

Constitutional Courts in Divided Societies: A Call for Scholarship on International Interventionism in Constitutional Law and Politics

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I. INTRODUCTION

In deciding large-scale national political controversies involving the application of international human rights norms, how should constitutional courts in deeply divided societies supervise the increasingly active interventionism of supranational bodies? A corollary issue would be: how do “international interveners” influence constitutional issues in fragile states? Conversely, given that international interventionism is on the rise, how should constitutional courts modulate the impact of international human rights norms in deciding highly politicized cases that divide and define whole nations?

During the past two decades, international and comparative constitutional law scholars have turned their attention to what Ulrich Preuss

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analogously terms as “constitutional intervention” in contrast to “humanitarian intervention.” The latter includes military exercises; the former, purely civil in character.¹ The author has no quarrel with the term “constitutional intervention” as such, since it displays a critical component not otherwise demonstrable in conventional jurisprudence. But there is a danger that the term might mislead to the extent that it blurs the distinction between supranational law and domestic law, or worse, it might connote a purely domestic form of interventionism. Hence, the author finds it more apt instead to use the term “international interveners” to broadly refer to international bodies that directly and indirectly engage in activities to influence the domain of national adjudication which traditionally lie beyond the control of the former.² Moments of international interventionism may arise in different forms, but regardless of their nature, the author focuses only on those activities that perceptively and significantly affect the decision-making of constitutional courts over the most politicized cases.

International interventionism may be direct or indirect. *Direct* intervention or influence is likely to arise in regimes that set up supranational monitoring and direct supervision. These regimes may involve international tribunals, international organizations, regional supranational courts, and regional associations, such as the United Nations Committee on Human Rights, the United Nations Security Council, the Inter-American Court of Human Rights, the European Commission on Human Rights, and specialized agencies such as the International Labor Organization and the International Atomic Energy Agency. Many of these bodies have established quasi-judicial powers over specialized fields. In addition, there might be cases where international interveners may *indirectly* influence constitutional adjudication over large-scale political questions. To exemplify, Andras Sajó argues that Hungary’s Constitutional Court tried to obstruct what would otherwise have been an abrupt and costly economic reform program

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1. See Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV. 466 (2006–2007).
2. See Ivan Simonovic, *Relative Sovereignty of the Twenty First Century*, 25 HASTINGS INT’L & COMP. L. REV. 371 (2002) (discussing the tension between the traditional principle of non-interference in the “internal affairs of a state” and the international community’s belief in its “responsibility to protect”).

imposed by the International Monetary Fund.³ The author will further discuss this below.

Today, international law and politics do not only shape the outcome of constitutional adjudication over pure political and moral questions endemic in divided societies, but also influence the very legitimacy of constitutional courts themselves. While comparative scholarship over the past decade has been progressively more attentive to the global expansion of “judicialized politics,”⁴ “juridification,”⁵ “juristocracy,”⁶ “courtocracy,”⁷ or “judicialization of mega-politics,”⁸ little attention has been paid to the relationship between the judicialization of politics and the intensifying international involvement in constitutional adjudication.⁹ In other words, the link between the judicialization of politics, in a sense still to be defined, and international interventionism in domestic constitutional affairs, is virtually an unexplored, yet increasingly significant, scholarly terrain.¹⁰ In particular, while there have been extensive studies on the reception of international law norms in domestic and hybrid systems as well as their implications for constitutional design,¹¹ little scholarship so far has given

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3. See Andras Sajó, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 E. EUR. CONST. REV. 31 (1996).
 4. See John Ferejohn, *Judicializing Politics, Politicizing Law*, in THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1997).
 5. See VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 766-76 (2006).
 6. See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) [hereinafter HIRSCHL, JURISTOCRACY].
 7. KIM L. SCHEPPELE, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS (S. B. Burbank & B. Friedman eds., 2002).
 8. See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008) [hereinafter Hirschl, *Mega-Politics*].
 9. With a few praiseworthy exceptions, such as Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998).
 10. For a very recent call for scholarship on this topic, see Preuss, *supra* note 1.
 11. See, e.g. Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT’L L. 819 (2006); Khalil

serious thought to the kinds of roles constitutional courts of fragile states should assume in the wake of intensifying international influence upon national processes of constitutional adjudication¹² as well as constitution-making. On the flipside, there is a perceptible gap in literature about the normative roles of international interveners in constitutional adjudication, in structure and in substance,¹³ especially in the context of post-conflict reconstruction.

Needless to say, one should resort to comparative law methodology¹⁴ in order to assess the dynamic relationship between the judicialization of politics and international interventionism. The author suggests that scholars for the time being confine their analysis to five constitutional courts: Bosnia and Herzegovina, Hungary, Turkey, South Africa, and the Philippines. These five jurisdictions exemplify not only how highly politicized constitutional courts have become, but also the increasingly active international participation and the heavier gravitational pull of human rights norms in post-conflict settings.¹⁵ Given time constraints, a working knowledge over the five courts will help build a sufficient understanding of

Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133 (2003); Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 A.J.I.L. 86 (2001); Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism*, 12 PACE INT'L L. REV. 253 (2000); Harold Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Harold Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS (Harold Koh & Ronald Slye eds., 1999).

