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Comparative Constitutional Law from and within the Global South: challenges, prospects and hopes

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This is an adapted version of the Krüger Academic Keynote delivered at the annual conference of the World Comparative Law, 5 July 2024, at the Faculty of Law of the Humboldt University Berlin.[1]

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A. Introduction

For my remarks today I have opted to engage with the edited volume *Comparative Constitutional Law and the Global South* co-edited by Philipp Dann, Michael Riegner, and Max-

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1 This keynote speech is based on the following scholarly contributions: *Dinesha Samararatne*, Dimensions and Dilemmas: Public Participation in Constitution-Making in Post-War Settings, Indian Law Review 7 (2023), pp. 218-243; *Anna Dziedzic / Dinesha Samararatne*, Asking the Woman Question of Constitutions: Insights from Sri Lanka', World Comparative Law 56 (2023), pp. 127-152; *Dinesha Samararatne*, Resilience through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis, Asian Journal of Law and Society 9 (2022), pp. 1-25, *Dinesha Samararatne*, Gendering 'The Legal Complex': Women in Sri Lanka's Legal Profession, Journal of Law and Society 47 (2020), pp. 666-693; *Dinesha Samararatne*, From South Africa to Sri Lanka: Prospects of Travel for Transformative Constitutionalism, Asian Journal of Comparative Law 15 (2020), pp. 45-68; *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Global South and Comparative Constitutional Law, Oxford 2020; *Tom Daly / Dinesha Samararatne*, Democratic Consolidation & Constitutional Endurance Comparing Uneven Pathways of Constitutional Development in Asia and Africa, Oxford 2024; *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne,* Constitutional Resilience Beyond Courts: Views from South Asia, Oxford 2023; *Dilini Pathirana / Dinesha Samararatne*, The Colombo Port City Project: How Chinese Investment Interacts with Local Public Law, in: Matthew S. Erie (ed.), A Casebook on Chinese Outbound Investment, Cambridge 2025, pp. 133-155; *Dinesha Samararatne*, An Umbrella Body for Guarantor Institutions: A Necessary Condition or a Strange-Creature?, Journal of Comparative Constitutional Studies Comparative Constitutional Studies 2 (2024), pp. 292-314; *William Partlett / Dinesha Samararatne*, Redeeming the National in Constitutional Argument, World Comparative Law 54 (2021), pp. 461-484; *Tarunabh Khaitan*, On scholactivism in constitutional studies: Skeptical thoughts, International Journal of Constitutional Law 20 (2022), p. 547; *Adrienne Stone*, A Defence of Scholarly Activism' Constitutional Court Review 13 (2023), p. 1

im Bönnemann.[2] Through their intervention, the editors and chapter contributors to that volume have been effective in placing the Global South on the agenda for consideration by all of us with an involvement in the field of comparative constitutional law. In this lecture, I intend to respond to their invitation or call to undertake Comparative Constitutional Law *from* the Global South and hence the title of my talk – *Comparative Constitutional Law from and within the Global South: Prospects, challenges and hopes*. To develop and illustrate the points that I make today, I will draw on my published and ongoing academic work in addition to my own experiences as a person who lives and works in Sri Lanka. I ask you to bear with me because I intend to move across several domains, the intellectual, professional, political, and the personal, but I hope that you will eventually understand why I do so. I organise my remarks under five questions that emerge from the topic I have chosen for today. Through my answers to these questions, I aim to leave with you, some ideas for you to consider if we are to take the Global South on its own terms in our field.

I must begin by acknowledging the irony and poignancy of speaking about the Global South here in the city of Berlin in Germany. As with identity, the category of the Global South seems to attract study and debate outside of it rather than within. I remember sharing similar remarks with the students of an intensive class that I taught at the Melbourne Law School in Australia last year. Although I was living and working in the Global South, I left it behind physically, in order to teach about it. Germany as a geographical location for this discussion raises several questions, especially in this particular political moment. However, I will not go into those questions today. I will nevertheless, comment briefly on the *World Comparative Law Journal (WCL)*, the reason for our gathering and this conference. The World Comparative Law Journal is most likely the only journal that is explicitly committed to providing an academic platform for scholarship about the Global South in our field. This institutional commitment has provided me and many colleagues in different parts of the geographical Global South like me, a forum to publish their work and communicate their ideas to the rest of the world. To my mind, the WCL is a living example of the way in which the injustices of the uniflow of intellectual and financial resources from the Global South to the Global North, is being reversed. It is a worthwhile example to emulate when considering the ways in which we may respond to the epistemic injustices and inequalities that concern us.

I turn now to my questions. None of them are new but I hope that in answering them in a sequential manner today that I can provoke your thinking in a useful way. The questions are:

(a) What is the Global South?
(b) From the perspectives of the Global South what is Comparative Constitutional Law?

2 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Global South and Comparative Constitutional Law, Oxford 2020.

(c) In terms of doing Comparative Constitutional Law from the Global South – what are our challenges?
(d) What are our prospects? and
(e) What are our hopes?

I would like to venture further and share, in conclusion, some further but provisional thoughts, which I hope might be useful overall, as we continue to reflect on these questions in our work.

B. What is the Global South?

Thanks to the work done by so many others, today we have some compelling answers to the question: what is the Global South? When I co-taught a course titled 'Constitutionalism and the Global South' at the Melbourne Law School with Prof Cheryl Saunders, the familiar fault lines became clear very quickly. The case for identifying the Global South as a lens or category is familiar to this audience. This audience is further familiar with the limits to that lens or category. During the intensive course, we worked with different case studies each day, learning in that process, that the Global South is a general but useful term that can be used to point beyond the usual jurisdictions that are studied in our field to the understudied, ignored, or invisible jurisdictions.

It is a useful term that helps us to focus on research agendas that are identified based on ground-up theory for comparative constitutional law. It is a reminder that constitutionalism remains a heavily contested concept throughout much of the world and that unless we examine the life of diverse constitutions from a broader perspective, we will be limited in our truth-seeking exercise. The Global South may not be a discreet place or concept, nevertheless, it can be a *distinct* category. Factors that result in this distinctness include colonisation, lower levels of economic development, persistent challenges to constitutional governance, and being under-represented and under-studied as sites for theory building in comparative constitutional law. It is also a category which is temporary and shifting in nature. We now recognise it as a place for agenda setting for our field, but most importantly, it is a mode of thinking and orientation, one which constantly takes us back to fundamental questions about methods and methodologies in comparative constitutional law.

C. What is Comparative Constitutional Law, from the perspective of the Global South?

I intend, today, to take on some aspects of the intellectual challenge presented to us by the Global South critique in comparative constitutional law. But before I get to that, let me turn to my second question: what exactly is comparative constitutional law, from the perspective of the Global South? I would like to mention five points very briefly and then explain them

further in answering the questions about prospects and challenges for doing this type of work.

When doing comparative constitutional law from and within the Global South in the contemporary context, often, our first and primary task is that of description. The knowledge gap in the description of the Global South is so vast that nuanced description itself might be what we do for a long time – of single jurisdictions or of comparable ones.

Second is the daunting task of interpretation of similarity and difference. Histories, different types of humans, ecological diversity, and armed conflict are three domains which reminds us of how complex this task of interpretation can be. Located in and focussing on South Asia, I am humbled and often overwhelmed by this task of the interpretation of similarities and differences.

The foregoing challenges are intimately connected with the third and fourth challenges that I identify here. The different constitutional systems are part of an ecosystem, connected in different ways to each other and influencing each other across time and space. This is obvious in the case of some jurisdictions, like within South Asia, but perhaps less so when looking at jurisdictions like Sri Lanka and Burma. But the connectivity is there when one begins to look and is not limited to regional connections. Accurate description and interpretation will draw out those connections in the ecosystem of comparative constitutional law.

The fourth challenge is that in stepping out to study complex similarities and differences in the Global South demand we have to overcome or deal with some of the inherent limits to our discipline, the law. We experience, learn, and use the law within political boundaries of the state, which until quite recently were also referred to commonly as the nation-state. This nationalist methodology has a way of framing and limiting our approach, our imaginations, our expectations, and our methods in multiple ways. Recognising and being self-aware of such limitations can be difficult.

The related fifth and final challenge is that as constitutional comparativists, we are, almost inevitably drawn into constitutional politics, reform, and advocacy. This push and pull, too, has a direct and indirect impact on us. This push and pull have re-emerged today as a debate around what we describe as ‘scholasticism.’

D. What are the challenges of doing Comparative Constitutional Law from and within the Global South?

Having considered the meaning we attach to the Global South and having considered what we do when we do comparative constitutional law from and within the Global South, let me now turn to the third question - what are the challenges of doing comparative constitutional law from and within the Global South?

Description itself is a daunting challenge. Because so little is known about jurisdictions that are typically identified as belonging to the Global South, those of us with interest in such jurisdictions carry the intellectual burden of description. Much of our scholarly labour is taken up by this task. Unless and until there is sufficient familiarity with our histories

and contexts, the Global South will remain unknown, invisible, even exotic, and often - a place of lack. In discharging this burden, most of us carry the responsibility of presenting our jurisdiction to the 'rest of the world' – mediated and limited by the international language in which we communicate. It is an exercise of intellectual agency and is shaped significantly by our positionality and identity and therefore our politics – which might be hidden from our audience.

Because the state of knowledge in international languages on the Global South is poor, description remains a primary task, leaving less room, energy, time, opportunities or other resources for theory building in the Global South. Multilingualism within domestic legal systems adds another layer of complexity here. Consequently, we are at a nascent stage in responding to the call to take the Global South on its own terms and to engage in comparative constitutional law *from* the Global South.

Description of a single understudied jurisdiction can be difficult enough if your interest is in moving on to the analytical and theory building. However, when engaging in comparative constitutional law from and within the Global South, you may end up having to offer detailed description of most of the jurisdictions that you consider. Much more collective effort is needed, perhaps across generations, to reach the necessary levels of description, which will allow for other types of comparative work, for broadening comparison, and for contributing to theory building from and within the Global South.

If description is challenging in our context, what do we make of interpretation of difference or similarity of the understudied jurisdictions that we work with? Let me take two recent examples from my work. Thanks to the invitation and encouragement first by Dr. Asanga Welikala around 2015 and by Prof. Tarunabh Khaitan from 2018, I have been studying the emergence of guarantor institutions in Sri Lanka. What began as descriptive work evolved into critical scholarship on the prospects for a fourth or guarantor branch and on the corresponding evolution of the doctrine of separation of powers. For a while, I desired to reflect on some of these questions comparatively, particularly comparing Sri Lanka's experience with that of Nepal. The establishment of the Constitutional Council of Sri Lanka after the Nepali model in 2001 is an example of what we may call South-to-South borrowing.[3] In trying my hand at comparing these little-known developments in Nepal and Sri Lanka, in work in progress titled 'An Umbrella Body for Guarantor Institutions: A Necessary Condition or Strange-Creature?', I experienced the several prospects and challenges for doing comparative constitutional law from and within the Global South.[4] My efforts at attempting to learn about the developments related to the Constitutional Council of Nepal have had limited success. I have had no access to any original material that captures the

3 Coincidentally, another example of South-South borrowing is the statement of Directive Principles of State Policy, originally borrowed from Ireland and replicated across the Global South.

4 Since then, published as *Dinesha Samararatne*, An Umbrella Body for Guarantor Institutions: A Necessary Condition or a Strange-Creature?, Comparative Constitutional Studies 2 (2024), pp. 292-314

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debates or discussions on how or why Nepal designed and adopted an institution such as a Constitutional Council. My access to Nepali history has been limited to material published in English, and I have no access to voices on the periphery of Nepali constitutional politics. Ideally, I would spend some time in Nepal on a research grant to find answers to these questions. But I now work in a context where even basic resources for academic work are scarce, and access to an international travel grant seems unlikely, to say the least.

Another example is my effort at advancing the research agenda for comparative constitutional law within South Asia. The practical challenges of comparison within and from the Global South, abound. The challenge of accessibility arises at several levels. Challenges related to accessibility of material, accessibility of the critical accounts of history, and the accessibility of different perspectives or voices (due to language, power, identity politics, etc.) are only some examples.

Due to these limitations and due to limitations of our own training, the questions, issues, and answers that lie beyond law and legal institutions and more in history, politics, culture, etc., can remain inaccessible to those of us engaging in comparison in general. This limitation is even more significant when studying societies that have long histories and have experienced colonial disruption. At this stage of my career, it seems to me that in such societies, two aspects of the law are inescapable. One, the law is very much a result of the complex interactions of history, economics, culture, etc., and second, the law is entangled with these domains of history, economics, culture, etc. This was clear to me in exploring the significance of public participation in constitution making in post war societies such as Nepal, Myanmar and Sri Lanka. This realisation led me to conclude, in my article 'Dimensions and Dilemmas: Public Participation in Constitution-Making in Post-War Settings', that in postwar societies where a political resolution to armed conflict is absent, public participation in constitution-making will reflect social divisions and even exacerbate them and therefore is an exercise that involves significant risks.[5] Even if one acknowledges that these deep challenges and questions about the role of law are prominent in the Global South, we nevertheless have to confront and respond to the expectations placed on the law to offer solutions, design relevant institutions, regulate human behaviour, etc. In comparative constitutional law, these expectations include the containment of the exercise of public power, state reform to meet expectations of service delivery including social welfare, and the regulation of foreign direct investment.

Another example comes to mind here. Direct foreign investment through China's Belt and Road Initiative is a recent development in the South Asian region. In Sri Lanka, one of the initiatives in this project is the creation of the Port City – built on reclaimed land as an area purpose-built for attracting foreign investment to Sri Lanka. Together with my colleague Dr Dilini Pathirana, an expert in the law of foreign direct investment, we examined the Port City as it relates to the law of investment and public law. This work

5 *Dinesha Samararatne*, Dimensions and dilemmas: public participation in constitution-making in post-war settings, Indian Law Review 7 (2023), pp. 218-243.

is due to be published as a case study chapter titled 'The Colombo Port City Project'.[6] Two insights from that work are relevant here. One is the way in which political goals of states result in path dependencies for foreign direct investment for the investor state and home state. These path dependencies determine the extent to which the law, including constitutional law, guides or is *guided* by political goals. Second is the role the law is required to play within a context deeply entangled with economics, regional politics, and culture of political parties, among other factors. The application of constitutional norms and remedies for judicial review of state and non-state action related to such projects at the local level becomes a challenging and complex exercise in that context. Anecdotally I know that this is a concern in many parts of the Global South.

These complexities give rise to a further challenge - that of searching for concepts and frames that we can use to interpret developments on the ground. Allow me to take another example. In April 2022, Sri Lanka defaulted from its sovereign debt repayment. The crisis in Sri Lanka at this time was not only severe but undeniable. Fuel and cooking gas were scarce, and life had ground to a halt for most. The economic solution to this crisis was assumed to lie in another agreement with the International Monetary Fund (IMF). When this agreement was finally reached, it was the 17th time Sri Lanka had resorted to borrowing from the IMF to deal with a balance of payment crisis. In a chapter titled 'Economic Governance and Rule of Law Discourses: the Port City and the Economic Crisis' I have reflected on these developments from a constitutional law perspective.[7] The practice of entering into agreements with the IMF is not unusual for Sri Lanka or in the region. Based on such agreements, governments undertake law reform across several domains, including taxation, public service, and institutional reform of the Central Bank. Interestingly, the Constitution is silent about the way in which IMF conditionalities can be met, should be subject to judicial review, etc. This leaves me looking for concepts and frames that I could use to interpret constitutional developments that have taken place in relation to Sri Lanka's latest (and 17th) agreement with the IMF and I know that similar developments are taking place in jurisdictions across the region. In this chapter, I attempt to trace the rule of law discourses that are invoked in such contexts by domestic and international actors. This work has further led me to the idea of state capture and its relevance for constitutional law. Here too, I am struggling to identify appropriate concepts and frames that I can use to interpret this phenomenon in relation to constitutional law.

I hope these examples illustrate to you that conditions for doing comparative constitutional law that are more common in the Global South leaves us with the triple challenge of description, conceptualisation, and theory building. Almost always, this triple challenge in the task of comparison is compounded by a thread of urgency and a general environment

6 Since then, published as, *Dilini Pathirana / Dinesha Samararatne*, The Colombo Port City Project: How Chinese Investment Interacts with Local Public Law, in: Matthew S. Erie (ed.), A Casebook on Chinese Outbound Investment, Cambridge 2025, pp. 133-155.

7 *Dinesha Samararatne*, Economic Governance and Rule of Law Discourses (2023).

of weak value commitments to advancing constitutionalism by many constitutional actors. In some cases, research on some of these topics can be inhibited by threats to academic freedom and personal liberty.

Dealing with this triple challenge has become harder due to reasons related to legal education. What I am about to say is a generalisation. Legal education at the undergraduate level may equip us to study law as standalone doctrine but does not equip us well to study law in society. Many of the best law graduates of the Global South then obtain their postgraduate training overseas in some of the leading law schools of the world. At undergraduate and graduate level, material on constitutional law is dominated by scholarship from the Global North, and the discourse too is dominated in the same way. As noted by my colleague Tarunabh Khaitan, the dominance of the US-centric and long-standing debate on the legitimacy of judicial review is one such example. This dominance limits legal education and training in such a way that in order to deal with the triple challenges in comparative constitutional law from and within the Global South, much of the learning has to be unlearned. Individuals and institutions doing comparative constitutional law from and within the Global South have to discharge this intellectual burden.

In writing about these issues and in my efforts to undertake comparison from and within the Global South, I am confronted with another question. Who will listen, read, and engage with this type of work? My own experience is that much of the interest and engagement comes from my fellow colleagues who are almost always located in places of privilege in the Global North. They not only have the genuine interest and commitment to engage with this type of work but importantly also have the privilege of listening because they have the relative luxury of structuring their time. My wider readership too is often located in places of privilege in the Global North. When I write primarily in English and publish in journals and with publishing houses like Oxford University Press and Cambridge University Press, which publish behind paywalls, this realisation should not surprise me. I have had the honour and pleasure of being a co-editor with Tom Daly of an edited volume titled *Democratic Consolidation and Constitutional Endurance: Comparing Uneven Pathways in Constitutional Development in Asia and Africa*[8] and with Tarunabh Khaitan and Swati Jhaveri in publishing *Constitutional Resilience Beyond Courts: Views from South Asia*[9]. These edited volumes cover understudied jurisdictions and significant constitutional developments in the Global South. I know they make an important contribution to the field. However, this work is not accessible on multiple levels to those in the Global South, including in terms of language.

I have therefore been reflecting on this following question – how should I speak about my work in a way that makes sense to what I write about, where I work, and who I am?

8 *Tom Daly / Dinesha Samararatne*, Democratic Consolidation & Constitutional Endurance Comparing Uneven Pathways of Constitutional Development in Asia and Africa, Oxford 2024.

9 *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne,* Constitutional Resilience Beyond Courts: Views from South Asia, Oxford 2023.

Three different experiences have given me some sense for what matters and what ought to be done, but whether I in fact have the capacity or energy to follow through is a separate question.

The first experience is that of speaking with different communities of women and men who have been impacted by systemic violations of their human rights in Sri Lanka. Since I began my career in academia, I have had the opportunity to engage in fact-finding and report writing on several such issues. Learning about these experiences through firsthand accounts, articulated in our local languages by people from different walks of life, has been confronting, humbling, and traumatic too. But these experiences have made me realise that constitutional values and remedies matter deeply on a day-to-day level to so many.

The second experience I have in mind is the engagement with the broader public during moments of constitutional crisis which involves public protests, etc. Being able to do this with different ethnic communities from different regions has given me firsthand insight into the way in which identity can influence how we approach public issues. During the Constitutional Crisis of 2018 and during the people's mass protests of 2022 in Sri Lanka, civic engagement opened up space for discussions on constitutional law – a topic not often discussed in that way. The interest, the questions and push back I experienced on those occasions have given me insights as to the type of contestations that play out between the elite and non-elite in places like the Global South.

These experiences have made me realise that constitutional issues and ideas can and ought to be the subject of debate in the public square. As a scholar, I should ideally train myself more to be able to communicate and participate in such debates in the local languages, and most importantly, listen and learn.

The third experience, which is where I have the least experience, comes from my observations and study of how social movements lead to political action and public interest litigation. Through this experience, I have observed the way in which new or pressing questions are translated to constitutional questions and how people considered to be in the peripheries of constitutional politics invoke, defend, and seek remedies for the violation of constitutional values that have been criticised by others as being euro-centric in nature. It has also helped me to develop my understanding of the role that litigators, media, academia, etc., can play as enablers. My work on the legal complex in Sri Lanka in two different articles, 'Resilience through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis'[10] published in the Asian Journal of Law and Society and the article ‚Gendering 'The Legal Complex': Women in Sri Lanka's Legal Profession'[11] published in the journal of Law and Society, tries to explore some of these themes.

10 *Dinesha Samararatne*, Resilience through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis, Asian Journal of Law and Society 9 (2022), pp. 1-25.

11 *Dinesha Samararatne*, Gendering 'The Legal Complex': Women in Sri Lanka's Legal Profession, Journal of Law and Society 47 (2020), pp. 666-693.

Allow me to pause here to add a fourth reflection that relates not just to experience but to our existence too, which is about death. How do we live and do comparative constitutional law, from wherever we do it, in light of the certainty of death? I was first alerted to this question by Tarun, while on a walk late evening across the leafy parts of Parkville, Melbourne. The inescapability of this question confronted me, my co-editor Tom Daly, and many other colleagues when Julius Yam, who authored the chapter 'Constitutional Courts and the Exceptionality of Regime Change' for the volume on Democratic Consolidation and Constitutional Endurance, passed away earlier this year at a young age.[12]

I think about this question often and have much to say but will only say the following for now. First, the reality and unpredictability of our death should help us to be extremely selective about what we write and teach. It could very well be the last thing we do. Have we worked on what matters most to us? Second, it should free us from our intellectual, social, and financial shackles - to take risks and be bold. I say this as someone who is weak and often anxious about the consequences of my actions and my scholarship. Julius Yam's scholarship has outlived his beautiful life and the same will be true of us. His death has challenged me to strive to be more kind in my work and his work illustrates for me the power of the written word; it defies not only power but even time and to some extent, individual death.

So, I guess what I am trying to say here is that, even if my traditional academic work is conceived and published in a limited setting and reaches a limited audience, if I am doing comparative constitutional law from and within the Global South, I need to see this traditional academic work as one aspect of a more complex and dynamic process. For the avoidance of any doubt, I must note here that whatever a scholar does, research, teaching, and publication is foundational. Everything else that we do, must flow from that.

Before moving to my fourth question, I want to briefly acknowledge that this type of deeply contextual comparison has the effect of shifting our attention away from usual suspects, such as the United States, and in the case of the Global South, India and South Africa. This shift helps us to avoid pitfalls such as the narrow conceptualisation of liberal constitutionalism. However, it could have its own risks. It may lead to fragmentation, regionalisation, and a sharpened focus on contingencies. I often wonder whether this may lead us to a place where we no longer agree on universal general truths. The prospects of such a scenario unsettles and troubles me, but I will not explore that question today.

E. What are the prospects for comparison from and within the Global South?

Amidst all these challenges, what are the prospects for comparison from and within the Global South? This is the fourth question that I would like to pose today, and it has already been answered to some extent in discussing the challenges of doing comparative constitu-

12 *Julius Yam*, Constitutional Courts and the Exceptionality of Regime Change, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation & Constitutional Endurance Comparing Uneven Pathways of Constitutional Development in Asia and Africa, Oxford 2024, pp. 99–116.

tional law from and within the Global South. I am increasingly noticing that challenges and prospects are co-constitutive. It is these very challenges that create new prospects. But let me list them out briefly for the purpose of clarity:

(a) Comparison from and within the Global South allows for the framing of new questions on their own terms.
(b) Consequently, it allows us to move away from a narrative of lack or transgression in the Global South.
(c) We can use new material (case law, constitutional text, scholarly writing, etc.) untouched or underexplored in the Global South, thus far, in answering new but also old questions.
(d) We have the opportunity to listen to voices that have previously been ignored or silenced and learn from them
(e) When we approach comparison in this way, we are able to highlight continuities, discontinuities, diffusions, adaptations, and identify constitutional developments that are distinct to the Global South. Philipp Dann and others have shown us that this allows us to do the double turn, first to the Global North, and then to the field as a whole.
(f) In this way, we could have a second chance at seeking to interpret our problems and hope to deal with them more effectively.

Let me offer another example for you to consider. When I was working at Melbourne Law School, regular conversation with my colleague William Partlett led us both to see similarities and resonance across two jurisdictions that were unlikely comparators – Russia and Sri Lanka. Further exploration led us to write a paper titled 'Redeeming the National in Constitutional Argument' where we argued that the experiences in constitutional litigation in these jurisdictions reveal the ways in which political reasoning trumps constitutional text, values, and logic.[13] We argued that there are prospects for redeeming 'the national' in advancing constitutionalism by exposing this type of political reasoning and in insisting on taking the text and constitutional values seriously. Beyond the writing of this article, working on this piece collaboratively with William Partlett, a trained historian and lawyer, helped me to be more mindful of historiography and its contested place in comparative constitutional law. It also helped me to better understand the limits to the category of the Global South when placed alongside jurisdictions like Russia and regions like Central Asia.

13 *William Partlett / Dinesha Samararatne*, Redeeming the National in Constitutional Argument, World Comparative Law 54 (2021), pp. 461-484.

F. What are our hopes?

I would like to end by offering some reflections on the point about hope in relation to doing comparative constitutional law from the Global South, my fifth point for this evening.

When we approach comparison in the ways that I have described so far, we can hope for less incompleteness in our pursuit of truth in the procedural, substantive sense as well as in relation to actors and institutions. This approach makes comparative constitutional law as a discipline more familiar, relevant, and inviting to more academic communities and institutions. In effect, as Tom Daly and I argued in our introduction to the edited volume *Democratic Consolidation and Constitutional Endurance*, it creates more space at the table.[14]

Importantly, we can hope for minimising the harm caused by the insights, theory, and prescriptions offered by the discipline. For instance, in 'Asking the Woman Question of Constitutions: Insights from Sri Lanka', Anna Dziedzic and I argued that focusing on constitutional text or constitutional reform is an inadequate approach to the problem of discrimination against women.[15] We argued that in addressing women's substantive equality, constitutional actors should look beyond constitutional text and practice to proximate institutions, both state and non-state, such as religious institutions and the military. Similarly, in 'From South Africa to Sri Lanka: Prospects of Travel for Transformative Constitutionalism', I argued that invoking transformative constitutionalism across jurisdictions must be undertaken cautiously and cannot be limited to a call for the dynamic interpretation of the constitution by the judiciary.[16] The idea has a much broader implication not just for constitutional institutions but also for legal culture.

Doing comparative constitutional law from and within the Global South can hopefully reduce the prospects for harm through our work. We can have hope that prescriptions that arise out of our intellectual labour could provide more meaningful solutions and that our discursive accountability will be greater. However, this is possible only if we continue to maintain intellectual rigour, honesty, and humility in our work. There is much to be said about how that can or cannot be done in the Global South, but we will have to leave that discussion for another day. As a member of the editorial board of the Indian Law Review and the editor of the University of Colombo Review, a multidisciplinary journal, I am acutely aware of the challenges involved and do not want to err by romanticising academic publication in the Global South.

14 *Tom Daly / Dinesha Samararatne*, Decolonising Comparative Constitutional Law (and Democratisation Studies)?, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation & Constitutional Endurance Comparing Uneven Pathways of Constitutional Development in Asia and Africa, Oxford 2024, pp. 1-36.

15 *Anna Dziedzic / Dinesha Samararatne*, Asking the Woman Question of Constitutions: Insights from Sri Lanka', World Comparative Law 56 (2023), pp. 127-152.

16 *Dinesha Samararatne*, From South Africa to Sri Lanka: Prospects of Travel for Transformative Constitutionalism, Asian Journal of Comparative Law 15 (2020), pp. 45-68.

I also think that this approach to comparative constitutional law helps us to reverse the flow of intellectual and other resources, to some extent. There are obvious reasons as to why academic hubs for robust comparative constitutional law are located in the physical Global North. I am acutely aware of the insurmountable challenges of doing scholarly research in my own context and the irresistible temptation to escape, relocate, and re-imagine your life elsewhere. This is more acute for me now, given the challenges of the constitutional office I hold. If we agree on the need to undertake comparative constitutional law from and within the Global South, I know that more scholars will seek to relocate to the Global South or find ways of being a part of the Global South in a sustained way. More funding will reach institutions of the Global South. Academics and institutions alike will seek to get their hands dirty with the hard work of institution and capacity building. Last year, I was invited by the wonderful Prof. Marie Gren from University of Paris 1, Pantheon-Sorbonne for a project she had developed along such lines. The semi-presidential system in Sri Lanka was inspired by the French system. Marie and her colleagues were interested to learn about Sri Lanka's experience with the semi-presidential system, in order to interpret their own experience. This 'reverse' comparison epitomises much of what I have been trying to articulate today. Not only was that exchange intellectually generative but it has led to us, along with Eleonora Bottini and Olatunde Jhonson, to be successful in obtaining a grant to engage in a similar exercise, this time including the United States – not as a model exporting jurisdiction, but as one that will try to learn from the Global South.

This approach to comparison, I think, also helps in developing meaningful professional relationships, connectedness, and solidarity. My second academic home, the Melbourne Law School, and my colleagues there have exemplified this for me along with several other colleagues who abide by me and other colleagues like me. I stand here today because of similar efforts by Philipp Dann and Theunis Roux, who took the initiative to support my travel in ways similar to those of Rosalind Dixon, who sought to support me last year to participate in ICON-S in New Zealand. However, last year, even though I had the funding for travel, I could not participate in the conference as my visa to New Zealand arrived far too late. This experience illustrates another serious inequality that we face in relation to the Global South. For academics like myself, the issue is about the administrative, financial, and personal burden of applying for a visa and experiencing the indignities that accompany that process. But I do think that is entirely negligible in comparison to the countless who desperately seek to cross political borders because their bare existence is at risk.

Through missed deadlines, sometimes sharing incomplete work and through times of deep anxiety, I have had colleagues and institutions offer me support. But the picture I paint here will be an incomplete one, if I do not share with you the difficult compulsion I feel to remain in Sri Lanka, engage, try even when I fail and the deep satisfaction I feel when I am able to present in writing the intellectual insights I gather because of my positionality in Sri Lanka. My classroom may have minimum physical resources, but as we know, that does not limit the prospects for intellectual exchange and transformation within that space. Throughout my work, having the opportunity to witness the intellectual and professional

development of some of the students who take on the challenge of higher education has been one of my deepest joys.

I mentioned that a constant line of reflection in my head is about how I should speak about my work in a way that makes sense to what I write about, where I work, and who I am. It is not considered appropriate or proper to unduly personalise academic work, but again, when you speak from the Global South, because it is often understood as a place of lack, we are given the intellectual permission to do so. This is an indulgence that I gladly embrace because I think this a suppressed theme in our work that requires more frank intellectual probing.

To be honest, I do not know what it means to be *from* the Global South. It seems silly for me to say I am from the Global South when I have read for a postgraduate degree at the Harvard Law School and worked for two years at the Melbourne Law School. I have received numerous scholarships and travel grants from the Global North. In Sri Lanka, I live in Colombo, the most populous region, producing the most GDP. It is a place asymmetrical in access to political, economic, cultural, and intellectual resources. Because of my education and professional experience, even if I am not traditionally from an elite family background, I am less in the margins and more in the centre. I say less because there are times when I am unceremoniously placed in the margins. In any event, this reality illustrates for me the relative nature of the Global South and the limits to the Global South as a category.

In January 2023, I was appointed as an independent member of Sri Lanka's Constitutional Council. In doing this work, I am learning and experiencing what it means to have a seat at a constitutional table – literally and metaphorically. I am learning about the demands and burdens of exercising constitutional discretion and, I have observed, with a front row seat, the nature of political contestations. I have been challenged in articulating values and ideas that I have been working on – to a political audience. I am also learning about the challenges of facing litigation as a respondent when decisions of the Council are reviewed in courts. In that process, I am also learning about access to justice. Overall, I feel the burden of knowing the constitutionally valid decision to make in the constitutionally accepted way even when challenged in several other ways - and that burden feels heavy.

Since January 2023, within a typical day and week, I move from my reading and writing, to teaching, to my work on the Council, to sitting with my children to help with their school work, to housework, to rest, to deal with the financial struggles of living in a bankrupt country to travelling overseas to attend conferences. A wide range of emotions and intellectual tasks are covered in the process. The sense of conviction and purpose, laughter, and surprise coexists with fatigue, despair, anger, fear, and anxiety. Soon, I realised that there was no script or prescription for this position that I occupy. I also know that there are others like me and many others like us who have gone before us.

How should one work with individuals holding the highest constitutional office in the country, feed and provide for the man who turns up at your doorstep because he is in generational poverty and answer your student who questions the deeply problematic

governance in your land? How do you maintain an attitude of purpose and hope through it all? How do you bring those emotions, questions, and aspirations to your intellectual work? How do you reconcile the spaces of intellectual and physical wealth with the daily places of abject intellectual and physical poverty that you inhabit? When I drive to Parliament, where the Constitutional Council meets, often from my university to attend meetings of the Council, I pass places where people have been murdered or disappeared. I pass a war memorial, beggars at traffic lights, mansions, slums, heavy traffic. If there has been a protest on that day, I also pass water cannons, heavy police guards, luxury cars carrying one person, motorbikes carrying two adults and three children, I pass children getting back from school laughing and joking…

I ask myself – what does all of this mean to me, for who I am, for who I will be, for the children I raise, for the deep connection that I feel to my land and the people I see around me? But not just that, I also ask myself what all this can and should mean for doing comparative constitutionalism from and within the Global South? What I have tried to do today is to share some of those thoughts, and I hope that it carries some provocation as you reflect on your own journeys.

Judicial Concept of Religion in India: An Analysis of the Relationship Between Religion and Culture in Indian Supreme Court Jurisprudence

By *Darshan Datar*[*]

Abstract: Scholars and judges have disagreed on an appropriate judicial definition of religion. Notably, scholarship has argued that definitions of religion are either underinclusive or over-inclusive. While this line of scholarship has achieved a significant amount of attention, scholars are yet to question whether the judicial concept of religion is different in free exercise and non-establishment clauses. Due to the polytheistic nature of Hinduism and the wealth of case law which has emerged from the Indian Supreme Court on this question, this paper seeks to answer the proposed question in an Indian Context. Notably, this paper will argue that Indian judges have a broad concept of religion in free-exercise cases. Specifically, this paper will draw on sociological literature to argue that the concept of religion in free exercise cases is broad enough to cover theistic, polytheistic, non-theistic, and lived religions. Furthermore, I will argue that this broad and inclusive concept of religion is narrowed by judges in cases which concern the separation of church and state to privilege the majority religion of the country. I will argue that judges narrow the concept of religion through a process called judicial inculturation. Judicial inculturation is the process by which judges hold that religious symbols or practices are cultural as opposed to religious due to their links to the majority religion of the country. In this way, judges narrow the concept of religion to exclude the country's majority religion, such that prohibitions and restrictions on government action by non-establishment clauses do not operate.
Keywords: Secularism; Freedom of Religion; Indian Constitution

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A. Introduction

The Judicial Concept of religion has proved to be contentious.[1] The difficulty of outlining the necessary and sufficient features of religion is rooted in methodological dogma which has frustrated the scholarly endeavour of defining religion in law and the humanities.[2] Judges across the world, have acknowledged this difficulty and expressed reservations about the possibility of coherently outlining a judicial concept of religion through case law. Justice Ramaswamy of the Indian Supreme Court, for instance, observed that '[for] different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice.'[3]

While judicially defining a concept of religion has been difficult, the judicial concept of religion defines the scope of freedom of religion and the separation of church and state. For instance, scholars have noted that the judicial concept of religion can undermine the religious freedom of citizens by being underinclusive.[4] Underinclusive definitions of the concept of religion result in a series of religious citizens being ignored in freedom of religion cases. Accordingly, scholars have argued that underinclusive definitions of religion violate the rights of minorities who fall outside the rubric of the Abrahamic faith.[5]

A second way in which freedom of religion and the separation of church and state can be undermined is through overinclusive definitions.[6] As argued by Ronald Dworkin and Brian Leiter, overinclusive definitions undermine the universality of the legal system.[7] This criticism is specifically leveled against legal systems that allow for conscientious exemptions from general and neutral laws. In such legal systems, an overinclusive definition would undermine the universal applicability of law by providing several citizens with exemptions from generally applicable laws and correspondingly result in a reduction in the efficacy of the law. Additionally, overinclusive definitions of religion result in people

1 See generally, *Ronald Dworkin*, Religion Without God, Cambridge MA 2013; *Brian Leiter*, Why Tolerate Religion?, Princeton 2013; *Cecile Laborde*, Liberalism's Religion, Cambridge MA 2017.

2 *Cole Durham / Elizabeth Sewell,* Defining Religion, in: James A. Serritella et al. (eds.), Religious Organisations in the United States: A Study of Legal Identity Religious Freedom and the Law, Durham 2005, pp. 3-83.

3 A.S. Narayana Deekshitulu v State of AP, (1996) 9 SCC 548, 593-594.

4 *Peter Edge*, Law and Religion: An Introduction, Oxfordshire 2006, pp. 89-91.

5 *Alex Deagon*, Towards a Constitutional Definition of Religion, in: Brett Scharffs et al. (eds.); Freedom of Religion or Belief: Creating a Space for other Fundamental Rights and Freedoms, Cheltenham 2020, p. 92.

6 *Rex Adhar / Ian Leigh*, Religious Freedom in a Liberal Age, Oxford 2011.

7 *Dieter Grimm*, Conflicts Between General Laws and Religious Norms, in: Susanna Mancini / Michel Rosenfeld (eds.), Constitutional Secularism in an Age of Religious Revival, Oxford 2014.

committing fraud against the government by claiming to be religious and garnering the benefits of being religious without being religious.[8]

While scholarship has engaged with the impact of a judicial concept of religion extensively, a significant amount of research emerges from the context of the US Constitution.[9] Additionally, there is limited literature on how the judicial concept of religion in cases which implicate the separation of church and state impacts the content and nature of constitutional secularism.[10] Using the case study of India, this paper will attempt to partially address this gap in the literature. This paper will use the jurisprudence of the Indian Supreme Court to study the concept of religion to determine how the concept varies in the context of free exercise and cases which implicate the separation of chruch and state. In doing so, this paper will demonstrate that while Indian judges have a broad concept of religion in free exercise cases, judges narrow their concept of religion in cases which implicate the separation of Church and State. Accordingly, this paper will show that the narrower concept of religion in cases that separate church and state is used by judges to privilege the majority religion of the country by removing it from the regulatory ambit of the Indian Constitution's secularism principle.

Through this paper, I will draw on sociological literature on the relationship between religion and culture to argue that judges in India narrow the concept of religion in cases involving the separation of church and state to privilege the majority religion of the country by conflating the concept of religion and culture in a process I call judicial inculturation. In Part B, I will demonstrate that judges adopt a broad concept of religion in free exercise cases, which extends to recognising theistic, non-theistic, and atheistic belief systems and practices. In Part C, I will show that Indian judges narrow the concept of religion in non-establishment cases. To make this argument, this paper will first demonstrate that the text of the Indian *Constitution* institutes a principle that separates church and state in certain constitutionally specified areas of governance: education, cultural rights, and elections. Once this paper has clarified the scope and content of the Indian separation of church and state, I will demonstrate how judges narrow the concept of religion in non-establishment cases and further highlight the definitional strategies used by judges to judicially enculturate the Hindu faith.

On a methodological note, this paper will focus on India due to the pluralism of religion within the country. Specifically, religion in India is a source of great communal conflict, and a study of theology in India clearly illustrates the intersubjective nature of

8 *Edge*, note 4, p. 91.

9 See for instance, *Kent Greenawalt*, Religion and the Constitution, Volume 1: Free Exercise and Fairness Princeton 2006; *Kent Greenawalt*, Religion and the Constitution, Volume 2: Non-establishment and Fairness, Princeton 2006; *Dworkin*, note 1; *Leiter*, note 1; *Durham / Sewell*, note 2; *Cole Durham / Brett Scharffs*, Law and Religion, Aspen 2010.

10 *Laurence H. Tribe*, American Constitutional Law § 14-6, Eagan 1988, p. 1186; See contra, *Carl H. Esbeck*, The Establishment Clause as a Structural Restraint on Government Power, Iowa Law Review 84 (1998), pp. 1, 6-7.

religion.[11] For instance, cultural practices can be sacralised and assume religious meaning through community acceptance or legal classification.[12] Certain epics (the Mahabharata and the Ramayana) have achieved religious status in India through widespread community acceptance.[13] Conversely, religious practices can be enculturated through a community.[14] Inculturation is a strategy through which a community or an institution attaches cultural meaning to a religious symbol or practice.[15] Therefore, it is clear that in the context of the Indian Constitution, the concept of religion is particularly significant.

From this context, we can infer that the diversity of beliefs in India, particularly within Hinduism, has resulted in a rich body of case law that concerns the legal definition of religion in India.[16] Unlike in the European jurisdictions or the United States, India does not have a body of case law which focuses heavily on monotheistic, Abrahamic religions.[17] Instead, Indian case law deals with a polytheistic Hindu faith.[18] Due to the complexity noted by scholarship around judges dealing with non-Abrahamic religions, the jurisdiction is fertile ground to assess the impacts of the judicial concept of religion.[19]

B. Concept of Religion in Free Exercise Cases

Articles 25 and 26 collectively form the free exercise clauses of the Indian *Constitution*. Article 25 guarantees the right to profess, practise, and propagate religion and permits the state to regulate economic, financial, political, or other secular activity associated with religious practice and provide for 'social welfare and reform' of religious institutions.[20] Article 26 gives religious groups and organisations the autonomy to manage their own affairs. Article 25, which governs individual religious liberties, states that '[s]ubject to public order, morality, and health and the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and

11 *Tarun Khaitan* / *Jane Norton*, The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions, International Journal of Constitutional Law 17 (2019), pp. 1126–1128.

12 *Winnifred F. Sullivan*, The Impossibility of Religious Freedom, Princeton 2005, p. 167.

13 The Ramayana and Mahabharat are both in the category of sham religions which emerge from fictional stories. For a detailed assessment of sham religions. See generally, *Tom Cheung*, Jedism as a Religious Order, Oxford Journal of Law and Religion 8 (2018), p. 377.

14 *Oliver Roy*, Holy Ignorance: When Religion and Culture Part Ways, Oxford 2010, p. 65.

15 Ibid.

16 *Ronojoy Sen*, Articles of Faith, Oxford 2010.

17 *Rehan Abeyratne*, Privileging the Powerful: Religion and Constitutional Law in India, Asian Journal of Comparative Law 13 (2018), p. 370.

18 Ibid.

19 Ibid.

20 *Sen,* note 16.

propagate religion.'[21] Article 26, which governs group religious rights, states that '[s]ubject to public order, morality and health, every religious denomination or any section thereof shall have the right- (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion…; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.'[22] The Articles collectively protect free exercise of religion, in a manner which is similar to other constitutions and human rights treaties. The protection afforded to Indian citizens is analogous to both the *ECHR* and the US.[23] In the discussion that follows, I will argue that the Indian judges have a broad concept of religion in free exercise cases.

Before assessing the concept of religion in Article 25 and 26 cases, it is important to take a step back and briefly assess the nuances in the doctrine of Indian free exercise cases. In Article 25 and 26 cases, Indian judges typically follow a three-stage inquiry before holding that a religious belief, practice or symbol should be protected under the *Constitution*.[24] First, judges consider whether a religious belief, practice, or symbol fits within their concept of religion.[25] Second, judges evaluate whether the case concerns an expression of the religion in question which should be protected.[26] Finally, judges assess whether this religious practice, belief, or symbol must be limited based on public health, morals or the rights of others.

The aspect of Indian free exercise jurisprudence which has received the most scholarly attention is the second stage of inquiry executed through the essential practice test.[27] Specifically, we must engage with the scholarly perspective which contends that this test institutes a narrow theistic definition of religion.[28] For instance, Jaclyn Neo, writing on the use of the essential practice test in the jurisprudence of Singapore and Malaysia, argues that the essential practice test creates a narrow theistic definition of religion.[29]

21 Article 25 of the Indian Constitution.

22 Article 26 of the Indian Constitution.

23 Ibid.

24 *Rajeev Dhavan / Fali Nariman*, The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities, in: Kirpal et al. (eds.), Supreme but not Infallible: Essays in Honour of the Supreme Court of India, Oxford 2000, pp. 256-287

25 Ibid.

26 Ibid.

27 *Sen*, note 16; *Jaclyn Neo*, A Critique of the Definition of Religion and the Essential Practice Test in Religious Freedom Adjudication, International Journal of Constitutional Law 574 (2018), pp. 576-577; *Marc Galanter,* Hinduism, Secularism, and the Indian Judiciary, Symposium on Law and Morality, Philosophy East and West 4 (1971), p. 467; *Khagesh Gautham*, Protecting free exercise of religion under the Indian and the United States constitutions: the doctrine of essential practices and the centrality test, Vienna Journal on International Constitutional Law 305 (2014); *Matthew John*, India's Communal Constitution, Oxford 2023.

