if it was supportive of unrestrained majoritarianism, and shared a warning from the Court not being a sufficient check on majority rule.[40] It went into even sharper lines when it accused the Court('s majority) of 'jumping on a train of cheap populism' and even 'denying our constitutional identity'.[41] This reasoning may sound persuasive only if the premise of CCs being 'antidemocratic' is being accepted which, as this research argues in its conceptual part, hold only if democracy is understood (or implied to be understood) as simple majority rule. Moreover, the opinion is itself inconsistent when elsewhere it interprets the powers of the interim head of state to exercise 'all competences without regard to [the head of state's, NB] democratic legitimacy'.[42] If the Court is to be legitimized through its capacity to review majority decisions, why should it not opt to review the one that has been made by Mečiar, the chairman of the most powerful political party at the time? A double standard seems to be at play in the dissent here because both decisions were made by actors enjoying substantial popular support at the time the decisions were made. Therefore, other considerations such as the ones employed by the majority decision need to be taken into account. In addition, the dissent does not engage with the argument that the second amnesty, that aimed to 'correct' the first one which did not cover all suspects in the crimes surrounding the murder of R. Remiáš and the kidnapping of M. Kováč Jr., was in effect unconstitutional because of the 1999 amnesty decision of the SCC that invalidated the effort of M. Dzurinda to abolish the amnesty. It is difficult to envision how a Court, understood as

[39] PL. ÚS 7/2017.
[40] PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Ľalík, 7.
[41] PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Ľalík, 21.
[42] PL. ÚS 7/2017, dissenting opinion of Judges Brňák and Ľalík, 13.

countermajoritarian and hence antidemocratic, may gain authority through sidelining its own previous case law.

Each of the three concurring opinions is a precious window into the thinking (at least as officially presented) of its author. The one by Ivetta Macejková is similar to US Supreme Court Justice Anthony Kennedy's 'agonizing' considerations over the role of the judge in a democracy (referring to Aharon Barak's work), and a rather unusual one compared to her previous opinions. Basically, Macejková argues she had given priority to the will of the democratic majority (not only in the parliament but in the broader public as well) which supported the abolishment of the amnesties despite her internal belief about this running upfront to legal certainty. Judges Gajdošíková and Mészáros did not present a competing or more restrictive understanding of democracy than the majority decision (authored by judge Orosz) did. Rather, they presented additional arguments in favor of moving beyond the majority rule. For Mészáros, worried about the tendencies of rising 'illiberal democracy', the 'decision on abolishment of amnesty of criminal acts, suspected to be committed by [governing, NB] power, is a component of ordre public, that is, the coming to terms with the past.'

Summing up, it appears that the 1990s (the Court's first term) cast a long shadow here. The SCC's decision making cemented the lack of accountability of core political elites surrounding the semi-authoritarian regime—beginning with PM Mečiar himself. After the introduction of the constitutional complaint procedure, the SCC became a careful guardian of due process rights but democracy became a useful 'servant' for decisions with different verdicts where the justification for this difference is rarely straightforwardly identifiable. The almost complete absence of egalitarian notions of democracy (in relation to social rights that are part of the Slovak Constitution) indicates that the SCC was even less comfortable than the HCC to enter this terrain.

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Constitutional Court and the Past Conflicts in Post-Authoritarian Indonesia

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Abstract

The fall of the New Order authoritarian regime in Indonesia was marked by the changing landscape of conflict resolution. In a more democratic setting, "*Reformasi"* regime has installed democratic institutions including the formation of the Constitutional Court. While the newly established court was celebrated as relatively successful in terms of defending human rights, its role in resolving the abused past is questionable. The new Reformasi regime inherits wounds and scars from the abuse committed by the previous iron fist regime. This paper aims to analyze the Constitutional Court's roles as a conflict-resolution body in dealing with the past gross violation of human rights in the light of Indonesian transitional justice. In that regards, this paper assesses the Court's decisions and how far it could answer the victims' call for justice. This paper found that regardless of the Court's intentions, the court's decisions still require further executive or legislative policies. The nature of the court doesn't bring instant enjoyment for the "winning" party to be benefited from the decisions. In short, the importance for the victims of past abuse of power as stated in the Court's

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decisions still has not been translated into justice. At the same time, this also indicates how far the Court is able to resolve this kind of social conflict: "justice delayed, justice denied." In a more Galtungian's perspectives, there is a gap between meta-conflict to be deployed into original-conflict. This paper suggests that to overcome such issues, a bridge to reconnect the two should be built. In this context, the changing regime from New Order to Reformasi should be coupled with a holistic approach of transitional justice tools and mechanisms. More importantly, to urge the delivery of justice for those who suffered.

Keywords: Conflict-Resolution; Constitutional Court; Democracy; Human Rights; Judicial Review; Modality; Post-Authoritarianism; Trajectory.

I. INTRODUCTION

In essence, the law and all its institutions are a problem-solving forum whose end is to reduce, if not resolve, conflict. Responding to conflicts with "justice." For a judicial institution with such authoritative authority to interpret the Constitution, the problem goes even further: ensuring that the Constitution provides solutions to problems that arise, that the Constitution is "alive" and provides protection of human rights. Departing from this premise, this paper aims to examine the role, modalities, and trajectories of the Indonesian Constitutional Court in resolving the past conflicts.

There are literatures on the similar discussion of the Constitutional Court and its role in conflict resolution. Pozas-Loyo & Rios-Figueroa examine the role of Constitutional Courts in Colombia, Peru, and Mexico in conflict resolution.[1] They distinguish between mediator-like jurisprudence and arbitrator. The role of the mediator comes when the Constitutional Courts provide jurisprudence that informatively connects the common ground between interested parties. The function of arbitration, on the other hand, arises when the court expressly declares the winner and loser in a case. Another study, by Marcus Mietzner, examines the Indonesian Constitutional Court's role in resolving political conflicts and

[1] Andrea Pozas-Loyo and Julio Rios-Figueroa, "Constitutional Courts as Third-Party Mediators in Conflict Resolution: The Case of the Right to Prior Consultation in Latin American Countries," in *Institutional Innovation and the Steering of Conflicts in Latin America*, ed. Jorge P Gordin and Lucio Renno (Colchester: ECPR Press, 2017), 117.

consolidating democracy.[2] In his analysis, the Constitutional Court has succeeded in becoming a channel for political disputes through the judicial route as part of strengthening the consolidation of democracy.

From a slightly different perspective, there have been many studies discussing the derivation of the authority of the Constitutional Court, among others: as the guardian of the constitution, the final interpreter of the constitution, the guardian of democracy, the protector of citizens' constitutional rights, or the protector of human rights.[3] Arief Hidayat, the Chairman of the 2015-2017 Constitutional Court, further stated that the Constitutional Court is the guardian of (national) ideology, that is Pancasila.[4]

The aforementioned literatures provide the basis for this paper. The Constitutional Court, through its authority to interpret the Constitution, has a significant role in building a culture of peace, realizing reconciliation, and providing protection for human rights and the advancement of democracy. This paper aims to examine the modalities and trajectories of the Constitutional Court as a conflict-resolution institution as contained in its decisions. So what is being proposed here is not something completely new but more accurately referred to as "old wine in a new bottle." How the available jurisprudence provides a foothold as constitutional engineering ties together the role of the Constitutional Court in conflict resolution.

The question to be asked here is how far the Court can handle deeply rooted political-social violence in a half-hearted transitional justice Indonesia. Since the fall of the New Order regime in the late 1990s, no significant policies have been

[2] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10 (2010), https://doi.org/10.1017/S1598240800003672.

[3] Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia [The Idea of the Indonesian Rule of Law]," 2011; Janedri M. Gaffar, "Peran Putusan Mahkamah Konstitusi dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu [The Role of Constitutional Court Rulings in the Protection of Human Rights Related to the Implementation of Elections]," *Jurnal Konstitusi* 10, no. 1 (May 2016), https://doi.org/10.31078/jk1011; Pan Mohamad Faiz, "Mengawal Demokrasi Melalui Tinjauan Konstitusi: Sembilan Pilar Demokrasi Putusan Mahkamah Konstitusi [Guarding Democracy through a Review of the Constitution: Nine Pillars of Democracy Constitutional Court Decisions]," ELSAM, published February 06, 2015.

[4] Arief Hidayat, "Negara Hukum Berwatak Pancasila [State of Law with Pancasila Character]," Speech Delivered in Jakarta, November 14, 2019, https://www.mkri.id/index.php?page=web.Berita&id=16801.

taken to tackle the issue. As concequence, the victims still suffer from a long traumatized past, and no perpetrator is punished for the crimes committed. For this reason, the term post-authoritarian regime was deliberately chosen not only to refer to a period of time but also to target the residual scars that linger and must be settled in a democratic rule of law Reformasi era.

Then, how the Court contributes to the untying nation's murky image of the inherited wound from the past? In the light of broad theoretical spectrum of conflict resolution, ethical,[5] structural,[6] or peace studies[7] are commonly agreed with the significance of the role of law. However, a new regime with more democratic and human rights friendly setting doesn't always warrant that social transformation would smoothly be commenced, as will be presented in the case of Indonesia.

This paper argues that there are modalities from the jurisprudence of the Constitutional Court decisions that can be used as a starting point to emphasize its role as a breaker of a social conflict. But of course, no system is completely perfect. As Horrowitz said: "Not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights".[8] The challenges of the human rights and democratic situation, public trust in institutions, are homework to answer: despite having modalities, can the Court indeed function as a conflict-resolution institution. Therefore, based on the background above, the following questions can be asked are how is the modality as conflict resolution institution cemented through the Court's decisions? and what is the trajectory of the Constitutional Court in conflict resolution in the future?

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5 Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: The MIT Press, 1995), 129.

6 Nancy Fraser, "Rethinking Recognition," *New Left Review* 3 (2000): 117-8.

7 Johan Galtung, "Institutionalized Conflict Rsesolution, A Theoretical Paradigm," *Journal of Peace Research* 2, no. 4 (December 1965), https://www.jstor.org/stable/422861.

8 Donald L. Horowitz, "Constitutional Courts: A Primer for Decision Makers," *Journal of Democracy* 17, no. 4 (2006): 125–37, https://doi.org/10.1353/jod.2006.0063.

II. DISCUSSION

2.1. Constitutional Court and Conflict Resolution Body

2.1.1. Institutionalized Conflict-Resolution Body: The Theoretical Landscape

According to Axel Honneth, conflict stems from "misrecognition" that determines one's status as a full human being. At that point, the marginalized groups experience marginalization (disrespect) on personal, legal, and social levels.[9] Meanwhile, Nancy Fraser argues that a social conflict is a form of structural oppression from one group to another. The two then debated how to transcend the conflict.[10] Honneth, who is often classed as an ethical thinker, argues that conflict remedies should be carried out with acknowledgment in the personal, legal, and solidarity domains. Fraser, on the other hand, emphasizes an approach to changing the legal structure to end conflict and ensure participation parity. Honneth and Fraser clash over which come first, the ethical approach or structural change. Even so, it is safe to conclude that the two have actually agreed that a legal approach can contribute to conflict resolution.[11]

In line with Honneth and Fraser, Galtung also conducts a conflict taxonomy. Galtung stated that violence is the actualization of conflict. Violence can broadly be divided into two: those that are personally targeted and those that involve a systematic structural action.[12] Both have the potential to eliminate entities that are considered "enemies". The difference is that personal violence only involves individuals, while structural violence is actions that occurs so pervasive due to power imbalances and the aftermath of which results in unequal life opportunities.[13] According to Galtung, conflict resolution institutions are a kind of solution provider machine. So the machine is tasked with recognizing problems

[9] Honneth, *The Struggle for Recognition*, 131-9.
[10] Fraser, "Rethinking Recognition." 120.
[11] Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003), 9, 112.
[12] Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969), https://www.jstor.org/stable/422690.
[13] Peter Lawler, "A Question of Values: A Critique of Galtung's Peace Research," *Interdisciplinary Peace Research* 1, no. 2 (October 1989), https://doi.org/10.1080/14781158908412711.

and providing projections of what is the point of interest, as well as determining which parties are benefited and harmed by the decision.[14] The conflict resolution process itself is referred to by Galtung as "meta-conflict" which is different from its factual form or "original-conflict". Conflict resolution for Galtung is when the decisions taken from the meta-conflict have a real impact on the resolution of the original-conflict.[15]

From Fraser, Honneth, and Galtung above, it can be concluded that for a judicial institution to be called a conflict resolution, it is: (1) to carry out a constitutional interpretation to provide inclusive protection of human rights (recognition & redistribution from Fraser & Honneth); and (2) so that the decisions taken are as acceptable as possible to the parties to the dispute (meta-conflict & original-conflict from Galtung).

Of course, resolving a conflict and structural violence (from Galtung) is never easy. Apart from that, there are also institutional weaknesses. Basically, the Constitutional Court does not directly decide on a concrete problem. This is due to the limitations of the Court to accept cases that are Constitutional Complaints and Constitutional Questions, and only to review the norms of the Act against the 1945 Constitution. Thus, the resolution of problems in the Constitutional Court is not only meta, but still requires follow-up executions by the Constitutional Court. This issue will be discussed separately later.

2.1.2. Justifying Constitutional Court as a Conflict-Resolution Body

The focus of this paper is to see how legal mechanism is able to conduct role as a means of conflict resolution: through independent judicial authority, which represents the rule of law. Judging from the practice, turning to judicial institutions for conflict resolution is actually not unprecedented. The goal is clear, to reduce conflict as well as to provide a democratic channel for questioning a

[14] Galtung, "Violence, Peace, and Peace, " 353-4.
Galtung stated: *To resolve a conflict means*: 1. To *decide*: a. who is the winner and who the loser, b. what the future distribution of value shall be; 2. To administer the *distribution* of value, and; 3. to define the conflict as *terminated*.

[15] Ibid., 356.

particular issue. As the experience in the US Supreme Court, where the court provides a constitutional interpretation by taking into account the aspirations that arise from social movements.[16] Studies conducted by Zines also show a similar trend. Sharp disputes between groups in debating industrial employment policies were finally decided by the Australian High Court.[17] Not to be missed is the Indonesian Constitutional Court as indicated by Mietzner in the case of the Electoral Result Dispute for the Presidential Election.[18]

This paper will specifically highlight the potential of the Constitutional Court as a conflict resolution in its authority to review laws against the 1945 Constitution. It has been mentioned that the relationship between conflict resolution and the Constitutional Court is part of how the Constitution adapts to resolve conflicts. Jimly Asshiddiqie, the first chairman of the Constitutional Court, stated that the most important task of the state in civil society is to provide services.[19] However, indeed that with all the pulls of political dynamics, the policies taken have the potential to create disputes. In the setting of democratic regime, every dispute requires moderation, especially if the disappointment is caused by state policies. From this point, it can be understood as a general tendency that the Constitutional Courts in many countries were born from transitions that wanted to distinguish themselves from the previous authoritarian rule.[20]

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16 Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of de facto ERA," *California Law Review* 94 (2006): 1323-37, https://doi.org/10.15779/Z38B97N.

17 Leslie Zines, "Social Conflict and Constitutional Interpretation," *Monash University Law Review* 22, no. 2 (1996), https://doi.org/10.1177/0067205X100380031.

18 Mietzner, "Political Conflict Resolution," 407.

19 Jimly Asshiddiqie, *Gagasan Konstitusi Sosial: Institusionalisasi dan Konstitusionalisasi Kehidupan Masyarakat Madani* [The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society Life] (Jakarta: Pustaka LP3ES, 2015), 134.

20 Ni'matul Huda, *Politik Ketatanegaraan Indonesia; Kajian Terhadap Dinamika Perubahan UUD 1945* [Indonesian Constitutional Politics; Study of the Dynamics of Changes to the 1945 Constitution] (Yogyakarta: FH UII Press, 2003), 223; Hamdan Zoelfa, "Mahkamah Konstitusi dan Masa Depan Negara Hukum Demokrasi Indonesia [The Constitutional Court and the Future of Indonesia's Democratic Law State]" in *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam*; *Menyambut 73 Tahun Prof. H. Muhammad Tahir Azhary, S.H* [Several Aspects of Constitutional Law, Criminal Law, and Islamic Law; Welcoming 73 Years of Prof. H. Muhammad Tahir Azhary, S.H], ed. Hamdan Zoelva (Jakarta: Kencana, 2012), 53; Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* [Constitutional Court: From Negative Legislature to Positive Legislature?] (Jakarta: Konstitusi Press, 2013); Fritz Edward Siregar, "Indonesian Constitutional Politics 2003-2013" (Doctoral thesis, University of New South Wales, 2016), 155.

2.1.3. The Rise of the Constitutional Court in Indonesian Reform

While the main strength of judicial authority is its nature of independence, in reality it does not always work that way. Studies from Pompe,[21] Hilbink,[22] and Tom Ginsburg *et al*[23] indicated problems of the independent judiciary during the authoritarian regime. In this context, judicial power is merely an extension of the executive, instead of protecting human rights and democratic values. Moreover, political pressure from the regime may not provide free space for the independence of judges.

During the New Order Regime, the presence of military culture and ideology appear in almost every aspect of civil society.[24] They do have almost unlimited discretional power. [25] With the military power being so hegemonic at the time, the military approach dominated conflict resolution. Indeed, this view is undemocratic and later on during Reformasi was declared as an abuse. After the transition of power took place in 1998, Indonesia was undergoing a phase of democratization.[26] There was the installment of democratic institutions and the strengthening of human rights laws, one of which was realized through the establishment of the Constitutional Court. At that time, it was felt that there was a need to create an institution authorized to conduct judicial reviews. It's just that the majority of

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[21] Sebastian Pompe, *Runtuhnya Institusi Mahkamah Agung* [Collapse of the Supreme Court Institution] (Jakarta: LeIP, 2012); Juan J. Linz, *Totalitarian and Authoritarian Regimes* (London: Lynne Rienner Publishers, 2000), 109; and Nora Hedling, *A Practical Guide to Constitution Building: The Design of the Judicial Branch* (Sweden: Bulls Graphics, 2011).

[22] Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship, Lessons From Chile* (New York: Cambridge University Press, 2007), 102-129, 157-176.

[23] Tom Ginsburg, Tamir Moustafa (eds). *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008), 4-7.

[24] Arie Sudjito, "Gerakan Dimiliterisasi di Era Transisi Demokrasi Peta Masalah dan Pemanfaatan Peluang [The Militarized Movement in the Era of Democratic Transition Map of the Problems and Utilization of Opportunities]," *Jurnal Ilmu Sosial dan Ilmu Politik* 6, no. 1 (July 2022): 123-8, https://doi.org/10.22146/jsp.11097.

[25] Ibid.

[26] Alexandru Jădăneanț, "The Collapse of Constitutional Legalism: Racial Laws and the Ethno- Cultural Construction of National Identity in Romania during World War II," *Procedia - Social and Behavioral Sciences* 183, (2015), https://doi.org/10.1016/j.sbspro.2015.04.945; Monica Claes, "The Validity and Primacy of Eu Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union," *Maastricht Journal of European and Comparative Law* 23, no. 1 (2016): 151-169, https://doi.org/10.1177/1023263X1602300110; John Harrington and Ambreena Manji, "Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013," *Journal of Eastern African Studies* 9, no. 2 (2015): 175–192, https://doi.org/10.1080/17531055.2015.1012439; Theunis Roux, "Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years," *Journal of Southern African Studies* 42, no. 1 (2016): 5–18, https://doi.org/10.1080/03057070.2015.1139683; K.E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14 (1998): 146, https://doi.org/10.1080/02587203.1998.11834974.

the MPR [People's Consultative Assembly] still rejected the idea. It was only after the impeachment of Abdurrahman Wahid and the lengthy political saga that a consensus was finally reached in the MPR to form a separate institution which was later referred to as the Constitutional Court through the 3rd amendment of the 1945 Constitution. The powers of the Constitutional Court include: (i) judicial review of statutes against the Constitution; (ii) to decide power disputes among state institutions; (iii) to decide the dissolution of political party; (iv) to decide the general election dispute; and (v) to review the presidential impeachment from the MPR. On August 16 2003, nine Constitutional Court judges took the oath and Jimly Asshiddiqie, a well known constitutional law scholar, chosen as the first chief justice.

The presence of the Constitutional Court inevitably provides a new color for promoting democracy and human rights. This is reflected in the vision and mission of the 2003-2008 Constitutional Court, which declared itself to be the "guardian of the Constitution and the protector of Indonesian human rights".[27] And the Constitutional Court did not take long to gain public trust. A number of innovations which in the decisions of the Constitutional Court have the support of civil society. Maruarar Siahaan (Judge 2003-2008) even mentioned that the support of civil organizations greatly helped the Constitutional Court.[28] Over time the Constitutional Court has developed through an approach that the second Chairman, Mahfud MD, called "substantive justice". That to answer the problems that arise, the Constitutional Court does not only annul statutory norms (negative legislature) but also helps formulate new norms (positive legislature). The legal rules in the decisions of the Constitutional Court are filled with an atmosphere of judicial activism and by most parties are considered to answer the problems of legislation in Indonesia.

Broadly speaking, the authority of the Constitutional Court which is shown through its decisions is considered positive by many parties and is generally considered to have succeeded in contributing to Indonesian constitutionalism. This element is important to maintain public trust to ensure legal compliance,

[27] Siregar, "Indonesian Constitutional Politics," 2.
[28] Mietzner, "Political Conflict Resolution," 414.

or by borrowing the Kelsenian scheme, to guarantee legal efficacy.[29] The same reason also makes the Court become bound to a certain standard. The Court must be able to maintain, on the one hand, horizontal public trust, and the political interests of the elected officials related to vertical friction. The rise of the Constitutional Court should be placed as a new approach after authoritarianism which also marks the portrait of a shift in conflict resolution models from the military to the rule of law, or in other words: from the barrel of a gun to the hammer of judges.

This study was launched with the premise that an institution that has the authority to provide an authoritative interpretation of the 1945 Constitution has a vital role to not only resolve a social conflict, but also to provide guidance in the form of legal rules to anticipate it in the future.[30] That the Constitution as "living law" offers a constitutional solution. The following will explain the formulation of legal rules in the decisions of the Constitutional Court in post-authoritarianism in Indonesia.

2.2. Constitutional Conflict-Resolution before the Court: Modality

This section describes the influence of the Constitutional Court to be regarded as a conflict-resolution institution on the aspect of modalities. This section focuses on the decisions and the legal rules in them by using the legacy of conflict during authoritarianism as a touchstone. The modalities mentioned here refers to Gidden's with a few modifications. Modality in Giddens is a rule that directs the behavior of the community that contains a certain flexibility while providing space for behavioral changes. [31] This paper adopts this definition by placing the decision of the Constitutional Court as the basis of the rules, which simultaneously provides an opportunity for re-interpretation of the Constitution for its amendments and determine which the decided law should be translated into actions.

[29] Hans Kelsen, "Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review* 55, no. 1 (November 1941): 50-1, https://doi.org/10.2307/1334739.

[30] R. Dixon, "Constitutional Drafting and Distrust," *International Journal of Constitutional Law* 13, no. 14 (2015): 819-846, https://doi.org/10.1093/icon/mov068.

[31] Richard Whittington, "Giddens, Structuration Theory and Strategy as Practice," in *Strategy as Practice*, ed. Damon Golsorkhi et al. (New York: Cambridge University Press, 2015), 23-43.

In the Indonesian context, the authoritarian regime has left a lingering presence in the society so deeply it has become the subconscious core of the Indonesian social structure. Such legacy of the New Order regime has been studied. Cornelis Lay[32] mentioned the New Order era as a sad period in which the "killing" of Pancasila was carried out systematically through the de-ideology of Pancasila. Soetandyo Wignjosoebroto[33] called it a period marked by the hegemony of state power. Pratikno[34] further argued that the violence occurred during the New Order was already an innate character of that regime in which the state was wholly implicated. Arie Sujito[35] blatantly called the New Order regime as "tyrannical". Ariel Heryanto[36] called the regime's violent past was a form of state terrorism. A more thorough of the above description can be found in the Indonesian National Commission on Human Rights (hereinafter, KOMNAS HAM)'s official report on preliminary gross human rights investigation which recorded conflicts and violence during the New Order.[37]

One notorious events which lay foundation for the New Order regime was the bloody transition during 1965-6. It was estimated that five hundred thousands of alleged communists were killed. The other ten of thousands were arbitrarily detained, mostly without proper trial. Another was 1982-5 of "Petrus" [*Pembunuhan Misterius*: Myterrious Killings], aimed at petty criminals and gang members. The killed victims were intentionally exposed in public space, gunned and tied up. The survivors mostly experiencing discrimination and closely monitored by the state's intelligence. These two theatre of horror were only samples of what was contained within the Komnas HAM's report. Those victims were and still experiencing discriminations from their traumatic past. As rightly stated by

[32] Cornelis Lay, "Pancasila, Soekarno, dan Orde Baru," *Prisma* 32, no. 2-3 (2013).

[33] Soetandyo Wignyosoebroto, "Hak-Hak Asasi Manusia: Perkembangan Pengertiannya yang Merefleksikan Dinamika Sosial-Politik [Human Rights: The Development of Their Understanding Reflecting Socio-Political Dynamics]," *Masyarakat, Kebudayaan dan Politik* 12, no. 4 (October 1999).

[34] Pratikno, "Keretakan Otoritarianisme Orde Baru dan Prospek Demokratisasi [The Cracks in New Order Authoritarianism and Prospects for Democratization]," *Jurnal Ilmu Sosial dan Ilmu Politik* 2, no. 2 (November 1998), https://doi.org/10.22146/jsp.11152.

[35] Sujito, "Gerakan Demiliterisasi di Era," 128.

[36] Ariel Heryant, *State Terrorism and Political Identity in Indonesia, Fatally Belonging* (New York: Routledge, 2006).

[37] Komnas HAM, *Merawat Ingatan Menjemput Keadilan, Ringkasan Eksekutif Peristiwa Pelanggaran HAM yang Berat* [Caring for Memory Picks Up Justice, Executive Summary of Serious Human Rights Violations] (Jakarta: Tim Publikasi Komnas HAM [Komnas HAM Publication Team], 2020).

Colombijn,[38] that those kinds of violence based approach has deep historical roots in Indonesian society.

Above depiction signify the role of judiciary in the context of transitional justice. Whether as the guardian and final interpreter of the Constitution, ideology, people's human rights and democracy, the Court is certainly expected to answer the challenges mentioned above. It does not mean that the efforts toward conflict resolution is non-existent. The early transition period has shown efforts to provide a settlement mechanism through judicial and extra-judicial. In that regard, both laws were filed to the Constitutional Courts, followed by the decisions.

2.2.1. Cornerstone Decisions Cemented by the Court

In the post-authoritarian regime, one of the main tasks in the transition period is the government's attitude to resolve the violence that occurred in the previous regime. Based on UN guidelines[39], transitional justice includes the following components: (i) initiatives to hold criminals accountable; (ii) disclosure of the truth; (iii) reparations for victims, (iv) institutional reforms; and (v) "national consultation" in the form of ensuring participation in the transitional justice process. As stated by pundits,[40] Indonesia has only partially adopting transitional justice principles. While the transition period initiate to many pillars of democracy (including the Constitutional Court), impunity and recognition of victims still have not been touched.

From a regulatory perspective, the criminal mechanism for gross violation of human rights is divided into two mechanisms: judicial and non-judicial. The former regulated in UU 26/2000.[41] The article 43 paragraph (1) of the UU *a quo* exclude the non-retroactive principle of past gross human rights violations

[38] F. Colombjin, "Explaining the Violent Solution in Indonesia," *The Brown Journal of World Affairs* 9, no.1 (2002): 49–50.

[39] UN Guidance Note of the Secretary General, *United Nations Approach to Transitional Justice* (New York: United Nations, 2010), 7-11.

[40] Sri Lestari Wahyuningroem, "From State to Society: Democratisation and the Failure of Transitional Justice in Indonesia" (Ph.D Thesis, Australian National University, 2018); Edward Aspinall, "The Irony of Success," *Journal of Democracy* 21, no. 2 (April 2010), https://doi.org/10.1353/jod.0.0157; Suparman Marzuki, *Tragedi Politik Hukum HAM* [Human Rights Legal Political Tragedy] (Yogyakarta: Pustaka Pelajar, 2011).

[41] Law of the Republic of Indonesia Number 26 of 2000 concerning the Human Rights Court (State Gazette of the Republic of Indonesia of 2000 Number 208).

through the *ad hoc* Human Rights Court. For the latter, non-judicial mechanisms, is regulated via Tap V/MPR/2000.[42] Tap *a quo* ordered the establishment of a Truth and Reconciliation Commission (TRC) which was then followed by the enactment of UU 27/2004.[43] These two instruments were intended to be the "Indonesian way" to commencing transitional justice. However, both were failed to be performed by the state.

2.2.2. Defending the "Retroactive" Principle: on Impunity

This section will successively discuss the decisions of the Constitutional Court relating to impunity for perpetrators of past conflicts. The most important fulcrum in this topic is the examination of the retroactive clause contained in Law 26/2000.

