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# Editor-in-Chief's Introduction to the Spring Issue of Volume IV of the De Lege Ferenda

It is with great pleasure that I introduce the first Issue of Volume IV of De Lege Ferenda. Conceived as the Cambridge Law Review's supplementary undergraduate law journal, De Lege Ferenda serves as a platform for undergraduate students to make their first entry into academia. The high quality of submissions combined with the rigorous review of the Editorial Board have made De Lege Ferenda, in a short period of time, one of the most successful undergraduate law reviews worldwide.

This year, we were fortunate to have received a record number of submissions of exceptionally high quality. In their article "Cryptocurrencies as Property: Solving the Riddle", Marco Montanaro and Chiara Sarti discuss the topical issue of the classification of cryptocurrencies as property. For the authors, the argument that cryprocurrencies do not fit any traditional category of property is false. As they argue, cryptocurrencies can be conceptualised as smart contractual rights (that is, rights under smart contracts) and therefore, should be treated as 'things in action' amenable to proprietary status.

Mathias Baudena writes in the area of legal history. In his article "Protection of Political Liberty in the British Empire: Behind the Double-Edged Sword", Baudena provides a framework to unpick the precise role played by the common law in protecting civil liberties in the British Empire in the second half of the 19th century. After analysing seminal cases from that period, Baudena concludes that the common law was instrumentalised to further conflicting political aims.

Richard Avinesh Wagenländer provides a commentary on the recent Bundesverfassungsgericht's ruling in PSPP in which the German court overruled, for the first time in its history, a judgement provided by the European Court of

Justice (CJEU) ("The Bundesverfassungsgericht in PSSP: A Legal and Practical Assessment with a View to the Future"). After highlighting contentious aspects of the Bundesverfassungsgericht's and the CJEU's decisions, Wagenländer considers potential reforms that would prevent or reduce the risk of judicial clashes between the CJEU and domestic courts.

Jyotsna Vilva writes in the area of discrimination law. Using the example of the legal challenges to the custom-based prohibition of entry of women between the ages of ten to fifty into the Sabarimala Temple in the state of Kerala in India, Vilva ("Cultural Relativism and the Sabarimala Judgement") argues that Indian law's affirmation of cultural relativist arguments through the Essential Religious Practices Test leads to a static conception of culture. For Vilva, this approach ultimately stunts the religion's capacity for organic growth and reform. Therefore, she argues that the law needs to recognise and accommodate 'cultural dissents' – that is, challenges by individuals within a community to modernise or broaden the traditional terms of cultural membership – when deciding cases involving challenges to cultural and religious norms.

In his article "Bullets and Ballots in Bangladesh: Does the Bangladeshi Government's Usage of Coercion and Co-Optation Breach Article 25 of the International Covenant on Civil and Political Rights?", Imran Dewan uses the People's Republic of Bangladesh as a case study to provide insight into the question how comprehensive is Article 25 of the International Covenant on Civil and Political Rights as a legal instrument to deliver electoral rights under autocratic governments? Taking an interdisciplinary approach, the article draws upon legal and political science literature as well as primary sources in the form of cases submitted to the Human Rights Committee. After applying Gerschewski's framework to Bangladesh, Dewan concludes that, while coercive activities are extensively dealt with by Article 25, the status of some co-optative activities remains relatively ambiguous.

In the last article of this Issue ("Who Will Watch the Watchmen? Evaluating the Prosecution Review Commission in Japan"), Margarita Avramtcheva examines the role and outcomes of the Prosecution Review Commission (PRC) in Japan. Relying on statistics and case studies, Avramtcheva argues that the PRC's activity is lacking. After highlighting the deficiencies of the current system, Avramtcheva makes suggestions for its improvement. As she argues, the PRC should include legal expertise in its Committees to strike a balance between achieving public trust and checking the power of prosecutors in Japan.

Overall, the six articles included in this Issue constitute exceptional pieces of academic work that enrich the literature in their respective fields. They provide

valuable insights into the selected areas of research, constituting interesting and enjoyable reads. Finally, I would like to express my gratitude to the Honorary Board for their invaluable guidance and to the Editorial Board for their tireless work, without which this Issue would not have been possible. I look forward to the Autumn Issue which will be published later in the year.

Despoina Georgiou
Editor-in-Chief

# Cambridge Law Review

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# Cryptocurrencies as Property: Solving the Riddle

Marco Montanaro* and Chiara Sarti**

Abstract

In this article, we provide a novel solution to the crypto-property riddle. Most scholars and the highly persuasive Legal Statement handed down by the UK Jurisdiction Taskforce agree that cryptocurrencies defy traditional categories of property. On their account, cryptocurrencies are neither things in possession nor things in action. Disquietingly enough, this may pose a challenge to their categorisation as property: if a strict bipartition of personal property were reaffirmed in the future, and appeal to a third category of 'intangibles' undercut, cryptocurrencies might eventually be denied proprietary status. However, we argue that there is a fundamental mistake in the Legal Statement and any argument running along similar lines. It is false that cryptocurrencies fit no traditional category of property: they can be treated as things in action. Our argument to this effect is structured as follows. Firstly, we show that cryptocurrencies are smart-contractual rights (that is, rights under smart contracts). Secondly, we observe that smart contracts are most likely to be treated like ordinary contracts in English law, and so rights under smart contracts as simple

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contractual rights. It follows that cryptocurrencies are indeed contractual rights and, therefore, things in action amenable to proprietary status.

*Keywords: bitcoin, blockchain, cryptocurrency, property, English law*

## I. Introduction

In January 2018, online financial-news-provider MarketWatch came up with a sharp simile: "cryptocurrencies are a bit like the Kardashians".[1] Just like the headline-hitting, celebrity-packed Californian dynasty, cryptocurrencies have large media exposure whilst remaining fundamentally obscure and shrouded in mystery. Unfortunately, their mystery is not confined to gossip circles. The legal status of cryptocurrencies is unclear and stuck in limbo too. As of November 2020, English law is still undecided as to whether cryptocurrencies are, or should be, property. At some point, it *will* have to decide one way or another. In fact, some may suspect that the issue is irrelevant to begin with as cryptocurrencies have no need for legal recognition: Blockchain-based platforms use peer-to-peer consensus precisely to avoid intermediation, and strong cryptography is meant to make dealings practically irreversible. After all, the 'code is law', or so the puzzled crypto-anarchist may say.[2] However, it would be fallacious to see the law as playing no role in the crypto-world. Although transactions may be cryptographically irreversible, their legal effects can always be reversed or altered. The recovery of fraudulently transferred or 'stolen' coins (or recovery of their value) is still ultimately a matter for judges to decide.[3] Similarly, the possibility of devising crypto-coins or of settling them on trust transcends computer science and the algorithms of cryptography.