28 *Neo*, note 27.

29 Ibid., pp. 534-536.

Through this section, I will show that the Indian Supreme Court (the Court) does not use the essential practice test to narrow the definition of religion. Instead, it uses the essential practice test to determine what practices, rituals, or symbols constitute an essential part of a religion for free exercise protection.[30] Accordingly, the Court only protects essential religious practices and does not afford non-essential or peripheral practices any protection.[31]

A useful starting point to demonstrate the breadth, scope, and nature of the essential practice test is through an analysis of the *Anand Margis* case.[32] In this case, the Supreme Court clarified that the essential practice test limited the scope of protection afforded to religious communities. The Court specifically clarified that freedom of religion in India only protected religious practices which are essential to the religion.[33] The Court clarified that an 'essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief.'[34]

The Court follows a series of strategies to determine what a core belief is. The Court can first investigate what the religious community agrees upon as a core religious practice. In the case of *Yagnapurushadji*, the Court observed that:

> *"In cases where conflicting evidence is produced in respect of rival contentions as to competing for religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. The question will always have to be decided by the Court, and in doing so, the Court may have to inquire whether the practice in question is religious in character and, if it is, whether it can be regarded as integral or essential part of religion."*[35]

The second strategy that the Court follows is a theological reading of religious doctrine to determine when a practice is an essential part of a religion. This is clearly seen in the case

30 Ibid., p. 576.

31 Ibid., p. 577; See also *Gautam Bhatia*, Freedom from Community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism 351 (2016).

32 The Commissioner of Police v Acharya Jagishwarananda Avadhuta 2004 (12) SCC 782. See also Jagadishwaranand v Police Commissioner of Calcutta AIR 1990 Cal 336. This case is specifically significant as it arose out of an appeal by a previous decision rendered by the Calcutta High Court in which the High Court rejected the essential practice test by holding that 'if courts start enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be.'

33 The Commissioner of Polive v Acharya Jagishwarananda Ayadhuta, Ibid.

34 Ibid., p. 783.

35 Shastri Yagnapurushadji v Muldas Bhundardas Vaishya AIR 1966 SC 1119, p 1410.

of *Shariya Banoo,*[36] which constitutionally challenged the validity the 'triple talaq' as a legitimate form of divorce under Muslim law. The majority of judges used a reading of the *Quran* to determine that triple talaq was not an essential part of the Muslim faith. To make this decision, the Court held that '[in order to determine] what constitutes an essential part of a religion or religious practice has to be decided by the courts concerning the doctrine of a particular religion.'[37]

A third strategy adopted to assess an essential religious practice is when the Court determines whether a religious practice amounts to a secular or religious function of the denomination. In the case of the *Durgah Committee, Ajmer vs Syed Hussain Ali and Others*,[38] the Court held that:

> *"[In order for] the practices in question [to] be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form… Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself."*[39]

One visible way in which the Court uses the essential practice test is to differentiate between beliefs that are central to a religion and beliefs which are merely superstitious beliefs.[40] Such a classification has resulted in some scholars incorrectly arguing that the Supreme Court's use of the essential practice test creates a narrow essentialist concept of religion in free-exercise cases.[41] However, as I have demonstrated previously, the essential practice test is not an evaluative filter which defines a concept of religion. The essential practice test determines when a religious belief is protected and does not determine when a belief, practice, or symbol is religious.

The Supreme Court is conscious of the difference between a definitional filter and a filter based on the scope of protection given to religious beliefs, practices, or symbols. In the case of *A.S Narayana*, the Court observed that it was difficult to define religion. However, the Court argued that limiting the protection given to religions through the essential practice test was possible. The Court observed that:

> *"Even to different persons professing the same religious faith, some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what religion is and what are matters*

36 Shariya Banoo v Union of India (2017) 9 SCC 1.

37 Ibid., para. 105.

38 The Durgah Committee, Ajmer vs Syed Hussain Ali and Others 1962 SCR (1) 383.

39 Ibid., para. 13.

40 S.P. Mittal v Union of India 1983 1 SCC 1.

41 *Neo*, note 27.

> *of religious belief or religious practice. That is far from saying that it is not possible to state with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion, which is subject to legislation by the State limiting or regulating any activity – economic, financial, political, or secular which are associated with religious belief, faith, practice, or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive."*[42]

In this case, the Court held that the essential practice test amounted to a limitation on the scope of protection and not a definitional test. The Court held that the essential practice test allowed the government to regulate economic, financial, political, or secular activities of religion as they did not form a part of the essential parts of a religion. Therefore, the Court is more comfortable limiting the scope of religion through the essential practice test and refraining from using a narrow evaluative filter through a definitional test.

The Court has been clear in numerous decisions that the concept of religion in India is broad. In the case of *Indian Young Lawyers Association v State of Kerala*,[43] the Court held that '[religion] does not need to be theistic. It can also include persons who are agnostic or atheistic.'[44] The Court further clarified that the *Constitution* is 'meant as much for the agnostic as it is for the worshiper – it values and protects the atheist.'[45] Similarly, in the case of *Sharaya Bano*, Justice Nariman observed that: "'[r]eligion' has been given the widest possible meaning by this Court...,'[46] such that, "in this country... atheism would also form part of 'religion'."[47]

I. Broad Concept of Religion Based on Self-Identification, Including Theistic, Non-Theistic, and Atheistic Beliefs

One way the Court has expanded upon the features of the broad concept of religion in Article 25 and 26 cases is by emphasising an individual or group's self-identification to determine whether they are religious. Judicial deference to an applicant's self-identification

42 A.S. Narayana Deekshitulu v State of AP (1996) 9 SCC 548, pp. 593-594.

43 (2017) 10 SCC 689.

44 Ibid., para. 176.

45 Ibid., para .176.

46 Shayara Bano v Union of India, para. 24.

47 Ibid., para 24 The Court however continued to hold that the scope of protection, but one important caveat has been entered by this Court, namely, that only what is an essential religious practice is protected under Article 25.

towards a religion has been called the self-deferential approach.[48] The central insight of the self-deferential approach is that a group's self-identification as being religious should be the deciding factor in a court's decision as to whether a group is religious.[49] Durham and Scharff demonstrate how this approach is implemented through an example. They observe that '[t]he fact that Scientology regards itself as a religion should count heavily in favour of its being regarded as such by others, whereas the fact that Marxism would be distressed by being labelled as a religion should count against its being so treated.'[50]

The self-deferential approach uses religious adherent's self-identification as the single most determinative factor in assessing whether a belief is religious or not. However, this does not mean that the self-deferential approach does not impose any limitations on the concept of religion. Durham and Sewell argue that the self-identification approach should be subject to inherent limitations of the free exercise clause, which are the test of sincerity and protection against fraud.[51] Durham and Scharffs clarify that:

> *"Under the [self-identification] approach, the person making a religious claim must show not only that she sincerely believes what she claims to believe but that she sincerely considers this belief to be religious. Just as there is no reason to grant free exercise protection based on beliefs the claimant does not actually hold, there is no reason to give deference to a believer's definition of her beliefs as religious if she herself does not consider them religious. The second limitation inherent to religious freedom is the reverse side of the first, namely that claims of religiosity made for fraudulent or strategic reasons deserve no deference or protection."*[52]

Durham and Scharffs designed the self-deferential approach as a normative suggestion for courts to consider when deciding whether a belief was religious or not. The self-identification concept of religion best explains the Indian Supreme Court's concept of religious denominations, as the Court defers to the self-identification of adherents.

Evidence that the Indian Supreme Court has a broad concept of religion based on self-deference in Article 25 cases can be seen in the case of *SP Mittal.* In this case, the Court considered whether the belief in the teachings of the saint Shri Aurobindo were religious. In holding that the tenets of Shri Aurobindo's teachings were not a religious belief, the Supreme Court observed that '[e]veryone has a religion, or at least, a view or a window on religion, be he a bigot or simple believer, philosopher or pedestrian, atheist or agnostic. Religion, like "democracy" and "equality", is an elusive expression, which everyone understands according to his pre-conceptions.'[53] Additionally, the Court clarified

48 *Durham / Schraffs*, note 9.
49 Ibid.
50 *Durham / Sewell*, note 2, p. 38.
51 *Neo*, note 27.
52 *Durham / Scharffs,* note 9.
53 S.P. Mittal, note 39, para. 51.

that 'a religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being.'[54] Furthermore, the Court held that:

> *"A religion is not merely an opinion, doctrine, or belief. It has outward expression in acts as well… Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principles regulate the lives of men believing in that theistic, conscience, or religious belief that alone can constitute religion as understood in the Constitution."*[55]

From this series of judicial observations, it is clear that the Supreme Court considers any moral or ethical belief that a citizen considers part of their 'own' conscience or belief to be religious. Additionally, the Court considers any belief an applicant subjectively considers part of their spiritual welfare to be religious. As such, it is clear that the Court considers the subjective opinion of an individual as being determinative when considering whether a moral, ethical, or spiritual belief is religious for Article 25.

The terminological difference between Articles 25 and 26 resulted in the Court interpreting the phrase 'religious denomination' in Article 26 cases and not the word 'religion', as in Article 25 cases. The Court demonstrated that it is conscious that the words 'religion' in Article 25 and 'religious denomination' referred to in Article 26 are similar. The Court observed that: '[t]he words "religious denomination" in Article 26 of the *Constitution* must take their colour from the word religion.'[56] In the case of *S.P. Mittal*, the Court held that the term religious denomination is defined as 'a religious sect or body having a common faith, organisation, and is designated by a distinctive name.'[57]

Referencing the test to determine whether a religion amounts to a separate religious denomination, the Court later clarified that:

> *"There is no formula of general application [to test whether a belief is religious] ... [Religion is] primarily ... a question of the consciousness of the community, how does the fraternity or sodality (if it is permissible to use the word without confining it to Roman Catholic Groups) regard itself, how do others regard the fraternity or sodality. A host of other circumstances may have to be considered, such as the origin and the history of the community, the rituals observed by the community, what the founder, if any, taught, what the founder was understood by his followers to have taught, etc. In origin, the founder may not have intended to found any religion at all.*

54 Ibid., para. 51.

55 Commissioner, Hindu Religious Endowments, Madras v Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt [1954] AIR 282 cited in SP Mittal, Ibid., para. 15.

56 S.P. Mittal v Union of India, note 39.

57 Ibid., para. 65.

> *He may have merely protested against some rituals and observances; he may have disagreed with the interpretation of some earlier religious tenets. What he said, what he preached and what he taught, his protest, his distant, his disagreement might have developed into a religion in the course of time, even during his lifetime. He may be against religion itself, yet history and the perception of the community may make a religion out of what was not intended to be a religion, and he may be hailed as the founder of a new religion."*[58]

The Court's concept of a religious denomination also reflects concept of religion based on the self-identification of an adherent. The three-part test is based on a group's self-identification as different from other organised religions, emphasising the group's organisational structure and distinctive name. The requirements that a group have a distinctive name and an independent organisational structure indicates that the Court defers to the self-identification of an applicant in Article 26 cases to determine whether they are religious or not. Accordingly, the Court's concept of religious denominations or groups draws colour from the self-identification of a group in a manner similar to individual instances of free exercise in Article 25 cases.

II. Broad Concept of Religion Based on Acceptance of Practice, Rituals as Religion

The second way the Supreme Court broadens its concept of religion is through an express recognition that rituals and practices are religious.[59] In the case of *Shirur Mutt*, the Court held that:

> *"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines… but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion."*[60]

Accordingly, it is clear that the Court has a broad concept of religion, including religious practices and rituals that may not be part of the text of the religion.

A clear instance of the application of this broad concept of religion can be seen in cases which consider whether practices are Hindu. The Supreme Court demonstrates an extensive understanding of what is Hindu. The Court has held that Hinduism is the:

58 Ibid., para. 20.

59 *Gilles Tarabout*, Ruling on Rituals: Courts of Law and Religious Practices in Contemporary India, South Asia Multidisciplinary Journal 17 (2018), p. 1.

60 Sri Shirur Mutt, note 55, para. 17.

> *"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse, and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion. This definition succinctly brings out the broad distinctive features of the Hindu religion. Therefore, it would be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of the Hindu religion. It can be safely described as a way of life based on certain basic concepts referred to above It is the release and freedom from the unceasing cycle of births and rebirths; Moksha or Nirvana, which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Art. 25 has made it clear that in sub-clause (b) of cl. (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*[61]

For instance, in the *Satyasangi case*,[62] the Court had to consider whether Satyasangi, the followers of the religious leader Swaminarayan, were exempted from *the Bombay Harijan Temple Entry Act 1948* (*BHTEA*). The *BHTEA 1948* was passed to ensure that citizens from marginalised castes were given access to Hindu Temples as part of a sustained effort to purge independent India of caste-based discrimination.[63] The Satyasangi's claimed that the *Act* did not apply to them because they were a religious denomination separate from Hinduism. Independent of the central legal issue, the Court interpreted Articles 25 and 26. In his interpretation of Article 26, Justice Gagendragadkar held that the Swaminarayan sect was a separate religious sect connected with the Hindus and Hindu religion. Justice Gajendragatkar observed that:

> *"The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founder Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic forms. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views: but underneath that divergence, there is a kind of subtle*

61 Yagnapurushadji v Union of India, note 34, p. 1130.

62 Ibid., p. 1121.

63 *Sen*, note 16, pp. 6-7.

> *indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion."*[64]

From this, we can observe that the Court considered religions such as Buddhism and Jainism as a part of a broader concept of Hinduism.[65] While the Court was conscious of the significant differences between Hinduism and the other religions, the Court noted that there was a unity between the religions and Hinduism. In *obiter*, Justice Gagendragadkar further observed that:

> *"When we think of the Hindu religion, we find it difficult, if not impossible, to define the Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim anyone God; it does not subscribe to any one dogma; it does not believe in one philosophic concept; it does not follow anyone set of religious rites … [Hinduism] does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more."*[66]

Even though the Court found Hinduism was a way of life, it has consistently referred to Hinduism as the 'Hindu religion.'[67] This indicates that, even though the Court observed that Hinduism is a way of life, it continued to consider Hinduism as a religion.[68] Accordingly, the Court has decided that cultural practices could form a part of Hinduism for the purpose of Article 25 and Article 26 protection.[69]

Further evidence of the Court's broad concept of Hinduism which includes cultural practice, can be seen in the *obiter* of the case of *Adi Saiva Sivachariyargal Nala Sangam vs Government of Tamil Nadu.*[70] In this case, the Court clarified that:

> *"Hinduism, as a religion, incorporates all forms of belief without mandating the selection or elimination of any one single belief. It is a religion that has no single founder; no single scripture, and no single set of teachings. It has been described*

64 *Yagnapurushadji*, note 34, p. 1130.

65 Ibid., p. 1127.

66 Ibid., p. 1128; *Sen*, note 16.

67 *Ratna Kapur / Brenda Cossman*, Secularism's Last Sigh? The Hindu Right, The Courts, and India's Struggle for Democracy, Harvard International Law Journal 38 (1997); See also Shuganchand v Prakash Chand, AIR 1967 SC 506; Guramma v Mallappa, AIR 1964 SC 520. Prakash Chand and Mallappa, both demonstrate how the Court has also expanded the concept of the Jain faith to include a series of practices which do not form a part of the foundational beliefs of the religion.

68 Ibid.

69 *Sen*, note 16.

70 (2016) 2 SCC 725.

> *as [Sarvara] Dharma, namely, eternal faith, as it is the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate."*[71]

This further demonstrates that even though Hinduism lacks a text, the collective wisdom passed down through rituals and practices form a part of the Hindu religion. Further evidence can be found in the case of *Ganpat v Returning Officer*[72]. The Court held that:

> *"It is necessary to remember that Hinduism is a very broad-based religion. Some people take the view that it is not a religion at all on the ground that there is no founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism, through the ages, has absorbed or accommodated many different practices, religious as well as secular, and also different faiths."*[73]

In the *Ramakrishna Mission* case,[74] the Court further demonstrates how it uses a broad, capacious definition of Hinduism to include many different faiths under Article 25. This case emerged from an appeal of the Calcutta High Court's decision. The High Court held that the Rama Krishna Mission was a religious organisation separate from the Hindu Faith. The High Court observed that:

> *"The cult or religion of Shri Ramakrishna Paramahansadeb is that all beings are the manifestations of God and all religions are but different paths of reaching God… There is no necessity of one surrendering his own religion, be he a Hindu or a Christian or Muslim or Jew in order to be a follower of the cult or religion of Shri Ramakrishna… Thus in fact, Thakur Shri Ramakrishna preached a World Religion which is quite different from all other religions."*[75]

On appeal, the Supreme Court overturned the Calcutta High Court's decision and held that the Ramakrishna Mission formed a part of a broad concept of Hinduism. The Supreme Court rejected the characterisation of the Calcutta High Court and clarified that the Ramakrishna mission was a 'religious denomination [of the] Hindu religion.'[76] Drawing on the written work of Swami Vivekananda, the Supreme Court observed that 'the glory of Ramakrishna is that he preached and made his principal disciple Swami Vivekananda to preach the religion of the Vedanta which is the religion of the Hindus.'[77] From this

71 Ibid., 800 sic.

72 (1975) 1 SCC 589, para. 25.

73 Ibid., para. 11.

74 2 Calcutta L.J. (1983); AIR 1995 SC 2099. The initial case was before the Calcutta High Court. The case was later appealed to and heard by the Supreme Court of India.

75 Ibid., p. 348.

76 AIR 1995 SC 2099, p. 2107.

77 Ibid., p. 2103.

we can determine that the Supreme Court has a capacious concept of Hinduism, which emerges from Vedanta, that includes a series of rituals, practices, and beliefs. As we have seen throughout this paper, in certain instances, this inclusive understanding of Hinduism attributes religious significance to cultural practices which do not find any place in the foundational texts of Hinduism.

The expansion of the concept of religion to include practices and rituals means that spiritual organisations are included in the Court's concept of Hinduism and, accordingly, the Supreme Court's concept of religion. In light of this expanded concept of religion, I contend that the judicial concept of religion in Article 25 cases is broad enough to include 'lived religion'[78] as theorised by Winnifred Sullivan.[79] Relying on anthropological literature and situating herself in the US legal system, Sullivan argues that '[l]ived' religion shifts the focus to the local, a local that is increasingly transient. Integration happens temporarily and at the instigation of individuals and families, and even occasionally local congregations, but is spectacularly resistant to hierarchical control.'[80] A lived religion is 'religion that takes place beneath the radar of religious officials and institutions.'[81]

Through this study, anthropologists argue that the practice of religion, at a grassroot level, is very different from the doctrines of religions. Robert Orsi argues that communities, in some instances, attach religious symbolism to otherwise innocuous secular symbols.[82] For example, through a study of a Roman Catholic community in Brooklyn, Orsi discovered that community members had started to worship a 'grotto' in Brooklyn.[83] As described by Orsi, the 'grotto' did not have any features of a traditional grotto and was merely New York water flowing down rocks due to a broken pipe. However, Orsi determined that the community's worship of the 'grotto' was sincere, and the community truly believed it to be religious. From this study, Orsi concludes that a lived practice of religion involves the attachment of religious significance to otherwise secular cultural practices. Therefore, on some occasions, what from the outside looking in is a cultural practice is religious to the people who practise it.

Sullivan's description of a lived religion reflects a broad concept of religion that encompasses religious beliefs localised to a small set of individuals outside a religious organisation.[84] A concept of lived religion reflects the understanding that ordinary rituals can assume religious significance for people even without an organisational recognition of

78 *Sullivan*, note 12.

79 Ibid.

80 Ibid, p. 140.

81 Ibid, p. 19.

82 *Robert Orsi*, The Madonna of 115th St.: Faith and Community in Italian Harlem 1880–1950, New Haven 1995, pp. 4-5.

83 Ibid., p. 5.

84 *Sullivan*, note 12, p. 167.

the beliefs. Therefore, this concept of religion would include localised cultural practices and rituals within its ambit.

In light of this expanded concept of religion, I contend that the judicial concept of religion in Article 25 and 26 jurisprudence is founded on a lived concept of religion.[85] By holding that the practice of religion, through rituals and practices, is a central component of the judicial concept of religion, the Court has made it possible for cultural practices which are in furtherance of spiritual well-being to be considered religious. The Court has further indicated that they have a lived concept of religion by characterising Hinduism as a 'way of life', which reflects the culture of the Indian subcontinent. Even though the Court has described Hinduism as a way of life, they continue to protect Hindu practices and rituals under Articles 25 and 26. This demonstrates that the judicial concept of religion is broad enough to include cultural practices.

As a consequence of the judicial concept of religion encompassing a lived religion, the Supreme Court has recognised numerous subsects of Hinduism as being religious. Even when the Court has described Hinduism as a way of life, it continues to protect Hindu practices, rituals, and beliefs under Articles 25 and 26. This demonstrates that the judicial concept of religion is broad enough to include cultural practices.

C. The Judicial Concept of Religion in Non-Establishment Cases

I. Content of the Non-Establishment Principle in the Indian Constitution

To determine the definition of religion in non-establishment cases, we must first determine whether and to what extent the content of the Indian constitution supports the separation of church and state. Non-establishment is a specific form of the separation of church and state which ensures that government cannot establish a state church or endorse, through explicit or implicit policy, the doctrines of a specific religion. Judicial accounts of the concept of secularism in India are contested. The Supreme Court (the Court) has referenced a series of related concepts to explain the meaning of secularism. The Court has referenced equality and the equal treatment of all religions,[86] fraternity and the unity and diversity of the country,[87] and positive neutrality.[88] For instance, in the case of *S.R Bommai v Union of India*,[89] which was a case that considered the meaning of secularism under the Indian *Constitution*, the majority in the Indian Supreme Court could not agree on the content of the principle of secularism. In *Bommai,* Justice Pandian observed that '[Indian secularism means that] the state does not extend patronage to any particular religion, [the] [s]tate is neither pro [a] particular religion nor anti [a] particular religion. It stands aloof, in other

85 Ibid.

86 Aruna Roy v Union of India AIR 2002 SC 3176.

87 M Siddique v Mahant Suresh Das & Ors Civil Appeal Nos 10866-10867 of 2010.

88 SR Bommai v Union of India (1994) 3 SCC 1.

89 Ibid.

words, maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on the secular part.'[90] Additionally, the Court stated that 'secularism in the Indian context bears positive and affirmative emphasis…. Positive secularism believes in the basic values of freedom, equality and fellowship.'[91]

In other cases, the Court has held that secularism is the equal treatment of all religions. In the case of *M. Siddiq v Mahant Suresh Das and Ors,*[92] a bench comprising of eleven judges reaffirmed that '[t]he value of a secular constitution lies in a tradition of equal deference.'[93] The Court has clarified that the 'tradition of equal deference' differs from Western understandings of separation of church and state or *laicite*. In the case of *S.R. Bommai*,[94] Justice Jeevan Reddy held that:

> *"Secularism [in India] is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought, or it may be, as some say, an abiding faith with the Indian people at all points of time."*[95]

The Court further explained the tradition of equal deference by holding that 'the *Constitution* postulates [that] the equality of all faiths, [t]olerance and mutual co-existence nourish[es] the secular commitment of our nation and its people.'[96] However, once again, the judges cast their definition of 'Indian secularism' in abstract terms. The Court has not consistently clarified what it means by tolerance, mutual co-existence, and equal deference.

Finally, the Court has also held that secularism is the preservation of the unity and diversity of the country. In the case of *St. Xaviers v State of Gujrat*, Justice Ray observed that Article 30 was part of the *Constitution* because it preserved the unity and integrity of the nation-state. He held that:

> *"The [religious] minorities are given this protection under Article 30 in order to preserve and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and girls of our country … General secular education will open doors of perception and act as the natural light of mind for our countrymen to live in the whole."*[97]

90 Ibid., para. 182.

91 Ibid., para. 182.

92 Siddique, note 87; Bommai, Ibid.

93 Siddique, Ibid. para. 555; *Rajeev Bhargava*, Reimagining Secularism: Respect, Domination and Principled Distance, Economic and Political Weekly 48 (2013), pp. 79-92.

94 Ibid.

95 Bommai, note 88, para. 818.

96 Siddique, note 87, para. 800.

97 St Xaviers College v State of Gujarat 1975 SCR (1) 173, 673.

While each of these accounts posits a theory of Indian secularism, the Court has yet to develop a coherent framework which explains the concept thoroughly. In light of the significant judicial and scholarly disagreement on the concept of Indian secularism, we must look to the text of the Indian *Constitution* to determine the nature of Indian secularism. The Indian *Constitution* has some non-establishment tendencies in certain narrowly enumerated fields.[98]

The Indian *Constitution* did not originally reference non-establishment, secularism, separation of church and state, or *laicite*. However, in 1976, the 42nd Amendment to the Indian *Constitution* inserted the word 'secular' in the Preamble.[99] The Indian Supreme Court, which serves as India's final court of appeals, in *S.R. Bommai*,[100] noted that the *Constitution* had features that made it secular long before the 42nd Amendment.[101] In *obiter*, the Court observed that '[n]otwithstanding the fact that the words "[s]ocialist", and "[s]ecular" were added in the Preamble … in 1976 by the 42nd Amendment, the concept of secularism was very much embedded in our constitutional philosophy … By this Amendment what was implicit was made explicit.'[102] The Court further observed that independent of the insertion of the word secularism in the preamble, the Indian *Constitution* has a principle of secularism which emerges from the text and structure of the *Constitution*.[103]

Apart from the 42nd Amendment, the Indian *Constitution* clarifies the government's relationship with religion in several Articles.[104] As noted by Bhargava, a series of Articles can be seen as supporting the separation of church and state in certain narrow aspects of the Indian *Constitution*.[105] A harmonious reading of the *Constitution* allows us to determine its features. Four categories of Articles deal with India's state-church relationships. The first category includes Articles that give special rights to religious minorities and allow the state to promote religious practices and activities.[106] The second includes Articles that peripherally regulate religious conduct, predominantly through regulating the caste system.[107]The

98 Ibid.; Bhargava, note 93; See also, *Deepa Das Acevedo*, Secularism in the Indian Context, Law and Social Enquiry 38 (2013), p. 138.

99 *Abhinav Chandrachud* Republic of Religion: The Rise and Fall of Colonial Secularism, New York 2020.

100 *Abhinav Chandrachud* Secularism and the Citizenship Amendment Act, Indian Law Review 4 (2020), pp. 138, 139 -162.

101 Ibid.

102 Bommai, note 88, p. 1951.

103 In the case of Bommai*,* Ibid.

104 *Sen*, note 16.

105 *Rajeev Bargava*, Secularism, and its Critics, Oxford 2005, p. 25.

106 *Sen*, note 16, pp. 6-7.

107 *Rajeev Dhavan,* Religious Freedom in India, The American Journal of Comparative Law 35 (1987), pp. 209, 220-254; *Rajeev Dhavan*, The Road to Xanadu: India's Quest for Secularism, in: G.J. Larson (eds), Religion and Personal Law in Secular India: A Call to Judgment, Bloomington 2001, pp. 301-329.

third category deals with non-justiciable aspirational norms that aim to influence policy around law and religion.[108]

The second category of Articles deviates substantially from traditional non-establishment states. Articles 27- 30 give religious and cultural minorities a series of cultural rights in education and taxation.[109] The rights themselves do not impose a non-establishment obligation on the state. However, the limitation clauses do. Article 27, for instance, states that '[n]o person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.'[110] Article 28 states that '[n]o religious instruction shall be provided in any educational institution wholly maintained out of State funds.' Article 29 states that: '(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language...'[111]

This set of Articles prevents the government from endorsing a particular religion when granting aid and from providing religious instruction in state-funded educational institutions. Articles 27-29 clarify that the government is constitutionally prevented from establishing or endorsing any religion in the microcosm of educational rights. Therefore, it imposes a non-establishment obligation on the government, similar to countries like the US and France.

The third category of Articles peripherally regulates the relationship between the church and state. Article 17 claims to abolish the caste practice of 'Untouchability,' and Articles 14, 15, and 16 protect against religious discrimination by the government.[112] Articles 14-17 are a set of Articles that protect the right to equality in India. Collectively, the Articles attempt to eliminate intra and inter-religious discrimination in India. Critically, the Articles protect against one religion being discriminated against by other faiths and protect members of a religious community from facing caste-based discrimination from within the religious denomination.[113]

Finally, the fourth category of cases deals with the directive principles of state policy and fundamental duties in Part IV and V of the *Constitution*. Notably, Article 44 instructs the Indian 'state [to] endeavour to secure for the citizens a uniform civil code throughout the territory of India.'[114] Furthermore, Article 51A—part of a section of the *Constitution*

108 *Dhavan / Nariman*, note 24, pp. 256-387.
109 Articles 27-30 of the Indian Constitution.
110 Article 27 of the Indian Constitution.
111 Article 28 of the Indian Constitution.
112 Article 30 of the Indian Constitution.
113 *Bhargava*, note 93.
114 Article 44 of the Indian Constitution.

concerning citizens' fundamental duties—mandates that every Indian citizen 'promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious... diversities.'[115]

On an initial reading, the text of the Indian *Constitution* paints a picture of India as having some elements of a non-establishment state, which gives private religious institutions some special rights.[116] The Indian *Constitution* separates church and state in education, cultural rights, and elections. One major objection to this assertion is that India is a multi-establishment state because it gives minority religions special privileges by allowing for the differential treatment of religious citizens.[117] However, providing religious minorities with additional rights is not uncommon in non-establishment constitutions. For instance, even in the US, certain religious citizens can opt out of a generally applicable law, where it conflicts with their sincerely held beliefs. Additionally, the text of the Indian *Constitution* makes it clear that the Indian government cannot discriminate against religions, nor can it provide special benefits for one religion unless expressly allowed by the *Constitution*.[118] This indicates that the text of the Indian *Constitution* is non-establishment in nature as it cannot discriminate against non-adherents when endorsing a religion through differential treatment.[119]

In addition to the constitutional provisions that create a non-establishment principle, the Supreme Court has interpreted certain statutes to give them constitutional significance in Indian non-establishment cases. In the case concerning the *Ayodhya Temple,*[120] where the Court had to consider whether the demolition of a mosque to construct a temple in the name of Lord Ram was constitutionally valid, the Supreme Court clarified that statutes could act in extension to the *Constitution* to enforce India's commitment to secularism. Speaking about the *Places of Worship Act 1991*, the Court held that the statute:

> *"[I]mposes a non-derogable obligation towards enforcing our commitment to secularism under the Indian Constitution. Hence, the law is a legislative instrument designed to protect the secular features of the Indian polity, which is one of the Constitution's basic features. Non-retrogression is a foundational feature of the fundamental constitutional principles of secularism as a core component. The Places of Worship Act is thus a legislative intervention which preserves non-retrogression as an essential feature of our secular values."*[121]

115 Article 51A of the Indian Constitution.

116 *Bhargava*, note 93.

117 Ibid.

118 Ibid.

119 Ibid.

120 M Siddiq (D) Thr Lrs v Mahant Suresh Das & Ors., note 87.

121 Ibid., para. 82. (SIC)

The Court further observed that:

> *"The Places of Worship Act was enacted in 1991 by Parliament [to] protect and secure the fundamental values of the Constitution. The Preamble underlines the need to protect the liberty of thought, expression, belief, faith, and worship. It emphasises human dignity and fraternity. Tolerance, respect for and acceptance of the equality of all religious faiths is a fundamental precept of fraternity."*[122]

The Supreme Court uses the term non-derogable to suggest that constitutional secularism creates a duty for the government to enforce such statutes. Accordingly, they form an important part of the legal framework that clarifies the state's secular commitment. A statute with similar constitutional significance is the *Representation of Peoples Act 1951.* The *Representation of Peoples Act 1951* was enacted to prevent religious vote bank politics.[123] This obligation emerges from section 123 of the *Representation of Peoples Act 1951*, which states that:

> *[No candidate in an election can promote], or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate (...)*[124]

Therefore, Section 123 of the *Representation of Peoples Act 1951* attempts to prevent certain divisive rhetoric from being used in electoral campaigns. Accordingly, the *Act* prohibits electoral candidates, at a state and federal level, from promoting communal tension through an appeal to religion. In light of this, the Courts have held that any appeal to religion during an electoral campaign falls foul of the regulation created by the *Representation of Peoples Act 1951.* The Supreme Court has held that the broader purpose of the *Representation of Peoples Act 1951* is to ensure that Indian democracy is protected from candidates who campaign against the 'spirit of secular democracy.'[125] The Court held that the spirit of secular democracy is that 'candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions [based on religion].'[126]

Accordingly, the *Representation of Peoples Act 1951* separates church and state in the microcosm of electoral campaigns. Facially, it seems as though the *Constitution* and

122 Ibid., para. 82.

123 *Sen*, note 16.

124 *Ratna Kapur*, Gender and the 'Faith' in Law: Equality, *Secularism*, and the Rise of the Hindu Nation, Journal of Law and Religion 35 (2020), p. 35; *Kapur / Cossman*, note 67, p. 113.

125 Ziyauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra & Ors (1976) 2 SCC 17, p. 31.

126 Ibid., p. 31.

statutes related to secularism institute a non-establishment principle in India.[127] The *Constitution* separates religion from core governmental functions such as education, taxation, elections, and public funds. Considering this, it is clear that the text of the Indian *Constitution* has a non-establishment principle in certain enumerated fields.

II. The Judicial Concept of Religion in Non-establishment Cases.

Unlike in free-exercise cases where the Indian Supreme Court protects rituals and practices as being religious even if they have some cultural significance, the Indian Supreme Court narrows its concept of religion in non-establishment cases to exclude Hindu practices which it decides are cultural. To fully understand why this is the case, it is important to note that political developments in India influence judicial inculturation. Therefore, while it is empirically observable that Indian judges judicially enculturate the Hindu faith, the process of judicial inculturation in India is linked to the political landscape.

Thomas Blom Hansen notes that the politics around Indian secularism is increasingly creating a civic culture based on Hinduism.[128] Hansen notes that:

> *"The growth of the Hindu nationalist Bhartiya Janata Party and affiliated organisations in the 1990s, the seminal conflicts around the Babri Masjid, and the ensuing decade of pogroms and attacks on Muslims, in particular, changed the political landscape in India and its political common sense. Open Hindu majoritarianism and public abuse of minorities became more common and acceptable. There was no longer a tacit consensus around what public speech should look like, for instance. Still, however much the BJP attacked official secularism as hypocritical "pseudo-secularism" ... The force of the BJP's criticism was not that secularism was worthless as a public virtue but that the Congress and others were not secular enough in the Indian sense, in that they did not practice proper balance between communities and were accused of pandering to the minorities."*[129]

The BJP advocated for a strict separation of church and state with the primary agenda of stopping any benefits which minority religions were entitled to accrue through differential treatment and state aid.[130] A Hindu majoritarian agenda underpins their advocacy for separationism. The BJP rooted the criticism of Indian secularism in a Hindu nationalist ideology. Hansen observes that: '[T]he Hindu nationalist movement itself is structured

127 *Kapur / Cossman,* note 67; *Bhargava*, note 93.

128 *Thomas Blom Hansen*, Secular Speech and Popular Passions, in: Winnifred Sullivan (ed.), After Secular Law, Princeton 2011. For a more general account, see, *Mancini Susanna / Rosenfeld Michel*, Nationalism, Populism, Religion, and the Quest to Reframe Fundamental Rights, Cardozo Research Studies Research Paper, p. 617.

129 Ibid., p. 268.

130 *Shylashri Shankar*, Indian Secularism in a Comparative Perspective, India Review 2 (2010), pp. 43-58.

around a structurally homologous divide between those wedded to cultural activism as a means to consolidate the Hindu nation, and those favouring political and electoral mass mobilisation to the same end.'[131] At the heart of the Hindu Right's ideology is the belief that Hinduism is not a religion but a cultural way of life in the subcontinent.[132] Golwalkar, a thinker at the heart of the Hindu majoritarian ideology, wrote that:

> *"This great Hindu Race professes its illustrious Hindu Religion, the only religion in the world worthy of being so denominated; which in its variety is still an organic whole .... Guided by this Religion in all walks of life, individual, social, political, the Race evolved a culture which despite the degenerating contact with the debased "civilisations" of the·Mussalmans and the Europeans, for the last ten centuries, is still the noblest in the world."*[133]

Central to Golwarkar's idea is the assertion that Hinduism is a religion that has now formed a unique culture for a race of people.[134] More generally, the Hindu Right does not think of Hinduism as solely a religion.[135] Instead, many associated with the Hindu Right has consistently asserted that Hinduism is a culture that emerges from religion to unite an entire race of people.[136]

For this reason, the Hindu majoritarian agenda does not engage in a frontal attack on the non-establishment parts of the Indian *Constitution*.[137] Instead, it uses non-establishment to achieve its end of creating a Hindu majoritarian state.[138] By advocating for a separationist regime, the Hindu Right can privilege Hinduism while at the same time disadvantaging other religions. Because Hinduism is not considered religious, a separationist regime would not bar the privileging of Hinduism. The political movement started by the Hindu Right has resulted in an increased spate of litigation in front of the Supreme Court. Unfortunately, the Court has not been clear on the boundaries and meaning of Indian non-establishment and has enculturated the Hindu faith.

In this section, I show that Indian judges are enculturating the Hindu faith in non-establishment cases. Judicial inculturation is the process by which judges hold that religious symbols or practices are cultural as opposed to religious due to their links to the majority religion of the country.[139] In this way, the judges narrow the concept of religion to exclude

131 *Hansen*, note 128, p. 268.
132 Ibid.
133 *M.S. Golwakar*, We or Our Nation Defined, Nagpur 1939, p. 40.
134 Ibid.
135 *Kapur*, note 67.
136 Ibid.
137 *Hansen*, note 128.
138 Ibid.
139 Ibid.

the country's majority religion, such that prohibitions and restrictions on government action by non-establishment clauses do not operate.

One of the reasons judicial inculturation occurs in non-establishment regimes is that non-establishment clauses and principles aim to create a secular culture where the political sphere is religiously neutral. Religious neutrality is an obligation placed on the government by non-establishment clauses to entrench a form of political secularism.[140] When faced with non-establishment clauses, religious advocacy groups claim that a particular religion has unique ties to secular culture.[141]

This claim attempts to enculturate a religion into an otherwise secular culture. The process of inculturation has been noted outside judicial settings by Olivier Roy,[142] who states that dominant religions have been 'powerful machines for manufacturing culture.'[143] Roy concludes, 'even if societies become secularised, they still bear the cultural imprint of the founding religion.'[144] This argument is cognisant of the possibility that the majority religion of a country could be considered religious.[145] Accordingly, the recognition of the cultural meaning of religion 'with a view to calling attention to the ways in which majority religions shape social institutions and cultural patterns'[146] is central to the process of inculturation. Inculturation is a strategy that suggests that the majority religion is integral to forming culture within a particular territorial boundary.

In non-establishment cases, Indian judges enculturate the Hindu faith in two ways. First, the Court increasingly enculturates Hinduism into the concept of non-establishment. The Court indicates that Hinduism is the genesis of non-establishment and religious tolerance in India. In *Ismail Fauroque*[147], the Court held that the value underpinning secularism was tolerance. Building on this assertion, the Court praised Hinduism for its 'tolerant' doctrines. The Court observed that 'Hinduism is a tolerant faith.'[148] In several cases, the Court has held that the true meaning of Indian secularism is *Sarvara Dharma.* As noted in *Ismail Fauroque*, the term itself is derived from Hindu texts.[149] To justify this conclusion, the Court noted that: '[Hinduisms' tolerance] had enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find a shelter and support [in India].'[150]Accordingly, the Court cited the Vedas, a Hindu text, to emphasise a long

140 *Cecile Laborde*, Liberalism's Religion, Cambridge MA 2017.
141 *Roy*, note 14.
142 Ibid., p. 28.
143 Ibid., p. 65.
144 Ibid., p. 67.
145 Ibid., pp. 67-75.
146 Ibid.
147 AIR 1995 SC 605.
148 Ibid., para. 159.
149 Ibid., para. 34.
150 Ibid.

historical relationship between Hinduism and Indian secularism.[151] In light of this form of reasoning, it is clear that the Court has enculturated the Hindu faith by holding that constitutional secularism and Indian secularism are based on Hinduism.

In *Ismail Faruqui*, judges hold that Hindu values, notably tolerance, are the genesis of secularism and the equal treatment of all religions. Accordingly, the Court has treated a series of Hindu texts as the source of a constitutional provision. It has thereby enculturated the texts into the constitutional culture of India, giving the Hindu faith a cultural meaning by uniquely tying it to the history of Indian non-establishment and the text of the *Constitution*.

Enculturating Hinduism through the universal value of tolerance can also be seen in the case of *Aruna Roy*.[152] In this case, the Court clarified that Indian non-establishment is based on a principle of *Sarva Dharma Samabhav*, which translates to an idea of equality amongst all religions.[153] For instance, the *Aruna Roy case,*[154] which challenged the government policy of mandatory academic courses on 'education for value development'[155] (added into the compulsory syllabus by the BJP led coalition in 2000), was examined.[156] The petitioners took objection to a particular part of the proposal which stated that '[a]lthough [religion] is not the only source of essential values, it certainly is a major source of value generation. What is required today is not religious education but education about religions, their basics, the values inherent therein and also a comparative study of the philosophy of all religions.'[157]

The Court went on to observe that 'education about religions must be handled with extreme care … All religions, therefore, have to be treated with equal respect (*Sarva Dharma Sam[a]bhav[a]*) and that there has to be no discrimination on the ground of any religion (panthanirapekshata).'[158] The petitioner challenged this on the grounds that the state-funded study of religions violated the *Constitution*. The Court held that 'the real meaning of secularism in the language of Gandhi is *Sarva Dharma Samabhav* meaning equal treatment and respect of all religions, but we have misunderstood the meaning of secularism as …[the] negation of all religions.'[159]

The second way the Court enculturates religion is by holding that the endorsement of Hindu symbols is constitutional due to Hinduism's links to the history and culture of India.

151 Ibid., para. 159.

152 Aruna Roy v Union of India, 2002 (7) SCC 389.

153 *Sen*, note 16.

154 *Roy*, note 152, pp. 402-408.

155 National Curriculum Framework for School Education, National Council of Educational Research and Training, New Delhi 2000, p. 18.

156 Ibid., p. 19.

157 *Roy*, note 152.

158 Ibid., p. 407.

159 Ibid., p. 407.

In contrast to being 'religious', Hinduism is interpreted by the Court as a belief system that has cultural meaning. The Supreme Court ties Hinduism to the culture and history of India in a similar way. The Court articulates an understanding of Hinduism as an essential part of the philosophy and culture of India.[160]

One example of the Court enculturating the state endorsement of the Hindu faith (understood as including Sikhism) is in publicly funded educational institutions.[161] In a case which concerns the constitutionality of a government-funded institution running a course on the teachings of Guru Nanak, a religious leader of the Sikh faith being taught as a compulsory subject, the petitioner argued that a law that mandated the teaching of Guru Nanak's philosophy infringed upon Article 28(1),[162] the Court distinguished between religious instruction and the study of religions. The Court held that 'to provide for the academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilisations cannot be considered as making provision for religious instruction.'[163]

Furthermore, in a concurring judgment, Dharmadhikari, J held that 'the academic study of the teaching and the philosophy of any great saint such as Kabir, Guru Nanak and Mahavir were held to be not prohibited by Article 28(1) of the *Constitution.'*[164] Justice Dharmadhikari justifies this position by holding that the Indian concept of *dharma* does not reflect the concept of religion as understood in the West. According to him, the concept of *dharma* reflects the idea that 'different faiths, sects and schools of thought merely are different ways of knowing the truth.'[165] Therefore, Justice Dharmadhikari holds that *dharma* is a philosophy of different cultures. He observes that *dharma* is a way of 'approaching the many religions of the world with an attitude of understanding.'[166] He noted that this understanding of religion is essential to preserving shared identity in a religiously diverse country.[167] The Court's description of *dharma* reveals that it is not religious and is a philosophy. While it is apparent that Indian secularism allows for religious instruction, the Court has made it clear that it does not think that syllabuses based on some aspects of Hinduism are religious.

Another example of judicial inculturation is in election cases which emerge from the *Representation of People Act 1951*. Section 123 of the *Representation of People Act 1951* prohibits electoral candidates from making an appeal to citizens to vote on religious lines. Sub Section 3A. of the *Act* states that:

160 *Roy*, note 14.
161 *Roy*, note 152.
162 Ibid.
163 Ibid., para. 58.
164 Ibid., para. 80.
165 Ibid., para. 58.
166 Ibid., paras 58-59.
167 AIR 1996 SC 1130.

