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The Constitutional Court of Indonesia as a Post-Conflict Institution

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Twenty Years of the Constitutional Court of Indonesia

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CHAPTER 5

The Constitutional Court of Indonesia as a Post-Conflict Institution

Christie S. Warren

Abstract

In post-conflict settings, constitutional courts have important roles to play despite complex and often competing challenges they face to institutionalize their legitimacy and entrench the rule of law while attempting to build bridges from conflict to peace. By processing political conflict through legal means, constitutional courts can shift the tenor of public dialogue and provide a less inflammatory platform for analyzing conflicts that have divided societies. This article analyzes two seminal cases decided by the Constitutional Court of Indonesia in the aftermath of post-Suharto conflict and finds that despite its young age, the Court addressed lustration issues and a Truth and Reconciliation scheme in ways that were consistent with approaches taken by other post-conflict apex courts, concluding that the Constitutional Court of Indonesia has solidified its position among modern constitutional bodies. Instead of relying only on its own decisions or those of the Supreme Court, it has demonstrated its ability to carry out comprehensive global comparative analysis, referring to cases from other constitutional and international courts to help shape its jurisprudence. In this way, the Indonesian Court is ahead of a number of other apex courts in its willingness to consider constitutional issues through a global lens.

Keywords

constitutional court – political conflict – post-conflict – transitional justice – truth and reconciliation – post-conflict reconstruction – amnesties – lustration

1 Post-Conflict Indonesia

In 1998, following sustained periodic conflict driven in part by ethnoreligious divisions, regional separatist movements, the influence of the Indonesian Communist Party and top-down authoritarian leadership, President

Suharto – who himself had taken control of the country by way of a coup – resigned, and the period known as *Era Reformasi* (the Reform Era) began.[1] This period brought about economic stabilization and initiated focus on democratic principles, more open free speech and political debate and, in general, increased liberal political and social policies. Incoming President B.J. Habibie's administration introduced a range of political reforms, including legislation increasing the number of permissible political parties, which had previously been limited to three under the Suharto regime. Over the course of the Reform Era, the 1945 Constitution was amended in four stages between 1999 and 2002. Human rights were strengthened, and a Bill of Rights modeled on the Universal Declaration of Human Rights was introduced in reaction to gross violations that had occurred at the end of the previous regime.[2]

A new institution to protect human and constitutional rights in the post-conflict recovery period was considered necessary. Simply augmenting the powers of the Supreme Court was not regarded as a viable option given widespread diminished confidence in the institution following years of corruption and neglect.[3] The third set of constitutional amendments included Article 24c, which created a new constitutional court with jurisdiction to review the constitutionality of legislation, resolve disputes over the authority of state institutions created by the Constitution, decide issues relating to the dissolution of political parties, resolve electoral disputes and rule on issues relating to constitutional violations committed by the President and Vice President.

On August 13, 2003, the Law on the Constitutional Court was signed by President Megawati Soekarnoputri, and Indonesia became the 78th country with an established constitutional court (The Constitutional Court of the Republic of Indonesia). The selection process for seating the nine justices allowed the three branches of government – the national Parliament, the President, and the Supreme Court – to each choose three judges.[4] Following the election of Dr. Jimly Asshiddiqie, a professor of Constitutional Law at the University of Indonesia, as Chief Justice and Dr. H. M. Laica Marzuki as Deputy Chief Justice, cases were transferred to the Constitutional Court from

1 The Asia Foundation, "Indonesia – The State of Violence and Conflict in Asia," *The Asia Foundation*, October 2017, https://asiafoundation.org/wp-content/uploads/2017/10/Indonesia-StateofConflictandViolence.pdf.

2 Simon Butt, "Indonesia's Constitutional Court: Conservative Activist or Strategic Operator?" Law Explorer, KnowledgeBase, October 8, 2016, https://lawexplores.com/indonesias-constitutional-court-conservative-activist-or-strategic-operator/.

3 Ibid.

4 Ibid.

the Supreme Court, where they had previously been heard pursuant to Article III of the Transitional Provisions of the 1945 Constitution, and the work of the Constitutional Court officially began.

2 Emergence of Post-Conflict Constitutional Jurisprudence

The new court did not shy away from challenge; in fact, despite its young age, it proved able to engage in thorough comparative analysis, aligning its methodology with that of other contemporary post-conflict constitutional courts grappling with similar issues. Within the first three years of the Court's existence, it issued two seminal decisions directly addressing the earlier period of conflict.

In Case No. 011–017/PUU-I/2003, the Court dealt with the issue of vetting actors allegedly implicated in the conflict by virtue of their past membership in the Communist Party and prohibiting them from running for office. Individuals and leaders of various organizations and committees filed a petition against the government, alleging that Article 60(g) of Law No. 12 of 2003, which prohibited former members of the Indonesian Communist Party from running for office in local, regional, and national elections, violated Article 27 of the Constitution. The plaintiffs argued that any restrictions of Article 27, requiring that all citizens be treated equally under the law, together with Article 28, which gives every citizen the right to take part in public affairs, including the right to vote and be elected, must be reasonable and proportionate. The Constitutional Court agreed, and, relying in part on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, held that MPRS Decree Number XXV/MPRS/1966 on the Dissolution of *Partai Komunis Indonesia* (Indonesian Communist Party), which had previously declared the Party a prohibited organization, in no way restricted the right of former Communist Party members to vote or run for elected office. Article 60(g), the Court held, constituted an abridgement of rights based on political belief and was therefore a violation of the Indonesian Constitution.

Three years later, in Case Br 006/PUU-IV/2006, the Constitutional Court addressed the issue of amnesties in the context of the Indonesian transitional justice scheme. The plaintiffs, individuals and members of organizations representing missing persons and victims of forced kidnappings, disappearances and violence that took place between 1997 and 1998, argued that Law No. 27 of 2004, which established the Truth and Reconciliation Commission, was unconstitutional in that it conditioned the rights of victims to rehabilitation and compensation on granting amnesty to perpetrators, thereby violating the

victims' constitutional human rights. The Court agreed, holding that the statutory scheme granting amnesty to perpetrators of gross human rights abuses precluded resubmitting claims to the ad hoc human rights court established by Law 26/ 2000 and eliminated the state's right to prosecute, violating both the Constitution and international human rights law. The Court also found that requiring the physical presence of perpetrators unfairly burdened victims' inherent rights to recovery. Since Law No. 27 was at the core of the national transitional justice scheme, the entirety of the law establishing the Truth and Reconciliation Commission was invalidated.