12. For a leading study on the interaction between supranational bodies and constitutional courts situated in Central and Eastern Europe, see Wojciech Sadurski, *Democracy and Supremacy: Central European Constitutional Courts vis-à-vis the Principle of Supremacy of EU Law*, Address Before the Harvard European Law Association (Feb. 13, 2008).
13. The terms "structure" and "substance" will be further discussed below. Please see accompanying text and notes.
14. For three possible avenues for comparative analysis, see Sujit Choudhry, *Globalization in Search of Justification*, 74 IND. L.J. 819 (1999). For a comprehensive account of related literature on critical approaches to international law, see David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417 (1994).
15. This is the author's tentative conclusion after reviewing all related literature to date.

the complex and dynamic interaction between constitutional courts and international interveners in general. In particular, for one who is interested in Philippine constitutional law and politics, a comparative analysis of the five divided societies might uncover invaluable lessons for optimal constitutional design that might be brought to bear on the 300-year old Philippine insurgency and terrorist problem in the island of Mindanao.¹⁶ In the selection of the most “politicized” cases, one should focus on three near-existential, political, and moral concerns that constitutional courts in divided societies confront: (i) the legitimacy of regime change; (ii) transitional or restorative justice; and (iii) defining national meta-narratives. The reason for further narrowing the scope of the study to these three areas is that they occupy the extreme end of the “mega-politics”¹⁷ spectrum in constitutional adjudication and thus, tend to predominate post-conflict reconstruction and legitimacy.

It is important to describe the origins and evaluate the consequences of the judicialization of politics by entering the emerging debate on the rise of constitutional courts as explicit political actors in deciding questions of legitimacy. The analysis cannot be confined to the four corners of translated decisions given the larger political context in which constitutional courts only form part. Moreover, conventional separation of powers analysis or rights jurisprudence can only capture some of the dimensions of the judicialization of politics going global. The debate can be framed as a question of whether strong courts diffuse or dampen deep ethnic and religious animosities that are endemic in severely fractured societies. Stated otherwise, it is a question of whether strong courts at the inception of new democracies inhibit or curtail much needed political and moral discourse during the polity’s formative or transitional stages. In light of these questions, it will be necessary to undertake a normative assessment of the fundamental roles and legitimating functions constitutional courts might assume in post-conflict reconstruction. But the author leaves this larger question for another time, given the narrower focus of this Essay.

In view of escalating international interventionism, some scholars are beginning to doubt whether constitutional courts can still be regarded as purely domestic instruments of government in a polity which seeks to exercise its right to national self-determination. Given the manifold participation of the international community in the constitutional affairs of the polity, can it be said that constitutional courts have more frequently

16. See *Estrada’s Risky Strategy*, *ECONOMIST*, Sep. 23, 2000, at 37-38.

17. The term “mega-politics” and its legal implications shall be discussed further below.

compromised their role as guardians of the domestic order? To address this question, one must evaluate the different modes of involvement of international interveners as well their legitimating functions, if any, in constitutional adjudication. These modes of involvement may range from oversight of intra-state constitution-making and adjudication, the steering of these arrangements, interim management, to the instatement of such processes.¹⁸ The study should then take a conceptual descent from the international plane and revisit the question of how, and to what extent, constitutional courts should supervise international interventionism and modulate the impact of international human rights norms.

II. THE JUDICIALIZATION OF MEGA-POLITICS¹⁹

Virtually all newly emerging democracies of the late 20th and early 21st centuries have armed their high courts with far greater powers than ever before. In designing their first liberal constitutions, deeply divided societies have re-engineered their constitutional courts to take on not just hard cases, but to define the meta-narratives of whole peoples and whole nations.²⁰ In post-conflict settings, the courts today are explicitly powerful political actors. In the judicialization of mega-politics, or, its converse, the politicization of the judiciary,²¹ traditionally majoritarian branches of government have increasingly and candidly relied on constitutional courts to address core moral predicaments, public policy questions, and political controversies. An entrenched bill of rights and powers of judicial review are the minimum features for heightened judicial activism.²² Constitutional designers are increasingly resorting to the incorporation of human rights norms by judicial decree. In healing the wounds of the past, high courts are tasked to create stable democratic rule in the context of extreme social polarization, to

18. See Preuss, *supra* note 1, at 493. Noteworthy is the claim that international intervention in constitutional affairs can be dated as early as 1984 when the U.N. Security Council declared South Africa's "new" constitution enacted during the apartheid era as "null and void" in U.N. Resolution 554 (Aug. 17, 1984).