> *"[Causing] feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."*[168]

The Supreme Court has held that this provision was enacted to preserve the integrity of Indian secularism.[169] Section 123 of the *Representation of People Act 1951* regulates religious speech by candidates in an election so that religion does not influence the outcome of an election. This is facially in line with Indian non-establishment. Interpreting this section of the *Representation of People Act 1951*, Justice Bheg observed that:

> *"Section 123, sub-sections (2), (3) and (3A) were enacted so as to eliminate from the electoral process appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised political and social order … Under the guise of protecting your own religion, culture, or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories."*[170]

The position adopted by Justice Bheg indicates that a candidate can, under no circumstances, make an appeal to voters based on religion. However, this position was revised by the Indian Supreme Court in the *Hindutva cases*.[171] In the case of *Prabhoo*, the petitioner challenged a ban on election rallies being conducted by Bal Thackeray, the leader of a right-wing political party in Maharashtra. The petitioner alleged that Bal Thackeray was incorrectly banned from campaigning by the Election Commission. The petitioner claimed that Mr Thackeray had not appealed to religion in his speeches. Instead, the petitioner claimed that he had referred to culture. Writing for the majority, Justice Verma held that:

> *"Considering the terms 'Hinduism' or 'Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professions, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the discussions in earlier authorities of this Court… It is indeed very unfortunate, if in spite of the liberal and tolerant features of Hinduism recognised in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage."*[172]

168 Ibid. Emphasis added.

169 The Court held that the RPA was one of the acts which was enacted in extension of Indian Secularism.

170 Kultar Singh v Union of India, AIR 1975 SC 1788, p. 1794.

171 Ramesh Yashwanth Prabhoo v Prabharkar Kashinath Kunte, 1995 S.C.A.L.E. 1.

172 Ibid., p. 16.

Justice Verma justified this position by downplaying the religious significance of Hinduism in Hindutva. He held that 'the word "Hindutva" is used and understood as a synonym for "Indianisation", i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country.'[173] The Court held that the reason Hindutva was central to the uniform culture of India was because 'Hinduism, the religion of the majority of Indians, comes to reflect the way of life of all Indians'[174]

In this case, the Court articulates an understanding of Hinduism as an essential part of the philosophy and culture of India. By making this statement, the Court moves away from holding that Hinduism is a purely religious belief which, when invoked in an electoral campaign, can intimidate non-believers.[175] Instead, the Court conflated Hindutva with an inclusive understanding of Hinduism, which, in the Court's opinion, symbolised the culture of tolerance in India.

D. Conclusion

Given the recent rise of Hindu nationalism,[176] its sustained political appeal,[177] and its increasing legitimacy,[178] it is vital that we understand the different institutions that are complicit in its rise to prominence. Scholarship has given a lot of attention to the strategies adopted by the Indian executive to undermine secularism and promote the Hindu nationalist agenda. Additionally, scholarship has focused on how the Supreme Court has been complicit in allowing the executive to undermine secularism.

This paper attempts to flesh out a novel dimension of the role the Indian Judiciary has played in rise of Hindu nationalism. Notably, this paper focused on the role of the judicial concept of religion in the rise of the Hindu majoritarian project. This paper demonstrated that judges narrow the judicial concept of religion in establishment cases compared to the broad definition of religion in free-exercise cases to privilege the majority religion of the country. Judges narrow the concept of religion through a process called judicial inculturation. By inculturating the Hindu faith, judges allow for the state endorsement of Hinduism on a constitutional level by removing Hinduism from the regulatory ambit of Indian Secularism. As such, the Supreme Court rubber stamps policies designed to uniquely promote Hinduism over other religions.

173 *Singh*, note 170, p. 1131.
174 Ibid., p. 1131.
175 Ibid.
176 *Roy*, note 14.
177 Ibid.
178 Ibid.

From Colonial Paradise to the Subversion of Paradise: Decolonizing National Parks in Brazil

By *Clara Adão*[*] and *Raquel Coelho de Freitas*[**]

Abstract: This article addresses land legal conflicts in Brazil arising from the overlapping of protected areas with traditionally occupied territories. This legal practice is inspired by the American and European environmental protection models, which reproduce the idea of a colonial paradise through the creation of Parks with the objective of protecting environmental beauty, in violation of the rights and autonomy of traditional communities and indigenous peoples. To understand this legal conflict, the article introduces a critical and decolonial reflection on the foreign concept of colonial paradise as a legally protected area without human beings, seeking its correspondence in Brazilian environmental law, in order to expose the territorial exclusion that it promotes in the National System of Conservation Units. Next, the article focuses on the interpretation of the Resettlement Institute to argue that the conservation of environmental beauty and socio-biodiversity can be more efficient with the inclusion of indigenous traditional communities and indigenous peoples, and not their exclusion. The archaeological-paradigmatic research was carried out through bibliographic and documentary data collected at the Chico Mendes Institute for Biodiversity Conservation and the Ministry of the Environment. The research points out the need to subvert the ideal of colonial paradise whenever the overlapping of protected areas occurs in violation of the rights and autonomy of indigenous peoples and traditional communities.

Keywords: Colonial Paradise; National Parks; Protected Areas; National System of Conservation Units

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A. Introduction

Colonization in Brazil was conducted by a process of seduction to maintain colonial power in the conquest of new territories, establishing Europe as a model of development, knowledge, and aesthetics with strong environmental interference through a concept of

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natural beauty to be followed.[1] Thus, the colonizers became a mirror of civilization, social organization, and lifestyle, legitimized by an elaborate set of political institutions that also allowed for environmental exploitation.

A durable aspect of this imposition of colonial models can be observed in today's biodiversity conservation policy. It was the result of European countries[2] imposing a North American model of conservation in Brazil through international environmental policies.[3] This model of biodiversity conservation, rooted in the concept of wilderness and untouched nature, emphasizes preserving large areas of land in a pristine state, free from human influence. This approach, which emerged prominently with the establishment of Yellowstone National Park in the United States, advocates for creating protected areas that prioritize ecological integrity over human activities. The idea is to maintain these areas as "wilderness" where natural processes can occur without significant human interference.

Throughout its implementation, this model began to present some incompatibilities and challenges with the legal and social reality of Brazil, such as the overlapping of specially protected areas with traditionally occupied territories. The legal protection implemented in these territories was not guaranteed, as they were constantly threatened, and at times, concrete violations of the rights and autonomy of traditional and indigenous communities challenged their very existence.[4]

This North American model of biodiversity conservation reached even European countries, but inadequacies and territorial conflicts in the region forced them to review the biodiversity conservation policy in their jurisdictions.[5] Thus, the European Union decided to adopt a new conservation paradigm, based on a moderate environmentalism, which sought to make human experiences compatible with the environment.[6] However, in the context of foreign relations, the European Union continued to impose the American model

1 *Jessé Souza*, Subcidadania Brasileira: para entender o país além do jeitinho brasileiro, Rio de Janeiro 2018.

2 According to Dieugues and Ferdinand European countries that have significantly influenced ecological movements and environmental policies in Latin America include Britain, France, Germany, Spain, the Netherlands, Norway, and Sweden. It is worth noting that specialized literature often presents a broad contrast between Europe and the Americas without specifying which European countries are being critiqued. However, the historical context of these discussions generally suggests that the criticisms are directed at the European Union or Western European countries, see for instance *Antonio Carlos Diegues*, O mito moderno da natureza intocada, São Paulo 2001; see also *Malcom Ferdinand*, Uma ecologia decolonial: pensar a partir do mundo caribenho, São Paulo 2022.

3 *Maurício Waldman*, Meio Ambiente e Antropologia, São Paulo 2006.

4 *José Heder Benatti*, A criação de Unidades de Conservação em áreas de apossamento de Populações Tradicionais: um problema agrário ou ambiental? Novos Cadernos NAEA, Belém 1998.

5 *Clara de Oliveira Adão*, Parques Nacionais à brasileira: decolonização da beleza cênica em Unidades de Conservação, Revista da Faculdade de Direito 51 (2023).

6 *Joana Otero Matias*, Análise Comparativa de Modelos de Gestão de Áreas Protegidas em Países da União Europeia, Dissertação (Mestrado), Universidade de Lisboa, Lisbon 2022.

of environmentalism policies on Brazil and other countries in Latin America,[7] particularly when referring to the so-called colonial paradises.[8]

Consequently, European preservationist environmentalism insists on the privileged protection of colonial paradises in Latin America to the detriment of other territories of the same ecological importance and of traditional peoples and communities. The prioritization of untouched areas justified by the concept of colonial beauty generated two main orders of tensions in Brazil: first, there is a conflict in institutional politics, as past environmental policies that either threatened or encouraged environmental destruction have now shifted to the realm of international neoliberal economic policies, which impose severe and unequal environmental restrictions. Second, it has a socio-political and aesthetic nature since the populations most affected by this unequal policy are traditional communities and indigenous peoples, who directly depend on the natural resources of these spaces for their subsistence. As for aesthetics, this reflects the culture that is imposed in the way of thinking and protecting biodiversity, of exploring natural resources, in short, of transforming colonial paradises into politically selective environments, in service of the interests of the colony, and later, of capitalist economic exploitation.

In this context, it is important to understand that aesthetics and politics are intertwined. Political decisions about which environments, resources, or natural assets should receive legal protection as "restricted protected areas" often neglect traditionally occupied territories. It is an environmental policy practice justified in the dissemination of the idea of "lost paradise" that must be legally protected, particularly preventing people from living there. A paradise, after all, without human beings.[9]

Confronting this issue, which threatens communities and the environment, this study aims to critically analyze Brazil's biodiversity conservation model by focusing on legal provisions that prioritize protecting colonial paradises over traditionally occupied territories. The article begins by exploring the concept of a "colonial paradise" and its reproduction within Brazil's National System of Conservation Units. It then discusses territorial exclusion and the relocation of traditional peoples, as dictated by preservationist environmental policies aimed at protecting paradisiacal territories devoid of human presence. The analysis of the conservation of socio-biodiversity and the ethno-knowledge of indigenous peoples and traditional communities is developed in compliance with their constitutional rights, based on a decolonial approach to the construction of paradisiacal territories.

7 *Diegues* (note 2) illustrates that Latin America embraced the wilderness model quite early, in the late 19th and early 20th centuries, with the establishment of protected areas in Mexico, Argentina, and Chile even before Brazil.

8 *Diegues*, note 2.

9 *Ferdinand,* note 2.

Methodologically, this study begins with epistemic indignation[10] to challenge the prevalent discourse of colonization regarding the materiality of paradise in Latin America.[11] This discourse persists in Brazil, shaping legal and social imaginaries based on aesthetic assumptions, a theme explored throughout this work.

The research method is archaeological-paradigmatic, drawing on Agamben's[12] insights, viewing the legal system itself as a discursive practice—both in its explicit laws and its omissions.[13] This approach focuses on the paradigmatic analysis of law and how its provisions impact traditional communities and indigenous peoples. Thus, it examines the enduring image of a colonial paradise in Brazilian Environmental Law, influencing the current National System of Conservation Units.

B. What is Colonial Paradise?

According to Sarah Aoun,[14] the concept of colonial paradise is inspired by the original paradise described in the Bible — a fertile and beautiful garden abundant with water and diverse flora, fostering communion between humans, nature, and animals. This idea, later seen as a lost paradise, motivated Spanish explorers to seek similar lands in the Americas, believing they would find this utopia. Malcom Ferdinand[15] points out that Christopher Columbus, in his reports to the Spanish crown, believed he had discovered this paradise due to the lush landscapes and the docility of the natives, mirroring the

10 According to *Freitas* and *Nóbrega* "indignation is understood as a sociopolitical feeling-thinking-acting against situations of social and cognitive injustice, resulting from the hegemonic political project of modernity, of denial of rights to subordinated social groups, expanding new theoretical and methodological possibilities for understanding these groups", see *Raquel Coelho de Freitas / Luciana Nogueira Nóbrega*, Indignação epistêmica e descolonização do conceito de minorias, Revista Direito e Práxis 14 (2023), p. 4.

11 *Raquel Coelho de Freitas*, Indignação e conhecimento: para sentir-pensar o direito das minorias, Fortaleza 2020.

12 Agamben expands Foucault's archaeological approach by introducing the notion of "paradigm". He argues that paradigms are fundamental structures that determine the ways of thinking and acting at a given time, playing a central role in the construction of power relations and the establishment of norms and categories of thought. Therefore, Agamben 's archaeological-paradigmatic method proposes an in-depth analysis of historical discourses and underlying power structures, seeking to identify the paradigms that shape society. As this is an archaeology based on paradigms, it is possible to analyse legal institutes and what they represent in a given historical period. In legal research, this method is appropriate when treating law as a set of discursive practices, whose legislative statements can be analysed as a reflection and consequence of social practices. In this research, the National System of Conservation Units is analysed, in its discourse, as a reproduction of the ideal of colonial paradise, a concept that explains the paradisiacal vision that the colonizers had of the conquered lands, see *Giorgio Agamben*, Signatura rerum: sobre o método, São Paulo/ Boitempo 2019.

13 Ibid.

14 *Sarah Aoun,* A procura do paraíso no universo do turismo, Campinas 2001.

15 *Ferdinand*, note 2.

biblical myth of human-nature harmony. Sergio Buarque de Holanda[16] adds that Portuguese explorers shared a belief in finding Eden-like lands upon arriving in Brazil. The encounter with the Americas' picturesque landscapes reinforced the perception of paradise, shaping hierarchical colonization policies based on natural resource exploitation and subordination to European centers. This led to a colonial habitation model marked by dependency on the metropolis, environmental exploitation, and epistemicide—rejecting cohabitation with existing cultures. It consists of the "refusal of the possibility of inhabiting the Earth in the presence of another".[17] Richard Grove[18] discusses how tropical islands were often viewed as idyllic landscapes, embodying the idea of a paradise that was ripe for exploitation and transformation. The portrayal of tropical regions as paradisiacal allowed colonizers to justify their expansionist endeavors. They believed they were bringing civilization to these "untouched" lands, which they viewed as needing European intervention and development. This romanticized view provided a moral rationale for their actions, framing colonization as a benevolent mission.

Moreover, the idea of paradise fuelled the desire to exploit the natural resources of these regions. Colonizers sought to extract valuable commodities, under the belief that they were enhancing the economic potential of these "Edenic" landscapes. This exploitation often came at the expense of the local environment and indigenous populations. Additionally, the cultural narratives surrounding paradise contributed to a perception that colonization was a means of preserving and enhancing the beauty of these lands. Such narratives frequently ignored the adverse effects on indigenous peoples and ecosystems, presenting colonization as a positive force.[19]

Colonizers viewed the new territories as wild and dangerous, and for that reason justified deforestations as a means of domestication. This policy contrasted sharply with the indigenous peoples' sustainable practices, resulting in biodiversity loss and genocidal actions aimed at seizing land. While the social organization of the native peoples of the Americas was based on harmony with nature, even though they cut down trees in their agricultural practices, the colonial occupation policy made the felling of trees a priority condition for their settlements.[20]

> *"[U]nable to grasp intellectually the magnitude of their discovery, the Portuguese stumbled through half a continent, driven by greed and righteousness, unmoved*

16 *Sérgio Buarque de Holanda*, Visão do paraíso, São Paulo 2010.

17 *Ferdinand*, note 2, p. 50.

18 *Richard H. Grove,* Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600–1860, Canberra 1996.

19 Ibid.

20 *Ferdinand*, note 2.

> *by pity or even curiosity. The magnificent Atlantic Forest left them unmoved and uncomprehending."*[21]

In addition to the destruction of fauna and flora, leading to significant loss of local biodiversity, colonial enterprise was characterized by genocidal policies that exterminated entire populations with the aim of occupying territories.[22] According to the survey conducted by Brazilian Institute of Geography and Statistics (BIGS), the Brazilian indigenous population in 1500 was estimated at about three million; by around 1650, this number had drastically dropped to 700,000 indigenous people; not to mention the 650,000 indigenous people, from at least eighteen ethnicities, who were extinct.[23]

Despite the devastation of nature and genocide, the colonial paradigm of paradise persisted,[24] supported by the idea of preservation to justify the exploitation of primitive paradisiacal lands during colonization, and more recently, to implement tourism. This has resulted in a landscape that excludes indigenous and traditional inhabitants, perpetuating the vision of an uninhabited territory. These were territories not intended to foster belonging or reciprocity between the land and those who appropriated it but rather spaces devoid of human beings – an invented paradise rooted in extractivism, frontier politics, extermination, and epistemicide[25].

On the other hand, the materiality of paradise persisted in the colonial imagination, becoming the paradise of Westerners while the new territory turned into a hell for indigenous peoples through the colonization of their lands. The colonial paradise thus became a space of recognized scenic beauty that displaced its indigenous inhabitants to accommodate visitors.

The horrors and devastation wrought during colonization were not sufficient to prompt the establishment of norms to protect nature and its inhabitants. According to Engels,[26] it took the degradation affecting the European bourgeoisie during the Industrial Revolution in England before environmental issues began to be addressed legally.

Initially formulated at the end of the 19th century and the beginning of the 20th century in Europe, foreign environmental legislation did not align with the realities of newly inde-

21 *Warren Dean,* With Broadaxe and Firebrand: The Destruction of the Brazilian Atlantic Forest, Berkeley 1995, p. 10.

22 *Marcelo Grondin / Moema Viezzer*, Abya Yala: genocídio, resistência e sobrevivência dos povos originários das Américas, Rio de Janeiro 2021.

23 Appendix: Statistics from 500 years of settlement, see Brazilian Institute of Geography and Statistics (IBGE), Brazil: 500 years of settlement, Rio de Janeiro 2000.

24 *Ferdinand* (note 4) describes that in addition to the genocide of indigenous peoples and the destruction of ecosystems, a true matricide took place in the colonies, which consists of the "de-indigenation" of the landscape and the institution of an aesthetic of repetition, with monoculture and exploration. Thus, they are colonial violence of various kinds, both environmental and genocidal and altericidal. There was an erasure of other possibilities of existence.

25 Ibid.

26 *Friedrich Engels*, A situação da classe trabalhadora na Inglaterra, São Paulo 2010.

pendent Brazil. The country was predominantly rural and agrarian, facing land conflicts due to the entrenched inequalities of large landholdings. In addition, the integration of newly freed black workers presented additional challenges, such as the lack of access to land and resources, widespread racial discrimination, limited economic opportunities, and inadequate social support systems. Freed black individuals often faced barriers to acquiring property and finding stable employment, and many were forced into precarious and exploitative labor conditions, perpetuating cycles of poverty and marginalization.[27] These Brazilian socioeconomic conditions contrasted sharply with European developmentalism, which was driven by economic exploitation and the slave regime in the Americas. These disparities meant that Brazil had much to address before adopting the environmental standards that were already in place in Europe.[28] Throughout the 19th century,[29] Brazil had only sporadic laws governing the exploitation of natural resources and their aesthetic values.[30] A more comprehensive legal framework for environmental protection emerged in the mid-20th century, influenced by post-World War II[31] developments and international pressures.[32]

Although environmental issues were part of the restoration policies in European countries, in Brazil, environmental discussions were not among the main political issues, which delayed the development of a legal framework that respected its people's idiosyncrasies and territory. Brazilian environmental regulations largely emerged due to intense pressure from European and Latin American countries, driven by the realization of the finite nature of natural resources. This pressure[33] compelled Latin American countries to adopt environmental concerns or face economic embargoes.[34]

The fact is that the reception of environmental legislation in Brazil, despite the many incompatibilities it presented with local realities, was significantly influenced both by

27 *Grondin / Viezzer,* note 22.

28 *Waldman*, note 3.

29 *Georgette N. Nazo* / *Toshio Mukai*, O direito ambiental no Brasil: evolução histórica e a relevância do direito internacional do meio ambiente, Revista Direito Administrativo 223 (2001), pp. 75–104.

30 As brought by Nazo and Mukai, in the 19th century, although there was no specific environmental legislation, through the Penal Code of 1830 there was a penalty for illegal logging; there was Law No. 601 of 1850, also called the Land Law, which required the registration of all lands; In 1862, the Tijuca forest, in Rio de Janeiro, was reforested. At the end of the 19th century, the 1891 Constitution provided for the power to legislate on mines and land (Ibid.).

31 The context for formulating the National System of Conservation Units was this post-war alarmist environmentalism, which led Brazil to establish a system of strictly protected areas, with a recruitment of environmental laws.

32 *Édis Milaré*, Direito do ambiente: a gestão ambiental em foco – doutrina, jurisprudência, glossário, São Paulo 2009.

33 *Waldman*, note 3.

34 This leads to a resurgence of environmental law, which generates conflicts with traditional peoples and communities. Although it is indeed important to protect ecosystems, the view that this must necessarily be done by mitigating human actions is a colonial agenda and harmful to the maintenance of the ways of life of indigenous and traditional peoples.

external imposition and by the belief that the conservation policies of Europe and the United States were superior to those that could be developed locally by Latin American countries. According to Freitas[35], this tendency to replicate legal and institutional models from these regions can be understood as part of the colonization of legal knowledge.

Raquel Coelho de Freitas argues that the adoption of foreign legal and institutional frameworks in Brazil reflects a broader pattern of intellectual and cultural colonialism[36]. This process involves the importation of European and North American legal concepts and environmental policies, which are often applied without sufficient adaptation to local contexts. This imposition of external models is rooted in a belief in their inherent superiority and efficiency, disregarding the unique environmental, social, and economic conditions present in Brazil. Consequently, this practice not only marginalizes local knowledge but also reinforces a dependency on Western legal paradigms.

In the context of Malcolm Ferdinand's[37] concept of paradise, this dynamic becomes even clearer. This author critiques the creation of idealized environmental spaces, which often emerge from colonial and post-colonial contexts. These spaces are typically designed according to foreign ideals and standards, which can lead to the exclusion and marginalization of local populations. The establishment of such paradises frequently involves the prioritization of environmental conservation over the rights and needs of indigenous and local communities. In conclusion, colonial paradise is thus founded on the forced displacement of peoples from their territories, resulting in deep injustices and dispossession.

I. The Coloniality of Brazilian Environmental Law

The modern concept of environmental law, shaped by a Eurocentric perspective, is based on the idea that nature exists separately from humans and requires protection from exploitation. This view has caused significant harm to ecosystems and Indigenous communities, influencing current environmental governance and reflecting a colonial legacy.[38]

In Brazil, the evolution of environmental law was gradual and fragmented, with a utilitarian and anthropocentric approach dominating for a long time.[39] A paradigm shift occurred in the late 20th century with the enactment of Law 6,938, which established the National Environmental Policy and adopted a more holistic view of nature.[40] This was the

35 *Freitas*, note 11.

36 *Freitas / Nóbrega*, note 10, pp. 1742–1770.

37 *Ferdinand*, note 2.

38 *Diegues*, note 2.

39 *Talden Farias / Francisco Seráphico da Nóbrega Coutinho / Geórgia Karênia Melo*, Direito Ambiental, Salvador 2015.

40 *Antonio Herman Benjamin*, Constitucionalização do ambiente e ecologização da Constituição brasileira, in: José Rubens Morato Leite / José Joaquim Gomes Canotilho (eds.), Direito Constitucional ambiental brasileiro, São Paulo 2008.

result of ecological struggles that aimed for both effective environmental protection and environmental justice.

The Brazilian Constitution of 1988 also mirrors this struggle for environmental justice by ensuring territorial rights for Indigenous and quilombola communities, recognizing their traditionally occupied lands as an existential right. However, the implementation of these guarantees often faces challenges from development projects that prioritize economic exploitation, such as mining and agriculture, which overlook the rights of these communities. Another critical issue is that the legislation often fails to align with these principles of territorial rights. This discrepancy creates conflicts between environmental protection and the preservation of traditional ways of life.[41]

The Constitution also incorporates environmental rights, creating a dedicated chapter for environmental protection that asserts the right to an ecologically balanced environment. This new paradigm led to various regulations and public policies, such as the Environmental Crimes Law and the National System of Conservation Units Law, which are crucial for strengthening environmental protection in Brazil.[42]

Nevertheless, the Environmental Crimes Law establishes penalties for environmental damage, but its enforcement frequently ignores local realities. Consequently, the environmental governance regime is not only unequal but also hierarchizes the value of environments, prioritizing those that generate greater economic return.[43]

The National System of Conservation Units Law is yet another example of this unequal distribution of environmental burdens. Even though it was created to protect ecologically significant areas, the implementation of conservation units often restricts access to and use of natural resources by communities that have traditionally inhabited these regions. As a result, local communities are frequently displaced or have their livelihoods threatened in the name of conservation, reflecting a logic that favours a modern, utilitarian view of nature.

Although the legislation has progressed and developed environmental policies, legal thinking continues to be influenced by modernity. It adopts classical European frameworks that rank the value of nature based on the resources to be preserved.[44] Therefore, Brazilian environmentalism is characterized by fluctuations and discontinuities, shaped by political, social, and economic factors that hinder the effectiveness of environmental policies.

> *"Biodiversity conservation is largely a colonial agenda. Not that preserving nature and ecosystem integrity isn't in the interest of all inhabitants—human and non-human—of this planet. But conserving biodiversity may not exactly equate to caring for or living with nature. Indigenous peoples and local communities coexist, manage, breathe, and blend with nature. Prejudice, racism, and discrimination have often*

41 *Benatti*, note 4.

42 *Farias, et al.,* note 39.

43 *Milaré*, note 32.

44 *Waldman*, note 3.

> *displaced these communities from territories deemed worthy of conservation in numerous cases and nearly everywhere around the world."*[45]

National parks in Brazil are a pertinent example of this phenomenon. These protected areas, often modelled after conservation strategies from Europe and North America, can sometimes reflect a form of environmental colonialism.[46] While they aim to preserve biodiversity and natural landscapes, the implementation of these parks can overlook the rights and traditional knowledge of local communities. In some cases, the creation of these parks has led to the displacement of indigenous peoples and the suppression of their traditional practices. This process exemplifies the tension between global conservation ideals and local realities, illustrating how the imposition of foreign models can contribute to the construction of "colonial paradises" that prioritize external standards over local needs and contexts. The issue goes beyond the violation of territorial rights of indigenous peoples and traditional communities. In addition to these rights violations, there is no guarantee that this form of preservation, which excludes human beings, is effective.

II. The Creation of National Parks and the Legislation for the Protection of Colonial Paradises in Brazil

The creation of National Parks and the associated legislation for the protection of "colonial paradises" in Brazil represents a complex intersection of environmental conservation and socio-political dynamics. These national parks are often modelled after conservation strategies from Europe and North America, reflecting a globalized approach to preserving natural landscapes and biodiversity. However, this importation of foreign conservation models has led to significant implications for local communities and their traditional practices. The legislation designed to protect these areas sometimes prioritizes environmental ideals over the rights and needs of indigenous and local populations, leading to tensions and conflicts[47]. This phenomenon illustrates a form of environmental colonialism, where the idealization of natural spaces as "paradises" can marginalize local knowledge and exacerbate socio-environmental inequalities. Understanding this dynamic is crucial for developing more equitable and context-sensitive approaches to conservation in Brazil.

An example of Brazil's adoption of European and American environmental models dates to 1876 when Brazilian abolitionist engineer André Rebouças proposed creating National Parks, inspired by the example of Yellowstone in the USA.[48] The establishment

45 *Nurit Bensusan*, Estranhos no Paraíso, in: Antonio Francisco Perrone Oviedo / Nurit Bensusan (eds.), Como proteger quando a regra é destruir, Brasília 2022.

46 *Clara de Oliveira Adão*, Colonialidade da natureza: análise das áreas protegidas na União Europeia e a distribuição desigual dos ônus ambientais ao Brasil. Realis Revista de Estudos Anti Utilitaristas e Pós Coloniais 12 (2022).

47 *Diegues*, note 8.

48 As previously mentioned, the model of national parks was only implemented in Brazil in the early 20th century, when international pressures for environmental protection led to the creation of

of National Parks in the United States, similarly, involved the expulsion of local peoples as a condition for implementing wildlife and environmental protection models. This proposal occurred despite controversies such as the displacement of indigenous Crow, Blackfeet, and Shoshone Bannock peoples from their territories.[49] In Brazil, this conservation model has generated various land conflicts with indigenous peoples and traditional communities, such as the Canastreiros in the Serra da Canastra National Park, the Caiçara in the Superagüí National Park, and the Apiaká people in the Juruena National Park. Thus, territorial exclusion in establishing National Parks was not an unintended consequence but a prerequisite for their environmental protection model, which inaugurated a conservation policy disconnected from human presence.

The creation of National Parks in Brazil was discussed since the late 19th century but formalized only in 1934 through the Brazilian Forest Code, Decree 23,793/1934.[50] This legal framework provided for the establishment of Parks under federal, state, or municipal jurisdiction as natural public monuments, aimed at preserving flora in areas deemed worthy of protection due to their unique circumstances.[51] The first protected area in Brazil, like in the United States, was a National Park, specifically Itatiaia National Park, established in 1937.

In 1965, a new Forest Code was enacted, expanding the categories of environmental protection due to Brazil's rapid urbanization, economic development aspirations, and the need to address international environmental concerns, which culminated in the United Nations Conference on the Human Environment in 1972.[52] The Forest Code has introduced not only Parks but also Biological Reserves, National, State, and Municipal Forests. Parks were designated as areas of integral protection where direct exploitation of natural

protected areas. However, the engineer André Rebouças considered this possibility as early as the 19th century, driven by the colonial mindset of replicating foreign knowledge, which was deemed superior to Brazil's own capacity to develop and formulate appropriate laws. Despite being aware of the controversies surrounding park creation in the United States, the renowned abolitionist believed that it would be beneficial for Brazil to showcase its biodiversity through supposedly untouched areas.

49 *Nurit Bensusan*, Conservação da biodiversidade em áreas protegidas, Rio de Janeiro 2006.

50 According to Santos Filho et al. the formalization of Brazil's first Forest Code occurred during a time when international environmental legislation was advancing, particularly in the United States, Europe, and industrialized countries in general. As then-President Getúlio Vargas aimed for the massive industrialization of the country, it was necessary to establish regulations regarding the exploitation of natural resources, which was the main reason for the formulation of this first Forest Code, see *Altair O. Santos Filho* /*José M. Ramos* / *Krysia Oliveira* / *Tany Nascimento*, A evolução do código florestal brasileiro, Caderno de Graduação - Ciências Humanas e Sociais – UNIT 2 (2015), pp. 271–290.

51 Art. 9 of the Brazilian Forest Code "National, state or municipal parks constitute public monuments naturaes, which perpetuate in their primitive floristic composition, sections of the country, which, due to peculiar circumstances, deserve it".

52 *Santos et al*., note 50.

resources was prohibited, as stipulated in Article 5, single paragraph.[53] Integral protection aims to preserve natural environments as much as possible by limiting anthropogenic activities, under the premise that any human interaction with nature is inherently harmful, often disregarding the traditional lifestyles of indigenous and local communities. This approach establishes a form of biodiversity conservation that can be exclusionary, as it frequently overlooks the sustainable practices and deep knowledge these communities have developed over generations. This regime can inadvertently marginalize those whose ways of life have historically contributed to the preservation of natural ecosystems.[54]

The Brazilian Constitution of 1988 was influenced externally by Spain and Portugal, which had also transitioned from authoritarian regimes to new democratic constitutions around that time.[55] Additionally, there was a significant influence from other European countries and their legislations, particularly regarding social and environmental concerns that emerged after the World Wars. For instance, as noted by Sarmento, Germany's emphasis on prioritizing fundamental rights in democratic societies served as a model for the Brazilian Constitution. Concerning this issue, the Brazilian constitutional text dedicated a chapter on environmental protection as a fundamental right. Article 225 ensures access to an ecologically balanced environment and lists areas to be specially protected under its paragraph 1, item III.[56] Subsequently, infra-constitutional legislation specified which areas would receive special protection, accomplished through Law 9,985/2000, which established the National System of Conservation Units (NSCU).[57] This law includes twelve categories of Conservation Units[58] under two legal regimes: sustainable use and integral protection. The sustainable use category was a new feature introduced by NSCU, complementing the pre-existing integral protection category established in the 1965 Forest Code.

Sustainable use was devised to harmonize traditional indigenous lifestyles with biodiversity conservation. Constitutional protections for cultural rights and indigenous ways of life compelled lawmakers to create this environmental legal framework accommodating

53 Art. 5 of the Brazilian Forest Code "The Public Power will create: Single paragraph. Any form of exploitation of natural resources in National, State and Municipal Parks is prohibited."

54 *Diegues*, note 8.

55 *Daniel Sarmento*, 21 anos da Constituição de 1988: a Assembleia Constituinte de 1987/1988 e a experiência constitucional brasileira sob a Carta de 1988, Direito Público 6 (2011).

56 Art. 225. "All have the right to an ecologically balanced environment, essential to a healthy quality of life, collectively imposing on the Government and the community the duty to defend and preserve it for present and future generations. § 1. In order to ensure the effectiveness of this right, it is incumbent upon the Government: III - to define, in all units of the Federation, territorial spaces and their components to be specially protected, with alteration and suppression permitted only through law, and any use that compromises the integrity of the attributes justifying their protection prohibited".

57 The Conservation Units are necessarily specially protected areas, but it is important to highlight that there are other specially protected areas that are not Conservation Units, such as the legal reserve area (LRA) and permanent preservation area (PPA).

58 In Portuguese, protected areas are referred to as conservation units.

communities living in or off natural habitats. Seven conservation modalities were created for this purpose[59]: Sustainable Development Reserves, Extractive Reserves, Forests, Areas of Ecological Interest, Environmental Protection Areas, Private Natural Heritage Reserves, and Wildlife Reserves. While all categories allow for the presence of traditional and indigenous peoples, only Sustainable Development Reserves and Extractive Reserves were specifically designed to reconcile traditional lifestyles with biodiversity conservation.

Regarding integral protection, National legislation created five Conservation Units[60]: Parks, Ecological Stations, Biological Reserves, Natural Monuments, and Wildlife Refuges. This represented an expansion from the 1965 Forest Code, which only recognized three types of Conservation Units: parks, forests, and biological reserves.

Parks alone represent almost 30% of all publicly managed Conservation Units,[61] although there are eleven types of public management. This illustrates a clear preference for protecting pristine and untouched areas, given their integral protection status and requirement of scenic beauty. Additionally, Parks are the most widely recognized Conservation Units, with 97% of Brazilians familiar with at least one Natural Park, according to Instituto Semeia.[62] Well-known examples include Lençóis Maranhenses National Park, Iguaçu National Park, Fernando de Noronha National Park, Jericoacoara National Park, and Tijuca National Park, all of which are tourist attractions often described by visitors as paradisiacal visions. As we can see below:[63]

59 Art. 14. **"**The Group of Sustainable Use Units comprises the following categories of conservation unit: I - Environmental Protection Area; II - Area of Relevant Ecological Interest; III – National Forest; IV - Extractive Reserve; V – Fauna Reserve; VI – Sustainable Development Reserve; and VII – Private Natural Heritage Reserve."

60 Art. 8. "The group of Integral Protection Units is made up of the following categories of conservation unit: I - Ecological Station; II – Biological Reserve; III – National Park; IV – Natural Monument; V – Wildlife Refuge."

61 National Registration of Conservation Units (NRCU), Brazilian Conservation Units Panel. Database prepared by the Ministry of the Environment. Spreadsheet for the second semester of 2022, https://antigo.mma.gov.br/areas-protegidas/cadastro-nacional-de-ucs.html (last accessed on 21 May 2021).

62 Semeia Institute, Parks of Brazil: population perceptions, São Paulo 2022.

63 The Brazilian law (law 9610/1998) allows the use of protected works for educational or scientific purposes, as long as the use is limited to the academic environment and is not for commercial purposes.

Figure 1 Lençóis Maranhenses National Park[64]

Figure 2 Iguaçu National Park[65]

64 Instituto Chico Mendes de Conservação da Biodiversidade, Lençóis Maranhenses National Park, https://www.icmbio.gov.br/parnalencoismaranhenses/galeria-de-imagens.html (last accessed on 03 February 2025).

65 Instituto Chico Mendes de Conservação da Biodiversidade, Iguaçu National Park https://www.icmbio.gov.br/parnaiguacu/guia-do-visitante.html (last accessed on 03 February 2025).

Figure 3 Fernando de Noronha National Park[66]

Figure 4 Jericoacoara National Park[67]

66 Instituto Chico Mendes de Conservação da Biodiversidade, Fernando de Noronha National Park, https://www.parnanoronha.com.br (last accessed on 03 February 2025).

67 Portal Jericoacoara, Jericoacoara National Park, https://www.parnanoronha.com.br (last accessed on 03 February 2025).

Figure 5 Tijuca National Park[68]

In Brazil, there are 3.5 times more Conservation Units aimed at protecting beautiful landscapes (Parks and Natural Monuments) than protected areas expressly designed to reconcile traditional ways of life with environmental conservation (Extractive Reserves and Sustainable Development Reserves).[69] These statistics highlight what Malcom Ferdinand[70] calls "reforestation without the world," where ecological gestures involve displacing peasants from their territories to maintain an idealized forest image, as "Earth to be preserved" is conceived from an uninhabitable standpoint. An anti-human paradise landscape is thus fabricated, prioritizing tourism ventures and biodiversity conservation without human pres-

68 Amigos Do Parque, Tijuca National Park, https://parquenacionaldatijuca.rio/locais/corcovado/, (last accessed on 03 February 2025).

69 NRCU, note 57.

70 *Ferdinand*, note 2, p. 127.

ence. However, a significant issue arises when there is a prioritization of creating and maintaining Parks and Natural Monuments over protecting Extractive Reserves and Sustainable Development Reserves. Moreover, there is no certainty regarding the effectiveness of nature protection through parks.

C. Territorial Exclusion in the National System of Conversation Units

Territorial exclusion is a political action that undermines the ability of entire populations, not just specific social groups, to lay claim to land. According to Rogério Haesbaert,[71] this occurs through two main processes: either the destruction of a territory is so severe that human habitation becomes impossible without significant harm (as seen in cases like Chernobyl), or accessible land is restricted from local populations due to conservation policies, such as certain types of protected areas (Conservation Units) in Brazil.

The integral protection category within the National System of Conservation Units can be seen as a form of territorial exclusion. Areas formerly used by indigenous peoples and traditional communities are now considered untouched and uninhabited for environmental protection, leading to the resettlement or expulsion of these communities. The prohibition on direct human use of natural resources assumes that all human-nature interactions are inherently harmful. However, this overlooks the cultural ties of indigenous peoples and traditional communities to nature, where their worldview integrates human existence with natural landscapes as sacred.[72] Thus, biodiversity conservation efforts that limit human activities for ecosystem protection highlight the political, selective, and unequal nature of full protection choices.

The maintenance of the integral protection model often involves expelling local populations to implement conservation efforts. Territorial exclusion in establishing National Parks, for example, aims not only to protect the environment but also to sustain a conservation model that excludes human presence, despite their role in environmental stewardship. This creates a conflict between the rights and autonomy of indigenous and traditional peoples living in areas overlapped by conservation units, and the perceived rights of nature, sometimes seen as conflicting. Nonetheless, traditional human habitation is integral to nature conservation, not obstructive.

The system of exclusions is legally addressed in two different ways for indigenous and traditional peoples. Article 57 of the NSCU[73] allows working groups to resolve conflicts

71 *Rogério Haesbaert*, Viver no Limite: território e multi/transterritorialidade em tempos de insegurança e contenção, Rio de Janeiro 2014.

72 *Joelson Ferreira* / *Erahsto Felício*, Por Terra e Território: caminhos da revolução dos povos no Brasil, Aracata 2021.

73 Art. 57 "The federal bodies responsible for implementing environmental and indigenous policies must establish working groups to, within one hundred and eighty days from the coming into force of this Law, propose the guidelines to be adopted with a view to regularizing any overlaps between indigenous areas and conservation units."

arising from conservation unit overlaps with indigenous territories, acknowledging the difficulty in harmonizing original rights with ecological conservation goals. Article 42 of the NSCU[74] mandates the resettlement of other traditional communities affected by conservation unit creation, reflecting challenges in reconciling traditional lifestyles with biodiversity conservation.

In efforts to balance these constitutional rights, the Supreme Federal Court has ruled that indigenous land rights are compatible with environmental protection objectives, as demonstrated in the Raposa Serra do Sol case (Petition 3388, Supreme Federal Court). This legal interpretation dismisses claims that overlapping indigenous lands and conservation areas inherently jeopardize environmental goals:[75]

> *"[..] A legal analysis of the issue of overlapping indigenous lands with conservation units should always lead to solutions that ensure the human dignity of indigenous people living in these areas. We understand that conservation units on indigenous lands, if created under these terms, should be considered an added protection for the area, with their legal and institutional mechanisms essential to guaranteeing a healthy environment for these peoples. In other words, conservation units should serve the needs of indigenous peoples, not the other way around."*[76]

Regarding traditional peoples, Technical Information No. 175/2021[77], a document aimed at analysing land tenure solutions for the overlap of specially protected areas with traditional housing, Chico Mendes Institute for Biodiversity Conservation[78] also stated that "territories occupied by traditional peoples and communities show good conservation status of natural resources, which often contributes to the invisibility of areas used and inhabited by these social groups, who reside in natural areas throughout the national territory."[79] The absence

74 Art. 42 **"**Traditional populations residing in conservation units in which their stay is not permitted will be compensated or compensated for existing improvements and duly relocated by the Public Authorities, in a location and conditions agreed between the parties."

75 CMIBC, Application Report of the Management Analysis and Monitoring System (RMAMS): 2021 cycle, Brasília 2021.

76 *Priscialla C. Rodrigues* / *Rafael R. Ferreira*, Sobreposição de Unidades de Conservação em terras indígenas no estado de Roraima, in: Jonathan Barros Vita /Valeria Ribas do Nascimento / David M. Ribeiro (eds.), Direitos fundamentais e democracia II., Florianópolis, pp. 303-317.

77 CMIBC, Opinion no. 00175/2021/CPAR/PFE- CMIBC/PGF/AGU; Administrative Process NUP 00810.001628/2020-40.

78 Technical information contained in the records of the administrative process (02121.001913/2019-11) of February 22, 2021. This is an administrative process for the signing of a Term of Commitment between the Association of Residents of the Remanscente Community of Quilombos of Cachoeira Porteira and CMIBC regarding the permanence of quilombola communities in the Integral Protection Conservation Unit of the Rio Trombetas Biological Reserve in Oriximiná, Pará.

79 CMIBC, Administrative Process NUP 02121.001913/2019-1. Subject: Term of Commitment. Interested parties: Association of Residents of the Remanent Community of Quilombos of Cachoeira Porteira - AMOCREQ/CPT, 2019.

of environmental damage and the good conservation status support the argument that it is possible to reconcile the right to the environment with the cultural rights of traditional peoples without the need for resettlement, as regulated in Article 42 of NSCU and Article 39 of its Regulation Decree 4340/2002.[80]

It is important to note that, under the conventionality control, resettlement must be carried out on land that has legally the same value, as established by Decree 10.088/2019, which ratifies ILO Convention 169. Thus, it is important to emphasize that the legal value of the territory does not equate to its symbolic and identity value for those who traditionally occupy it.[81]

It is also important to mention that under ILO Convention 169, resettlement is treated as an exception, as the right to territory must be safeguarded. Article 16[82] and its respective items guarantee the immovability of peoples in their territories, preserving their right to remain due to their ancestral bond with the territory. The Convention also establishes progressive levels of protection for this immovability, ensuring that resettlement will only occur in cases of necessity and with consent. In cases where consent is absent, it provides that the representation of traditional peoples must be guaranteed, and if the need for resettlement ceases, their return to their original territory must be facilitated.

However, the Convention does not clearly define the circumstances that justify resettlement, leaving it to the discretion of managers to determine which events may necessitate resettlement. Based on the absence of legal criteria, resettlement as envisaged in NSCU may be considered a necessary legal framework for biodiversity conservation, leading to numerous legal questions such as: "On what scientific or legal evidence is the notion based that environmental protection requires the resettlement of traditional peoples? What

80 Art. 39. "As long as they are not resettled, the conditions for the populations to remain traditional activities in Full Protection Conservation Units will be regulated by a term of commitment, negotiated between the executing body and the populations, after consulting the council of the conservation united."

81 *Ferreira / Felicio*, note 73.