In English law, there is a welcome judicial trend towards treating cryptocurrencies as property.[4] However, two problems stand in the way of a full recognition of their proprietary status. Firstly, cryptocurrencies may be seen as mere information (that is, as just a series of lines of code) and information is, in principle, precluded from constituting property.[5] Secondly, English law traditionally

1 Stacy Rapacon, 'Clueless about Bitcoin? Here's Your Cryptocurrency Crash Course' (*MarketWatch*, 31 January 2018) <https://www.marketwatch.com/story/clueless-about-bitcoin-heres-your-cryptocurrency-crash-course-2018-01-31> accessed 26 November 2020.

2 Lawrence Lessig, 'Code Is Law' (*Harvard Magazine*, 1 January 2000) <https://harvardmagazine.com/2000/01/code-is-law-html> accessed 26 November 2020.

3 See Section III.B below.

4 See Section III below.

5 *Your Response v Datateam Business Media* [2014] EWCA Civ 281, [2015] QB 41, [42]; UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' (LawTech Delivery Panel 2019) paras 59–65.

contemplates two categories of personal property: things in possession and things in action. Oddly enough, cryptocurrencies are said to belong to neither.[6]

In the present article, we address the second challenge. We argue that cryptocurrencies *are* things in action and, therefore, amenable to property status. The argument is structured as follows: In the next section, we provide an overview of cryptocurrencies, charting their rampant rise and cursorily outlining the technology behind them. In the third section, we briefly contextualise the scholarly and judicial debate on the legal characterisation of cryptocurrencies, surveying the case law and the Legal Statement on Cryptoassets and Smart Contracts recently released by the UK Jurisdiction Taskforce. In the fourth section, we provide a technical argument to show that cryptocurrencies can be conceptualised as 'smart-contractual rights'. In the fifth and sixth section, we deduce that by virtue of their smart-contractual nature, cryptocurrencies amount to contractual rights and, therefore, to things in action. As a result, we conclude that they can comfortably be accommodated within the property law doctrine.

## II. Setting the Stage: A Peek at the Crypto-Universe

Introduced by Satoshi Nakamoto in 2008, Bitcoin is an electronic payment system that operates without requiring participants or peers, to trust centralised financial institutions to secure transactions.[7] While there had been previous attempts at building peer-to-peer payment networks where transactions are validated cryptographically, Bitcoin provided the first trustless solution to the so-called "double-spending problem".[8] The key to this achievement is twofold: it consists of (a) a data structure, i.e., the blockchain, and (b) a procedure to modify it, i.e., the Proof-of-Work or PoW.[9] As the name itself suggests, the blockchain is made up of a sequence of groups of transactions (so-called 'blocks'): these are linked together through cryptographic proofs, which ensure that the history of transactions cannot

[6] UK Jurisdiction Taskforce (n 5) paras 66–84.

[7] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008) 1 <https://bitcoin.org/bitcoin.pdf> accessed 4 November 2020.

[8] The double-spending problem arises when participants attempt to spend the same coins multiple times, either maliciously or erroneously. See Wei Dai, 'B-Money' <http://www.weidai.com/bmoney.txt> accessed 4 November 2020; Nick Szabo, 'Bit Gold' (*Satoshi Nakamoto Institute*, 29 December 2005) <https://nakamotoinstitute.org/bit-gold/> accessed 4 November 2020; Adam Back, 'Hashcash - A Denial of Service Counter-Measure' (2002) 10 <http://www.hashcash.org/papers/hashcash.pdf> accessed 4 November 2020.

[9] Markus Jakobsson and Ari Juels, 'Proofs of Work and Bread Pudding Protocols' in Bart Preneel (ed.), *Secure Information Networks: Communications and Multimedia Security IFIP TC6/TC11 Joint Working Conference on Communications and Multimedia Security (CMS'99) September 20–21, 1999, Leuven, Belgium* (Springer US 1999) <https://doi.org/10.1007/978-0-387-35568-9_18> accessed 4 November 2020.

be altered. Any participant in the network may publish a proposal for the next block, so long as they supply a valid PoW for that block through a process referred to as 'mining'. PoW is a cryptographic puzzle that is slow and computationally (thus, economically) expensive to solve, but incredibly fast to verify. Since computational resources cannot be faked, by selecting the blockchain that was hardest to the mine (that is, the longest chain), network participants can form a consensus on the true history of transactions.[10] The resulting framework allows peers to independently verify any cryptographic claim of ownership of Bitcoin tokens by third parties.[11]

Since then, the paradigm has spread to other applications, with blockchain being used for alternative cryptocurrencies,[12] or to describe digitised (or *tokenized)* physical assets,[13] like gold,[14] real-estate properties, and art.[15] Therefore, the technology soon expanded from *cryptocurrencies*, implementing blockchain to create money-like tokens, to *cryptoassets* modelling generic transferable digital assets.

The need to address the adoption problems caused by the high volatility of traditional cryptocurrencies led to the birth of *stable-coins*, i.e., cryptocurrencies backed by fiat currency, gold, or other cryptocurrencies.[16] These currencies allowed the decentralised finance (De-Fi) ecosystem to boom, with applications

[10] This is because PoW mathematically proves that the majority of resources have been committed to backing this version among alternative transactional histories.

[11] Clearly, 'claim of ownership' is here meant in the strictly cryptographic sense, as something determinable by computers alone.

[12] Brad Chase and Ethan MacBrough, 'Analysis of the XRP Ledger Consensus Protocol' (2018) Ripple Research arXiv:1802.07242 [cs] <http://arxiv.org/abs/1802.07242> accessed 4 November 2020; Shen Noether and Sarang Noether, 'Monero Is Not That Mysterious' (2014) Monero Research Lab, 10 <https://coinpaprika.com/storage/cdn/whitepapers/39.pdf> accessed 4 November 2020.