3 Roles and Challenges of Post-Conflict Constitutions and Constitutional Courts

In order to contextualize the significance of the granting of jurisdiction and holdings in Cases 011–017/PUU-I/2003 and Br 006/PUU-IV/2006, an understanding of specific roles, functions and challenges faced by post-conflict constitutions and constitutional courts is useful. Although Indonesia's Constitution is not per se a post-conflict document, the four amendment stages that took place between 1999 and 2002 were in direct response to periods of violence and instability preceding Suharto's resignation. The need for a new constitutional court was rooted in political disputes and conflicts accompanied by ambiguous laws that threatened to upend the democratization process.[5] As had been the case in post-war Germany, processing political conflict via legal means and a new constitutional court shifted the tenor of public dialogue and provided a less inflammatory platform for analyzing the conflict that had plagued the country.[6]

3.1 *Post-Conflict Constitutions*

Constitutional courts in general are of comparatively recent origin and are the product of Hans Kelsen's theories that led to the creation of the Austrian Constitutional Court in 1920. This institutional innovation caused a fundamental shift in the adjudication of constitutional claims.[7] Constitutions created or

5 Ibid.

6 Anuscheh Farahat, "The German Federal Constitutional Court," in *Constitutional Adjudication: Institutions*, Vol. III (Oxford: The Max Planck Handbooks in European Public Law, Oxford University Press, 2020), 281.

7 Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (January 2007): 44–68; Farahat, "The German Federal Constitutional Court, 283."

amended as part of peacebuilding efforts are of even more recent origin. In the modern era, Germany's 1949 constitution is considered one of the earliest post-conflict constitutions, and since 1989, post-conflict constitution building processes have been undertaken throughout Latin America, Africa, Eastern Europe and Asia.[8] Although constitutions need not follow conflict to be considered transformative,[9] and although amendment processes themselves can lead to democratic backsliding,[10] post-conflict constitutional processes are now part of many peacebuilding strategies as countries seek to create new blueprints for the future based on democratic principles.[11] These processes may include utilizing interim constitutions designed to facilitate transitions to

8 Kimana Zulueta-Fülscher, "Interim Constitutions: Peacekeeping and Democracy-Building Tools," International IDEA, October 2015, 10, https://www.idea.int/sites/default/files/publications/interim-constitutions-peacekeeping-and-democracy-building-tools.pdf.

9 Courts can be transformative even if they are not established after conflict. See, for example, the Constitutional Court of India, whose role and jurisprudence in many ways are surprisingly similar to those of the Constitutional Court of Germany (See Michaela Hailbronner, "Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism," *International Journal of Constitutional Law* 12, no. 3 (July 2014): 626–49). Transformative constitutionalism presents issues relating to social utopias and uplift-ment, which can be at odds with desires for legal certainty (See Hailbronner, "Rethinking the Rise," 645). See also Commentary by Justice Albie Sachs, who recounts early visits to the new Constitutional Court of South Africa by India's former Chief Justice and Attorney General, whose descriptions of their own Supreme Court caused the South African justices to reconsider the role of their court (See Albie Sachs, "Karl Klare: The Person Who Helped Us See the Tree for the Wood," Northeastern University School of Law. Northeastern University School of Law, June 17, 2022, https://law.northeastern.edu/karl-klare-testimonial/ and Jackie Dugard, "Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor?" in *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, edited by Daniel Bonilla Maldonado, 329 (Cambridge: Cambridge University Press, 2013), https://doi.org/10.1017/CBO9781139567114.011).

10 In recent years, constitutional amendment processes have resulted in democratic backsliding in Hungary, Venezuela, Honduras, Ecuador and Nicaragua (see Landau, "Constitutional Backsliding: Colombia," 499). Some courts have restricted amendment processes if the amendments would undermine core constitutional principles (see Landau, "Constitutional Backsliding: Colombia, 500)" and Yaniv Roznai, "Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea," *The American Journal of Comparative Law* 61, no. 3 (2013): 657–719. http://www.jstor.org/stable/43668170.

11 Vivien Hart, "Democratic Constitution Making." (Special Report 107. United States Institute of Peace, July 2003), https://www.usip.org/publications/2003/07/democratic-constitution-making.

more just democratic political orders based on fundamental human rights or, as in the case of Indonesia, amending pre-existing constitutions.[12]

Because of their nature, post-conflict constitutions tend to focus on values such as human dignity, reconciliation and national unity. In Germany's constitution, drafted in the aftermath of World War II, peace is mentioned fifteen times; Article 1 states that human dignity shall be inviolable and that it shall be the duty of state authorities to respect and protect it. The 1978 Constitution of Spain, drafted after forty years of dictatorship and inspired by constitutional processes that had taken place in Germany, Italy and France, created a new regime of rights, freedoms and democratic principles designed to break from international isolation that resulted from the Franco dictatorship.[13] In South Africa, the epilogue to the post-apartheid constitution emphasizes the fundamental role of national unity and reconciliation and states that the Constitution is meant to serve as an "historic bridge between the past of a deeply divided society characterized by strife, conflict and untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[14] The Preamble to the post-conflict constitution of Kosovo similarly focuses on peace, envisioning Kosovo as a "free, democratic and peace-loving country that will be a homeland to all of its citizens … (and) a dignified member of the family of peace- loving states of the world".[15]

3.2 *Post-Conflict Constitutional Courts*

Just as post-conflict constitutions differ from those created under less turbulent circumstances, constitutional courts created in the aftermath of conflict also face unique challenges. Sapiano analyzes factors that distinguish the jurisprudence of post-conflict constitutional courts from that of other courts.[16] The

12 Fülscher, "Interim Constitutions," 3; Albie Sachs, "War, Violence, Human Rights, and the Overlap between National and International Law: Four Cases before the South African Constitutional Court," *Fordham International Law Journal* 28, no. 2 (January 2005): 432–476.