82 Article 16. 1. "Subject to the provisions of the following paragraphs of this Article, the interested peoples must not be relocated from the lands they occupy". 2. When, exceptionally, the transfer and resettlement of these peoples is considered necessary, it may only be carried out with their consent, freely granted and with full knowledge of the facts. When it is not possible to obtain their consent, the transfer and resettlement may only be carried out after the completion of appropriate procedures established by national legislation, including public polls, when appropriate, in which the interested people have the possibility of being effectively represented. 3. Whenever possible, these peoples must have the right to return to their traditional lands as soon as the causes that motivated their transfer and resettlement no longer exist. 4. When return is not possible, as determined by agreement or, in the absence of such agreements, by appropriate procedure, these peoples shall receive, in all cases where possible, lands whose quality and legal status are at least equal to those of the lands they previously occupied, and which allow them to cover their needs and guarantee their future development. When interested peoples prefer to receive compensation in money or goods, this compensation must be granted with appropriate guarantees."

environmental impacts would justify such action, given that the lifestyle of urban-industrial populations causes greater impact without equivalent sanction?"[83]

Diegues[84] and Bensusan[85] argue that traditional peoples are displaced so that urban-industrial populations can enjoy leisure activities in protected areas. Therefore, it is necessary to question firstly whether it is indeed necessary to remove traditional peoples from their lands in the name of conservation and how a norm of territorial exclusion that contradicts the cultural rights of traditional peoples can be legally justified.

This model of territorial exclusion is the rule in conservation in Brazil, since of the 1,593 Conservation Units (UC) under public management, approximately 55% are in the Strict Protection category, despite this category having two fewer options than the Sustainable Use UC. Of the 851 Strict Protection Conservation Areas, almost 70% are Parks.[86]

As a consequence of prioritizing strict protection, there are numerous land conflicts that pit the right to an ecologically balanced environment against the social and cultural rights of indigenous and traditional peoples in Brazil.[87] Management reports from the Chico Mendes Institute for Biodiversity Conservation (CMIBC) have shown that there is no difference in effectiveness between strict protection and sustainable use in preserving protected areas.[88] This indicates that while strict protection was created as a more rigorous legal category to intensively preserve areas that do not allow human occupation, there are no significant differences in the level of protection compared to areas where direct use of natural resources is allowed. In other words, mitigating anthropogenic action has not yielded the expected results under the law, presenting the same level of environmental protection as areas where direct use of natural resources is permitted.

Management reports also demonstrate numerous instances of prohibited use of natural resources in strict protection areas. They further highlight that incomplete land regularization (i.e., expropriations and resettlements) hinders compliance with protection guidelines, while activities such as ecotourism have significant environmental impacts.

In addition to occurrences of prohibited resource use in Strict Protection Conservation Units, it is important to note that two-thirds of Parks created in Brazil have not been fully implemented, as only 164 out of 520 Parks have Management Plans (MP) and Management Councils. The lack of MP means there are no documents to regulate activities allowed

83 *Clara de Oliveira Adão* / *Karyna Batista Sposato*, Reassentamento de populações tradicionais: morte social e negação ao território, in: XI Congresso Internacional da ABRASD – Sociologia Jurídica Hoje: cidades inteligentes, crise sanitária e desigualdade social, Anais trabalhos completes, Porto Alegre 2021, p. 256.

84 *Antônio Carlos Sant'Ana Diegues,* Etnoconservação: Novos rumos para a proteção da natureza nos trópicos. Hucitec, Nupaub 2000.

85 *Bensusan*, note 45.

86 Chico Mendes Institute for Biodiversity Conservation (CMIBC), Application Report of the Management Analysis and Monitoring System (RMAMS): 2019 cycle, Brasília 2022.

87 *Benatti*, note 4.

88 CMIBC, notes 87.

within the area, such as visitation, scientific research, and management of fauna and flora by CU staff, which is the reality for over 60% of Brazilian Parks. The absence of a Management Council, in turn, indicates low public participation and the absence of a multidisciplinary team for decision-making, affecting more than half of the CUs.[89]

It is also noteworthy that a report released by Semeia Institute[90] reveals that half of Brazilian Parks lack basic infrastructure, such as water fountains, toilets, signage, accessible trails, and service stations. Moreover, half of the Parks also lack entry controls through gates or turnstiles, complicating monitoring of activities inside the Parks. Finally, one-third do not track visitor numbers.

Based on these data, it is evident that maintaining a conservation policy based on human exclusion is untenable for ensuring effective biodiversity preservation in Brazil. Given that this policy is rooted in the reproduction of colonial imaginaries that persist today, a decolonial revision of this policy is urgently needed to recognize the cultural differences of social groups directly impacted by this environmental protection model. Without them, conservation areas are more vulnerable to degradation than with their presence in their original territories, as evidenced by the fact that deforestation rates in Indigenous Territories, for example, were nearly 70% lower than in private areas.[91]

This does not mean that protection of indigenous and traditional territories should be justified solely on utilitarian grounds, recognizing their role as "guardians of nature" for environmental preservation. The right to territory is constitutionally protected for these peoples because they are also part of nature. Therefore, based on the data presented here, removing indigenous peoples and traditional peoples from their territories for environmental preservation purposes has been a precarious policy for the environment, as well as a violation of the rights and autonomy of traditional and indigenous peoples and communities.

D. Conclusion

Viewing Parks as colonial paradises raises critical questions about their impact on the rights and autonomy of indigenous and traditional communities. Many National Parks and protected areas were established on lands once inhabited by these groups, displacing them to preserve conservation ideals devoid of human presence.

During colonization, colonial powers often ignored the cultural and spiritual ties of indigenous communities to the land, claiming these areas as their own. This colonial habitation was marked by violence against both indigenous peoples and the natural environment, driven by a conquest mentality that included deforestation and genocide. This colonial

89 CMIBC, note 87.

90 Semeia Institute, note 63.

91 MapBiomas, 7 Facts about Indigenous Lands in Brazil, April 2023 Edition, https://mapbiomas-br-site.s3.amazonaws.com/downloads/MapBiomas_Terras_Indígenas_28.04_OK.pdf, (last accessed on 20 June 2023).

violence reshaped the concept of paradise based on colonizers' actions. Paradise became associated with places that were exploited rather than inhabited, void of human presence. Thus, the colonial paradise emerged by excluding indigenous peoples and communities. Even after Brazil gained independence, these paradisiacal areas gradually became Parks, perpetuating a romanticized view of untouched nature while marginalizing or ignoring the presence and rights of indigenous and traditional communities. Parks have spread globally and are widely recognized in Brazil as the most numerous forms of publicly managed Conservation Units, symbolizing environmental protection. However, data on Parks reveal their inadequate effectiveness in conserving nature, which questions the necessity of excluding traditional and indigenous peoples from these areas. This reproduction of colonial paradises overlooks the history, knowledge, and deep connections that indigenous and traditional communities have with their lands. Viewing Parks as pristine spaces devoid of human presence reflects a Eurocentric perspective that fails to acknowledge the reciprocal relationships many communities maintain with their environment. The concept of colonial paradise is rooted in an absence principle, where human presence is seen as incompatible with conservation goals, rather than recognizing the role of indigenous and traditional peoples in biodiversity conservation.

Nevertheless, significant progress has been made in recent decades towards including and recognizing the rights of these communities in protected areas. Movements advocating for justice have led to greater participation and shared management of these spaces, acknowledging the crucial role of traditional knowledge in biodiversity conservation. In Brazil, the Supreme Federal Court (SFC) has acknowledged the dual impact regime concerning overlapping with indigenous lands, and the Chico Mendes Institute for Biodiversity Conservation supports maintaining traditional peoples in their territories through an intercultural constitutional interpretation of the National System of Conservation Units. These contemporary legal and doctrinal advancements aim to transform colonial paradises into inclusive paradisiacal ideals where traditional and indigenous peoples are not just present but essential for the preservation of Brazil's natural treasures. Recognizing their ethno-knowledge and reciprocal relationship with their territories challenges the notion of paradise without humans, fostering a new vision of harmony between people and nature.

Dissolution Power is no longer immune from Judicial Review: The Case of Kuwait

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Abstract: The dissolution of Parliament is one of the most important prerogatives of the Executive in Parliamentary and Semi-Presidential Systems. Nevertheless, most comparative legal systems have long regarded the use of such a prerogative as a '*non-justiciable*' question for its political nature. This article examines the possibility of subjecting the Dissolution Power to judicial review of Constitutional Courts to ensure its compatibility with constitutional principles and safeguards. In doing so, the article will highlight two landmark decisions of the Constitutional Court of Kuwait leading to an important legislative amendment that confirms the right of the Constitutional Court to review Emiri Decrees of Dissolution.
Keywords: Dissolution; Separation of Powers; Kuwait; Constitutional Court; Parliament

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A. Introduction

Due to its political nature, the Executive's exercise of the Dissolution Power has long escaped judicial scrutiny in major legal systems. This article seeks to examine the possibility of subjecting the Dissolution Power to judicial review. In addressing our inquiry, we focus on the recent development in Kuwait's legal system that has resulted in the expansion of the Constitutional Court's scope of judicial power to include reviewing Dissolution Decrees.

Section B of this article explores the scope of the Dissolution Power in general terms. Section C identifies the types of dissolution procedures specified in the Kuwaiti Constitution and distinguishes these procedures from other analogous constitutional procedures that may lead to the removal of the Parliament.

Section D investigates the Courts' capacity to review Dissolution Decrees. It will be divided into two parts. Part one will examine the possibility of subjecting Dissolution Power to judicial review in a number of Comparative legal systems such as Egypt, France, and the United Kingdom. Part two will investigate Kuwait's legal system and constitutional prece-

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dents of the Constitutional Court of Kuwait (Al-Mahkama Al-Dusturia المحكمـــة الدســـتورية) *(hereinafter* KCC) to identify the legal grounds for subjecting Dissolution Decrees to judicial review as well as the scope of this judicial review power.

Part E concludes with a call to subject the Dissolution Power of the Executive to judicial review to avoid any potential abuse of the power of dissolution and to ensure that the exercise of such power is compatible with constitutional safeguards and principles.

B. What is the Power of Dissolution?

Although Parliaments would normally be dissolved at the end of their scheduled terms of office, most comparative constitutions sanction premature dissolution of Parliaments by the Executive before the completion of their term through what is known as *the Power of Dissolution*. Accordingly, the Power of Dissolution refers to the power of the Executive branch of the Government to end the term of office of parliamentary members, thus allowing for a new parliamentary election to take place.[1]

This power has always been connected to the Government formation and removal rules in Parliamentary and Semi-Presidential regimes, which are grounded on a careful balance of reciprocal trust between the Executive and Legislative branches of the Government. It is considered the constitutional equivalent of Parliament's power to hold the government accountable or to withdraw its support through a vote of no confidence.[2]

Comparative Constitutions vary substantially, however, in terms of the range of Dissolution Power.[3] While some Constitutions confer upon the Executive a wide discretionary power to dissolve the Parliament,[4] other Constitutions tend to limit the ability of the

1 *Yehia Al-Gamal*, The Constitutional System in Kuwait (Al-Nezam Al-Dostouri Fi Al-Kuwait – النظام الدستوري في الكويت) Kuwait 1971, p. 398; *Othman Abd AL-Malek Al-Saleh*, Constitutional System and Political Institutions In Kuwait (Al-Nezam Al-Dostouri We Al-Moaasasat Al-Seyaseya Fi AL-Kuwait النظام الدستوري والمؤسسات السياسية في الكويت) Kuwait 2003, p. 705; *Aly Al-Baz*, Public Authorities in the Kuwaiti Constitutional System (Al-Sultat Al-Ama Fi Al Nezam Al-Dostouri Al-Kuwaiti السلطات العامة في النظام الدستوري الكويتي), Kuwait 2012, pp. 182-185; *Edward A. Freeman*, The Power of Dissolution, North American Review 129 (1879), p. 156.

2 *Al-Gamal*, note 1, pp. 398-400; see also *Al-Said Ahmed Al-Said / Essam Said El Ebaidi,* The Right to Dissolve Majlis Al-Ummah in the Kuwaiti Constitutional System (Haq Hal Majlis Al-Ummah Fi Al-Nezam Al-Dostouri Al-Kuwaiti حق حل مجلس الأمة في النظام الدستوري الكويتي), Kuwait Law Review 1 (2021), pp. 285-315; *Alaa Abdelal,* The Dissolution of Parliament in Comparative Parliamentary Constitutional System (Hal Al-Barlman Fi Al-Anzema Al-Barlmania Al-Dostouria Al-Moquarna حل البرلمان في الأنظمة البرلمانية الدستورية المقارنة), Alexandria 2004, pp. 85-90.

3 International Institute for Democracy and Electoral Assistance, Dissolution of Parliament 16, International IDEA Constitution-Building Primer, https://www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf. (last accessed on 03 June 2024), pp. 9-13, hereinafter referred to as IDEA Primer.

4 See, e.g., Art. 12 of the Constitution of France, promulgated on October 4, 1958 (*hereinafter* the Constitution of France). As shall be discussed later in this article, Art. 12 the French Constitution confers upon the President of the Republic a broad power to dissolve the Parliament at will.

Executive to use such power by laying down several circumstances and conditions, only under which dissolution would be permissible.[5]

In addition, dissolution may serve a variety of purposes according to the rules and circumstances specified in each Constitution.[6] For instance, some Constitutions provide for a wide latitude of Dissolution Power as a means to enhance and strengthen the position of the President of the Republic.[7] Others provide for the same power as a means to break down deadlocks inside the Parliament or between the Government and the Parliament,[8] as a means to overcome repetitive objections of the Parliament in the Government formation process,[9] or as a way to check public opinion on major issues, such as the removal of the head of the State.[10]

Finally, due to the grave consequences the usage of such power normally entails – including temporary suspension of the Parliamentary life and complete transferal of legislative power to the Executive - Comparative Constitutions tend to delimit the Executive scope of power to dissolve parliaments with some constitutional safeguards that aim to preclude any potential encroachment or abuse of power from the Executive.[11] These constitutional safeguards vary considerably from Constitution to Constitution, including consultation with other authorities or institutional actors before dissolving the Parliament,[12] setting out the date of election of the next Parliament,[13] identifying periods where the

5 See, e.g., Art. 76 of the Constitution of Malta 1964, (rev. 2016). The article vests the Dissolution Power in the President, subject to the binding advice of the Prime Minister; see also Articles 155 & 225 of the Constitution of Poland 1997, which only allows the Head of the State to dissolve the Parliament in two cases; when a new government fails to attain a vote of confidence, or when the Parliament fails to approve the draft budget.

6 IDEA Primer, note 3, p. 4.

7 Art. 12. of the Constitution of France.

8 Art. 102 of the Constitution of Kuwait, 1962 (Reinstated 1992) (*hereinafter* the Constitution of Kuwait).

9 Art. 146 of the Constitution of Egypt 2014, as amended in April 2019 (*hereinafter* the Constitution of Egypt).

10 Art. 161 of the Constitution of Egypt.

11 IDEA Primer, note 3, p. 9.

12 See, e.g., Art. 12 of the Constitution of France requires the President to consult the Prime Minister and the Presidents of the two Assemblies before ordering the dissolution of the Parliament. But their opinion is of a consultative nature, meaning that the President is not bound to act according to the advice given by these authorities.

13 See, e.g., Art. 107 of the Constitution of Kuwait requires the election of the new Parliament to take place within two months of the date of the dissolution.

dissolution of the Parliament is impermissible,[14] or the prohibition of the dissolution on the same ground twice.[15]

C. Constitutional Procedures of Dissolution in Kuwait's Legal System

Kuwait is one of the first established emirate states in the Gulf region. Its current Constitution, promulgated in 1962, provides for the establishment of a special system of government that combines features of Parliamentary and Presidential regimes.[16] State governmental authority in Kuwait is divided between the Executive Branch, the Legislative Branch (*Majlis Al-Ummah*), and the Judicial Branch.

Although Kuwait's system of government is founded on the basis of the separation of powers between the three branches of the Government along with their collaboration,[17] the Constitution introduces a distinctive system of checks and balances between the Legislative and Executive branches with the following two characteristics:

First, despite the Constitution's assurance of the ministerial responsibility to Majlis Al-Ummah, the no-vote confidence procedure specified by the Constitution is only applicable to ministers on an individual basis,[18] and not the Prime Minister or the cabinet.[19]

Second, the power to dissolve the Parliament is entrusted to the Head of the State, the Emir. However, given that the Constitution provides that the Emir can only exercise his

14 See, e.g., Art. 172 of the Constitution of Portugal 1976 (rev. 2005), which forbids dissolution of the Parliament in a number of circumstances, such as during the six months following its election, during the last six months of the President of the Republic's term of office, or during a state of siege or emergency.

15 See, e.g. Art. 107 of the Constitution of Kuwait which explicitly forbids the dissolution of the Parliament on the same ground twice; See also Art. 29 (1) of the Constitution of Austria 1920 (reinstated 1945 and revisited 2009) which reads "The Federal President can dissolve the National Council, but he may avail himself of this prerogative only once for the same reason."

16 See the Explanatory Note of the Constitution of Kuwait (Al-Mozakera Al-Tafsirya Le Dostour Dawlet Al-Kuwait - المذكرة التفسيرية لدستور دولة الكويت)) November 1962 (*hereinafter* The Explanatory Note of the Constitution of Kuwait), https://www.kna.kw/Democratic/ExplanatoryNote/15/18 (last accessed on 03 February 2025). The Framers of Kuwait's Constitution deliberately adopted this special system of government in Kuwait after a careful weight of merits and deficiencies of parliamentary and Presidential systems. This is reinforced by what the framers of Kuwait's Constitution explicitly noted in the Explanatory note of the Constitution, which reads "The Keen desire to preserve the unity of the homeland and the stability of government has led to the adoption of a middle-ground course between the Parliamentary and Presidential Regimes, with much more inclination towards the Parliamentary former, as the latter is only applicable in Republics."

17 Art. 50 of the Constitution of Kuwait; see also *Saba Habachy,* A Study in Comparative Constitutional Law: Constitutional Government in Kuwait, Columbia Journal of Transnational Law 3 (1964), pp. 122-123.

18 Art. 101 of the Constitution of Kuwait

19 Art. 102 of the Constitution of Kuwait stipulates "The Prime Minister does not hold any portfolio; nor shall the question of confidence in him be raised before the National Assembly…"

Constitutional powers by the medium of his ministers, the Dissolution Decrees must be co-signed by the Prime Minister after obtaining the approval of the Cabinet.[20]

The following section shall first identify the types of dissolution procedures specified in the Kuwaiti Constitution, and shall, secondly, distinguish the Dissolution Power from other analogous constitutional procedures.

I. Types of Dissolution in Kuwait's Constitution

Kuwait's Constitution, unlike many other Constitutions in the Arab Region,[21] provides for two constitutional procedures to be followed if the Emir decides to dissolve the Majlis:

1. Dissolution on the Ground of Art. 102 of Kuwait's Constitution

The first procedure to dissolve Majlis Al-Ummah is stipulated in Article 102 of the Kuwaiti Constitution which lays down the circumstances under which dissolution is permissible.[22]

The Dissolution in this article is used as a way to resolve deadlocks between the Cabinet and Majlis Al-Ummah in cases where the latter decides that it can no longer cooperate with the Prime Minister.

In such instances, the Majlis shall refer the whole matter to the Emir who, acting as an arbitrator between the two authorities, could either relieve the Prime Minister of office and appoint a new Cabinet or dissolve the Majlis.

However, in the event of dissolution, if the newly elected Parliament decides by an absolute majority vote that it cannot cooperate with the said Prime Minister, the latter shall be considered to have resigned as from the date of the decision of the new Majlis in this respect, and a new Cabinet shall be appointed.

20 This requirement has been confirmed by the KCC in its decision No. 6 & 30 of 2012 on the grounds of Articles 54 and 55 of the Constitution, which confer upon the Emir of the State an *inviolable* status and does not authorize him to exercise his powers except through his ministers. Therefore, the Dissolution Decree should be co-signed by the Prime Minister, who shall solely bear the political responsibility that may arise out of that action. For more details, see KCC Decision No. 6 & 30 of 2012, 6 June 2012, published by the Technical Office of the Kuwait Constitutional Court, in the Collection of Ruling handed down by the Court in the Electoral Appeals, Volume 6, Part 3, From January 2009 to December 2015, pp. 155-165.

21 See, e.g., Art. 104 of the Constitution of Qatar, 2004, Articles. 58 bis 19 of Constitution of Oman 1996 (revisited 2011), Art. 42(b) of the Constitution of Bahrain 2002 (revisited 2017).

22 Art. 102 of the Constitution of Kuwait stipulates that "[t]he Prime Minister shall not be responsible for any Ministry and the casting of a vote of confidence in the Assembly shall not be applicable to him. However, should the National Assembly, in the manner prescribed in the preceding Article, deem it impossible to cooperate with the Prime Minister, the matter shall be referred to the Head of State; and in that case the Amir shall either relieve the Prime Minister and form a new Cabinet or dissolve the National Assembly. Should, after dissolution, the new Assembly return with the same majority a motion of non-cooperation with the Prime Minister, the latter shall be deemed relieved of his post from the date of the Assembly's decision and a new Cabinet shall be formed."; see also *Al-Said / El Ebaidi*, note 2, p. 307.

2. Dissolution on the Ground of Art. 107 of Kuwait's Constitution

The second procedure of dissolution is incorporated in Article 107 of the Constitution. Although this procedure entrusts the Emir with a broad power to dissolve the Parliament through an Emiri Decree, the Constitution provides for several safeguards that the Emir must respect while exercising the power of Dissolution on the basis of this article.[23]

The first safeguard is that which requires – as noted earlier – Dissolution Decrees to be cosigned by the Prime Minister.

The second safeguard is that which requires Dissolution Decrees to include the grounds prompting the Dissolution. Although the KCC has consistently asserted that the Emir enjoys considerable discretion in determining these grounds, it has emphasized that there are a variety of grounds that could justify the dissolution of the Parliament on the basis of this article, such as in cases of necessity, deadlocks, non-cooperation, or breakdown of mutual trust or confidence between the Legislative and the Executive branches of the Government.[24]

The third safeguard is that which prohibits the dissolution of the Parliament on the same grounds or the same reasons twice. This safeguard is intended to protect the Majlis from unwarranted dissolutions.

Finally, the article incorporates a number of constitutional safeguards to restore parliamentary life as early as possible. In doing so, the same article requires the new Majlis's election to be held within a period not exceeding two months from the date of dissolution. If the elections are not held within this period, the dissolved Majlis shall be restored as if the dissolution never happened and shall continue to perform its functions until a new Majlis is elected.

Unlike dissolution under Art. 102, which has rarely taken place in Kuwait's political history, the dissolution of Majlis Al-Ummah under Art. 107 has been frequently used to resolve political deadlocks between the Cabinet and Majlis Al-Ummah. This includes the Dissolution of Majlis Al-Ummah in 1999 for the excessive use of Parliament's instruments of oversight and control against the Prime Minister and his Cabinet, the 2003 Dissolution against the backdrop of a political crisis triggered by the amendments of the Electoral law, the 2006 Dissolution for conflict over naturalization issues and expenditure of Prime Minister's office, the 2008 Dissolution for unwarranted interference of the Majlis with the Executive powers, the 2011 Dissolution for the excessive use of force by the security forces

23 Art. 107 of the Constitution of Kuwait enshrines that "[t]he Amir may dissolve the National Assembly by a decree in which the reasons for dissolution are indicated. However, dissolution of the Assembly may not be repeated for the same reasons. In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. If the elections are not held within the said period, the dissolved Assembly is restored to its full constitutional authority and meets immediately as if the dissolution had not taken place. The Assembly then continues to function until the new Assembly is elected."; see also *Al-Said / Said El Ebaidi*, note 2, p. 297.

24 See the KCC decision No. 11 of 2022, 19 March 2023, p. 7.

against peaceful protestors who were calling for an early parliamentary election and removal of the Prime Minister, the 2016 Dissolution due to the increased numbers of interpellation addressed by members of the Majlis to the Minister of finance and Minister of justice.[25]

The latest dissolution under Art. 107 took place took place by means of the Emiri Decree No.16 of 2024 on February 15, 2024.[26] The rationale behind this dissolution was, however, quite different from the preceding ones.[27] As noted in the Decree, the main impetus was the parliament's violation of the long-standing constitutional principle of the Emir's "inviolable" status.[28]

II. Distinguishing the Emiri Dissolution Power from other analogous constitutional procedures

Dissolution of Majlis Al-Ummah by the Emir - as identified in the previous section - varies from other analogous constitutional procedures which may also lead to the removal of the Parliament or the suspension of its sessions.

1. Dissolution Power vs. Prorogation Power

Although they are both monarchial prerogatives entrusted to the Head of State with the aim to control the Parliament, the Prorogation power, unlike the Dissolution Power, does not lead to the termination of the Parliament or the removal of its members from office but only suspends temporarily session of the Parliament.[29]

25 For more on the History of Dissolution of Majlis Al-Ummah in Kuwait, See *Mirza Al Khouwaylady*, The Third Suspension of Kuwaiti Majlis Al-Ummah, and its 13th Dissolution" (Al-Taaliq Al-Thaleth Le Majlis Al-Ummah Al Kuwaiti … Wel Al 13 Fi Tarikho), (التعليق الثالث لمجلس الامة الكويتي ... والحل ال 13 في تاريخه), https://aawsat.com/ التعليق الثالث لمجلس الامة الكويتي ... والحل ال 13 في تاريخه (last accessed on 14 May 2024); *Al Jazeera,* Dissolution of Kuwaiti Majlis Al-Ummah … incidents and Reasons, 17.10.2016, (Hal Majlis Al-Ummah Al-Kuwaiti … Al-Halat we Al-Asbab حل مجلس الأمة الكويتي ... الحالات والأسباب), https://www.aljazeera.net/encyclopedia/2016/10/17/ حل مجلس الأمة الكويتي ... الحالات والأسباب (last accessed on 14 May 2024).

26 The Emiri Decree No. 16 of 2024 with relevance to the Dissolution of Majlis Al-Ummah, 15.02.2024, https://www.kna.kw/News/NewsDetail/5/22/1335 (last accessed on 14 May 2024).

27 *Sean L. Yom*, Will Kuwait's Next Parliament Be Its Last?, Journal of Democracy, https://www.journalofdemocracy.org/online-exclusive/will-kuwaits-next-parliament-be-its-last/ (last accessed on 14 May 2024); *Vivian Nereim*, Kuwaiti Emir Suspends Parliament, Citing Political Tumult, New York Times, 10.05.2024, https://www.nytimes.com/2024/05/10/world/middleeast/kuwait-emir-parliament-suspension.html, (last accessed on 14 May 2024).

28 The Emiri Decree No. 16 of 2024, note 26.

29 Art. 106 of the Constitution of Kuwait codifies that "[t]he Amir may, by Decree, prorogue the National Assembly's session for a period not exceeding one month. Prorogation shall not be repeated in the same annual session save with the Assembly's consent and for once only. The prorogation period shall not be reckoned in the session's term."

2. Dissolution Power of the Emir vs. Judicial Dissolution

Dissolution of the Parliament by an Emiri Decree further differs from Judicial Dissolution of the Parliament recognized in Kuwait,[30] as well as some Arabic constitutions such as Egypt.[31] Although they would eventually lead to the termination of service of Parliament's members and the election of a new Parliament, Judicial Dissolution does not result as a consequence of political turmoil between the Executive and legislative powers, but rather as

30 See, e.g., the KCC decision No 15 of 2012, 16 June 2013. The Court, after concluding that the Decree-Law No. 21 of 2012 with Relevance to the Establishment of the Superior National Election Committee and the Amendment of some Provisions of Law No. 35 of 1962 with Relevance to Electoral Law of Majlis Al-Ummah were unconstitutional, annulled the results of the parliamentary elections held on the basis of this Decree and dissolved consequently the 2012 Parliament. See also the KCC decision No. 11 of 2022, 19 March 2023, note 24. In this Case, the KCC found unconstitutional the Emiri-Decree No. 136 of 2022 Dissolving the 2020 Parliament. As a result of this finding, the Court concluded that the 2022 parliamentary election held right after the dissolution took place was void and ordered therefore the dissolution of the 2022 elected parliament along with the restoration of the previous Parliament.

31 See, e.g., the Egyptian Supreme Constitutional Court decision No. 131 of Judicial year 6, 16 May 1987, (the Court in this case ruled unconstitutional art. 5 bis, art. 6 (para.1), and art. 17 (para.1) of Law No. 38 of 1972 with relevance to the People's Assembly as amended by Law No. 114 of 1983, reasoning that the adoption of the *Party-list* system (*known also as* the *Closed*-list system) as the sole electoral system for the election of the Egyptian Parliament deprives citizens who are not affiliated to any of the existing political parties from running for office, and therefore violate a number of constitutional articles of the Constitution (*the 1971 Constitution*), such as Art. 62 which confers upon every citizen the right to vote and the right to run for public offices, Art. 40 which asserts the right of all citizens to equality before the law, and Art. 8 which stresses the state's obligation to guarantee equality of opportunity to all citizens. As a result of this decision, the 1984 Assembly which was entirely elected on the basis of the *Party*-list system was dissolved three years after it was held in 1987. It is worth mentioning that following this decision the Egyptian Electoral law was amended as to combine between the *Party-list* system (for the 2/3 of Parliament's seats) and the *Independent-list* system (for the remaining 1/3 of Parliament's seats). *See also* the Egyptian Supreme Constitutional Court decisions No. 37 of Judicial year 9, 19 May 1990, and also the Egyptian Supreme Constitutional Court decision No. 20 of Judicial year 34, 14 June 2012. In those later two decisions, the Supreme Constitutional Court dissolved the 1990 and the 2012 Parliament on similar grounds after a finding that the Egyptian Electoral law articles (Law No. 38 of 1972 with relevance to the People's Assembly as amended by the Law-Decree No. 120 of 2011) allowing for candidates affiliated with political parties to compete not just against each other in the *Party-list* system, but also against independent candidates unaffiliated to political parties in the *Independent-list* system, enabled political parties to win more seats then initially intended by the constitutional framers and were unconstitutional for violating a number of constitutional principles including the principles of equality before the law, equal opportunities, and fair competition. For more commentaries on the Egyptian Supreme Constitutional Court decisions with respect to dissolution of Parliament, see *Mohamed Fadel*, The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence, International Journal of Constitutional Law 16 (2018), pp. 936–951.

a consequence of Constitutional Courts' decisions invalidating electoral laws, regulations, or procedures.[32]

3. Dissolution Power vs. Suspension of some Constitutional Articles

The dissolution power of the Emir also differs significantly from the practice of "*suspending some Constitutional articles* or *suspending the parliamentary life*." This later practice, which was seen as unconstitutional action – since it finds no basis in the constitutional system of Kuwait - has taken place more than once in the modern history of Kuwait,[33] the latest of which was on May 2024 by an Emiri Decision.[34]

These suspension decisions do not just entail the dissolution of the Parliament but usually include many other tougher measures, such as the suspension of several constitutional articles pertaining to the composition and the jurisdiction of the Parliament and the suspension of the parliamentary life with a complete transferal of the legislative power to the Emir and his Cabinet for a transitional period.[35]

D. Could the Dissolution Power Be Subject to Judicial Review?

Having highlighted the legal rules regulating the Dissolution of the Parliament in Kuwait, the following section shall attempt to answer the main inquiry of this paper on the possibility of subjecting the Emiri Prerogative of dissolution to judicial review. In addressing this inquiry, this section will be divided into two parts. Part one will examine the possibility of subjecting Dissolution Power to the Judiciary in Comparative Law. Part two will investigate Kuwait's legal system and constitutional precedents of the KCC to identify the legal grounds for subjecting Dissolution Decrees to judicial review and the scope of this judicial review power.

32 See *Omar Alabdali / Luai Allarkia*, Speculation Is Rife About the Future of Kuwait's Parliament, News Lines Magazine, 27.06.2024, https://newlinesmag.com/argument/speculation-is-rife-about-the-future-of-kuwaits-parliament/ (last accessed on 29 June 2024).

33 See in this Respect the Emiri Decision with relevance to amending the Constitution, promulgated in Al-Seif Castle on 29 August 1976; and the Emiri Decision with relevance to dissolving Majlis Al-Ummah, promulgated in Al-Seif Castle on 6 July 1982.

34 Emiri Decision, promulgated on 10 May 2024; Although the decision was grounded on the public interest of the State, The Emir further justified the measures taken by the decision in a televised speech by holding that the political turmoil in Kuwait required a "hard decision to save the country" and that "he will not permit for democracy to be exploited to destroy the State." For more details on the grounds of the Emiri Decision, see e.g. *Nereim*, note 27.

35 Articles 1, 2 and 3 of the Emiri Decision, promulgated on 10 May 2024.

I. Judicial Review of Dissolution Power in Comparative Law

The following part shall investigate the possibility of questioning the constitutionality of dissolving decisions by the Judiciary in several comparable legal systems, including Egypt, France, and the United Kingdom.

1. Judicial Review of Dissolution Decisions in the Egyptian Legal System

The right of the Executive to dissolve the Parliament has always been one of the main foundational elements of the Egyptian political system both as a monarchy and as a Republic following the 1952 Revolution. It was included in almost all the Constitutions Egypt has witnessed since 1923.[36]

In the current 2014 Constitution, the Dissolution Power of the Executive is vested in the hands of the President of the Republic. This power, however, may not be exercised in an unfettered way; Article 137 of the Constitution requires several safeguards for the legitimate use of such power, such as limiting the scope of the Dissolution Power to cases of necessity, requiring dissolution decisions to include reasons warranting the dissolution, and prohibiting the dissolution of the Parliament on the same grounds twice. The article further requires Presidential decisions of dissolution to be subsequently approved in a nationwide referendum.[37]

It is worth mentioning that the 2014 Egyptian Constitution allows for an "Automatic Dissolution"[38] of the Parliament in two other scenarios; the first of which is in cases of failure twice to form a Government enjoying the confidence of the Parliament.[39] The

36 See, e.g., Art. 38 of the 1923 Constitution of Egypt, 2 April 1923; Art. 38 of the 1930 Constitution of Egypt, 22 October 1930; Art. 111 of the 1956 Constitution of Egypt, 16 January 1956; Art. 91 of the 1964 Interim Constitution of Egypt, 24 March 1964; Art. 136 of the Constitution of Egypt, 11 July 1971; Art. 127 of the 2012 Constitution of Egypt, 25 December 2012.

37 Art. 137 of the Constitution of Egypt 2014 says that "[t]he President of the Republic may not dissolve the House of Representatives except, when necessary, by a causal decision and following a public referendum. The House of Representatives may not be dissolved for the same cause for which the previous House was dissolved. The President of the Republic must issue a decision to suspend parliamentary sessions and hold a referendum on dissolution within no more than 20 days. If voters agree by a majority of valid votes, the President of the Republic issues the decision of dissolution and calls for early parliamentary elections to take place within no more than 30 days from the date of the decision's issuance. The new House convenes within the 10 days following the announcement of the referendum results."

38 IDEA Primer, note 3, p. 22, ('Automatic Dissolution' means that Parliament is legally dissolved with no action needed from the President).

39 Art. 146 of the Constitution of Egypt stipulates that "[t]he President of the Republic assigns a Prime Minister to form the government and present his program to the House of Representatives. If his government does not obtain the confidence of the majority of the members of the House of Representatives within no more 30 days, the President appoints a Prime Minister based on the nomination of the party or the coalition that holds a plurality of seats in the House of Representatives. If his government fails to win the confidence of the majority of the members of the House of

second occurs in situations where the Parliament proposes to withdraw confidence from the President of the Republic before the completion of his term. In this latter scenario, the Parliament's motion to withdraw confidence from the President should be submitted to a public referendum. If the majority approves the Parliament's decision to withdraw confidence, the President of the Republic is removed from office. However, if the majority refuses to withdraw confidence, the Parliament is automatically dissolved, and new elections are called.[40]

Nevertheless, neither the 2014 Constitution nor its predecessors have explicitly or implicitly allowed for the judicial review of dissolving decisions of the parliaments. In addition, nothing in the laws of judicial bodies, including the law of the Supreme Constitutional Court,[41] the law of the Judicial Authority,[42] and the law of the State Council,[43] could be construed as extending the jurisdiction of any judicial courts to cover such a matter.

This silence of the Egyptian legal system with respect to the possibility of judicial review of dissolution decision explains, perhaps, why there hasn't been any judicial decision in this respect so far. It has also led many Egyptian legal scholars to conclude – in light of the Sovereign Acts Doctrine embraced by the Supreme Constitutional Court –[44] that these

Representatives within 30 days, the House is deemed dissolved, and the President of the Republic calls for the elections of a new House of Representatives within 60 days from the date the dissolution is announced. In all cases, the sum of the periods set forth in this Article shall not exceed 60 days. In the event that the House of Representatives is dissolved, the Prime Minister presents the government and its program to the new House of Representatives at its first session. In the event that the government is chosen from the party or the coalition that holds a plurality of seats at the House of Representatives, the President of the Republic may, in consultation with the Prime Minister, choose the Ministers of Justice, Interior, and Defence."

40 Art. 161 of the Constitution of Egypt codifies that "[t]he House of Representatives may propose to withdraw confidence from the President of the Republic and hold early presidential elections upon a causal motion signed by at least a majority of the members of the House of Representatives and the approval of two-thirds of its members. The motion may only be submitted once for the same cause during the presidential term. Upon the approval of the proposal to withdraw confidence, the matter of withdrawing confidence from the President of the Republic and holding early presidential elections is to be put to public referendum by the Prime Minister. If the majority approves the decision to withdraw confidence, the President of the Republic is to be relieved from his post, the office of the President of the Republic is to be deemed vacant, and early presidential elections are to be held within 60 days from the date the referendum results are announced. If the result of the referendum is refusal, the House of Representatives is to be deemed dissolved, and the President of the Republic is to call for electing a new House of Representatives within 30 days of the date of dissolution."

41 Law No. 48 of 1979 with relevance to the Supreme Constitutional Court, as amended by Law No. 137 of 2021, 15 August 2021.

42 Law No. 46 of 1972 with relevance to Judicial Authority, as amended by Law No. 77 of 2019, 26 June 2019.

43 Law No. 47 of 1972 with relevance to State Council, 5 October 1972.

44 The Egyptian Supreme Constitutional Court, Decision No. 20 of 34, June 14, 2012. According to the Court's ruling, the Constitutional review power carried out by the Court in accordance with the Constitution and Law No. 48 of 1979 with relevance to the Supreme Constitutional Court finds

types of decisions are non-justiciable due to their political nature and therefore fall beyond the jurisdiction and competence of Egyptian courts.[45]

2. Judicial Review of Dissolution Declarations in the French Legal System

Despite being qualified as a semi-presidential system, the Dissolution Power in France can be traced back to the 17th century when it was incorporated in the 1814 French Constitutional Charter.[46] The current in-force Constitution, which is the 1958 Constitution, places the power of dissolution in the hands of the President of the Republic who may resort, in most circumstances, to such power at his own will. This stands true even though Art. 12 of the Constitution requires the President to consult the Prime Minister and the Presidents of the Houses of Parliament before proceeding to dissolve the Parliament because their role in this process is merely consultative and their opinion is not binding in any respect upon the President.[47]

Although the same article provides for several constitutional guarantees for the exercise of such power, the most important of which is forbidding the dissolution of the newly elected parliament in the following twelve months,[48] nothing in the French Constitution in particular, nor the French legal system in general, could be construed as to allow French courts to question the constitutionality of the Presidential Declaration of Dissolution.

Such a finding has been ascertained by the French Constitutional Council (le Conseil Constitutionnel) whose members explicitly refused to review the constitutionality of dis-

its basis in the principles of legitimacy and the rule of law which are the basis of governance in the State. Yet, these principles are not absolute. One recognized exception to these principles - according to the consistent settled case law of the Court - is the Sovereign Acts Doctrine which limits the ability of national courts to hear political questions due to their intimate connection with the political regime of the State and its sovereignty.

45 *Ibrahim Abd El Aziz Chiha*, The Administrative Jurisprudence, principle of Legitimacy and Organization of Administrative Judiciary (Al-Qadaa Al Idary, Mabdaa Al-Mashrouya , Tanzim Al-Qadaa Al Idaryالقضـاء الإداري، مبدأ المشـروعية وتنظيـم القضـاء الإداري) Alexandria 2017, p. 187; see also *Ibrahim Abd El Aziz Chiha*, The Role of the Executive Authority in Comparative Political system (Wadaa Al-Sulta Al-Tanfizia fi Al-Anzema Al-Seyasya Al-Moaseraوضـع السـلطة التنفيذيـة في الأنظمـة السياسية المعاصرة), Alexandria 2006, p. 79.

46 Art. 50 of the French Constitutional Charter of 1814, 4 June 1814.

47 Art. 12 of the Constitution of France enshrines that "[t]he President of the Republic may, after consulting the Prime Minister and the Presidents of the Houses of Parliament, declare the National Assembly dissolved. A general election shall take place no fewer than twenty days and no more than forty days after the dissolution. The National Assembly shall sit as of right on the second Thursday following its election. Should this sitting fall outside the period prescribed for the ordinary session, a session shall be convened by right for a fifteen-day period. No further dissolution shall take place within a year following said election".

48 Examples of other guarantees incorporated into the French Constitution are those aiming to restore the parliamentary life without delay, such as the requirement to hold the new election within 40 days from the date of the dissolution and the requirement that the newly elected Parliament meet the second Thursday following its election.

solving declarations in the case of Rosny Minvielle de Guilhem de Lataillade, reasoning that Dissolving Declarations fall outside its jurisdiction because the Constitution does not bestow upon the Council any power to question the validity of dissolving declarations.[49]

This decision has been seen by many as pertaining to the Sovereign Acts Doctrine embraced by the Constitutional Council, which forbids any judicial institution in France from reviewing the constitutionality of a number of the executive decisions, especially those with relevance to the relationship between the executive and legislative branches of the government, such as the President's use of the veto power, or the President's decision to suspend or to resume sessions of the parliament.[50]

3. Judicial Review of Dissolution Decisions in the United Kingdom Legal System

The Right to Dissolve the Parliament has always been one of the most important inherent Royal Prerogatives in the United Kingdom.[51] Being as old as the parliament itself, this power was deemed as a Royal check to preserve the Monarchy against parliamentary abuse of powers.[52] Over the years, it has been the subject of a number of developments that limited its scope. Nevertheless, this power remained within the hand of the sovereign who, by modern convention, could only exercise such a power upon a request from the Prime minister.[53]

49 Conseil Constitutionnel Décision n° 88-4 ELEC du 4 juin 1988, "Considering that no provision of the Constitution grants the Constitutional Council the authority to rule on the above-mentioned request."

50 *Bruno Genevois,* L'étendue de la compétence du juge de l'élection [A propos des décisions du Conseil constitutionnel des 4 juin et 13 juillet 1988], Revue française de droit administratif (1988), pp. 702-712.

51 See *Thomas Poole*, United Kingdom: The Royale Prerogative, International Journal of Constitutional Law 8 (2010), p.146. Having their origin in the Common law, there has never been any precise or strict legislative definition of the term *Royal Prerogative.* It refers in general to those powers recognized for the Crown to exercise with no further authorization or consultation from other authorities, including, but not limited to, the right to declare war, to sign treaties, to dissolve parliament, to appoint some high ranked officials, and to award honours. It should be noted that there have been some scholarly attempts to define the scope of *Royal Prerogatives* such as that of Blackstone who viewed royal prerogatives "...in its nature singular and eccentrical that it can only be applied to those rights and capacities which the king enjoys alone...and not to those which he enjoys in common with any of these subjects", see Blackstone's Commentaries on the Laws of England , Oxford 1778, p. 232

52 *James Strong*, The Fixed-term Parliaments Act (FTPA): an 'in memoriam,' of sorts, 01.04.2022, https://ukandeu.ac.uk/ftpa-an-in-memoriam-of-sorts/ (last accessed on 06 June 2024).

53 *Robert Blackburn,* The prerogative power of dissolution of Parliament: law, practice, and reform, Public Law 4 (2009), p. 769.

In 2011, however, a tremendous shift happened. The Fixed-Term Parliaments Act, known also as the *FTPA*, superseded this longstanding prerogative and placed the power of dissolution within the hands of the Parliament itself.[54]

A few years later, the Royal Prerogative to Dissolve the Parliament was once again reinstated by the Dissolution and Calling of Parliament Act of 2022 which repealed the FTPA[55] and "ma(de) express provision to make the prerogative powers relating to the dissolution of Parliament, and the calling of a new Parliament exercisable again, as if the 2011 Act had never been enacted."[56]

Perhaps the most significant innovation introduced by the new legislation was the rule pertaining to the Court's ability to review Dissolution Decisions. Unlike other prerogative powers which may be subject to judicial review – in terms of their existence, their scope, and whether or not they have been exercised legally or rationally[57] – Art. 3 of the Dissolution and Calling of Parliament Act has been formulated very broadly to preclude all possibility of judicial review over either 1) the exercise or the purported exercises of the Dissolution Power; 2) decisions or purported decisions relating to this power; or 3) the limits or extent of this power.[58]

This latter provision, which forbids the Court from reviewing "the limits or the extent" of the Dissolving Power was seen as being the most significant.[59] It was intended by the drafters of the Act to exclude the earlier type of judicial review adopted by the Supreme Court's decision over the scope of the Prorogation Power in Miller v. Prime Minister.[60] In this case, the Court imposed an important limitation on the sovereign's power of proroga-

54 Art. 3 (1) (2) of the fixed-term Parliaments Act 2011, published September 15, 2011.

55 Art. 1 of the Dissolution and Calling of Parliament Act 2022, published 28 March 2022.

56 Explanatory Notes of the Dissolution and Calling of Parliament Bill (Bill 8-EN, 58/2, 12 May 2021), para 18; Art. 2(1) of the Dissolution and Calling of Parliament Act 2022, published March 28, 2022 states that "[t]he powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by virtue of Her Majesty's prerogative immediately before the commencement of the Fixed-term Parliaments Act 2011 are exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted."