19. HIRSCHL, *JURISTOCRACY*, *supra* note 6. Professor Ran Hirschl coined the term "mega-politics."

20. *Id.*

21. Cf. John Ferejohn, *Judicializing Politics, Politicizing Law*, 61 *LAW & CONTEMP. PROBS.* 41 (2002).

22. See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861 (2004).

demarcate the bounds of raw majoritarian politics, and to form an integrated political authority that can claim legitimacy beyond ethnic or racial lines.²³

As intimated, the judicialization of mega-politics is a swiftly expanding global phenomenon. Among the leading thinkers here are Ran Hirschl²⁴ and Mark Tushnet.²⁵ Hirschl broadly defines the “judicialization of mega-politics”²⁶ as the wholesale transfer of power from representative institutions to judiciaries, whether domestic or supranational.²⁷ The disturbing fact is that in many cases the judicialization of politics, or the politicization of the judiciary, occur discreetly and pass undetected. To exemplify, Sajo argues that the Hungarian constitutional court, by invoking entrenched socioeconomic rights in a series of cases, obstructed what would otherwise have been an abruptly dramatic and costly economic reform program geared to hasten Hungary’s transition to a market economy in the 1990’s.²⁸ In what

23. See Issacharoff, *supra* note 22, at 1865–68.

24. See, e.g. Ran Hirschl, *Repositioning the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J. LAW JURISPRUDENCE 191 (2002); HIRSCHL, JURISTOCRACY, *supra* note 6; Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819 (2004); Ran Hirschl, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471 (2005); Ran Hirschl, *Preserving Hegemony? Assessing the Political Origins of the EU Constitution*, 3 INT’L J. CONST. L. 269 (2005).

25. See, e.g. JACKSON & TUSHNET, *supra* note 5; Mark V. Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004); Mark V. Tushnet, *Non-Judicial Review*, 40 HARV. J. LEGIS. 453 (2003); Mark V. Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995); Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Mark V. Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435 (2002).

26. Hirschl, *Mega-Politics*, *supra* note 8, at 7. “Judicialization of mega-politics” is a subset of “judicialization of politics.” According to Hirschl, the judicialization of “mega-politics” is an “elusive” yet “intuitive” category which includes “existential” national issues, the quality which differentiates it from other levels of judicialization.

27. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism: The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 721 (2006).

28. It has been claimed that the reform programs were carried out by the Hungarian government as an essential part of the bailout package of the International Monetary Fund in the wake of an economic crisis. See Sajo, *supra* note 3.

might appear to be a run-of-the-mill disciplinary case for extra-marital conduct thought to be unethical for judicial officers, the Philippine Supreme Court in *Estrada v. Escritor*²⁹ chose to grapple with the infinitely larger question of apostasy and religious freedom as a member of Jehovah's Witness. In *Leyla Sahin v. Turkey*,³⁰ what started as a disciplinary case about inappropriate school uniform turned out to pit the deepest religious convictions against anti-secularist forces, dragging in the European Court of Human Rights to finally quash the issue. The European Court affirmed Turkey's prohibition against wearing headscarves in public universities. In another case, in dissolving two political parties the Turkish Constitutional Court had to confront the near-existential issues of cultural and religious identity, theocratic governance, secularism, separatism, "national interest," and the very integrity of the polity itself.³¹ Even more recently is the Turkish court's decision of 31 March 2008 to hear petitions seeking yet again to ban the governing political party, thus, provoking another confrontation between religious and secular Turks.³² At the extreme end of the constitutional continuum, Bosnia and Herzegovina as well as South Africa, stand out as unique contexts where constitutional courts have had to rule upon the constitutionality of a constitution itself.³³ But there is more: the shifting status of indigenous peoples of the Philippines³⁴ and Australia,³⁵ the

29. *Estrada v. Escritor*, 408 SCRA 1 (2003).

30. *Sahin v. Turkey*, 19 B.H.R.C. 590 (2007).

31. See Hirschl, *Mega-Politics*, *supra* note 8 (citing TCC Decision 1/1998, Jan. 16, 1998 (Turk.); TCC Decision 57/2001, June 21, 2001 (Turk.)); N. Rosenblum, *Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies*, 1 J.L. ETHICS HUM. RTS. 17-75 (2007); Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 INT'L J. SOC. 258 (2003).

32. See Sabrina Tavernise, *Turkey Court Takes Politically Explosive Case*, available at <http://www.nytimes.com/2008/04/01/world/europe/01turkey.html?em&ex=1207195200&en=5af1c502bd279a4d&ei=5087%0A> (last accessed Aug. 22, 2008). This article was provided by Prof. Hirschl as required reading in his class, *Political Trials and the Judicialization of Politics*: Reading Group (Spring 2008).

33. See Issacharoff, *supra* note 22, at 1868 (citing *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SALR 744 (CC) (S. Afr.)); Constitutional Court of Bosnia and Herzegovina, *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, Case U 5/98-III, Partial Decision of July 1, 2000 (FBiH).

34. See *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA 128 (1999).

prosecution of Charles Taylor in Sierra Leone,³⁶ the Hariri proceedings in Lebanon and The Netherlands,³⁷ the Khmer Rouge trial in Cambodia,³⁸ and the Bangsamoro question raised by the Moro Islamic Liberation Front³⁹ and the Abu Sayyaf⁴⁰ in Southern Philippines — all these cases put to fore the great questions of collective identity, of national meta-narratives,⁴¹ the most deep-seated religious convictions, and the pure political questions that traditionally lie within the gray twilight of majoritarian politics and even war.