[13] Darryn Pollock, 'How Tokenization Opens A New World Of Asset Management And Investment' (*Forbes*, 15 April 2019) <https://www.forbes.com/sites/darrynpollock/2019/04/15/can-tokenisation-open-a-new-world-of-asset-management-and-investment/> accessed 4 November 2020.

[14] Charles Cascarilla, 'Pax Gold Whitepaper' (2019) Pax Gold 14 <https://www.paxos.com/wp-content/uploads/2019/09/PAX-Gold-Whitepaper.pdf> accessed 4 November 2020.

[15] Michael Stephen Haley, '"Digital Art" Framed And Collected On Blockchain' (*Forbes*, 30 January 2020) <https://www.forbes.com/sites/michaelhaley/2020/01/30/digital-art-framed-and-collected-on-blockchain/> accessed 4 November 2020.

[16] 'The Maker Protocol: MakerDAO's Multi-Collateral Dai (MCD) System' <https://makerdao.com/whitepaper/White%20Paper%20-The%20Maker%20Protocol_%20MakerDAO%E2%80%99s%20Multi-Collateral%20Dai%20(MCD)%20System-FINAL-%20021720.pdf> accessed 4 November 2020.

including decentralised exchanges,[17] peer-to-peer lending,[18] and insurance.[19] The assets currently locked in De-Fi, account for $12 billion out of the $400 billion total market capitalisation of cryptocurrencies,[20] a staggering figure that shows how the interest in cryptocurrencies is no longer limited to freaks and enthusiasts. This is further borne out by data from the leading exchange platform, Coinbase, which reports holding $7 billion worth of cryptocurrencies in their institutional custody platform.[21]

A remarkable application of blockchain has been using it as a consensus layer to agree on outcomes of smart-contract execution. It is worth noting that smart contracts do not necessarily have to use blockchain: their invention precedes Bitcoin by two decades, originally referring to systems (like vending machines) that use software and hardware to provide self-enforceability of contracts.[22] However, blockchain-based smart contracts have found widespread adoption: by leveraging the trustless properties of the blockchain consensus model, they remove the need to trust any particular execution environment of the smart contract. We will refer exclusively to this class of smart contracts throughout the article. This paradigm has been mainly popularised by Ethereum,[23] currently the second-biggest cryptocurrency by capitalisation,[24] which provided a blockchain to host programmable smart contracts. A common use case has been to implement new cryptocurrencies by describing the transactional logic in a smart contract on top of an existing blockchain, without the need to build a new decentralised network.

[17] Michael Oved and Don Mosites, 'Swap: A Peer-to-Peer Protocol for Trading Ethereum Tokens' (2017) 13 <https://www.airswap.io/pdfs/SwapWhitepaper.pdf> accessed 4 November 2020.

[18] Robert Leshner and Geoffrey Hayes, 'Compound: The Money Market Protocol' (2019) 3-4 <https://compound.finance/documents/Compound.Whitepaper.pdf> accessed 4 November 2020.

[19] Hugh Karp and Renis Melbardis, 'A Peer-to-Peer Discretionary Mutual on the Ethereum Blockchain'<https://nexusmutual.io/assets/docs/nmx_white_paperv2_3.pdf> accessed 4 November 2020.

[20] 'Cryptocurrency Prices, Charts And Market Capitalizations' (*CoinMarketCap*) <https://coinmarketcap.com/> accessed 4 November 2020.

[21] 'Coinbase Custody Acquires Xapo's Institutional Business, Becoming the World's Largest Crypto…' (*Medium*, 19 August 2019) <https://blog.coinbase.com/coinbase-custody-acquires-xapos-institutional-business-becoming-the-world-s-largest-crypto-2c1b46fc94c4> accessed 4 November 2020.

[22] Nick Szabo, 'The Idea of Smart Contracts' (1997) <https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/idea.html> accessed 22 October 2020.

[23] Vitalik Buterin, 'A next Generation Smart Contract & Decentralized Application Platform' (2014) 36 <https://cryptorating.eu/whitepapers/Ethereum/Ethereum_white_paper.pdf> accessed 22 October 2020.

[24] 'Cryptocurrency Prices, Charts And Market Capitalizations' (*CoinMarketCap*) <https://coinmarketcap.com/> accessed 4 November 2020.

For Ethereum, a huge milestone was standardising these types of contracts through common interfaces. The first of these was ERC20,[25] which has been used to create more than three hundred thousand distinct coins.[26]

## III. Cryptocurrencies: A Legal Riddle

Despite their relevance in our society, the status of cryptocurrencies in English private law is still unsettled and largely disputed.[27] The critical juncture in the scholarly debate is whether bitcoins and all other cryptocurrencies could (and should) count as property.[28] Far from being merely academic lucubration or a verbal dispute, this so-called 'property question' has far-reaching implications in at least two practical respects.[29] Firstly, determining that something ('*x*') is property has a facilitative effect: we expand the range of ways that an owner ('A') can deal with *x* (for example, enabling A to maximise *x*'s value or alienate it if she so wishes). As noted by Tatiana Cutts, recognition of *x*'s proprietary status often practically translates, among other things, into A's ability to (a) devise *x*; (b) settle *x* on trust; (c) secure rights on *x*; or (d) include *x* in a company's estate for the purposes of insolvency proceedings.[30]

Secondly, finding that *x* counts as property has a protective effect: we can legally safeguard A's connection to *x* by imposing so-called 'exclusionary duties' on others (e.g., tortious liability in conversion or interference with goods).[31] Furthermore, many statutes make express reference to 'property' so that both their effect and application are largely dependent on proprietary status.[32] Seeing how consequential the proprietary label can be, it is then critical to clarify when it can

[25] Artur Gontijo and Sam Richards, 'ERC-20 Token Standard' (7 December 2020) <https://ethereum.org/en/developers/docs/standards/tokens/erc-20/> accessed 4 November 2020.

[26] 'Token Tracker | Etherscan' (*Ethereum (ETH) Blockchain Explorer*) <http://etherscan.io/tokens> accessed 17 February 2021.

[27] Kelvin FK Low and Ernie GS Teo, 'Bitcoins and Other Cryptocurrencies as Property?' (2017) 9 Law, Innovation and Technology 235, 235-236; see also UK Jurisdiction Taskforce (n 5) 9.

[28] Low and Teo (n 27) 235.