The first precedent is the review of Article 43 Paragraph (1) of Law 26/2000 through Decision Number: 065/PUU-II/2004 (Human Rights Tribunal Case) which was requested by Abilio Jose Osorio Soares. The Constitutional Court stated that retroactive application could be limited to extraordinary crimes.[44] That the crime of gross human rights violations is an act that is contrary to the Constitution. For this reason, the exception to the non-retroactive principle is justified because what is protected is the interest of humanity as a whole.[45] The Constitutional Court basically stated that the deviation was justified because the basic rights (non-derogable rights) contained in Article 28I paragraph (1)

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[42] Ketetapan Majelis Permusyawaratan Rakyat Nomor V/MPR/2000 tentang Pemantapan Persatuan Nasional [General People's Assembly Decree on Promotion of National Unity].

[43] Law of the Republic of Indonesia Number 27 of 2004 concerning the Truth and Reconciliation Commission (State Gazette of the Republic of Indonesia of 2004 Number 114).

[44] Constitutional Court of Indonesia, Decision No. 065/PUU-II/2004 (Indonesian Constitutional Court 2004), 52:
> Considering whereas the standard for determining the balance between legal certainty and justice, in particularly in upholding the principle of non-retroactivity must be carried out by considering three tasks/objectives of law which affect one another (*spannungsverhaltnis*) namely legal certainty (*rechtssicherkeit*), legal justice (gerechtigkeit) and legal usefulness (zweckmassigkeit). With Equal consideration of the three legal objectives, the limited retroactive application of a law, particluarly for extraordinary crimes, is legally justifiable;

[45] Ibid., 54.
> [...] Therefore, the overriding of the principle of non-retroactivity on such crime is not contradictory to the 1945 Constitution; as the constitution of a civilized nation, the spirit of the 1845 Constitution in fact mandated the enforcement of humanity and justice; hence the above described crimes against humanity must be eradicated. When the demand to uphold humanity and justice is hindered by the principle of non-retroactivity-which historically and initially had the background of the intent to protect individual human beings' interest from arbitrary actions of absolute rulers - hence the overriding of the principle of non-retroactivity becomes an unavoidable action because the interest which are to be saved through such overriding is the interest of human beings as a whole whose value exeeds the interest of an individual human being;

were limited by the "limitation" clause in Article 28J paragraph (2) of the 1945 Constitution. The non-retroactive exception for gross human rights violations was again mentioned in Decision Number: 29/PUU-V/2007 (Film Censorship Case), which states that non-derogable rights in paragraph (1) can be limited by Article 28J paragraph (2) of the 1945 Constitution.[46]

The review of the retroactive principle in Law 26/2000 marked a shift of interpretation from the previous precedent, Decision Number 013/PUU-I/2003 (Bali Bombing Case). The Bali Bombing Case mainly questioned the retroactive provisions in Law 16/2003 where the Court differentiated the category of serious crime (in this case, terrorism) and extraordinary crime (gross violation of human rights).[47] The Constitutional Court stated that the non-retroactive principle can only be accepted in the latter case.[48] In the Bali Bombing Case, the Constitutional Court argued that the provision of "non-derogable" clause in Article 28I paragraph (1) cannot be reduced to the "limitation" clause in Article 28J paragraph 2 of the 1945 Constitution due of the phrase "under any circumstances". In this section, the Constitutional Court refers to the opinion of the expert Maria Farida Indrati (Constitutional Court Judge 2008) regarding the rule of law that the constitution should not "slice its own flesh" [*de constitutie snijdt zijn eigen vlees*].[49]

[46] Constitutional Court of Indonesia, Decision No. 29/PUU-V/2007, 223:
[...] Moreover, for Human Rights classified as non-derogable rights, fo example the right not to be prosecuted under retroactive laws (non-retroactive) might be waived in cases of gross violence of human rights, such as crime against humanity and genocide: Similarly, the Human Rights namely the Right to life as stipulated in Article 28I paragraph (1) may be restricted by the Article 28J paragraph (2) of the 1945 Constitution;

[47] Law of the Republic of Indonesia Number 16 of 2003 concerning Stipulation of Government Regulation in lieu of Law of the Republic of Indonesia Number 2 of 2002 concerning the Enforcement of Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism, in the Bali Bombing Explosion Date October 12, 2002 Becomes Law (State Gazette of the Republic of Indonesia of 2003 Number 46).

[48] Constitutional Court of Indonesia, Decision No. 013/PUU-I/2003, 43-4:
[...] Hence, a reffererence to the Rome Statute of 1998 as well as Law, Bali bombing does not belong to an extraordinary crime that may be subjected to a retroactive principle of law, but an ordinary crime that is very cruel, but can still be prosecuted under the existing criminal code. [...]
[...] it is important to first look at the aim of applying the nonretroactive principle, that is, in order that the people in power will not arbitrarily make a law to punish their citizens. From the philosophical view, this principle must not of course be used for protecting the people who have committed a violation against the human rights, if such an effects a situation where the people who have committed gross violation of human rights will enjoy impunity. The nonretroactive principle should not be rigidly applied. [...]

[49] Constitutional Court of Indonesia, Decision No. 013/PUU-I/2003, 42:
Considering that Article 28I of the 1945 Constitution endorses the previous laws and regulations and places the a quo principle as supreme laws and regulations in the constitutional law arrangements. *Constitutie is de hoogste wet!* The State is unable to negate the Constitution as such a thing would mean the Constitution is slicing its own flesh. Referring also to the opinion of Dr. Maria Farida Indrati, S.H., M.H., the provision of

In terms of procedural law, the Court made its stance in the Decision 18/PUU-V/2007 (Human Rights Tribunal Mechanism Case I). This decision questions the procedure for establishing an *ad hoc* Human Rights Court in Law 26/2000. The Constitutional Court stated that the DPR [House of Parliament] cannot establish an ad hoc Human Rights Court without first obtaining the results of an early and further investigation by Komnas HAM and the Attorney General's Office.[50] As a result, the DPR cannot arbitrarily decide whether an action constitutes a gross human rights violation without preliminary phase conducted by those two institutions.

The next decision is a matter of technical order regarding the stagnation of the follow-up to the Komnas HAM's early investigation by the Attorney General's Office. This stagnation is motivated by the division of powers of "investigation" in the Law 26/2000. The Attorney General's Office returned the Komnas HAM's early investigation under the pretext that it was incomplete and needed to be corrected. Komnas HAM then fixed the documents but again the Attorney General returning it and refusing to proceed to conduct a further investigation.

The Petitioner believes that the two institutions' deadlock has resulted in legal uncertainty. The Constitutional Court through Decision 75/PUU-XIII/2015 (Human Rights Tribunal Mechanism Case II) rejected the applicant's application. There was a conflicting arguments within the decision. First, the Court argued that the main issue was not a matter of unconstitutionality but more of a problem of norms implementation. Second, the Constitutional Court acknowledges the incompleteness of investigation procedure within the law. In the end, the Court only makes suggestions on how in the future the policy should be taken by the legislative. The Constitutional Court merely "provides suggestions" for: (i) resolving differences of opinion between Komnas HAM and the Attorney General; (ii) regarding if Komnas HAM is unable to complete the dossier within the time limit as stipulated in Article 20 paragraph (3) of Law 26/2000; and (iii) a way out that can be taken by citizens who feel aggrieved.[51]

Article 28J paragraph (2) of the 1945 Constitution, which gives limitations to human rights, does not apply to Article 28I paragraph (1) because there is the phrase "under any conditions whatsoever".

50 Constitutional Court of Indonesia, Decision No. 18/PUU-V/2007, 94.

51 Constitutional Court of Indonesia, Decision No. 75/PUU-XIII/2015, 85.

2.2.3. On Dealing with the Past through Non-Judicial Mechanism

The most important decision related to resolving past conflicts through non-judicial means is Decision 006/PUU-IV/2006 (Reconciliation Case). This case was brought by civil society, which in essence questioned the imbalance relationship between victims and perpetrators in the reconciliation process. That the victim is charged with forgiving the perpetrator as a condition for obtaining reparations. The Constitutional Court approved the opinion of the Petitioners and annulled Law 27/2004 in its entirety. According to the Constitutional Court, the pardon provision in Article 27 is a "Key Article", so the cancellation of that Article will affect the construction of Law 27/2004 as a whole. In addition to canceling Law 27/2004 in its entirety, the Constitutional Court provides rules for settlement through the reconciliation mechanism, which are explained as follows.

First, about the position of the victim. The fact that gross human rights violations have occurred has created an obligation for both the state and the perpetrators to provide restitution, compensation, and rehabilitation to victims, without any other conditions.[52] Second, about the position of the perpetrator. That amnesty can actually be granted to perpetrators, but with limitations where the person concerned cannot benefit from the amnesty and amnesty cannot be granted for types of crimes that violate human rights that have been recognized by international law.[53] Third, regarding the form of settlement in the future through, among others: (i) reconciliation in the form of legal policies in

[52] Constitutional Court of Indonesia, Decision No. 006/PUU-IV/2006, 122:
The fact that there are gross human rights violations, which the state is actually obliged to avoid and prevent, and victims whose Human Rights should be protected by the state, are adequate to give rise to the legal responsibility of the state and individual perpetrators who can be identified to provide restitution, compensation and rehabilitation to the victims, without any other conditions. Stipulating amnesty as a requirement is a negation of legal protection and justice. [...]

[53] Ibid., 124
[...] It is stated that although the KKR is intended to create conducive conditions in achieving peace and national reconciliation, it is necessary to determine the limitations for the granting of amnesty, namely the perpetrators may not take advantage of amnesty. Amnesty should not have legal concequences relating to the rights of the victims to obtan reparation, and further amnesty shall not be granted in respect of violations of human rights and international humanitarian law, which constitute criminal offences, for which amnesty and other forms of immunity are not allowable.

accordance with the Constitution and universal human rights law, or (ii) through political policies in the context of rehabilitation and general amnesty.[54]

Previously, the Constitutional Court had decided on the cases filed by Sumaun Utomo et al, some of whom were former New Order political prisoners. The Petitioners in essence questioned the prohibition of prohibited organizations from participating in the General Election as stated in Article 60 letter G of Law 12/2003.[55] The Constitutional Court through its Decision 011-017/PUU-I/2003 (ex-Communists Party Election Case) stated that the limitation was discriminatory and therefore unconstitutional. In his considerations, it was also stated that these restrictions were irrelevant to reconciliation efforts in developing democracy and justice.[56] The two decisions above provide complementary precedents on the principles of reconciliation. Apart from the ultra petite controversy in the Reconciliation Case, in general the Constitutional Court has given its support for the reconciliation program which is currently being launched at that time.

2.2.4. Comprehending the Court's Intentions

Basically, the tests in the Bali Bombing Case and the Human Rights Tribunal Case test the same thing, namely the application of the non-retroactive principle. In these two cases, the Constitutional Court basically stated that the exception of non-retroactive principle can only be limitedly applies to the gross human rights violations. They defended their stance while at the same time making a shift of interpretation. In the Bali Bombing Case, The Court nullify the retroactive clause in the Bali Bombing Emergency Law by positioning "non-derogable clause" of Article 28I paragraph (1) of 1945 Constitution as irreducible. Falling within this non-derrogable clause was the right to not to be prosecuted with the retroactive law. Meanwhile, in the Human Rights Tribunal Case, the Court justified the

[54] Ibid., 131.
[...] Many options can be selected for achieving such goal, among others, by achieving reconciliation in the form of legal policies (laws), which are in line with the 1945 Constitution and universally applicable human rights instruments, or achieving reconciliation through policies on general rehabilitation and amnesty.

[55] Law of the Republic of Indonesia Number 12 of 2003 Concerning the General Election of Members of the People's Representative Council, Regional Representative Council, and Regional People's Representative Council (State Gazette of the Republic of Indonesia of 2003 Number 37).

[56] Constitutional Court of Indonesia, Decision No. 011-017/PUU-I/2003, 37.

retroactive clause in the UU 26/2000 by interpreting that Article 28I paragraph (1) is subordinate respective to the "limitation clause" in Article 28J paragraph (2) of 1945 Constitution.

The decisions on the retroactive clause imply the Constitutional Court's stance on impunity. The considerations in the jurisprudence show that the Constitutional Court justifies the exception of the non-retroactive principle specifically for cases of gross human rights violations, namely crimes against humanity and genocide. It is also implied that gross human rights violations are considered a higher degree of crime than terrorism. Thus, broadly speaking, the Constitution does not condone impunity for perpetrators of gross human rights violations. This attitude was reaffirmed by the limitation of the amnesty conditions contained in the consideration of the Reconciliation Case.

The procedural aspect of the ad hoc Tribunal of Human Rights is a bit difficult to conclude. The Constitutional Court stated that the DPR cannot arbitrarily declare a case as a gross human rights violation or not. This decision certainly has the effect of preventing the potential for the DPR to unilaterally decide a case to grant impunity. However, in the Human Rights Tribunal Mechanism Case II Decision, the Constitutional Court gave a less firm answer, namely acknowledging the lack of regulation but stating that the article was constitutional. The Constitutional Court only provides suggestions for guidance to the legislature to complete the lack of norms. Because the form is just a suggestion, there is no obligation for the legislature to make improvements as stated in the rules for considering that Decision.

For cases related to past conflicts through extra-judicial channels, the opinion of the Constitutional Court can be read from several perspectives. The Constitutional Court annulled Law 27/2004 in its entirety and as consequence the victim loses the momentum for a settlement through reparations.[57] This phenomenon is actually a dilemma, especially from two main considerations. First, in relation to what has been mentioned earlier, that the cancellation of Law

[57] Dissenting opinion from Justice I Gede Dewa Palguna, Constitutional Court of Indonesia, Decision No. 006/PUU-IV/2006, 143.

27/2004 means that the victim is unable to take extra-judicial routes. Second, the Constitutional Court still leave the door open for reconciliation as shown in its *ratio decidendi* [reason for falling]. Perhaps the Constitutional Court did not imagine that in fact the decision was not followed up by the legislature which resulted in the uncertainty of the fate of the victims due to the absence of a legal umbrella.

Broadly speaking, the above-mentioned decisions show the modality of norms testing in the Constitutional Court as a means of conflict resolution. In brief, the Court does not justify the existence of impunity and encourages the realization of peace through reconciliation, recognition of the victims' once-forcibly-taken rights. But of course, this modality does not necessarily solve the problem. As is well known, so far none of the perpetrators has been convicted and not a single victim has received legal recognition and received reparations. This absence of punishment and reparation shows a fracture between the meta-conflict and its real solution, the original-conflict.

2.3. Enhancing the Role of the Court: Trajectory

2.3.1. Court Decisions as Constitutional Engineering in Indonesian Rule of Law

The decision of the Constitutional Court has the nature of finality which justifies it as the basis for interpretation of the 1945 Constitution. Therefore, there are decisions whose legal rules provide a conclusion for resolving problems with a mediation or arbitration approach. Through the principles contained in its decisions, the work of the Constitutional Court can also be interpreted as part of constitutional engineering.

The decisions of the Constitutional Court have shown the modalities as well as the faults between meta-conflict in the realm of original-conflict. That there is a discontinuity of resolutions in the trial forum with real problem solving in the field. This topic is a classic problem regarding the executional aspect of the Constitutional Court decisions, where its *erga omnes* [towards all] nature does not necessarily make it directly implemented. This problem was acknowledged by

Maruarar Siahaan, who emphasized the acceptance of the Constitutional Court's decisions by other branches of power, especially the legislature.[58] Another study that extensively explores the relationship between the Constitutional Court and the legislature can be found in Fajar Laksono's dissertation research.[59] This paper confirms these opinions while adding to the relationship with conflict-resolution institutions.

If conflict resolution institutions are judged on their ability to resolve real conflicts on the ground, the experience of the Constitutional Court has given varying results. These variations relate to the extent to which the execution of the Judgment takes place, but it is not the only one. In certain cases, it appears that the Constitutional Court is careful to provide clear solutions. This modality then determines how to see constitutional engineering carried out by the Constitutional Court for conflict resolution. This challenge will also be seen in a broader context: the political momentum as an aspect of its own.

2.3.2. Injustice for Inherited Conflicts

As already noted, the Court has determined its position as shown in the discussion [2.2]. The stance of the establishment of the Constitutional Court, at least normatively, has an important role in the direction of resolving conflicts inherited from the New Order. In its ideal form, the legislature could actually follow up on the issue by adhering to the rules of the Reconciliation Case Decision. Not that there is no initiation at all. In 2015, a draft of the TRC Bill appeared. Then continued with the 2015-2021 period with a number of ideas ranging from the National Harmony Council to policies through Presidential Regulations by forming a special work unit. Long story short, none of these plans came true.

From another level, the prosecution has stalled without any significant progress. In this case, the Constitutional Court has given its view through the

[58] Maruarar Siahaan, "Mahkamah Konstitusi dalam Penegakan Hukum Konstitusi [Constitutional Court in Upholding Constitutional Law]," *Jurnal Hukum* 16, no. 3 (July 2009): 376, https://dx.doi.org/10.20885/iustum.vol16.iss3.art3.

[59] Fajar Laksono, "Relasi Antara Mahkamah Konstitusi dengan Dewan Perwakilan Rakyat dan Presiden Selaku Pembentuk Undang-Undang (Studi terhadap Dinamika Pelaksanaan Putusan Mahkamah Konstitusi melalui Legislasi Tahun 2004-2015) [The Relationship Between the Constitutional Court and the House of Representatives and the President as Legislator (Study of the Dynamics of Implementation of Constitutional Court Decisions through Legislation 2004-2015)]" (P.hD Thesis, PDIH FH University of Brawijaya Malang, 2017).

Human Rights Tribunal Mechanism Case II with unsatisfactory considerations. The stagnation of the process from the investigative institutions and investigators made the case unable to immediately proceed to the DPR to establish an ad hoc Human Rights Court.

The result of the impasse is legal certainty for victims. There are only two ways to get official recognition as a victim. First, through a reconciliation mechanism, unfortunately, until now there is no legal umbrella. Second, through the ad hoc Human Rights Court. This mechanism still needs a long way to go because it requires prerequisites for the perpetrator to be convicted through a decision that has permanent legal force. The simple logic is that the legal events of gross human rights violations and their victims require that the perpetrators be punished first. It means that even if Komnas HAM and the Attorney General's Office has reached an agreement and an *ad hoc* Human Rights Court is formed, it still does not guarantee that any perpetrators would be convicted so that victims can get reparations.

With no guarantee of legal certainty, and in the absence of legal recognition to victims, how to interpret the Constitutional Court's decisions? In the light of Carl Schmitt, the interpretation of norm and its implementation are viewed as a unity of monism.[60] Borrowing that perspective lead to the argument that this "more democratic regime" of Reformasi as a mere banner, not to say the worst, a new form of authoritarianism. In other words, it does not passed the test to formed a "We" that distinguished a new society with their darker past.

2.3.3. Bridging Meta to Original: Translating Decisions into Actions

If the Constitutional Court decision is indeed a legal engineering that can be utilized to resolve a conflict, then the next task is to connect the values contained in the decisions with conflicts that occur in the real world. Yet with all the authority it has, the Constitutional Court still cannot run alone, which in Javanese terms is often likened to an "*idu geni*" [spit of fire] proverbs where what is said can simply come true. In a broader perspective, this follow-up is also

[60] See Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (Chicago: The University of Chicago Press, 2005).

needed as a fulfillment of transitional justice; justice for victims and perpetrators to assemble a collective memory for the mistakes of the past regime and not repeat the atrocious crimes of the past. For this reason, this paper will try to offer a settlement option based on the above Constitutional Court decisions. Thus, following the logic of the decisions of the Constitutional Court above, it is possible to reach a settlement through two mechanisms: judicial and extra-judicial.

First is about the judicial mechanism. It has been explained that the obstacles that arise to the problem of judicial settlement are mainly the problem of improving the procedural law mechanism as stated in "Human Rights Tribunal Case Mechanism II". These improvements are to bridge the deadlock in the preliminary investigation and investigation procedures that have been hampering the progress of the case. There are two ways to fix this issue, either amending the law to meet the requirement as stated by the Court or to make drastic approach synchronizing Komnas HAM and Prosecutor's perspectives.

Second is about the extra-judicial mechanism. Referring to the principles presented by the Court in the Reconciliation Case, a number of keywords can be formulated: (i) prioritizing the right to reparation for victims; (ii) caution if there is sub-poena authority to grant amnesty to perpetrators; (iii) the opening of options for implementing extra-judicial settlement policies, including through legal policies and political policies. By taking into account these references, the option is open to determine the design of the settlement through the reconciliation mechanism. There are at least four options: first, a legal policy accompanied by sub-points of authority such as in South Africa; secondly, legal policies without sub-poena authority, such as in Chile; third, political policies through rehabilitation and general amnesty; and fourth, an alternative route by setting up a temporary commission/team before being followed up with legal or political policies.

On August 16, 2022, President Joko Widodo stated that he has signed the Presidential Decree No. 17/2022 on the formation of task force for gross violations

of human rights through non-judicial mechanisms. Judging from its form, this policy can be classified as the fourth option, namely a temporary policy as a bridge until later resolved through legal policy or political policy. At a minimum, this team should be able to provide disclosures on the legacy of past conflicts and recommendations for reparations to victims. One small note perhaps is the emphasis on urgency. After more than two decades, many of the victims have died. Some with wounds wide open, some with unspeakable sufferings, and some of them are still in silence without having time to tell the sufferings they had to endure. How far this new task force could contribute in the Indonesian transitional justice agenda is still need to awaited and anticipated.

2.4. Constitutional Courts in a "Moving Backward" Democracy

There are studies on the rise and fall of human rights momentum in Indonesia's post-New Order regime. First, many scholars generally accepted that there is a changing trend of human rights developments in Indonesia.[61] In essence, the researchers said that there was a strong momentum of human rights commitment at the beginning of Reformasi. As time goes by, studies shown the decline of democracy.[62]

Judicial institutions, even though they have independent powers, will have no meaning if their decisions are not obeyed. This is apart from the problem of political attraction at the time of selection of judges which is more or less influenced by the existing political background.[63] Compliance of the decision is needed to maintain the corridor to ensure how it being translated into actions. For this reason, it can be said that the political aspect also influences the nature

[61] Wahyuningroem, "From State to Society"; Marzuki, *Tragedi Politik Hukum*; Hikmahanto Juwana, "Special Report Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003," *Singapore Journal of International & Comparative Law* (2003).

[62] Herlambang P. Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 16, https://doi.org/10.1177/0067205X221107404; Thomas P. Power, "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline," *Bulletin of Indonesian Economic Studies* 54 (2018); Thomas Power, Eve Warburton (eds), *Democracy in Indonesia From Stagnation to Regression?* (Heng Mung Keng Terrace: ISEAS Publishing, 2020); Iqra Anugrah, "The Illiberal Turn in Indonesian Democracy," *The Asia-Pacific Journal* 18, no. 1 (March 2020); Abdurrachman Satrio, "Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?" *Constitutional Review* 4, no. 2 (December 2018), https://doi.org/10.31078/consrev425.

[63] See Hendriyanto, *Law and Politics of Constitutional Courts, Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 155-9.

of the decisions, at least in the sense of maintaining the continuity of the decision and the supremacy of the court. [64]

Despite the existing criticism, the Constitutional Court has subsequently provided guidelines for conflict resolution through human rights and transitional justice approach. However, still no justice for either perpetrators or victims. The recognition and redistribution contained in the meta-conflict are not materialized in the original-conflict. Justice delayed, justice denied. This shortcoming, once again, certainly cannot be charged to the Constitutional Court alone. If the Court has already made their decisions in what manner the dark past should be dealt with, then now is time for other branches of power to prove their stance. Translating decisions into policies to once and for all ending the conflict. Whether or not Indonesia's democracy is walking in stagnation or even regressing should be answered by real actions to answer the call for those who suffered the most.

This rised a further question: unable or unwilling? As comparison, Chile has the experience with the Amnesty Law 1978 which protected the crimes committed by the Pinochet's regime and South Africa's Indemnity Acts 1962, 1977, 1990, and 1992 that blocking legal prosecution for the crimes during apartheid. Yet both were relatively able to cope with the questions of their past through victims' reparation and punishment for the perpetrators. There were and are dynamics on both, but at least they did not stay silence. As reflected by the Court's decisions, Indonesia does not have such legal obstacle to restore the nation's dignity to deploy recognition and redistribution as required by the transitional justice. The Court has condemned the impunity and urged the truth revealing and victim's reparation to resolving the abused past. It means that legally speaking there is no available pretext that they are unable to fulfill its duty.

III. CONCLUSION

The question remains, can the Indonesian Constitutional Court be called as conflict-resolution body? The Court has successfully defended the retroactive

[64] Michael Hein, "Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoritical Approach," *Studies of Transition States and Societies* 3, no. 1 (2011).

clause within the Act 26/2000. It also provides a legal foundation for the future reconciliation agendas through legal policy and political policy. In this sense, the answer is yes, the Court has taken the role as the conflict-resolution body.

But on the other hand, lack of justice in the realm of original-conflict requires further examination. The decisions of the Constitutional Court cannot necessarily guarantee that the "winning" party will immediately receive justice. There are factors for that, from the problem of interpretation in the decisions itself, the authority to carry out executions, to the political dimension which are aspects that should be considered. The Constitutional Court will always be faced with choices on how to carry out the "distribution of values" in its decisions. The distribution pattern that determines the winners and losers, as described, will be greatly influenced by the level of compliance and public trust. Since this paper has proven that the Court has carved a constitutional pathway to urge the transitional justice, then it relies on the willingness of the policymakers.

In the end, the biggest challenge for the Constitutional Court to become a conflict resolution body depends on how far their decisions are translated into actions. This paper acknowledged that the Court had fulfilled its duty to determine how society should be transformed constitutionally. However, it was the nature of the Court's lack of political legitimation to provide final closure for the problem of transitional justice. This inability of the Court was arguably not a weak spot of an institutional setting. If so, who should blamed for this stagnation? in the case of transitional justice in Indonesia, for the most part, it is not the Court.

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Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to a Constitution

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Abstract

This paper reflects on the transformative role of courts to direct and change the pathway of the countries in which they serve. The paper commences with a brief discussion of what is meant by transformative constitutionalism. It takes issue with the proposition that newly created courts under post 1990-constitutions are more prone to constitutional transformation than courts under older constitutions. It shows how there have been examples where courts have transformed their societies throughout the history of courts. It also points out that courts must, regardless of their transformative role, demonstrate respect for the separation of powers since all organs of government must work together to effectively transform society. The paper then focuses on 4 case studies where courts have radically transformed their society, namely Germany through the use of Bundestreue to give content to the federal system; India where Directive Principles of state policy are used to give content to human rights; Australia where the Aboriginal native title had been recognised after 200 years of denial; and South Africa where Ubuntu is used as a life-giving word to effect social justice. The proposition put is that the transformative ability of a constitution and the judiciary serving under that constitution is not determined by the age of the constitution, but by the ability of its justices to determine disputes on the facts, in accordance with the law, and in reflection of the realities of the society in which they reside. The fault

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lines of society often rapture in litigation, and that is when and where judges may direct a nation into a new direction.

Keywords: *Bundestreue*; Directive Principles of state policy; Mabo; Native title; Socio-economic rights; Transformative constitutionalism; Ubuntu.

I. INTRODUCTION

The judiciary can be an essential agent in the transformative process of a country. This is because the judiciary can breathe life into the dry text of a constitution. The judiciary can make a rainbow of the black print. The judiciary can let the silent words of the constitution speak out by resolving disputes based on findings of fact, the application of relevant law, and the exercise of discretion. It can fill in gaps in policies. Handing down a judgement is not a computer-generated exercise. This is because the judiciary is responsible, based on the facts and submissions before it, to declare the law of the land for which it is responsible. The judiciary cannot write a constitution, but it can enliven it. The life-giving ability of the judiciary applies to long established, young and emerging democracies.

Sometimes, as illustrated below by way of the four (4) selected case studies the subject of this article, the judiciary can be *the* agent of transformation. It can be *the* rudder that changes the course of a country by the stroke of a pen. In the case of Australia, for example, the High Court shifted direction from a century-old dogma that the country was *terra nullius* (no persons' land) at the time of settlement in 1788, to the recognition of native title in 1992 and thereby acknowledge extensive rights to the land of Aboriginal people Two centuries of denial of Aboriginal customary property rights were wiped away by a single judgement.[1]

The dynamics that influence the outcome of reasoning of the judiciary are complex, diverse, and influenced by the social issues of the day. In the Marbury v Madison-judgement the Supreme Court of the United States introduced what

[1] Mabo (2), Mabo v. Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1 (1992).

is today known as constitutionalism and sovereignty of the law.[2] In Brown v the Education Board of Topeka, the Supreme Court of the United States in the briefest of judgments overturned the dogma of 'separate but equal' and set the USA (and consequently many other nations) on a course of civil rights and equality.[3] These judgments, arising from the oldest written constitution, are exemplary examples of transformative constitutionalism.