13 Marian Ahumada Ruiz, "The Spanish Constitutional Court," in *Comparative Constitutional Reasoning*, ed. András Jakab, Arthur Dyevre, and Giulio Itzcovich, 604 (Cambridge: Cambridge University Press, 2017), https://doi.org/10.1017/9781316084281.018.

14 Sachs, "War, Violence, Human Rights," 435.

15 The Constitution of Indonesia, although not post-conflict in its entirety, contains similar language, promoting "a world order based on freedom, perpetual peace and social justice".

16 Jenna Sapiano, "Courting Peace: Judicial Review and Peace Jurisprudence," *Global Constitutionalism* 6, no. 1 (2017): 138, https://doi.org/10.1017/S2045381716000253.

authoritative bases of post-conflict constitutional courts can differ from other courts as well; the post-war German Constitutional Court achieved a large measure of authority from public reaction to the Nazi regime.[17]

Other unique aspects of post-conflict courts are discussed by Tushnet, who identifies strategies that can be undertaken by new constitutional courts to enhance the legitimacy of peace agreements and related legislation by invalidating some of their provisions without overtly legitimizing or discarding the rest.[18] Ran Hirschl's description of constitutional courts as engaged in "mega-politics" – the resolution of high-stakes controversies dealing with core questions of national identity and immediate political leadership – resonates even more strongly in the immediate aftermath of conflict than in times of peace.[19]

Post-conflict constitutions and constitutional courts are not always able to avoid controversy, however, given the competing roles they are asked to assume. Vicki Jackson describes the paradox of constitution-making in post-conflict environments when constitutions serve as both political pacts towards peace and foundational legal documents serving more typical ultra vires functions.[20] In Spain, the preeminent post-dictatorship impulse was to normatize the Constitution as a binding legal framework and establish standards to harmonize prior law with the new Constitution in order to avoid legislative gaps and inconsistencies.[21] Peace agreement constitutions also bear the heavy burden of moving societies beyond existing divisions toward stability while accommodating warring factions that may bear residual reluctance to achieve a united national identity.[22]

Post-conflict constitutions may be pulled into political territory as well when addressing thorny transitional justice issues, including the granting of amnesties, reparations for violations of human rights and vetting processes to prohibit actors who were involved in past conflict from serving in public office. This was the case in Germany, where constitutional drafters were largely

17 Hailbronner, "Rethinking the Rise of the German Constitutional Court," 628.

18 Mark Tushnet, and Beatriz Botero Arcila, "Conceptualizing the Role of Courts in Peace Processes," *International Journal of Constitutional Law* 18, no. 4 (December 2020): 1290–1302.

19 Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11, no. 1 (June 1, 2008): 94. https://doi.org/10.1146/annurev.polisci.11.053006.183906.

20 Vicki C Jackson, "What's in a Name? Reflections on Timing, Naming, and Constitution-Making," *William & Mary Law Review* 49, no. 4 (March 1, 2008): 1249.

21 Ruiz, "The Spanish Constitutional Court," 607.

22 Sapiano, "Courting Peace: Judicial Review," 137.

concerned with issues addressing the composition of state institutions and ways to render them less susceptible to authoritarian capture in the future.[23]

3.2.1 Establishing Legitimacy

Among the primary challenges newly created constitutional courts must confront is establishing their own legitimacy and embedding the rule of law in societies where it may have been undermined or eradicated.[24] Over the decades, constitutional courts have sought public legitimacy through a variety of means. Debates in post-war Germany preceding the creation of the German court, for example, included the idea of appointing lay justices in order to solidify public confidence.[25] In Italy, the Constitutional Court has sought to neutralize hostility from lower courts through the novel strategy of refraining from selecting and imposing one interpretation of a challenged law and instead simply eliminating one or more possible interpretations, leaving lower courts free to choose the one they believe to be correct from among several legitimate alternatives.[26] Another feature utilized by the Italian Court is the abrogative referendum (*referendum abrogativo*), whereby the Court reviews the constitutionality of requests for citizens to vote whether to repeal a statute.[27]

By contrast, the Constitutional Court of Bosnia and Herzegovina, created by Annex IV of the Dayton Peace Accords, suffered from an initial lack of legitimacy since it was the creation of external international actors and was not authoritatively ratified by any state institution.[28] The Court's legitimacy was further compromised by its unpopular hybrid nature, which featured international judges sitting jointly on panels with Bosnian counterparts in an effort to balance presumed political biases of local judges.[29]

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23 Hailbronner, "Rethinking the Rise of the German Constitutional Court," 630.

24 The contours of the theory of institutional legitimacy in the context of the South African Constitutional Court are analyzed by Gibson, see Gibson, "The Evolving Legitimacy."

25 Farahat, "The German Federal Constitutional Court," 285.

26 Vincenzo Vigoriti, "Italy: The Constitutional Court," *The American Journal of Comparative Law* 20, no. 3 (1972): 413. https://doi.org/10.2307/839312.

27 Clare Tame, and Sarah Pasetto, trans, "The Italian Constitutional Court," Constitutional Court of Italy, March 2020, https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf.

28 David Feldman, "Developments," *International Journal of Constitutional Law* 3, no. 4 (October 2005): 651; James C. O'Brien, "The Dayton Constitution of Bosnia and Herzegovina," in *Framing the State in Times of Transition*, 332–49 (United States Institute of Peace, 2010). https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter12_Framing.pdf.

29 Alex Schwartz, "International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia," *Law & Social Inquiry* 44, no. 1 (February 2019): 1.