[29] Paul T Babie and others, 'Cryptocurrencies as Property: Ruscoe and Moore v Cryptopia Limited (In Liquidation) [2020] NZHC 728' (2020) University of Adelaide Law Research Paper No. 2020-33, 1 <https://papers.ssrn.com/abstract=3578264> accessed 25 October 2020.

[30] Tatiana Cutts, 'Crypto-Property: Response to Public Consultation by the UK Jurisdiction Taskforce of the LawTech Delivery Panel' (2019) LSE Law Policy Briefing Papers 36/2019, 3 <https://papers.ssrn.com/abstract=3406736> accessed 8 November 2020.

[31] ibid 3.

[32] By way of example, see the Theft Act 1968, s 4(1).

rightly be used. For this purpose, we now turn to unpack the very concept of 'property'.

### A. Property: a primer

Firstly, it is inaccurate to speak of 'property' in terms of objects (e.g., 'the car is my property').[33] It is widely agreed that 'property' refers to a type of rights we have *in* objects.[34] Specifically, property rights bind an indeterminate class of people with respect to a thing (a so-called 'res'). We could refer to them as 'rights in something' or 'rights *in rem*' if we are to use a vexed terminology dating back to Roman jurisprudence.[35] If property rights usually affect the world at large, *personal* rights have a more limited effect instead and are only binding on one or a few parties. We could classify the latter as 'rights *vis-à-vis* someone' or 'rights *in personam*'.[36]

Sure enough, the third-party effect cannot account for what makes a right proprietary in the first place. It is just a *consequence* of the property status, not its conceptually-defining feature. In fact, we might face a charge of circularity if we were to define property in terms of its third-party effect: ultimately, we would be saying that (i) a right is proprietary if it affects third parties and that (ii) a right affects third parties *because* it is proprietary.[37] As a result, some have found that property should be better characterised as 'a bundle of rights' (which may consist, among other things, of the right to alienate, devise or secure rights on *x*).[38] Others have taken a narrower view and conceptualised property as simply 'a right to exclude'.[39] On this view, we have property in *x* when the law acknowledges that others owe us a duty not to interfere with *x*: their duty of non-interference correlates with our *right* to exclude them from *x*.[40]

Importantly for the purposes of our argument, English law traditionally divides property into two categories: land ('real' property) and chattels ('personal'

[33] UK Jurisdiction Taskforce (n 5) para 35.

[34] ibid paras 35–36.

[35] For an analysis and critique of this terminology, see Pavlos Eleftheriadis, 'The Analysis of Property Rights' [1996] 16(1) Oxford Journal of Legal Studies 31.

[36] It is worth noting that most commentators find that all rights are ultimately rights against a person (rights in personam); see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (Walter Wheeler Cook ed, Yale University Press 1919).

[37] See Kevin Gray, 'Property in Thin Air' (1991) 50(2) The Cambridge Law Journal 252, 293.

[38] Eric R Claeys, 'Property 101: Is Property a Thing or a Bundle?' (2009) 32(3) Seattle University Law Review 637.

[39] James E Penner, 'The Bundle of Rights Picture of Property' (1995) 43(3) UCLA Law Review 711; Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77(4) Nebraska Law Review 730.

[40] Penner (n 39); James E Penner, *The Idea of Property in Law* (Oxford University Press 2000).

property).[41] The category of chattels (specifically, that of 'chattels personal') is further divided into two subject-matters: things in possession and things in action. In the sections below, we will see how this distinction relevantly plays out in the context of cryptocurrencies and their legal categorisation.[42]

### B. Cryptocurrencies in english private law

The question over the legal status of cryptocurrencies (for the sake of brevity, we will refer to this as the 'crypto-property question') was addressed for the first time in the Common Law world in *B2C2 v Quoine*, a judgement delivered by the Singapore International Commercial Court in March 2019.[43] The facts were as follows. The defendant Quoine operated a crypto-currency-exchange platform. Following a technical glitch in its trading algorithm, Quoine inadvertently carried out some trades at two hundred and fifty times the market rate. Holding cryptocurrencies on Quoine's platform, B2C2 profited largely from the error in their system. Unsurprisingly, Quoine quickly moved to reverse the trades after detecting the glitch. B2C2 alleged that Quoine held the traded cryptocurrencies on trust for them and that reversing the trades amounted to a breach of trust. Since an asset can only be held on trust if it is capable of amounting to property in the first place, the crypto-property question loomed large in *Quoine*.[44] Even so, the issue was given short shrift in the judgement. Seeing as the defendant Quoine accepted that cryptocurrencies could be *treated as* property, Thorley IJ felt no need to dwell on the issue any further. Still, he swiftly acknowledged that this was the correct legal position, noting that cryptocurrencies have 'the fundamental characteristic of intangible property as being an identifiable thing of value'.[45]

On the other hand, the first known case to confront the crypto-property question in the UK was *Robertson v Persons Unknown*.[46] In that case, Mr Robertson had been involved in a spear-phishing attack and was tricked into transferring £1m worth of Bitcoins into a swindler's account. Mr Robertson sought an interlocutory

41 Technically, chattels are first divided in 'chattels real' (i.e., leasehold interests) and 'chattels personal'. It is the category of chattels personal to be then further divided into things in action and things in possession: see MG Bridge, *Personal Property Law* (4th edition, Oxford University Press 2015) 12-13.

42 See Sections IV, V, and VI below.

43 *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I).

44 Sarah Green, 'Cryptocurrencies in the Common Law of Property' in David Fox and Sarah Green (eds.), *Cryptocurrencies in Public and Private Law* (OUP 2019) 141 ('A crypto-coin can never become the subject matter of a trust or a proprietary right of security, nor will it be an asset in a deceased person's estate, unless it is first recognised as an object of property'); UK Jurisdiction Taskforce (n 5) paras 35-37; *Ruscoe and Moore* [2020] NZHC 728, [63] (Gendall J)(New Zealand).

45 *Quoine* (n 43) [142] (Thorley IJ).

46 *Liam David Robertson v Persons Unknown* (CL-2019-000444, 15 July 2019)(QB).

Asset Preservation Order (APO) over one hundred stolen Bitcoins, eighty of which were intercepted at Coinbase in the UK.

In the High Court, Mrs Justice Moulder found that the question of whether Mr Robertson had property in the cryptocurrencies, was a seriously triable issue. As a result, she granted both an Asset Preservation Order (APO), prohibiting any dealing with the intercepted Bitcoins, and a *Bankers Trust* order enjoining Coinbase to disclose any information it had on the fraudster.[47] Even if it was but an interim decision, *Robertson* was a first step in evidencing English courts' readiness to tackle the crypto-property question head-on and in particular, to treat cryptocurrency as property, if and when necessary.