The factors that influence justices to make course adjustments are multiple, varied, and subtle, and can often only be the subject of speculation. Assumptions are often made about events or circumstances that influence judges, but those are rarely the subject of in-depth analysis to establish the accuracy of the proposition. Dugard, for example, has found that the popular assumption in South Africa was *incorrect,* namely that justices appointed pursuant to the post-democratic, newly created Constitutional Court of South Africa would hand down judgments in the socio-economic sphere that are more 'transformative' than the judgments of judges that had been appointed to the lower, pre-existing, *apartheid*-courts.[4] She suggests that the greatest factor that may have influenced more progressive or less progressive outcomes of judgments in the socio-economic sphere in South Africa may not have been the race of the judges; the time of their appointment; the age of the constitution; or the courts in which they served, but rather something as simple as whether justices sat in a single bench on their own, or collectively on the bench with other justices.[5]

The judiciary can of course also be an instrument of oppression. A defender of the *status quo*. But defending the status quo may also sometimes provide a bullwork against tyranny. It all depends on circumstance. The apartheid-courts in South Africa for many decades used their legal reasoning to give effect to a system of oppression, but many judges within those courts also attempted to

[2] Marbury, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), (1803).
[3] Brown-case, Brown v. Board of Education, 347 U.S. 483 (1954) (SC 1954).
[4] J. Dugard, "Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994-2015," *International Journal of Human Rights* 20 (2016): 1154.
[5] Ibid., 1155.

hand down judgments that resisted the might of state power as much as it was legally possible.[6]

The 'independence' of the judiciary, therefore, does not imply it being a life-giving institution. In central and eastern Europe, for example, the laudable constitutional provisions enacted post-1990 that relate to the rights of ethno-cultural minorities within those deeply divided societies 'are seemingly well developed on paper [but] frequently not given the full legal effect by the courts as minorities may expect'.[7] Whilst in Latin America, where there has been extensive lip-service to indigenous rights and the importance of 'free, prior and informed consent' (FPIC) of indigenous people whenever their interests in land are affected, courts have been slow to adopt normative consultation standards of 'consent' with indigenous people. Consequently, indigenous people 'continue to face significant power imbalances'.[8]

A judiciary, restricted to the black letter of the law-approach, or being an undue servant of the sovereignty of parliament, may lack the value of conscience or the ability to breathe life into a constitution. On the other hand, however, a judiciary that adopts a programmatic approach whereby it pursues a quasi-legislative and policy agenda and thereby undermines the separation of powers, may erode the legacy and credibility of the court. The Montesquieu-based dogma of separation of powers may not be an eternal truth, but it remains the most theoretically sound and pragmatic way to organise the powers of government.

The question of the subject of this article is what the role is, if any, of the judiciary to breathe life into the constitutional text by giving it an identity that goes beyond the words of the constitution, but nevertheless reflects the values and aspirations of the nation? To answer the question, 4 case studies are used to demonstrate the nature and extent of the involvement of the judiciary to

6 L.G. Baxter, "Apartheid and the South African Judiciary," *Duke Law Magazine* 5 (1987): 9–15.

7 F. Palermo and S. Constantin, "Litigating Linguistic Rights of National Minorities in Central, Eastern and South-Eastern Europe," in *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts*, ed. B. De Villiers et al. (Leiden: Brill, 2021), 212.

8 A. Tomaselli and F. Cittadino, "Land, Consultation and Participation Rights of Indigenous Peoples in the Recent Jurisdictions of the Inter-American Court of Human Rights: The Cases of Sarayaku v. Ecuador and Kalina and Lokono v. Suriname," in *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts*, ed. B. De Villiers et al. (Leiden: Brill, 2021), 175.

breathe life into a constitutional text that reflects the values and aspirations of the people, albeit that those values were not explicitly stated in the constitution. In doing so, the courts became an agent of what is generally referred to as transformative constitutionalism.

In each of the 4 cases, the justices utilised the circumstances of the nation to direct policy makers towards a more just and equitable society, but without usurping the powers and functions of parliament or the executive. The judiciary found a way to interpret, respectfully, what otherwise would be standard clauses of legal text, into a format that gives direction to the nation; that inspires it; that guides it; but most importantly for the purposes of this paper, that transformed it. In each of these case studies the nation pre- and post-judgments were irrevocably changed.

The examples referred to are those of India where the Supreme Court through the use of the Directive Principles of state policy, set the scene for fundamental human rights to be interpreted in a manner that recognises the importance of socio-economic transformation and ultimately gave rise to the justiciability of social and economic rights; the Constitutional Court of Germany that has used the implied term of *Bundestreue* to lay down the contours of German federalism and intergovernmental relations in a manner that is nowadays referred to as 'cooperative federalism'; the High Court of Australia that recognised after more than 2 centuries of denial, the existence of Aboriginal native title to land, which in turn has given rise to several other common law jurisdictions following suit; and finally the Constitutional Court of South Africa that read into the Constitution the implied term *Ubuntu* and thereby used that undefined term to initiate transformation in several areas of law, including the abolition of the death penalty and the pursuance of socio-economic rights and justice. The methodology used is to use a literature-based assessment and comparison of jurisprudence arising from the respective case studies to demonstrate the transformative ability of courts based on specific ground-breaking judgments.

These cases highlight and celebrate the transformative power of the judiciary and the ability of justices to breathe life into a constitution.

II. TRANSFORMATIVE ABILITY OF COURTS

Much has been written about the transformative ability of courts. This potential of courts is often referred to as 'transformative constitutionalism', implying that the provisions of the constitution ought to be used by the courts to actively address the essential issues that cause inequality in a particular society, for example, through the recognition of socio-economic rights; minority and indigenous rights; or environmental rights. In Latin America the term *Ius Constitutionale Commune en America Latina (ICCAL)* has been coined to reflect what is seen as transformative constitutionalism in that subcontinent.[9] ICCAL refers to the role of law in transforming societies.[10] Couso observes that in Latin America 'the notion that social transformation can be achieved through the judicial enforcement of social and economic rights, is now widespread...'[11] A notable caution is, however, expressed by Ugarte when he says: 'Let us not forget that their [social and economic rights] application depends not only on technical and institutional dynamics, but also on culturally imbedded political, social and judicial guarantees...The challenge lies in ensuring that the logic of rights prevails over the logic of power and privilege'.[12]

The concept of a transformative court has been explained as follows by the Supreme Court of Kenya, but in doing so the court has emphasised values that may as well also be associated with traditional liberalism (for example, social justice, equality, devolution, human rights, rule of law and freedom and democracy):

> Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of earlier decades which essentially sought

[9] A. Von Bogdandy et al., "Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune," *International Journal of Constitutional Law* 17, no. 1 (January 2017): 368–374, https://doi.org/10.1093/icon/moz011.

[10] A. Von Bogdandy et al., "Ius Constitutionale Commune En America Latina: A Regional Approach to Transformative Constitutionalism" (MPIL Research Paper Series Heidelberg: MPIL, 2016), 3.

[11] J.A. Couso, "The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity," in *Courts and Social Transformation in New Democracies*, ed. R. Gargarella, P. Domingo, and T. Roux (Hampshire: Ashgate, 2006), 74. (Hampshire: Ashgate, 2006).

[12] P.S. Ugarte, "The Struggle for Rights and the Ius Constitutionale Commune," in *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, ed. A. Von Bogdandy et al. (London: Oxford University Press, 2017), 82.

> the control and legitimation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy... [13]

It is easier to *describe* transformative constitutionalism than to *define* it. Whilst what is exactly meant by transformative constitutionalism remains ambiguous, it has been suggested that the essential difference between transformative constitutionalism and traditional liberalism is that the latter pursues *formal* equality, whilst the former pursues *substantial* equality.[14] This proposition is however open to challenge. Bogdandy, for example, notes that the ideal of 'social inclusion' that is pursued by transformative constitutionalism, is an objective that can be shared by 'conservative, liberal and socialist forces'.[15] Baxi acknowledges that transformative constitutionalism 'presents a distorted lens'. [16]

In the case of the constitutional transformation of South Africa from an *apartheid*-state to a state based on the rule of law and constitutionalism, Klare has sought to define constitutional transformation as being:

> ...a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction...an enterprise of inducing large-scale social change... [17]

In each of the 4 examples discussed below, the justices had ventured onto a path that the respective parliaments and governments were unable to traverse. In doing so, the respective courts walked a tightrope where they challenged the separation of powers; where they ran the risk of encroaching on legislative and executive

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[13] Speaker-case, Speaker of the Senate and Another v. Attorney-General and Another [2013] eKLR par 51 (2013).

[14] E. Kibet and C. Fombad, "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa," *African Human Rights Law Journal* 17 (2017): 353.

[15] Von Bogdandy et al., "Ius Constitutionale Commune," 5.

[16] U. Baxi, "Preliminary Note on Transformative Constitutionalism," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, Indian and South Africa*, ed. O. Vilhena, U. Baxi, and F. Viljoen (Pretoria: Pretoria University Law Press, 2013), 23.

[17] K. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights*, (1998): 150, https://doi.org/10.1080/02587203.1998.11834974.

functions; where they opened the door for public criticism and rejection; and where they adopted a vision hoping it would find resonance with the public.[18]

It is not surprising that transformative constitutionalism has 'received a fair amount of criticism' since it seeks greater involvement of the courts in policy priorities and even budgetary allocations.[19] Pursuing an own agenda may bring the courts in conflict with other organs of government; whilst being enslaved to the text of the constitution or parliamentary sovereignty may erode the public credibility and legitimacy of the courts. In each of the case studies discussed below the highest court managed to retain the umbilical constitutional cord that links it to the nation; it upheld and respected the separation of powers; it adhered to the constitution under which it serves; and yet it managed to change the direction of the nation.

The proposition by some authors that contemporary-created courts may be more suitable for transformative constitutionalism than older, liberal-based courts does not, in light of the experiences of these 4 case studies, hold water. Gargarella, for example, is of the view that 'in countries with old constitutions, which are exclusively committed to negative liberties' the transformational role of the court by way of social rights may be hard to achieve. [20] This is not necessarily the case. A transformational court, regardless of the age of its constitution, must be alive to the social issues that are relevant to contemporary society. The scientific community may post-1990 have be drawn to the new concept of

[18] It is often suggested that liberal constitutions seek to protect basic freedoms in a negative manner by *preventing* state action, whilst transformative constitutionalism seeks to protect rights in a positive manner by *requiring* state involvement. This is not a defendable distinction of justiciable rights. Many judgments require some form of executive action or impact on the allocation of resources (Gargarella, Domingo, and Roux, 2006, 260). The doctrine of separation of powers operates on the basis of proportion rather than absolutism. But, one must acknowledge that courts must be mindful of the remedies granted since those must be lawful, practical and achievable.

[19] Kibet and Fombad, "Transformative Constitutionalism," 353.

[20] R. Gargarella, "Theories of Democracy, the Judiciary and Social Rights," in *Courts and Social Transformation in New Democracies*, ed. R. Gargarella, P. Domingo, and T. Roux (Hampshire: Ashgate, 2006), 25. I agree with the observation of Gargarella and others that 'the view that social rights are different in kind to civil and political rights has now been thoroughly discredited' Gargarella, Domingo, and Roux, "Courts, Rights and Social Transformation: Concluding Reflections," 257. However, if that is the case, then why would Gargarello draw a distinction between 'negative liberties' of 'old constitutions' and positive liberties of 'new constitutions? This contradiction highlights in my view the inconsistency to attribute transformative capacities principally to newly created courts. Few contemporary cases have had the impact on international constitutionalism and transformation as *Marbury* and *Mabo* respectively, and yet both were handed down pursuant to so called old constitutions within the liberal constitutional tradition.

transformative constitutionalism due to international events, but courts have been transforming societies for a long time. The endorsement in Marbury v Madison of the principle of constitutionalism, is arguably *the* most important example of transformative constitutionalism of all judicial outcomes. Notably, Dugard finds in her analysis of socio-economic type judgments in the 20 years post the new democratic constitution of South Africa, that the judgments by judges appointed under the pre-democracy, created High Court and the judges appointed pursuant to the post-democracy, created Constitutional Court displayed outcomes that were more consistent with one another than would perhaps have been anticipated. She observes that the High Court judgments in South Africa were not 'as conservative' as may have been expected, whilst the Constitutional Court judgments in South Africa were 'not as transformative' as may have been expected.[21]

The question is often raised in literature whether young and emerging democracies require a special form of judicial activism to nudge the nation towards social justice and equality? Kibet and Famobad, for example, suggest that the "traditional notion of constitutionalism is inadequate in meeting peculiar needs of transitional societies".[22] This is a proposition that is yet to be established by sound research. In fact, a court that exceeds its constitutional limitations, may harm a young democracy. The role of the courts as an independent source of powers has been transformative since the foundation of liberal democracies. Some of the oldest courts have handed down what could be regarded as transformative judgments, whilst there are many examples where some of the contemporary appointed justices in emerging post-1990 democracies have been careful not to offend those in political power. The proposition that courts created after a certain date, or subsequent to a specific democratisation or revolutionary event, are by nature more prone to being transformative, is at best romantic and at worst illusionary. Comparative law is filled with case studies of older courts being transformative and recently created courts being conservative.

[21] Dugard, "Testing the Transformative," 1154.
[22] Kibet and Fombad, "Transformative Constitutionalism," 350.

In essence: the transformative role and ability of a court goes deeper and is more multi-layered than the age of the constitution under which the courts function. The transformative role of the judiciary may arise from a democratisation process; an end to civil war; eradication of socio-economic inequality; recognition of ethnic-minority and indigenous rights; accommodation of societal plurality; ensuring equal treatment of all individuals; laying the contours of federal-state intergovernmental relations; upholding constitutional values such as the separation of powers, or acknowledging the importance of environmental issues.

While transformative constitutionalism is often referred to in literature within the context of socio-economic rights, the true test for transformative constitutionalism is whether the courts address the issues that a relevant to a particular society *and* whether those judgments give rise to practical changes within the society. For example, in a similar way that the often quoted Grootboom-judgement [23] reflected the socio-economic realities of South Africa, so the Mabo case reflected the social realities of Australia.[24]

It is not surprising that similar legal questions may be resolved in different ways in different countries. As shown below, for example, the meaning given by the Supreme Court of India to Directive Principles of state policy differs fundamentally from the meaning given by the courts of Ireland to the Directive Principles of state policy contained in the constitution of Ireland.[25] While in India the Directive Principles shaped the thinking of the court about the content of fundamental rights, in Ireland the Directive Principles were ineffective and a mere *obiter* in their impact. Similarly, the values imbued in the term *Bundestreue* by the Constitutional Court of Germany, have been interpreted more expansively than the effect of the same term in the constitutional traditions Switzerland and Belgium.[26] Whilst in Germany *Bundestreue* is regarded as *the* implied term

[23] Grootboom-case, Government of the Republic of South Africa and Others v. Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) (2000).

[24] Mabo (2), *Mabo*.

[25] B. De Villiers, "Socio-Economic Rights in the New South Africa: Critical Evaluation of the Recommendations of the SA Law Commission," *Journal of South African Law*, no. 3 (1992): 434.

[26] B. De Villiers, "Intergovernmental Relations: Bundestreue and the Duty to Co-Operate from a German Perspective," *South African Public Law* 14 (1994): 430–39.

that permeates the federal system, the same status is not accorded to the term in Switzerland or Belgium. In similar vein, in South Africa the term *Ubuntu* has become widely used by the courts to facilitate societal change, while the same term, albeit widely used in a social context in southern Africa, has not had the same use or impact on courts in other African countries.[27]

There is, of course, a fine balance to be struck between a judiciary giving life to a constitution that reflects the values and aspirations of the society it serves, and a judiciary that pursues its own social-policy agenda and, in the process, loses track of its core functions, its duty towards its people, its obligation to uphold the constitution, and in doing so exceeds its powers and encroaches on the separation of powers. Judiciaries often test the balance of societal and constitutional tolerance. Albie Sachs writes as follows:

> In an open and democratic society, political compromise based on the principle of give-and-take rather than the idea of winner-takes-all, was to be applauded. Yet judges were unsuited to take decisions on houses, hospitals, schools, and electricity. They just did not have the know-how and the capacity to handle those questions. But judges did know about human dignity, about oppression and about things that reduced a human being to a status below that which a democratic society would regard as tolerable.[28]

The notion of constitutionalism was transformative two centuries ago, whilst today giving content to socio-economic rights, environmental rights, or balancing the rights of competing religious communities, are regarded as transformative.

The ability of the courts to bring about change and to be transformative is however limited by the constitution and the functions of other organs of government. It is particularly in emerging democracies where the courts may become the forum where the competition for scarce resources is most intense. The courts may find themselves in what Klug calls 'lawfare'. But the courts cannot by themselves address all the inequality, incapacity, ineptitude and disharmonies of government.[29] The courts cannot create work, build houses,

[27] T.W. Bennett, "Ubuntu: An African Equity," *Potchefstroom Electronic Law Journal* 14 (2011): 30–61.

[28] A. Sachs, *The Strange Alchemy of Life and Law* (London: Oxford University Press, 2009), 170–71.

[29] H. Klug, 'Towards a Sociology of Constitutional Transformation: Understanding South Africa's Post-Apartheid Constitutional Order', *Legal Studies Research Paper Series No. 1373 Wisconsin Law School*, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2729460.

clean the environment, or bring peace to violent ethnic conflicts. The courts are part of a team, with the other elements of the team being the executive and legislature, and in addition, an active civil society. The 'interests of the disadvantaged cannot only be advanced through successful litigation...we would argue that courts need the cooperation of both the legislature and the executive in order to ensure respect for their decision'.[30] Change is best achieved if and when all parts of the teamwork in unison. In the absence of strong institutions and an active civil society, the demanding role placed on the judiciary to effect change is often undermined by a 'bottleneck' of weak policy implementation.[31] Ultimately, the 'judiciary cannot substitute policy making through political institutions'.[32] The transformative role of the courts therefore does not end with a laudable, transformative judgement. The impact is ultimately assessed about the practical change it brings to a society.

The proposition by Kibet and Fombad that transformative constitutionalism in itself 'offers hope for better prospects of constitutionalism and protection on fundamental rights in Africa', is untested by sound research [33]. Judges are not necessarily immune to abuse of power; political influence; corruption; or undisclosed political or other agendas. Baxi correctly observes that 'despite the brilliance of erudite transformative constitutionalism discourse, socio-economic rights have not yet come into existence....'[34] The most recent developments in the United States of America regarding judgments of the Supreme Court, most notably on the issues of abortion and firearm control, illustrate how the legal reasoning of justices can be influenced by societal factors, personal beliefs and values, effluxion of time, socio-economic events, international law, and political persuasion and pressure.

Justices are understandably often frustrated that the values and ideals aspired to in a constitution may not be open to judicial enforcement; or promises made in the constitution may not be suitable to justiciable and enforceable remedies.

[30] Gargarella, Domingo, and Roux 2006, 273.
[31] Von Bogdandy et al., "Ius Constitutionale Commune," 9.
[32] Ibid., 11.
[33] Kibet and Fombad, "Transformative Constitutionalism," 354.
[34] Baxi, "Preliminary Note on Transformative Constitutionalism," 41.

Regardless of the lofty promises that are made in constitutions – especially many post-1990 constitutions - about equality, fairness, social and economic rights, and equal treatment, all societies, but notably those of young and emerging democracies, suffer inequality and encroachments and denials of human rights at a scale that often ridicules the constitutional guarantees. For example, South Africa, which is lauded by many as an example of transformative constitutionalism,[35] continues to suffer some of the greatest socio-economic inequality in the world[36] and unbridled corruption and state-capture.[37]

The inability of the judiciary to give effect to constitutional promises, can affect not only the legitimacy of the courts, but could lead to the erosion of trust in the entire system of government and in constitutionalism itself. Justices in particularly emerging democracies find themselves inhibited by the limited remedies available to give effect to laudable constitutional rights. Geoff Budlender, a senior legal practitioner in South Africa, observes as follows about the inconsistency between constitutional *ideal* and practical *reality*:

> The really difficult question is what role the courts can play to address systematic failures. This is the question that requires creativity and energy. Currently all of us, including the courts, are passive observers of a systemic and wholesale breach of the rights of those who are most vulnerable, and whose rights are most important to our ability to succeed as a nation...Many rights problems are not solved overnight. You cannot wish for a court order that will solve the school system like a magic wand. But a proper interaction between government, civil society and the courts can go a very long way in taking us away from systemic breakdowns, towards systematic enforcement and realisation of the rights in the Constitution.[38]

In summary, the courts can play a transformative role in a society; the nature and extent of the transformative role of courts is not necessarily dependent on the age of the constitution or when it was enacted; the transformative role

[35] Von Bogdandy et al., "Ius Constitutionale Commune," 6.

[36] Gini Index, "Gini Index (World Bank Estimate) South Africa," Washington DC, World Bank, 2022, https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country.

[37] R.M.M. Zondo, "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State" (Pretoria, Judicial Commission, 2022), https://www.statecapture.org.za/site/files/announcements/649/Judicial_Commission_of_Inquiry_into_State_Capture_Report_Part_3-1.pdf.

[38] G. Budlender, "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights," *ESR Review* 8, no. 1 (2007): 9. https://hdl.handle.net/10520/AJA1684260X_318.

of a court depends on the issues that are relevant to a particular society, for example, socio-economic inequality; recognition of cultural and indigenous diversity; environmental concerns and land rights; and the justices, even within a transformative milieu, must be respectful of the limited powers of the judiciary, their allegiance to the constitution, and the importance of the separation of powers.

III. FOUR CASE STUDIES OF TRANSFORMATIVE JUSTICE

The 4 case studies the subject of the next part highlight a common theme concerning the value of an implied term in the constitution that may be used to influence and determine the outcome of adjudication of disputes. In each of the case studies the highest court decided, soon after the enactment of the constitution, to recognise and rely on implied constitutional values to guide the court in its resolution of disputes and to give effect to the constitution in a transformative manner. Each of the judgments discussed were transformative, sometimes not only to the nation to which it applied, but also as a precedent at the level of international jurisprudence. Each judgement succeeded to set the nation on a new course that at the time may not have been reflective of the political will of the legislature.

The approach adopted by the Supreme Court of India regarding the Directive Principles of state policy has had a marked impact on the way human rights in that country are interpreted and in the development of the justiciability of socio-economic rights internationally. The approach adopted by the Constitutional Court of Germany in recognition of *Bundestreue* (translated as federal comity or federal trust), as an implied term in the Basic Law, not only set the scene for the conduct of German federalism but provided a basis for the notion of cooperative federalism in literature and newly drafted constitutions such as those of South Africa. In Australia, the recognition of native title by the High Court sent reverberations through the nation, but after the dust had settled the case of Mabo became a much-cited judgement in other common law jurisdictions. Finally, the Constitutional Court of South Africa has to great effect used the

implied term Ubuntu not only to transform society, but it has also given to jurisprudence a unique fingerprint to which South Africans can relate.

These implied values exhibited by the respective case studies and recognised by the respective courts can be described as reflecting the 'soul' of the respective constitutions and are primary examples of transformative constitutionalism.[39]

3.1. India: Transforming Society By Way of Directive Principles

The inclusion into the Constitution of India of a chapter called Directive Principles of State Policy, reflected the history of India whereby individuals were not only the bearers of fundamental rights and freedoms, the Rulers in turn also had a duty of care towards the poor, the infirm and the needy. The Directive Principles are found in Part IV of the Constitutions (aa 36-51). The Principles sets out essential obligations of government towards the society. The traditional *Raja Dharma*, which reflects on the duties of the Rulers, were in effect codified by including those general obligations into the Constitution with clear non-justiciable objectives and ideals for the state to pursue.[40] The Directive Principles are, for purposes of this article, treated by the courts as the soul of the Constitution whereby the aspirations of the people and the duties of government to address those aspirations, are bound together into a chapter.[41]

The principle underlying the Directive Principles is that they constitutionally recognise the obligations of the state towards the people, particularly the extremely poor and vulnerable, without converting those moral claims into justiciable rights.[42] The Principles had to ensure that a socially just, 'economic democracy' is achieved *in addition* to an elected, constitutional democracy.[43] The Directive Principles differ from the terms Bundestreue and Ubuntu discussed below in the sense that those terms were not included in the respective constitutions

[39] B. De Villiers, "Does a Constitution Have a Soul? The Role of Bundestreue in Germany and Ubuntu in South Africa to Give Life and Identity to a Constitutional Text," in *Navigating the Unknown – Essays on Selected Case Studies about the Rights of Minorities* (Leiden: Brill, 2022), 163–214, https://doi.org/10.1163/9789004512115_007.

[40] K.J. Ready, "Fundamentalness of Fundamental Rights and Directive Pricinples of State Policy in the Indian Constitution," *Journal of the Indian Law Institute* 22, no. 3 (1980): 403, https://www.jstor.org/stable/43950702.

[41] K.C. Markandan, *Directive Principles of State Policy in the Indian Constitution* (Jalandhar: ABS Publications, 1987), 92.

[42] B. De Villiers, "Directive Principles of State Policy and Fundamental Rights: The Indian Experience," *South African Journal on Human Rights* 8, no. 1 (1992): 30, https://doi.org/10.1080/02587203.1992.11827851.

[43] M.P. Jain, *Indian Constitutional Law* (New Delhi: LexisNexis Butterworths, 1978), 549.

of Germany and South Africa, but the courts implied it. In the case of India, substantial thought and debate took place about the proper wording and legal status of the Directive Principles and although not justiciable, those Principles were in due course given a broadened meaning.

The constitutional debates in India became the precursor to developments in international law about the limitations that are suffered by traditional liberty-rights, and the need to ensure that the duty of the state towards socio-economic transformation is recognised in the constitution. Social justice was seen in India as an objective of equal importance to the protection of fundamental rights.[44] The Constitution was in this respect ahead of its time since it anticipated that to transform the socio-economic reality of India, the state would have to play an active role, even if it meant that in some respects limitations had to be placed on the scope of fundamental individual rights. The reality of the impact of poverty within the context of justiciable rights was summarised as follows:

> For those who suffer from want and hunger, the so-called fundamental rights would be meaningless and remain only paper rights.[45]

The founders of the Constitution of India, therefore, agreed to include into the Constitution a *justiciable* charter on fundamental rights, and a *non-justiciable* chapter on Directive Principles of state policy. The former included fundamental rights that could be enforced against the state, whilst the latter included objectives of the state, albeit not justiciable as rights. But since both chapters are accorded constitutional status, both must be given effect by the courts and interpreted harmoniously. The Constituent Assembly regarded the Directive Principles as follows:

> The principles of state policy set forth in this chapter are intended for guidance of the State. While these principles shall not be cognizable by any court, they are nevertheless fundamental in the governance of the country and their application in the making of law shall be the duty of the State.[46]

[44] S.K. Sharma, *Justice and Social Order in India* (New Delhi: Intellectual Pub. House, 1984), 176.
[45] Minerva Hills-case, Minerva Mills Ltd v. Union of India AIR 1980 SC 1843 (1980).
[46] Constitutional Assembly, "Constituent Assembly Debates (CAD) Vol. 5," 1947, 406, https://www.constitutionofindia.net/constitution_assembly_debates/volume/5.

Although there were some who argued that the Directive Principles should not be part of the Constitution due to their programmatic, non-enforceable nature, the majority of the Assembly felt that the Principles expressed the 'salient features of the new social and economic order' and hence those objectives ought to be elevated to constitutional objectives.[47] Chaundri summarised the rationale for the Directive Principles as follows:

> The political, social and economic ideology expressed in the Directive Principles imparts continuity to the nation's policy and makes it comparatively free from the vicissitudes of the ideology of political parties that might come into force from time to time.[48]

The Directive Principles can be grouped together into 5 main categories, namely, socialist principles; Gandhian principles; general welfare principles; international principles; and environmental principles.[49] These categories were the frontrunners for what is today known as second and third generation rights. Although the Principles cannot be a basis to initiate litigation for purpose of enforcement, the courts have developed the Principles into a legal framework to understand the intention and duties of the legislature and to explain why a certain meaning ought to be given to fundamental rights. In essence, there is an implied presumption that laws ought to be interpreted to ensure their consistency with the objectives of the Directive Principles, and if there is an inconsistency, the effect that closest resembles the intent of the Directive Principles must be given.[50] It is important that whilst the Directive Principles may be constructed to limit the scope of a fundamental right, they cannot abrogate or abolish it. It is therefore a question of degree as to when a limitation on a fundamental right is 'reasonable' in light of the Directive Principles.[51]

The Supreme Court endorsed a general presumption that all legislation and executive actions are aimed at implementing the Directive Principles, and that the Principles could be used to resolve statutory and policy ambiguities.[52] The

47 A.S. Chaundri, *Constitutional Rights and Limitations* (New Delhi: Wadhwa, 1955), 221.
48 Chaundri, 223.
49 De Villiers, "Directive Principles of State Policy," 35–36.
50 Balsara-case, F.N. Balsara v. Bombay 1959 Bom 17 (1959).
51 Tamil Nadu-case, State of Tamil Nadu v. L Abu Kavier Bai AIR 1984 SC 725 (1984).
52 S.M. Tripathi, *Fundamental Rights and Directive Principles in India* (Hamburg: Anchor Acedemic Publishing, 2016), 209.