Although some post-conflict courts – such as the South African Constitutional Court – are purposely activist, in other contexts judicial activism can compromise legitimacy in the eyes of the public. The German Court's post-conflict jurisprudence rendered it susceptible to allegations of activism; between 1951 and 2011, the Court invalidated 640 laws and administrative regulations.[30] The Corte Suprema de Justicia of El Salvador avoided risking controversy by declaring its incompetence to determine the constitutional validity of amnesty laws on the basis that the issue violated the political question doctrine.[31]

Dangers associated with the erosion of legitimacy are illustrated by the example of Hungary in 2009, when the populist Fidesz party amended the constitution in an attempt to undermine the Constitutional Court, eliminating the Court's jurisdiction over fiscal and budgetary matters in response to a decision the Court had recently issued in those areas. Two years later, the party succeeded in replacing the constitution with an entirely new document.[32]

Direct access of ordinary citizens to constitutional courts can enhance the courts' legitimacy in the eyes of the public. When people have direct access, free of cost, to petition courts when they perceive their rights to have been violated, confidence and trust are strengthened. This is especially true in post-conflict settings when populations often harbor mistrust resulting from previous governmental misfeasance.[33] In post-war Germany, the constitutional complaint doctrine became an important means of instilling public confidence in the government's commitment to move past the Nazi period by providing individuals with free direct access to the Constitutional Court.[34] In Spain, the *recurso de amparo* was introduced in 1978 to provide direct judicial access to individuals whose human rights were violated.[35] In Colombia, the *tutela* was introduced in the 1991 Constitution, giving citizens access to a rapid avenue

30 Donald P. Kommers and Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany 3rd ed* (Duke University Press Books, 2012).

31 Massimon Starita, "Amnesty for Crimes against Humanity: Coordinating the State and Individual Responsibility for Gross Violations of Human Rights," *Italian Yearbook of International Law* 9 (1999): 86–112.

32 David Landau, "Constitutional Backsliding: Colombia," in *Constitutionalism in Context*, ed. David S. Law, 3 (Cambridge: Cambridge University Press, 2022), https://doi.org/10.1017/9781108699068.023.

33 Petra Stockmann and Hanns-Seidel-Stiftung, "The New Indonesian Constitutional Court: A Study into Its beginnings and First Years of Work" (2007): 11.

34 Uwe Kranenpohl, "Decision Making at the German Federal Constitutional Court," in *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court* (Berghahn Books, 2016), https://www.jstor.org/stable/j.ctt1btbw22.11 and Kommers and Miller, "*The Constitutional Jurisprudence*," 12.

35 Ruiz, "The Spanish Constitutional Court," 612.

to challenge actions impacting their fundamental rights.[36] Article 113(7) of Kosovo's post-conflict constitution authorizes individuals to refer violations of their rights and freedoms to the Constitutional Court after exhausting all other legal remedies. Exhaustion of all other remedies is similarly required by the Spanish *recurso de amparo.*

3.2.2 Embedding the Rule of Law

Newly established constitutional courts also bear responsibility for entrenching the rule of law, which may have been undermined in previous regimes and may have contributed to conflict. In Spain, the judicial system played a key role in political repressions of the Franco era.[37] In post-war Germany, legislators were concerned with questions of separating the operation of law and politics and resolving tensions between representative democracy and constitutional review.[38] In South Africa, the Constitutional Court, established in the immediate post-apartheid era, bolstered the rule of law by endorsing legal analysis of issues that could otherwise have been construed as political.[39] Gibson describes the growing legitimacy of the South African Constitutional Court as the result of a process of promoting public acceptance that the court had the moral authority and duty to decide if it was to perform its democratic role.[40]

The Constitutional Court of Colombia offers an example of a powerful post-conflict court created as part of an overall political movement to reform institutions that had lost legitimacy due to violence and corruption. Over time, the court built independence, credibility and respect that later allowed it to rebuff two attempts by a powerful president to extend his term limits.[41] Popularity of the court emanates in part from the *tutela* process described above. The appointment process for justices, whereby the President, the Supreme Court and the Council of State each select candidates for one third of the seats, has further solidified the court's legitimacy.[42]

36 Landau, "Constitutional Backsliding: Colombia," 7.

37 Paloma Aguilar, "The Spanish Amnesty Law of 1977 in Comparative Perspective: From a Law for Democracy to a Law for Impunity," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne, 317 (Cambridge: Cambridge University Press, 2012), https://doi.org/10.1017/CBO9781139177153.016.

38 Hailbronner, "Rethinking the Rise of the German Constitutional Court," 630 and Kommers and Miller, "*The Constitutional Jurisprudence*," 33.

39 Tushnet and Arcila, "Conceptualizing the Role of Courts in Peace Processes," 1294.

40 Gibson, "The Evolving Legitimacy," 229–66.

41 Landau, "Constitutional Backsliding: Colombia," 5.

42 Landau, "Constitutional Backsliding: Colombia," 7.

The Constitutional Court of Kosovo provides another example of a court's post-conflict commitment to strengthen the rule of law. Soon after the new constitution was enacted, the Constitutional Court publicized its vision and mission statement on its public website: to serve as a "professional, competent, and independent institution that is establishing a new tradition of judicial impartiality and full accountability in the service of the citizens of Kosovo. … (and serve as a) transparent institution that vindicates the rights and fundamental freedoms of the citizens and communities of Kosovo, by adjudicating in a fair and transparent manner within its jurisdiction, and overseeing fairness in the exercise and use of powers vested in it by the Constitution. … (and serving as the) final authority of the constitutional order of the country, thereby ensuring and supporting the transition of Kosovo toward prosperity, democracy, and rule of law."[43]

3.2.3 Navigating Relationships with Other Apex Courts

Newly created constitutional courts face additional challenges when their competencies were previously held by other apex courts, including Supreme Courts.[44] In these situations, tensions between the two apex courts can be difficult to negotiate. This was the case in post-war Germany, when the new constitutional court found itself in competition with ordinary courts and in particular with the Federal Supreme Court, or Bundesgerichtshof.[45] In the end, the need for a new judicial institution became clear because the Nazis, who had been elected by the people, had abused rights; the new court was considered necessary to establish a legitimate bridge to a new era.[46] In post-dictatorship Spain, the Constitutional Court had to defend its normative power to the Supreme Court and other high level courts as late as four years after the Constitution entered into force.[47] In Italy, tensions between the Constitutional Court and Court of Cassation, another apex court, arose when the Constitutional Court introduced new interpretations of law that contradicted earlier decisions of the Court of Cassation.[48]

43 "2010 Annual Report," Constitutional Court of Kosovo, 2011, https://gjk-ks.org/wp-content/uploads/2017/11/Annual-Report-2010.pdf.