Similarly, in *Vorotyntseva v Money-4 Ltd* the High Court granted the claimant a worldwide freezing order against cryptocurrency platform Money-4 (trading as Nebeus).[48] Mrs Vorotyntseva had transferred £1.5m worth of Bitcoins and Ethereum to Nebeus, to hold it on its platform. When Mrs Vorotynteseva began to suspect that her funds could be dissipated (and given that no evidence to the contrary effect was forthcoming), she applied for a worldwide freezing order against Money-4. At the interlocutory hearing, Birss J was satisfied that there was an actual risk of dissipation and moved to grant a freezing order prohibiting any future disposal of the relevant cryptocurrencies.[49] Importantly, Mr Justice Birss found it unproblematic that the court could grant a *proprietary* injunction on the facts of the case. He noted that no one had ventilated any possibility that Mrs Vorotyntseva was not entitled to the cryptocurrencies nor "any suggestion that cryptocurrency cannot be a form of property".[50]

Despite signalling English judges' welcome pragmatism and their preparedness to treat cryptocurrencies as property, both the interlocutory decision in *Vorotyntseva* and the one in *Robertson,* failed to shed light on the legal basis of the would-be proprietary status of cryptocurrencies. Eventually, a more coherent and reasoned analysis of the issue was articulated in a legal statement released by the UK Jurisdictional Taskforce (UKJT) of the LawTech Delivery Panel ('the

[47] ibid (Moulder J).
[48] *Vorotyntseva v Money-4 Ltd, t/a Nebeus.com* [2018] EWHC 2598 (Ch).
[49] ibid [10] (Birss J).
[50] ibid [13] (Birss J).

Statement'). Albeit not technically binding, the Statement is still a highly persuasive authority and has already been relied upon in a few recent judgements.[51]

### C. The legal statement

In the main, the Statement finds that cryptocurrencies can in principle be treated as property.[52] In its discussion of property, the Statement appeals to the 'necessary characteristics' of property as identified by the House of Lords in *Ainsworth*: (i) definability; (ii) identifiability by third parties; (iii) power to affect (and be assumed by) third parties and; (iv) permanence or stability.[53] The Statement further adds (i) certainty; (ii) exclusivity; (iii) control and; (iv) assignability as other indicia, recognised in the case law to be critical to the proprietary status.[54] After recapping these alleged pre-requisites of property at common law, the Statement concludes that there is nothing automatically disqualifying cryptocurrencies from meeting all such conditions, in line with the High Court's approach in *Robertson* and *Vorotyntseva*.[55]

Still, the Statement acknowledges that there are some doctrinal complications in conceptualising cryptocurrencies as property. Above all else, there is the elephant in the room of the English case of *Colonial Bank v Whinney*.[56] In *Whinney*, Fry LJ held that "all personal things are either in possession or in action. The law knows no *tertium quid* [third thing] between the two".[57] That case has long been taken to state a fundamental proposition of law: only things that can be physically possessed and rights that can be claimed or enforced through legal action can be personal property – nothing else can.[58] Disquietingly enough, the Statement finds that cryptocurrencies can neither be physically possessed (they are by their very nature, intangible) nor embody any right capable of being enforced

[51] *AA v Persons Unknown Who Demanded Bitcoin on 10th and 11th October 2019, Persons Unknown Who Own/Control Specified Bitcoin, iFINEX trading as Bitfinex, BFXWW Inc trading as Bitfinex* [2019] EWHC 3556 (Comm); *Ruscoe v Cryptopia Ltd (in Liquidation)* [2020] NZHC 728 (New Zealand).

[52] UK Jurisdictional Taskforce (n 5); specifically, the Statement refers to 'cryptoassets' and not 'cryptocurrencies'. But, as the sections below will show, what is said of cryptoassets applies to cryptocurrencies as well (in a technical sense, cryptocurrencies are just a subset of cryptoassets).

[53] *National Provincial Bank v Ainsworth* [1965] 1 AC 1175, 1247-48 (Lord Wilberforce). This test has been subjected to heavy criticism for its apparent circularity: see Martin Dixon, *Modern Land Law* (Routledge 2018) 6 ('the definition is clearly circular, for only if a right is already proprietary is it capable of assumption by third parties (that is, of affecting people who did not create it). After all, the search for an answer to the question – does it bind third parties? – is often the very reason why we need to establish the proprietary or personal nature of the right in the first place.'); Gray (n 37); *Yanner v Eaton* (1999) 201 CLR 351 (HCA), 366.

[54] UK Jurisdictional Taskforce (n 5) para 39; *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886.

[55] UK Jurisdictional Taskforce (n 5) para 85.

[56] *Colonial Bank v Whinney* (1885) 30 Ch D 261 (CA).

[57] ibid 285 (Fry LJ). The House of Lords endorsed Fry LJ's dictum: (1886) 11 App Cas 426 (HL).

[58] UK Jurisdictional Taskforce (n 5) paras 66–84.

through legal action.[59] On this view, they are neither things in possession nor things in action.

Nevertheless, the Statement resists the conclusion that cryptocurrencies are not property. Instead of throwing in the towel and taking *Whinney* at face value, it notes that property has sometimes been recognised in things that were presumably neither things in possession nor things in action.[60] Take the milk quotas in *Dairywise Farms*, the waste management licences in *Re Celtic* and the carbon emission allowances in *Armstrong* – these were all held to constitute property, albeit failing to fit any doctrinal partition.[61] For the Statement, the case law is reason for hope: English law seems willing to stretch the doctrinal boundaries of property and dispense with watertight compartments if society and modern commercial needs so require. Pragmatically, the doctrine could be stretched in two ways: either by diluting the notion of 'things in action' and taking it as a catch-all phrase for all items of property that are not in possession, or by the admission of a third box of personal property (that of often-called 'intangibles').