Supreme Court has further ruled that the Directive Principles could be used to ascertain the ambit of legislation and to restrict the scope of fundamental rights since public objectives had to be fulfilled. In this respect restrictions have been allowed in fundamental rights involving property;[53] freedom of contract;[54] fair labour practices;[55] and legal aid.[56]

The transformative role of the Directive Principles did not commence immediately after the enactment of the Constitution. In the initial years the courts followed an approach whereby the fundamental rights were regarded as sacrosanct and could not be limited by legislation that sought to promote the Directive Principles.[57] In later years however the courts sought to achieve greater harmony between the Directive Principles and fundamental rights. In the Chandra Bhawan-case the court stated emphatically as follows:

> While rights conferred under Part 3 [Fundamental Rights] are fundamental, the directives given under Part 4 [Directive Principles] are fundamental to the governance of the country. We see no conflict between the provisions contained in part 3 and Part 4. They are complementary and supplementary to each other.[58]

The Supreme Court has over time actively used the Directive Principles to inform its jurisprudence in a manner that may not have been anticipated by the founders of the Constitution. The Indian approach is by far more adventurous than the approach of the Irish courts where Directive Principles were also available to assist the court, but not much came from it.[59]

The application of the Directive Principles has not been without controversy, for example, the use of the Principles to restrict the scope of fundamental rights

53 State of Bombay-case, State of Bombay v. Balsara AIR 1951 SC 318 (1951).
54 Public Works-case, Secretary Government Public Works v. Adoni Ginning Factory AIR 1959 AP 838 (1959).
55 Eveready-case, Eveready Flashlight v. Labour Court AIR 1962 All 497 (1962).
56 Hoskot-case, Hayawauadanrao Hoskot v. Maharashtra AIR 1978 SC 1548 (1978).
57 Madras-case, Madras v. Champakam Dorairajan 1951 AIR SC 226 (1951).
58 Chandra Bhawan-case, Chandra Bhawan Boarding and Lodging Bangalore v. The State of Mysore 1970 SCR 600 (1970).
59 B. De Villiers, "Social and Economic Rights," in *Rights and Constitutionalism: The New South African Legal Order*, ed. D. Van Wyk et al. (Cape Town: Juta, 1994), 615–18. Compared to India, there has only be scant reference by courts in Ireland on the Directive Principles B. De Villiers, "Socio-Economic Rights in a New Constitution: Critical Evaluation of the Recommendations of the South African Law Commission," *Journal of South African Law*, 1992, 430. The case of Rogers was one of the first judgments where the court in Ireland concluded that it was 'entitled' to investigate the aims of the Directive Principles in order to ascertain the nature and extent of the right to freedom of contract Rodgers-case, Rodgers v Irish Transport and General Workers Union 1978 WJSC-HC 922, [1978] ILRM 51 , [1978] 3 JIC 1501 (1978).

was frowned upon by the earlier courts. In the social sphere, India continues to be challenged by some of the starkest inequality in the world. The Directive Principles have not been a panacea to the socio-economic inequality suffered by Indians, but to be fair they were designed to give direction, not to provide immediate solutions. The Directive Principles influenced and continue to impact on state policies and when so measured, they had success.

The purpose of this discussion of the Directive Principles is however not in a defence of their operation, but rather in illustration of how the courts have used the non-enforceable Principles to give guidance to legislative and executive organs; to allow restrictions on fundamental rights that otherwise may not have been possible; and to give a unique identity to judgments with reference to the Principles. The contrast between Ireland and India in the use of the Directive Principles is stark: in Ireland there is for all practical purposes no reliance or reference on the Directive Principles, whilst in India the courts have used the Directive Principles creatively and actively. The Directive Principles of India reflect the soul and spirit of the Constitution; they serve as a socio-economic chart of the nation; although not enforceable, they give light and content to fundamental rights; and they consistently remind all organs of government of their obligations under the Constitution.[60]

3.2. Germany: Laying the Basis of Cooperative Federalism through *Bundestreue*

The German federal system, which is known for its 'cooperative' intergovernmental relations, relies on the little known, and undefined principle of *Bundestreue* to guide the conduct of the federal affairs of the country.[61] The federal constitutional court, in a series of judgments after enactment of the Basic Law, read the implied term *Bundestreue* into the Constitution and thereby used it to direct German federalism into the future.[62] The Constitutional Court effectively cemented the term to a legal standard, obliging both the Federation

[60] De Villiers, "Directive Principles of State Policy," 38–39.
[61] B. De Villiers, *Budestreue: The Soul of an Intergovernmental Partnership* (Johannesburg: Konrad Adenauer Foundation, 1995).
[62] BVerfGE 1 56; BVerfGE 1, 117; BVerfGE 1 299.

and the Laender to conduct their affairs in a 'federal friendly relationship' *(bundesfreundliches Verhalten)*.[63] In one of its first judgments (21 May 1952) the Constitutional Court described the essence of *Bundestreue* as follows:

> The federal spirit brings about a constitutional obligation that the member states of the Federation must act in good faith and trust towards one another as well as towards the Bund. The constitutional obligation in the federal state places the Bund and the member states under a justiciable duty to friendly relations. (own translation)[64]

The effect of *Bundestreue* in contemporary Germany is varied, ranging from a term to supplement constitutional provisions in the Basic Law; to the protection of the rights of individual Laender; and to regulate the relationship horizontally between Laender, and vertically between the federal government and Laender.[65]

The term *Bundestreue* does not have a direct translation into English, but it implies federal trust, comity, or partnership. The term, which does not appear in the Basic Law, requires cooperation, consultation, coordination, and respect between the respective levels of government for the interests of each other. All governments are expected to exercise their powers and functions responsibly and adhere to *Bundestreue*. The powers must be discharged in a cooperative, non-litigious manner, rather than by way of competition and litigation.[66]

It is notable that the term Bundestreue is not found in the Basic Law or in any other act of parliament. In fact, the term was not even mentioned during the drafting-process of the Basic Law. But the Constitutional Court nevertheless recognises the importance of Bundestreue as a fundamental constitutional principle. This is because *Bundestreue* represents a value system, a tradition, a complex history, and an ideal. Its origins can be traced to the German confederal system of 1871 where the 'trust' that had to displayed between the constituted parts of Germany was seen as the glue that gave rise to modern Germany.[67]

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63 BVerfGE 1 299, 315.

64 BVerfGE 1 299, 315.

65 De Villiers, "Intergovernmental Relations."

66 B. De Villiers, "The Duty on Organs of State to Cooperate: Bundestreue, Cooperative Government and the Supply of Electricity in a Culture of Non-Payment," *Journal of South African Law*, 2019, 605–18, https://hdl.handle.net/10520/EJC-16f185a93f.

67 R. Smend, "Ungeschriebenes Verfassungsrecht Im Monarchischen Bundestaat [Unwritten Constitutional Law in the Monarchical State]," in *Festgabe Fur Otto Mayer: Zum 70. Geburtstag Dargebracht von Freunden, Verehrern Und Schulern* (Tubingen: Mohr, 1916), 39.

The contemporary understanding of cooperative federalism in literature is closely associated with the development of the theory and practice of intergovernmental relations and cooperative federalism in Germany.[68] The Constitutional Court of Germany has been *the* 'driving force' in the evolution of German federalism through the use of *Bundestreue*, giving rise to its cooperative rather than the competitive, USA-style of federalism.[69]

The principle of *Bundestreue* is applied vertically between the levels of government as well as horizontally between the Laender.[70] Importantly, *Bundestreue* refers not only to the substance of intergovernmental relationships, but also to the style and manner in which relationships are managed. The Constitutional Court effectively transformed the German federal system through the use of Bundestreue. The drafters of the 1996 constitutions of South Africa were so impressed with the practical application of *Bundestreue* in Germany, that they attempted in chapter 3 of the 1996 Constitution of South Africa to codify the essential principles of Bundestreue of relevance to the new federation [71]. In its practical application *Bundestreue* has been reflected in the voting arrangements between states; the importance of consensus when decisions are made that affect all states; recognition of mutual interests; limitations on the way in which states exercise their powers; and the obligation on federal and state governments to refrain for litigating against each other.[72]

In light of the theme of this paper, the use of the term *Bundestreue* by the Constitutional Court of Germany has been transformative, creative and innovative. Through constitutionalism a legal standard had been adopted shortly after the enactment of the Basic Law to guide the federal arrangements in Germany. The use of a historic constitutional convention that pre-dates modern Germany was creatively intertwined since the earliest judgments with the contemporary provisions of the Basic Law in a manner that the term not only represents

[68] M. Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006).
[69] A. Benz, "From Joint Decision Traps to Over-Regulated Federalism", in *German Federalism in Transition: Reforms in a Consensual State*, ed. C. Rowe and W. Jacoby (London: Routledge, 2010), 76.
[70] De Villiers, "Intergovernmental Relations."
[71] B. De Villiers and J. Sindane, *Cooperative Government – The Oil of the Engine* (Johannesburg: Konrad Adenauer Foundation, 2011).
[72] De Villiers, "Does a Constitution Have a Soul?" 184–90.

an umbilical cord to the past, but it also established the contours of German federalism into the future.

3.3. Australia: Recognition of a Title to Land Long Denied

Arguably the most important transformative judgement handed down by the High Court of Australia, was that of Mabo in which the native title that Aboriginal people held over their land since time immemorial, became recognised for the first time in common law in 1992.[73] This judgement not only corrected a historical wrong, but it also directed Australia towards revisiting its relationship with Aboriginal people and their rights to land. The judgment has become one of the most often cited judgments in disputes about traditional ownership of land in other parts of common law-traditions, particularly so in southern African countries such as South Africa, Botswana and Namibia.[74]

When Australia was settled in 1788, the historic status of Aboriginal people at law was determined by the legal dogma that applied at the time.[75] At that stage, the Aboriginal people of Australia were seem as incapable of negotiating or entering into a treaty since they purportedly lacked a cohesive social, cultural and legal organisation that was required for treaty-type negotiations. The entirety of Australia was therefore regarded at law as *terra nullius* (no person's land) under common law and the laws of the settler nation therefore took effect for the entire territory.[76] It was only some 200 years later, that it was recognised in the Milirrpum-judgement of 1971 that Aboriginal people at the time of settlement had 'elaborate' systems of social rules and customs that gave rise to a stable order of society.[77] The Court found as follows:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or

[73] Mabo (1), Mabo v. Queensland (No 1) (1988) 166 CLR 186 (1988); Mabo v. Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1.

[74] G.N. Barrie, "The Mabo-Decision and the "Discovery" of Native Title in Australia and Beyond," in *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts*, ed. B. De Villiers et al. (Leiden: Brill, 2021), 7–51.

[75] W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), 104.

[76] S.J. Anaya, S.J., *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).

[77] Milirrpum, Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 (27 April 1971) Supreme Court (NT). (1971).

> influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[78]

The court in Milirrpum ended short, however, of recognising native title rights and interests. It was in the Mabo-judgement of 1992 that the High Court declared that native title continued to exist and that to the extent that native title had not been extinguished, native title is recognised by common law.[79] In doing so the court overturned 200 years of legal dogma and subsequent policies that denied traditional ownership of ancestral land. The effect of the judgement was that the Australian legal system acknowledged that Aboriginal people had at the time of settlement and continue to have sophisticated systems of traditional laws and customary rules that regulated ownership, use, access and control of their traditional lands. These traditional rights, called native title, continue to exist unless otherwise extinguished by way a clear intent of the settler nation.[80] If a native title right is diminished or extinguished, compensation can be claimed.[81]

The court described the unique complexity of native title and the relationship of Aboriginal people to their ancestral country as follows:

> The range of current estimates for the whole continent [at time of settlement] is between three hundred thousand and a million or even more. Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way common law notions of property or possession.[82]

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78 Milirrpum, para. 267.
79 Mabo (2), *Mabo*.
80 Wik, Wik Peoples v. The State of Queensland [1996] HCA 40, (1996) 187 CLR 1 (23 December 1996), High Court. (1996).
81 B. De Villiers, "Using Control over Access to Land to Achieve Self-Government (of Some Sort): Reflecting on the Experiences of Aboriginal People with the Right to Negotiate in Australia," in *Navigating the Unknown – Essays on Selected Case Studies about the Rights of Minorities* (Leiden: Brill, 2022), 133.
82 Mabo (2), *Mabo*, para. 37.

For purposes of this paper, the Mabo-judgement sits high in the international examples of transformative judgments. It was akin to a legal revolution in the sense that it upset and overturned the 200-year-old status quo and the legal theory, history and traditions that supported it. The court ventured a path that no parliament in Australia would have been able to traverse. As a result of the judgement the Native Title Act, 1993 had been enacted and hundreds of native title land claims have since been recognised and thousands of native title agreements have been concluded.[83] The recognition of native title has in turn opened opportunities for Aboriginal to self-determination of their cultural affairs at a local level.[84]

The Mabo-judgement highlights how a court can radically change the direction of a nation; how the legislature and executive must respond with respect to such a transformative event; and how, over time, all organs of government and civil society can work together to give effect to the transformation in a manner that brings greater social justice.

3.4. South Africa: Transforming Society through Ubuntu

In the first judgment handed down by the newly appointed Constitutional Court of South Africa under the new, post-1993 democratic order, the death penalty was abolished, and with it arose the principle of Ubuntu as a guiding set of values to the court.[85] Madala J described Ubuntu as a term that 'permeates' the Constitution.[86] Mokgoro J relied on Ubuntu as an instrument by which the Constitution should be interpreted because it reflects the underlying values of South African society. Mohamed J speaking to the meaning of Ubuntu, adding namely that it is -

> the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within

[83] R. Bartlett, *Native Title in Australia* (Australia: LexisNexis Butterworths, 2020), 24.
[84] De Villiers, "Using Control over Access."
[85] Makwanyane-case, S , para. 37. Makwanyane 1995 3 SA 391 (CC) (1995). It must be noted that the Makwanyane-judgement was handed down pursuant to the Interim Constitution of 1993 in which mention was made of Ubuntu. The subsequent 1996 Constitution contains *no* reference to Ubuntu, but the Constitutional Court has nevertheless declared that Ubuntu is an implied term of the Constitution and that it can be relied upon to resolve disputes.
[86] Makwanyane-case, S, para. 37. Makwanyane 1995 3 SA 391 (CC), para. 237.

> the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by each other.[87]

Although the word Ubuntu does not appear in the 1996 Constitution, the Constitutional Court has found that the word and the values that it represents are implied in the Constitution as a fundamental norm to regulate relationships in society and to serve as an instrument to interpret the Constitution.[88] Although the word ubuntu is known in several languages in southern Africa, in South Africa Ubuntu is associated particularly with the Xhosa and Zulu languages and it reflects and combines essential human virtues, compassion and humanity.[89] Some of the inherent values that are imbedded in Ubuntu are humanness; gentleness; hospitality; empathy; deep kindness; friendliness; generosity and vulnerability.[90] Some would compare it to the Biblical concept of love-thy-neighbour.

The term Ubuntu does not give rise to distinct rights under the Constitution, but it has been used as an implied term for various purposes, for example, to give content to constitutional rights; to interpret the Constitution; and to legitimise the Constitution and jurisprudence arising from it.[91] In contrast to *Bundestreue*, which applies only within the intergovernmental, public law context in Germany, Ubuntu has also found its way into the jurisprudence of several non-constitutional disputes, for example criminal,[92] contractual,[93] and immigration law.[94]

Ubuntu is an open-ended customary term which applies to all aspects of society and is used as a cornerstone to facilitate the transformation of South African society from *apartheid* to a free and democratic society based on social justice. There is a risk of course that the vagueness of the term may give rise to inconsistent interpretation and application. Justices of various courts have relied

[87] Makwanyane-case, para. 37. 262.
[88] De Villiers, "Does a Constitution Have a Soul?" 196.
[89] Ubuntu Lexico, 'Lexico', 2020, https://www.lexico.com/definition/ubuntu.
[90] F. Mangena, 'Hunhu/Ubuntu in the Traditional Thought of Southern Africa', *Internet Encyclopedia of Philosophy*, 2020, https://www.iep.utm.edu/hunhu/.
[91] Sachs, *The Strange Alchemy of Life and Law*.
[92] T. Metz, "Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing," *Constitutional Court Review* 9 (2019): 113–34, https://doi.org/10.2989/CCR.2019.0005.
[93] K. Manolios, "Pacta Servanda Sunt, para. 37. Ubuntu," *Without Prejudice* 18 (2018): 32–34.
[94] A.M. Mangu, "Xenophobia and Migration in Post-Apartheid South Africa: Myths and Realities', *African Journal of Democracy and Governance* 6 (2019): 44–72.

on and applied Ubuntu in divergent contexts, albeit principally to interpret rights and duties and to balance competing interests. Ubuntu has creatively been used to encapsulate a home-grown African jurisprudence in a world where Western jurisprudence is prevalent and dominant.[95] It is particularly concerning South Africa's Constitution, which has been described as not merely a black letter text but rather a breathing document with a soul that seeks to transform society, where Ubuntu has provided a practical and philosophical basis to interpret the Constitution and transform society.[96]

The use of the word *ubuntu* has played an essential role in grounding the Constitutional Court's philosophical approach towards transformative constitutionalism. There is, of course, a risk that such an undefined, non-legal term can give rise to romanticism and unlimited jurisprudential discretion not grounded in the Constitution. It is therefore incumbent on courts to ensure whilst they may refer to Ubuntu in their judgments, that the merit of disputes is determined based on the facts, and the remedies ordered are consistent with the Constitution.

IV. CONCLUSION

This paper has explored the potential transformative role of the courts and how that role has translated into specific examples where courts have changed the direction of their countries. Courts ordinarily exercise a judicial function whereby disputes are resolved. But sometimes, not often and not in the case of every country, a court can change the direction of a country through a life-giving judgement; it can transform a country through transformative constitutionalism. These case studies share a communality, namely that the respective courts have relied on an implied term of the constitution to give life, content and direction to the constitution and policies arising from the constitution. Each of these courts met the description of what nowadays in literature is referred to as

[95] R. English, "Ubuntu: The Quest for an Indigenous Jurisprudence," *South African Journal on Human Rights* 7 (1996): 641–48.

[96] Klare, "Legal Culture and Transformative Constitutionalism."

transformative constitutionalism. It is proposed that, although in literature the topic of transformative constitutionalism has received a lot of attention during the past 2-3 decades, the transformative role of judiciaries is as old as the concept of rule of law and constitutionalism itself. The proposition sometimes expressed in literature that transformative constitutionalism is more prevalent under recently drafted constitutions than in older constitutions, is challenged in this paper. It is pointed out that some of the most radical, transformative judgments by courts have arisen from pre-1990 constitutions. The proposition I put is that the transformative ability of a constitution and the judiciary serving under that constitution is not determined by the age of the constitution, but by an ability of its justices to determine disputes on the facts, in accordance with the law, and in reflection of the realities of the society in which they reside. The fault lines of society often rapture in litigation, and that is when and where judges may direct a nation into a new direction.

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Rethinking Amnesties and the Function of the Domestic Judge

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Abstract

The award of amnesties or pardons has been used time and again to facilitate the attainment of peace after a civil war. However, this practice has been condemned by human rights and other international bodies as incompatible with the duty of states under human rights law to investigate, prosecute and punish human rights violations and the victims' rights of access to justice and to the truth. Due to this incompatibility, the function of the domestic (constitutional) judge is none other than to strike down amnesty legislation as null and void. This appears to be the prevailing narrative in contemporary human rights discourse. The present contribution takes issue with this narrative. It takes the position that the international effect of regional human rights jurisprudence has been to condition, as opposed to wholesale outlaw, the use of amnesties as a post-conflict peace-building tool. It defends the view that while blanket amnesties are increasingly considered incompatible with victims' rights today, that does not mean that all amnesties are prohibited. From this perspective, this article argues that the proper function of domestic constitutional courts in the performance of the constitutionality control of amnesty legislation should take a different shape; instead of querying whether to strike down or to uphold amnesty legislation in its entirety, Constitutional Courts should condition amnesties to criteria – such as their position as part of a broader transitional justice package including truth telling and compensation – and monitor their implementation on a case-by-case basis.

Keywords: Amnesties; Human Rights; Incompatibility; National Judge.

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I. INTRODUCTION

In the 1980s, the Republic of El Salvador was embroiled in a civil war between the government of El Salvador and the *Frente Farabundo Marti para la Liberacion Nacional* (FMLN). From 11-13 December 1981, the Atlacatl Battalion of the Salvadoran military forces launched a coordinated attack against the cantons of El Mozote and nearby places, killing more than 1000 civilians and torturing and raping many more.[1] Years later, negotiations between the warring parties under the auspices of the United Nations with the support of the government of Colombia, Mexico, Spain and Venezuela, led to the emblematic Chapultepec Peace Agreement[2] and a series of other agreements ('the Mexico Agreements') [3] collectively known as the Salvadoran Peace Accords. These agreements purported to conclude the El Salvador civil war that lasted more than a decade and to pave the way for an enduring peace. Among others, Article 2 of the Mexico Agreements provided for the establishment of a Truth Commission, with the task of "investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth."[4]

Article 5 of the Chapultepec Agreement further provided that the Truth Commission would put an end to any indication of impunity for acts committed by officers of the armed forces, because:

> "acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible."[5]

The Truth Commission was given six months to complete its work.[6] In its final report, the Commission explained to the UN Security Council that during

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1 President of El Salvador Mauricio Funes, Statement on January 16, 2012. See: Massacres of El Mozote and Surrounding Areas v. El Salvador, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights (2012), para. 23.

2 UN. Department of Public Information, "El Salvador Agreements: The Path to Peace," United Nations Digital Library, published January 16, 1992.

3 Ibid., 13-31.

4 Ibid., 29-30.

5 Ibid., Art. 5. See further: Belisario Betancur, Reinaldo Figueredo Planchart, and Thomas Buergenthal, "From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador" (Report presented for President of the Security Council at El Salvador, 1993). The Report is publicly available as an Annex to the Letter dated 29 March 1993 addressed to the President of the Security Council, 1 April 1993.

6 Betancur, Planchart, and Buergenthal, "From Madness to Hope," 19.

its operation, different types of pressure were applied to it. In the beginning, it received hints "from the highest level" to name names and establish responsibility on the individual level; towards the conclusion of its mandate, it received new hints "from the highest level" to the exact opposite direction, i.e. to avoid naming names, in order to facilitate national reconciliation.[7] In the final report, the Commission proceeded to name names where sufficient corroboration was possible.[8]

Mere days after the Truth Commission's Report, Salvadorean President Cristiani and his party adopted legislation granting a blanket amnesty to all individuals accused in the Commission's report of involvement in serious acts of violence.[9] Days later, the Inter-American Commission responded to the adoption of this law by a letter to the President of El Salvador. In its missive, the Commission decried the adoption of the amnesty legislation as a possible failure to comply with Salvador's international obligations under the Peace Agreements and the American Convention on Human Rights.[10] The Government of El Salvador responded a few months later by a letter addressed to the Commission, where it stated that:

> "We believe that this law for total and absolute amnesty, passed by the Legislative Assembly, needs the support of the international and national community in order to turn this painful page in our history and look to a brighter future for our children and the nation."[11]

The Inter-American Commission in both the 1994 Special Report on El Salvador and in its subsequent Annual Report found that the adoption of the law was in violation of El Salvador's international commitments under the

7 Ibid.," 14.

8 Ibid., 52-53.

9 "El Salvador: Decreto No. 486 de 1993 - *Ley de amnistía general para la consolidación de la paz* [General Amnesty Law for the Consolidation of Peace]," UNHCR, published March 20, 1993. Article 1 provided in part "full, absolute and unconditional amnesty to all those who participated in any way in the commission, prior to January 1, 1992, of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty."

10 Ibid.

11 Ibid.

American Convention.[12] Subsequent reports of the Inter-American Commission,[13] and judgments of the Inter-American Court[14] repeated this conclusion in cases arising from complaints brought by victims whose access to El Salvadorean justice was frustrated by the amnesty law.

This situation continued for approximately a quarter of a century, when in 2016 the Constitutional Chamber of the Supreme Court of El Salvador declared the 1993 General Amnesty Law for the Consolidation of Peace unconstitutional.[15] Even though the legal basis for the ruling was Additional Protocol II to the Geneva Conventions, the Inter-American Commission welcomed this "historic ruling as a milestone in the road to truth, justice and reparation in El Salvador". It underscored that:

> "States, for their part, have an *unwaivable legal duty* to take reasonable steps to prevent human rights violations, to use the means at their disposal to carry out a serious investigation of violations committed within their jurisdiction, to identify those responsible and impose upon them the appropriate punishment, and to ensure the victim adequate compensation. (emphasis added)"[16]

However, this historical ruling was not the end of the matter. On the contrary, new legislative initiatives in the Salvadorean Parliament ensued, proposing another blanket amnesty.[17] The proposal met with international condemnation

[12] Ibid., 77. "The very sweeping General Amnesty Law passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because the law makes possible a 'reciprocal amnesty' without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims." This conclusion was reiterated and reinforced in the Michael Reisman, "The Annual Report of the Inter-American Commission on Human Rights Chapter VI by the President of the IACHR" (Report presented for the Committee on Juridical and Political Affairs of the Permanent Council of the OAS at El Salvador, 1994).

[13] Parada Cea et al. v. El Salvador, No. 10.480 (Inter-American Commission of Human Rights 1999); Ellacuria S.J. et al. v. El Salvador, No. 10.488 (Inter-American Commission of Human Rights 1999), paras. 200-22; Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador, No. 11.481 (Inter-American Commission of Human Rights 1999), para. 671.

[14] Cases against El Salvador involving the amnesty laws from the jurisprudence of the Inter-American Court of Human Rights' Cases: Monsignor Romero (1980), Rochac Hernández et al. (1980), Contreras et al. (1981), the Massacres at El Mozote and nearby places (1981), the Disappearance of the Serrano Cruz sisters (1982), the Massacre at Las Hojas (1983), and the Extrajudicial execution of six Jesuit priests and two women (1989).

[15] Judgment on Unconstitutionality 4-2013/145-2013 (Constitutional Chamber of the Supreme Court of El Salvador 2016). For (partial) English translation see: "El Salvador, Supreme Court Judgment on the Unconstitutionality of the Amnesty Law," ICRC Casebook, accessed September 3, 2022.

[16] "IACHR Hails Determination of Unconstitutionality of Amnesty Law in El Salvador," OAS, published July 25, 2016.

[17] Adolfo Parker, "Draft Amnesty Law of December 2018," DPLF, accessed September 3, 2022. See further: "Three Years After the Annulment of the Amnesty Law: Victims of the Armed Conflict Defeat a Renewed Attempt at Codifying Impunity in El Salvador, but the Fight is Far from Over," DPLF, accessed September 3, 2022.

and the President's veto.[18] What is more, victims organisations applied to the Inter-American Court of Human Rights and obtained a provisional measures decision ordering the suspension of the Salvadorean legislative process of the proposed new blanket amnesty law, pending new proceedings on the El Mozote massacre.[19] Ultimately, the draft law was defeated and the El Mozote massacre case opened 36 years after the event (1981) with requests for US records still featuring prominently in the public eye as late as 2020.[20]

However, to this day it remains uncertain whether the proceedings will ever be concluded and if so by which bench. In 2020, investigating Judge Jorge Guzmán Urquilla asked the Prosecutor General to open a criminal investigation on the President's and the Defence Minister's refusal to comply with a court order to disclose the military records of that period.[21] A decision issued by the Constitutional Chamber of the Supreme Court supporting the judge did nothing to alter the situation.[22] In 2021, the newly appointed Attorney General and the defence sought to remove the investigating judge on grounds of bias, due to a paper he wrote during his university studies on human rights violations during the civil war.[23] Within the same year, a new law on Judicial Career was adopted, lowering the age of retirement from 35 to 30 years of service for judges over the age of 60. At the time the law was passed, judge Guzmán Urquilla was 61.[24] Against this background it remains unclear whether criminal proceedings will ever take place for the El Mozote massacres.

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18 Ibid.

19 Massacres of El Mozote and Surrounding Areas v. El Salvador (Inter-American Court of Human Rights 2019), para. 42.

20 Kevin Sieff, "El Salvador Is Trying Suspects in the Notorious El Mozote Massacre. The Judge Is Demanding Crucial Evidence: U.S. Government Records," Washington Post, published March 14, 2020.

21 Naomi Roht-Arriaza, "On El Salvador's 1981 El Mozote Massacre, President Bukele Sides with Impunity," Just Security, published October 28, 2020.

22 Amparo Decision, No. 408-2020 (El Salvador Constitutional Chamber of the Supreme Court 2020).

23 "More Attempts to Add Roadblocks on Road to Justice in El Mozote Case," El Salvador Perspectives, published April 19, 2021.

24 Note that the adoption of a new law lowering the mandatory retirement age from 35 to 30 years and a 60-year-old age limit has also been denounced by victims organisations and the Inter-American monitoring bodies as another obstacle on the way to justice for the victims of El Mozote. See among others: "Reform to the Judicial Career Law Threatens El Mozote Investigation, Inter-American Court Requests Information from the Salvadoran State," CEJIL, published September 20, 2021; "IACHR and UN Expert Reject Legislative Reforms that Remove Judges and Prosecutors in El Salvador and Calls for Respect of Guarantees for Judicial Independence," OAS, published September 7, 2021; Peter Canby, "Is El Salvador's President Trying to Shut Down a Hearing on the Infamous El Mozote Massacre?" The New Yorker, published September 10, 2021.