44 Lech Garlicki argues that it is nearly impossible to completely separate the jurisdictions of dual apex courts. See Garlicki, "Constitutional Courts versus Supreme Courts."

45 Farahat, "The German Federal Constitutional Court," 28.

46 Hailbronner, "Rethinking the Rise of the German Constitutional Court," 626.

47 Ruiz, "The Spanish Constitutional Court," 606.

48 Vigoriti, "Italy: The Constitutional Court," 413.

4 Contextualizing Transitional Justice: Comparative Post-Conflict Jurisprudence

It is in the context of the particular challenges faced by post-conflict constitutions and constitutional courts that Indonesia's post-conflict jurisprudence should be considered. The relevant analysis can best be undertaken by comparing whether and how other post-conflict constitutional courts became involved in transitional justice issues, specifically questions relating to lustration and amnesties, and whether their decisions served the goals of contributing to peace and stronger democratic processes.

4.1 *Lustration*

In addition to Indonesia, a number of countries emerging from conflict, including Belgium, France and the Netherlands, have addressed legacies of war through lustration – that is, processes designed to purge political and other influences that led or contributed to the conflict. The most prominent lustration case study is Germany.

In early post-war Germany, the newly formed Constitutional Court directly addressed the country's post-war legacy in a series of decisions. One of the first dealt with banning political parties associated with Nazi ideology.

On November 22, 1951, the federal government requested a determination by the Federal Constitutional Court that the West German Communist Party was unconstitutional under Article 21(2) of the Basic Law. On November 28, the same request was made with respect to the Socialist Reich Party, an extreme right-wing, neo-Nazi type political party.[49] The Court soon ruled that although the German Basic Law guaranteed free establishment and freedom of action for political parties, those guarantees did not apply to parties seeking to abuse formal democratic instruments in order to abolish the free democratic order.[50] Both parties were banned since neither maintained internal structures conforming to basic democratic principles, and the Court found that both endangered the existence of the Federal Republic of Germany.[51]

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49 Petersberg Agreement, 1 BVerfGE 351 (German Federal Constitutional Court 1952).

50 "Statement by the Press Office of the Federal Constitutional Court," The Federal Constitutional Court, October 23, 1952, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/1952/bvg52-059.html and Edward McWinney, "The German Federal Constitutional Court and the Communist Party Decision," *Indiana Law Journal* 32, no. 3 (Spring 1957): 295–312.

51 "Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany (NPD)," *German Law Journal* 1, no. 2 (2000): E3. https://doi.org/10.1017/S2071832200003102. Decisions in the Socialist Reich Party Case and the Communist

In 2017, the Constitutional Court issued a long-awaited third decision on the issue of political parties associated with the former Nazi regime. Contrary to the two earlier decisions, the Court found that although the Nationaldemokratische Partei Deutschlands (NPD) advocated political ideologies aimed at destroying the free democratic order, there was no indication at that time that it would be able to achieve its unconstitutional goals.[52] On this basis the Court declined to ban the party. This outcome might be viewed as protecting freedom of association instead of furthering lustration goals, indicating that the need for post-conflict lustration expires after the passage of time.

4.2 *Amnesties*

The issue of amnesties in post-conflict societies can be contentious and often involves separation of powers issues. Criticisms of amnesties following conflict include that they entrench impunity and prevent even minimal investigation and accountability, thereby discouraging justice.[53] Although the United Nations Human Rights Committee has condemned amnesties, amnesty laws have been enacted in a number of countries, including Chile, Brazil, Uruguay, Argentina, Nicaragua, Honduras, El Salvador, Haiti, Peru, Guatemala, Côte d'Ivoire, South Africa, Algeria, Sierra Leone, and Liberia pursuant to the argument that they are effective to uncover the truth and lead to national healing.[54] For the purposes of this discussion, the issue of note is which branches of government in post-conflict contexts have addressed amnesties, and whether this issue is appropriately addressed at all by the judicial branch and, in particular, by constitutional courts.

Party Case can be found at: http://www.uni-wuerzburg.de/dfr/bv002001>www.uni-wuerzburg.de/dfr/bv002001 and http://www.uni-wuerzburg.de/dfr/bv005085>www.uni-wuerzburg.de/dfr/bv005085. The approach of the German Constitutional Court in reckoning with the past is in contrast to that taken by the Hungarian Constitutional Court in 1989. Second and third generation European constitutional courts, such as the Hungarian court, tend not to completely abolish former political institutions but instead seek to maintain institutional continuity while achieving radical new beginnings (Sólyom 2020, 363).

52 "Proceedings for the Prohibition of Political Parties." German Federal Constitutional Court, n.d. https://www.bundesverfassungsgericht.de/EN/Verfahren/WichtigeVerfahrensarten/Parteiverbotsverfahren/parteiverbotsverfahren_node.html.

53 Ronald Slye, "The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights," *WIS. INT'L L. J.* 22 (January 1, 2004): 99, https://digitalcommons.law.seattleu.edu/faculty/552.

54 Simon Chestermann, "Justice and Reconciliation: The Rule of Law in Post-Conflict Territories," in *You, The People: The United Nations, Transitional Administration, and State-Building*, 159 (Oxford University Press, 2004).