As intimated, the “judicialization of mega-politics” is a catch-all phrase termed by Professor Hirschl. In this broad or umbrella-like term, Hirschl lists five sub-categories which the author portrays in a somewhat ascending order of importance: (i) electoral processes and outcomes;⁴² (ii) core executive

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35. See *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.); *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 (Austl.).
36. See Kingsley Chiedu Moghalu, *Sierra Leone: Judging Charles Taylor*, in GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIBUNALS (2006); Micaela Frulli, *A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor's Arrest in Liberia*, 4 J. INT'L CRIM. JUST. 351 (2006).
37. See Human Rights Watch, *Establishing the Hariri Tribunal*, Letter to Secretary General Kofi Annan (Apr. 2006); S.C. Res. 1664, U.N. Doc. S/Res/1664 (Mar. 29, 2006); S.C. Res. 1644, U.N. Doc. S/Res/1644 (Dec. 15, 2005).
38. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228, U.N. Doc. A/Res/57/228B (Feb. 27, 2003).
39. See Saeed A. Daof, *GRP-MILF Peace Talks*, PHIL. STAR, Oct. 28, 2006.
40. See MALCOLM COOK & KIT COLLIER, *MINDANAO: A GAMBLE WORTH TAKING* (2006).
41. See Hirschl, *Mega-Politics*, *supra* note 8, at 11-13 (citing & interpreting Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.)); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 BVerfGE 155 (F.R.G.); Bundesverfassungsgericht BVerfG [Federal Constitutional Court] Sep. 4, 2003, 2 BvR 1436/02, A.I.1 (F.R.G.); R (on the application of Begum (Shabina)) v. The Headteacher and Governors of Denbigh High School [2006] UKHL 15 (Gr. Brit.); Ameer Jamaat-e-Islami v. Pervez Musharraf, Chief Executive of Pak., Constitution Petition 15/2002 (April 21, 2002) (Pak.); Wassel v. Minister of Education, No. 8 of the 17th judicial year (May 18, 1996) (Egypt); HCJ 2597/99 Thais-Rodriguez Tushbaim v. Minister of Interior [2005] IsrSC 59(6) (Isr.); HCJ 7052/03 Adalah v. Minister of the Interior, [2006] 2 TakEl 1754 (Isr.).
42. See Hirschl, *Mega-Politics*, *supra* note 8 (citing & interpreting Bush v. Gore, 531 U.S. 98 (2000)); Constitutional Tribunal 41/2006 Attorney General v. Thai Rak

prerogatives;⁴³ (iii) legitimacy of regime change;⁴⁴ (iv) transitional or restorative justice;⁴⁵ and (v) questions of collective-identity or the defining of

Thai Party, Pattana Chart Thai Party, and Pandin Thai Party, May 30, 2007 (Thail.); TCC Decision 1/1998 (Welfare [Refah] Party Dissolution case), Jan. 16, 1998 (Turk.); TCC Decision 57/2001 (Virtue [Fazilet] Party Dissolution case), June 21, 2001 (Turk.); S. Issacharoff, et al., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2007) (discussing the redrawing of electoral districts); N. Rosenblum, *supra* note 31.

43. See Hirschl, *Mega-Politics*, *supra* note 8 (citing & interpreting *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791 (Can.)); Corte Suprema de Justicia [CSJN], 26/10/2004, “Bustos, Alberto Roque y otros v. Estado Nacional y otros/amparo” (Arg.); *A and others v. Sec’y of State for the Home Dep’t* [2004] UKHL 56, *X and another v. Sec’y of State for the Home Dep’t* [2005] 2 WLR 87 (Gr. Brit.); *R (Al Skeini) v. Secretary of State for Defence* [2007] UKHL 26 (Gr. Brit.); HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Isr. [1999] IsrSC 53(4) 817 (Isr.); Russian Federation Constitutional Court’s Ruling Regarding the Legality of President Boris Yeltsin’s Decree to Send Troops to Chechnya, July 31, 1995 (Russ.); HCC Decision 43/1995 Austerity Package Case (Hung.).
44. See Hirschl, *Mega-Politics*, *supra* note 8 (citing & interpreting 2004 Hun-Na 1, Impeachment of the President Roh Moo-hyun Case, 16-1 KCCR 609, May 14, 2004 (S. Korea)); Certification of the Constitution of the Republic of S. Afr. 1996 (4) SA 744 (CC) (S. Afr.); Certification of the Amended Text of the Constitution of the Republic of S. Afr. 1997 (2) SA97 (CC) (S. Afr.); Republic of Fiji Islands v. Prasad [2001] 1 LRC 665 (HC), [2002] 2 LRC 743 (CA) (Fiji); Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pak., P.L.D. 2000 S.C. 869 (Pak.); see also Estrada v. Arroyo, 353 SCRA 452 (2001); A. Edsel C. F. Tupaz, *The People Power and the Supreme Court in Estrada v. Arroyo*, 47 ATENEO L.J. 8 (2002); A. EDEL C. F. TUPAZ, *THE LAW ON PEOPLE POWER: A JURISTIC THEORY OF SOVEREIGNTY* (2004).
45. See *Mega-Politics*, *supra* note 8, at 11-13 (citing & interpreting Report No. 28/1992 *In re: Full Stop and Due Obedience Laws* [Inter-American Commission on Human Rights]); STC 237/2005, Rigoberta Menchú Tum y otros v. a Tribunal Supremo / amparo 1744-2003, Sep. 26, 2005 (Universal Jurisdiction of Spanish Courts in Genocide Cases) (Spain); *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.); *Wik Peoples v. Queensland* [1996] 187 C.L.R. 1 (Austl.); *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*, [2000] 1 N.Z.L.R. 265 (N.Z.); Azanian Peoples’ Organization (“AZAPO”) v. President of the Republic of S. Afr. 1996 (4) SA 672 (CC) (S. Afr.); Corte Suprema de Justicia [CSJN], 14/06/2005, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, Supreme Court (Arg.). In addition, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International