The El Salvador debacle serves as a useful illustration of the extremely sensitive and complicated issues emerging from amnesties, especially when the latter are adopted as part of a peace agreement seeking to end an internal armed conflict. They give rise to situations where political, legal and ethical issues are sometimes inextricably intertwined.

At the center of this legal-political debacle sits the domestic – and particularly the constitutional – judge. Arguably, one of the greatest challenges a constitutional court judge may face during his or her tenure is a decision on the constitutionality of an amnesty law forming part of a peace process in the aftermath of a civil war. The stakes are the highest possible. Typically, petitioners – victims of horrific crimes or their relatives – ask the constitutional judge to lift the amnesty obstacle, grant them access to national criminal justice institutions and open investigations and – where appropriate – prosecutions against their wrongdoers. Eventually, the proceedings may also include reparation claims. The state, responding to the complaint, typically highlights that the constitutionality of an amnesty clause should be upheld as an essential part of post-conflict peace and a necessary concession to ensure the country's transition to a prosperous future.

Against this background, constitutional litigation on amnesty laws would appear to be nothing short of historical. Yet, in many jurisdictions, this historical impact may be dampened by subsequent rulings of human rights bodies. Since the 1990s, victims have complained to regional and international human rights bodies against national decisions upholding amnesties. Some of these bodies – and primarily the Inter-American Court of Human Rights – have found for the applicants. They declared amnesty laws incompatible with international human rights treaties under their purview, primarily due to the restrictions they impose on the victims' right of access to justice and the right to truth.[25]

This jurisprudence, combined with the practice of institutions such as the United Nations and UN human rights bodies, lend weight to the view that the dominant approach to amnesties today is their incompatibility with victims' rights and therefore their invalidity. In turn, this narrative suggests that the

[25] Peter Canby, "Is El Salvador's President."

function of the constitutional judge in such litigations is binary. The judge must decide whether to uphold or to strike down the amnesty law. Human rights bodies strongly emphasize the second option as the only option compatible with the 'unwaivable legal duty' to investigate, prosecute and punish human rights violations.[26]

The present contribution takes issue with both this normative approach and its corresponding conceptualisation of the judicial function on the domestic level. While it remains sympathetic to the plight of victims and the imperative of recognition and reparation for the harm suffered, it takes the view that under contemporary international law, amnesties are not wholly outlawed. As a result, the treatment of constitutional complaints against amnesty laws calls for a more nuanced approach by the domestic judge. On that basis, this article suggests that the national judge should avoid a binary approach to the relevant litigation. Instead, the judge is called to perform a balancing exercise between the rights of victims with the prerogatives for peace. Viewed under this light, one way forward might be the interpretation and application of 'blanket' amnesty law subject to conditions inspired by human rights jurisprudence, in combination with a more nuanced, individualised and case-by-case application.

To make its point clear, part I of this paper will discuss the incompatibility thesis, present its normative foundations and its effects. Part II will turn to a critique of this approach and highlight that, contrary to the prevailing view in human rights discourse, the international restriction on amnesty is neither absolute nor universal. Part III will discuss ways forward in the adjudication of constitutional complaints on amnesty seeking to reconcile respect for victims' rights with the exigencies of post-conflict peace building. In closing, certain concluding observations will recapitulate the key points in the discussion and its principal argumentation.

[26] Ibid.

II. THE INCOMPATIBILITY THESIS

In recent times, the award of unconditional amnesties has been increasingly perceived as 'commanded forgetting'[27] and a sacrifice of justice on the altar of political pressures, instead of a legitimate peace-building tool.[28] Unavoidably, this reconceptualization of amnesty led to a judicial reaction first and foremost in the law and practice of the human rights bodies of the Inter-American system. They were the first to adopt the view that amnesties precluding prosecution and punishment for serious human rights violations are incompatible with human rights law.

In its first reports on this issue, the Inter-American Commission took the view that amnesties are a matter of national law and their use or annulment rest with the legitimate institutions of national democracies.[29] However, soon thereafter, the 1988 *Velasquez Rodriguez* judgment issued by the Inter-American Court ruled that the duty to 'ensure' respect for human rights under Article 1(1) of the American Convention entails that states parties have a duty to investigate, prosecute and punish – where appropriate – human rights violations and provide remedies.[30]

The Inter-American Commission applied the *Velasquez Rodriguez* principles in its subsequent decisions on amnesties and found that the amnesty laws of Argentina, El Salvador and Uruguay were incompatible with the victims' rights under Articles 1(1), 8 and 25 of the American Convention.[31] The democratic

[27] Paul Ricoeur, *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2004), 451-452.

[28] Martha Minow, "Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties and Complementarity at the International Criminal Court," *Harvard International Law Journal* 60, no. 1 (March 2019): 3, https://harvardilj.org/.

[29] In an often-quoted passage, the Inter-American Commission had noted in its 1985-1986 report that "only the appropriate democratic institutions usually the legislature-with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty [or] the scope thereof, while amnesties decreed previously by those responsible for the violations have no juridical validity."

[30] Judgment on Merits, Velásquez-Rodríguez v. Honduras (Inter-American Court of Human Rights 1988), para. 166 (on general duty to 'respect') and para. 176 (on impunity incurred due to the failure of the 'state apparatus' to act).

[31] Inter-American Commission on Human Rights, Report No. 34/91 (1991) Cases Nos. 10.147, 10.181, 10. 240, 10.262, 10.309, 10.311 (Argentina); Inter-American Commission on Human Rights, Report No. 22/92 (1992) Cases Nos. 10.029, 10.036, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay). From the literature, among many others, David Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone," *Human Rights Quarterly* 16, no. 1 (February 1994): 105-130, https://doi.org/10.2307/762413.

legitimacy argument underpinning the adoption of the amnesties – i.e. that they were measures endorsed by the local population in one way or another – did not sway the Commission.[32] As Gavron notes:

> "Despite the fact that the Argentine laws were passed by a democratic government in the wake of an investigative commission and high level prosecutions; El Salvador, in conjunction with the UN, was establishing a truth commission, and the Uruguayan amnesty was approved by a democratic referendum, the Commission found that each one violated the Convention. It is clear that the position in 1992 was that an amnesty law, by its very nature, was incompatible with the 'Full observance of the Human Rights set forth in the American Declaration on the Rights and Duties of Man and the American Convention on Human rights.'"[33]

The Inter-American Court of Human Rights followed suit. In its first judgment on point, the matter became considerably easier by the concessions of the new Peruvian government to the Inter-American Commission's claims. Arguably, this enabled the Court to decide unanimously that:

> "4. [...] Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect. 5. [...] the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible."[34]

The *Barrios Altos* ruling was repeated in the Court's subsequent jurisprudence and constitutes to this day the emblematic *dictum* on the incompatibility of amnesties with human rights norms. However, this otherwise robust finding of law did not entail equally robust consequences in all three cases at that time. In its early jurisprudence the Commission took a more reserved approach on the

[32] The Permanent Representative of Uruguay, in a formal Letter addressed to the President of the Organisation of American States (OAS) on May 7, 1993, criticised the Commission's approach as one that showed "a lack of sensitivity" by the Commission towards referenda as expressions of direct democracy. See: Felipe González Morales, "The Progressive Development of the International Law of Transitional Justice: The Role of the Inter-American System," in *The Role of Courts in Transitional Justice*, ed. Jessica Almqvist and Carlos Espósito (London: Routledge, 2013), 41-65.

[33] Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court," *International & Comparative Law Quarterly* 51, no. 1 (January 2002): 98, https://doi.org/10.1093/iclq/51.1.91.

[34] Judgment on Merits, Chumbipuma Acquirre et al. v. Peru (Barrios Altos) (Inter-American Court of Human Rights 2001), paras. 4-5.

issue of remedies, stopping short of calling for criminal punishment of individuals covered by the amnesty and found to have been involved in the commission of human rights violations.[35]

In its subsequent jurisprudence, the focus shifted from the incompatibility issue – which was considered settled by *Barrios Altos* – to the question of remedies. This proved a critical point of discussion. In Barrios Altos, the Inter-American Court ruled that the amnesty legislation of Peru was null and void due to its incompatibility with the latter's human rights obligations and accepted Peru's unilateral promise of implementation.[36] The Inter-American Court accepted that this promise of the Government, in conjunction with judgments issued by the Peruvian Constitutional Court upholding its decision, meant that the Fujimori amnesty legislation would remain inapplicable within the Peruvian legal order, even though formally it was still in force.[37]

The question of remedies emerged acutely in the context of Chile. The question there concerned the keeping in effect Pinochet's blanket amnesty legislation long after Chile became a party to the American Convention on Human Rights.[38] In the case of the extrajudicial killing of Almonacid Arellano, the Inter-American Court noted with dismay that for over 16 years since the ratification of the American Convention, Chile remained in violation of its duty to adapt its national law to its human rights obligations as regards Pinochet's blanket amnesties, irrespective of the fact that on occasion the authorities did not give it effect.[39] The Court ruled that Chile had an international obligation to annul the amnesty legislation.[40]

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35 Note that in the most far-reaching set of recommendations – the ones on El Salvador – the Commission recommended judicial process to impose sanctions, but it did not expressly identify the sanctions as criminal. Gavron, "Amnesties in the Light," 91-117.

36 Chumbipuma Acquirre et al. v. Peru (Barrios Altos) (Inter-American Court of Human Rights 2001), paras. 4-6; Barrios Altos v. Peru (Inter-American Court of Human Rights 2001), para. 5(a); Barrios Altos v. Peru (Inter-American Court of Human Rights 2005), para. B.

37 This reflection is included in the Judgment on Reparations and Costs, La Cantuta v. Peru (Inter-American Court of Human Rights 2006), para. 162.

38 On the Pinochet amnesty decree law no. 2191, see the critical remarks in Ben Chigara, *Amnesty in International Law: The Legality Under International Law of National Amnesty Laws* (Harlow: Longman, 2002).

39 Preliminary Objections, Merits, Reparations, Judgment, Arellano v. Chile (Inter-American Court of Human Rights 2006), para. 121.

40 Ibid., paras. 121-22.

However, the Court made clear that the duty did not fall solely on the shoulders of the political apparatus. Judges too had a duty to abide by the rulings of the Inter-American Court interpreting the Convention. In the Inter-American Court's own words:

> "When the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention."[41]

The Inter-American Court went on the explain the predicate and effect of the obligation to comply with its rulings:

> "The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This *forces* them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and *that have not had any legal effects since their inception*. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (Emphasis added)"[42]

Although in terms of public international law and the law of state responsibility there is little to be gainsaid by the reminder that domestic judgments engage the international responsibility of a state *qua* actions of state organs, this paragraph appears to reshape the paradigmatic construction of the judicial function of the constitutional judge. The domestic judge is no longer called upon to assess the validity of an amnesty legislation based solely on the formal constitutional requirements governing the valid adoption of the legislation.[43] Through the

[41] Arellano v. Chile, para. 123.

[42] Ibid., 124.

[43] Louise Mallinder and Kieran McEvoy, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies," *Contemporary Social Science* 6, no. 1 (February 2011): 118, https://doi.org/10.1080/17450144.2010.534496.

obligation to conduct a 'conventionality control', domestic judges are 'forced', i.e. duty bound, to apply the decisions of the Inter-American Court on the question of amnesties and to declare amnesty legislation null and void *ab initio* regardless of or in addition to their constitutional mandate.

In its subsequent jurisprudence the Inter-American Court has following this approach more or less consistently. In some instances, it clothed its judgments with direct applicability, thus rendering obsolete both the need to annul amnesty legislation and the fear of wavering in its implementation.[44] In others, it did not spell out explicitly the requirement of annulment of national law but only described an effect, leaving the choice of means to the government.[45]

The sum of the Inter-American Court's jurisprudence is usefully summarized in *Anzualdo Castro v. Peru* along the following terms:

> "The State shall not be able to argue or apply a law or domestic legal provision, present or future, to fail to comply with the decision of the Court to investigate and, if applicable, criminally punish thos responsible for the facts. For this reason and as ordered by this Tribunal since the delivery of the Judgment in the case of Barrios Altos v. Peru, the State can no longer apply amnesty laws, which lack legal effects, present or future [...], or rely on concepts such as the statute of limitations on criminal actions, res judicata principle and the double jeopardy safeguard or resort to any other measure designated to eliminate responsibility in order to escape from its duty to investigate and punish those responsible."[46]

Following a review of this practice, Micus comes to the conclusion that:

> "The granting of amnesty to the alleged authors of gross human rights violations, such as torture, summary executions, and forced disappearances, is contrary to the non-derogable rights laid down in the body of international law on human rights and in particular to some provisions of the American Convention on Human Rights. The I/A Court of consequently held that such amnesty laws are, "devoid of legal effects," and that state authorities

[44] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2015).

[45] Indicatively, Judgment on Merits and Reparations, Gelman v. Uruguay (Inter-American Court of Human Rights 2011), para. 11; Judgment on Preliminary Objections, Merits, Reparations, and Costs, Gomez-Lund et al. v. Brazil (Inter-American Court of Human Rights 2010), paras. 171-176; Massacres of El Mozote and Surrounding Areas v. El Salvador (Inter-American Court of Human Rights 2012), paras. 283-286.

[46] Judgment Castro v. Peru (Inter-American Court of Human Rights 2009), para. 182.

are obliged to initiate criminal proceedings against the alleged authors of those crimes."[47]

The position of the monitoring organs of the American Convention on Human Rights was not isolated. The UN Secretary General,[48] the UN Human Rights Committee,[49] the UN Commission on Human Rights,[50] the Committee against Torture,[51] the International Criminal Tribunal for the Former Yugoslavia,[52] the Special Court for Sierra Leone,[53] the African Commission on Human Rights[54], and the Extraordinary Chambers of the Courts of Cambodia[55] have all followed in their practice the position of the Inter-American institutions. This has prompted the UN High Commissioner for Human Rights to speak of a norm under customary law that prohibits amnesties for serious human rights violations.[56]

III. CHALLENGING THE INCOMPATIBILITY THESIS: NOTHING MORE THAN A 'WAVE' *DE LEGE FERENDA*

Strong as the incompatibility thesis may be, it is far from unanimous or unequivocal. Jurisprudence and academic scholarship challenge its purported

47 Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Leiden: Brill, 2015), 155.

48 United Nations, "Report of the Secretary General to the UN Security Council, on the Establishment of a Tribunal for Sierra Leone" (Report presented for United Nations, October 4, 2000), paras. 22-24.

49 Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1 no. 30 (1994), para. 15; Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.1326 (26 May 2004), para. 18; Human Rights Committee Resolution 2004/72 Impunity, E/CN.4/RES/2004/7 (21 April 2004), para. 3; Human Rights Committee Resolution 2005/81 Impunity, E/CN.4/RES/2005/81 (21 April 2005), para. 3; Hugo Rodríguez v. Uruguay, Communication 322/1988, UN Doc. CCPR/C/51/D/322/1988 (9 August 1994), para. 12.

50 Human Rights Committee Resolution 2004/72 Impunity, E/CN.4/RES/2004/7 (21 April 2004) and the subsequent Human Rights Resolution 2005/81 Impunity, E/CN.4/RES/2005/81 (21 April 2005). Paragraph 3 of the relevant Resolutions is the critical part.

51 Committee against Torture, General Comment No. 2 (2007); Committee against Torture, General Comment No. 3 (2012).

52 Prosecutor v. Furundzija, Judgment IT-95-17/1-T (International Criminal Tribunal for the former Yugoslavia 1998), para. 153; Prosecutor v. Mucić and Others, Judgment IT-96-21-T (International Criminal Tribunal for the former Yugoslavia 1998), para. 454; Prosecutor v. Kunarac, IT-96-23-T and IT-96-23/1 (International Criminal Tribunal for the former Yugoslavia 2001), para. 466.

53 Decision on Challenge to Jurisdiction: Lomé Accord Amnesty. See: Prosecutor v. Kallon and Kamara, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (Special Court for Sierra Leone), paras. 82-84.

54 Communication 431/12, Kwoyelo v. Uganda (Inter-African Commission on Human and Peoples' Rights 2018), para. 289. 'Amnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, particularly for individuals with senior command responsibility, also violate customary international law.'

55 Decision on Ieng Sary's Appeal against the Closing Order. See: Prosecutor v. Sary, 002/19 09-2007-ECCC/OCIJ (PTC75) (Extraordinary Chambers in the Courts of Cambodia 2011), paras. 199-201.

56 United Nations Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States – Amnesties* (The Office of the High Commissioner for Human Rights, 2009), 12, 15, and 18.

prevalence and customary law pretenses as a view out of step with state practice and therefore aspirational at best. This becomes manifest particularly in human rights and international criminal jurisprudence outside the confines of the Inter-American system.

Arguably, nothing makes the ambivalence surrounding the incompatibility thesis as sharp as the glaring jurisprudential dissonance on point within chambers of the same international court. The examples of the European Court of Human Rights and the International Criminal Court are telling.

3.1. The ECHR Perspective: *Margus v. Makuchyan* and *E.G.*

Various chambers of the European Court of Human Rights faced the question of amnesties for international crimes. In *Yaman v. Turkey*, the Chamber found that Turkey violated the prohibition of torture and ill-treatment because police officers subjected the applicant to serious maltreatment while in police custody.[57] In its subsequent discussion on the question of effective remedy, the Chamber noted in *obiter* that:

> "Where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."[58]

It proceeded on this ground to find a violation of article 13 due to the prosecutor's dilatory practice in the relevant investigation.[59]

In *Ould Dah,* the Fifth Section of the ECtHR declared inadmissible an application alleging that the applicant's conviction by French courts for the crime of torture violated his human rights, on the basis that he benefited from Mauritania's amnesty law covering torture by state officials during an internal conflict.[60] In rejecting his complaint, the Fifth Section applauded the stance of the French courts and noted that:

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[57] Yaman v. Turkey Appl., No. 32446/96 (European Court of Human Rights 2004), paras. 47-48.
[58] Ibid., para. 55.
[59] Ibid., para. 57.
[60] Decision on Admissibility. See: Dah v. France, Appl., No. 13113/03 (European Court of Human Rights 2003).

> "The prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State [...]."[61]

On the other hand, other chambers of the Court distanced themselves from this approach. In *Tarbuk v. Croatia*,[62] the First Section of the Court discussed the application of the Croatian General Amnesty Legislation for crimes committed during the war in the 1990s. The Chamber considered the General Amnesty Act as 'a sovereign act'.[63] It further reverted to earlier findings of the now defunct European Commission on Human Rights and held that:

> "Even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public."[64]

The time for the Grand Chamber to discuss amnesties came in 2013. In *Margus*, the applicant – a member of the Croatian army – was convicted by Croatian courts for numerous charges including murder and serious bodily harm committed in 1991. The conviction took place, even though on 24 September 1996 a General Amnesty Act was enacted, precluding proceedings for all criminal offences committed in the context of the war in Croatia (17 August 1990 – 23 August 1996) with the exception of war crimes and genocide.[65] Due to the amnesty legislation, charges on two killings and serious bodily harm were discontinued in the first set of criminal proceedings before the court of first instance, only to be brought again in the second set of proceedings as charges of war crimes.[66] By

[61] Ibid.
[62] Tarbuk v. Croatia, Appl., No. 31360/10 (European Court of Human Rights 2012).
[63] Ibid., para. 48
[64] Ibid., para. 50.
[65] Margus v. Croatia, Appl., No. 4455/10 (European Court of Human Rights 2014), para. 16.
[66] Ibid., para. 122.

doing so, claimed the applicant, Croatia violated the *ne bis in idem* principle.[67] The Grand Chamber rejected the complaint and found for Croatia because the *ne bis in idem* principle was inapplicable. The Court was very careful in its *expose*:

> "In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. *A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.* Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances. (Emphasis added)"[68]

The fact that the *ne bis in idem* principle was not applicable was buttressed in the Joint Concurring Opinion of Judges Spielmann, Power-Forde and Nussberger. The judges explained that in this case, the applicant was not 'finally acquitted' on the originally discontinued charges because the amnesty ruling of the Court of First Instance contained no assessment of the applicant's responsibility for any crime and therefore the decision was neither an 'acquittal' nor a 'conviction' for the purposes of Art. 4, Protocol 7 ECHR.[69] Judges Ziemele, Berro-Lefevre and Karakas, on the other hand, would have found the provision applicable but no violation on the substance. They read the judgment in a different light and expressed their view along the following lines:

> "One could sum up by saying that today, under international law, amnesty may still be considered legitimate and therefore used so long as it is not designed to shield the individual concerned from accountability for gross human rights violations or serious violations of international humanitarian law. *The next step* might be an absolute prohibition of amnesty in relation to such violations. The Court's decision in the case at hand may be read as already taking the approach proposed during the drafting of the ICC

[67] Ibid., paras. 92-93.
[68] Ibid., para. 139.
[69] Ibid., para. 13.

> Statute, to the effect that where proceedings concerning gross human rights violations result in an amnesty and are followed by a second set of proceedings culminating in a conviction, the ne bis in idem issue as such does not arise. (emphasis added)"[70]

Judges Sikuta, Wojtyczek and Vehabovic, in their own joint concurring opinion made clear that "stating that international law in 2014 completely prohibits amnesties in cases of grave breaches of human rights does not reflect the current state of international law."[71] In their view:

> "[t]he adoption of international rules imposing a blanket ban on amnesties in cases of grave violations of human rights is liable, in some circumstances, to reduce the effectiveness of human rights protection. [...] We must acknowledge that *in certain circumstances there may be practical arguments in favour of an amnesty that encompasses some grave human rights violations*. We cannot rule out the possibility that such an amnesty might in some instances serve as a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly, thereby preventing further violations in the future."[72]

This ruling therefore read in the light of all these concurring opinions makes clear that the Grand Chamber of the ECHR did not preclude amnesties for serious human rights violations. The Grand Chamber acknowledged 'a growing tendency' but it did not rule that amnesties are incompatible with human rights protection under the Convention. In fact, the Grand Chamber appears to have left the door wide open for the adoption of any kind of amnesties, provided they were part of a reconciliation process and/or compensation scheme for the victims.[73]

Surprisingly, this rather clear statement of the Grand Chamber appears to have been subjected to subsequent interpretation by Sections of the Court that points in the opposite direction.[74] In *Makuchyan and Minasyan v. Azerbaijan and Hungary*, the applicants complained that Azerbaijan violated their right to life,

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[70] Joint Separate Opinion of Judges Ziemele, Berro-Lefevre and Karakas. See: Margus v. Croatia, Appl., No. 4455/10, para. 5.

[71] Ibid., para. 8.

[72] Margus v. Croatia, Appl., No. 4455/10, para. 9. Where "the grant of amnesty was contrary to the increasing tendency in contemporary international law [...]".

[73] Ibid., para. 139.

[74] The Chambers of the Court are not alone in that misinterpretation. See Separate Concurring Opinion of Judge Perrin de Brichambaut. See: Prosecutor v. Gaddafi ICC-01/11-01/11-662-Anx. (International Criminal Court 2019), para. 130.

by issuing a Presidential pardon to a person who killed the second applicant's relative and attempted the killing of the first applicant.[75] The facts of the case as summarized by the Chamber tell the story of two Armenian military officers who attended a NATO training course in Budapest in 2004. During the training, Azerbaijani military officer R.S. also participating in the training attacked and decapitated with an axe the relative of the second applicant while he was sleeping and tried to kill the first applicant.[76] After the conviction of the Azerbaijani officer by the Hungarian courts, Hungary eventually accepted to transfer the prisoner over to Azerbaijan to serve his sentence there. Upon his arrival, the President of Azerbaijan issued him a Presidential Pardon and the next day he was promoted to the rank of major in a public ceremony.[77] A few months later, he was provided a state flat and 8 year salary arrears.[78] The European Parliament condemned the pardon and 'glorious welcome' of R.S. as "a gesture which could contribute to further escalation of the tensions between two countries [...]."[79]

In the context of this case, the Fourth Section of the Court referred to *Margus* and held that:

> "Pardons and amnesties are primarily matters of member States' domestic law and are in principle not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights."[80]

The Chamber was particularly struck by the glorification of a convicted murderer and found that by granting impunity to R.S. for the crimes against the Armenian victims, the procedural limb of Article 2 ECHR was violated.[81]

The *Makuchyan obiter* was repeated in the 2021 judgment in *E.G. v. Moldova*.[82] The case concerned a sexual offence against the applicant and the misapplication

[75] Makuchyan and Minasyan v. Azerbaijan and Hungary Appl., No. 17247/13 (European Court of Human Rights 2020), para. 4.

[76] Ibid., para. 9. The perpetrator explained in his oral statement that he did so because he lost relatives in the Nagorno-Karabakh conflict and because the victims allegedly mocked the Azeri flag; therefore, he chose to act on the anniversary of the beginning of the Nagorno-Karabakh region. Ibid., para. 11.

[77] Ibid., para. 20.

[78] Ibid., para. 21.

[79] Ibid., para. 42. See also "Resolution on Azerbaijan: The Ramil Safarov Case," European Parliament, published September 13, 2012.

[80] Ibid., para. 160.

[81] Ibid., paras. 172-173.

[82] E.G. v. Moldova Appl., No. 37882/13 (European Court of Human Rights 2021).

of a domestic amnesty law by the Moldovan courts, because of which the co-perpetrator was enabled to flee and never face justice after the reversal of the case by the higher courts.[83] Specifically, the issue was that in the one year that elapsed between the ruling awarding the amnesty and the ruling reversing finally this decision, the suspect was released and allowed to flee.[84] It is in the cadre of these circumstances that the Second Section of the Court recalled verbatim the *Makuchyan obiter* and found that Moldova violated its positive obligations under Articles 3 and 8 ECHR.[85]

A careful reading of the *Makuchyan obiter* juxtaposed with paragraph 139 of the *Margus* ruling reveals that there is little reason to believe that *Makuchyan* properly invoked *Margus* as the predicate for its views on amnesties. While *Margus* allows room for amnesties, *Makuchyan* does not appear to do so. Admittedly, the wording of the *Makuchyan dictum* as repeated in *E.G.* is not commendable either for its clarity or for its justification. Neither the Fourth Section in *Makuchyan*, nor the Second Section in *E.G.* explained the reasoning underpinning this finding. Critically, the reference to *Margus* by itself is not sufficient to justify what appears to be a departure from the Grand Chamber's view.

In any event, it is noteworthy that *Makuchyan* did not concern an amnesty legislation applicable across the board to an unidentifiable number of persons, but a single, tailor-made presidential pardon. *E.G.* on the other hand related to a national law according to which 'a person condemned to a penalty of imprisonment of up to and including 7 years, who at the moment of the entry into force of the present law, has not reached the age of 21 years old, is exempted from the criminal penalty'.[86] Against this background, one might be justified to suggest that the Second Section's views on the incompatibility of amnesty legislation with the duty to prosecute and punish serious human rights abuses should not be given much weight. They would appear to depart from the views

[83] Ibid., paras. 14-19.
[84] Ibid., para. 45.
[85] Ibid., paras. 49-50.
[86] Ibid., para. 28.

of the Grand Chamber in *Margus* and such departure happened only in *obiter*. It remains to be seen whether it will influence subsequent Grand Chamber jurisprudence on point. One thing however is clear from all the above: there is still considerable controversy at the ECHR front on the question of amnesties. The guiding precedent remains *Margus* and the Grand Chamber's view that 'we are not there yet' as regards the incompatibility thesis.

3.2. The ICC Appeals Chamber and the 'Developmental Stage' of International Law on the Question of Amnesties

The jurisprudence of the International Criminal Court offers further evidence of the ambivalence surrounding the incompatibility thesis. In the Situation in Libya, Saif Al-Gaddafi's defence team brought an admissibility challenge before Pre-Trial Chamber I, claiming that the case against him was inadmissible.[87] The accused claimed that he was convicted by the Libyan courts for essentially the same conduct as the one for which he stood accused before the ICC and that he was subsequently released from custody following the adoption of a national amnesty legislation.[88]

The Pre-Trial Chamber rejected the admissibility challenge. On the point of amnesty, the reasoning was ambivalent.

Somewhat confusingly, the Pre-Trial Chamber ruled in the beginning of the judgment that:

> "There is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law."[89]

However, only a few pages later, after a review of the relevant human rights jurisprudence, the Chamber reasoned that:

[87] Decision on the Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662. See: Prosecutor v. Gaddafi ICC-01/11-01/11-662 (International Criminal Court 2019).

[88] Ibid., para. 5.

[89] Ibid., para. 61.

> "Granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate."[90]

As a result, the Pre-Trial Chamber ruled that:

> "Thus, applying the same rationale to Law No. 6 of 2015 assuming its applicability to Mr Gaddafi leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights. This is so, in the context of the case sub judice, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable."[91]

The defendant appealed the decision before the Appeals Chamber. The Appeals Chamber ruled that the Libyan amnesty law did not apply to the case of Mr. Gaddafi according to the provisions of the law and the view of the Libyan Government.[92] As regards the Pre-Trial Chambers *dicta* on amnesties and their incompatibility with human rights law, the Appeals Chamber ruled that "that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were *obiter dicta*."[93] Moreover, the Appeals Chamber took a decidedly different approach to the Pre-Trial Chamber's categorical finding of incompatibility and ruled as follows;

> "For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties. The Pre-Trial Chamber appears to have accepted this: rather than determining that this question was settled, it found 'a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties

[90] Prosecutor v. Gaddafi ICC-01/11-01/11-662, para. 77.
[91] Ibid., para. 78.
[92] Ibid., paras. 93-94.
[93] Ibid., para. 96.