4.2.1 Germany

In post-war Germany, Parliament held the power to legislate amnesties; the Constitutional Court ultimately weighed in and upheld its ability to do so.[55] This followed a period of reluctance on the part of the judiciary to become involved in amnesties, which was attributed to a high degree of continuity in the judicial system following the dissolution of the Nazi regime.[56]

4.2.2 Italy

The 1947 Constitution of Italy established that powers relating to grants of amnesty were held by the executive branch.[57] However, these powers were limited by the legislature to crimes committed after the Constitution was enacted; therefore, amnesty could not be granted for crimes committed during the war.[58]

In 2014, the Constitutional Court affirmed its jurisdiction over the issue of German immunity for crimes committed in Italian territory during World War II, including claims by Italian citizens who had been sent to German concentration camps. In Judgment No. 238/2014, the Court ruled that legislation compelling compliance with decisions from the International Court of Justice (ICJ) was unconstitutional, thereby in effect ruling against German immunity and paving the way for lawsuits in Italian courts brought by surviving victims of violations of humanitarian law committed by the Nazi regime during World War II.[59] This decision was significant in that the Constitutional Court asserted its authority to decide whether international norms interpreted by the ICJ could be applied within the Italian domestic order.[60]

4.2.3 Spain

The 1977 Amnesty Law provided amnesty for political crimes committed prior to December 15, 1976, crimes committed before June 15, 1977, whose purpose

55 Norbert Frei and Joel Golb, "The Amnesty Law of 1954," in *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, 75 (Columbia University Press, 2002), http://www.jstor.org/stable/10.7312/frei11882.9.

56 Frei and Golb, "The Amnesty Law," 67–68.

57 In 1992, the Constitution was amended to permit Parliament to grant amnesties following approval of two thirds of both Houses (Amendment to Article 79 1992).

58 "Legge Costituzionale 6 marzo 1992, n. 1.," Legge Costituzionale 6 marzo 1992, n. 1. (1992): 1–1.

59 Italy's Diplomatic, 2014.

60 Maria Elena Gennusa, "Constitutionalising the International Legal Order through Case Law – Judgment No. 238/2014 from the Italian Constitutional Court," *Cambridge Journal of International and Comparative Law* 5, no. 1 (2016): 144.

was restoring autonomy to Spain, and political crimes not involving threats to life committed before October 6, 1977.[61] Recently, in Auto 80/2021 de 15 de Septiembre de 2021, the Constitutional Court denied a petition for *recurso de amparo* alleging that crimes committed by a member of the secret police between 1964 and 1974 constituted violations of international and domestic law.[62] Aguilar argues that this outcome was influenced by the absence of strong social demand for truth and justice following Franco's death. The fact that both sides in the Spanish Civil War committed atrocities led to an intense need for mutual and reciprocal forgiveness and ultimately allowed the Constitutional Court to approve the 1977 Amnesty Law.[63] In Spain, reconciliation is inextricably tied to "forgetting," "erasing," "burying" and "overcoming."[64]

4.2.4 South Africa

The Constitutional Court of South Africa considered itself a transformational institution from the outset of its existence. Within its first few years, the Court issued a series of decisions addressing structural inequalities that had buttressed the apartheid era.[65] The issue of amnesties was addressed in Azanian Peoples' Organization (AZAPO) v. President of the Republic of South Africa, in which the Court held that the Committee on Amnesty could grant amnesty to perpetrators of politically motivated crimes. As a result of the granting of amnesty, perpetrators would not be held civilly or criminally liable. The constitutionality of Section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 was upheld by reference to the epilogue to the Constitution (National Unity and Reconciliation), which stated that the "Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society." The Court's judgment was issued over the objection

61 Law 46/1977 of 15 October 1977 Of Amnesty (1977): 1–5.

62 Order 80/2021, No. 5781–2018 (Constitutional Court of Spain September 15, 2021).

63 Aguilar, "The Spanish Amnesty Law," 316–18.

64 Ibid., 331.

65 Drew Cohen, "A Constitution at a Crossroads: A Conversation with the Chief Justice of the Constitutional Court of South Africa," *Northwestern Journal of Human Rights* 12, no. 2 (April 1, 2014): 132. https://scholarlycommons.law.northwestern.edu/njihr/vol12/iss2/1.

that providing amnesties to perpetrators of crimes would necessarily negatively impact victims' fundamental rights.[66]

In State v. Basson, following the conclusion of a trial against a former employee of the South African National Defence Force charged with conspiracy to commit 67 counts of murder, fraud, and various other crimes, the government appealed to the State Court of Appeal, challenging certain rulings that had been made during trial. The appeal was rejected on both procedural and substantive grounds; the government then applied to the Constitutional Court for leave to appeal against the judgment of the State Court of Appeal. The Constitutional Court held hearings to determine whether constitutional issues were at stake as a precursor to deciding whether it had jurisdiction to accept the case.[67] Further cementing its role as an activist court, the Court accepted jurisdiction in the first prosecution of apartheid crimes that had reached it.[68] In his concurring opinion, Justice Sachs highlighted the significance of the Court's granting of jurisdiction in the case:

> The questions before us have to be determined in the complex historical and jurisprudential situation in which the South African State had moved from perpetrating grave breaches of international humanitarian law to providing constitutional protection against them. Issues which in another context might appear to be purely technical concerning the interpretation of a statute or the powers of a court on appeal, took on profoundly constitutional dimensions in the context of war crimes.[69]

4.2.5 Cambodia

Domestic Cambodian courts have been only minimally involved in the issue of amnesties. In 1994, decades after the fall of the Khmer Rouge, the Cambodian government passed legislation banning the group and providing amnesty to Khmer Rouge guerrillas who defected to the government between certain specific dates. After the law was passed, the King retained discretion to decide who would benefit from amnesties.[70] Although some commentators argued that the 1994 law was not passed in compliance with the Constitution, at least one Cambodian court disagreed.[71]

66 Sachs, "War, Violence, Human Rights," 437.

67 Sachs, "War, Violence, Human Rights," 449.

68 Mia Swart, "The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?" *Heidelberg Journal of International Law* 68 (2008): 209.