nations via courts.⁴⁶ As intimated, fractured societies reeling from protracted conflict are deeply concerned with near-existential questions — the latter three — that define or divide the collective. In other words, the questions of (iii) legitimacy of regime changes, (iv) transitional/restorative justice, and (v) collective-identity occupy the extreme end of the “mega-politics” spectrum and predominate post-conflict reconstruction. Here is where the stakes are at their highest. Judges are asked to come to terms with the nation’s horrific past and engage in political discourse on legitimacy and national hope. As intimated, within the three fields might lie the paradigmatic cases of the Québécois in Canada, of the place of the Germans in the European Community, and of the highly sensitive issue on the constitutional provision stating that “Israel is a Jewish and democratic state.”⁴⁷

III. INTERNATIONAL INTERVENTIONISM

On a higher plane, the international community is increasingly involved in national constitution-making. It has been observed that the influence of international courts and jurisprudence today on domestic institutions has taken on a “quasi-constitutional” character.⁴⁸ In this “transnational cooperative order,” the traditional boundaries of international law and domestic law are blurred and lose their distinctions; direct international intervention in civil war, the domestication of inter-state conflicts, and the transnational effects of intra-state dispute resolution, have all been fused. It is argued that national courts are no longer purely domestic instruments.⁴⁹

A review of recent literature suggests that international interventionism may be grouped under two broad categories: *substantive* and *structural*. It is *substantive* if the content of supranational or international law norms themselves directly bear upon the content of the constitutional court’s

Criminal Court (ICC), are among the many international bodies that directly deal with transformative or restorative justice in post-conflict settings.

46. See *supra* text accompanying note 41.

47. See Hirschl, *Mega-Politics*, *supra* note 8.

48. See Jutta Limbach, et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, INTERRIGHTS, May 2003, at 7.

49. See Preuss, *supra* note 1, at 491-94. Cf. *Ten Lessons From the Saddam Trial*, 39 CASE W. RES. J. INT’L L. 8 (2006-7); Benjamin Schiff, *Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission*, in POST CONFLICT JUSTICE 325-43 (M. Cherif Bassiouni ed., 2002).

decisions.⁵⁰ It is *structural* if supra-national interventionism has a direct impact on the institutional design of the court's judicial review powers.⁵¹

Substantive. For a classic example, the post-apartheid South African Constitution expressly provides that in the interpretation of the bill of rights, the constitutional court must consult sources of international law.⁵² Of particular import too is the European Convention on Human Rights as well as the development of newer human rights regimes within the European Union. It has been observed that in the interpretation and enforcement of human rights norms, the judgments of the European Court of Human Rights and the European Court of Justice — the “crown jewels” of the world’s “most advanced international system for protecting civil and political liberties”⁵³ — carry greater weight than their foreign counterparts. This is in part due to the relatively highly developed institutional features of the European Convention on Human Rights as well as the length of its operation. In borrowing from European experience, domestic institutions reopen the debate on the dialectic between international human rights law and municipal law.⁵⁴ As to the nature of this dialectic, as intimated, it has

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50. For a treatment of international influence in substantive domestic decision-making, see generally Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003); Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177 (2006).
51. Cf. JACKSON & TUSHNET, *supra* note 5, at 584 (briefly discussing supra-national influence on the structures of judicial review in the context of the European Court of Human Rights).
52. See, e.g. Azanian Peoples' Organization (“AZAPO”) v. President of the Republic of S. Afr. 1996 (4) SA 672 (CC) (S. Afr.).
53. Laurence R. Helfer, *Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008).
54. See, e.g. Schiff, *supra* note 49, at 325-43 (describing national leaders in transitional settings seeking to establish legal legitimacy by embracing international human rights norms); Schoiswohl, *supra* note 11 (discussing the “internationalization of constitutions”); Ambassador Samir Sumaida'ie, *Trying Saddam: An Insider's Perspective*, 39 CASE W. RES. J. INT'L L. 15 (2006-2007) (discussing the interplay between international law and domestic norms); Paul Wolf, *The Poisonous Precedent: How the Iraqi Special Tribunal Undermines International Law*, 39 CASE W. RES. J. INT'L L. 203 (2006-2007). See *Ten Lessons From the Saddam Trial*, 39 CASE W. RES. J. INT'L L. 8 (2006-2007) (expounding on the establishment of domestic war crimes trials in countries languishing in a conflict environment). One can argue that the “domestic” character of the Iraqi High Tribunal is misleading since it is reported that the U.S. played a crucial