> or pardons under international law'. In these circumstances, the Appeals Chamber will not dwell on the matter further."[94]

The Appeals Chamber ruling thus appears to do two things with a single breath: on the one hand, it denudes of normative effect the Pre-Trial Chamber's reasoning on amnesties by declaring it – and the corresponding finding of incompatibility of the Libyan amnesty – a mere *obiter dictum*; on the other, it draws attention away from paragraphs 61-78 of the Appeals Judgment and highlights the early statement made by the Pre-Trial Chamber on the 'strong, growing, universal tendency' – which is not law yet. As a result, paragraph 96 of the Gaddafi decision makes it abundantly clear that, in contrast to the decision of Pre-Trial Chamber I on point, the ICC Appeals Chamber is not convinced that the present stage of development of international law prevents the adoption of amnesties precluding criminal prosecution for international crimes.

IV. THE FUNCTION OF THE NATIONAL JUDGE IN THE FACE OF AMNESTY CHALLENGE: FROM A ZERO-SUM GAME TO A BALANCING EXERCISE

Against this background, a critical question concerns the function of the judge in amnesty litigations. Should domestic judges – including constitutional judges – follow lock, stock and barrel the position exemplified by the Inter-American Court, and in the exercise of a 'conventionality control' strike down amnesty legislation due to its incompatibility with human rights norms?

This view has not gone unnoticed and uncriticised in the relevant literature. The first point of criticism concerns the tension between democratically adopted amnesties and Inter-American court decisions. Specifically, it is argued that by invalidating directly national amnesty legislation through the creation and imposition of a 'super-right' of victims' access to justice and the 'conventionality

[94] Ibid., Judge Ibanez Carranza, in her opinion entitled Separate and Concurring Opinion to this judgment, dissented strongly and unequivocally with the findings of the Appeals Chamber. In her view, the Appeals Chamber was wrong in both the classification of the *obiter dicta* (paras. 19, 24) and the view that there is no rule of international law on incompatibility. In her view, the Pre-Trial Chamber was correct in finding that amnesties for international crimes are not allowed under well-established rules of international law (paras. 139, 144). Interestingly, Judge Carranza failed to consider in her otherwise thorough opinion the views of the ECHR Grand Chamber in *Margus*.

control', the organs of the Inter-American system violate essential principles of democracy and give absolute priority to its own solutions that lack any democratic legitimacy in the relevant societies. As a result of its disregard for the democratic processes underpinning the adoption of amnesty legislation and its categorical rejection of any and all amnesties, even when adopted by parliament and approved by referenda,[95] the Inter-American Court has been classified as an aristocratic organ guilty of human rights absolutism.[96] Gargarella traces the origins of this approach to an international post-World War II 'obsession with rights', whose defining trait – probably owing to the rise in power of Hitler and Mussolini through democratic process – was that emphasis and priority shifted internationally from concern for democratic process to concern for strengthening human rights.[97] In Gargarella's view, this international 'obsession with rights' went hand-in-hand with a distrust of majoritarian democratic processes and is partly to blame for the Inter-American Court's focus on the *ratio legis*, at the expense of due consideration for the democratic legitimacy of the authority and the process that led to the adoption of the decision.[98]

A second line of criticism relates to the incompatibility of the choices made by the Inter-American Court with human rights law in general and the American Convention in particular. Authors following this school of thought suggest that both prosecutions and amnesties can be justified under international human rights law and find support in various human rights clauses. From that perspective, the absolute and *a priori* selection of one option (prosecution) over the other (amnesty) is said to constitute nothing more than the Inter-American Court's ideological preference – a preference presented as a universal truth, as opposed to what it actually is, i.e. the particular position of a specific

95 Gavron, "Amnesties in the Light," 98.

96 Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," *International Criminal Law Review* 12, no. 4 (January 2012): 686, https://doi.org/10.1163/15718123-01204003.

97 Roberto Gargarella, "Democracy's Demands," *American Journal of International Law Unbound* 112 (May 2018): 73-78, https://doi.org/10.1017/aju.2018.33.

98 Gargarella, "Democracy's Demands," 77-78. Gargarella's emblematic example relates to the Gelman v Uruguay decision, where the Inter-American Court proceeded to order Uruguay to annul the Expiry law, even though it was democratically adopted and reaffirmed twice by popular referenda.

human rights organ.[99] This ties in with the well-known work of Kennedy and Koskenniemi, who take particular note of human rights jurisprudence predicated on allegedly universally accepted norms, only to camouflage choices particular to an institution.[100] Arguably, from this perspective, the Court with its amnesty jurisprudence attempts to present itself to domestic audiences as the neutral and emancipatory voice of universally accepted truths, in order to bolster the acceptance of its exercise in interventionist judicial activism.

The Court's amnesty approach and its consistency with the American Convention on Human Rights was strongly criticized by none other than the former President of the Inter-American Commission of Human Rights Felipe Gonzalez-Morales. In his view, the Court's position on the incompatibility of amnesties and the corresponding duty on states to revoke or annul them is not consistent with the Court's duty to engage in a balancing of rights. He draws attention to Article 32(2) ACHR, according to which:

> "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

From this provision, Gonzalez-Morales deduces a duty to balance rights in circumstances such as the one presented by amnesties. Morales finds that amnesty litigation essentially asks of human rights organs whether some rights should be limited (such as the victims' rights of access to justice), in order to create conditions that allow the free enjoyment of these rights.[101] In other words, there is conflict between the individual right of access to justice and the collective good of the protection of the democratic order.[102] These two should be balanced against each other without *a priori* determinations of prioritization.[103] While Morales stops short of disagreeing with the Court's conclusion on incompatibility, he appears to disagree with the bluntness of the Court's approach in this matter.

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99 Carvalho Veçoso, Fabia Fernandes, "The Inter-American View on Amnesties: Human Rights Absolutism?" *Revista Derecho del Estado* 35 (July 2015): 3, https://doi.org/10.18601/01229893.n35.01.

100 Veçoso, Fernandes, "The Inter-American View," 17-18. From the scholarship of Kennedy and Koskenniemi, see in particular: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005), 23; Martti Koskenniemi, *The Politics of International Law* (London: Bloomsbury Publishing, 2011), 149.

101 Felipe González. "The Progressive Development," 53.

102 Ibid., 51.

103 Ibid., 51-53.

The third point of criticism stems from what is perceived to be the prioritization of inelastic legalistic formulas by human rights organs over broader, socially inclusive solutions drawing from the teachings of other fields of social sciences such as criminology. Mallinder and McEvoy have made clear that much of the incompatibility thesis is predicated upon a "unidimensional and legalistic" equation of amnesties with impunity, where punishment of perpetrators comes first and victim reparations and truth recovery second.[104] They query on the meaning of punishment and whether selective judicial punishment of the 'big fish' *qua* retribution – in the sense of pressing 'the sharp knife' of criminal punishment to distinguish the proper from the improper – is the best way to move forward in circumstances where extreme social and political violence have been embedded in the social fabric.[105] In their view, asking questions such as whom and what transitional justice are for would bring to light the complex needs of victims – needs that arguably far outweigh and outshine narratives of 'punishing offenders' and 'bringing justice to victims'.[106] They argue for a deeper understanding of the relationship between amnesty and accountability, where truth commissions and other transitional justice mechanisms, including amnesties, would have a role to play.

Against this background, it would seem that the role of the constitutional judge is perhaps not as clear cut or unequivocal as the Inter-American Court and its adherents would like one to believe. It is true that a state undertakes international commitments by the ratification of international treaties and that judges – in their quality as state organs *par excellence* – through their actions or omissions may engage the international responsibility of that state when their decisions violate treaty obligations.[107] If a specific treaty precludes amnesties, the organs of a state party to the treaty have an international obligation to abide by it.

However, the problem emerges when no explicit provision is included in the treaty text and recourse is required to judicial interpretation deducing an

[104] Mallinder and McEvoy, "Rethinking Amnesties," 122.
[105] Ibid., 123.
[106] Ibid.
[107] See "Responsibility of States for Internationally Wrongful Acts" (Report presented for General Assembly as a part of the Commission's Report, 2001).

obligation from a generally worded treaty provision or from general international law. It becomes even more complicated when a treaty explicitly provides for or encourages the adoption of amnesties.[108]

Against the background of the preceding analysis, it would seem that under customary international law, there is a wave of opinion in favour of the incompatibility thesis that has yet to crystallise into a norm of customary law status.

Beyond the jurisprudential contestations between the Inter-American Court and the European Court of Human Rights, state practice seems to be far from unequivocal on the point of the prohibition of amnesties. Writing in 2007, Mallinder notes that since the 1999 statement of the UN Secretary General declaring the award of amnesties incompatible with the duty of states to prosecute international crimes,[109] at least 24 new national amnesties were awarded, granting amnesty for international crimes.[110] In 2015, the UN Security Council unanimously endorsed the February 2015 Minsk Agreement, aspiring to create peace in Eastern Ukraine.[111] Paragraph 5 of that Agreement provided for amnesties prohibiting prosecution for any offence connected to the events in Donetsk and Luhansk.[112] Obviously, it would seem that at least the UN

[108] See for example the Amnesty Declaration of the Treaty of Lauzanne 1923, which provides for the mutual obligation of the Signatory Powers to grant amnesties. See: Carnegie Foundation, *The Treaties of Peace 1919-1923*, *Vol. II* (New York: Carnegie Endowment for International Peace, 1924); Cambridge University Press, "Agreements Relating to Algerian Independence," *International Legal Materials* 1, no. 2 (October 1962): 214-30, https://doi.org/10.1017/S0020782900061234. Whereas, Article 6(5) Additional Protocol II to the 1949 Geneva Conventions mentions that States Parties "shall endeavour to grant the broadest possible amnesty to persons who participated in an armed conflict." See, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, "Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)," OHCHR, adopted June 08, 1977.

[109] United Nations, "Report of the Secretary," para. 22.

[110] Louise Mallinder, "Can Amnesties and International Justice Be Reconciled?" *The International Journal of Transitional Justice* 1, no. 2 (July 2007): 214, https://doi.org/10.1093/ijtj/ijm020.

[111] "Letter from the Permanent Representative of the Russian Federation (Ukraine)," UNSCR, published February 17, 2015, http://unscr.com/en/resolutions/2202.

[112] Ibid., Annex 1. See also: "Package of Measures for the Implementation of the Minsk Agreements," United Nations Peacemaker, published February 12, 2015. Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine. The footnote entitled 'Notes' to the agreement further specifies that such measures include "Exemption from punishment, prosecution and discrimination for persons involved in the events that have taken place in certain areas of the Donetsk and Luhansk regions [...]."

Security Council was not convinced of the Secretary General's 2012 call to reject endorsement of amnesty for serious crimes.[113]

Domestic judges enjoy a greater margin in the appreciation of the legality of domestic amnesty legislation than the incompatibility thesis enthusiasts would have one believe. The use of this room for judicial determination would be influenced by various parameters flowing from domestic and international law. One thing remains clear: the function of the judge remains a performance of a balancing exercise among the competing interests.

The outcome of the balancing exercise cannot be prejudged or predetermined. Invariably, it would depend on the legal conceptualisation of the juxtaposed values or rights. To give an example, Morales suggests that questions of amnesties should be addressed by looking into Dworkin's and Alexy's theories on rights. This leads him to theorise that in the instance of amnesties of international crimes there is no conflict of rights present before the judge, insofar as amnesties do not represent an established human right but rather a collective good or general principle, namely the preservation of democratic governance in transition. Therefore, there is no reason to condition or not apply the rights of the victims. In the alternative, Morales entertains the idea that there may exist on the normative plane a conflict between a collective good (peaceful democratic transition via amnesty) and an established right (access to justice). In the contest between the two, using Alexy's normative hierarchy, collective goods are afforded a subordinate position to established rights and therefore the former have to give way to the later in case of conflict.

Morales' conclusions as to the outcome of a contest between amnesties and victims' rights of access to justice on the basis of Dworkin's and Alexy's views are predicated on an understanding of amnesties as a common good or a value, as opposed to an entrenched human right. From this classification, the conclusion derives that an established right of access to justice must be awarded priority.

[113] Ban Ki-Moon, "Remarks to Security Council Meeting on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings" (Report presented for President of the Security Council of United Nations, 2012). "I also encourage the Council to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law."

However, one might wonder whether this outcome would still stand following a different conceptualisation of amnesty.

Concretely, in amnesty litigation, the constitutional judge will more often than not be called upon to decide on the validity of amnesty legislation following a complaint by a victim after the adoption of the relevant legislation. The moment however that the amnesty legislation is adopted, the accused may well have a claim of legal certainty under the principle of legality, insofar as the amnesty does not constitute any more an abstract general good, but a specific rule of law granting them favourable criminal treatment – a *lex mitior*. Viewed from this angle, one might argue that the adoption of amnesty legislation does not pit the abstract value of 'peaceful democratic transition' against the victims' rights of access to justice, but rather the concrete right of the accused to legal certainty and *lex mitior* as an aspect of legality against the victims' rights of access to justice. From this perspective, the constitutional judge would have to resolve a conflict of rights under the rules of their own legal order, drawing inspiration from relevant legal theory. Clearly, this exercise is not subject to abstract pre-determinations, but would require careful balancing and individualised scrutiny.

V. CONCLUSION

This article discussed the question of the incompatibility of amnesties with international law and the corresponding implications for the function of the domestic judge. It queried whether a domestic judge is duty-bound under general international law to disregard and set aside amnesty legislation adopted as a post-conflict peace building tool.

The article takes the view that, barring specific treaty commitments, general international legal standards prohibiting the award of amnesties in these circumstances have yet to crystallize. Customary law does not appear at the present stage of its development to preclude amnesties in that context. Accordingly, this article suggests that the function of a domestic judge in amnesty litigation is not a predetermined finding of invalidity, but a balancing exercise seeking to reconcile the various domestic and international norms and interests at play.

To complete its examination, the article considered the reasons underpinning the resistance to the incompatibility thesis and its consequences for the function of the domestic judge. As regards the reasons, it explained that the incompatibility thesis does not sit well with many constitutional lawyers. From their perspective, when an amnesty has been clothed with democratic legitimacy through genuine democratic process, judges – especially international judges – seeking to upend such amnesty legislation violate essential principles of democratic governance with dangerous side-effects for societies in transition. It also does not sit well with many international lawyers, where some see behind the incompatibility thesis instances of human rights absolutism and others a failure of international courts to engage in balancing of rights in case of conflict as prescribed by their founding instruments. Finally, criminologists and social scientists challenge the view that amnesty equals impunity and the twin supposition that punishment of wrongdoing is the primary consideration for victims. They hold that a genuine investigation into the needs of victims would reveal a need to reconsider prioritizing domestic prosecutions to the detriment of peace-building, reparation and reconciliation measures, including truth telling and compensation schemes.

This article started with a discussion of the El Mozote case. It is only fitting that it closes by reverting to it, with one final remark. In spite of the numerous interventions of the Inter-American Commission and the Inter-American Court, today, 41 years after the massacre, justice in the sense of criminal prosecutions has yet to be delivered in El Salvador. Judge Guzman has retired and the discussion in El Salvador has shifted from identification of perpetrators and criminal proceedings to identification and reparation for the victims.[114] Obviously, no believer in the rule of law can celebrate the non-enforcement of judicial decisions by the executive and the inability of domestic judges to see justice through as a success story. That said, however, there was no popular uprising forcing the

[114] The Government of El Salvador passed a law on 29 June 2022 to facilitate the documentation requirements for victim status of individuals or their relatives victimised by the El Mozote massacres and correspondingly their access to financial compensation schemes. See: "Asamblea aprueba ley que permitirá a sobrevivientes de la masacre de El Mozote recibir compensación económica [Assembly Approves Law that Will Allow Survivors of the El Mozote Massacre to Receive Financial Compensation]," National Assembly of El Salvador, published June 29, 2022.

government's hand either. From that perspective, perhaps El Mozote goes a long way to show that promoting one particular way for addressing past atrocities over others cannot be externally forced but remains a choice firmly in the hands of the domestic societies. If international organs fail to heed domestic needs and demands – and amnesty legislation may sometimes be emblematic of such needs and demands – international institutions risk losing their standing and ultimately their international audience.

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Strengths and Limitations of the Indonesian Constitutional Court's "6 Basic Principles" in Resolving Water Conflicts

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Abstract

Many parts of Indonesia are already experiencing water stress and the condition is expected to become worse by 2045, when, according to the World Bank, 67% of Indonesia's GDP will be produced in areas with high water stress. Conflict over water resources has been reported between water users and uses, such as between agriculture and drinking water, between agriculture and fisheries, and between farmers and industries. In 2015, responding to the petition to curtail private sector control over water resources, the Constitutional Court invalidated Water Law 7/2004 and introduced the 6 basic principles, that have been used as normative guidance for implementing the regulation on water resources and for resolving future water conflicts. However, the principles are ambiguous in many ways. This paper will critically examine the principles and then outline the difficulties in its implementation. The methodology employed is normative-analytical; incorporating analytical frameworks from water law and governance into constitutional adjudication. First the paper clarifies some conceptual frameworks related to water conflict and how the principles have been interpreted by regulators. The paper then explains the general categories of water conflict and where those principles would, or would not, fit. The paper then continues with a critique of the principles, in terms of their (i) unclear scope, (ii) conflation between users and uses, (iii) neglect of footprint and (iv) the implications for water reallocation. This paper finds that one of the strengths of the principles is that they provides a basic normative guidance for solving conflict in water allocation, the protection of human rights and the environment.

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However, these benefits come with some limitations: neglect of efficiency over perceived equity and potential restriction of reallocation of water among different users. The principles are also difficult to implement where there is conflict over water quality or spatial development. As such, the paper recommends that the Constitutional Courts revise and expand the principles in future cases using teleological approach and that in terms of implementation, the 6 basic principles should also be interpreted teleologically.

Keywords: Allocation; Conflict; Governance; Indonesia; Water.

I. INTRODUCTION

Recent water conflicts have been captured by news media outlets. In Southern Sumatera, the utilization of water for an inland fishery in the upstream area led to water shortage downstream that precipitated conflict among farmers.[1] The development of hydropower has caused the submergence of rice fields in Southeastern Sulawesi that led to protests from the affected farmers.[2] In Northern Sumatera, the development of hydropower caused agricultural land to be submerged and disturbed the livelihoods of smallholder farmers.[3] In Sidoarjo, conflict between farmers arose when one village closed drains, which caused rice fields in another village to be submerged.[4]

Conflicts over water have been well reported in the literature. In Bali, the prioritization of urban drinking water and tourism has caused resentment among farmers and undermined the traditional Subak irrigation system.[5] In West Sumatera, hydropower projects compete with irrigation needs.[6] In Karanganyar,

1 PUPR Research and Development Agency, "Solusi Tangani Kekeringan dan Kelangkaan Air Indonesia [Solutions to Handle Indonesia's Drought and Water Scarcity]," Badan Penelitian dan Pengembangan PUPR [PUPR Research and Development Agency], published June 6, 2020.

2 Liputan6.com, "Protes Petani Terdampak Pengembangan PLTA Poso, Mogok Makan hingga Mengecor Kaki [Farmers Protest Affected by Poso Hydropower Development, Hunger Strikes to Casting Feet]," Liputan6.com, accessed May 26, 2022.

3 Harian Medan Bisnis, "20 Ha Lahan Pertanian Tergenang Air, Petani Kuta Gajah Langkat Protes PT TLE [20 Ha of Agricultural Land Flooded, Kuta Gajah Langkat Farmers Protest PT TLE]," MedanBisnisDaily.com, accessed June 16, 2022.

4 Republik Jatim, "Wabup Sidoarjo Urai Polemik Saluran Irigasi Antar Desa di Porong Pemicu Lahan Pertanian Terendam Banjir [Deputy Regent of Sidoarjo Explains Polemic of Irrigation Channels Between Villages in Porong Triggers Flooded Agricultural Land]," Republik Jatim, accessed June 16, 2022.

5 Sophie Strauß, "Water Conflicts among Different User Groups in South Bali, Indonesia," *Human Ecology* 39, no. 1 (February 2011): 69–79, https://doi.org/10.1007/s10745-011-9381-3.

6 Franz von Benda-Beckmann, "Contestations over a Life-Giving Force Water Rights and Conflicts, with Special Reference to Indonesia," in *A World of Water Rain, Rivers and Seas in Southeast Asian Histories*, ed. P. Boomgaard (Leiden: KITLV Press, 2007), 240.

Central Java, some conflicts arose between tourism, local government and the private sector.[7] In Klaten, Central Java, conflict occured between smallholder farmers and companies.[8] In Pandeglang, Banten, the religious community attending Islamic Boarding Schools -- led by their religious leaders (*Kyai*) – resisted an industrial project that sought to control several springs.[9] Conflict also occurs between farmers themselves, for example, in Southern Sumatera conflict occurred between diversion of water for rice fields and inland fishery.[10]

These conflicts will likely intensify due to increasing water scarcity. All islands in Indonesia suffer from heavily polluted surface water.[11] River basins in Java, Bali, East Nusa Tenggara and Sulawesi already experience water stress. The island of Java, which is home to 57% (143 million) of Indonesian population is experiencing medium to high water stress.[12] The top 5 (GDP generating) river basin territories in Java are experiencing high to severe water stress annually.[13] Other islands such as Bali and East Nusa Tenggara (Nusa Tenggara Timur or NTT), and Sulawesi experience water stress[14] and it is estimated that by 2045, almost all of the river basins in Java, Bali, and Nusa Tenggara islands will experience severe water stress.[15]

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7 Zaini Rohmad, et al., "Conflict Management of Water in Tourism Area in Indonesia," *Mediterranean Journal of Social Sciences* 7, no. 1 (2016): 416, https://doi.org/ 10.5901/mjss.2016.v7n1s1p416.

8 Jean-Marie Lopez, et al., "From Conflict to Equity: Handling the Challenge of Multipurpose Use of Ground and Surface Water in Indonesia," (Proceeding presented in Grounwater Conference 2011 Gestion des ressources en eaux souterraines at Orléans, France, 2011.

9 M. Dian Hikmawan, Ika Arinia Indriyany, and Abdul Hamid, "Resistance Against Corporation by the Religion-Based Environmental Movement in Water Resources Conflict in Pandeglang, Indonesia," *Otoritas: Jurnal Ilmu Pemerintahan* 11, no. 1 (2021): 19–32, https://doi.org/10.26618/ojip.v11i1.3305. See also Agus Lukman Hakim et al., "Perebutan Sumberdaya Air: Analisis Konflik dan Politik Tata Ruang [Struggle for Water Resources: Conflict Analysis and Spatial Politics]," *Sodality: Jurnal Sodiologi Pedesaan* (2017): 81–91, https://doi.org/10.22500/sodality.v5i2.17901.

10 Edward Saleh, "Studi Konflik Air Irigasi dan Alternatif Penyelesaiannya di Daerah Irigasi Kelingi Sumatera Selatan [Study of Irrigation Water Conflicts and Alternative Solutions in the Irrigation Area of South Sumatra]," *Journal Keteknikan Pertanian* 24 (April 2010): 39-44, https://doi.org/10.19028/jtep.24.1.

11 Abed Khalil, et.al., "Indonesia Vision 2045: Toward Water Security (Policy Note)," World Bank, published December 1, 2021, https://openknowledge.worldbank.org/handle/10986/36727.

12 Ibid.

13 Ibid. These are the Ciliwung-Cisadane, Brantas, Citarum, Bengawan Solo and Jratenseluna River Basin Territories.

14 Ibid. "Water Scarcity" is a condition where existing supply (in terms of volume) is inadequate to fuilfill human consumption. "Water Stress" is a broader concept which includes the lack of available water to meet human and ecological needs, taking into account ambient water quality. See Pacific Institute, "Defining Water Scarcity, Water Stress, and Water Risk," Pacific Institute, accessed September 22, 2022.

15 Khalil, et al., "Indonesia Vision 2045."

The relationship between water scarcity and conflict has been reported in the literature. Unfried et.al show that a reduction in total water volume increases the likelihood of social conflict, sometimes by up to three times.[16] Climate change contributes to these water challenges in many ways, for example by increasing the demand for water and simultaneously reducing the available resource, or increasing its variability.[17] International water conflicts have been a subject of many studies. The conflict between Palestine and Israel is also due to agricultural water demand.[18] The Nile river basin is shared by 10 (ten) countries; Egypt have always felt threatened by upstream water resources development, such as that conducted by Sudan and more acutely with hydropower development on the White Nile in Ethiopia.[19] Conflict, raids, tensions, threats to use force and military mobilization have occurred there and in Central Asia in a bid to control water resources or flows of water.[20]

However, this paper's interest is on localized (as opposed to international) water conflict. Gleick outlined a number of water related conflicts that have occurred from 3000 BC to 2013[21]. This includes: conflicts in Kenya between farmers and herders; in Tanzania between farmers and pastoralists; in Somalia fights to control water wells; in Mali between herders and nomadic tribes. Gleick also mentions a 2012 conflict in Saparua, Maluku, between the villages of Porto and Haria over springwater.[22] According to a BBC report, this conflict in Saparua has simmered for generations.[23] Areas which are considered fragile and have long

[16] Three times if calculated by larger standar deviation. Kerstin Unfried, Krisztina Kis-Katos, and Tilman Poser, "Water Scarcity and Social Conflict," *Journal of Environmental Economics and Management* 113 (2022): 102633, https://doi.org/10.1016/j.jeem.2022.102633.

[17] Ibid.

[18] Christiane J. Fröhlich, "Security and Discourse: The Israeli–Palestinian Water Conflict," *Conflict, Security & Development* 12, no. 2 (2012): 123–48, https://doi.org/10.1080/14678802.2012.688290.

[19] M. El-Fadel et al., "The Nile River Basin: A Case Study in Surface Water Conflict Resolution," *Journal of Natural Resources and Life Sciences Education* 32, no. 1 (2003): 107–17, https://doi.org/ 10.2134/jnrlse.2003.0107.

[20] José Antonio Peña-Ramos, Philipp Bagus, and Daria Fursova, "Water Conflicts in Central Asia: Some Recommendations on the Non-Conflictual Use of Water," *Sustainability* 13, no. 6 (January 2021): 3479, https://doi.org/10.3390/su13063479.

[21] Peter H. Gleick, et.al., *The World's Water 2008-2009: The Biennial Report on Freshwater Resources* (Washington D.C: Island Press, 2009).

[22] Gleick, et.al., *The World's Water*.

[23] BBC News Indonesia, "Situasi Saparua Berangsur Normal [The Situation of Saparua is Gradually Normal]," BBC News Indonesia, published March 8, 2012.

history of violence such as the Maluku Island, Sampit, Poso, Tarakan, Papua, and many others must thus pay careful attention to their water security.[24]

Both in international[25] and local/interstate[26] water conflicts, the role of the Court is important. The Indonesian Constitutional Court has adjudicated a Judicial Review of the Water Resources Law several times, eventually invalidating Water Law 7/2004 in 2015.[27] In the same decision, the Constitutional Court established 5+1 principles – popularly known as the 6 basic principles -- that target strict control of the "commercialization" of water.

The methodology used in this paper is normative-analytics, utilizing theories from water law and governance to inform constitutional adjudication. This paper will first explain the "6 basic principles" mentioned in the Constitutional Court's Decision, how the principles are incorporated into the new Water Law 17/2019 and how they are enshrined in the implementing regulations. The paper will then clarify several conceptual frameworks used in water governance, such as the distinction between services and resources and the values embedded in Integrated Water Resources Management (IWRM), such as efficiency, environmental sustainability and equity. Subsequenty, the chapter will elaborate three categories of water related conflict: quality, quantity, and spatial, and how the 6 basic principles applies to them.

This paper finds that the strength of the "6 basic principles" lies in their emphasis on: the state's duty to protect the human right to water (principle 1); the state's duty to fulfill human rights to water (principle 2); and the protection of the environment (principle 3). However, as elaborated in Section 5 below, the principle is ambiguous in many ways. The principle is drafted in order

[24] Khalil, et al., "Indonesia Vision 2045."

[25] International Court of Justice, "Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)," International Court of Justice, accessed June 19, 2022; International Court of Justice, "Construction of a Road in Costa Rica along the Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). See also Christina Leb, "Water Conflicts and the Role of International Law in Their Prevention," *SSRN Electronic Journal* (February 2012), https://doi.org/10.2139/ssrn.2000951.

[26] Robert T Anderson, "Indian Water Rights: Litigation and Settlements," *Tulsa Law Review* 42, no. 1 (July 2006): 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140324; Texas v. New Mexico and Colorado, No. 141 Original.