69 Sachs, "War, Violence, Human Rights," 450.

70 Slye, "The Cambodian Amnesties," 101.

71 Ibid.

4.2.6 Bosnia and Herzegovina

According to a 1997 amendment to the 1995 Constitution, the President holds the power to grant pardons for crimes other than war crimes, crimes against humanity, and genocide. The Constitutional Court has only marginally been involved in the issue of amnesties. In Case No. U 44/03 of 23 September 2003, it held that a right to amnesty is not included in the list of rights under Article II (3) of the Constitution of Bosnia and Herzegovina and is not provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.[72]

4.2.7 Argentina

Courts in Argentina, including the Supreme Court, have taken active roles in amnesty issues. Beginning in 2001, lower domestic courts began to strike down amnesty laws enacted after the Dirty War, which had taken place between 1976 and 1983. In 2005, the Supreme Court confirmed lower court rulings holding the amnesty laws unconstitutional, citing as binding authority a 2001 Peruvian case in which the Inter-American Court of Human Rights declared that two amnesty laws introduced by the Fujimori government in 1995 were incompatible with the American Convention on Human Rights and therefore without legal effect.[73] The decision by the Supreme Court of Argentina impacted the validity of amnesty laws in other Latin American countries, including Chile, Uruguay and Colombia.[74]

4.2.8 Timor Leste

Perhaps because the post-conflict Constitution of Timor Leste was created with input primarily from common law advisors, it does not provide for a constitutional court. Instead, Article 124 states that the Supreme Court of Justice is the highest court and shall administer justice on juridical, constitutional and electoral matters. Article 95(3)(g) assigns to Parliament the power to grant amnesties, while Article 149 allows the President to request anticipatory review by the Supreme Court of Justice of any bill, including those relating to amnesties, submitted to him or her for promulgation.

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72 "Admissibility: As to the Prima Facie (Manifestly) Ill-Founded." Constitutional Court of Bosnia and Herzegovina, n.d. https://www.ustavnisud.ba/en/as-to-the-prima-facie-manifestly-ill-founded.

73 Human Rights Watch. "Argentina: Amnesty Laws Struck Down," June 14, 2005. https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down.

74 The Supreme Court of Chile had previously limited the application of Chile's amnesty law in 1999, holding that it did not apply in cases of disappearances (Slye, "The Cambodian Amnesties").

The power to grant amnesties was also given to the Commission for Reception, Truth, and Reconciliation, which was established in 2001. After holding hearings on crimes committed between April 25, 1974, and October 25, 1999, the Commission was to report its findings to Parliament along with recommendations. Its power to grant amnesties was limited to minor crimes committed by individuals who admitted to them and performed community service.[75]

4.2.9 Kosovo

Article 65(15) of the Constitution of Kosovo permits the Assembly to enact amnesty laws that are approved by a two-thirds vote. The Law on Amnesty (04/L-209) was passed in 2013, providing amnesty for a group of criminal offenses committed before June 20, 2013, with the exception of violations of international humanitarian law and crimes resulting in serious bodily harm or death.

In Case No. KO 108/13, applicants argued that the Law on Amnesty violated their right to a legal remedy, as guaranteed by Article 32 of the Constitution. The Constitutional Court upheld the constitutionality of the statute but held that broad amnesties for some crimes, including arson, would undermine the objective of reconciliation; amnesties for those crimes were therefore deemed unconstitutional.

4.2.10 Colombia

In 2006, the Constitutional Court of Colombia ruled on the constitutionality of Law 975, known as the Justice and Peace Law, which addressed criminal and civil liability of recently demobilized paramilitary groups.[76] In general, the Court upheld the law while setting constitutional limitations on its application to ensure victims' ability to participate in proceedings to determine eligibility of former combatants to receive reduced sentences and other concessions. The Court voiced concern that criminal penalties should not be lightened unless whole truths were factually uncovered without relying solely on defendants' confessions. The Court also held that former members of paramilitary groups would lose the benefits of the law if they failed to compensate their victims.[77]

75 "Truth Commission: Timor-Leste (East Timor)," United States Institute of Peace, February 7, 2002. https://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor.

76 Constitutional Case No. C-370/06 (Constitutional Court of Colombia 2006).

77 Tushnet, and Beatriz Botero Arcila, "Conceptualizing the Role of Courts in Peace Processes," 1298.

5 Contextualizing the Indonesian Cases

Against the backdrop of approaches taken by other constitutional courts that have addressed transitional justice issues, the decisions in Cases No. 011–017/PUU-I/2003 and 011–017/PUU-I/2003, decided by the Constitutional Court of Indonesia, are not outliers but are instead consistent with outcomes and analytical approaches taken by similar courts. In addition to conducting constitutional analysis and limiting standing in appropriate ways, the Indonesian Court carried out comparative studies of caselaw from other post-conflict constitutional courts that were asked to rule on the constitutionality of legislation and rules relating to lustration and amnesties.

In Case No. 006/PUU-IV/2006, the Court considered the issue of applicants' standing and issued a nuanced, well-considered ruling that in order to sustain claims of standing, petitioners must demonstrate that (1) their rights are protected in the Constitution; (2) their rights have been impaired; (3) impingement on their rights is specific and actual, or at least potential; (4) there is a causal relationship between the alleged action and harm; and (5) the Court's action will remedy any continued harm. Over the objection of two justices, the Court held that individuals and associations who were impacted by the Truth and Reconciliation Law had standing to file their petitions.

The substance of the Court's decision in this case, that the principles and objectives of the challenged law could not be carried out because the law failed to provide legal certainty – both in the formulation and implementation of norms – with respect to remedies for victims, was reached after careful consideration of reparations schemes in South Africa, Argentina, Colombia and Timor Leste, along with provisions of the International Covenant on Civil and Political Rights. In its decision, the Court, consistent with positions taken by other post-conflict constitutional courts, acknowledged that this case involved political as well as legal issues. The Court found persuasive authority for deeming the entirety of the Truth and Reconciliation Law unconstitutional – as opposed to only parts of its provisions – in Article 45 of the South Korean Constitutional Court Law, which states that if an entire statute cannot be enforced when one of its provisions is found to be unconstitutional, the whole statute may be ruled unconstitutional.