been observed that international and comparative scholarship is collapsing the time-honored distinction between “inside” and “outside” the state; the dichotomy between municipal and international law is increasingly becoming obsolete;⁵⁵ and the spatial differentiations established by the Peace Treaties of Westphalia are losing their convenient distinctions. As the breakdown of conceptual differences between municipal and international law norms continues, in like manner the institutional structures of both supranational and national tribunals have increasingly become interwoven and interdependent. This kind of interlocking relationship directly affects the structural nuances of domestic courts.

Structural. The Constitutional Court of post-Dayton Bosnia and Herzegovina is a case which depicts both structural and substantive features of interventionism: not only did its membership provisions require non-citizens to sit as judges in order to preempt voting strictly along ethnic lines (structural), the Court drew primarily from international law norms to strike down the Constitution of Republika Srpska as being “too Serbian”⁵⁶ (substantive).

As intimated, South Africa and Bosnia and Herzegovina exemplify not only the blending of substantive higher law and constitutional law, but also the entanglement of supranational actors with national agents. In these cases, the increasingly powerful normative pull of international law in national processes (substantive) as well as “thicker” supranational influence in domestic institutional design might have empowered constitutional courts to forthrightly rule upon the “constitutionality” of constitutions without jeopardizing their political and legal legitimacy.⁵⁷

role in drafting the tribunal’s Statute, collecting evidence, providing security and financial resources, among other kinds of U.S. assistance.

55. See Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT’L L. 819, 862 (2006).

56. See Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Case U 5/98-III, Partial Decision of July 1, 2000, ¶ 131; Issacharoff, *supra* note 22, at 1883–91.

57. By political legitimacy, the author refers to the empirical or social fact of obedience; by legal legitimacy, the author refers to the normative coherence of judicial reasoning in the classic or formal sense. The author owes this distinction to Professor Duncan Kennedy. Interview with Duncan Kennedy, Carter Professor of General Jurisprudence, Harvard Law School, in Cambridge, Mass. (Sep. 7, 2007). See Frank I. Michelman, *A Reply to Baker and Balkin*, 39 TULSA

By adhering to the principle of supremacy of the European Union (EU) law either substantively or structurally, do national courts effectively cede their authority as guardians of their national constitutional orders to supranational tribunals? Sadurski claims that EU expansion has transformed the high courts of Hungary, the Czech Republic, and Poland into “EU courts” — in ruling in favor of EU policy, their constitutional courts might have accelerated their countries’ accession into the EU, but only at the great cost of compromising their role as protectors of their national constitutions.⁵⁸ To Sadurski, this much is obvious. What is less obvious is that constitutional courts, as the argument goes, are inclined to exploit supranational sources of legitimacy as much as possible in light of their institutional self-interests.⁵⁹ While Sadurski makes no explicit reference to substantive or structural categories of international interventionism, his argument nonetheless implicates both. And in many ways the analytical distinctions of whatever is substantive or structural may likewise collapse in large part due to the internationalization of constitutional law and politics, or its converse, the constitutionalization of international law and politics. It is necessary for one to keep both notions in mind in the attempt to explain the nature and consequences of international interventionism as an expanding global phenomenon.

In transitional justice settings, the normative pull of human rights norms⁶⁰ and the presence of international interveners are most keenly felt whenever hybrid tribunals⁶¹ are designed, set up, and try cases involving

L. REV. 649, 659 (2004) (warning readers of the risk of conflating empirical with normative legitimacy).

58. See Sadurski, *supra* note 12.

59. *Id.* at 17.

60. Cf. Schoiswohl, *supra* note 11 (arguing that the new Afghanistan Constitution does not adequately address the relationship between international law and municipal law); Sadurski, *supra* note 12 (discussing the tension between the supremacy of EU law and national law). See Susanne Alldén, *Internalising the Culture of Human Rights: Securing Women’s Rights in Post-Conflict East Timor*, 8 ASIA-PAC. J. HUM. RTS. & L. (2007) (providing an intriguing critique on the incorporation and application of overtly “Westernized” gender rights in South East Asia).