57 *Lorne Sossin*, The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black v. Chritien, McGill Law Journal 47 (2002), pp. 435-436.

58 Art. 3 of the Dissolution and Calling of Parliament Act 2022, published 28 March 2022.

59 See Chapter 2 of The Independent Review of Administrative Law Report, CP 407 (March 2021); https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf (last accessed on 06 June 2024); see also Select Committee on the Constitution Dissolution and Calling of Parliament Bill, 8th Report of Session 2021-22, 19.11.2021, HL Paper 100, https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/100/10002.htm (last accessed on 06 June 2024). The majority of the Joint Committee believed that Parliament "should be able to designate certain matters as ones which are to be resolved in the political rather than the judicial sphere, and Parliament should accordingly be able to restrict, and in rare cases, entirely to exclude, the jurisdiction of the courts."

60 R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41.

tion by requiring the government to provide a reasonable justification, subject to review by courts, in cases where the prorogation decision frustrates or impedes the Parliament from carrying out its functions.[61]

II. Judicial Review of Dissolution Decrees in Kuwait's Legal System

The following Part shall examine the possibility of questioning the constitutionality of Emiri Dissolution Decrees by the KCC in Kuwait. In doing so, this part will first overview the KCC scope of jurisdiction to inquire if there is any legal basis for the Court to exercise such authority or not. It will then consider two of the KCC's recent landmark decisions that reveal the Court's perception on this matter. It will further discuss the impact of such decisions and highlight the critiques they have engendered. It will finally explore the scope of the newly approved legislative amendment of the KCC scope of judicial review power.

1. Is there a Legal Basis for the KCC to Review Dissolving Decrees?

Similar to many other Arab countries in the Region,[62] Kuwait's legal system allocates the power to decide constitutional litigations to a centralized Court, which is the KCC.[63]

According to its establishment law, Law No. 14 of 1973 (*hereinafter* the Constitutional Court Law), the KCC has three types of exclusive jurisdiction,[64] as follows:

(a) The authority to interpret any constitutional provisions at the request of either Majlis Al-Ummah or the Cabinet. Such a request shall identify the article/s to be interpreted and the reasons prompting the submission of the request.[65]

61 "For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course", see Ibid., at para. 50.

62 See, e.g., Arts. 191-195 of the Constitution of Egypt, Art. 140, the Constitution of Qatar, and Art. 106 of the Constitution of Bahrain, see also in this respect *Islam Ibrahim Chiha / Abdel Hafiz el-Shimy*, Is It Possible to Overrule a Constitutional Precedent in the Egyptian Legal System?, Arab Law Quarterly 38 (2021), pp. 140-41.

63 Art. 173 of the Constitution of Kuwait. This article provides for the establishment of a judicial body to decide upon the constitutionality of laws and regulations (Al-Qawanin wa Al-Lawa'h القوانين واللوائـح) with binding and final decisions. The same article confers upon the legislator the authority to determine further powers of the Court and procedural rules to be followed before it.

64 Law No. 14 of 1973 with relevance to the establishment of the Constitutional Court, 9 June 9 1973, Art. 1 (*hereinafter* the Constitutional Court Law).

65 Decree with relevance to the Constitutional Court Regulation, Art. 1, 12 May 1974 available in Arabic at https://www.cck.moj.gov.kw/ar/laws/%D9%85%D8%B1%D8%B3%D9%88%D9%85%

(b) The authority to decide Constitutional challenges of Laws, Regulations, and Decree-Laws (known also as the *Necessity Regulations)*. As originally enacted, the law did not allow for direct constitutional challenges to be brought before the KCC. Rather, it identified two procedures to enable the Court to exercise such a power,[66] either (a) at the request of Majlis Al-Ummah or the Cabinet; or (b) at the request of a court of merit (a national court or judicial body), if such a court found, in the course of an ongoing litigation, whether on its own initiative, or upon a serious argument made by one of the litigants, that deciding the case requires a decision on the constitutionality of a law, decree-law, or regulation that might apply in the litigation. In such an instance, the court of merit would adjourn the case and transfer the constitutional matter to the KCC for judicial review.

(c) In 2014, however, the Constitutional Court Law was amended to confer upon every natural or moral person the right to bring constitutional challenges directly on an original claim before the Constitutional Court. The authority to decide Electoral Appeals with relevance to the election of Majlis Al-Ummah or the validity of its membership; these appeals shall be submitted to the Court directly or through Majlis Al-Ummah in accordance with the established procedures in this regard.

Having examined the KCC's scope of jurisdiction, one can hardly infer any jurisdiction for the KCC to review the constitutionality of Dissolution Decrees.

After all, such decrees cannot fall within the first category of jurisdiction as they are not part of the constitutional text and hence cannot be subject to any interpretation request.[67]

They also do not fall within the category of laws, regulations, and decree laws that could be susceptible to constitutional challenges because they differ in terms of nature and content. Unlike these later legislative tools which contain general and abstract rules, Dissolution Decrees are, by their nature, directed towards dissolving the legislative authority based on specific facts.

There is a further difference between Dissolution Decrees and Decree-Laws. These later types of decrees are a form of regulations that have the force of laws once approved by the Parliament. They could only be issued by the Emir provided that, first, there exists

20%D8%A8%D8%A7%D8%B5%D8%AF%D8%A7%D8%B1%20%D9%84%D8%A7%D8%A6%D8%AD%D8%A9%20%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9%20%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9.pdf (last accessed on 19 October 2024).

66 Art. 4 of the Constitutional Court Law.

67 *Fathi Fekry*, The Jurisdiction of the Supreme Constitutional Court over Interpretive Requests (Ekhtesas Al-Mahkama Al-Dostouria Al-Olia Bealtalab Al-Asly Leltafsirاختصاص المحكمة الدستورية العليا بالطلب الأصلي للتفسير-), Cairo 2011, pp.47-48; *Mohamed El Feily*, The Original Jurisdiction of the Constitutional Court To Interpret Constitutional Text in Kuwait Constitutional system (Al-Ekhtesas Al-Asly le Al-Mahlkama Al- Dostouria Betafsir Al-Nosous Al-Dostouria Fil Al- Nezam Al Dostouri Al-Kuwaitiالاختصاص الأصلي للمحكمة الدستورية بتفسير النصوص الدستورية في النظام الدستوري الكويتي -), Alexandria 2008, p. 26.

an extreme urgency or force majeure that requires taking measures of utmost urgency, and secondly, the Majlis al-Ummah is absent.[68]

Finally, at first sight, it is hard to construe the Electoral Appeal provision in the KCC Law as to acknowledge any reviewal power for the KCC over the Dissolution Decree of a former Majlis. As formulated, this provision was meant to cover electoral process litigations of a newly elected Majlis or challenges to parliamentary memberships of its members, and not to cover constitutional challenges of Dissolution Decrees of a former Majlis. In addition, it is also implausible that the newly elected Majlis will challenge the Dissolution Decree of the former Majlis, as it has no standing in doing so.

2. The KCC Perception with Respect to Reviewing Dissolution Decrees

Despite the lack of any explicit legal basis in the Constitutional Court Law provisions – as highlighted in the previous section – to question the constitutionality of Dissolution Decrees in Kuwait's Legal system, the KCC jurisdiction has, nevertheless, asserted the right of the Court to review these decrees in two of its landmark constitutional precedents in 2012 and 2023.[69]

The following section shall underline the legal grounds identified by the KCC to review Dissolution Decrees. It will then thoroughly analyze the two constitutional precedents establishing the KCC judicial review power over Emir Dissolution Decrees.

a) The Legal grounds relied upon by the KCC to Review Dissolution Decrees

In reviewing the Dissolution Decrees, the KCC has broadly interpreted the Electorate Appeal provision in the Constitutional Court Law, viewing that its jurisdiction over this type of appeal is of a comprehensive nature that enables the Court to extend its judicial oversight over the entire phases of the election process— from pre-election procedures to the final stages of election, to ensure the fairness and validity of the whole election.[70]

Hence, if a new election were to be held following a premature dissolution of the parliament by the Emir, the Dissolution Decree in such instances should be treated as among the pre-election decisions or procedures leading up to the new election and could therefore be subject to the KCC Judicial Review to ensure its conformity with the Constitution in the course of an ongoing electoral litigation.[71]

68 Art. 71 of the Constitution of Kuwait.

69 See the KCC Decision No. 6 & 30 of 2012, note 20; *See also* the KCC decision No. 11 of 2022, note 24.

70 Ibid.

71 Ibid.

b) The KCC Decision No. 6 & 30 of 2012

This case arose out of a challenge submitted before the Court to invalidate the results of the 2012 parliamentary elections on the ground that the Dissolution Decree of the former Parliament leading up to the challenged parliamentary elections was unconstitutional.

The appellant contended that the Dissolution Decree violated the Constitution because the dissolving request was initiated by a Cabinet who had already resigned from office, while the Constitution requires that such a request be submitted by a responsible Cabinet. He maintained that the newly appointed Prime Minister who co-signed the Dissolution Decree had sought approval of the ministers in the resigned Cabinet before he even selected members of his Cabinet. Based on the above, the appellant argued that this constitutional violation rendered the Dissolution Decree unconstitutional and the whole electoral process conducted on its basis void.[72]

On the other side, the Government challenged the jurisdiction of the KCC to review the Dissolution Decree under the pretext that this type of decree is among the political acts pertaining to the relationship between the Executive and Legislative branches of the Government and therefore falls under the category of Sovereign Acts Doctrine that cannot be adjudicated by the Courts for the sake of protecting the state sovereignty and its national interests.[73]

In asserting its jurisdiction to review the constitutionality of the Dissolution Decree, the Court reasoned that it is unacceptable to contend that the Constitutional system of Kuwait, which has founded the constitutional review system over the laws, regulations, and Decree-Laws promulgated by either the Legislative or the Executive branches of the Government, and which has established the KCC as the ultimate arbiter of the constitution, has failed to secure subjecting some of the Executive's pre-election decisions or procedures - including Dissolution Decrees - to the Court's jurisdiction in the course of deciding electoral appeals litigations to ensure their conformity with the Constitution. To claim otherwise or impede the Court from extending its jurisdiction over such decisions and procedures, would be to say that the Dissolution Decrees have a higher status and more privilege than the law itself.[74]

72 See KCC Decision No. 6 & 30 of 2012, note 20, p. 156; See also the Dissolution Decree No. 443 for 2011, 6 December 2011. The appellant in this case explained that the Emir, on November 28, 2011, had accepted the resignation of the Prime Minister Sheikh Naser Al Sabah and his Cabinet from office by an Emiri Decision which tasked them to continue in their offices until a new Cabinet is formed. Two days later, and specifically on November 30, the Emir appointed a new Prime Minister, Sheikh Jaber Al Sabah, who was charged with selecting candidates of his Cabinet to be approved by the Emir. Nonetheless, the New Prime Minister, instead of forming his new Cabinet, had sought approval from members of the old Cabinet to request the dissolution of the Parliament. This is supported by the Preamble of the Dissolving Decree No. 443 for 2011 which explicitly recorded the approval of the Government.

73 KCC Decision No. 6 & 30 of 2012, note 20, p. 159.

74 Ibid. p, 162.

The Court then rejected the defendant's contention that litigations involving Dissolution Decrees are political questions and, therefore, non-justiciable. In doing so, the Court, although acknowledging the constitutional right of the Executive branch to Dissolve the Parliament as an important tool to maintain the balance between the Executive and Legislative branches, drew a careful distinction between assessing the appropriateness or the soundness of Dissolution Decrees and the mere violation of constitutional provisions, holding that while the Court has no business to interfere in the former matter because it is inherently discretionary, it must strike down Dissolution Decrees when they are repugnant to the Constitution. It further asserted that rules and safeguards specified in the Constitution cannot be abandoned, neglected, or disregarded under the guise of being political.[75]

Applying the above to the facts of the case, the Court observed that the fact that the Dissolution Decree was requested by the newly appointed Prime Minister upon the consent of an already resigned Cabinet that is no longer in command constitutes a violation of the Constitution and makes the Dissolution Decree unconstitutional.[76] On the above ground, the court ruled void the entire election process conducted in the wake of the Dissolution and ordered the restoration of the dissolved Parliament as if the dissolution never happened.[77]

c) The KCC Decision No. 11 of 2022

Similar to the former Precedent, but ten years later, this case also evolved from a challenge to invalidate the results of the Parliamentary elections of 2022 on the ground that the Dissolution Decree of the preceding Parliament was unconstitutional.[78]

The alleged constitutional violation was, however, quite different from the one raised in the earlier precedent. In this case, the appellant contended that the challenged Dissolution Decree violated the Constitution because it was unwarranted. He argued that the justifying reasons maintained by the government to dissolve the Parliament - which centered on the existence of "discrepancies, non-cooperation, and non-harmonization" between the Executive and Legislative branches of the Government - were far from being accurate because the Cabinet requesting the dissolution was a new Cabinet that had been appointed just one day before the promulgation of the Dissolution Decree. Therefore, it is inconceivable to infer - in such a short period - any sign of disagreement or non-cooperation between this Cabinet and the Parliament that could warrant such dissolution.[79]

75 Ibid. p. 161.

76 Ibid. pp. 164-65.

77 Ibid. p.165.

78 The KCC decision No. 11 of 2022, 19 March 2023, note 24.; See also Dissolution Decree No. 136 of 2022, 2 August 2022.

79 The KCC decision No. 11 of 2022, 19 March 2023, note 24, p.2. The appellant further explained although there has been a stark disagreement between the former Cabinet headed by the Prime Minister Sheikh Al-Sobah Hamed Al-Sobah and Majlis al-Ummah, it is presumed to have vanished upon the resignation of this Cabinet. Therefore, the succeeding Cabinet's reliance, in the wake

In resolving the case, the Court, proclaiming itself as the guardian of the Supremacy of the Constitution, re-asserted its jurisdiction to review the constitutionality of Dissolution Decrees to ensure their compliance with constitutional safeguards specified in Article 107 of the Constitution, including that which requires Dissolution Decrees to be premised upon genuine grounds. The Court further asserted that it is the province of the Court to ensure the existence of factual grounds to avoid any constitutional violations and to prevent the Executive from abusing its dissolution powers.[80]

Having highlighted the above, the Court opined that the alleged grounds of "discrepancies, non-cooperation, and non-harmonization" upon which the Dissolution Decree was premised were erroneous.

In reaching this belief, the Court relied heavily on the fact that the request to dissolve the Parliament was submitted by the new Cabinet on the same day of its appointment, holding that this fact rendered the government's allegations of non-cooperation flawed.[81] The Court further noted that the newly appointed Cabinet could not rely on allegations of disagreements between the preceding Cabinet and the Parliament to request the dissolution of the Parliament, because such allegations were presumed to have vanished once the resignation of the former Cabinet was accepted. Therefore, these allegations can no longer also constitute valid grounds for the succeeding Cabinet to dissolve the Parliament.[82]

Based on the above, the Court struck down the Dissolution Decree for not being premised upon genuine grounds and voided consequently all actions taken on the grounds of this decree including the 2022 parliamentary election results.[83]

3. The Impact of the KCC Decisions

Although the above-discussed Court's decisions have been highly unanticipated in the way they invoked the constitutional principle of "Judicial Review", They have been deemed by some commentators as an unlawful attempt "judicial overreaching" for not being supported by means of any explicit or even implied terms in neither the Kuwaiti Constitution nor the Constitutional Court Law.[84]

of its appointment, on this prior disagreement to dissolve the Parliament rendered the Dissolving Decree repugnant to the Constitution for not being grounded on factual reasons.

80 Ibid. p.7.

81 Ibid. p.8.

82 Ibid. p.9.

83 Ibid. pp.9-10.

84 See for example *Youssef Al Youssef*, Two Contradictory Opinions in the Constitutional Court Decision reinstating the 2009 Parliament (Rayan Motadan Fi Hokmeha Beeadet Majlis 2009 رأيـــــان متضـــادان في حكمهـا بإعـادة مجلـس 2009), https://alwatan.kuwait.tt/articledetails.aspx?id=204992 (last accessed on 01 November 2024).

In addition, these decisions have been also criticized on the ground that they are affecting the Court's legitimacy for improperly interfering into the political thicket.[85] In other words, such decisions have been seen by some as compromising the legitimacy of the Court because they affected the way it is perceived by the public. Instead of being perceived as a unique and independent institution, especially in political turmoil or charged times, these decisions have made the Court to appear as "just another political institution."[86]

We, however, do not agree with the above arguments for the following two reasons: First, in contrast to the assertion that there are no constitutional or legislative provisions supporting the Court's jurisdiction to review dissolution decrees, it has been demonstrated that the Court has grounded its jurisdiction in both decisions, on the Constitutional Court Law, and more particularly on the Electorate Appeal provision. According to this provision, the Court was bestowed with an exclusive and a comprehensive jurisdiction to extend its judicial oversight over the entire phases of the elections, including the constitutionality of dissolving decrees if such elections were held following a premature dissolution of the Parliament.

Second, the other argument with relevance to the Court's legitimacy is similarly not accurate. Claiming that interference in political arena renders the Court as an "another political institution" and strips it of its' legitimacy is highly debatable. In fact, interference in such arena is sometimes warranted to protect the rule of law and preserve the Supremacy of the Constitution. Legitimacy of Courts is secured, as noted by one scholar, "so long as the Justices reach their decisions through principled decision-making processes, as opposed to behaving strategically, which the public may perceive as politically motivated. The man on the street does not care that the Court appears to side with one party over the other. He only cares that the Court follows a principled process" and this is typically what happened in both precedents."[87] This is typically what happened in the Case of Kuwait. As noted in the above section, despite the existence of a ten-year time lapse between the two rulings, the Court has maintained the same rationales and holdings in both decisions, refusing to stray from the settled norms.

Indeed, we, in contrast to the above position, strongly believe The KCC's insistence on monitoring Dissolution Decrees is largely inspired by the Court's desire to vindicate the rule of law and constitutional legitimacy over political considerations.

The Court's approach in both precedents is premised on the *Manifesting Error* Doctrine adopted by the constitutional jurisprudence in Kuwait and many other civil law

85 Ibid.

86 Ibid.; *James L. Gibson / Michael J. Nelson,* Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?, Journal Empirical Legal Studie 14 (2017), p. 592.

87 *Luis Fuentes-Rohwer*, Taking Judicial Legitimacy Seriously, Chicago Kent Law Review 93 (2018), p. 507.

countries.[88] Although this Doctrine does not generally empower Constitutional Courts to decide political questions nor exercise discretion beyond its competencies, it entitles them to void political actions in cases where they significantly violate a procedural or substantial safeguard stipulated in the Constitution. In other words, this doctrine limits the scope of judicial review over political actions to check the conformity of such actions with the Constitution, not to assess their appropriateness or soundness on behalf of the Executive.

The ruling of the KCC in the Dissolution Decree precedents confirmed our above observation. As revealed in the discussed precedents, only the constitutionality of the Dissolution Decrees, and not their appropriateness or suitability, was subject to judicial review. This is supported by the fact that Dissolution Decrees were not invalidated on the grounds of their unsuitability, inappropriateness, or unsoundness, but rather because they violated constitutional safeguards requiring such decrees to be requested by an in-command Cabinet (2012 ruling) and to be premised upon factual reasons (2023 ruling).

In the end, we believe that the KCC's rulings in the Dissolution Decree precedents are significant in many respects. First, these rulings make the State of Kuwait the first country in the Arab region to subject Dissolution Decrees to judicial review. Second, they may have a profound impact on the Doctrine of Sovereign Acts in Kuwait's legal system because they could serve as a legal premise for the KCC to scrutinize many other political actions – that have long been deemed nonjusticiable - to ensure their consistency with the Constitution. Third, these rulings demonstrate the importance of judicial review as a means to enforce the limits of the Constitution on one hand and to compel other governmental branches to recognize the limits of their powers on the other hand.

III. The 2023 Legislative Amendment of the Constitutional Court Law

This last section will, first, highlight the newly approved amendments of the Constitutional Court Law with respect to the KCC's authority to review Dissolution Decrees and, second, emphasize our remarks concerning these amendments.

1. Codification of the KCC Judicial Review Power over Dissolving Decrees

The Dissolution Decree decisions prompted an important legislative intervention in 2023 when some members of the parliament proposed an amendment to the Constitutional Court Law. Although the amendments, as originally proposed, were aimed at precluding the Court from questioning the validity of Dissolving Decrees on the grounds of their political

88 For more on the Manifesting Error Doctrine see *Zaki Mohamed Al-Nagar,* The Idea of Manifesting Error in the Constitutional Jurisprudence - Comparative Study (Fekrat Al-Ghalat Fi Qadaa Al-Dostouria – Derasa Moqarna فكرة الغلط في قضاء الدستورية – دراسة مقارنة), Cairo 1997.

nature,[89] the majority of the Parliament rejected this proposal and opted instead for an amendment of the same law that upheld the Court's reviewing power over these Decrees.[90]

The approved amendments were translated into the newly added article *4 bis* which includes two main provisions.

The first provision confers upon the Court an exclusive jurisdiction to decide constitutional challenges of Dissolution Decrees. These challenges could be raised by any individual with a personal interest via the direct constitutional Challenge process, provided that the challenges are submitted to the Court within ten days from the date of their publication in the Official Gazette. The provision further urges the Court to decide upon those challenges within ten days of the expiration of the appeals time.[91]

The second provision, however, prohibits the KCC from considering the constitutionality of Dissolution Decrees once the parliamentary election results have been announced. This later provision was intended to immunize Majlis Al-Ummah after the Election Process had ended and to preclude KCC's earlier practices of questioning the constitutionality of Dissolution Decrees in the course of electoral appeal proceedings.[92]

2. Our Remarks on the 2023 Legislative Amendments

We believe that the Constitutional Court Law amendments constitute an important step toward upholding the rule of law and the Supremacy of the Constitution because they empower the Court to act as a backstop against the unconstitutional exercise of the Dissolution Power.

Recognizing the KCC's ability to question the Constitutionality of Dissolution Decrees should not be construed, however, as allowing the Court to make policy judgments on behalf of the Executive or to examine the appropriateness or the soundness of political considerations beyond the promulgation of Dissolution Decrees. Rather, the Court's scope of judicial review over these Decrees should be limited, as illustrated by the KCC Case law, to situations where such decrees are repugnant to the Constitution or hinder any of its safeguards.

We also believe that the legislative amendments render the KCC more accessible to individuals for two reasons. First, the KCC, before the amendment, could only have reviewed

89 *George Sadek*, Kuwait: Members of Parliament Propose New Amendments to Constitutional Court Law, https://www.loc.gov/item/global-legal-monitor/2023-07-12/kuwait-members-of-parliament-propose-new-amendments-to-constitutional-court-law/ (last accessed on 12 June 2024).

90 The amendments were included in the Law No. 119 of 2023 amending Law No. 14 of 1973 with relevance to the establishment of the Constitutional Court, promulgated on 27 August 2023.

91 See the Constitutional Court Law, note 64, art.4bis (a); For more on the Direct Constitutional Challenge procedure before the Constitutional Court, see *Khalifa Thamer Alhamida*, Direct Constitutional Challenges in Kuwait, Yearbook of Islamic and Middle Eastern Law Online 21 (2022), pp. 3-7.

92 Art. 4bis (b) of the Constitutional Court Law.

constitutional challenges of Dissolution Decrees if raised during ongoing litigations of electoral appeals, which meant that such challenges would be held inadmissible if raised in any other proceedings before the KCC. However, the amendments allow individuals to challenge Dissolution Decrees via the direct constitutional challenge process without requiring them to establish any connection between these challenges and electoral appeal litigations.

Second, individuals who were entitled to raise constitutional challenges of Dissolution Decrees, before the amendments were only those who had *Locus standi* in electoral litigations. However, the amendments paved the way to challenge Dissolution Decrees, not just for parties in electoral litigations, but for every individual with a personal interest.

That being noted, we do have the following remarks with respect to the amendments: Although the amendment was hoped to ensure the full implementation of constitutional legitimacy, it has only allowed the KCC to consider challenges of these decrees if raised within 10 days of their publication in the Official Gazette. If challenges were submitted to the Court after this period or after the election results have been announced, the KCC must dismiss them. Such a period is too short for the parties concerned to file their constitutional claims and prepare their arguments. Therefore, we believe it is important to prolong this period. Even though the scope of the KCC's judicial review power over Dissolution Decrees seems to be very broadly worded in the legislative amendment, we believe that it should not be construed to allow the Court to make policy judgments on behalf of the Executive or to examine the appropriateness or the soundness of political considerations beyond the promulgation of Dissolution Decrees. Accordingly, we believe that it would have been sounder if the amendment had explicitly limited the Court's scope of judicial review over these Decrees, as illustrated by the KCC Case law, to situations where such decrees are repugnant to the Constitution or hinder any of its safeguards.

We further believe that, due to the political nature of Dissolution Decrees, it would have been more convenient to adopt an *ex-ante* reviewing system as opposed to the currently adopted *ex-post* review. In this proposed *ex-ante* review, the KCC would be seized on a mandatory basis to review these decrees before their promulgation upon a referral from the Emir or the Government. Adopting this model of review could alleviate any potential risk of embarrassment for the KCC while interfering in political relations between the Executive and Legislative branches and would avoid possible violations of the Constitution before they materialize.

E. Conclusion

The article has attempted to examine the possibility of subjecting the Dissolution Power to judicial review. In addressing this inquiry, we discovered that although major legal systems such as Egypt, France, and the United Kingdom have– via explicit legal provisions or Constitutional Court decisions – opted to eliminate all forms of judicial review over the exercise of the Dissolution Power due to their political nature, there has been an emerging

approach in Kuwait's legal system to subject Dissolution Decrees to the judicial review of the Constitutional Court.

As emphasized in this article, this legal development in Kuwait was initiated via two landmark decisions of the KCC in which the Court affirmed its jurisdiction to question the constitutionality of Dissolution Decrees, provided that challenges to these Decrees were raised in the course of electoral appeal litigations. However, the scope of judicial review over these Dissolution Decrees – as noted by the Court - is limited to ensure the compliance of these decrees with the Constitution and does not in any respect empower the Court to examine the appropriateness or the soundness of these decrees.

The KCC's rulings have prompted an important legislative amendment in which the Parliament has expanded the judicial review power of the Constitutional Court by explicitly entrusting the Court with the power to examine the constitutionality of Dissolution Decrees.

It is our point of view that subjecting the Dissolution Power to a judicial review model, similar to that established in Kuwait, is the most, if not the only, effective means to ensure that constitutional limits and safeguards surrounding the exercise of this power are enforced.

The Pan-African "Charter for African Cultural Renaissance": A Postcolonial Agenda for Africa in the 21st Century

By *Prof. Dr. Dr. Sabine von Schorlemer*[*] and *Emma Neuber*[**]

Abstract: Despite the formal end of colonial rule in Africa, (neo-)colonial structures continue shaping parts of the continent. Against this situation, the concept of an African Renaissance envisions the rebirth of the continent and its rise from oppression. The Charter for African Cultural Renaissance is a Pan-African treaty that most clearly defines this concept to date. The Charter aims to give back agency to African actors and empower Africa to reach its full potential through culture in a broad range of areas, including human rights, education, science, technology, creative industries, and cultural heritage. The present article examines the treaty's emancipatory character and explores to what extent it may serve as a postcolonial agenda for Africa in the 21st century, potentially bringing about real change for the continent's future. In that respect, an in-depth legal analysis of the Charter's substantive provisions will show that the African-wide treaty contains numerous innovative provisions. Furthermore, existing links to international law are highlighted. An exploration of actions taken for the implementation of the treaty reveals significant international efforts. For the African Union, the Charter's implementation is part of wider efforts to achieve Pan-Africanism and African Renaissance. Supportive initiatives by UNESCO have been placed under the framework of "Global Priority Africa." Still, challenges to fulfil the promises of African Cultural Renaissance persist. In that respect, the article proposes some pathways to overcome those challenges.

Keywords: Charter for African Cultural Renaissance; Postcolonialism; Cultural Heritage Cultural Development

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A. Introduction

> *"The call for Africa's renewal, for an African Renaissance is a call to rebellion. […] Surely, there must be politicians and business people, youth and women activists, trade unionists, religious leaders, artists and professionals from the Cape to Cairo, from Madagascar to Cape Verde, who are sufficiently enraged by Africa's condition in the world to want to join the mass crusade for Africa's renewal. It is to these that we say, without equivocation, that to be a true African is to be a rebel in the cause of the African Renaissance, whose success in the new century and millennium [sic] is one of the great historic challenges of our time."*[1]

Thabo Mbeki, then South African president, describes that Africa must overcome its current state in the world and renew itself. One of the main reasons for this need is the fact that despite the end of formal colonial rule, (neo)colonial dependency and power structures persist. To mention just a few examples: Arbitrary colonial border delimitations continue to divide African communities and remain a source of conflict between States.[2] The wealth of African cultural heritage and cultural expressions has been severely damaged by colonial occupation, plunder, and exploitation.[3] Much of the cultural property removed during colonial times remains outside its countries of origin, leaving many African communities alienated from their culture and without access to their cultural heritage. The languages of former colonial powers remain dominant in Africa, thus neglecting local languages and impairing cultural diversity, identity, and heritage.[4] Also, the "ongoing denial of African history"[5] rooted in the falsification and appropriation of history by colonial powers leaves many Africans without knowledge of their own history. As Judge Abdulqawi Yusuf highlighted, "African history […] was interrupted in its development, buried in the ashes of

1 *Thabo Mbeki*, The African Renaissance Statement, SABC, Gallagher Estate, 13 August 1998, https://dirco1.azurewebsites.net/docs/speeches/1998/mbek0813.htm (last accessed on 18 January 2025).

2 The International Court of Justice dealt with various cases of border conflicts with colonial origins. See ICJ, Case concerning the Frontier Dispute (*Burkina Faso v. Republic of Mali*), Judgment of 22 December 1986; ICJ, Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria: Equatorial Guinea Intervening*), Judgment of 10 October 2002; ICJ, Case concerning the Frontier Dispute (*Benin v. Niger*), Judgment of 12 July 2005; ICJ, Frontier Dispute (*Burkina Faso v. Niger*), Judgment of 16 April 2013. More generally see *Brian Taylor Sumner*, Territorial Disputes at the International Court of Justice, Duke Law Journal 53 (2004), pp. 1779-1812.

3 *Sabine von Schorlemer*, Die panafrikanische 'Charter for African Cultural Renaissance': Eine postkoloniale Agenda für das Kulturerbe Afrikas und für Restitutionen, Opladen 2025, p. 21.

4 *Bruno de Witte*, Language as Cultural Heritage, in: Francesco Francioni / Ana Filipa Vrdoljak (eds.), The Oxford Handbook of International Cultural Heritage Law, Oxford 2020, p. 370; *Olawale I. Maiyegun* / *Angela Martins*, The Role of Culture in African Renaissance, Integration, and Sustainable Development, The International Journal on Green Growth and Development 3 (2017), p. 66.

5 *Dan Hicks*, The Brutish Museums, London 2020, p. 47.

colonial conquest or disrupted through the plundering of cultural heritage items, artefacts and archives from the continent."[6]

Already this short overview illustrates that despite many former African colonies having gained formal independence in the second half of the 20th century, the impact of colonialism has not been overcome yet. Quite on the contrary, its effects still shape African communities, societies, and States to this day.

African Renaissance seeks to overcome this status quo. It aims at the rebirth of Africa and its rise from neo-colonial oppression to reach its full potential.[7] This endeavour is codified and further concretized in the Charter for African Cultural Renaissance (CACR)[8] – a Pan-African treaty negotiated under the auspices of the African Union (AU), adopted in 2006 and in force since 2020.[9]

The CACR centres around culture and its crucial role in achieving the African Renaissance. It aims to revive Africa's diverse culture and rich cultural expressions oppressed by external forces such as former colonialism and contemporary globalisation[10] as well as using the force of culture to further development.[11]

The CACR has been described as one of the AU's "most significant contemporary treaties."[12] Indeed, it aims to empower African States and societies to accomplish "political, economic and social liberation,"[13] and seeks to give back agency to African States and societies to reappropriate their culture, languages, and history. Nevertheless, the Charter remains rather unknown. In fact, it took 14 years until the treaty entered into force – one of the possible reasons for that being the lack of awareness of the relevance of culture in the field of African Renaissance.[14]

Against this backdrop, the present article seeks to analyse the Charter and its significance, exploring in what way the CACR is suitable to serve as a postcolonial agenda for

6 *Abdulqawi A. Yusuf*, Foreword, in: Sabine von Schorlemer, Die panafrikanische 'Charter for African Cultural Renaissance': Eine postkoloniale Agenda für das Kulturerbe Afrikas und für Restitutionen, Opladen 2025, p. 6.

7 *Vincent O. Nmehielle*, The African Union and African Renaissance, Singapore Journal of International and Comparative Law 7 (2003), pp. 416 ff.

8 Charter for African Cultural Renaissance (CACR) (adopted on 14 January 2006).

9 African Union, Continental Launch of the Entry into Force of the Charter for African Cultural Renaissance (2006) and Africa Day Celebrations, 25.05.2021, https://au.int/en/newsevents/20210525/continental-launch-entry-force-charter-african-cultural-renaissance-2006-and (last accessed on 18 January 2025).

10 Preamble para. 6 CACR.

11 Preamble para. 7 CACR.

12 *Janet Blake*, International Cultural Heritage Law, Oxford 2015, p. 316.

13 Preamble para. 10 CACR.

14 *Kevin Bakulumpagi*, Resolution of the African Commission on Human and Peoples' Rights on the Protection of Sacred Natural Sites and Territories, African Human Rights Yearbook 5 (2021), p. 317.

Africa in the 21st century. Therefore, it will examine to what extent the CACR's provisions are innovative and able to bring real change to Africa's future.

To answer these research questions, the article will first explore the central concepts of the African Cultural Renaissance and Pan-Africanism, then turn to an in-depth analysis of the substantive provisions of the CACR, before examining actions by the African Union and UNESCO to implement this treaty.

Being aware of the constant risk of potential Eurocentric biases, the current study will focus on the document that the African Union with its 55 Member States has adopted solemnly and whose promotion can, thus, be assumed to be in Africa's genuine interest: The Charter for African Cultural Renaissance.

B. Background: African Cultural Renaissance and Pan-Africanism

The roots of the concept of the African Renaissance go back at least to the 20th century. The idea was made popular by the Senegalese anthropologist and historian Cheikh Anta Diop in a series of essays published between 1946 and 1960.[15] It was further promoted by Thabo Mbeki, quoted above, at the end of the century. Not only did Mbeki take up the idea in his speeches,[16] but he also hosted a conference on the African Renaissance in 1998 and opened the African Renaissance Institute in Pretoria, South Africa, one year later.[17]

African Renaissance aims at the continent's postcolonial rebirth. It "encapsulates the need for Africa to arise from oppression, neo-colonial subjugation, lack of continental accountability, in order to enable the continent to reach its greatest potential."[18] Culture plays an important role in this quest for African development. For Cheikh Anta Diop, it was essential that African culture and history were the foundations of the renewal. Agency being a central cornerstone of the concept, Diop emphasized that Africans should be enabled to take responsibility for building their own future.[19]

African Renaissance itself is "deeply rooted in the idea of Pan-Africanism."[20] Likewise, Pan-Africanism strives for African development. It sees African unity as the driving force to that end. As it has been aptly described:

> *"Pan-Africanism is an ideology and movement that encourages the solidarity of Africans worldwide. It is based on the belief that unity is vital to economic, social and political progress and so, it aims to 'unify and uplift' people of African descent.*

15 *Sabelo J. Ndlovu-Gatsheni*, Revisiting the African Renaissance, Oxford Research Encyclopedia of Politics (2019), p. 5. The essays were published collectively in 1966 under the title "Towards the African Renaissance: Essays in Culture and Development, 1946-1960".

16 With further references *Yusuf*, note 6, p. 5.

17 *Ndlovu-Gatsheni*, note 15, p. 2.

18 *Nmehielle*, note 7, pp. 416 ff.

19 *Ndlovu-Gatsheni*, note 15, p. 5.

20 *Yusuf*, note 6, p. 5.

> *[…] The ideology asserts that the fate of all African peoples and countries are intertwined. At its core, Pan-Africanism is 'a belief that African peoples, both on the continent and in the Diaspora, share not merely a common history, but a common destiny'."*[21]

Pan-Africanism, as further concretized by the African Union, fosters not only democratization and development[22] but also recognizes the important role of culture. In cultural terms, Pan-Africanism is particularly about respecting and recognizing the uniqueness of African cultures, traditions, and lifestyles and giving them high priority in the context of overall social development.[23] Likewise, the African Cultural Renaissance is "about the revival of African cultures based on the dynamic values of African cultural expressions and cultural heritage that promote African identity, human rights, social cohesion and human development."[24]

Consequently, Pan-Africanism and African Renaissance are fundamental to Africa's future and "critical to the continent's progress."[25] This becomes evident in the AU's "Agenda 2063: The Africa We Want."[26] This 50-year strategic framework for the long-term transformation of the continent envisions Africa developing into an integrated, united, peaceful, sovereign, prosperous, and independent continent, "driven by its own citizens, and representing a dynamic force in the international arena."[27] A self-confident Africa is envisioned – "self-confident in its identity, heritage, culture and shared values."[28]

"The Africa We Want" reflects the continent's determined will to regain agency and find its own path – based on the African Cultural Renaissance and Pan-Africanism. The CACR has similar objectives, which will be outlined in the following part.

21 African Union, Presentation on ICT, Pan-Africanism and Renaissance, https://au.int/en/file/27222-wd-presentationonictpanafricanismandrenaissancepdf (last accessed on 18 January 2025).

22 *Abdulqawi A. Yusuf*, Pan-Africanism and International Law, in: Académie de Droit International de la Haye (ed.), Collected Courses of The Hague Academy of International Law – Recueil des cours, The Hague 2014, pp. 199–202.

23 African Union, Agenda 2063, The Africa We Want, https://au.int/en/agenda2063/overview (last accessed on 18 January 2025), para. 7; see also *Schorlemer*, note 3, p. 36.

24 *Yusuf*, note 6, p. 6.

25 African Union, Agenda 2063 Framework Document, p. 85. See also *Lando Kirchmair*, Shifting the Focus from an International Towards a More Regional Cultural Heritage Protection in the Middle East and North Africa, World Comparative Law 53 (2020), p. 283.

26 African Union Agenda 2063.

27 African Union / African Union Development Agency, Second Continental Report on the Implementation of Agenda 2063, Midrand 2022, p. iv.

28 African Union Agenda 2063, para. 7.

C. Legal Basis: The Charter for African Cultural Renaissance

I. Genesis of the CACR

After the formal liberation from colonial rule in the 1950s and 60s, most independent African States focussed primarily on the economic development of their countries.[29] At the same time, however, they were concerned with the revitalization of autochthonous cultural values, which were often suppressed, even eradicated by colonial powers. Thus, it became questionable whether the preservation of traditional values and progressive development were compatible. An alignment of the two objectives was found in the concept of cultural development, viewing cultural development as "one of the essential factors in general development."[30] This concept was significantly shaped by UNESCO, which pushed to transform the perception of culture as something rather static and traditional into an innovative tool for development.[31]

Gradually, African States started to take cultural aspects into consideration within their development policies.[32] In 1985, the Organization of African Union's (OAU)[33] Heads of State and Government committed themselves to "the need to align cultural development with the economic development of Africa."[34] Moreover, the importance of cultural development for Africa's international relations was emphasized in the OAU's 1996 Yaoundé Declaration in which the Heads of State acknowledged: "[…] the continent's place in the concert of nations of tomorrow and beyond and the pull it will have on the other regions will depend on its cultural development."[35]

The importance of culture was further acknowledged in the OAU's Cultural Charter for Africa – the CACR's predecessor – which was adopted in 1976 and entered into force in 1990.[36] This previous Charter can be seen as an early normative step in the quest for an African Cultural Renaissance.[37] It understood culture as an important tool in the struggle for political and social liberation and "the most efficient force of our victorious resistance to imperialist blackmail."[38] To this end, the treaty foresaw to strengthen cultural

29 *Schorlemer*, note 3, p. 56.

30 UNESCO Doc. SHC/MD/13 (1970), Resolution 12, para. 1. More generally on the culture-development nexus see *Sabine von Schorlemer*, UNESCO-Weltkulturerbe und postkoloniale Diskurse, Baden-Baden 2022, pp. 85 ff.

31 *Schorlemer*, note 3, p. 56.

32 *Kebede Kassa Tsegaye*, The Cultural Agenda of the OAU/AU since 1963, Africology: The Journal of Pan African Studies 9 (2016), pp. 43 ff.

33 The OAU, founded in 1963, is the predecessor of the AU, founded in 2002.

34 OAU Doc. AHG/Decl.2(XXI) (1985), preamble para. 7.

35 OAU Doc. AHG/Decl.3 (XXXII) (1996), para. 29.

36 Cultural Charter for Africa (adopted on 5 July 1976). For further analysis of the content of this treaty, cf. *Schorlemer*, note 3, pp. 58–61.

37 *Schorlemer*, note 3, p. 61.

38 Preamble paras. 10, 11 Cultural Charter for Africa, see also Art. 1 a, d Cultural Charter for Africa.

cooperation[39] and preserve and promote African cultural heritage.[40] Furthermore, a whole part of the Charter was dedicated to national cultural development,[41] in which the State Parties agreed to develop national cultural policies[42] and integrate them into economic and social development policies.[43]

With the founding of the African Union in 2002,[44] an even stronger focus was placed on the importance of culture. The promotion of sustainable cultural development was already mentioned as an objective in the AU's Constitutive Act.[45] The AU Commission's Strategic Plan (2004), furthermore, saw African culture and languages as assets to be used for Africa to become "a force we can rely upon."[46]

Only four years after the AU's founding, in 2006, a new cultural treaty, the CACR, was adopted,[47] replacing the Cultural Charter for Africa and clearly reflecting the AU's focus on culture. In practice, however, the CACR got off to a rather rough start. Initially, the treaty foresaw that it would enter into force after two-thirds of the AU Member States ratified it.[48] However, by 2011, five years after the Charter's adoption, only three members had become State Parties.[49] The AU, several African States, UNESCO, NGOs, and networks launched public campaigns calling on the AU Member States to ratify. This included, among others, the 2013 "Pan-African Forum for the Culture of Peace" by the AU, UNESCO, and the Government of Angola,[50] a conference on "Partnership with Civil Society in […] the Charter of African Cultural Renaissance: What Challenges? What Solution?" in 2017,[51] and

39 Art. 1 e, f Cultural Charter for Africa. See also Arts. 30-32 Cultural Charter for Africa.

40 Art. 1 b Cultural Charter for Africa. See also Arts. 26-29 Cultural Charter for Africa.

41 Part III, Arts. 6-11 Cultural Charter for Africa.

42 Art. 6 a Cultural Charter for Africa.

43 Art. 6 b Cultural Charter for Africa.

44 AU Doc. ASS/AU/Decl. 2 b (1) (2002).

45 Art. 3 j Constitutive Act of the African Union (adopted on 11 July 2000). See also Art. 3 k Constitutive Act of the African Union as an indirect reference to culture.

46 AU Commission, Strategic Plan of the African Union Commission, https://sarpn.org/documents/d0001693/P2037-AU_Strategic-Plan_May2004.pdf (last accessed on 18 January 2025), p. 3.

47 AU Doc. Assembly/AU/Dec. 94 (VI) (2006). Approved by Ministers of Culture already in AU Doc. AUCMC/MIN/DRAFT/RAPT/RPT(I) (2005), para. 19.

48 Art. 35 CACR.

49 African Union, Launch of the Campaign for African Cultural Renaissance for the Southern Africa Development Community (SADC) Member States, 30.11.2011, https://au.int/sites/default/files/speeches/27738-sp-remarks_for_csa_-_sadc_launch_-_with_directors_input_edited1_0.pdf (last accessed on 18 January 2025), p. 3.