In line with the Statement, many from the academic ranks have similarly expressed the view that cryptocurrencies are neither things in possession nor in action, whilst still trusting that a toolbox of 'intangibles' could be used to rescue them from legal limbo.[62] All things considered, the legal debate exudes optimism: despite the House of Lords' judgement in *Whinney*, cryptocurrencies will somehow elbow their way into property law. However, there are reasons to be more cautious and to endorse a "pessimism of the intellect, optimism of the will"[63] in Antonio Gramsci's words. As a matter of fact, *Whinney* has never been overruled. Sitting on the Court of Appeal in *Your Response* in 2014, Moore-Bick LJ found that *Whinney* made it "very difficult to accept that the common law recognises the existence of intangible property other than [things] in action (apart from patents, which are subject to statutory classification)".[64] Interestingly, many statutes expressly stretch the notion of property to include things in action and "other intangible property".[65] The fact that 'other intangible property' is invoked *separately* from (and in addition to) 'things in action' may precisely suggest that the latter category is no catch-all receptacle. Were this the case, we would be left with one option to squeeze cryptocurrencies into property law – namely, that of hoping they could fit the space of 'intangibles', despite it being a judicially-undefined category and one whose very

[59] ibid.

[60] ibid paras 82–84.

[61] *Dairy Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 (Ch); *Re Celtic Extraction Ltd* [1999] EWCA Civ 1835, [2001] Ch 475; *Armstrong v Winnington* [2012] EWHC 10, [2013] Ch 156.

[62] By way of example, see David Fox, 'Cyber-currencies in private law' [2016] OtaLawFS 13.

[63] Francesca Antonini, 'Pessimism of the Intellect, Optimism of the Will: Gramsci's Political Thought in the Last Miscellaneous Notebooks' (2019) 31(1) Rethinking Marxism 42.

[64] *Your Response v Datateam Business Media* (n 5) [26].

[65] By way of example, see the Theft Act 1968, s 4(1), the Proceeds of Crime Act 2002, s 340(9)(c), and the Fraud Act 2006, s 5(2)(b).

existence is still shrouded in doctrinal mystery. Sure enough, the ultimate threat would still loom large: if *Whinney* were to be reaffirmed by the Supreme Court and appeal to the category of 'intangibles' expressly undercut, cryptocurrencies could quickly be expunged from the proprietary compass.[66] However, a crucial point must be noted. The *Whinney* challenge stands *only* as long as we concede that cryptocurrencies are neither things in possession nor things in action. Our point is that we should not make this concession.

Against the Statement and the bulk of legal scholarship, we argue that cryptocurrencies are things in action. The argument we provide to this effect is structured as follows: Firstly, we show that cryptocurrencies are smart-contractual rights, that is, everyone holding a 'coin' has ultimately a smart-contractual right or, that is the same, a cryptographic faculty to spend (or unlock) the coin itself. This holds true both in the UTXO model (where each user's coin is nothing but an unspent transaction output) and in the account-based model (where each user's coin reflects their balance in the system). Secondly, we show that smart-contractual rights can indeed be considered contractual rights, in light of recent developments and of the Statement itself. Thirdly and lastly, by showing that cryptocurrencies are ultimately contractual rights, we conclude that they can indeed be classified as things in action. Therefore, they can be property irrespective of the fate of *Whinney* and its alleged doctrinal bipartition.

## IV. Cryptocurrencies as Smart-Contractual Rights

In this section, we will support the following claim: in cryptocurrencies, the 'coins' can be identified with, and ultimately *are* smart-contractual rights. In fact, as our argument will show, cryptocurrencies are always underpinned by a specific class of smart contracts. We can only appreciate this point once we acknowledge the technical similarity in how cryptocurrencies and smart contracts are implemented. This technical fact, albeit discussed in the specialist literature,[67] has seemingly gone unnoticed in English legal scholarship. As a result, its far-reaching implications for the legal categorisation of cryptocurrencies have never been explored. Although a very similar argument can be made in general for all *cryptoassets*, we will focus on cryptocurrencies for the purposes of this article.

Let us start from the basics. In order to implement cryptocurrencies, we have to answer the fundamental question of how to algorithmically represent money. Generally, this can be done via two algorithmic models: the Unspent

[66] See also Michael G Bridge and others, *Law of Personal Property* (Sweet & Maxwell 2018) paras 7–128.

[67] Simon Geiregat, 'Cryptocurrencies Are (Smart) Contracts' (2018) 34(5) Computer Law & Security Review 1144; Buterin (n 23) 36.

Transaction Output (UTXO) model and the account-based model.[68] The choice between the two depends on a technical property (so-called 'statefulness') that a given blockchain may or may not have.[69] Informally, the difference between the two models roughly maps onto the one between banknotes and debit cards. In the case of banknotes, as with UTXOs, money is represented by a set of notes of a certain denomination currently in one's possession. On the other hand, with debit cards, money is represented at any given time by a balance associated with one's account.

### A. UTXOs as smart-contracts

The UTXO model is most notably used in Bitcoin and was first introduced by Satoshi Nakamoto. In these types of blockchains, the total supply of coins is represented by the set of currently valid UTXOs, that is, the *results* of transactions confirmed by the network which have not been spent yet. In particular, each transaction contains inputs and outputs (adding up to the same value), and each input must refer to a previous unspent output. Thus, double-spending can be detected when two or more competing transactions seek to spend the same output. A balance for a party can here be understood as the sum of the unspent outputs currently in their wallet.

In this framework, a transaction works as follows. Suppose Alice has two 10 Bitcoins UTXOs in her wallet (a balance of BTC20) and she wants to send BTC15 to Bob. She can create a transaction with her two UTXOs as inputs, and as outputs BTC15 for Bob and BTC5 as her change. After the transaction is settled, these outputs will become the new UTXOs in their respective wallets. Since only Alice can spend her coins, the spender(s) must prove cryptographical ownership of the UTXO in order to build the transaction. This is typically done by providing a digital signature of the output with a specific private key, but possibly by a more complicated criterion (such as providing multiple signatures), which is specified by

[68] 'Ethereum Design Rationale' (*Ethereum Wiki*) <https://eth.wiki/en/fundamentals/design-rationale> accessed 4 November 2020. For alternative models, see Colin LeMahieu, 'RaiBlocks: A Feeless Distributed Cryptocurrency Network' 8 <https://content.nano.org/whitepaper/Nano_Whitepaper_en.pdf> accessed 4 November 2020; Serguei Popov, 'The Tangle' (2018) <https://assets.ctfassets.net/r1dr6vzfxhev/2t4uxvsIqk0EUau6g2sw0g/45eae33637ca92f85dd9f4a3a218e1ec/iota1_4_3.pdf> accessed 4 November 2020. It is worth noting that the arguments we make can be also applied to these cases, but are omitted for brevity.