The outcome of this case has been criticized in that it left victims of human rights violations without a legal remedy.[78] Although the Constitutional Court

78 Saivol Virdaus, Nasrulloh Ali Munif, and Zainal Arifin, "The Urgency of the Truth and Reconciliation Commission (KKR)," 560–67 (Atlantis Press, 2021), https://doi.org/10.2991/assehr.k.211112.073.

proposed alternative methods for resolving past violations of human rights via legal or political means and ordered the government to draft a new law within two years, none of these actions have been undertaken since Case No. 006/PUU-IV/2006 was decided.[79]

In Case No. 011–017/PUU-I/2003, it was the dissent that found authority through comparative analysis. The legal issue in that case was the constitutionality of Article 60(g) of the Election Law, which banned former members of the Indonesian Communist Party from running for legislative office. The majority opinion held that the law was based only on political considerations and that it contained nuances of political punishment aimed at former Communist Party members. Stating that Article 60(g) constituted an impermissible denial of rights and discrimination on the basis of political belief, the Court held that the law was contrary to human rights guaranteed by the Constitution and therefore had no binding legal force.

The dissent disagreed, arguing that post-war Germany presented an analogous context with a different outcome. Citing expert testimony presented during hearings in the Indonesian case, the dissenting justice argued that at the beginning of the era of the Federal Republic of Germany (1949–1953), several actions were taken to conduct de-Nazification, including restricting former members of the Nazi party from occupying certain government positions. These restrictions were not permanent, the dissenting opinion argued, but were progressively loosened over time and were finally ended in 1956.

Case No. 011–017/PUU-I/2003 represented another example of the way constitutional courts may be asked to address issues that intertwine individual and political rights with security concerns of the state. As Mietzner states, the decision in this case was of enormous symbolic importance and highlighted the Court's protection of individual rights even at the risk of alienating large segments of the population who remained deeply opposed to the Communist Party, and in spite of harsh criticism from the armed forces.[80]

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79 In January 2023, the news outlet Inside Indonesia criticized the President for not moving forward redrafting the Truth and Reconciliation Law as mandated by the Constitutional Court in Case No. 006/PUU-IV/2006. Instead, he formed a new team of academics, diplomats, former military officers and state officials to examine past human rights violations through a non-judicial approach. Human rights activists and civil society organizations reacted to this development with sharp criticism, stating that it would not be effective to hold past human rights abusers accountable (Wahyuningroem 2023).

80 Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (2010): 409, http://www.jstor.org/stable/23418865.

6 Conclusion

In post-conflict settings, constitutional courts have important roles to play despite the complex and often competing challenges they face to institutionalize their legitimacy and entrench the rule of law while attempting to build bridges from conflict to peace. As Kim Lane Scheppele states, constitutional courts can also help shape collective memory about previous regimes of horror.[81]

The Constitutional Court of Indonesia has solidified its position among modern constitutional bodies. Instead of relying only on its own decisions or those of the Supreme Court, it has demonstrated its ability to carry out comprehensive global comparative analysis, referring to cases from other constitutional and international courts to help shape its jurisprudence. In this way, the Indonesian Court is ahead of a number of other apex courts in its willingness to consider constitutional issues through a global lens.[82]

At the 5th Congress of the World Conference on Constitutional Justice, held in Indonesia in October 2022, the 94 delegations in attendance acknowledged the relationship between constitutional justice and peace and affirmed that protection of human rights is a prerequisite to conflict resolution and sustained peace. The conference's Resolution stated that constitutional courts contribute directly to appeasing social tensions and maintaining social peace by curbing excessive political power and ensuring diversity, guaranteeing respect for the rule of law and honoring the trust people place in the law and courts.

81 Kim Lane Scheppele, "Constitutional Interpretation after Regimes of Horror" (SSRN Scholarly Paper. Rochester, NY, May 1, 2000), https://doi.org/10.2139/ssrn.236219 and Hailbronner, "Rethinking the Rise of the German Constitutional Court," 628.

82 Debate about the legitimacy of foreign and international law when interpreting the U.S. Constitution has taken place at the Supreme Court level for decades. Former Justice Antonin Scalia argued that reference to foreign constitutional law may be acceptable when writing a new constitution but not when interpreting an existing one. See Vicki C. Jackson, "Resisting the Transnational," in *Constitutional Engagement in a Transnational Era*, 17–38 (Oxford University Press, 2013). Former Justice Stephen Breyer takes a different approach, arguing that "local law is increasingly affected by what happens abroad. Lawyers, legislators, and judges to an ever greater extent must look beyond their own shores to answer questions of local law." Breyer states that in close to twenty percent of the Supreme Court's current caseload, it is necessary to consider approaches taken by courts in other countries to find appropriate solutions to current legal problems in the United States. See Stephen Breyer, "America's Courts Can't Ignore the World" *The Atlantic*, October 2018, https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/.

In meeting these goals, constitutional courts no longer need operate in isolation. Through information provided by CODICES, the database maintained by the Council of Europe's Venice Commission, and the World Conference on Constitutional Justice, among other resources, constitutional courts are now able to benefit from the individual and collective experiences of other apex courts operating in post-conflict contexts despite the diversity of legal systems and languages. These avenues of cooperation allow judicial cross-fertilization contributing to jurisprudence that supports democracy, human rights and the rule of law, which can be shared "from court to court, from country to country, from continent to continent".[83] As Vicki Jackson states, constitutional engagement "offers important insights for constitutional adjudication, both from a deliberative perspective concerned with improving. … decision-making. … and from a relational perspective in accommodating and mediating the developing relationships among and between constitutional and supranational legal systems."[84]

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83 Buquicchio, Gianni, and Schnutz Rudolf Dürr. "Judicial Cross-Fertilisation – Co-Operation between Constitutional Courts as a Means to Promote Democracy, the Protection of Human Rights and the Rule of Law" in *Liège, Strasbourg, Bruxelles: Parcours Des Droits de l'homme: Liber Amicorum Michel Melchior* (2011): 311–23.

84 Vicki C. Jackson, "Constitutional Adjudication in the U.S. Supreme Court: Why Engage the Transnational?" in *Constitutional Engagement in a Transnational Era*, 103 (Oxford University Press, 2013).

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