50 UNESCO Doc. AFR-2013/WS/2 (2013), p. 130.

51 Centre Régional pour les Arts Vivants en Afrique, Regional Workshop on the 2005 UNESCO Convention and the African Union Charter for Cultural Renaissance, 13.04.2022, https://www.ceravafrique.org/fr/node/16?language_content_entity=en (last accessed on 18 January 2025).

activities by the Pan-African Arterial Network of artists, companies, and NGOs.[52] Despite these efforts, the number of ratifications remained below the threshold set by article 35 CACR, so in 2019, an amendment to the Charter was adopted, lowering the number of required ratifications to 15.[53] Only months later, in 2020, the CACR finally entered into force.[54] Currently, 34 States have signed the treaty, of which 18 have ratified it.[55]

The reasons for the apparent lack of political will to accede to the Charter of African Cultural Renaissance could be manifold. They might include the lack of awareness of the relevance of the treaty provisions and their exact content,[56] the supposedly small importance of culture compared to other political matters such as security or economy, and the diversity of State and non-State actors involved in cultural policies complicating related decision-making processes.[57] Moreover, it is possible that some States considered the 1976 Cultural Charter for Africa to be sufficient and therefore saw no need to ratify another cultural treaty.[58]

As of today, the CACR is an African-wide international treaty that binds States that have ratified it. In the relations between its parties, it replaces the older Cultural Charter for Africa.[59] If State Parties of the Cultural Charter have not ratified the CACR, the former remains in force.[60] Against this background, the following analysis of the legal provisions of the CACR will reveal that the CACR contains some important provisions.

52 Arterial Network, Understand the Charter for African Cultural Renaissance, 21.03.2018, https://www.youtube.com/watch?v=6pib4T2tz4c (last accessed on 18 January 2025).

53 AU Directorate of Information and Communication, Key Decisions of the 32nd Ordinary Session of the Assembly of the African Union (January 2019), https://au.int/sites/default/files/pressreleases/35794-pr-decisions.pdf, On the Draft Legal Instruments, para. vi (last accessed on 18 January 2025).

54 African Union, Continental Launch of the Entry into Force of the Charter for African Cultural Renaissance (2006) and Africa Day Celebrations, 25.05.2021, https://au.int/en/newsevents/20210525/continental-launch-entry-force-charter-african-cultural-renaissance-2006-and (last accessed on 18 January 2025).

55 African Union, List of Countries which Have Signed, Ratified/Acceded to the Charter for African Cultural Renaissance, https://au.int/sites/default/files/treaties/37305-sl-CHARTER_FOR_AFRICAN_CULTURAL_RENAISSANCE_0.pdf (last accessed on 18 January 2025).

56 *Bakulumpagi*, note 14, p. 317.

57 African Union, Launch of the Campaign for African Cultural Renaissance for the Southern Africa Development Community (SADC) Member States, https://au.int/sites/default/files/speeches/27738-sp-remarks_for_csa_-_sadc_launch_-_with_directors_input_edited1_0.pdf (last accessed on 18 January 2025), p. 5.

58 *Schorlemer*, note 3, pp. 67–69.

59 Art. 2 a CACR. This reflects the legal principle of lex posterior derogat legi priori.

60 Art. 2 b CACR.

II. Provisions of the CACR

1. Preamble

While a treaty's preamble is not itself legally binding, it sets an important context for the interpretation of the following provisions.[61]

The CACR's preamble starts by defining what culture is. Culture entails "the set of distinctive linguistic, spiritual, material, intellectual and emotional features of the society or a social group," which "encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[62] This expresses a broad understanding of culture, which includes not only tangible but also intangible cultural heritage and cultural expressions. Moreover, it is acknowledged "that all cultures emanate from societies, communities, groups and individuals."[63] In turn, it can be concluded that cultural development also comprises societal development.

Accordingly, the cultural autonomy of individuals is emphasized: "[…] any people have the inalienable right to organize their cultural life in full harmony with their political, economic, social, philosophical and spiritual ideas."[64] This already hints at the CACR's human rights approach, which will be discussed later.

Moreover, the CACR's *telos* becomes apparent. First, Africa's experiences of cultural oppression during colonialism are recalled. The preamble states that "cultural domination […] during the slave trade and the colonial era led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially their languages by that of the colonize [sic]."[65] Building on this, the Charter's understanding of culture is elucidated: Culture is seen as a tool in the "political, economic and social liberation struggle"[66] and "the most efficient response to the challenges of globalisation."[67] This already hints at the emancipatory potential of the CACR as a post-colonial agenda for Africa. The central concern of the Charter is overcoming remaining dependencies and achieving the desired resurgence of the continent in the 21st century through culture.

61 Art. 31 (2) Vienna Convention on the Law of Treaties (adopted on 23 May 1969).
62 Preamble para. 3 CACR.
63 Preamble para. 4 CACR.
64 Preamble para. 5 CACR.
65 Preamble para. 7 CACR.
66 Preamble para. 16 CACR.
67 Preamble para. 15 CACR.

2. Objectives and Principles

After setting the context through the preamble, article 3 lays out the twelve objectives of the CACR, the achievement of which is specified in the following provisions. Subsequently, five principles are enumerated in article 4, underlying and supporting the achievement of these objectives.

Among the most important objectives are the promotion of human rights, namely "the dignity of African men and women"[68] and the "freedom of expression and cultural democracy"[69] – the former expressing the emancipatory character of the CACR as respect for the dignity of Africans is essential for the post-colonial aim to overcome colonial injustice, acknowledge the harm done, and promote African identities.[70] Further human rights provisions such as "respect for […] cultural rights of minorities"[71] and "access of all citizens […] to culture"[72] are mentioned as the CACR's underlying principles in article 4.

Another crucial objective is related to development. Cultural objectives are to be integrated into "development strategies"[73] and "an enabling environment" should be promoted which "maintain[s] and reinforce[s] the sense and will for progress and development."[74] This is also important to enable people "to cope with globalization."[75]

Furthermore, cultural heritage is to be preserved, restored, and rehabilitated.[76] The return of cultural property plundered in colonial contexts, and the repatriation of human remains, i.e., ancestors of African communities remaining in various museums in the Global North, often those of former colonial powers, is part and parcel of this endeavour.[77]

Further objectives include strengthening the role of culture "in promoting peace,"[78] democracy,[79] and "social cohesion"[80] and encouraging cultural cooperation between Member States and internationally – this also involves the diaspora.[81] To achieve the latter,

68 Art. 3 a CACR.
69 Art. 3 b CACR.
70 See Art. 6 CACR.
71 Art. 4 c CACR.
72 Art. 4 a CACR.
73 Art. 3 g CACR.
74 Art. 3 c CACR.
75 Art. 3 l CACR.
76 Art. 3 d, i CACR.
77 For more detail, see the analysis by *Schorlemer*, note 3, pp. 139–307, including the return of the Benin Bronzes from Germany to Nigeria.
78 Art. 3 j CACR.
79 Art. 3 b CACR.
80 Art. 3 k CACR.
81 Art. 3 f, k CACR. The role of the African diaspora is to be discussed *infra*.

the "exchange and dissemination of cultural experiences between African countries"[82] is established as a principle.

The thematic breadth of the objectives reflects the importance attributed to culture in various areas of society and for the future of Africa. It also expresses the cross-cutting approach of the CACR. Obviously, the drafters were committed to integrate cultural objectives into various policy areas such as human rights, development strategies, or also peace and democracy.

3. Substantive Legal Provisions in the CACR

After presenting the CACR's context, the following chapter will analyse the substantive provisions of the CACR in order to examine the post-colonial, emancipatory character of the treaty.

First, it should be noted that the significance of cultural diversity is emphasized in the Charter. This importantly shapes the understanding of an African Cultural Renaissance. Article 5 reads: "African States recognize that cultural diversity is a factor for mutual enrichment of peoples and nations."[83] The conclusion drawn from this general recognition is quite remarkable. For State Parties "commit themselves to defend minorities, their cultures, their rights and their fundamental freedoms."[84] Given the lack of protection of minorities in many States, this is a significant statement, as it shows that the State Parties are willing to protect and promote the rights of minorities, including in the context of cultural rights.[85] This approach is in line with the UNESCO Universal Declaration on Cultural Diversity, which acknowledges cultural diversity as a source for development and creativity on the one hand[86] and emphasizes the need to protect cultural diversity through human rights on the other hand.[87]

Cultural diversity might not only relate to individuals and communities but also to the diverse cultural industries – comprising the creation, production, and distribution of cultural goods and services – whose promotion is covered by the CACR, too.[88] Likewise, the above-mentioned UNESCO Declaration and, additionally, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions[89] are concerned with cultural goods and services, their production, and dissemination as an aspect of cultural

82 Art. 4 e CACR.

83 Art. 5 (1) CACR.

84 Art. 5 (1) CACR.

85 *Schorlemer*, note 3, p. 83.

86 UNESCO Doc. 31 C/Resolution 25 (2001), Arts. 3, 7.

87 Ibid., Arts. 4-6.

88 Art. 22 CACR.

89 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted on 20 October 2005).

diversity.[90] In this regard, the CACR acknowledges that training, especially for young people, is crucial to facilitate innovation and cultural development.[91] Hence, State Parties are obliged to support training programmes through corresponding policies, the improvement, renewing, and adaptation of existing trainings, and the establishment of training institutions.[92] At the same time, it is emphasized that modern training methods must not break the links with "traditional sources of culture."[93] Consequently, the Charter tries to strike a balance between preserving cultural traditions on the one hand and utilising modern technologies for creative endeavours on the other. This must be taken into account when planning measures for the implementation of the CACR.[94]

Second, education and the promotion of traditional languages assume an important role in the CACR. African Cultural Renaissance is closely linked to education with the aim of fighting the alienation of Africans from their own culture on the one hand and changing the global perception of Africa through awareness-raising on the other hand. This is especially important in a post-colonial context to overcome remaining power imbalances. Thus, the CACR foresees that State Parties should develop national language policies and implement reforms to integrate African languages into their education systems.[95] Such systems should also embody African and universal values.[96] In this way, the roots of Africa's youth in African culture should be strengthened and their social forces unleashed.[97]

Third, a decisive matter for the African Cultural Renaissance is the reappropriation of African history.[98] The CACR states that State Parties "agree on the need for reconstruction of the historical memory and conscience of Africa and the African Diaspora."[99] This provision is not only innovative but also central to the understanding of the African Cultural Renaissance, as it links knowledge of the pre-colonial and colonial past with the future of the African continent.[100]

To develop a comprehensive understanding of history, suitable learning and teaching materials are required. The CACR refers in this respect to the 'General History of Africa'

90 UNESCO Doc. 31 C/Resolution 25 (2001), Arts. 8, 9.
91 Art. 15 CACR.
92 Arts. 16, 17 CACR.
93 Art. 17 CACR.
94 *Schorlemer*, note 3, p. 87.
95 Arts. 18, 19 CACR.
96 Preamble para. 7 CACR.
97 *Schorlemer*, note 3, p. 84.
98 See Preamble paras. 6, 7; Arts. 7 (2), 27 CACR.
99 Art. 7 (1) CACR.
100 *Schorlemer*, note 3, p. 84.

(GHA) compiled by UNESCO[101] as a "valid base" to teach the history of the continent.[102] In fact, the GHA vividly illustrates how Africa's historical memory can be activated and knowledge about it can be imparted anew if needed. Therefore, the State Parties recommend its dissemination in African languages and its publication in shorter, simplified versions to reach a wider audience.[103] Lastly, the recollection of historical records is a necessary prerequisite to reappropriate African history.[104] In that regard, the return and preservation of archives[105] is crucial, which will be discussed further below.

Fourth, the CACR reveals that the African Cultural Renaissance is characterized by cultural development and innovation – the latter being sort of a leitmotif of the Charter.[106] It is acknowledged that "culture is a factor of social progress and a driving force for innovation."[107] Therefore, State Parties are obliged to support cultural innovation and development.[108] More specifically, they should "create an enabling environment that fosters creativity."[109] This includes providing appropriate institutional and legal frameworks, financial, technical, and other support, as well as incentives such as tax exemptions.[110] To promote cultural development, the CACR demonstrates an openness towards science and new technologies. The strengthened "role of science and technology" is fundamental to an African Cultural Renaissance as it is already mentioned as an instrument to achieve the CACR's objectives.[111] More specifically, article 19 states that technological progress should be considered when intensifying the use of African languages.[112] In general, the State Parties commit themselves to encourage the use of "information and communication media for their cultural development"[113] and create an environment that promotes the "creation, protection, production and distribution of cultural works."[114]

Fifth, another new approach of the CACR is the wholehearted consideration of existing and newly forming "cultural stakeholders." A whole chapter of provisions is dedicated to them.[115] The State Parties acknowledge that State and non-State actors are involved in

101 All volumes can be found under UNESCO, General History of Africa, https://www.unesco.org/en/general-history-africa (last accessed on 18 January 2025).
102 Art. 7 (2) CACR.
103 Ibid.
104 *Schorlemer*, note 3, p. 100.
105 Art. 27 CACR.
106 *Schorlemer*, note 3, p. 85.
107 Art. 8 CACR.
108 Arts. 9, 11 CACR.
109 Art. 22 CACR.
110 Ibid.
111 Art. 4 d CACR.
112 Art. 19 CACR.
113 Art. 20 CACR.
114 Art. 21 c CACR.
115 Chapter II, Arts. 11-17 CACR.

cultural development, including "designers, private developers, associations, local governments, the private sector."[116] Accordingly, they commit themselves to legislative, administrative, and financial support.[117] Furthermore, the CACR is the first cultural treaty that explicitly acknowledges elderly and traditional leaders as "cultural stakeholders in their own right."[118] They are "to be integrated in modern mechanisms of conflict resolution and the inter-cultural dialogue system."[119] Their protection as the guardians of traditional ancestral knowledge is an essential instrument for the preservation of cultural heritage, especially sacred cultural heritage sites, and the cultural values and identities inextricably linked to those sites against (neo)colonial threats to cultural heritage.[120] The provision is also in line with human rights law, namely the UN Declaration on the Rights of Indigenous Peoples, which ensures that indigenous peoples can participate in decision-making processes by self-chosen representatives,[121] including elders and traditional leaders. At the same time, the provision might not be entirely unproblematic from a human rights point of view as (male-dominated) traditions might have negative effects for future generations or even go against the principle of equality between men and women as foreseen, for example, in article 2 of the African Charter on Human and Peoples' Rights.[122]

Sixth, besides various provisions that are generally in line with universal human rights law,[123] the CACR also includes more specific provisions entailing dedicated human rights objectives, thereby strengthening cultural human rights in particular. Besides the recognition of cultural human rights in the preamble discussed earlier, the Charter contains various concrete provisions on human rights, among them the freedom of art,[124] gender equality,[125] the protection of minorities,[126] and the right to cultural participation and access to culture.[127] Especially the latter two are crucial points in postcolonial discourses, as the

116 Art. 11 (1) CACR.

117 Art. 11 (2) CACR.

118 Art. 14 CACR; see *Schorlemer*, note 3, pp. 93–94.

119 Art. 14 CACR.

120 See also *Schorlemer*, note 30, pp. 366 ff.; *Schorlemer*, note 3, pp. 85–86, 92–94.

121 UN Doc. A/61/295 (2007), Art. 18.

122 African Charter on Human and Peoples' Rights (adopted on 1 June 1981).

123 See the various references to international human rights law made earlier in the discussion of specific provisions.

124 Art. 10 (2) CACR. In international human rights law see similarly International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966), Art. 15 (2); International Covenant on Civil and Political Rights (adopted on 16 December 1966), Art. 19 (2).

125 Art. 12 (2) CACR. See similarly Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979), Art. 2 a.

126 Arts. 4 c, 5 (1) CACR. See also International Covenant on Civil and Political Rights, Art. 27.

127 Arts. 4 a, 10 (2), 15 CACR. See likewise International Covenant on Economic, Social and Cultural Rights, Art. 15 (1). Its relevance has been reflected in International Law Association, Participation in Global Heritage Governance, Final Report, Lisbon 2022, para. 37.

lack of access to culture and cultural heritage is understood as a manifestation of remaining colonial power and dependency structures.[128] The distinguishing feature of the wording chosen in the CACR is that marginalised and underprivileged communities are explicitly mentioned as rights holders: "African States should create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities."[129] This also reflects the traditional relevance of people's and group rights and non-State actors in the African legal sphere, as highlighted in articles 20-24 of the African Charter on Human and Peoples' Rights.[130]

Seventh, the CACR clearly emphasizes the role of the diaspora, i.e., "peoples of African origin living outside the continent, irrespective of their citizenship and nationality and who are willing to contribute to the development of the continent and the building of the African Union."[131] For the first time, the diaspora is seen as an important entity in an Africa-wide cultural treaty. Not only is the "conscience of […] the African Diaspora"[132] to be reconstructed, but also the ties with it to be strengthened.[133] Part VIII on the diaspora in general aims at generating support for Africa's further development,[134] raising awareness, and strengthening African perspectives internationally.[135] This corresponds to the rising consciousness of Afro-descendant people all over the world who generally wish to intensify their links with Africa and to promote African interests.[136]

4. Focus of the CACR: Provisions on the Protection of Cultural Heritage and Restitution

The promotion and preservation of African cultural heritage is central to the African Cultural Renaissance and chapter V contains five articles dedicated entirely to these objectives.[137] The central relevance of the matter can also be explained with the CACR's understanding of cultural heritage. Cultural heritage is not static but has "dynamic values" whose develop-

128 For more, see *Schorlemer*, note 30, pp. 366 ff.

129 Art. 15 CACR.

130 More generally on group rights in the African legal sphere, see *Vincent O. Nmehielle*, Development of the African Human Rights System in the Last Decade, Human Rights Brief 11 (2004), pp. 6–11; *Richard N. Kiwanuka*, The Meaning of "People" in the African Charter on Human and Peoples' Rights, American Journal of International Law 1 (1988), pp. 80–101; *Fatsah Ouguergouz*, The African Charter of Human and Peoples' Rights, The Hague 2003.

131 AU Doc. EX.CL/164(VII) (2006), para. 2. For further definitions, see *Larissa van den Herik*, Diasporas and International Law, ESIL Reflections 7 (2018), p. 1.

132 Art. 7 (1) CACR.

133 Art. 32 CACR.

134 Ibid.

135 Art. 33 a, b CACR.

136 On the connection between African diaspora and their 'homelands', see e.g., *Ross Bond*, Understanding International Migration, Social, Cultural and Historical Contexts, Cham 2022, pp. 75–99.

137 Besides chapter V, see also Arts. 3 d, 10 (2) CACR.

ment "promote human rights, social cohesion and human development"[138] and thus serve the overarching goals of an African Renaissance.

More specifically, the CACR contains a provision that obliges State Parties to "take steps to put an end to the pillage and illicit traffic of African cultural property."[139] From the point of view of cultural heritage law, such steps should be taken in line with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[140] which offers more detailed provisions on the matter. Indeed, the increasing traffic of art and antiquities from Africa to art markets in the Global North, especially in Europe, North America, and Japan, has been criticized as a continuum to the removal of cultural property under colonial rule: "A prelude to colonial conquest and domination, the chaos and rampant destruction of Africa's heritage today is, to a large degree, a result of colonization and subsequent neo-colonization that implanted within the African states dictatorial Western-leaning regimes, dependent and catering to the North's interests."[141] The consequences for African societies are profound: Societies, especially their youths, lose connection to their cultural heritage and its linked meanings and values, and the shaping effect heritage has on identities and social cohesion is impaired. Moreover, organized crime grows, which might lead to a further division of society.[142] Hence, the above-mentioned provision can be seen as an attempt to fight colonial continuities and, therefore, further shapes the CACR as a postcolonial agenda for Africa.

Furthermore, the CACR contains the obligation to ensure that cultural property, archives, and historical records removed from the continent are returned to their countries of origin.[143] The relevant provisions are supported by an ever-growing movement calling for the return of cultural property from colonial contexts from museums, cultural, and scientific institutions in the Global North.[144] The return of illicitly removed cultural property, the acknowledgment of the related colonial injustice committed, and the restoration of people's access to their cultural heritage are important postcolonial goals for an emancipated Africa that overcomes colonial structures.[145] With regard to archives and historical records, returns are essential for the reappropriation of African history. The restoration of

138 Art. 3 k CACR.

139 Art. 26 CACR.

140 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted on 14 November 1970).

141 *George Abungu*, Illicit Trafficking and Destruction of Cultural Property in Africa, A Continent at a Crossroad, The Journal of Art Crime 15 (2016), p. 36. See also *Kwame Anthony Appiah*, Whose Culture Is It, Anyway?, in: James A. R. Nafziger / Ann M. Nicgorski (eds.), Cultural Heritage Issues, Leiden 2009, p. 212.

142 *Abungu*, Ibid.

143 Arts. 26, 27 CACR.

144 *Schorlemer*, note 3, p. 97.

145 On returns of cultural heritage and their importance for post-colonial Africa, see extensively *Schorlemer*, note 3.

the collective memory contained in archives is an important prerequisite to close colonial-related knowledge gaps as they make it possible to explore the past and remember it.[146] Still, the return alone will not be enough to compensate for the loss of knowledge and the consequences of colonial plundering, let alone remedy them.[147]

With regard to the provisions on the return of cultural property, it can be criticised that in contrast to countries of origin, communities or societies of origin, such as ethnic groups, minorities, or indigenous communities, are not mentioned as entitled to returns in the CACR. This risks to marginalise non-State groups, which are traditional culture bearers taking care of cultural heritage and transmitting it and the related knowledge to next generations. From a postcolonial perspective, participation of communities in return procedures and respect for their cultural rights are crucial to avoid their marginalization.[148]

Lastly, regarding the preservation of cultural heritage, the CACR establishes the African World Heritage Fund[149] – a facility intended to ensure the necessary resources for the safeguarding of African cultural heritage. While the CACR itself does not contain any further provisions on the exact nature of the fund, e.g., regarding its financing or implementation, practice following the CACR's adoption[150] showed that the Fund is mainly used to protect UNESCO World Heritage Sites, support their management, and prepare inscriptions of new sites to overcome the underrepresentation of African sites on the UNESCO World Heritage List.[151] The Fund's activities and other measures for the implementation of the Charter will be discussed in the following.

146 *Olaf Zimmermann*, Mein kulturpolitisches Pflichtenheft, Berlin 2023, p. 161. On the return of archives see among others *Lara Müller*, Returns of Cultural Artefacts and Human Remains in a (Post)colonial Context, Working Paper Deutsches Zentrum Kulturgutverluste 1 (2021), p. 13; *Bénédicte Savoy*, Plunder, Restitution, Emotion and the Weight of Archives, in: Ines Rotermund-Reynard (ed.), Echoes of Exile, Berlin 2015, pp. 27–44.

147 *Manlio Frigo*, Restitution of Cultural Property and Decolonization of Museums, in: Laura Pineschi (ed.), Cultural Heritage, Sustainable Development and Human Remains, London 2024, p. 189.

148 *Kristin Hausler*, The Participation of Non-State Actors in the Implementation of Cultural Heritage Law, in: Francesco Francioni / Ana Filipa Vrdoljak (eds.), The Oxford Handbook of International Cultural Heritage Law, Oxford 2020, p. 785. On the importance of the participation of non-State actors in return processes, see *Schorlemer*, note 3, pp. 174 ff., 254 ff.

149 Art. 25 CACR.

150 The African World Heritage Fund was established in 2006 by the AU and has since been supported by UNESCO. See African World Heritage Fund, Annual Report 2022, https://awhf.net/wp-content/uploads/2023/06/AWHF-2022-Annual-Report.pdf (last accessed on 18 January 2025), p. 1.

151 On the latter, see *Schorlemer*, note 30, pp. 354 ff.

D. Implementation and Enforcement of the Charter for African Cultural Renaissance

I. Actions by the African Union

The CACR can only function successfully as a postcolonial agenda for Africa in the 21st century if it is implemented. In practice, one can observe the intensified cultural cooperation in Africa as foreseen in the CACR.[152] This development is considerably driven by the AU and will be illustrated followingly by some examples.

The AU declared 2021 as the year of "Arts, Culture and Heritage: Levers for Building the Africa We Want"[153] – a theme that resembles the core of the African Cultural Renaissance. The specific contents of this theme were presented at the "Biennale of Luanda, Pan-African Forum for Culture of Peace."[154] At this conference, a roadmap was published that laid out specific activities, so-called flagship initiatives, and related projects to be implemented by various State and non-State partners.[155] Especially flagship initiative I, "The contribution of arts, culture and heritage to sustainable peace," and its related activities[156] can be seen as part of the CACR's implementation process. Related activities include, among others, a programme to promote employment in the cultural industry in six African countries, a project to empower young jazz artists, a programme to promote cultural innovation, and the development of a publication reflecting on Africanness and the "role of education systems in the African cultural renaissance."[157]

A conference on the theme year, organised by the AU in May 2021, also celebrated the CACR's entry into force. The celebration further shaped the contours of the African Cultural Renaissance by emphasizing focus areas of the CACR, including the promotion of African identity and shared values in the spirit of Pan-Africanism and African Renaissance, as well as the development of the creative industries in Africa.[158] Furthermore, an increase

152 See Arts. 30-32 CACR.

153 AU Doc. EX.CL/1231(XXXVII) Rev.1 (2020).

154 African Union / UNESCO, Preliminary Report, https://www.unesco.org/biennaleluanda/2021/sites/default/files/medias/files/2022/01/EN%20Biennale%20of%20Luanda%20Preliminary%20Report_FIN%20%282501%29.pdf (last accessed on 18 January 2025).

155 African Union / UNESCO, Preliminary Report, Annexes, https://www.unesco.org/biennaleluanda/2021/sites/default/files/medias/files/2022/01/EN%20ANNEXES_PRELIMINARY%20REPORT_FIN%20%2825.01%29.pdf (last accessed on 18 January 2025), Annex 9.

156 Ibid., pp. 59–63.

157 Ibid.

158 *Schorlemer*, note 3, p. 108. See also African Union, Programme for the Virtual Celebration of Africa Day and Continental Launch of the Entry into Force of the Charter for African Cultural Renaissance, 25.05.2021, https://au.int/sites/default/files/newsevents/programmes/40355-pg-programme_for_the_conmitnental_launch_of_the_entry_into_force_of_the_charter_for_african_cultural_renaissance.pdf (last accessed on 18 January 2025); African Union, Launch, 25.05.2021, https://www.youtube.com/watch?v=wJmchr7_e_4 (last accessed on 18 January 2025).

in inscribed UNESCO World Heritage Sites[159] was mentioned as an objective of the African Cultural Renaissance. This is noteworthy, as the 1972 UNESCO Convention is not explicitly referred to in the CACR. However, by linking the Charter with the globally applicable UNESCO World Heritage Convention, African cultural heritage law becomes more closely intertwined with the universal level. This may lead to beneficial synergy effects between regional and universal cultural heritage preservation.[160]

Furthermore, in March 2021, the AU Minister of Arts, Culture, and Heritage published a communiqué, in which they not only committed themselves to promote the AU theme of the year and related events and activities,[161] cooperate with the AU to implement the above-mentioned roadmap,[162] but also more specifically advocated for "Member States to allocate at least 1% of their national budget to the arts, culture and heritage sector by 2030."[163] While this budget might put a considerable burden on some States' households, it can also support their socio-economic development, constitute a considerable investment into a Pan-African future, and contribute to the achievement of the CACR's objectives.[164]

Another AU project aimed at implementing the CACR is the establishment of the "Great Museum of Africa" (GMA) in Algeria: "The African Charter for African Cultural Renaissance recognises the important role that culture plays in mobilising and unifying people around common ideals and promoting African culture to build the ideals of Pan-Africanism. The Great Museum of Africa (GMA) project aims to create awareness of and benefit from Africa's vast, dynamic, and diverse cultural artefacts and the influence Africa has and continues to have on the various cultures of the world in areas such as art, music, language, and science. The Great African Museum will be a focal centre for preserving and promoting African cultural heritage."[165] To these ends, the GMA is supposed to offer rooms for Africa-wide exhibitions and performances. Meanwhile, considerable progress has been made regarding the completion of the project: A temporary site was opened in

159 Inscriptions are made based on the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (adopted on 16 November 1972).

160 *Schorlemer*, note 3, p. 110.

161 African Union, Communiqué of the 2nd Virtual Forum of the African Union Ministers Responsible for Arts, Culture and Heritage on the Launch of the AU Concept Note and Roadmap on the Theme of the Year for 2021, 25.03.2021, https://au.int/en/pressreleases/20210325/2nd-virtual-forum-au-ministers-responsible-artsculture-and-heritage, (last accessed on 18 January 2025), para. 9.

162 Ibid., para. 10.

163 Ibid., para 13.

164 *Schorlemer*, note 3, p. 111.

165 African Union / African Union Development Agency, note 27, p. 75.

June 2023,[166] the first continental exhibition has been prepared and important bureaucratic procedures with the host country Algeria were completed.[167]

Another aspect of the CACR's implementation process concerns the African World Heritage Fund (AWHF), established in article 25 CACR.[168] In order to support the newly established Fund, UNESCO classified the AWHF as a "Category II Centre,"[169] which makes it an official partner of the UNESCO World Heritage Centre, Paris, and part of a worldwide network of institutions. The AWHF's activities across Africa aim for the Pan-African strengthening of African heritage in line with the CACR.[170] Among others, these activities include the support of preparations for inscriptions of UNESCO World Heritage Sites through workshops, financial support in the form of grants, and training for the capacity-building of heritage professionals. Activities also focus on capacity-building regarding the management and safeguarding of already listed UNESCO World Heritage Sites through workshops, trainings, and the financing of specific measures aimed at the conservation of World Heritage Sites.[171] As limited financial resources make the fund's work challenging, in May 2023, the United Arab Emirates in cooperation with the AWHF and the International Alliance for the Protection of Heritage in Conflict Areas (ALIPH)[172] established a new fund to boost the AWHF's activities. This new funding mechanism allows the AWHF to also implement new projects, while at the same time, financial demands remain high considering possible threats from climate change and more conflicts breaking out.

II. Support by the UNESCO: Global Priority Africa

Early on, UNESCO recognized the CACR's potential. Already in 2007, then UNESCO Director-General Koïchiro Matsuura called the adoption of the CACR a "historic deci-

166 African Union, Launch of the Temporary Site of the Great Museum of Africa (GMA), 14.06.2023, https://au.int/en/newsevents/20230614/launch-temporary-site-great-museum-africa-gma-flagship-project-african-union (last accessed on 18 January 2025).

167 African Union / African Union Development Agency, note 27, p. 62.

168 Art. 25 CACR.

169 UNESCO, Agreement Between the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Government of South Africa Referring to the Creation and Operation of the African World Heritage Fund under the Auspices of UNESCO (Category 2) (2010). Category II Centres support the UNESCO's strategic objectives while not being a legal part of the Organization. Most Centres engage in capacity-building, research or the financing of activities.

170 *Schorlemer*, note 3, p. 118.

171 See, e.g., UNESCO Doc. WHC-03/27.COM/24 (2003), Decision 27 COM 7B.3; UNESCO Doc. WHC-06/30.COM/19 (2006), Decision 30 COM 8B.34; UNESCO Doc. WHC-08/32.COM/24Rev (2006), Decision 32 COM 8B.50.

172 ALIPH was founded in 2017 by the United Arab Emirates in cooperation with France, see ALIPH, Bylaws Adopted by the Foundation Board on 8 March 2023, https://www.aliph-foundation.org/files/ALIPH_Bylaws_2023_EN_TK_MAM_BK.pdf (last accessed on 18 January 2025).

sion[…]."[173] Ever since, UNESCO has adopted various measures to actively support the AU and its Member States in the implementation of the Charter.[174]

For UNESCO, the CACR fits into the overarching framework of its "Global Priority Africa." This strategic focus was decided upon by the UNESCO General Conference in 2019.[175] It aims to link the objectives of the 2030 UN Agenda for Sustainable Development with the 2063 AU Agenda,[176] thereby improving sustainable development, peace, and security in Africa. In this regard, UNESCO's 2022-2029 Medium-Term Strategy mentions for the first time the importance of Pan-Africanism and African Renaissance for this priority.[177] Although the CACR is not explicitly mentioned, one can infer that it will play a decisive role in this strategic focus. This is, firstly, because the CACR is the legal instrument that most precisely characterises the African Cultural Renaissance to date, and secondly, the objectives mentioned in the Medium-Term Strategy are closely aligned with the provisions of the CACR. For example, UNESCO calls on African States to ratify the UNESCO conventions as they will "respond to the growing need to ensure heritage conservation and sustainable development."[178] Likewise, the CACR emphasizes the importance of the UNESCO conventions and promotes their ratification.[179] Furthermore, UNESCO commits itself "to build institutional, legal and operational capacities" to respond "to the rise in illicit trafficking of cultural property in Africa"[180] – an important post-colonial matter of the Charter discussed earlier.[181]

The "Global Priority Africa" is further operationalized in the 2022-2029 "Operational Strategy for Priority Africa." This UNESCO Strategy describes challenges for the achievement of an African Cultural Renaissance while developing flagship programmes to overcome these challenges.[182] Especially relevant for the implementation of the CACR are the flagship programmes "Campus Africa: Reinforcing Higher Education in Africa,"[183] "The General History of Africa as a Catalyst for Achieving Agenda 2063 and Agenda 2030,"[184] and "Fostering Cultural Heritage and Capacity Development."[185] Depending on the concrete resources mobilized in the years to come for the implementation of these

173 UNESCO Doc. DG/2007/094 (2007), p. 4.
174 For more examples, see *Schorlemer*, note 3, pp. 123–138, 310–328.
175 UNESCO Doc. 40 C/11 (2019).
176 AU Doc. Assembly/AU/Dec.565(XXIV), para. 6.
177 UNESCO Doc. 210 EX/22 (2020), para. 34.
178 UNESCO Doc. 41 C/4 (2022), p. 30.
179 See Preamble para. 2, Arts. 22 d, 29 CACR.
180 UNESCO Doc. 41 C/4 (2022), p. 30.
181 Art. 26 CACR.
182 UNESCO Doc. ADM-2022/WS/1 (2022).
183 Ibid., pp. 15 ff.
184 Ibid., pp. 21 ff.
185 Ibid., pp. 27 ff.

programmes and their related activities, UNESCO's Operational Strategy for Priority Africa is able to make a significant contribution to achieving the objectives of the CACR.[186]

In summary, it can be said that UNESCO's activities take up central demands of the CACR to the universal level and incorporate them not only into the Organization's strategic considerations but also into UNESCO's operational activities in the current decade.[187] It can be hoped that the AU will practically benefit from the alliance with UNESCO. Through UNESCO's institutional, legal, and operational capacities bridging regional and international levels of action, real progress in the implementation of the CACR can be expected.

III. Progress on the Implementation of the African Cultural Renaissance

The actual progress made on the implementation of the CACR has been evaluated in the Continental Report on the Implementation of Agenda 2063.[188] The reason for this procedure is related to the fact that Goal 16 of the Agenda 2063 states that "African Cultural Renaissance is pre-eminent," referring to the priority areas of "Values and Ideals of Pan Africanism," "Cultural Values and African Renaissance," and "Cultural Heritage, Creative Arts and Businesses."[189] All of the areas are in line with the CACR's provisions.

The latest Implementation Report from 2022 shows that progress on the African Cultural Renaissance was slower than planned. The overall progress on Goal 16 is assessed at 45%.[190] However, real progress varies strongly between regions. While North Africa shows a progress of 65% on Goal 16,[191] Central Africa demonstrates no progress at all (0%).[192] A closer look reveals that a high number of countries (22 out of 37 analysed) have not shown any progress at all, while other countries have proven considerable progress, such as Ethiopia, Ghana, Senegal, and Tunisia (100%, respectively).[193]

The overall rather slow progress can be explained by the weak integration of indigenous African culture, values, and languages into school curricula through which the progress has been assessed in the Implementation Report.[194] This stands in contrast to the commitment to the implementation of the General History of Africa representing African culture and values addressed earlier, which was affirmed by African Heads of States and Governments at a side-event to the Transforming Education Summit in September

186 *Schorlemer*, note 3, pp. 130 ff.
187 Ibid., p. 129.
188 See for example African Union / African Union Development Agency, note 27.
189 Ibid.
190 Ibid., p. 86.
191 Ibid., p. 89.
192 Ibid., p. 91.
193 Ibid., pp. 96-132.
194 Ibid., pp. 41, 138.

2022.[195] While the reasons for the discrepancy between such declarations of intent and actual progress are not very clear and might be country-specific, the AU's analysis of best practices shows that considerable progress can be observed in such countries where there was the necessary political will and responsible ministries have assumed responsibility to revise school curricula.[196] This implies that good governance and the availability of sufficient personnel and financial resources in the education sector are crucial for future progress in the field.

Moreover, one can observe that the AU und UNESCO have made considerable efforts to support the dissemination of the GHA as a tool for the implementation of the CACR. In May 2024, the two organisations jointly hosted a seminar on "Teaching African History: Pathways to Africa's Renaissance and Integration" in which, inter alia, the potential of the GHA for an African Cultural Renaissance was emphasized.[197] More concretely, the UNESCO dedicated an entire flagship programme under its Global Priority Africa to the GHA[198] and launched a two-year 300,000 US dollars project which aims at building capacities and mainstreaming the GHA into African education systems.[199] Under this framework, in September 2024, UNESCO launched updated tools to support domestic stakeholders with the implementation of the GHA into national curricula and hosted a pilot workshop with representatives from various West African countries presenting the use of these tools. The workshop led to the development of a roadmap for the implementation of the GHA and the formation of a collaborative network for sharing best practices.[200] These outcomes can be seen as a promising sign for future progress in the implementation of the CACR and show how AU and UNESCO support can foster national efforts.

With regard to the implementation process, other organisations have highlighted fragile structures for civil society organisations and a lack of cooperation between them as a reason for slow progress.[201] The Advisory Organ of the AU, the Economic, Social, and Cultural Council (ECOSOCC), is composed of different civil society groups, serving as a "platform

195 African Union, Teaching of African History Pathways to Africa's Renaissance and Integration, 30.05.2024, https://au.int/en/pressreleases/20240530/teaching-african-history-pathways-africas-renaissance-and-integration (last accessed on 22 December 2024).

196 African Union / African Union Development Agency, note 27, pp. 41–42.

197 African Union, Teaching of African History Pathways to Africa's Renaissance and Integration, 30.05.2024, https://au.int/en/pressreleases/20240530/teaching-african-history-pathways-africas-renaissance-and-integration (last accessed on 22 December 2024).

198 UNESCO Doc. ED-2024/WS/16 (2024).

199 UNESCO, Transforming Education through the General History of Africa (GHA), https://core.unesco.org/en/project/3210131031 (last accessed on 22 December 2024).

200 UNESCO, Mainstreaming the General History of Africa into Education Systems, 29.10.2024, https://www.unesco.org/en/articles/mainstreaming-general-history-africa-education-systems?hub=74448 (last accessed 22 December 2024).

201 Centre Régional pour les Arts Vivants en Afrique, Regional Workshop on the 2005 UNESCO Convention and the African Union Charter for Cultural Renaissance, 13.04.2022, https://www.ceravafrique.org/fr/node/16?language_content_entity=en (last accessed on 18 January 2025).

for civil society."[202] This brings to the fore that civil society should play a greater role as well in the implementation of the CACR.[203] Civil society contributions are undoubtedly central to the successful implementation of the ambitious goals of the African Cultural Renaissance in the context of the 2063 Agenda for Sustainable Development (and the CACR) throughout Africa.

IV. Future Efforts

The analysis of actions by the AU and UNESCO showed that various initiatives have been taken to bring the CACR's provisions to life. For the AU, the CACR's implementation is placed in the wider frameworks of achieving Pan-Africanism and African Renaissance while in the context of UNESCO, the CACR is anchored in the "Global Priority Africa." These links between the CACR and broader political objectives can strengthen the CACR's implementation. However, despite those efforts, the discussion of the findings of the 2063 Agenda Implementation Report has shown that the overall progress is slow, and further efforts for the implementation of the Charter are needed.

What might these efforts look like? Until today, out of the AU's 55 Member States, only 34 have signed the CACR and an even smaller number of 18 States have ratified it.[204] Real progress on the implementation of the African Cultural Renaissance first and foremost requires more States to become parties and bind themselves to the CACR. Now that a first milestone has been reached with the treaty's entry into force, sustained efforts by the AU and UNESCO would be welcomed, especially because the ratification of cultural treaties seem to generally take longer than the ratification of international treaties in other fields.[205] AU efforts could especially build upon the argument that the ratification of the CACR does not entail high costs for the State Parties, as no profound legal changes at national level are required by the CACR. For UNESCO, the endorsement of ratifications could be embedded in its wider Global Priority Africa and could be supported by dialogues on the potential of the CACR for development in the education and culture sector with potential State Parties.

However, more ratifications are not enough. For the successful implementation of the CACR, State Parties should focus on the areas of implementation that have been identified to have room for improvement, including education, the inclusion of non-State actors, and ending the ongoing plundering and illicit trafficking of cultural property. To these ends, they should make use of the support of the AU and UNESCO.

The treaty's broad wording gives States a relatively high degree of flexibility to implement measures. This scope might be used constructively by State Parties for improving

202 *Yusuf*, note 22, p. 299.

203 This is also in line with Arts. 11-17 CACR.

204 African Union, List of Countries which Have Signed, Ratified/Acceded to the Charter for African Cultural Renaissance, https://au.int/sites/default/files/treaties/37305-sl-CHARTER_FOR_AFRICAN_CULTURAL_RENAISSANCE_0.pdf (last accessed on 18 January 2025).

205 *Schorlemer,* note 3, pp. 67–69.

the implementation of the CACR at a national level. However, it might also risk a lack of actions.[206] This concern is even more pressing considering that of the 18 State Parties, eight, i.e., almost half of them, belong to the Sahel region, which has recently experienced repeated military coups and political instability.[207] In such a context, it remains uncertain whether the concerned States will prioritise culture and be able and willing to fulfil their treaty obligations. Considering the importance of culture for peace and security especially in "fostering cohesive societies and bridging the divides,"[208] it would nevertheless be welcomed if State Parties continued to implement the CACR even under conditions of political instability. The foreboding backlash for the African Cultural Renaissance would be particularly regrettable not only because some countries in the Sahel zone were leading in the implementation of the African Cultural Renaissance,[209] but also because the Charter itself is important for promoting employment of African people in the creative industries.

At the same time, the monitoring, i.e., the supervision of the progress of implementation by State Parties appears to be rather weak. For example, unlike in the UN system, no committee has been set up responsible for reviewing State Parties' actions and making suggestions for improvement.[210] However, the AU Commission's role has been strengthened to "coordinate, monitor, evaluate and harmonize best practices and policies concerning programmes and networks."[211] These competencies might also be used to ensure that State Parties follow their commitments made in the CACR.[212]

Lastly, it must be emphasized that not only actions by African actors are needed to realise an African Cultural Renaissance but also actors in the Global North must get involved in this endeavour. Hence, in areas such as the return of cultural property, the active involvement of museums, institutions, and States in the Global North is required, as well as a change in practice at the world's art markets to stop the ongoing traffic of cultural property, to mention just two examples.[213]

This shows that there is still a long way to go, and worldwide efforts are needed to finally overcome dependencies and unfold Africa's full (cultural) potential.

E. Conclusion

The African Cultural Renaissance aims for the African continent to develop further and reach its full potential in the field of and through culture, cultural heritage, and cultural

206 Ibid., p. 90.
207 Ibid., p. 114 on Niger.
208 AU Doc. PSC/PR/COMM.1243 (2024), para. 11 e.
209 AU / African Union Development Agency, note 27, p. 42.
210 Regarding monitoring structures of the CACR, cf. *Schorlemer*, note 3, p. 197.
211 Art. 31 (1) CACR.
212 *Schorlemer*, note 3, p. 107.
213 In greater detail, cf. ibid., pp. 139–308.

diversity. The CACR is the legal instrument which up to now lays out the contours of this concept in greatest detail.

Throughout the article, it became obvious that the CACR's provisions aim to overcome neo-colonial power imbalances, give agency to African actors, reappropriate what has been taken during colonialism, and empower Africa to reach its full potential.

An in-depth analysis of the CACR's provisions has demonstrated that the Charter specifies in what practical forms culture can play a role in the struggle for political, economic, and social liberation and in meeting the developmental challenges of globalisation. Its provisions cover a wide range of topics, including science, technology, the creative industries, education, and tangible and intangible cultural heritage. Various articles set important impulses for shaping the African Cultural Renaissance in the 21st century.

As it has been shown at various points throughout this article, the CACR's provisions refer directly or indirectly to other instruments of international cultural heritage or human rights law or are aligned with them.[214] The links between regional and international law are welcomed as synergy effects might emerge that have positive effects on both legal regimes.[215] The nexus might also benefit the CACR provided that the international law instruments, ratified by most AU Member States, are used to support the implementation of the CACR.[216]

However, it is difficult to say whether CACR's normative provisions may come to grips with challenges in the future, be it climate change or digitalisation, and their effects on African culture and development. State Parties might propose amendments or a revision of the treaty, which is to be adopted by the AU Assembly by consensus or a two-thirds majority.[217] In this way, provided political will for reform exists, the CACR will remain flexible to react to future challenges and demanding tasks.