[27] Constitutional Court Decision No.85 / PUU-XI / 2013 Regarding the Review of Law Number 7 Year 2004 Concerning Water Resources.

to curtail commercialization of water, however, as explained in Section 4, water conflict often involves social conflict between community groups, such as between farmers or between agriculture and inland fisheries, where the the principle offers no resolution. Although the protection of the environment under Principle 3 is a strength, the 6th basic principle is confined to settling disputes over "commercialization" and thus, raise question as to whether it can be generalized into water governance as a whole (not only commercialization). The principle also disregards economic productivity[28] as a value recognized in water governance. This has two implications: first, water footprint is neglected, i.e. water will be distributed to smallholder farmers or state/region/village-owned enterprises despite that it may be less valuable and, secondly, the principle disallows the reallocation of water from less prodiuctive to more productive water uses. Finally, the principle is more applicable – notwithstanding the above criticism – to resolving water conflicts arising from allocative question (who gets x quantity of water) than to resolving conflict from water quality degradation or conflict relating to spatial plans which impacts water resources.

In light of these limitations, the paper recommends that the Constitutional Court utilize a teleological approach and based on such approach, revises the 6 basic principles in future cases so that it can address all types of water conflict. The exact re-formulation of the principles is not discussed in this paper, although it recommends what elements should be present. The implementation of the 6 basic principles through regulation and conflict resolutions by other courts or other bodies should also utilize the teleological approach.

II. THE 6 BASIC PRINCIPLES AND THEIR APPLICATION

2.1. Constitutional Court's Decision

Water Law 7/2004 has been judicially reviewed several times. Most notably, it was judicially reviewed in 2004, in which the Constitutional Court (CC) declared

[28] "Economic productivity" is defined as "...the value derived per unit of water used". See D Molden et al., "Pathways for Increasing Agricultural Water Productivity," in *Water for Food, Water for Life*, ed. D. Molden (London: International Water Management Institute, 2007), 279–310.

it conditionally constitutional.[29] In the 2005 decision, the CC declared that the Water Law 7/2004 can be invalidated if its implementing regulation does not follow CC's prescription. Subsequent judicial reviews had not been successful, however, Water Law 7/2004 was judicially reviewed again in 2013 and in 2015 the CC finally decided to invalidate the law in its entirety.[30]

The 2013 petition was largely motivated by the concern over the control of water resources by the private sector. The petitioner argued that "*the right to use water for commercial purpose...*" (*Hak Guna Usaha Air*) -- which is a permit instrument that can be granted to individuals and the private sector to utilize water for commercial acitvities – "*...provide a large space for the private sector to control water resources*" and that such mechanism "*....enables the private sector to take over of water sources controlled by the community*" which in turn "*creates monopoly on the control of water resources by the private sector*".[31] The petitioner was especially concerned that the space for non-commercial water uses will greatly reduce while and on the other hand the allocation for commercial water use greatly increases – to the detriment of the former.

As such, in order to curtail private sectrol control, the CC invented principles which could guide the commercialization of water The CC begins outlining the basic principles by elaborating:

[...] "*...based on the above consideration, then, water commercialization must be strictly limited in an effort to preserve and sustain the availability of water for the nations' life:*[32]

1. *[...] water commercialization shall not impede, override, or even abolish people's right to water because the land, the earth and water and the natural riches contained therein, in addition to that they shall be controlled by the State, should be exploited to the greatest benefit of the people;*

[29] Constitutional Court Decision No.058-059-060-063 / PUUII / 2004 Regarding the Review of Law Number 7 Year 2004 Concerning Water Resources (2005).

[30] Constitutional Court Decision No.85 / PUU-XI / 2013 Regarding the Review of Law Number 7 Year 2004 Concerning Water Resources.

[31] Ibid., 28-32.

[32] This translation is paraphrased by the author and is developed from authors' previous translation. See Mohamad Mova Al'Afghani, "Alienating the Private Sector: Implications of the Invalidation of the Water Law by the Indonesian Constitutional Court," *Journal of Water Law* 26, no. 3 (2019): 112, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666679.

2. *[..] the state shall fulfill the people's right to water. [As mentioned earlier] the access to water is a specific human right, then article 28 I (4) Constitution 1945 stipulates that "Protecting, advancing, upholding and the fulfilling human rights are the responsibility of the state, especially the government."*
3. *[...] we must pay attention to environmental conservation, since as the human rights Article 28H (1) of the Constitution, 1945, states "Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain health services".*
4. *[...] as a vital production sector, which controls the livelihood of the people [...] must be controlled by the state (Based on Article 33 (3) of the Constitution, 1945) and water (according to Article 33 (3) of the Constitution, 1945) must be controlled by the state and shall be used to the greatest benefit of the people. Therefore, the supervision and the control by the state regarding water is absolute;*
5. *[...] as a continuation of state control and since water controls the livelihood of the people then the primary priority on the commercialization of water is by State Owned Enterprises (BUMN) or Region-Owned Enterprises (BUMD);*
6. *In the event all the restrictions above have been fulfilled and there is an availability of water, the Government may grant permits to private enterprises to commercialize water based on strict requirements."*

The term "6 basic principles" itself has never been mentioned by the CC in its Decision. The CC only states 5 principles which limits commercialization of water and 1 principle which states that commercialization by the private sector can be allowed pursuant to the fulfillment of the aforementioned limitations. Nevertheless, the media, CC's own website, scholars and also the government have used the term "6 basic principles".[33]

2.2. Water Law

The Water Law 17/2019 interprets the 6 basic principles through an allocation framework under Articles 8 and 49.[34] Article 8 is very specific regarding water

[33] Irfan Nur Rachman, "Implikasi Hukum Putusan Mahkamah Konstitusi Tentang Pengujian Konstitusionalitas Undang-Undang Sumber Daya Air [Legal Implications of Constitutional Court Decision on Constitutional Review of the Water Resources Law]," *Kajian* 20, no. 2 (September 2016): 109–28, https://doi.org/ 10.22212/kajian.v20i2.573; Directorate General of Water Resources, Ministry of Public Works and Public Housing of the Republic of Indonesia, "Enam Prinsip Dasar Pengelolaan Air Kembalikan Pengaturan Air Ke Negara [Six Basic Principles for Managing Water Return Water Regulation to the State]," Directorate General of Water Resources, Ministry of Public Works and Public Housing of the Republic of Indonesia, accessed April 5, 2017.

[34] Republic of Indonesia Law Number 17 Year 2019 Regarding Water Resources.

allocation. The state is obligated to fulfill the human right to water in terms of minimum daily basic needs. In addition to that, Article 8 requires the state to prioritise daily needs, peoples' farming, and water for drinking. In the event of scarcity, water for daily needs must be prioritised over people's farming. Nevertheless, Article 8 is not really clear as to whether it intends to fulfill daily basic needs, which are taken directly from water source (Article 8(2)a) or bulk supply for drinking water (Article 8(2)c) or both. The next priority under Article 8 is non-commercial water needs and other commercial needs for which licenses have been granted. The allocation priority is ranked below:

Table 1: Allocation Priority Under Law 17 and other Regulations

Law 7	**Law 17**		
	Art 8	**Rank**	**Art 49**
Minimum Daily Basic Needs	Minimum Daily Basic Needs	1.	*General Daily Basic Need (no permit**)
		2.	Daily basic need for large group
		3.	Daily basic need which alters the natural condition of the water source
People's Farming "Within an Existing Irrigation System"	People's Farming	4,	*People's Farming Within an Existing System (no permit)*
		5.	People's farming outside of existing irrigation system
	Daily basic needs *through* drinking water supply	6.	Daily basic needs through drinking water supply
		7.	Non-commercial activities for public needs

Law 7	Law 17		
	Art 8	Rank	Art 49
		8.	Water utilization for state, region and village-owned enterprises*
		9.	Water utilization for the private sector (individual or enterprises)

* In the event of scarcity, rank 1, and 8 can trump other ranks (see Article 8 of Water Law 17/2019).

Source: AlAfghani, MM, Water Tenure in Indonesia (FAO, 2022)

2.3. Strength of the 6 Basic Principles

The strength of the 6 basic principles lies on its emphasis on human rights and the environment. Principle 1 can be seen as a manifestation of the state's obligation to protect the right to water. In essence, principle 1 requires the state to protect its citizens from commercial appropriation of water resources which might be detrimental to their rights.

Principle 2 is a manifestation of the obligation to fulfill Principle 1. Principle 2 reaffirms General Comment 15 and ICESCR that the state has the obligation to ensure the human right to water, by all means. In addition, Principle 2 reaffirms "the right to water" as a specific category of human right.

Water use for smallholder farmers is not specifically mentioned by the 6 basic principles. Nevertheless, access to water for "subsistence farming" is guaranteed by General Comment 15.[35] As such, we can argue that water for subsistence farming forms a part of the human rights to water guaranteed by Principles 1 and 2 . The term used by the Water Law is "*Pertanian Rakyat*" (people's farming

[35] United Nations Committee on Economic Social and Cultural Rights, "General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)," E/C.12/2002/11 (Geneva: United Nations, 2003), para. 2.

or smallholder cropping). However, whether subsistence farming and pertanian rakyat are similar is subject to discussion. The General Comment 15 at para 7 refers to Article 1(2) of the ICESCR, which states that people may not "be deprived of its means of subsistence". However, as Winkler notes, in practice, it may be difficult to draw the line between "subsistence" and agriculture in general. Winkler proposed that one of the signifier of subsistence farming (in terms of human rights to water) is whether the community has no option to procure food and as such, rely for food production by themselves. In this case, water directly affects their survival from hunger and malnutrition.[36] *Pertanian Rakyat* (people's farming) under the Water Law is a much broader category however, since it incorporates both "subsistence" farming (water needed for survival from hunger and malnutrition) and water to irrigate rice fields which are not directly related to subsistence.

Principle 3 calls for the protection of the environment as it is necessary to protect human health. Thus, this principle still sees the protection of environment, not as a *sui generis* environmental right, but in the context of human rights. Principle 4 is best read in conjuction with Principle 5, namely that state control should be realized by prioritizing water allocation for state owned enterprises.

Finally, the strength of the 6 basic principles is in providing value-guidance in conflict over water shortage. There are basically 4 (four) categories of water uses recognized by the 6 basic principle: people, environment, state/region/village owned enterprises and the private sector. People and the environment come first while – according to principle 6, the private sector comes last.

III. CONCEPTUAL FRAMEWORKS

3.1. Resources and Services

One of the most important distinction in water governance and water law is the management of water as a resource and the management of water as a service. As elaborated by Hendry, water services and resources are usually a part of different water law reform packages, meaning that a country will usually have

[36] See Inga T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Oxford: Portland, 2012).

its own water (resources) law and its own water (services) law.[37] Hendry notes that services can be argued to be a sectoral use of water, namely for water supply and sanitation, among many other types of water use.

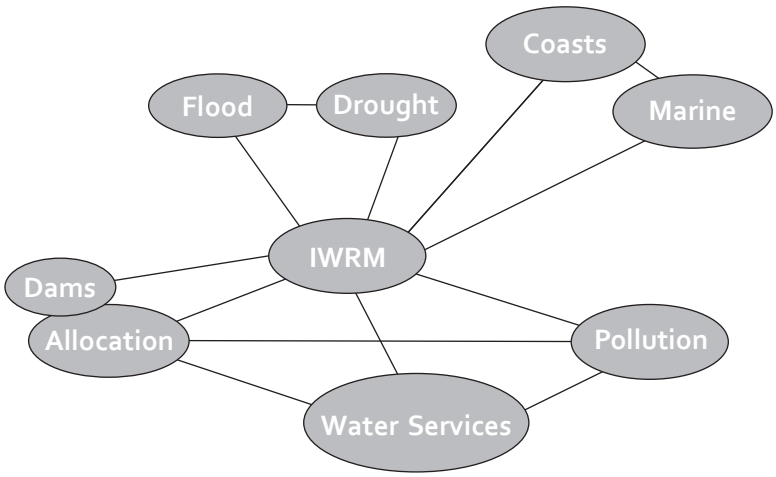

Figure 1. Water Law Meta Regime by Hendry (2014)[38]

As can be seen in Figure 1 above, water resources domain address pollution, allocation, water infrastructure (other than services), flood, drought and to a certain extent, coasts and marine. Water services are usually treated under their own regime. In most cases, when we speak of "water privatization", we speak about the privatization of water services, such as hydropower and water and/or sewerage utilities.[39] Unlike Indonesia, many countries have developed water services sector legislation, separate from resources regulations.[40]

The distinction between resources and services and the understanding of the other water law meta-regime as explained above is important, as I will argue later that the 6 Basic Principles are the most appropriate when solving conflict arising

[37] Sarah Hendry, *Frameworks for Water Law Reform* (London: Cambridge University Press, 2014).
[38] Ibid.
[39] Karen J. Bakker, *Privatizing Water: Governance Failure and the World's Urban Water Crisis* (New York: Cornell University Press, 2010); K. J. Bakker, *An Uncooperative Commodity: Privatizing Water in England and Wales* (London: Oxford University Press, 2003).
[40] Defra, *Water Industry Act 1991 Section 13(1) Modification of the Conditions of Appointment of United Utilities Water Plc* (London: The Stationery Office, 2005).

out of allocation (see figure 1), but are not so useful when applied to conflict arising out of pollution or conflict over water services, such as privatization.

3.2. Values in Water Governance

According to Turall, Good Water Governance is the mechanisms to achieve fair, productive and sustainable use of water through the actions of good institutions (laws, regulations, responsible organisations, user representation, policies, actions and incentives) and sufficient human and financial resources which supports them.[41] Water governance enshrines competing values, namely equity, efficiency and environmental sustainablity.

Equity means fairness or justice, a concept with its own history of debates from the Greek philosphy to Rawl's theory of justice and Sen's capability approach – which will not be discussed in detail here. [42] Lenton and Muller describe equity in this context as "*equitable access to water, and to the benefits from water use*" from all walks of life, irrespective of gender, socioeconomic group or country.[43]

In addition, efficiency is defined as the maximum economic output from the use a scarce input; i.e that water should be "*...strategically allocated to different economic sectors and uses*" to the best outcome possible. Environmental sustainability is defined as the protection of water resources and aquatic ecosystems in an effort to address wider environmental issues such as loss of biodoversity, habitat, climate change, the the provision of energy and food.[44] As noted earlier, these values often compete with each other; what is considered efficient may not be considered "equitable" and so forth.

Embracing efficiency as a value is important here as it would mean that water should be allocated from lower to higher productive uses. From example, Factory A used 1 liter of water to produce Rp10,000 worth of product, whereas Factory B can only produce Rp1,000 worth of product with the same volume. We can

[41] Discussion with Hugh Turall on September 3, 2022.

[42] J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1999); Amartya Kumar Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001).

[43] Mirja Kattelus, "Integrated Water Resources Management," in *Practice: Better Water Management for Development*, ed. Roberto Lenton and Mike Muller (London: Earthscan, 2009).

[44] Ibid.

infer that the Factory A is moreproductive than Factory B. Reallocation would mean that during scarcity water should be preferentially allocated to Factory A instead of B – this could be done with or without compensation depending on the legal framework. Some industry have more water footprint than others and some agriculture use more intensively than others.[45] However, the issue is much more complicated if it involves different kinds of water uses and users, for example within the agriculture sectore or between agriculture and drinking water, as will be explained below.

IV. CATEGORIES OF WATER RESOURCES CONFLICT

In most generalized terms, there are three types of water conflict: i.e. (1) conflict over water quantity (too little or too much), (2) conflict over water quality (too dirty), and (3) conflict over spatial development with implications to water security. The analytical distinction between different categories of conflict is important in order to assess whether the 6 basic principles can be applied.

4.1. Conflict over the quantity of water utilised

Conflicts over quantity have been reported in many instances in Indonesia and can be caused by either scarcity or flooding. Conflicts can occur in the same category of use (for example between smallholder farmers) or between different categories of use (for example between agriculture and drinking water). Conflict due to water scarcity for farming usually arise from inefficient operation of an irrigation system. Nurhayati *et al*. explain that conflict between farmers in Northen Aceh was caused by lack of coordination in water distribution, inadequate water availability during the drought season, a lack of maintenance of irrigation infrastructure or unilateral action from upstream farmers in lessening or preventing water flows downstream.[46]

[45] On related study regarding water footprints, see F. Bulsink, et.al., "The Water Footprint of Indonesian Provinces Related to the Consumption of Crop Products," *European Geosciences Union* 14, no. 1 (2009): 119-128, https://doi.org/10.5194/hess-14-119-2010.

[46] Nurhayati, Cut Rizka Al Usrah, and Alwi Alwi, "Konflik Air Irigasi Antar Petani Sawah di Gampong Tanjong Keumala dan Gampong Babah Buloh Kecamatan Sawang Kabupaten Aceh Utara [Irrigation Water Conflict Between Paddy Field Farmers in Gampong Tanjong Keumala and Gampong Babah Buloh, Sawang District, North Aceh Regency]," *Jurnal Sosiologi Dialektika Sosial* 1, no. 2 (2021): 97–110, https://doi.org/10.29103/jsds.v1i2.5114.

While natural conditions contribute to the lack of flows during the dry season, inefficient water management is often the primary cause of water crises. Industry is often blamed for a water crisis during drought despite the fact that this accusation is usually difficult to prove hydrologically. In one research study in Klaten, Lidon *et al*. discovered that inefficient irrigation management contributed significantly to the water crisis whereas the withdrawal from one private bottled water company was (volumetrically) insignificant.[47] Through participatory rural appraisal, farmers agreed that the causes of the crisis, other than natural conditions, were the deteriorating irrgation system, a lack of respect for water sharing rules, water theft, and poor coordination of cropping calendars.[48] One of the reasons why irrigation infrastructure is under-maintained in many parts in Indonesia is that there are fewer and fewer young farmers.[49] Another problem is the lack of local government attention in maintaining irrigation systems.[50] In this example, industrial water withdrawal is very small compared to agricultural water use and reallocating water from industry to farmers would have negligible impact on resolving the conflict. Since it is very likely in the future that these cases be brought to a Court, it is thus important for the Court to first understand the cause of a water crisis – and whether such a reallocation is the proper and effective remedy. If a conflict is caused by infrastructural and managerial issues, then it could be improved (in the future) by addressing these problems instead of reallocating water entitlements.[51]

[47] Bruno Lidon et al., "Approach and Impact of a Participatory Process for the Reorganization of Irrigation Management: A Case Study in Indonesia," *Cahiers Agricultures* 27, no. 2 (March 2018): 1-9, https://doi.org/10.1051/cagri/2018015.

[48] Ibid.

[49] In 2011 30% of the young people work in agriculture, in 2021, only 19% work as farmers, 25% work in manufacture and 55.8% work in services. See, Data Indonesia, "Krisis Petani Muda di Negara Agraris [The Crisis of Young Farmers in an Agricultural Country]," Dataindonesia.id, accessed June 21, 2022. See also, Sri Hery Susilowati, "Fenomena Penuaan Petani dan Berkurangnya Tenaga Kerja Muda serta Implikasinya bagi Kebijakan Pembangunan Pertanian [Phenomenon of Aging Farmers and Decreasing Young Labor Force and Its Implications for Agricultural Development Policies]," *Forum penelitian Agro Ekonomi* 34, no. 1 (June 2016): 35, https://doi.org/10.21082/fae.v34n1.2016.35-55.

[50] Ahmad Sururi, "Efektivitas Implementasi Program Pemeliharaan Infrastruktur Jaringan Irigasi di Kabupaten Lebak [Effectiveness of Infrastructure Maintenance Implementation Program for Irrigation Networks in Lebak Regency]," *Pamator Journal* 13, no. 1 (April 2020): 95–104, https://doi.org/10.21107/pamator.v13i1.6949; Fandi Armanto, "Baru 15 Persen Delapan Titik Jaringan Irigasi Jauh dari Target [Only 15 Percent of Eight Irrigation Network Points have Achieved Target]," Radar Bromo, published August 9, 2021.

[51] It will not be efficient for the legal system to have a reactive adjudication everytime a dispute arises. It is much more efficient that disputes are resolved at the river basin level, utilizing TKPSDA (The Coordination Team for Water Resources Management). This has yet to materialize and it is one of the recommendation from the World

Another type of water conflict is between different kinds of uses among farmers, for example, the conflict between aquaculture and rice farmers.[52] Fishponds are mushrooming in the regions between Musi Rawas Regency and Lubuk Linggau (Kelingi Tugumulyo Irrigation Area (Southern Sumatera)). The conflict has been ongoing for several years.[53] According to Saleh, the problem is quite complex: (i) rice farmers felt that their water entitlement was not protected by the government, (ii) there is no allocation framework for dividing water between fish ponds and ricefields, (iii) lack of enforcement of current rules and norms, (iv) lack of consistent enforcement of cropping pattern[54], (v) water theft by fishpond owners by damming irrigation channels or not returning the flows to irrigation channels, (vi) the accelerating growth of fishponds, (v) lack of maintenance of irrigation infrastructure, and (vi) siltation of the channels.[55] Many of these factors result in the lack of water ("too little") for downstream farmers, especially during drought.[56] However, Saleh also noted that the damming of on the upstream also causes rice fields to be flooded ("too much").[57]

One of the most common conflict is between agriculture and drinking water – operated by regionally-owned water utility (PDAM). Instances have been reported to occur in Klaten (Cokro spring)[58], Bali (Badung and Tabanan Regency)[59], and

Bank Water Security report that such system be developed at the river basin level. See Khalil et al., "Indonesia Vision 2045." However, there could cases where TKPSDA deliberation results as incorporated by allocation decision from public officials are challenged in Court. Clarifications regarding the norms on reallocation and a consistent application of such norms by the Court would be needed in order to ensure legal certainty. The author would like to thank Pak Hugh Turral for raising the clarification on this important issue.

52 See for example Ollaf Winesia, "Konflik Air Daerah Irigasi Kelingi Tugu Mulyo Provinsi Sumatera Selatan – Balai Bws Sumatera Viii [Water Conflicts in the Tugu Mulyo Irrigation Area, South Sumatra Province – Balai BWS Sumatra VIII]," Directorate General of Water Resources, Ministry of Public Works and Public Housing of the Republic of Indonesia, accessed May 22, 2020.

53 Saleh, "Studi Konflik Air."

54 Local government agricultural agencies issue and enforce policy on cropping patterns – by adjusting to seasons. Thus, they may require that rice shall not be planted during droughts. However, this is hard to enforce as oftentimes the price of rice increases during drought and thus, incentivized farmers to plant rice by securing additional water supply, for example, through groundwater.

55 Saleh, "Studi Konflik Air."

56 Ibid. See also Winesia, "Konflik Air Daerah."

57 Saleh, "Studi Konflik Air".

58 Yunita Permatasari, "Resolusi Konflik Pengelolaan Sumber Mata Air Cokro Tulung Kabupaten Klaten [Conflict Resolution on the Management of Cokro Springs, Tulung, Klaten Regency]," *Sosialitas: Jurnal Ilmiah Pendidikan Sosiologi-Antropologi* 5, no. 2 (2015): 163558, https://jurnal.fkip.uns.ac.id/index.php/sosant/article/view/10472; Ardhi Satria K, "Kerjasama antara Pemerintah Kabupaten Klaten dan Pemerintah Kota Surakarta Tentang Pemanfaatan Air Umbul Cokro [Collaboration between the Klaten Regency Government and the Surakarta City Government on Umbul Cokro Water Utilization]" (PhD Thesis, University of Muhammadiyah Surakarta, 2014).

59 Hikmah Trisnawati, "Dampak Perkembangan Infrastruktur Pariwisata terhadap Konflik Air di Kabupaten Badung dan Tabanan [The Impact of Tourism Infrastructure Development on Water Conflict in Badung and Tabanan

Malang (Sumber Pitu Water Source).[60] Baiquni and Rijanta reported that water conflicts between PDAM and farmers in other areas, some of which may have been resolved: Semarang (Umbul Senjoyo), Klaten (Arunsari Village), Boyolali (Umbul Sangsang), Kendal and Semarang (Umbul Boja).[61] All of these reported conflicts typically involve the utilization of spring water as bulkwater supply for PDAMs, sometimes in another city.

The problem of a "thirsty" city is not peculiar to Indonesia and is in fact a common problem all over the world.[62] Research by Garrick *et al.* covering 69 urban agglomerations in South America and Africa estimated that there had been transfers totalling 16 billion m^3 of water per year.[63] These reallocation from rural to urban use are usually mediated by an agreement, which contains items on compensation, water source replacement for the donor region or for the infrastructure operating rules.[64] Water reallocations to urban use are sometimes detrimental to rural communities, however, a win-win situation can materialize if there are benefits to the donor region (rural community), usually in the form of flood control, increased irrigation efficiency, new infrastructure or alternative water sources.[65] New infrastructures could take the form of on-farm storages to collect catchment runoff and irrigation supply[66]. In addition, the Dutch experience shows that cities can also utilize alternative water sources, such as from private and collective rainwater harvesting.[67] These experiences show that

Regencies]," *Jurnal Ilmiah Pariwisata* 2, no. 1 (2012): 109–222, https://ojs.unud.ac.id/index.php/jip/article/view/3671.

60 Nasional Tempo.Co, "Petani Malang Cemaskan Proyek Eksplorasi Air [Malang Farmers Worry about Water Exploration Projects]," Nasional Tempo.Co, accessed June 22, 2022; "Sumber Pitu Dimonopoli PDAM, Petani Malang Menjerit [Pitu Springs Monopolized by PDAM, Malang Farmers Cry Out]," Memorandum.co.id, accessed March 8, 2020; Redaksi Bacamalang.com, "Ini Rekom Dewan Soal Pemanfaatan Air Sumber Pitu untuk Petani [This is the Council's Recommendation Regarding the Utilization of Pitu Springs for Farmers]," *Bacamalang.com*, published March 4, 2020.

61 M. Baiquni and R. Rijanta, "Konflik Pengelolaan Lingkungan dan Sumberdaya dalam Era Otonomi dan Transisi Masyarakat [Conflicts in Environmental and Resource Management in the Era of Autonomy and Society Transition]," *Bumi Lestari Journal of Environment* 7, no. 1 (2007), https://ojs.unud.ac.id/index.php/blje/article/view/2414.

62 Dustin Garrick et al., "Rural Water for Thirsty Cities: A Systematic Review of Water Reallocation from Rural to Urban Regions," *Environmental Research Letters* 14, no. 4 (2019): 1-14, https://doi.org/ 10.1088/1748-9326/abodb7.

63 Ibid.

64 Ibid.

65 Ibid.

66 N. Roost et al., "Adapting to Intersectoral Transfers in the Zhanghe Irrigation System, China: Part II: Impacts of in-System Storage on Water Balance and Productivity," *Agricultural Water Management* 95, no. 6 (June 2008): 685–97, https://doi.org/10.1016/j.agwat.2008.01.011.

67 Suzanne Loen, "Thirsty Cities: Learning from Dutch Water Supply Heritage," *Adaptive Strategies for Water Heritage* (2020): 79, https://doi.org/10.1007/978-3-030-00268-8.

reallocating water from urban to rural needs to take into account the benefit of rural communities. These initiatives however, will need to be incorporated into the legal regimes in order to provide legal certainties.

4.2. Water Quality Conflict

Conflicts over water quality occur when stakeholder's expectation over a certain water quality standard are not met. One example is the conflict between rice farming and aquaculture, where brackish water from fish and prawn ponds seeps into paddy fields and damages rice plants.[68]

Another example is the decrease of water quality due to aquaculture/floating net cages (*keramba jaring apung*) in dams. In 2016, it was estimated that there were 23 thousand floating net cages in the Jatilihur dam, causing disturbance to the operation of electricity turbines and billions of rupiah increase in drinking water treatment costs.[69] Aquaculture increases acidity of water and produces sulfic acid, which corroded the hydropower turbines.[70] This situation also occurs in Koto Panjang hydropower dam, which supplies electricity to Riau. Euthrophication from floating net cages and solid waste from tourism likewise impairs turbine operation.[71]

Floating net cages also allegedly contribute to the decrease of water quality in Lake Toba, which renders it inappropriate for tourism and drinking water purpose.[72] In these cases, the utilization of water bodies for fishery contributes to the deterioration of water quality required for other purposes. The solution to

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[68] Tomi, "Ganggu Pertanian, Tambak Udang Harus Ditata [Disrupting Agriculture, Shrimp Ponds Must be Regulated]," *KRJogja*, published February 3, 2017.

[69] Mediaindonesia.com, "Jaring Apung di Jatiluhur Ganggu Turbin PLTA [Floating Nets in Jatiluhur Disrupt Hydropower Turbines]," Mediaindonesia.com, published November 7, 2016.

[70] Sonny Koeshendrajana et al., "Kajian Eksternalitas dan Keberlanjutan Perikanan di Perairan Waduk Jatiluhur [Externalities and Sustainability Study of Fisheries in the Jatiluhur Reservoir]," *Jurnal Sosial Ekonomi Kelautan dan Perikanan* 4, no. 2 (2017): 137–56, http://dx.doi.org/10.15578/jsekp.v4i2.5826.