61. Hybrid tribunals are domestic bodies operating under the auspices of an international mandate or arise by virtue of international or foreign political pressure. For instance, it is widely accepted that the United States was the main actor in drafting the statute of the special court that tried and convicted Saddam Hussein. See Wolf, *supra* note 54. A more apparent case would be the Hariri Tribunal which was formed by virtue of a treaty between the United Nations Security Council and Lebanon. See *supra* note 37 and accompanying text.

extreme injustices and state-sponsored human rights abuses.⁶² Hand in hand with judicial empowerment is the transformation of large-scale human rights controversies into judicial ones. Domestic tribunals and “truth and reconciliation commissions” have been inaugurated under the auspices of international bodies in South Africa,⁶³ Sierra Leone (Charles Taylor),⁶⁴ East Timor,⁶⁵ and Cambodia (Khmer Rouge).⁶⁶ Occasionally, legal scholars have gone to the extent of accusing international interveners for “hegemonic” practices of deploying instant “justice packages” or “cookie-cutter criminal codes” that are too abstracted from the local conditions of post-conflict societies.⁶⁷ One author points out that the statute of the Iraqi Special Tribunal which tried former strongman Saddam Hussein had been written entirely in English by American lawyers; had no reference to Islamic Law but tried an Iraqi head of state in an Islamic country; and had been “signed into law” by an American diplomat.⁶⁸ A more profound irony here is the imposition of human rights norms by an occupying power.

IV. THE NEED FOR NEW SCHOLARSHIP

While some studies on the theory and practice of constitutional design in divided societies are genuinely mindful of the new-found functions of constitutional courts today, Hirschl rightly argues that the parameters of the

62. Cf. Ray Murphy & Katarina Mansson, *Perspectives on Peace Operations and Human Rights*, 13 INTERNATIONAL PEACEKEEPING 457, 458 (Dec. 2006) (discussing the deliberate and state-sponsored violation of human rights norms and state accountability); *Id.* at 459–60 (arguing in favor of model penal codes reflecting human rights norms); Human Rights Watch, *Establishing the Hariri tribunal*, Letter to Secretary General Kofi Annan (Apr. 2006) (applying Lebanese substantive criminal law and thus giving the tribunal with a domestic or hybrid character national dimension). For a criticism of “ready-made” “justice packages,” see Vivienne O’Connor, *Rule of Law and Human Rights Protections through Criminal Law Reform: Model Codes for Post-conflict Criminal Justice*, 13 INT’L PEACEKEEPING 517–30 (Dec. 2006).

63. See Schiff, *supra* note 49.

64. See Kingsley Chiedu Moghalu, *Sierra Leone: Judging Charles Taylor*, in GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIBUNALS ch. 5 (2006).

65. See, e.g. Lars Waldorf, *Mass Justice For Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 3 (2006).

66. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, *supra* note 38.

67. See Waldorf, *supra* note 65.

68. See Wolf, *supra* note 54, at 205.

debate are couched in an exceedingly “outmoded” adversarial rights jurisprudence⁶⁹ and separation of powers analysis. In this view, comparative scholarship typically frames the issues of the case in analytical terms of “abstract” and “concrete” review, or “centralized” and “diffused” review.⁷⁰ Many scholars argue for positive or negative correlations between armed conflict and judicial activism, between abstract review and judicial politics, and so forth.⁷¹ In brief, Hirschl differentiates current studies into four patterns: criminal due process rights (classic procedural rights); negative liberty (classic “first generation” rights); positive liberty, including subsistence social and economic rights (classic “second generation” rights); and rights protecting the private economic sphere from state intrusion (“worker’s rights”).⁷² But, as Hirschl observes, “much of the pertinent literature seems not to recognize that the great judicialization train has long since left the ‘rights jurisprudence’ station.”⁷³ The term “judicialization” suffers from “analytical fuzziness” and is often used sweepingly to cover a wide range of processes, from judge-made policy-making, rights jurisprudence, to politicized judicial appointments.⁷⁴ Hence, there is a growing need for scholarship to catch up.⁷⁵ Jackson and Tushnet likewise call for new

69. See Hirschl, *Mega-Politics*, *supra* note 8.

70. See Hirschl, *Mega-Politics*, *supra* note 8. See, e.g. Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* (Donald W. Jackson & C. Neal Tate eds., 1992); Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert Rosenthal eds., 1990); JACKSON & TUSHNET, *supra* note 5, at 464–69, 492–96.

71. See, e.g. GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993), in JACKSON & TUSHNET, *supra* note 5, at 612, 618. Aggregate data confirms that about two-thirds of all “hotly” contested political cases in the past two decades deal with constitutional rights of this nature, such as classic civil liberties, formal equality, and other due process rights. See Hirschl, *Mega-Politics*, *supra* note 8, at 4.

72. See HIRSCHL, *JURISTOCRACY*, *supra* note 6, at 13, 100–48. Cf. *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that redistricting based on race must be reviewed under the standard of strict scrutiny under the equal protection clause). To Hirschl, the *Shaw* cases were an American form of “political apartheid” or an invitation to “balkanization.”