To conclude, the Charter for African Cultural Renaissance is an exceptional regional treaty as it is based on a broad understanding of culture highlighting its cross-cutting relevance for diverse areas of society, including education, development, innovation, science, technology, human rights, and cultural heritage. The treaty contains numerous provisions that reveal important new elements of the African Cultural Renaissance, such as cultural diversity, the reappropriation of African history, the role of cultural stakeholders, or the impact of the African diaspora. Thus, the CACR's provisions give essential contours to the concepts of African Cultural Renaissance and Pan-Africanism – aiming at the well-being

214 See the explicit reference to the instruments of international law in preamble para. 2; Arts. 22 d, 29 CACR. Provisions in line with other instruments of international law can be found in Arts. 4, 5, 10 (2), 12 (2), 14, 15, 26 CACR. For a detailed discussion of these articles see above.

215 On synergy effects between cultural heritage and international human rights law, see *Schorlemer*, note 30, pp. 431 ff.

216 This could include, for example, the ratification and implementation of the 1970 UNESCO Convention as a means to fulfil the obligation to end the pillage and trafficking of cultural property as stipulated in Art. 26 CACR.

217 Art. 39 CACR.

of African people and their cultural autonomy. Therefore, the CACR can be regarded a promising post-colonial agenda for an emancipated Africa in the 21st century.

BERICHTE / REPORTS

Revealing Insights on Marital Rape and the Violence against Persons (Prohibition) Act in Nigeria

By *Ifeoma Lynda Agbo*[*]

Abstract: Research reveals that more women than men are victims of marital or spousal rape, a persistent issue in many African marriages due to the archaic belief that wives are the property of their husbands. This belief is rooted in the idea, that upon marriage, the husband and wife become "one" with an implied consent to sex, despite the current trends that recognize a woman as a person in her own right. This study argues for repealing this belief and criminalizing marital rape. For instance, the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act) addresses rape as a non-discriminatory crime, recognizing both men and women as potential victims. However, its failure to classify marital rape as an offense undermines its holistic protection of 'persons'. The failure to criminalize marital rape can be linked to the continuing prevalence of androcentric theories, which will also be briefly elaborated upon. Through a gendered lens, this study examines the effects of marital rape in Nigeria. The key question posed is whether a woman gives up her personal rights as a human being the day she marries? Analysing the VAPP Act's innovations, the study posits that, if amended, it could better protect Nigerian women from marital rape. The study recommends enacting specific legislation, amending existing laws, or utilizing judicial activism to criminalize marital rape in Nigeria. To provide a broader perspective, it also examines marital rape laws in other jurisdictions. It concludes that criminalization is necessary to uphold the sanctity of marriage and bodily autonomy, as stipulated for instance in various international instruments.
Keywords: Marriage; Rape; Marital Rape; Nigeria

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A. Introduction

There is dearth of authorities on rape, and none specifically addressing marital rape in Nigeria. Sexual abuse and assault, including rape, can occur within and outside family,

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meaning it can occur in both private and public life. Sexual abuse constitutes violence against persons and should be prohibited and is actually prohibited regardless of the context in which it occurs.[1] It is generally accepted that once a person is attacked and sexually assaulted by an assailant, whether outside or inside the house, it is referred to as rape and constitutes a crime. When the offense is committed by a husband against his wife, it is however often not regarded as a serious crime and is rarely classified as rape. Instead, the woman is left victimized, violated, and compelled to continue to live with her assailant, who is capable of repeatedly committing the offence.[2] Although rape can generally be committed by anyone, including spouses, regardless of gender, it has become a gender-specific crime, predominantly committed by husbands against their wives, ex-wives, estranged wives, or cohabiting partners.

In this regard, the impacts of marital rape on the physical and mental health of victims should be emphasized. Research reveals that an estimated thirty-five per cent of women worldwide have experienced either physical and/or sexual intimate partner violence. Women who have experienced physical or sexual intimate partner violence report higher rates of depression, may have been forced to have an abortion and are at risk of acquiring HIV and/or other sexual diseases, compared to women who have not experienced such violence.[3] The violent nature of marital rape may lead to a more deep and lasting damage than any other violent crime. Marital rape not only exposes individuals to prolonged health issues and leads to severe psychological trauma, but it can also destroy the sanctity, trust, and fiduciary nature of the marriage, along with individual autonomy and privacy of the victim.

By now, there is a growing global trend which recognizes that marital rape should be criminalized.[4] Nevertheless, the Nigerian practices concerning marital rape reveal several shortcomings. The non-consensual sexual intercourse with a spouse may not be considered as a crime in Nigeria yet. In many cases there is still an assumption that a wife gives implied consent to intercourse upon marriage[5] and that such implied consent can only be

1 National Agency for the Prohibition of Trafficking Persons, Violence Against Persons (Prohibition) Act 2015, https://naptip.gov.ng/download/violence-against-persons-prohibition-act-2015/ (last accessed on 03 February 2025).

2 Ogundere J posits that in a prosecution of rape or unlawful carnal knowledge of a female without her consent, it is the duty of the prosecution to prove that a man, the accused, had sexual intercourse with a woman, the victim, that the act of intercourse was unlawful, not being between husband and wife. In other words, the act which would have been unlawful and termed rape and in case of married parties 'marital rape' became lawful on ground of marriage, see State v Ojo (1980) 2 NCR 391.

3 UN Women, Facts and figures: Ending violence against women, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures (last accessed on 03 February 2025).

4 *Charles Emeka Ochem* / *C. T. Emejuru,* An Appraisal of the Jurisprudence of Spousal Rape in Nigeria, Donnish Journal of Law and Conflict Resolution 1 (2015), pp. 1-9.

5 *Cyprian Okechukwu Okonkwo*, Criminal Law in Nigeria, Ibadan 1980, p. 272. This position was also impliedly evidenced by the case of R v Clarke - [1949] 2 All ER 448.

revoked by a court order or a binding separation agreement.[6] An illustrative example in this regard provides the argumentation provided in the 1949 decision *R v Clarke*.[7] After being married for eleven years, the wife obtained a judicial separation order that included a clause stating that she was no longer obligated to live with her husband.[8] Within two weeks of obtaining the separation order, the wife was allegedly raped by her husband. Justice Byrne, the presiding judge, acknowledged that a husband cannot be guilty of raping his wife but held that when a wife is granted a legal separation, her implied consent to marital intercourse is revoked. This decision emphasized that it was the legal instrument of separation that served to revoke consent. In other words, in the absence of the separating order, the marital rape would have been exempted, and the victim would have been forced to continue living with the perpetrator.

Regrettably, many women, while carrying out their wifely "duties", perceive marital rape as a consequence of their failure to be sufficiently submissive as the marital role anticipates. Some equally see the endurance of marital rape as being tolerant of the partner's fault, even when it is unbearable.[9] The Quran speaks of the intimate and close relationship of the two spouses in these words: "They are like garments unto you as you are like garments unto them."[10] Thus, since garment is considered to be one of the most fundamental needs of human beings in all stages of life and it is expected to cover the private parts; most women hide their husband's weakness and frailty and do not want them to be disclosed to others even when they are being raped. Following this, they end up blaming themselves and the devastating act reduces their level of self-worth and confidence. On the other hand, informed women or women married under the Act[11] are sceptical about bringing the offence of marital rape to court because, in the end, the assailant might be convicted for a lesser offence such as assault or wounding.[12]

Against this background, this study advocates for the explicit criminalization of marital rape. The emphasis is on studying legislation regarding rape offenses in Nigeria, with particular focus on the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act). It concludes that the failure of the VAPP Act to explicitly classify marital rape as an offense undermines its comprehensive protection of 'persons. The non-criminalization of marital rape can be linked to the continuing prevalence of androcentric theories, which will also be briefly elaborated upon. Using a gendered lens, this study explores the impact of marital

6 R v Miller [1954] 2 Q.B 282.

7 R v Clarke - [1949] 2 All ER 448.

8 Ibid.

9 Section 55 of the Penal Code Act, Chapter 53, Law of Federation of Nigeria, 2004 stipulates that "nothing is an offence which does not amount to infliction of grievous hurt upon any person which is done[…] by a husband for the purpose of correcting his wife, such husband and wife being subject to any native law and custom under which such correction is lawful."

10 Quran 2:187.

11 Marriage Act, Chapter M6, Law of Federation, 2004.

12 *R v Miller* [1954] 2 Q.B 282.

rape in Nigeria within a global context. The central question it raises is whether a woman forfeits her personal rights as a human being upon marriage? By analysing the innovations in the VAPP Act, the study suggests that an amendment could provide greater protection for Nigerian women against marital rape. It recommends the enactment of specific legislation, amendments to existing laws, and/or the use of judicial activism to criminalize marital rape in Nigeria. To provide a broader perspective, the study also examines marital rape laws in other jurisdictions and considers developments within international law on this issue, by focusing specifically on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, hereinafter the Convention).[13] It concludes that criminalization is crucial to uphold the sanctity of marriage and bodily autonomy.

B. Consensual Marital Sex Vs. Non-Consensual Marital Rape

As this study advocates for explicitly criminalizing marital rape, the question arises of how to define marital rape. Marital rape remains a difficult concept to grasp. This is because, it is assumed that in marriage spouses' vow to each other for life and give themselves to one another till death. This belief is grounded in androcentric theories, which are discussed further below, and contributes to the reasons why some states have yet to criminalize marital rape. Though, for instance Bryan Andrew defined marital rape as "a husband's sexual intercourse with the wife by force or without her consent";[14] the author of this study simply defines marital rape as a situation where either of the parties of the marriage has sexual intercourse with the other, to whom he/she is lawfully married without his/her consent.

It is important to distinguish between marital rape and consensual marital sex to clarify the boundaries of consent within marriage. Marriage is a contract between two adults, based on mutual consideration and respect. Throughout the world, especially in Africa, it is a respected institution that grants spouses rights and duties. Marriage be loosely defined as the legal union of a couple as spouses.[15] In that sense, marriage constitutes a contract. Marriage is further defined as the mutual relation of husband and wife ("wedlock"). It is the institution in which men and women are joined in a special kind of social and legal relationship, primarily for the purpose of creating a family.[16] Marriage legalizes the sexual relations between man and woman in society for the perpetuation of the race, permitting lawful expression of passions, preventing licentiousness, and enabling the procreation of children.[17] The practice of marital sex is considered a non-discriminatory conjugal right.

13 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979).

14 *Bryan Andrew Garner*, Black's Law Dictionary Ninth Edition, Eagan 2009, p. 1059.

15 Ibid.

16 *Abdur Rahman Biswas*, Biswas Encyclopedic Law Dictionary, New Delhi 2008, p. 979.

17 Ibid.

Religious Christians viewed marriage as a union where there is no denial of a conjugal right: "The husband should fulfil his marital duty to his wife, and likewise the wife to her husband. The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife. Do not deprive each other except perhaps by mutual consent and for a time, so that you may devote yourselves to prayer. Then come together again so that Satan will not tempt you because of your lack of self-control."[18] Islam also protects the marital sex, and satisfying the sexual appetite of one's spouse is a legitimate objective of sexual relations and even of marriage itself. The right of gratification belongs to both, the husband and wife, and it is a mistake to assume that only the husband enjoys this privilege.[19] One of the objectives of marriage in Islam, which is equally upheld by Christians, is the preservation of morals and chastity.[20] Another objective of marriage in Islam is upholding love and compassion. For example, the Quran provides as follows: "And of His Signs is that He has created mates for you from your own kind that you may find peace in them and He has set between you love and mercy. Surely there are Signs in this for those who reflect."[21] According to the Quran, the relationship between husband and wife should be one of love, mercy, and mutual understanding. Allah also commands men to treat their wives in a good manner when it admonishes: "And consort with your wives in a goodly manner, for if you dislike something about them, it may be well that you dislike something which Allah might yet make a source of abundant good."[22]

Marital rape cannot be considered a form of good treatment toward the wife though, as it disregards her lack of consent for this act of intimacy. More legally speaking, martial rape constitutes an act of sexual assault and domestic violence[23] occurring when an individual commits a sexual act[24] against their spouse or ex-spouse whether living or not living in the same residence,[25] against their will or in the absence of concern or "unequivocal voluntary agreement".[26] Marital rape takes place in coercive circumstances and constitutes a violation

18 1 Corinthians 7: 3-5, NIV.

19 Mohammed Shoiab Ibn Ebrahim Adam, Guidelines to Intimacy in Islam, https://irp-cdn.multiscreensite.com/3844bd1d/files/uploaded/Guidelines%20to%20intimacy%20in%20Islam%20pdf.pdf (last accessed on 03 February 2025).

20 *Maulana Abdul A'la Maudoodi*, the Laws of Marriage & Divorce in Islam, Kuwait 1983, p. 7.

21 Quran 30:21.

22 Quran 4:19.

23 United Nations, UN Handbook on sexual violence legislation, New York 2009, pp. 24 ff.

24 "[Invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body", see e.g. International Criminal Court, Elements of Crime, Article 7 (1) (g) 1 Crime against humanity of rape, https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (last accessed on 03 February 2025).

25 See Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

26 UN Handbook on sexual violence legislation, note 23, pp. 26 ff.

of bodily integrity and sexual autonomy.[27] The lack of consent and the presence of force next to penetration are often considered crucial elements for an act to be considered as rape. It was however not until the latter half of the twentieth century that marital rape was even recognized as a legal problem.

C. Revisiting Different Theories on Rape

Contemporary understandings of what constitutes rape are still heavily influenced by ancient theories of rape on this matter. Therefore, this section revisits the most influential theories to examine their impact on issues such as marital rape. Historically, there are three theories that "justify" the exemption of accusing husband of rape: thereby undermining the concept of marital rape. The first documented legal statement regarding marital rape, popularly known as implied theory, occurred in 1736. Back then, Sir Matthew Hale, who served as chief justice in England, published the following passage in the "History of the Pleas of the Crown":[28] "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[29] This statement became known as the "Lord Hale doctrine" and represented a common-law exemption for marital rape, under which husbands could not be accused of raping their wives.[30]

By the middle of 18th century, the marital rape exemption gained further support when Blackstone introduced the "unity theory", which viewed the husband and wife as becoming "one" in marriage.[31] According to this theory, women lost their own civil identities in marriage, and they were subsequently viewed as their husbands' property.[32] In Blackstone's Commentary on the Laws of England (1765), he wrote, "Husband and wife are legally one person. The legal existence of the wife is suspended during marriage, incorporated into that of the husband. ...If a wife is injured, she cannot take action without her husband's concurrence."[33] This illustrates why at that time, women could not obtain immigration passes without their husband's consent. It is important to note that in Nigeria, prior to

27 Committee on the Elimination of Discrimination against Women, General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992).

28 *Mathew Hale et al.*, Historia Placitorum Coronae: The History of the Pleas of the Crown, Philadelphia 1847, p. 69.

29 Ibid.

30 *Jennifer A. Bennice / Patricia A. Resick*, Marital rape: history, research, and practice, Trauma Violence Abuse (2003), pp. 228-246.

31 Ibid.

32 *Small A. Mark / Pat A. Tetreault,* Social Psychology, Marital Rape Exemptions, Behavioral Sciences & Law 8 (1990), pp. 141 ff.

33 *Bennice / Resick*, note 30.

2009[34], this "unity theory" was operational in Nigeria as the Nigerian Immigration Services (NIS) required married women to obtain written consents from their husbands before applying for an international passport. Although the Immigration Act[35] does not permit discrimination, married women applying for Nigerian passports were still required to submit the written consent of their husbands. The NIS claimed that this requirement was in-line with its administrative policy, despite how significantly the so-called policy violated the fundamental human rights of married women.[36]

During that middle of 18th century, rape was considered a crime against another man's property rather than a violation against a woman's body and personal integrity.[37] As a result, common law dictated that it was impossible for husbands to steal (i.e., rape) their own property (i.e., wives); thus, marital rape was considered a legal impossibility.[38]

The "unity theory" supported the view of women as property, while the separate spheres theory further eroded the women's civil identity. Under this theory, men were considered to inhabit the political/public sphere, whereas women were relegated to the family/private sphere.[39] Because women were already considered the property of their husbands, there were no laws to restrain male power within the private realm. As a result, husbands were free to abuse their wives with little fear of penalization.[40] In *R. v. J.*,[41] Justice Rougier would have eliminated marital exemption; however, he adhered to what he felt was his judicial duty and interpreted "unlawful" as he believed it meant at the time the Act was passed.[42] Meanwhile, the common belief that spousal abuse was a private matter further dissuaded criminal justice officials from taking any legal action.[43]

34 When this NIS policy was challenged by Dr. Priye Iyalla-Amadi (wife of popular author- Elechi Amadi) at the Federal High Court, Port Harcourt, Rivers State, Nigeria and the Federal High Court (per Justice G. K. Olotu) delivered a reassuring judgment on 15 June 2009, reiterating supremacy of the Nigerian constitution and that the so-called policy of NIS was archaic and a violation of human rights. Since 2009 till date, there is no known report that the celebrated judgment of the Federal High Court has been appealed against by the NIS. So, NIS is by all standards and measures bound by the said judgment.

35 Immigration Act, Laws of the Federation of Nigeria, 2015.

36 *Onyekachi Umah*, Married Women and the Need for Husband's Consent for International Passport, https://sabilaw.org/married-women-and-the-need-for-husbands-consent-for-international-passport/ (last accessed on 03 February 2025).

37 *Tetreault,* note 32.

38 This is commonly known as property theory.

39 *Small / Tetreault*, note 32.

40 Ibid.

41 [1991] 1 All E.R. 759, 765 (Crown Court 1990).

42 Sexual Offences (Amendment) Act of 1976.

43 *Susan Caringella-Macdonald*, The Relative Visibility of Rape Cases in National Popular Magazines 4 (1998).

All theories, but especially the implied consent theory thrived. Previously in Nigeria, women were referred to as a chattel capable of being inherited.[44] The impact of legislation such as *Married Women Property Act 1870*[45] and *Married Women Property Act 1882*[46] is so glaring that the unity theory or the practice of referring to a wife as a property are now considered obsolete and mundane. Today, a woman in a statutory marriage inherits her husband's property just as he inherits hers.[47] They have mutual and equal rights over their properties, and the same should extend to their bodies. A great deal of revolution and judicial activism was necessary for women to achieve their current status regarding property rights. Thus, the revolution that led to women's inheritance in Nigeria is what this study canvasses in relation to criminalizing marital rape.

D. Analysing Nigeria's Legislation on Rape Offenses

After elaborating the prevailing theories on rape which continue to hinder the criminalization of rape, this part will focus on Nigeria's legislation on rape offenses. This part elaborates Nigeria's stance on rape more generally before addressing the specific offense of marital rape, which is not explicitly criminalized. Special attention will be paid on the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act) and its potential to address marital rape. Conclusively, the concept of rape has been expanded under Nigerian Law to accommodate socio-realities but the desired revolution for criminalization of marital rape is yet to be attained.

I. What Constitutes as Rape?

Historically, in Nigeria, rape was defined as unlawful sexual intercourse with a woman against her will. The essential elements of the crime included sexual penetration, force, and lack of consent.[48] The absence of consent is the main component that determines if the act of rape occurred. In *Idi v State*, the Court per Ibrahim Shata Bdliya JCA made reference to the case of *Posu v State*[49] defined rape as follows:

> *"[..] an unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man to have sexual intercourse forcibly and against her will. It is the act of sexual intercourse committed by a man with a*

44 *Suberu v Sunmonu* (1957) 2 F.S.C. 31.

45 This Act enabled women to keep their income (but not other property) for their own use.

46 This Act enables a married woman to keep separate possessions. Under this Act, she could sue and be sued in her own right over disputes relating to her separate property.

47 *Ifeoma Lynda Agbo*, Palm Tree Justice and Settlement of Matrimonial Property under A Statutory Marriage in Nigeria, International Review of Law and Jurisprudence 3 (2021), p. 72.

48 *Ogunbayo v State* (2007) 8 NWLR (Pt. 1035) 157; *Idi v State* (2016) LPELR-41555(CA).

49 2 Nigerian Weekly Law Report (NWLR) (Part 1234) P. 392, 414 -416 (2011).

> *woman who is not his wife without her consent ... or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear or harm, or by means of false and fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband."*[50]

Force as an ingredient of rape encompasses 'constructive force'. This accounts for cases in which no force is required beyond what is inherent in the act of the intercourse. The requirement of force is simply a means of demonstrating that the unlawful violation of the woman was without her consent and against her will.[51] The Court maintained that among the cogent evidence that the prosecution must adduce to establish the offence of rape is that the prosecutrix was not the wife of the accused.[52] In other words, a man can assumingly not rape his wife.

In the era when women were perceived as only victims of rape, women who were raped were expected to have physically resisted to the utmost of their power, otherwise their assailant might not be convicted of rape. This resistance is seen as evidence that the act was done without the woman's consent. However, even when a woman cooperates with the assailants due to threat, the lack of resistance should not absolve the assailant of responsibility.[53] Thus, there is different between submission and consent. Submission may be induced by threat or promise. This is further explained by the dictum of Coleridge in *R. v Dav:*[54]

> *"There is different between consent and submission, every consent involves a submission but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description, was not consenting, on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be consent as will justify the prisoner in point of law".*[55]

Surprisingly, a husband in Nigeria could have sex with his wife against her will without being charged with rape, even in cases where there is bodily harm that demonstrates physical resistance and absence of consent. There is no denial that the biological makeup of the female sexual organ is such that when a woman is ready to have sex, the relevant hormones are released by her body to prepare her physically and psychologically for the

50 See also Section 357 Criminal Code Act C38, Laws of the Federation of Nigeria (LFN), 2004; Section 282 of the Penal Code Chapter P3, Laws of the Federation of Nigeria (LFN), 2004.

51 *Rollin M Perkins / Ronald N. Boyce*, Criminal Law, New York 1982, pp. 211-212.

52 *Ogunbayo v State* (2007) 8 Nigerian Weekly Law Report (NWLR) (Pt. 1035) 157.

53 *Udjor v State* (2018) Law Pavilion Electronic Law Report (LPELR)-43928(CA).

54 (1941) 9 C & P. 722, 7224.

55 *Suleiman Ikepechukwu Oji / Idiat Funmilol Akande*, Mental Element of Rape, ResearchGate, https://www.researchgate.net/publication/334561084_MENTAL_ELEMENT_OF_RAPE (last accessed on 03 February 2025).

process, which includes providing lubrication for smooth penetration to occur. How does one however explain a situation where a wife tells her husband that she is not in the "mood" for sex and yet the man defies her decision to painfully penetrate her?Rape is legally defined under the *Criminal Code Act* of Nigeria as:

> *"[..] having unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in case of a married woman, by personating her husband".*[56]

Section 6 of the *Criminal Code Act*,[57] nailed the plight of wife rape victim when it provides that: "unlawful carnal knowledge" means carnal connection which takes place otherwise than between husband and wife."

The *Penal Code* which is applicable in the Northern part of Nigeria expressly provides that rape cannot occur between husband and wife: "sexual intercourse by a man with his own wife is not rape, if she has attained to puberty."[58] Thus, if the non-attainment of puberty of the married women can be proven, the husband can be convicted of rape.

Other means recognized under the *Criminal Code Act* by which an act against a married woman amounts as rape is if someone impersonates her husband. In *Adonike v State*[59] one of the elements that a prosecutor must prove in a rape case is that the prosecutrix was not the wife of the accused. The offence of rape is punishable under the *Criminal Code Act* by imprisonment for life, with or without caning.[60] Additionally, rape is punishable under the *Penal Code* with imprisonment for life or for a lesser term, and the offenders shall also be liable to a fine.[61]

Rape is despicable and its effect remain unimaginable. The despicable nature of this sexual act warranted a notable pronouncement in the case of *Edwin Ezigbo v The State*[62] where Justice Muhammed J.S.C shared these findings:

> *"[..]the facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal. When the "criminal" was alleged to have committed the offence of rape, he was 32 years. His two young victims: Ogechi Kelechi, 8 years old, and Chioma, 6 years, were, by all standard underage. What did the appellant want to get out of these underage girls [?]. Perhaps, the appellant*

56 Section 357 of the Criminal Code Act, Chapter C38, Laws of the Federation of Nigeria (LFN), 2004; Section 282 Penal Code Chapter P3, 2004.

57 Chapter C38, Laws of the Federation of Nigeria (LFN), 2004.

58 Section 282 (2) of the Penal Code.

59 (2015) Law Pavilion Electronic Law Report (LPELR)-24281(SC).

60 Section 358 of the Penal Code.

61 Section 283 of the Penal Code.

62 (2012) 16 Nigerian Weekly Law Report (NWLR), Pt. 1326.

> *forgot that by nature, children, generally, are like animals. They follow anyone who offers them food. That was why the appellant, tactfully, induced the young girls with ice cream and zobo drinks in order to translate his hidden criminal intention to reality, damning the consequences. Honestly, for an adult man like the appellant to have carnal knowledge of underage girls such as the appellant's victims, is very callous and animalistic. It is against the laws of all human beings and it is against God and the State. Such small girls and indeed all females of whatever age need to be protected against callous acts of criminally likeminded people of the appellant's class. I wish the punishment was heavy so as to serve as deterrent."*

Although the offence committed by the assailant above falls within the offence of defilement due to the victims' age, Justice Muhammed's analyses is apt and should not be ignored; it is even an abomination for a thief to steal what is bestowed on him/her for safekeeping and this is further buttressed by an Igbo adage that "a dog does not eat bone hung on its neck".

II. Promises and Pitfalls of the VAPP Act in Combating Marital Rape

A novel development in Nigeria is the adoption of the Violence Against Persons (Prohibition) Act of 2015 (VAPP Act), which addresses rape as a non-discriminatory crime, recognizing both men and women as potential victims. It is important to mention that the VAPP Act has repealed the Criminal Code, Penal Code and Criminal Procedure Code. Against this background, this section will reflect on its potential promises and pitfalls in combating marital rape. Analysing the VAPP Act reveals that the definition of rape in Nigeria is now more encompassing and broader. Section 1(1) of VAPP Act provides: "A person commits the offence of rape if (a) he or she intentionally penetrates the vagina, anus, or mouth of another person with any other part of his or her body or anything else; (b) the other person does not consent to the penetration; or (c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse." Except where the exceptions apply, the penalty for rape in Nigeria is life imprisonment.[63]

Despite the comprehensive provisions of the *VAPP Act*, it is applicable only to the Federal Capital Territory (FCT), Abuja, and only the High court of FCT has jurisdiction over crimes created in the *VAPP Act*. As a result of the innovations of the *VAPP Act*, many states have passed their own versions of the Act applicable within their respective jurisdictions.[64]

63 Section 1 (2) of the VAPP Act.

64 Anambra, Bauchi, Ekiti, Enugu, Kaduna, Oyo, Benue, Ebonyi, Ondo, Osun, Ogun, Cross River, Lagos, Plateau, Akwa Ibom, Abia, Kwara, Yobe, Jigawa and recently, Rivers State.

In general, the VAPP Act is considered to be the first piece of legislation in Nigeria which recognizes that men are capable of being raped as well. The old school of thought believed that the act of rape can only be committed by a man, in that sense, the penis is perceived as the sole instrument of penetration and the vagina as the sole object of rape. This belief presumes that a male person under the age of 12 years is incapable of having carnal knowledge[65] and thus, cannot be guilty of the offence of rape. Although, a male child under 12 years may be charged of rape, he can be convicted of indecent assault.[66]

For the first time, the VAPP Act classifies unlawful anal or oral sex as rape[67], rather than classifying these acts as mere sexual assault.[68] In addition, the VAPP Act was radical in its definition, stating that the instrument of penetration does not have to be a sex organ of another person;[69] it can include other parts of the body, such as the hand or even an object such as a dildo, pen, pencil, cucumber, etc.

The Act removes the judge's discretion to sentence the accused to less than the maximum imprisonment and provides that if the accused is found guilty of rape, they must be sentenced to a minimum of twelve years' imprisonment. .[70] However, the judge still has the discretion to impose a sentence longer than twelve years, including life imprisonment.[71]

One of the key innovations of the VAPP Act is the recognition that justice in criminal cases is tripartite:[72] "Justice is a three-way traffic, justice for the victims of the offence who is crying for justice from the grave, justice for the state and justice for the accused person who is standing trial for murder."[73] In this instance, surviving victims of rape can be financially compensated. This is a welcoming development because the compensation assists the survivor of rape in rebuilding and resuscitating his/her life after the act of rape. For instance, the victim of rape might need to go for therapy, which is most often the case. The bill of such therapy should not be paid by the victim of rape. Instead, the accused person will be ordered to finance the bill.

The VAPP Act provides that the name of the rapist may be entered into a register for convicted sexual offenders, which will be made accessible to the public.[74] A sex offender registry is a system designed to allow government authorities to track the residence and activities of sex offenders, including those who have completed their criminal sentences.

65 Section 30 of the Criminal Code Act.
66 Sections 223 and 231, Administration of Criminal Justice Act, 2015.
67 Section 1 (1) (a) of the VAPP Act.
68 Section 214 of the Criminal Code Act.
69 Section 1 (1) (a) of the VAPP Act.
70 Section 1 (2) (b) of the VAPP Act.
71 Sections 2 & 2 (2) (a) of the VAPP Act.
72 Section of the 1 (3) VAPP Act.
73 Per Oputa, JSC in the case of Josiah v State (SC. 78/1969) [1970] 10 (19 June 1970).
74 Section 1 (4) of the VAPP Act.

The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) refers to it as a one-stop solution to reporting and curbing sexual offences.[75]

As exemplified in this analysis, the VAPP Act prohibits all forms of violence in both private and public life and provides maximum protection and effective remedies for victims.

Moreover, the VAPP Act makes consequential amendments to the *Criminal Code Act*, *Penal Code,* and *Criminal Procedure Code* to the effect that any provision of the VAPP Act shall supersede any other provision on similar offences in the *Criminal Code Act*, *Penal Code* and *Criminal Procedure Code*.[76]

It is interesting to interrogate the effectiveness of the above innovations found in the revolutionary nature of the *VAPP Act* in bolstering the fight against sexual offences, in particular the largely unaddressed topic of marital rape. That is; has the mischief been cured? The pertinent answer remains that it has, by no means, addressed the issue of marital rape and the plight of married women regarding marital sexual harassment in general. Marital rape remains a widespread problem for women that has existed for centuries throughout the world.[77] Despite this fact, marital rape has been largely overlooked in the rape and domestic violence literature. The experience of marital rape has been validated for its victims legally, culturally, and otherwise. As a result, the proliferation of validation continues to have serious implications for the victims of this crime.

III. Alternative Roads?

The absence of a specific legislation criminalizing marital rape might lead to a repletion of the occurrence in R. v. J.,[78] where Justice Rougier, faced with interpreting the word "unlawful" within the definition of rape, was torn between his desire to eliminate the marital exemption and his obligation to comply with the Sexual Offences (Amendment) Act of 1976. He further pronounced that:

> *"Once Parliament has transferred the offence from the realm of common law to that of statute ... then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallized as at the making of the [Sexual Offences] Act and only Parliament can alter it."*

In the interim or if the legislature fails to criminalize marital rape, nothing prevents the court from employing activism and extending the definition of rape to marital rape. The

75 National Agency for the Prohibition of Trafficking Persons, Nigeria Sexual Offender & Service Provider Database, https://nsod.naptip.gov.ng/ (last accessed on 03 February 2025)

76 Section 45 of the VAPP Act.

77 *Bennice / Resick*, note 30, p. 228.

78 [1991] 1 All E.R. 759, 765.

courts can explore the provision of section 34 of the 1999 Constitution of the Federal Republic of Nigeria which provides for the right to dignity of human persons and interpret marital rape as one concepts that enjoys constitutional vindication. In addition, the preamble to the Fundamental Rights (Enforcement Procedure) Rules encouraged the court to expansively and purposely interpret and apply provisions of the Constitution, especially Chapter IV, as well as the African Charter, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.[79] Also, for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court are mandated to respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions.[80] After all, Oliver Wendel Holmes defined law as: "the prophesies of what the court will do in fact, and nothing more pretentious."[81]

E. A Global Trend: Towards the Criminalization of Marital Rape

It is evident from the discussions so far in this work that the plight of the female folks, particularly married women, can be linked to that of an endangered species due to the archaic legal frameworks on the subject. More worrisome is consensus in the dominant theories exploring spousal rape. The English common law system, which by extension applies to Nigeria through common law inheritance, at one time or another had little regard for the sanctity of a wife's right not to be violated by her spouse. The exemption for marital rape in Nigeria does not align with the fundamental principles of justice and equality, which is the basic feature of the Nigerian Constitution. The advancement in the international legal system is undoubtedly shaping the current trend to operate within the ambiance of human rights. These developments suggest that maintaining exceptions for marital rape are unjust.[82]

In recent years, the definition of rape was expanded *globally*, to include marital rape as well. This was achieved by revising the relevant legislation to keep up with changing circumstances. The major factor that led to criminalization of marital rape in these countries is not only the effects of marital rape on its victims but also the autonomy of a woman's body. If this autonomy is not protected, it ultimately affects the security, liberty, integrity and dignity of all human beings in the long run.

79 Preamble 3 (a), Fundamental Rights (Enforcement Procedure) Rules, 2009.

80 Preamble 3 (b), Ibid.

81 *Stephen R. Perry*, Holmes versus Hart: The Bad Man in Legal Theory, in: Steven J. Burton (ed.), The Path of the Law and its influence: The Legacy of Oliver Wendell Holmes, Cambridge 2000, pp. 158 ff.

82 *Theresa Fus*, Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches, Vanderbilt Journal of Transnational Law 20 (2006).

I. Criminalizing Marital Rape Within Other Jurisdictions

In the United State of America, by 1993, all states had removed marital rape exemptions from their laws concerning rape. The first case to charge a man for marital rape was *Oregon v Whiteout*[83] where the accused forcefully engaged in sexual intercourse with his wife after they had a fight. This case, although the accused was acquitted, drew national attention to the topic, and highlighted the need to criminalize marital rape. The public controversies led to the removal of "marital rape exemption" by the amendment of the *Oregon Criminal Code*. In *People v Liberta*,[84] the United States of America Court of Appeal held that the marital rape exemption was unconstitutional. Judge Sol Wachtler ruled that the exemption for marital rape was unconstitutional: "Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. A marriage license should not be viewed as a license for a husband to rape his wife with impunity. A married woman has the same right to control her body as does an unmarried woman".[85]

Another illustrative example is the development related to the California Penal Code, particularly California's repeal of section 262, where marital rape is treated as all other forms of rape. Prior to its repeal on October 8, 2021, spousal rape was regulated in the separate section 262. However, with the passage of Assembly Bill 1171, rape between spouses is now prosecuted under section 261 of the Penal Code, treating it largely the same as rape between non-spouses.[86] Moreover, the California Penal Code encompasses exhaustive grounds for scenarios that can constitute marital rape, while also avoiding associating acts of rape exclusively with the male gender. In other words, marital rape is any sexual act committed by a spouse on the other partner without the partner's express consent, or where such consent is obtained by force or threat.[87]

83 (1978) 108, 866, Circuit Court, County of Marion, Oregon.

84 (1984) 64 N.Y.2d 152.

85 *People v Liberta (1984) 64 N.Y.2d 152*

86 California Legislative Information, Assembly Bill No. 1171, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1171 (last accessed on 04 February 2025).

87 *Adeniyi Israel Adekunle*, Marital Rape: An Examination of the Current Position of Law in Nigeria, This Day, 07.09.2021, https://www.thisdaylive.com/index.php/2021/09/07/marital-rape-an-examination-of-the-current-position-of-law-in-nigeria/ (last accessed on 03 February 2025).

Other countries, including Canada (1983)[88] and France (1990)[89] have also taken steps to criminalize marital rape. Some African countries including South Africa (1993),[90] Zimbabwe in 2001,[91] and Sierra Leone in 2012[92] have enacted similar legislation.

As the Nigerian legal system is based on common law due to colonization, Nigeria is expected to follow the trend in United Kingdom, where the marital rape exemption has been outlawed as well. In the United Kingdom, the case or *R v R*[93] abolished the marital rape exemption, with the House of Lords describing it as an anachronistic and offensive legal fiction.

In sum, other legal systems have recognized the necessity of neutralizing the gender of rape, acknowledging that, aside from a woman being raped by a man, a man can also be raped by a woman; and a boy or man can be raped by another man. Consequently, the objects of rape have been further defined to include vagina, anus, mouth or any other part of the body. Meanwhile, the requirement of force has been watered. It has been suggested that emphasising on coercion suggests that rape is mostly a crime of inequality, whether of physical, relational or status-based. Having non-consent as the element of rape focuses on the deprivation of sexual freedom.[94] Most Civil-Law-states define rape by mentioning coercive measures of the offender or coercive circumstances that lead to a breach of the victim's will and thereby facilitate the sexual act. The Common Law-states establish the offence of rape by proving an inner state of mind, namely the lack of consent of the victim to the sexual act.[95] Many jurisdictions have moved towards a model of affirmative consent, meaning consent is not assumed. Rather a positive obligation is placed on the individuals to ensure that the other party is consenting.[96]

II. International level

On the international level, which heavily influences contemporary conceptions of rape, it is particularly important to refer to the role of the Convention on the Elimination of All Forms

88 The introduction of the *Canadian Charter of Rights and Freedoms* in 1982 provided the impetus for the criminalization of marital rape in Canada.

89 *Rita J. Simon*, A comparative perspective on major social problems, Lanham 2001.

90 Spousal rape was criminalized by article 5 of the Prevention of Family Violence Act, 1993.

91 Section 68 of the Criminal Law Act, 2004.

92 Sections 5 and 6 of the Sexual Offences Act, 2012.

93 (1992) 1 AC 599.

94 *Catharine A. MacKinnon*, Defining Rape Internationally: A Comment on Akayesu, Columbia Journal of Transnational Law 44 (2005), pp. 940-958.

95 *Alexandra Adams*, The First Rape Prosecution before the ICC: Are the Elements of Crimes Based on a Source of International Law? International Criminal Law Review 15 (2015), pp. 1098-1121.

96 *Kiran Grewal*, The Protection of Sexual Autonomy under International Criminal Law, The International Criminal Court and the Challenge of Defining Rape, Journal of International Criminal Justice 10 (2012), pp. 373-396.

of Discrimination against Women (CEDAW, hereinafter 'the Convention'). The Convention itself does not expressly prohibit marital rape and generally does not contain explicit references to violence against women and girls.[97] The CEDAW General Recommendations 12, 19 and 35, however "clarify that the Convention, as per Article 2 on non-discrimination, extends to violence against women, and also makes detailed recommendations to States to address violence against women."[98] The CEDAW General Recommendation No. 19 (1992) was historic as it clearly framed violence against women as a form and manifestation of gender-based discrimination, used to subordinate and oppress women. It unequivocally brought violence outside of the private sphere and into the realm of human rights. The Recommendation defines Gender Based Violence against Women as, "[..] violence that is directed against a woman because she is a woman or violence that affects women disproportionately [..]" to the inclusion of "[..] acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship."[99] CEDAW General Recommendation No. 35, updating Recommendation No. 19, explicitly calls for the criminalization of marital rape and other acts of sexual violence as crimes against women's right to personal security and their physical, sexual and psychological integrity.[100] Despite this, the *Declaration on the Elimination of Violence against Women (1993)* specifically focused on addressing violence against women, and Article 2 (a) of the Declaration explicitly refers to marital rape as a form of violence.[101]

H. Concluding Remarks

Although marital rape is not expressly considered as a criminal offence in Nigeria, human beings evolve and our societies changes. Therefore, our laws must keep up with the changes and define our interactions in the context of new societies. Many areas of Nigerian laws are not responding to societal changes. Areas such as marital rape need the guiding hands of legislature or pronouncements from the courts to liberate its victims, who are mostly women. It is suggested that in light of the growing and disturbing statistics of domestic violence and sparsely reported cases of marital rape in Nigeria, the Nigerian lawmakers should rethink on the criminalization of marital rape in Nigeria. This recom-

97 Articles 1-3 and 5 (a) of the CEDAW.

98 UN Women, Global norms and standards: Ending violence against women, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards (last accessed on 03 February 2025).

99 CEDAW General Recommendation No. 19: Violence against women, para. 6, see also CEDAW General recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19 (1992), para. 12.

100 CEDAW General Recommendation No. 35 (2017), para. 33.

101 Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

mendation is apposite, in line with the current international trend of the criminalization of marital rape. For instance, other jurisdictions such as the United States, South Africa, Zimbabwe and Sierra Leone as evidenced in this study, have necessarily criminalized marital rape.

Given this, Nigeria should emulate the growing global trend and take steps to criminalize marital rape by reshaping the archaic legal regimes on the subject to match international standards. Since Nigeria, as seen in VAPP Act, has adopted the modern social-legal realities in respect of rape, a non-gender discriminatory approach to marital rape should be revisited, and it is essential to establish specific legislation on this special issue. This is increasingly urgent, the absence of law criminalizing marital rape leaves victims with no recourse, trapping them in a horrible situation. Additionally, it emboldens those inclined to commit such crimes, as they have no fear of legal retribution.

It is equally highly recommended that if not feasible to establish a new and independent law specifically addressing marital rape, the VAPP Act should be amended to incorporate marital rape into the definitions of rape and violence. This amendment should provide adequate penalties, such as life imprisonment. Any spouse who suffers marital rape should be separated from the perpetrator, who should face punishment. A comprehensive framework should be established that includes protection orders, institutions for recovery and therapeutic services to support victims of marital rape, given the intimate nature of the crime**.**

Finally, the reluctance to criminalize marital rape in Nigeria and most common law countries can be attributed to the opinions of Hale and other prevailing theories on rape. It is important to note that these views have been widely contested though and have been overtaken by event, circumstances and legislations.[102] In other words, the reason for not criminalizing marital rape is obstinate, mundane, obnoxious, and sacrilegious.

The core element of rape is penetration, as emphasized in *Udjor v State*[103] where the court held, that in a rape case, evidence of penetration must be established. Unless penetration is proven, the prosecution will fail. However, even slight penetration is sufficient, and it is not necessary to demonstrate any injury or the rupture of the hymen to constitute the crime of rape.[104]

With the enactment of the *VAPP Act*, most of the elements of rape have been expanded. For instance, Section 1 1 (a) of the *VAPP Act* broadened the instrument of rape to include

102 Justice Owen in R v R [1991] 1 All E.R. 748 rejected Hale's statement as being made “at a time when marriage was indissoluble”.

103 Law Pavilion Electronic Law Report (LPELR)-43928(CA) (2018).

104 *Okoyomon v The State* (1972) 1 Nigerian Monthly Law Report (NMLR), p. 292, (1972) 1 SC, p. 21 at 33.

dildo, pen, pencil, cucumber, etc. Therefore, as the elements of rape have been broadened, the definition of victim of rape should likewise be expanded to include husbands and wives.

BUCHBESPRECHUNGEN / BOOK REVIEWS

Review Article: Post-Colonial Theory, Constitutionalism and the "Global East"

Herbert Küpper/William Partlett, **The Post-Soviet as Post-Colonial, A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire**, Cambridge University Press, 2022, 281 pages, $135.00/$40.00, ISBN 9781802209440

By *Caroline von Gall*[*]

Abstract*:* Post-colonial legal theory has tended to focus on the binary of the Global North and the Global South, but it may also be helpful to understand constitutional development and "democratic backsliding" in Eastern Europe. This is shown by William Partlett and Herbert Küpper in their 2022 book "The Post-Soviet as Post-Colonial, A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire". Consideration of colonial experiences in Eastern and Central Europe can lead to important contributions to the global perspective of postcolonial legal studies and broaden its comparative scope as well as to the global history of international law and to comparative constitutional law. However other than Partlett and Küpper suggest, coloniality in Eastern European legal thought is not only shaped by Russian and the Soviet Union's but also by Western coloniality. It is recommended that future studies on Eastern European constitutionalism that rely on post-colonial theory may pay greater attention to the nuances and complexities of the multi-layered colonial legacy in Eastern Europe, encompassing not only the influence of Russian and Soviet colonialism but also that of Western colonialism.
Keywords: Constitutionalism; Post-Colonial theory; Soviet Union; Global East; Legal theory

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A. Introduction

In 2022, Herbert Küpper and William Partlett comprehensively discuss in their book "The Post-Soviet as Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire" the effects of post-colonialism on constitutionalism in the former Soviet empire.[1] Their study was very timely in the light if the ongoing Russian aggression against Ukraine, that has been convincingly qualified as an "imperial war" underpinned by Russia's imperial legacy and the open denial of Ukraine's political sovereignty and the Ukrainians' right to exist as an independent nation.[2]

William Partlett and Herbert Küpper, both renowned scholars of comparative constitutional law, present a well-informed study on the role of constitutions in the process of state building in the very different areas of Eastern Europe in the aftermath of the collapse of the Soviet Union. Partlett and Küpper's book "The Post-Soviet as Post-Colonial, A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire" is an important contribution to a new field of research. Their book seeks to provide a new angle of understanding constitutional change in the former Socialist bloc in Europe and Eurasia after the end of the Cold War until today as well as to understand "resilience of authoritarianism" in the region (p. vii). The authors use the post-colonial perspective to compare the constitutions of countries they identify as former Soviet colonies. They argue that constitutional dynamics in post-socialist Europe and Eurasia are usually analyzed through the lens of post-authoritarianism, discussing the end of Soviet dictatorship and the targeted transformation to the liberal democratic rule of law-based state. These approaches had focused on the ability of constitutions to limit state power by separation of powers and human rights. By this approach the questions of sovereignty, constitutional identity and nation-building, the relationship to other states and among the different federal regions in a country remained overlooked. Instead, the authors propose to add a "postcolonial lens" that turns attention "to the role of constitutions in building and consolidating the state" (p. 2). According to Partlett and Küpper, the post-colonial perspective is "aware of the problem of the challenge of asserting sovereignty and State building and the challenge of creation of postcolonial national identity". The new lens shifts the focus from the question of democracy to the question of sovereignty.