[71] Happy Rosalina, Sujianto Sujianto, and Sofyan Husein Siregar, "Strategi Pengembangan Ekowisata di Kawasan Waduk Pembangkit Listrik Tenaga Air (PLTA) Koto Panjang Kabupaten Kampar [Ecotourism Development Strategy in the Koto Panjang Hydroelectric Power Plant (PLTA) Area of Kampar Regency]," *Dinamika Lingkungan Indonesia* 1, no. 2 (2014): 97–108, http://dx.doi.org/10.31258/dli.1.2.p.97-108.

[72] Yudhi Soetrisno Garno, Rudi Nugroho, and Muhammad Hanif, "Kualitas Air Danau Toba di Wilayah Kabupaten Toba Samosir dan Kelayakan Peruntukannya [Water Quality of Lake Toba in the Toba Samosir District and Its Suitability for Use]," *Jurnal Teknologi Lingkungan* 21, no. 1 (January 2020): 118–24, https://doi.org/10.29122/jtl.v21i1.3277. See also Lukman, *Danau Toba: Karakteristik Limnologis dan Mitigasi Ancaman Lingkungan dari Pengembangan Karamba Jaring Apung* [Lake Toba: Limnological Characteristics and Environmental Threat Mitigation from Floating Net Cage Development] (Menteng, Jakarta: LIPI Press, 2013).

these problems therefore, often involves the governance on the use of particular water bodies – in this case concerning fish net cages.[73] Managing new uses (such as the floating net cages) can take the form of either taxation, licensing, administrative penalties combined altogether with citizen monitoring.

4.3. Conflict due to certain land use activities

This category is used to describe conflicts which arise in situations where certain land use activities causes water quality or quantity to decline. This could range from deforestation which contributes to flooding and landslides[74] to the conversion of open green spaces into residential or commercial districts.[75] In this cases the problem and its solution would require the invocation of different legal sectors outside of water law.

Regimes which are designed to reduce surface runoff, such as the obligation of minimum open spaces in building developments[76] or the obligation of zero delta Q[77] in areas with high elevations or peatlands, follow spatial development regimes outside of water law.

In many cases, conflict arises due to mining activities – which are governed by mining law. Open pits filled with highly acid water have been used by community-based water supply systems in East Kalimantan to supply water for daily needs.[78] Mining actvities in Muara Enim also caused water to smell

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[73] In turn, these could trigger social conflict. See Nendah Kurniasari et al., "Risiko Sosial Penertiban Keramba Jaring Apung di Waduk Jatiluhur [Social Risks of Regulating Floating Net Cages in Jatiluhur Reservoir]," *Jurnal Sosial Ekonomi Kelautan dan Perikanan* 15, no. 1 (2020): 107–19, http://dx.doi.org/10.15578/jsekp.v15i1.8363.

[74] Jessie A. Wells et al., "Rising Floodwaters: Mapping Impacts and Perceptions of Flooding in Indonesian Borneo," *Environmental Research Letters* 11, no. 6 (2016): 064016, https://doi.org/10.1088/1748-9326/11/6/064016; Jennifer Merten et al., "Flooding and Land Use Change in Jambi Province, Sumatra: Integrating Local Knowledge and Scientific Inquiry," *Ecology and Society* 25, no. 3 (2020), https://doi.org/10.5751/ES-11678-250314.

[75] T. P. Moeliono, *Spatial Management in Indonesia: From Planning to Implementation: Cases from West Java and Bandung: A Socio-Legal Study* (Leiden: Leiden University, 2011).

[76] Presidential Regulation Number 60 of 2020 on the Spatial Plan of the Urban Areas of Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak, and Cianjur.

[77] Zero delta Q means that all development activity must not increase water flows to rivers or drainage systems. In other words, water from needs to be recharged back to aquifers. See Government Regulation of the Republic of Indonesia Number 26 of 2008 on the National Spatial Plan. The obligation to recharge aquifers are also manifested in building codes. See Minister of Public Works Regulation Number 11/Prt/M/2014 on Rainwater Management in Buildings and Land Plots.

[78] "Ketika Warga Desa Sikalang Gunakan Air dari Kolam Bekas Tambang Batubara [When Residents of Sikalang Village Use Water from a Former Coal Mine Pond]," Mongabay.co.id, published May 5, 2021.

of rust.[79] One stakeholder we interviewed from that area also commented that rust is major challenge for community based water infrastructure since it often damages their waster treatment facilities.[80]

V. CRITICISMS OF THE 6 BASIC PRINCIPLES

5.1. Unclear Scope

As mentioned in section 2, The Constitutional Court (CC) prefaced the 6 basic principles by elaborating: [...] *based on the above consideration, then, water commercialization must be strictly limited in an effort to preserve and sustain the availability of water for the nations' life* (underlined by author). The underlined phrase denotes that the scope of the 6 basic principle is the commercialization of water. What "commercialization" means have been extensively discussed by AlAfghani, in which the element of commercialization is profit-generation.[81] If water is used as a material or media or that water bodies (blue space) are being used for any activities which produce profit, then it is "commercial". In the literature, the term "commercialization" is often equated by "private sector participation" or privatization of drinking water services[82] or an opposition on treating water as social good (where water is considered a "commercial good").[83]

Nevertheless, Water Law 17/2019 does not even utilize the term *pengusahaan* (commercialization) – except for few examples in transitionary provisions. The term used by the Water Law is "*The Utilization of Water Resources for commercial needs – the "commercial use" of water*" (*Penggunaan Sumber Daya Air Untuk Kebutuhan Usaha*). As such, the definition of commercialization of water is not

[79] Helper Sahat P Manalu, Bambang Sukana, and Kenti Friskarini, "Kesiapan Pemerintah Kabupaten Muara Enim dalam Rangka Menanggulangi Pencemaran Batubara [The Readiness of the Muara Enim Regency Government in Dealing with Coal Pollution]," *Indonesian Journal of Health Ecology* 13, no. 2 (2014): 95-104, https://www.neliti.com/publications/81029/kesiapan-pemerintah-kabupaten-muara-enim-dalam-rangka-menanggulangi-pencemaran-b.

[80] Interview with community based water stakeholders in Muara Enim for the research project "Supporting Sustainable Rural Water Service Delivery: District Associations of Community-Based Organisations in Indonesia" on January 26-27, 2014.

[81] Al'Afghani, "Alienating the Private Sector."

[82] Sean Flynn and Danwood M. Chirwa, "The Constitutional Implications of Commercializing Water in South Africa," In Book *The Age of Commodity: Water Privatization in Southern Africa* 59. London: Routledge, 2004.

[83] J. Dugard, "Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy," *Review of Radical Political Economics* 42, no. 2 (June 2010): 175–94, https://doi.org/10.1177/0486613410368495.

clear under existing legislation. Perhaps this is meant to avoid the sensitive issue of commercialization of the water sector. In any case, the question here is the scope of the 6 basic principles: was it means for water governance as a whole or only for the commercialization of water resources?

This question is relevant because if the 6 basic principles are meant to guide water governance as a whole, non-commercial water use must fall within it. This means that utilization of water for smallholder crops and drinking water as well as social and religious activities must pay attention to the 6 basic principles. On the other hand, if the 6 basic principles are meant only to limit commercialization, then those activities will not be covered by it.

The second problem is the relevance of the said principles in governing water services. As discussed in Section 3, "water services" is one of the meta regimes in water law. The strength of the 6 basic principles is its role in providing guiding values for water allocation. In the case of water services, when water has been considered to have been allocated among other uses, the problem is considered to have been settled at the resources (river basin) level, and not within the governance of water services. Nevertheless, it is possible to extend the interpretation of 6 basic principles for allocation of water among water utility consumers in the event of water crisis in which household water use and water for daily basic needs should be prioritized over industrial or commercial water use (such as water use in malls).

The other problem in the water services sector has more to do with ownership (public vs private), pricing/tariffs, stakeholder participation, network expansion or public utilities capture.[84] As Al'Afghani and Bisariyadi notes, privatization in water service provision covers a spectrum; from management contract, to affermage, lease, BOT, concession and in its highest form, divestiture – of the

[84] Mohamad Mova Al'Afghani, *Legal Frameworks for Transparency in Water Utilities Regulation: A Comparative Perspective* (London: Routledge, 2016); Hendry, *Frameworks for Water Law Reform*. Here is taken from Stigler's 1971 seminar paper. Acording to Stigler, "*...as a rule,regulation is acquired by the industry and is designed and operated primarily for its benefits*". See, George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21, https://doi.org/10.2307/3003160; E. Dal Bo, "Regulatory Capture: A Review," *Oxford Review of Economic Policy* 22, no. 2 (2006): 203, https://doi.org/10.1093/oxrep/grj013.

infrastructure.[85] Principle 5 is closer to the other principles with regards to the question of ownership. Principle 5 states:

> ["...sebagai kelanjutan hak menguasai oleh negara dan karena air merupakan sesuatu yang sangat menguasai hajat hidup orang banyak, maka prioritas utama yang diberikan ***pengusahaan*** atas air adalah Badan Usaha Milik Negara atau Badan Usaha Milik Daerah"]
>
> *[...] as a continuation of state control and since water controls the livelihood of the people, then the primary priority on the* ***commercialization*** *of water is by State Owned Enterprise (BUMN) or Region-Owned Enterprise (BUMD) (emphasized by author);*

Both the Indonesian term "*Pengusahaan*" and the english translation "*Commercialization*" is underlined by author. As mentioned earlier, the term used by the Water Law is different from the 6 basic principles by the Constitutional Court (CC). Water Law used the terms "commercial use" and "non-commercial use". [86]

The CC's uses of the term *Pengusahaan* is because commercialization (the CC decision used both terms: *komersialisasi* and *pengusahaan*) are widely used and intensely debated during the trials. As such, Principle 5 seeks to addres this. This however, can trigger another question: which license typology on the allocation framework (see table 1 above) can be considered a "commercialisation"?

The problem is that principle 5 is not specific to water services and is aimed at regulating the whole range of commercialization of water, including water services. Principle 5 simply means that stateand region-owned enterprises should be prioritized in the commercial use of water resources – in other words, in terms of license, it should be granted first. Principle 5 does not even prohibit commercialization or the private sector's role in water services.

The Water Law 17/2019 seemed to interpret Principle 5 even further by ruling, in Article 50, that if the productis drinking water, abstraction licenses can only be granted to state, regional or village-owned enterprises.[87] It appears

[85] Mohamad Mova Al'Afghani and Bisariyadi, "A Hidden Legal Loophole: The Problematique of Regulating Private Sector's Participation in Indonesia's Drinking Water Service," SSRN, published December 30, 2021, http://dx.doi.org/10.2139/ssrn.3996774.

[86] See, Article 8 Law Number 17 Year 2019 Regarding Water Resources.

[87] Law Number 17 Year 2019 Regarding Water Resources.

that entities apart from state/region/village-owned enterprises are prohibited from supplying drinking water. However, the government has often stated that foundations, associations or community groups could still obtain an atraction license under Article 45 to fulfill their "daily basic needs". However, what if the daily basic need is for drinking water – as often supplied by housing developers or in apartments? This is where the presence of Article 50, in conjunction with Article 45, creates legal uncertainty. This has been addressed in another paper.[88]

5.2 Inapplicability to Certain Conflict Categories

As discussed earlier, the strength of the 6 basic principles is that they can be used to guide the resolution of water conflicts. The following table summarizes the different categories of real-life water conflicts outlined in Section 4 and assess whether they can be resolved using the 6 basic principles.

Table 2. The Different Categories of Real-Life Water Conflicts

No.	Conflict Categories	Parties	Applicability
1.	Quantity	Between Smallholders (Farmers vs Farmers)	**Not applicable**. Since the 6 basic principles apply to different categories of uses and users, it is of little relevance to conflict within the same categories of uses and users. For example, if two state-owned enterprises compete over water, the principle is of little use.
2.		Smallholder Farmers vs Industry	**Applicable**. Smallholder farmers should be prioritized over industry. However, allocation priority may not matter too much if industrial water use is to small to be usefully reallocated to smallholder farmers. There are also cases where conflict arises due to inefficient irrigation infrastructure and its management.

[88] Al'Afghani and Bisariyadi, "A Hidden Legal Loophole."

No.	Conflict Categories	Parties	Applicability
3.		Rice fields vs Aquaculture (*tambak*)	**Applicable IF** aquaculture is **not** defined as "*pertanian rakyat*" (smallholders). Note that elucidation of Article 8(b) of Law 17/2019 categorized "perikanan" (fishery) as smallholders. If this is the case then the principle is not applicable (see no 1 above).
4.		Smallholder vs Drinking Water	**Applicable** but does not provide clear solution. It can be argued that drinking water – through drinking water utilities (PDAM) - is more protected by the constitution than the rights of smallholder farmers. But this is more complicated than it sounds, some PDAMs also supply water to hotels, malls and industries and they are commercial, in that they levy charges and make an operating profit. During scarcity, it is possible for example, to allocate a certain amount of water to PDAM and ensure that priorities be given to households and consumers utilizing water for their daily needs. As discussed above, reallocation of water from rural to urban needs to be accompanied with incentives and compensation mechanisms.
5.	Water Quality	Aquaculture vs Rice Farmers (Smallholders)	**Not Applicable**. The language of the 6 basic principle (at principle 6) is "*apabila masih ada ketersediaan air*" (if there is an availability of water). In conflict over quality, water is available in terms of quantity but its quality is low. **However**, it can be applicable

No.	Conflict Categories	Parties	Applicability
			IF the 6 basic principle is interpreted extensively so as to cover quality and that aquaculture is not categorized as *pertanian rakya*t. Hence, the principle would prioritize rice farmers.
6.		Aquaculture vs Hydropower	**Not Applicable**. Neither aquaculture (in this case *Keramba Jaring Apung*) nor hydropower* is specifically adressed in the 6 basic principles. Principle 1 and 2 protect "access" to water, this possibly meant water for daily basic need, which constitutes the core elements of the human right to water.** In addition, even if sufficient volume of water is available, the problem is that waters are dirty and/or corrosive. **However**, it can be applicable **IF** the 6 basic principle is interpreted to cover water quality. In this case, Hydropower which is operated by state owned companies should be prioritized over aquaculture.
7.		Aquaculture vs Tourism	**Not applicable**. Neither *Keramba Jaring Apung* nor tourism is the concern of the 6 basic principles.
8.	Land Use implications of water	Conversion of green or blue spaces into residential or business districts	**Not applicable.** None of them are considered as water uses or users under the 6 basic principles

* There are social, including welfare considerations in terms of granting access to electricity which should be weighed against other uses, such as the floating net cages or agricultural water needs. The author would like to thank Pak Hugh Turall for raising this issue.

** United Nations Committee on Economic Social and Cultural Rights, "General Comment 15 ICESCR."

No.	Conflict Categories	Parties	Applicability
9.		Mining vs Drinking Water	**Not Applicable**. The state has the duty to protect and fulfill the people's right to water, however, principle 1 is confined to the context of commercialization: "*water commercialization shall not impede*...". Discharging dirty water into the river does not fit into this category. Dewatering (the drainage of tunnels or pits to enabe mining activity) is an allocation issue. If dewatering affects drinking water, drinking water shall be prioritized over dewatering.

As can be seen from the above table, that the 6 basic principles can only be used to resolve certain kinds of conflicts. Conflicts over quantity (allocation issues) can be resolved by referring to the principle, but only if they concern different kinds of water uses and users.

Conflicts over quality are generally inapplicable since the 6 basic principles seem to be preoccupied with *ketersediaan air* (water availability) which is a quantity issue. However, if *ketersediaan air* can be interpreted extensively so as to cover availability of water at a desired quality, then the 6 basic principles would be more applicable. For instance, any water quality conflict between hydropower and *keramba jaring apung* (floating fish cages) would prioritize water use for hydropower.

Water conflicts which arise due to land use, development or the pollution of waterways due to activities, such as mining, are not covered by the 6 basic principles. This is because the principle is preoccupied with commercialization and not governance as whole. Principle 1 reads "*water commercialization shall not impede*...". Land use cases, such as the conversion of open green spaces into commercial areas, are not water commercialization *per se*. It is the commercialization of land, whose function is to retain and regulate water. Likewise,

pollution cases are not water commercialization *per se*, i.e. water is neither abstracted as media or materials in which the abstraction itself is detrimental to other parties. This is different from situation where, for example, abstraction by industrial water users reduces water availability for daily needs. In pollution cases, it is the discharge (and not the abstraction) of polluted water back into the environment that lessens the enjoyment of water by other parties. In order for Principle 1 to be applicable to pollution cases, we need to ignore the phrase "water commercialization" and interpret it as any kinds of water use.

5.3 The Problem of Water Efficiency

As discussed in Section 3, one important value in water governance other than equity and environmental sustainability is efficiency, which means that scarce water resources should *"...go as far as possible" and allocated strategically* "...to different economic sectors and uses".[89] Lenton and Muller do not define efficiency[90] further, but from their article, it is possible to denote that efficiency in the context of water allocation means achieving as large an output as possible with as little water input. Using less water intensive crops (higher productivity), reducing seepage in irrigation infrastructure, replacing faucets with automatic taps are all examples of techncial water efficiency measures to reduce the net consumption of water. Increasing productivity requires allocating water to uses that generate more economic value to the economy (allocative efficiency). In the words of Allan, allocative efficiency simply means: *which activity brings the best return* (more productive value) *to water*?[91]

The question now becomes: do the 6 basic principle allow allocative efficiency measures? There are two ways to approach this problem, the first, is through literal interpretation of the 6 basic principles, and the second is through teleological interpretation of the principles.

[89] Kattelus, "Integrated Water Resources."

[90] In many parts of this paper, the term used to denote efficiency is the "productive value of water."

[91] Tony Allan, "Productive Efficiency and Allocative Efficiency: Why Better Water Management May Not Solve the Problem," *Agricultural Water Management* 40, no. 1 (March 1999): 71–75, https://doi.org/10.1016/S0378-3774(98)00106-1.

The Literal Interpretation

In the strict literal sense, Principle 6 can be read as follows: Private enterprises can only be granted a permit to abstract water *if, and only if,* the other allocation priorities, namely (i) human right to water – water for daily basic needs and livelihood including smallholders, (ii) water for environmental conservation, and (iii) water for state owned enterprises - have been fulfilled and sufficient resource exist to supply commercial demand. This means that, according to the literal interpretation, if there is no water left, the private sector ***shall not*** be allocated any.

The agricultural is the most intensive consumer of water compared to other sectors. According to PT Jasa Tirta 2 (the river basin corporation) annual report 2020, around 6.8 billion meter cubic meters of water – or 90% of its water deliveries - are distributed across 300,000 hectares of agricultural land in northern west Java, *free of charge*.[92] This means that only 10% of its water generates profit.

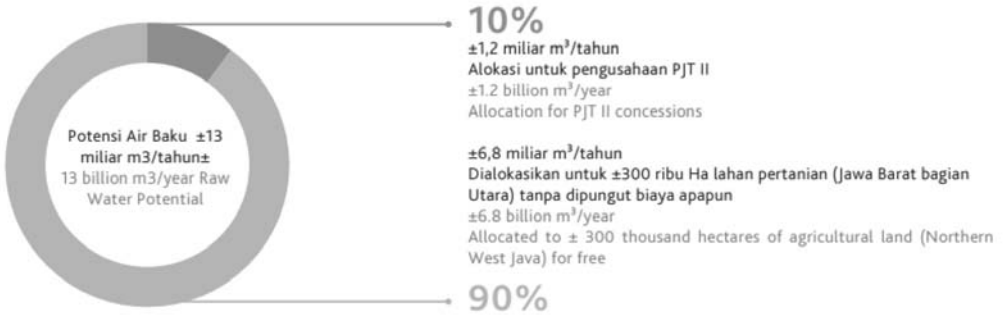

Figure 2. Water Allocation in PJT 2

The remaining 10% is utilized for electricity, bulkwater supply to Jakarta and water supply to industry. If the literal interpretation is applied – also by referring to the allocative framework under Water Law – then drinking water and smallholders will need to be fulfilled first before industry can be supplied.

[92] PJT 2, "Annual Report 2020: Beyond A New Normal A New Era of Growth" (Purwakarta: PJT 2, 2020).

Teleological Interpretation

According to Bulsink *et al.*, rice consumes more water than other crops.[93] Coffee and cocoa are also water hungry, but they take their water from rain (green water); rice on the other hand needs quite a lot of irrigation (blue) water. The average water footprint for Java is 2800 m^3/ton.[94]

Table 3. Water footprint of crops in Indonesia

	Water footprint [m^3/ton]			
	Green	Blue	Grey	Total
Rice	2527	735	212	3473
Maize	2395	75	13	2483
Cassava	487	8	19	514
Soybeans	1644	314	0	1958
Groundnut	2962	162	0	3124
Coconut	2881	0	16	2896
Oil palm	802	0	51	853
Banana	875	0	0	875
Coffee	21904	0	1003	22907
Cocoa	8895	0	519	9414

Source: Bulsink (2009)

1 kg of beef needs 15,000 liter of water whereas a pair of jeans needs 8,000 liter of water.[95] Bottled water on the other hand, require 17.42 liter of raw water for every liter of production.[96] In these cases, during scarcity, can water be allocated from rice farmers to other crop production with higher economic value? Can water be allocated from *peternakan* (livestock) to bottled water?

Unlike the literal interpretation, the teleological interpretation looks at the purpose behind the 6 basic principles. In Dworkin's words:, "*...constructive interpretation is a matter of imposing* ***purpose*** *on an object or practice in order to make it the best of possible example of the form or genre to which it is taken*

[93] Bulsink, et.al., "The Water Footprint."
[94] Ibid.
[95] Arjen Y. Hoekstra, *The Water Footprint of Modern Consumer Society* (London: Routledge, 2013).
[96] Shalini A. Tandon, Niranjan Kolekar, and Rakesh Kumar, "Water and Energy Footprint Assessment of Bottled Water Industries in India," *Natural Resources* (February 2014), https://doi.org/10.4236/nr.2014.52007.

to belong" (emphasized by author).[97] He continued: "*...an interpretation is by nature the report of a purpose*".[98]

Principle 1 reiterates Article 33 of the 1945 Constitution in that natural resources (water included) should be exploited to the greatest benefit of the people's welfare (*sebesar-besarnya kemakmuran rakyat*). In this case, water should be allocated in such a way that would optimize welfare – which could include employment in the private sector. At the same time, the teleological argument states that less than economically optimal (but nonetheless "equal") allocation of water would violate the constitution. Thus, if industries have higher economic water productivity, which means that they can produce more rupiah per drop of water compared to agriculture or livestock, then (some) water may need to be reallocated to industry.

What welfare (*kemakmuran*) means is a matter of debate. It is thus possible to argue that in situation where water is allocated to certain industry (for example, bottled water) and denied to certain farmers group (for example, one part of the irrigation area) and the result of such allocation brings more benefit to state or village income (through taxation or other means) – to the detriment of certain farmer groups – then it could be consistent with the constitutional goal to increase welfare.[99]

Although (re)allocating water from farmers (which consumes the highest percentage of water in many river basins – Citarum is one example) to industry seems easy on paper, there are plenty of other considerations, such as social conflict, consensus-building and most importantly equity. It is true that such reallocation would increase the economic benefits (i.e industry produce more rupiah than farmers) and is beneficial for taxes, but the distributional questions remains, what do the farmers receive in compensation for letting go some of their water entitlement? In this situation, a compensation mechanism will need to be created. Certain farmers groups could receive less water in exchange for

97 Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).
98 Ibid.
99 In economic terms, the allocation is a Kaldor-Hicks improvement. See Guido Calabresi, "The Pointlessness of Pareto: Carrying Coase Further," *The Yale Law Journal* 100, no. 5 (March 1991): 1211, https://doi.org/10.2307/796691.

financial or other benefits. If all parties agree to such mechanism than both the welfare maximization consideration and the equity consideration could go hand in hand. This is more aligned with the Article 33 and preamble of the 1945 Constitution which seeks to increase welfare. The situation could be more complicated if reallocation involves environmental water use as their economic value might and welfare implicatons might be harder to determine.

5.4 Restrictions on Reallocation

In order for such welfare-enhancing mechanism to operate, the Water Law needs to allow the reallocation of water. However, from the discussion in Section 2 and the allocation rank in Table 1 (Articles 8 and 49 of the Water Law), it is not really clear if the water law permits the reallocation of water from smallholders to the private sector. Furthermore, it is also not clear that, if such reallocation is actioned, farmers would be entitled to receive compensation.

Likewise, the 6 basic principles, in the literal sense, do not provide any room for reallocation of water from smallholders to industry, even when industrial/non-commercial water use could be more beneficial and welfare enhancing. Principle 6 stipulates that the private sector can only be allocated with water "*apabila masih ada ketersediaan air*" (if there is an availability of water). It is also not possible for farmer groups to exchange (for money) some of their water quota to industry.

Therefore, in order to allow a fair water reallocation, the 6 basic principles will need to be reinterpreted, namely that reallocation should be allowed to the extent that it is fair and maximizes welfare In other words, if farmers are happy to receive less or no water in exchange of money, then it should be allowed – insofar as the social costs which may arise from such reallocations are taken into account.

VI. CONCLUSION

This paper has demonstrated that the 6 basic principles' strength is in providing value guidance in water conflicts over quantity (too little), between people, environment, state owned enterprises and the private sector. Nevertheless,

this comes with limitations – the 6 basic principles (and their implementation in Water Law) cannot really provide guidance for conflicts which arise from the same category of uses and users (for example between farmers for agriculture). The 6 basic principles offer little guidance to solve water conflicts which arise due to water quality (too dirty) or flooding (too much) or those which arise from spatial (both land and water) developments. One important limitation to the 6 basic principles is that they ignore economic productivity and inadvertently prohibits the reallocation of water from smallholders to industry – even when such reallocation is economically efficient and welfare-maximizing.

If another judicial review on Water Law is submitted to the Constitutional Court (CC) in the future, the CC should utilize teleological approach as outlined in this paper and revised the 6 basic principles accordingly. In addition, it is also better to extend the interpretation of the 6 basic principles into water governance as a whole instead of only water commercialization since non-commercial water use will still need to pay attention to environmental and human rights concerns.

In terms of implementation, the 6 basic principles should be interpreted teleologically in which, reallocation of water from low value uses to higher value uses must be allowed if it maximizes welfare and includes compensation of the donor party and internalizes any social costs. The procedures and regulation for a welfare-maximizing, democratic and accountable water reallocation in Indonesia is a subject for future research.

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Subject Index

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AUTHOR GUIDELINES

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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.

1. Manuscripts have to be written in English.
2. The translation of any foreign language in body text, footnotes, and bibliography need to be added (in a bracket) after the sentence/word in foreign language.

   Example:

   Foreign language in bibliography

   Corte Costituzionale Italiana [Italian Constitutional Court]. Sent. 194/2013 Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality] No. 194/2013 (July 17, 2013).

   Foreign language in footnote:

   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.

Foreign language in body text:

Therefore, the founding fathers of the Indonesian Constitution made the Negara Kesatuan [Unitary State] the central feature of the new Indonesian statehood, as it is set out most prominently in article 1(1)6 and 25A.

3. 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.
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9. 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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         1.1.1. Sub-sub-heading

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10. 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.

- It is typed by using Times New Roman 16, upper case, alignment: center text.

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- The identity covers the author's name, affiliation, and e-mail address.
- The name is typed under the title by using Times New Roman 12, bold, alignment: center text then put asterisk after the name.
- The content of the asterisk is about short explanation of the author(s), could be short biography (short bio) or gratitude, and placed in a footnote. Example:

Example of identity with the asterisk

INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

Theunis Roux*
The University of New South Wales (UNSW), Sydney, Australia
t.roux@unsw.edu.au

Example of the explanation of the asterisk:

of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

* Professor of Law at The University of New South Wales (UNSW) Sydney, former, Secretary-General of the International Association of Constitutional Law (IACL), and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.

- Font: Times New Roman, font size: 12, alignment: justify text, space: 1.5, margin: Normal.
- Total words: No more than 350 words.

IV. Keywords

- Preceded by the word "Keyword" in bold style (**Keywords**).
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- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

V. Body

The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/ aim of the article.
- **Method:** It is an optional section for articles which are based on research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
- **Conclusion:** This section is the most important section of your article. It contains the overall explanation of your article. It should be clear and concise.
- **Reference:** The paper needs to cover at least 10 articles from reputable journal. Our reference uses The Chicago Manual of Style (CMS).

  Consult to: http://www.chicagomanualofstyle.org/ https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide- 1.html.

- **Example of Table:**

TABLE 2. Real-world magnitudes of the relationship between tort reform and death rates

Tort reform	Annual death rates (%)	Number of deaths in 2000	Deaths across all years
Cap on noneconomic damages	−3.54	−333	−5,242
Higher evidence standard for punitive damages	−2.57	−982	−11,798
Product liability reform	−3.83	−1,267	−16,841
Prejudgment interest reform	−4.88	−647	−9,060
Collateral source reform			
Offset awards	+4.71	+938	+14,160
Admit evidence	+2.43	+294	+4,468
Net effect		−1,998	−24,314

Note: Values presented are average changes. These computations are based on the coefficients from the primary regression (table 3) and the average annual populations and average annual death rates in the states that had each reform. The sums of the individual reforms differ by one from the net effects owing to rounding.

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