[69] Statefulness refers to whether a blockchain acts only as a method of timestamping transactions, or it also explicitly associates a "state" with each block.

the UTXO itself. No matter the spending criterion, the coins 'can only be either spent or unspent'.[70]

Since spent coins cannot be spent again, each UTXO cryptocurrency offers only one cryptographically-enforceable right: *to* spend, *or* unlock, *the coins only once, at any time, by using it as an input in a transaction after satisfying the pre-agreed criterion*. Sure enough, by 'right', we do not yet mean 'legal right'. What we mean is simply that spending your coin is something that the platform recognises as cryptographically legitimate: you just have the possibility of doing so.[71] Whether you have the faculty of spending or unlocking a coin is something determined through cryptographic computations, executed under the consensus of a peer-to-peer network and in a decentralised and trustless way. We will now show that this right to spend or unlock the coin is in fact smart-contractual. To do so, it is necessary to clarify what is meant by 'smart contract'.

Surely, giving an exact definition of a smart contract is impracticable owing to the historical evolution of the term. Given the relevance of the project, we will follow the informal definitions given in Ethereum: namely, that of smart contracts as 'cryptographic boxes that contain value and only unlock it if certain conditions are met,' or pieces of code implementing arbitrary rules to directly control digital assets.[72] It seems evident that UTXOs meet both these definitions: they encode the conditions under which coins may be spent. It follows that we may consider the UTXOs a special class of smart contracts.

Besides, it is worth noting that some blockchains allow users to *specify* the unlocking conditions for the outputs by expressing them in custom ('mini') programming languages. Such UTXOs are often referred to as 'contracts'.[73] They are also mentioned in the Ethereum White Paper, which states that "even without any extensions, the Bitcoin protocol actually does facilitate a weak version of a concept of smart contracts".[74] Therefore, we reach our desired conclusion. If UTXOs are just smart contracts, each 'coin' under the UTXO model is ultimately

[70] Buterin (n 23) 12.

[71] This is why a common motto by cryptocurrency users is 'not your keys, not your coins'. As a legal example of this, see the US Case *Archer v. Coinbase, Inc.* 53 Cal App 5th 266 (2020).

[72] Buterin (n 23) 13.

[73] 'Contracts — Bitcoin' <https://developer.bitcoin.org/devguide/contracts.html> accessed 4 November 2020.

[74] Buterin (n 23) 11.

just a smart-contractual right: having a Bitcoin (or any other UTXO cryptocurrency) just means having a smart-contractual right to unlock an output.

### B. Accounts as smart-contracts

We are yet to show that the same holds true for account-based cryptocurrencies. In this model, each agent in the network is assigned a balance, a non-negative number representing the quantity of assets in their possession.[75] To parallel the example above, suppose Alice has 20 Ether (monetary units in Ethereum) as her balance, and wishes to transfer ETH15 to Bob, whose current balance is ETH10. Seeing that the amount transferred is not greater than the balance, the network will approve the transaction, subtracting ETH15 from Alice's balance and adding them to Bob's. The resulting balances are ETH5 for Alice and ETH25 for Bob.

We can here reiterate the reasoning followed above for UTXOs. We can identify each coin under the account model as a cryptographically-enforceable right (or faculty) *to spend any fraction of the balance at any time by providing a digitally signed transaction with the private key that controls the account*. Since this happens under the consensus of the blockchain network and the account serves as a cryptographic 'box' holding the asset, the account itself meets the given definitions of a smart contract. Again, we reach our desired conclusion. If blockchain accounts are just smart contracts, then the 'coins' under the account-based model are nothing but smart-contractual rights: briefly put, having some Ether (or any other account-based cryptocurrency) just means having a smart-contractual right to spend or unlock a fraction of one's balance.

## V. Smart-Contractual Rights as Contractual Rights

In the preceding section, we have shown that 'coins' are always ultimately smart-contractual rights, both in the UTXO model and in the account-based model. We now turn to the second critical point in our argument: namely, that cryptocurrencies are also *contractual* rights by virtue of their smart-contractual nature.

No authority has settled the status of smart contracts in English law.[76] Nevertheless, the Legal Statement handed down by the UK Jurisdictional Taskforce (explored above) notes that smart contracts are most likely to be treated as traditional contracts, and enforced as such, by English courts.[77] The Statement registers a few main features of smart contracts: (i) automaticity; (ii) use of a networked system

[75] Gavin Wood, 'Ethereum: A Secure Decentralised Generalised Transaction Ledger' (2014) 3 <https://ethereum.github.io/yellowpaper/paper.pdf> accessed 4 November 2020.

[76] For a useful overview of the topic, see Larry A DiMatteo, Michel Cannarsa and Cristina Poncibò, *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge University Press 2019).

[77] UK Jurisdictional Taskforce (n 5) para 136.

relying on cryptographic authentication, decentralisation and consensus to execute contractual performance and; (iii) obscurity of contractual terms to those unfamiliar with the relevant programming language.[78] In the Statement's view, none of these features should disbar smart contracts from being enforceable just like conventional contracts.[79] Contract law is ultimately about enforcing promises and does not require contracts to have a particular form.[80] As a consequence, the fact that the smart-contractual promises are meant to be executed automatically or in a 'mechanistic way' should make no difference to their legal enforceability.[81] Nor should one think that there is simply no scope for the law to operate with smart contracts. Sure enough, smart contracts may prevent intentional non-performance (or make it very much harder) and leave smaller room for factual disputes or conflicting interpretations of terms. Still, unpredicted events external to the platform (e.g., a system failure) may affect contractual execution, and the code may sometimes yield unexpected or unintended outcomes. In either case, any ensuing dispute may be settled only by legal means and should therefore be amenable to adjudication.