73. See Hirschl, *Mega-Politics*, *supra* note 8, at 3.

74. *Id.*

75. Hirschl illustrates as follows: while it has been claimed that *a priori* and abstract systems of judicial review lead to judicial policy-making as in the case of France, such a line of argument cannot explain why opposing systems of concrete and *a*

scholarship to consider the possibilities that human rights jurisprudence of the European Court of Human Rights might affect the institutional structures of domestic judicial review, noting that such a transformation is imminent in the United Kingdom upon the recent enactment of the Human Rights Act.⁷⁶ This transformation is not confined to Europe alone. At the other side of the world is an even more recent development: the signing of the new 2007 Charter of the Association of South East Asian Nations (ASEAN), which establishes (or confirms) the group as an international legal entity, is said to have explicitly paved the way toward a European-style economic community by 2015.⁷⁷ Does this not further evidence the progression toward a “transnational cooperative order”⁷⁸ where traditional Westphalian state or non-state borders have faded away?⁷⁹ If so, might another World Trade Organization (WTO) style supranational dispute resolution system emerge in due course? How then should constitutional courts of ASEAN member-states deal with an ASEAN appellate body once it begins handing down binding decisions over complex economic issues? The “porosity” of national boundaries, as well as the multifaceted interaction among non-state agencies, non-governmental organizations, international organizations, and interim authorities established under Chapter VII of the

posteriori review have led to the same politicized outcome, as in the United States. Whether the judiciary is decentralized or centralized: constitutional courts in Germany, Russia, and Hungary employ centralized systems and yet appear to have become entangled in the most sensitive political controversies of the day. See *Mega-Politics*, *supra* note 8, at 23 (citing C. Tate, *Comparative Judicial Review and Public Policy: Concepts and Overview*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 3-14 (D Jackson & C.N. Tate eds. 1992)). See also HIRSCHL, *JURISTOCRACY*, *supra* note 6. Studies are slowly coming to terms with the judicialization of politics. Hirschl further groups emerging scholarship into four categories: functionalist, rights-centered, institutionalist, and court-centered. See *Mega-Politics*, *supra* note 8, at 20. Hirschl argues for a fifth category, namely, a more “realist” approach, a “judicialization-from-above” account that situates constitutional courts essentially as political actors in the middle of the political sphere, and which more adequately captures the dramatic expansion of judicial power worldwide. *Id.*

76. JACKSON & TUSHNET, *supra* note 5, at 584 (citing HILAIRE BARNETTE, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 618 (2002)); *McGonnell v. United Kingdom*, 30 EHRR 289 (2002).

77. See Wayne Arnold, *Historic Asean Charter Reveals Divisions*, available at <http://www.iht.com/articles/2007/11/20/asia/asean.php> (last accessed on Aug. 22, 2008).

78. See *supra* text accompanying note 49.

79. See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501 (2005).

United Nations Charter, with the constitutional affairs of a polity, have created new constellations of international politics — at the center sits the constitutional court which, with only limited absorptive capacity,⁸⁰ must cope with all forms of constitutional interventionism. Again, it is well to point out that in all these cases, there are significant substantive and structural implications that certainly bear upon constitutional adjudication in transitional and post-conflict settings, and thus, a call for scholarship over these issues is no less urgent.

The comparative law scholar can make a compelling contribution to legal scholarship by formulating a normative framework for optimal institutional design in general and for constitutional adjudication in particular. By undertaking a comparative and critical study of the constitutional courts of Bosnia and Herzegovina, Turkey, Hungary, South Africa, and the Philippines, future research might suggest how, and to what extent, deeply divided societies — chiefly through their constitutional courts — should supervise international interventionism in substance and in structure. Not only are courts becoming more and more politicized, international decision-making and domestic adjudication, to repeat, are progressively losing their convenient distinctions. This fusion of concentric or concurrent jurisdictions will considerably affect how constitutional courts and international interveners should confront near-existential and transformative predicaments that strike at the very heart of post-conflict reconstruction and national survival.

It is difficult to exaggerate the theoretical and practical implications of this study. It will impel one to rethink the traditional categories of international law, the role of international law in non-Western legal systems, and, last but not least, even settled conceptions of democratic legitimacy. These implications might make one critically more aware of how skeptic or optimistic one should be in assessing the merits of humanitarian intervention as well as constitutional adjudication. Through this project, one might be able to offer pragmatic prescriptions more forcibly. It is a difficult but certainly not an impossible task.

80. Cf. Paul Collier & Anke Hoeffler, *Aid, Policy, and Growth in Post-Conflict Societies* (World Bank Policy Research Working Paper 2902, 2002) (positing that international financial aid is subject to diminishing returns as the country's absorptive capacity for aid positively correlates to the level of development of national policy and institutions).

V. SUMMARY

By way of summation, to build a normative framework for optimal institutional design in post-conflict reconstruction, this Essay makes a call for scholarship and suggests that one should further explore the following topics and their related components:

I. The judicialization of mega-politics in the constitutional courts of five deeply divided societies, namely, Bosnia and Herzegovina, Turkey, South Africa, Israel, and the Philippines; by “mega-politics,” the author refers to the near-existential political and moral issues as defined by Hirschl that are endemic in post-conflict reconstruction, such as:

- a) the legitimacy of regime change;
- b) transitional or restorative justice; and
- c) the writing or re-writing of national meta-narratives;

II. A normative assessment of the roles and legitimating functions constitutional courts might assume in post-conflict reconstruction in light of intensifying international intervention; and, conversely,

III. A normative assessment of the roles and legitimating functions of international interveners as well as international human rights norms in constitutional adjudication in divided societies.