In recent years, post-colonial theory had been increasingly recognized as a methodological tool to analyze and discuss legal development in former colonies in the Global South.[3]

1 *Herbert Küpper / William Partlett*, The Post-Soviet as Post-Colonial: a New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire, Cheltenham 2022.

2 *Timothy Snyder*, The War in Ukraine is a Colonial War, The New Yorker, 28.02.2022, https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war (last accessed on 04 February 2025); *Maria Mälksoo*, The Postcolonial Moment in Russia's War Against Ukraine, Journal of Genocide Research 25 (2023), pp. 471-481.

3 *Alpana Roy,* Postcolonial Theory and Law: A Critical Introduction, Adelaide Law Review 29 (2008), p. 315; *Peter Fitzpatrick / Eve Darian-Smith*, Laws of the Postcolonial: An Insistent Intro-

Post-colonial theory has broadened the perspective and the understanding of legal development in the former colonies of the Global South showing that the effects of colonial laws and the underlying ideology continue to have contemporary relevance as they "*continue* to be used as an instrument of control in this post-colonial world."[4]

Post-colonial theory has brought a critical perspective on eurocentrism and the claim of universality of Western law in legal debate.[5] As Fitzpatrick and Darian-Smith suggest, "postcolonialism would [...] oppose those who perceived law as a great civilizing mode of colonization or as an instrument of development or of modernization."[6] It sides with the Global South and is aware of the difficulties arising from colonialism by tracing "the patterns of epistemological and pedagogic reterritorialization of the non-Western world."[7]

For many years, post-colonial critique had focused on Western colonialism in the Global South. The post-colonial debate is therefore greatly shaped by the particularities of the North-South divide: economic and normative hegemony of the Global North, exploitation of the South and questions of race. Studies have focused on the very different regions of the Global South that were all affected by Western colonialism and discussed their similarities.

Colonialism in Central and Eastern Europe is still a blind spot of post-colonial legal studies. While there has been a growing literature on Eastern European coloniality in social science and the humanities,[8] post-colonial legal scholarship continues to disregard the effects of colonialism and post-colonialism on Eastern European constitutions. Scholars have only on rare occasions argued that not only the constitutions of the Global South demand a post-colonial reading but also the constitutions in Europe and Eurasia.[9]

Therefore, using a post-colonial perspective relying on post-colonial theory for studies on Eastern European constitutionalism is an important innovation, However, it is to criticize that Partlett and Küpper focus to much on Soviet colonialism. Further studies should pay more respect to the particularities and ambiguities of multi-layered colonialism in Eastern Europe established by Russian and Soviet but also Western colonialism in Eastern Europe.

duction, in: Peter Fitzpatrick / Eve Darian Smith (eds.), Laws of the Postcolonial, Ann Arbor 1991, p. 4.

4 *Roy,* note 3.

5 *Fitzpatrick / Darian-Smith*, note 3.

6 Ibid.

7 *Roy*, note 3.

8 *David Chioni Moore*, Is the Post- in Postcolonial the Post- in Post-Soviet? Toward a Global Postcolonial Critique, Publications of the Modern Language Association 116 (2001), p. 111 ; *Hana Cervinkova*, Postcolonialism, postsocialism and the anthropology of east-central Europe, Journal of Postcolonial Writing 48 (2012), p. 155; *Dorota Kołodziejczyk / Siegfried Huigen*, East Central Europe Between the Colonial and the Postcolonial: A Critical Introduction, in: Dorota Kołodziejczyk / Siegfried Huigen (eds.), East Central Europe Between the Colonial and the Postcolonial, Heidelberg 2023.

9 *James Fowkes / Michaela Hailbronner*, Decolonizing Eastern Europe: A global perspective on 1989 and the world it made, International Journal of Constitutional Law 17 (2019), p. 497.

B. Küpper/ Partlett: The Post-Soviet as the Post-colonial

Küpper and Partlett's book is divided into six chapters. The first chapter introduces the key concepts of the study. Most interestingly, the authors do not further engage in the discourse on post-colonial legal theory or postcolonial critique. Instead, they quickly define "postcolonialism" as "the end of colonial dominance of one political entity over territory with another political entity" that involves two processes: First the withdrawal of imperial dominance of the colonial power and second in the process of constructing independence stated by the former colony public on the process of constitutional change in the process of decolonization (p. 7).

In a second step the authors discuss the question of whether the Soviet Union qualifies as a colonial power (p. 16 ff.). The authors argue that Soviet rule was based on hard power through military and political dominance as well as soft power, communist ideology. The authors recall that while Western European colonialism had a strong racist component, dividing the "masters" from the "subaltern", communist ideology advocated equality and rejected all forms of colonialism. The ethnical aspect nonetheless remained of importance in the system, the Russian people had a superior position. The authors explain that Russian superiority was justified by the allegation of the Russians as most advanced on the path leading to communism. Against that backdrop, the authors identify five pillars of Soviet colonialism: The dominance of the Russian people in the Soviet Union, communist party hierarchies, the dominance of the Russian language and culture. Outside the Soviet Union, in the "outer empire" it is the presence of the Soviet army. Compared to Western colonialism the authors see no exploitation of the colonies although they acknowledge the constraints for the national economies deriving from the Soviet COMECON planned economy, and the fact that the colonies were used as "reservoir of commodities" and a market for the center's own products (p. 22).

This methodological part is followed by several case studies on the different countries. The case studies discuss how the constitutions respond to colonial history, how they tackle the question of sovereignty, national identity and the influence of international law and finally how post-coloniality is used in constitutional discourse. The authors begin with the Russian case (p. 36). They demonstrate how the Russian state struggled to come to terms with this new position as an independent nation in between two alternative paths: Joining Europe as an equal partner or following an explicitly nationalist and pre-Soviet form of Russian exceptionalism grounded in the tsarist era (p. 37). They show how the discourse of exceptionalism grew in influence and "imperial nostalgia" became increasingly important for constitutional dynamics (p. vii).

The third chapter examines the constitutions of the state of the "inner empire", the former republics within the Soviet Union. The authors claim that many Soviet successive states in Eurasia were "not prepared for the challenges of independence after the collapse of the Soviet Union" (p. 6) and struggled with building a national identity and a new independent state after the collapse of the Soviet Union. According to the authors, the

sudden need to consolidate power may explain the hyper-centralized approach in these countries.

The fifth chapter discusses the constitutions of the outer empire, followed by an in-depth case study on Hungary. The authors recall that in the 1990s most constitutions of the outer empire explicitly engaged with their countries' "return to Europe" but remained silent on former Soviet colonialism. The authors argue that remaining silent on the past "has allowed room for populism and divergence from post authoritarian approaches in recent years" (p. 118). The Hungarian constitutional reform in 2010 constitutionalized a particular narrative showing the new basic law as a symbol of the end of the transitional period after Soviet colonial rule and presenting the achievements of the current government by restoring full state sovereignty and historical justice. The authors describe this approach as strategic: The victimization of the Hungarian nation as subaltern to Soviet foreign power is especially convincing for those Hungarians who were part of the communist system and aim to whitewash the involvement of Hungarians in communist crimes.

The authors conclude that the postcolonial lens reveals five key lessons: First it turns the attention "to the understanding of the way in which history is strategically interpreted (or avoided) by powerful individuals in the post-socialist space" (p. 238). Second, it turns the attention to external sovereignty and "the role of constitutional integration with international law." The authors understand the "current resistance" to international law "as a postcolonial development;" that helps to "understand the basis for the nationalist backlash against the transnational project both in the imperial center and the former colonies" (p. 239). Third, it shows how the need to assert control over the territory of these newly independent states has shaped the constitution (p. 239). The postcolonial lens brings attention to the details of constitutional state building beyond courts and rights and shows how the postcolonial requirement of nation building has shaped constitutional text.

The authors maintain that the postcolonial emphasis on sovereignty obviously collides with the post-authoritarian emphasis on the implementation of European norms and democratic constitutionalism (p. 234). However, the authors admit leaving it to future scholars to further develop "this understanding and counter the anti-democratic argument that sometimes emerge as part of this past-coloniality" (p. 247).

C. Applying Post-Colonial Theory in Eastern Europe

The study is eye-opening and pursuing: Küpper and Partlett rightly observe that research on Eastern European constitutionalism is very much focused on the question of the political transformation to the democratic rule of law-based state and the dichotomy of democracy and authoritarian rule. Research on post-socialist transformation in Eastern Europe had nonetheless acknowledged at an early stage that the newly independent states in the European East face multiple challenges after the collapse of the Soviet Union, not only political transformation from authoritarianism to democracy. Already in 1989, Claus Offe had outlined the complexity and challenges of simultaneously establishing the institutions of

representative democracy and market economy as well as the question of nation building.[10] Only recently Lauri Mälksoo had explained the consequences of Russian imperial legacies for the Russian approaches to international law.[11] Nevertheless, *constitutional* scholarship had long ignored the implications of history and coloniality for constitutionalism in Eastern Europe. The proposal to direct the post-colonial lens to the role of constitutions in the process of nation building, the question of sovereignty and national identity is thus promising and innovative and as a new methodological tool constitutes a major contribution to constitutional studies.

The Partlett and Küpper use of this new tool does however leave open the categorial question regarding the many contradictions and paradoxes of the Soviet Union as a colonial power as well as the effects of Western colonialism and dominance in Eastern Europe.

Apart from the methodological contribution the book delivers interesting findings through the application of the post-colonial lens in the case studies. For Russia it is convincing to outline how "imperial nostalgia" became important for constitutional dynamics, especially with regard to the weak character of federalism and the rights of smaller ethnicities and regions in the Russian Federation or with regard to the affirmation of the primacy of national sovereignty over international law by the 2020 Russian constitutional amendments. The sudden need to consolidate power in the former republics of the Soviet Union after becoming independent from the former Soviet empire may also explain the hyper-centralized approach in these countries in recent years. The book argues convincingly that Hungary's lack of confrontation and historical reappraisal of its time as a Soviet "colony" contributes to the fact that populists today can successfully implement nationalist and anti-European constitutional measures and underline sovereignty and the importance of the independence from the European Union.

However, the study of Partlett and Küpper leaves many questions unanswered. First, the study does not further engage with the particularities and paradoxes of Russian and Soviet coloniality compared to Western empires. Consequently, the study does not further discuss how a discourse on Eastern Europe may possibly differentiate from earlier post-colonial discourse and to what extent the Eastern European example may add to the global perspective on colonialism.

Second, the current constitutional "backlash" is obviously shaped not only by Soviet colonialism but also by Western dominance in Europe and the question of "Europeanness" of the Central and Eastern European countries, the question of Eastern European countries being equal partners in Europe or characterized by otherness compared to Western European countries. The authors discuss the consequences of the Soviet colonial power, but

10 *Claus Offe*, Das Dilemma der Gleichzeitigkeit. Demokratisierung und Marktwirtschaft in Osteuropa, in: Claus Offe (ed.), Übergänge, Heidelberg 2020, p. 59.

11 *Lauri Mälksoo*, The Russian Concept of International Law as Imperial Legacy, in: Peter Hilpold (ed.), European International Law Traditions, Heidelberg 2021; see also *Anastasiya Kotova / Ntina Tzouvala*, In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law, American Journal of International Law 116 (2022), p. 710 .

surprisingly fail to reflect the consequences of Western colonialism in Central and Eastern Europe, thereby neglecting not only the anti-Western stance of current constitutional backsliding in Eastern Europe but also the successful authoritarian abuse of anti-colonial critique.

Rather than discussing post-coloniality one-dimensionally as the effects of former Soviet colonialism, it seems more convincing to conceptualize coloniality in Eastern Europe on the basis of Martin Müller's concept of the "Global East".[12] Müller acknowledges the paradoxes of Eastern Europe being neither a part of the Global North nor of the Global South, but in itself shaped by different layers of Western as well as Russian and Soviet colonialism and the question of being an equal part of Europe or "the other", the oriental. This concept allows a better understanding of the current constitutional challenges in Eastern Europe based on an ambiguous history of colonialism but also explains the communist's ("Eastern") implications on the North-South divide. Adding the Global East leads to a more comprehensive understanding of coloniality and its implications for the history of international law as well as global constitutionalism.

I. The Soviet Union as a Colonial Power?

Partlett and Küpper quickly define the Soviet Union as a colonial power, but neglect the lengthy discourse in Eastern European coloniality in social science and the humanities.[13] They also keep silent on the reluctance of parts of the literature to describe the former Soviet Union as a colonial power and to convey the paradigm of post-colonialism to Eastern Europe, a question that is still contested in scholarship.[14] Consequently, the study does not further discuss how a discourse on Eastern Europe differs from earlier post-colonial

12 *Martin Müller*, In Search of the Global East: Thinking between North and South, Geopolitics 24 (2020), p. 734.

13 For a recent overview on the literature with regard to Central Europe: *Kołodziejczyk / Huigen*, note 6. See also *Martin Schulze Wessel*, Der Fluch des Imperiums: Die Ukraine, Polen und der Irrweg in der Russischen Geschichte , München 2023.

14 *Ulrich Hofmeister*, Kolonialmacht Sowjetunion: Ein Rückblick auf den Fall Uzbekistan, Osteuropa 56 (2006), p. 69; *Sharad Chari / Katherine Verdery*, Thinking between the Posts: Postcolonialism, Postsocialism, and Ethnography after the Cold War, Comparative Studies in Society and History 51 (2009), p. 6; *Jill Owczarzak*, Introduction: Postcolonial Studies and Postsocialism in Eastern Europe, Journal of Global and Historical Anthropology 53 (2009), p. 3; *Dirk Uffelmann*, Theory as Memory Practice: The Divided Discourse on Poland's Postcoloniality*,* in: Uilleam Blacker /Alexander Etkind / Julie Fedor (eds.), Memory and Theory in Eastern Europe, Heidelberg 2013, p. 103; *Madina Tlostanova*, Postsocialist ≠ postcolonial? On post-Soviet imaginary and global coloniality, Journal of Postcolonial Writing 48 (2012), p. 130; *Cristina Sandru*, Worlds Apart? A Postcolonial Reading of Post 1945 East Central European Culture, Newcastle upon Tyne 2012; *James Mark / Slobodian Quinn*, Eastern Europe in the Global History of Decolonization*,* in: Martin Thomas / Andrew Thompson (eds.), The Oxford Handbook of the Ends of Empire, Oxford 2018, p. 351; *Michał Buchowski*, The Specter of Orientalism in Europe: From Exotic Other to Stigmatized Brother, Anthropological Quarterly 79 (2006), p. 463; *Claudia Snochowska-Gonzalez*, Post-colonial Poland – On an Unavoidable Misuse, East European Politics and Societies and

discourse, although it seems obvious that that branding Central Europe as "post-colonial" will always "ring a false bell or iterate discussions on the inevitability of dependence in the world-system and evoke accusations of derivativeness."[15] It is in the end convincing to see the Soviet Union as a colonial power as the state exercised military power over its satellite states, but the study leaves questions unanswered. As mainstream post-colonial studies focus on the political construction of racial hierarchies along the color lines, it would have been interesting to better understand how ethnic hierarchies and racial differentiations of master and subaltern played a role in the Russian Imperial project. Yet it is obvious that the different colonies in the East and the West were treated differently by the Russian and Soviet colonizers and that the different colonies had a very different legal history. The Western colonies of the Russian Empire had in different periods also been part of the German, Prussian or Austro-Hungarian empire and also participated in the legal development of these countries or empires. The universities of Prague, Pécs and Krakow are among the oldest universities in Europe with legal faculties.

At the same time, it is interesting to see that compared to Western empires, Russia not only imposed its laws to the colonials, Russian legal theory is also very much shaped by legal scholars from the peripheries. Some of most eminent "Russian" legal scholars with an enormous impact on Russian legal development came from the Western peripheries such as legal realist Leon Petrażycki (Poland), legal philosopher Bogdan Kistyakovski (Ukraine) or international lawyer Friedrich Fromhold Martens (Estonia).

It is also fascinating to see the extent to which ethnic hierarchies collide with ideological hierarchies in the Soviet Union. From the perspective of communism, the working class was superior to other classes like the bourgeoisie. From the ideological perspective ethnic hierarchies did not play a role. Until today Russia (like the Soviet Union before) builds its feeling of superiority on the defeat of fascism and Nazi occupation, the liberation of Europe. In the rhetoric's the Soviet Union and Russia today does often not claim to fight ethnic groups like Germans or Ukrainian, but fascism as a political idea. And while the Soviet Union used communist ideology as a justification for colonial rule, the ideology itself praised the non-colonial form of participation in the Soviet Union and the equality of workers worldwide.

At the same time, Russian and Soviet power always used to be authoritarian and dictatorial against its own people. Alexander Etkind has shown how Imperial Russia applied the cultural and political tools to colonies beyond but also within its own borders.[16] Ideology and ethnical superiority were of course used tactically, but unfortunately the authors remain

Cultures 26 (2012), p. 708; *Viatcheslav Morozov,* Russia's Postcolonial Identity: A Subaltern Empire in a Eurocentric World,London 2015.

15 *Kołodziejczyk / Huigen*, note 6, p. 21.

16 *Alexander Etkind*, Internal Colonization: Russia's Imperial Experience, Cambridge 2011; *Dominic Lieven*, Empire: The Russian Empire and its Rivals, New Haven 2000.

too vague on the relationship between hard power, ideology and ethnic hierarchies and its consequences.

Any approach conveying the discourse on coloniality on Eastern Europe should be more cautious on the differences and closely examine the context of coloniality in each country as well as the narratives accompanying coloniality. Any analogy to the countries of the Global South demands a more careful exposure of the differences. Only then can a post-colonial perspective, as global perspective, dismantle the assumption of a bipolar world and uncover the interconnections of this order.

Finally, in the light of the Russian aggression against Ukraine there is the obvious question if Russia should rather be discussed as acting as a colonial than a post-colonial power.

II. Soviet Anti-colonialism

Another paradox of Soviet colonialism is that the Soviet Union, while being a colonial power itself, very much contributed to anti-colonial aspirations of the Global South. While from the Western perspective as well as from the perspective of its immediate neighbors the Soviet Union and Russia are colonial powers, from the perspective of the Global South both are anti-colonial powers. The Soviet Union was not only opposed to Western aspirations on the international sphere but itself also influenced the development of international law.[17] Recent scholarship has highlighted the special impact of the Soviet Union on the development of the right of self-determination under the United Nations.[18] Victor Kattan has shown how the communist approach to the right of self-determination was appropriated and applied by the emerging leaders in the Third World to support their claims to self-determination against Western colonizers. In a recent article, Kattan cites Nelson Mandela who in 1963–64 explained that

> *"for many decades communists were the only political group in South Africa who were prepared to treat Africans as human beings and their equals; who were prepared to eat with us; talk with us, live with and work with us. Because of this, there are many Africans who, today, tend to equate freedom with communism."*[19]

17 *Bill Bowring*, The Soviets and the Right to Self-determination of the Colonized: Contradictions of Soviet Diplomacy and Foreign Policy in the Era of Decolonization, in: Jochen von Bernstorff / Philipp Dann (eds.), The Battle for International Law: South North Perspectives on the Decolonization Era, Oxford 2019, p. 404 ; *Johannes Socher*, Russia and the Right to Self Determination in the Post Soviet Space, Oxford 2021; *Lauri Mälksoo*, The Soviet Approach to the Right of Peoples to Self-determination: Russia's Farewell to jus publicum europaeum, Journal of the History of International Law 19 (2017), p. 200; *John B. Quigley,* Soviet Legal Innovation and the Law of the Western World, Cambridge 2007, pp. 47-52, 143-147.

18 *Victor Kattan*, Self-Determination in the Third World: The Role of the Soviet Union (1917-1960), Jus Gentium 8 (2023), p. 87.

19 *Nelson Mandela*, Long Walk to Freedom, Boston 1994, p. 504; 2013 reprint; p. 110.

Kattan argues the Soviet Union with communism and self-determination could offer more appealing concepts to many leaders in Africa than the West with democracy and individual rights.[20]

Consequently, Neil Lazarus' perception of the post-colonial framing of post-communist studies as "paradoxical" is convincing on the account of an assumption that the Soviet Union was a decolonizing force.[21] Lazarurs stresses that initially post-colonial theory was driven by its communist anti-capitalist critique of its uneven development at the peripheries. Therefore, this paradigm would not fit in Eastern Europe.

Partlett and Küpper's book neglects the influence Marxism had on decolonizing movements.[22] This is also more astonishing as today again Russia uses anti-Western resentment as soft power in Africa[23] to gain support for its colonial war in Ukraine.[24] Today, Putin successfully plays the global leader of anti-Western rebellion that clashes with the anti-colonial narrative in Central Europe. The nature of Soviet colonialism can only be understood by the constant struggle of the Soviet power to contest the Global North's liberal script as well as its anti-colonial empowerment of the Global South.

D. Explaining Constitutional Backlash by Post-colonial Theory?

As the book aims to better understand democratic backlash and authoritarian resilience in Eastern Europe it is fascinating to see that Partlett and Küpper remain almost completely

20 *Kattan*, note 18, p. 115.

21 *Neil Lazarus*, Spectres haunting: Postcommunism and postcolonialism, Journal of Postcolonial Writing 48 (2012), p. 117.

22 *Sanja Petvoska*, Book Review: William Partlett & Herbert Küpper's The Post-Soviet as Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire, Marx&Philosophy, 19.10.2022, https://marxandphilosophy.org.uk/reviews/20583_the-post-soviet-as-post-colonial-a-new-paradigm-for-understanding-constitutional-dynamics-in-the-former-soviet-empire-by-william-partlett-and-herbert-ku%CC%88pper-reviewed-by-sanja-petkovska/.

23 *Gilles Paris*, Whatever Putin may say, Russia is no less predatory in Africa than the colonial powers of yesteryear, Le Monde, 06.10.2022, https://www.lemonde.fr/en/opinion/article/2022/10/06/whatever-vladimir-putin-may-say-russia-is-no-less-predatory-in-africa-than-were-the-colonial-powers-of-the-past_5999308_23.html (last accessed on 04 February 2025); *Peter Dickinson*, Putin Denounces Imperialism while Annexing Large Swathes of Ukraine, Atlantic Council, 30.09.2022, https://www.atlanticcouncil.org/blogs/ukrainealert/putin-denounces-imperialism-while-annexing-large-swathes-of-ukraine/ (last accessed on 04. February 2025); *Howard French*, Why Putin's Denunciations of Western Imperialism Ring Hollow, Foreign Policy 05.10.2022, https://foreignpolicy.com/2022/10/05/putin-speech-ukraine-annexation-western-imperialism/ (last accessed on 04 February 2025); *Edyta Bojanowska*, Putin's Anti-Colonial Agenda?, Yale Macmillan Center, 16.12.2022, https://europeanstudies.macmillan.yale.edu/news/putins-anti-colonial-agenda (last accessed on 04 February 2025).

24 *Andrey Pertsev*, Putin, the Anti-Colonialist. The Kremlin's new Model of Russian "Soft Power" will fuel Anti-Western Resentment in Southern Europe, South America, Africa and Asia, Meduza, 11.11.2022, https://meduza.io/en/feature/2022/11/11/putin-the-anti-colonialist (last accessed on 04 February 2025).

silent on Western colonialism in Eastern Europe and the anti-western, anti-liberal justification of current authoritarization framed as anti-colonial discourse.

I. Western Colonialism in the East

Coloniality in Eastern Europe is multilayered. Apart from the Russian and Soviet colonial past there is also a history of Western colonialism in Eastern Europe. Partlett and Küpper neglect the fact that Central Europe was not only colonized by the Soviet Union but also has a long history of being part of the Austro-Hungarian and German/Prussian Empire.[25] The narratives are interconnected: The Soviet Union legitimized their power in Eastern Europe not only by communist ideology but also by the liberation from German fascism and the Nazi-occupation.

In his essay "In Search of the Global East: Thinking between North and South" Martin Müller recollects the story of an old man who says he was born in Austria-Hungary, went to school in Czechoslovakia, married in Hungary, worked most of his life in the Soviet Union, and retired in Ukraine. "Travelled a lot, then?" asks his interviewer. 'No, I never moved from Mukachevo."[26] The joke is very telling not only with regard to multi-layered Eastern European colonialism but also the widespread ignorance versus this very special colonial history.

II. Eastern European "Otherness"

As post-colonial studies initially aimed to critically engage with *Western* dominance and political construction of hierarchies, it is appealing that Partlett and Küpper remain silent on the discussion of Eastern European otherness and its relationship to the West. Edward Said's influential concept of "orientalism"[27] can easily be applied to Eastern Europe. Based on Said, Milica Bakić-Hayden and Robert Hayden developed the concept of "nesting orientalism" as "a tendency for each region to view cultures and religions to the south and east of it as more conservative or primitive."[28] It has been argued that it was the West that created the difference between East and West that provided grounds for considering the region from a postcolonial perspective. Until today, Eastern European countries are often regarded as

25 Kopp argues that the colonization of the East was inscribed in the project of German expansion, see *Kristin Leigh Kopp*, Germany's Wild East: Constructing Poland as Colonial Space, Ann Arbor 2012, p. 2.

26 *Offe,* note 10.

27 *Edward Said*, Orienatlism, New York 1978.

28 *Milica Bakić-Hayden / Robert Hayden*, Orientalist Variations on the Theme "Balkans": Symbolic Geography in Recent Yugoslav Cultural Politics, Slavic Review 51 (1992), pp. 1, 4; *Milica Bakić-Hayden*, Nesting Orientalisms: The Case of Former Yugoslavia, Slavic Review 54 (1995), p. 917.

the other, the inferior, the latecomers in European history.[29] The conceptions of Eastern Europe as the other or the "new" Europe does display the characteristics of orientalism—the exaggeration of difference, the presumption of Western cultural superiority, and the application of clichéd analytical models for perceiving the other. Larry Wolff's "Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment" (1994)[30] discusses Eastern Europe as an imaginary, an ideological construct of the Western European othering, while Maria Todorova's "Imagining the Balkans" (1997) studies the Orientalist construction of the Balkans.[31]

The post-colonial perspective also demands a critical reading of Western academic engagement with East European law, e.g., of the German former discipline of "Ostrecht". The first German journals dealing with the law in the newly independent states in Eastern Europe and in Russia under the special designation "Ostrecht"[32] emerged in Germany during the 1920s. Although the articles in these journals are almost all unbiased and objectively guided by an sincere interest, many written by expatriates, Ditt has argued that most people understood "Ostrecht" as something less than other law.[33] "Ostrecht" gained a new meaning during the 1940s: It now covered the practical legal issues of the occupation on the basis of a special understanding of the German East coined by national socialist ideology.[34] After the Second World War, representatives of "Ostrecht" such as Reinhold Maurach[35] sided with the West and liberalism, drawing on the dichotomy of Eastern (socialist) and Western law. Consequently, constitutional scholars of Ostrecht aimed to unmask authoritarian socialist constitutionalism as mere shame, as façade as "wrong" constitutionalism.[36]

After the collapse of the Soviet Union, the rift dividing the rich Western European and post-communist societies, triggered new images of inferiority and backwardness now again

29 *Hans-Christian Petersen*, Rassismus gegen Weiße? Für eine Osterweiterung der Rassismusdebatte, Geschichte der Gegenwart, 23.02.2022, https://geschichtedergegenwart.ch/rassismus-gegen-weisse-fuer-eine-osterweiterung-der-deutschen-rassismusdebatte/ (last accessed on 04 February 2025); *Manuela Boatcă*, Multiple Europas und die interne Politik der Differenz, in: Manuela Boatcă / Willfried Spohn (eds.), Globale, Multiple und Postkoloniale Modernen, München 2010, p. 341; *Anca Parvuelscu*, Eastern Europe as Method, The Slavic and Eastern European Journal 63 (2019), p. 470; *Madina Tlostanova*, Can the Post-Soviet Think? On Coloniality of Knowledge, External Imperial and Double Colonial Difference, Intersections. East European Journal of Society and Politics 1 (2015), p. 38.

30 *Larry Wolff*, Inventing Eastern Europea: The Map of Civilzation on the Mind of the Enlightment, Stanford 1994; *See Tomasz Zarycki*, Ideologies of Eastness in Central and Eastern Europe, 2014.

31 *Maria Todorova*, Imagining the Balkans, Oxford 2009.

32 Starting with the journals "Ostrecht" and "Zeitschrift für Ostrecht".

33 *Thomas Ditt*, „Stoßtruppfakultät Breslau": Rechtswissenschaft im „Grenzland Schlesien" 1933–1945, Tübingen 2011, p. 14 .

34 Ibid.

35 *Viktor Nerlich*, A Baltico ad Euxinum: Reinhart Maurach und die Frühzeit der Deutschen Ostrechtforschung, Berlin 2015.

36 For example, *Georg Brunner*, Die Grundrechte im Sowjetsystem, Berlin 1963, pp. 59, 115.

measuring the distance from the normative West. Transformation science focused on legal systems in Eastern Europe on their way to becoming more like Western systems, focusing on non-compliance and violations of European norms, focusing again on the insufficient.

At the same time, Eastern European scholarship itself suffered from "West-centrism" of post-colonial studies.[37] As Müller states, there is an irony that remaining outside British and French colonialism limited the chances to be heard. Russian, as main language of knowledge production, excluded Eastern European scholars from global and European discourse after the collapse of the Soviet Union. Until today Eastern European academic debates remain a grey zone to Western discourse.[38]

Being regarded as the "other European" has obviously shaped the identity of Eastern European countries and Russia. The perception of Russia's backwardness in legal development influenced Russia's self-perception. Non-compliance with alleged universal values and the allegations of backwardness have repeatedly provoked reactions by stressing Russia's and the Soviet Union's uniqueness and otherness in the Russian self-discerption. From the 1850s it provoked a vibrant discussion between "Westernizers" and "Slavophiles" among Russian intelligentsia if Russia should try to catch up with Western legal development. Responding to the claim of backwardness, Slavophiles argued that Russian culture is based of concepts bigger than the law, such as community and orthodoxy. The discourse on the role of the law mirrors the general ambiguity of Russian discourse about being an equal part in Europe or a different exceptional entity. Nevertheless, the universality claims of Western law continued to put pressure on Russian authoritarian leaders. After the Second World War, when human rights became a subject of international law and foreign policy, communist leaders in response developed an alternative "socialist" human rights concept focusing on social rights to contest western claims as well as dissidents' demands.

In the same way Central Europe is characterized by the in-betweenness of the region, between Europe and Russia: "The in-betweenness of the region has been inherently contradictory: on the one hand, founded on the strong identification with Europe, and, on the other, driven by the anxiety of incomplete belonging and not ranking high enough to merit the status of Europeanness."[39] Despite being dependent on the Prussian/German, Austro-Hungarian or Russian empires until the end of the First World War, the countries would not consider themselves Western colonies: In-betweenness determines its equivocal self-perception as both inherently European and different, or, perhaps, made different by historical and geopolitical circumstances.[40]

37 *Offe,* note 10.

38 Ibid.

39 *Kołodziejczyk / Huigen*, note 6, p. 1.

40 Ibid., p. 22.

During the Cold War, dissidents in the Soviet Union and Central Europe used the common language of universal human rights to oppose the socialist regime.[41] Consequently, the year 1989 was regarded as a return to Europe, post-communist countries aspired to join the European Union, the Council of Europe and NATO to seek redress for the decades of separation from Europe and the West. A post-colonial discourse on Eastern Europe should be aware of these conceptions and ambiguities.

III. The EU as a Colonial Power?

Particular awareness is even more essential as post-coloniality today is largely applied by populist and authoritarian leaders in Eastern Europe in order to stir anti-EU sentiments and create a narrative of national decolonization from the European Union covering up a nationalist and anti-democratic agenda.[42] It is particularly surprising that the book is silent on anti-colonial political discourse in Poland, Hungary or Russia against western domination and the hegemony of European institution as populist leaders explain constitutional backlash not only by the Soviet past as the book suggests but also explicitly by European hegemony. Here the "postcolonial condition" turns into a powerful political weapon, disguising the illiberal democracy as the politics of decolonization.[43] The postcolonial concepts have become tools legitimating right-wing populist politics, providing the vocabularies of decolonization, "of a national insurgency against the hostile hegemony of the West, of the deprivation of national agency resulting in a domination by hegemonic states within the EU."[44]

For leaders like Putin and Orban, colonialism has evolved into a powerful metaphor for the alleged arrogance of Western liberal elites. In this approach they unite with right wing populists worldwide. Putin not only justified the 2020 constitutional amendments by the need to strengthen sovereignty to repel Western cultural dominance[45] but also to justify the current war. In his speech on September 30, 2022 announcing the annexation of

41 *Michal Kopeček*, Dissident Legalism, Human Rights, Socialist Legality, and the Birth of Legal Resistance in the 1970s Democratic Opposition in Czechoslovakia and Poland, in: Celia Donert / Ana Kladnik / Martin Sabrow (eds.), Making Sense of Dictatorship. Domination and Everyday Life in East Central Europea After 1945, Budapest 2022, p. 241.

42 *Simon Taylor*, Orban accuses EU of colonialism, Politico, 16.03.2012, https://www.politico.eu/article/orban-accuses-eu-of-colonialism.

43 *Kołodziejczyk / Huigen*, note 6, p. 16.

44 *Siegfried Huigen / Dorota Kołodziejczyk*, New Nationalisms: Sources, Agendas, Languages. An Introduction, European Review 29 (2020), p. 427; *Dorota Kołodziejczyk*, Comparative posts going political-The postcolonial backlash in Poland, in: Lars Jensen / Julia Suarez-Krabbe / Christian Groes / Zoran Lee Pecic (eds.), Postcolonial Europe. Comparative Reflections After The Empire, Lanham 2017, p. 177; *Dorota Kołodziejczyk / Cristina Şandru*, Introduction: On colonialism, communism, and east central Europe – some reflections, Journal of Postcolonial Writing 48 (2012), p. 113.

45 *Lauri Mälksoo*, International Law and the 2020 Amendments to the Russian Constitution, American Journal of International Law 115 (2021), p. 78; see *Marianna Muravyeva*, Russia and the

Ukraine's Donetsk, Luhansk, Zaporizhzhia, and Kherson regions, Putin spoke little about Ukraine, instead heavily attacking the West for the alleged attempt to colonize Russia: "They do not want us to be free," Putin accused Western leaders, "they want us to be a colony" he claimed. While the West had claimed to be bringing freedom and democracy to the world, according to Putin, the exact opposite was true: Western states indented "total de-sovereignization" to impose liberal values to destroy Russian culture and democracy: "This explains their aggression towards independent states, traditional values and authentic cultures, their attempts to undermine international and integration processes."[46]

In Hungary, similarly Prime Minister Orbán and political figures supporting the Hungarian government have been constructing a colonial discourse against the West. According to this narrative, Hungarian culture and values as well the Hungarian understanding of democracy were not respected. The framing of EU-relations as a new colonial dependence is also crucial for the understanding of the backsliding in Poland.[47] The Istanbul Convention of the Council of Europe has been particularly targeted in that anti-European, anti-colonial constitutional politics.[48] It has been argued that anti-genderism forms a "symbolic glue"[49] to unite right wing politicians worldwide. This conservative version of anti-colonialism simply equates gender egalitarianism with colonization and compares it with totalitarianisms or the deadly Ebola virus.[50] Brussels has been cast as colonial and imperialist, but especially in Central Europe also connected to "communist" history as observed in sentiments such as "Brussels is the new Moscow."[51] The phenomenon in populist politics in Hungary and Poland, which claimed to be post-colonial actors in order to stir anti-EU sentiments and create a narrative of national decolonization from the European Union, proves how easily academic paradigms can be co-opted to legitimate politics. This makes post-colonial theory applied in Eastern Europe particularly delicate. It bears the risk that liberal pro-European scholars tend to neglect the colonial perspective as mere populist propaganda. In turn, scholarship should not ignore the abuse of the theory by Putin and others. Regardless of the abuse, an anti-colonial critique of the EU has a core of truth. Structural inequalities of the European Union, the accession conditions and the

Istanbul Convention: Domestic Violence Legislation and Cultural Sovereignty, Osteuropa-Recht 68 (2022), p. 147.

46 *President of Russia*, Signing of Treaties on Accession of Donetsk and Lugansk People's Republics and Zaporozhye And Kherson Regions to Russia, http://en.kremlin.ru/events/president/transcripts/69465.

47 *Marta Bucholc*, The Rule of Law as a Postcolonial Relic: The Narrative of the Polish Right, Zeitschrift für Rechtssoziologie 42 (2022), p. 43.

48 *Caroline von Gall*, Introduction: The Istanbul Convention in Central and Eastern Europe, Osteuropa-Recht 68 (2022), p. 5.

49 *Eszter Kováts / Maari Põim* (eds.), Gender as Symbolic Glue, Friedrich-Ebert Stiftung, 2015, https://library.fes.de/pdf-files/bueros/budapest/11382.pdf.

50 *Elżbieta Korolczuk / Agnieszka Graff*, Gender as 'Ebola from Brussels': The Anti-colonial Frame and the Rise of Illiberal Populism, Signs 43 (2018), p. 797.

51 *Kováts et al.,* note 49.

ongoing asymmetrical relations within the EU cannot be disregarded. Given the economic and symbolical asymmetries, this claim is not far-fetched and can and should be analyzed critically.

In "The light that failed" Ivan Krastev and Stephen Holmes discuss EU-accession as a kind of voluntary cultural colonization, which they characterize as "imitation."[52] The argument is put forth that the pressure on East European countries to "imitate" Western institutions during the period of transformation after the collapse of the Soviet Union has fostered the politics of resentment and authoritarianism in these states. The relationship between the imitator and the imitated may be regarded as asymmetrical relation with an implicit superiority of the model over the mimic. Remaking its own politics and economics according to a foreign model feels itself humiliated or irritated at having to toss away or devalue its own traditions in the light of "superior" foreign ideas like democracy, human rights, free markets, etc. Tanja Petrović has explored the employment of colonialist patterns emerging in the South-Eastern periphery of the EU and related to the process of accession of the neighboring countries, referred to as the Western Balkans in political discourse.[53]

E. Conclusion: The Global East as a Category of its Own

Küpper and Partlett's attempt to shifting the focus from non-compliance of EU and Council of Europe's standards in Eastern Europe to the question of sovereignty and the role of the constitution in the process of post-colonial and anti-colonial nation-building is a meaningful endeavor. The post-colonial perspective also highlights the shortcomings of transformation science discourses by provoking a critical revision of the legacies of colonialism in Eastern Europe. However, constitutional discourse and politics in Central and Eastern Europe demand a more careful reading. Precisely because the authors aim to better understand democratic "backlash" and "authoritarian resilience" the reader might expect more concrete answers to the question of the causal relation between coloniality and new authoritarianism in Eastern Europe. Indeed, (post-) colonialism and authoritarianism appear closely related. New liberal constitutions in Eastern Europe can easily be interpreted as not only a symbol of the break with ideology and authoritarianism but also with colonial power. The current discourse on (constitutional) identity[54] is clearly shaped by the normative demands for compliance set by the EU and the Council of Europe. Anti-colonial discourse is abused by political leaders to justify authoritarianism and war. This link indeed needs further reflection. A major challenge is to foster critical thought on European constitutional hegemony

52 *Ivan Krastev / Stephen Holmes*, The Light that Failed: A Reckoning, Bristol 2019.

53 *Tanja Petrović*, The Idea of Europe or Europe Without Ideas? – Discourses on the "Western Balkans" as a Mirror of Modern European Identity, in: Heinz Fassmann / Wolfgang Müller-Funk / Heidemarie Uhl (eds.), Kulturen der Diferenz – Transformationsprozesse in Zentraleuropa nach 1989: Transdisziplinäre Perspektiven, Göttingen 2009, pp. 137, 141.

54 *Julian Scholtes*, The Abuse of Constitutional Identity in the European Union, Oxford 2023.

while at the same time detect and reject hostile takeovers of anti-colonialism to justify anti-liberal forms of governance by political leaders in Eastern Europe.[55]

To convey the post-colonial paradigm into the discussion on current constitutional development on Eastern Europe is also meaningful for the global discourse on colonialism. Until today, mainstream post-colonial legal theory has focused on the binary of the Global North and the Global South. Emerging German scholarship in post-colonial legal studies focuses on (German) coloniality in the Global South, ignoring German colonial history in the East.[56] Eastern Europe still suspends in the shadows of these two poles, not fitting neatly in either category.[57] As Martin Müller described, the Eastern European countries "fell between the crack rather than joining the north or the south, they seem to be stuck in eternal transition towards modernity".[58] Müller has argued that the inscription of the East is long overdue to unsettle the binary of North and South as well as of East and West. Therefore, it is to discuss the "Global East" as category of its own shaped by Russian, the Soviet Unions and Western colonial power but also by the claim of universality of Western constitutionalism, the Western orientalist reading of constitutionalism in Eastern Europe that often portrays the East by its backwardness, otherness and non-compliance of the normative demands of the West.

Küpper and Partlett do not further discuss how much Soviet colonial power was shaped by the East-West divide and ideological struggle to compete with the universality claim of Western constitutionalism. At the same time the Soviet Union successfully engaged with the Global South, offering anti-colonial support against the West.

In sum, proposing the post-colonial lens to discuss constitutional backlash in Eastern Europe is an important contribution to the debate. However, a better focus on the particularities of colonial experiences in Eastern and Central Europe in the light of Soviet colonialism going hand in hand with Western hegemony could have even more impact to the global perspective of postcolonial studies and broaden its comparative scope. This could lead to helpful contributions to the global history of international law was well as to comparative constitutional law.

55 *Kołodziejczyk / Huigen*, note 6, p. 23.

56 *Philipp Dann / Isabel Feichtner / Jochen von Bernstorff* (eds.), (Post)koloniale Rechtswissenschaft. Geschichte und Gegenwart des Kolonialismus in der Deutschen Rechtswissenschaft, Tübingen 2022; See also the 38th Biennial Conference of the German Society of International Law: "Koloniale Kontinuitäten im internationalen Recht", (15–17 March 2023), https://owncloud.gwdg.de/index.php/s/jVHQwNKXkfiODBC (last accessed on 04 February 2025).

57 *Kołodziejczyk / Huigen*, note 6.

58 Ibid.

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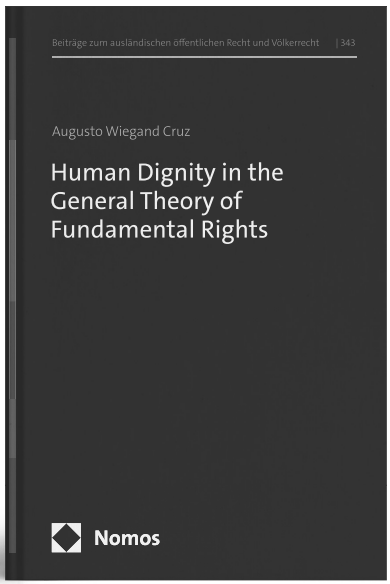
Human Dignity in Chilean and German Law



Human Dignity in the General Theory of Fundamental Rights

By Dr. Augusto Wiegand Cruz

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This research concerns the legal doctrine of human dignity in the general theory of fundamental rights in the Chilean constitutional order. This research further examines how the constitutional concept of human dignity has been treated in Germany, where the doctrinal work around human dignity has seen unparalleled evolution and development. The question of how one can benefit from comparative legal perspectives in general and the German perspective in particular will be discussed. Against this background, three dimensions of the German experience are of particular importance for the interpretation of the human dignity clause of the Chilean Constitution. The latter arises from three perspectives: the methodological, the dogmatic and the sociological.

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