Although it usually does not require contracts to have any given form, English law will enforce only those promises that satisfy the traditional conditions for the formation of a contract: agreement (that is, offer and acceptance), intention to be legally bound and consideration.[82] Some smart contracts may satisfy all these conditions; others may not. The smart contracts underlying cryptocurrencies usually will. Consider the scenario where Alice acquires a UTXO.[83] Alice is (objectively) accepting the terms of the platform she chooses to transact on, whatever that may be: all participants in the network will 'promise' Alice to allow her to unlock any of her unspent transaction outputs (UTXO) if she satisfies the underlying cryptographic criteria, and she will promise the same to any other participant on the platform.[84] The agreement is inferred by the parties, *objectively* accepting the code and transacting on its basis.[85] Similarly, consideration is established through the parties' mere exchange of 'promises'.[86] Admittedly, it may

78 ibid para 135.
79 ibid paras 136-148.
80 ibid.
81 ibid para 136.
82 ibid para 137.
83 The same applies by analogy to the Accounts model, and therefore to all cryptocurrencies exhaustively.
84 Promises are not express, but they rarely can be in smart contracts running on decentralised systems. As the Legal Statement suggests, new contractual scenarios will require new (and unusual) forms of conduct to be considered: UK Jurisdictional Taskforce (n 5) para 146.
85 UK Jurisdictional Taskforce (n 5) para 148.
86 See above (n 84).

seem harder to establish the parties' intention to be legally bound, all the more so given that the users may often not even know each other's identity. However, the Statement itself suggests a nice way out: that is, analogising this contractual scenario to unincorporated associations (like clubs). Here, the association itself has no legal status, but all its members contract with the membership taken as a whole: crucially, their intention to be legally bound is objectively inferred from their decision to join the association in awareness of its rules. The Statement uses this analogy to conclude that the parties to a Decentralised Autonomous Organisations (or 'DAOs', defined by one party publicly deploying a platform – i.e., a code – and other parties transacting on the basis of the smart contract running the platform) should be contractually bound to each other. Ironically, Bitcoins can be considered the first fully-operational DAO, and all platforms underlying cryptocurrencies under our previous analysis can too.[87] What is more, the Statement reminds us of a fundamental point: "as the 'contracting' diverges further from traditional contractual models, less conventional conduct will need to be considered".[88]

All things considered, the smart contracts running cryptocurrencies in both the UTXO and account-based models are most likely to be treated and analysed as enforceable contracts. It follows that, if the cryptocurrencies themselves are shown to be smart-contractual rights (as we showed above), then they are also proven to be *contractual* rights.

## VI. Contractual Rights as Property

So far, we have established two critical points: namely, that (i) cryptocurrencies (or 'coins') are smart-contractual rights; and, by way of corollary, that (ii) cryptocurrencies are contractual rights too. We now turn to our last point and final link in our argumentative chain: namely, that it follows from their characterisation as contractual rights that cryptocurrencies are *property*.

This last point is not a problematic one to make. It is an undisputed proposition of law that contractual rights are things in action.[89] In *Torkington v Magee*, things in action were indeed described as "all personal rights of property which can only be claimed or enforced by action and not by taking physical possession".[90] It nicely follows that, if cryptocurrencies are contractual rights, then they are things in action too. On this view, it is doctrinally straightforward to conclude that

[87] Ying-Ying Hsieh and others, 'Bitcoin and the Rise of Decentralized Autonomous Organizations' (2018) 7 Journal of Organization Design 14.

[88] UK Jurisdictional Taskforce (n 5) para 146.

[89] See also WS Holdsworth, 'The History of the Treatment of "Choses" in Action by the Common Law' (1920) 33(8) Harvard Law Review 997.

[90] *Torkington v Magee* [1902] 2 KB 427, 430 (Channell J).

cryptocurrencies are property. Our contribution to the debate is precisely that this conclusion stands *regardless* of the fate of *Whinney* and its *prima facie* bipartition of property into things in possession and things in action only.

## VII. Conclusion

In the present article, we offered an easy, yet largely overlooked solution to the crypto-property puzzle. Namely, to treat cryptocurrencies as things in action. Finding that cryptocurrencies reflect no legal rights, most scholars and the Legal Statement itself quickly dismiss the things-in-action option out of hand. This move is unwarranted. By closer technical inspection, cryptocurrencies are shown to be *smart-contractual* rights: each 'coin' is ultimately a cryptographically-enforceable faculty to unlock an output in the UTXO model or spend any fraction of one's balance in the account-based model. If smart contracts are treated like ordinary contracts, rights under smart contracts are nothing but mere contractual rights. We showed that the smart contracts running cryptocurrencies are most likely to be treated as enforceable contracts. It follows that, by virtue of their smart-contractual nature, cryptocurrencies are indeed contractual rights and, therefore, things in action. Our hope is that this may prove a doctrinally-watertight way of concluding that cryptocurrencies can be property: and crucially, one that does away with the need to interpret very loosely, or even turn a blind eye to, Fry LJ's judgement in *Colonial Bank v Whinney*. We no longer have to overstretch the category of 'things in action' or rely on an undefined category of 'intangibles' to fit the crypto-universe into English property law discourse. By virtue of their smart-contractual (and thereby, contractual) nature, cryptocurrencies are already property in their own right.

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# Protection of Political Liberty in the British Empire: Behind the Double-Edged Sword

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Abstract

In the second half of the 19th century, a firm belief was held amongst Englishmen that the common law provided effective protection of civil liberties. This picture, however, came to be challenged when the common law applied beyond the borders of the metropolis, in the wider British Empire. This article proposes a framework to unpick the precise role played by the common law in protecting civil liberties throughout the Empire. By focusing on some central cases, two conflicting pictures emerge: on the one hand, the common law seemed to protect civil liberties; on the other, it enabled them to be thwarted. This points to the conclusion that in this period, the common law was instrumentalised to further conflicting political aims.

*Keywords: common law, civil liberties, British Empire, habeas corpus, Kwok A Sing*

## I. Introduction

Dicey's *Law of the Constitution* expresses a firmly held belief in English society that the common law unwaveringly protected political liberties for English subjects.[1] Whether this was true for subjects in the wider British Empire came to be considered at the end of the nineteenth century, when a number of 'rule of law moments' came to the fore:[2] While prisoners from Upper and Lower Canada were

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1 Michael Lobban, 'Habeas Corpus, Imperial Rendition, and the Rule Of Law' (2015) 68(1) Current Legal Problems 27.

2 Michael Taggart, 'Ruled By Law?' (2006) 69(6) Modern Law Review 1006, 1024.

able to challenge their deportation to Van Diemen's land,[3] it was not evident that the common law always protected political liberties. Indeed, the brutally repressed 1865 rebellion in Jamaica, where *habeas corpus* had been suspended in favour of martial law, showed how the common law could also be used to undermine liberties in the Empire.[4]

The common law was used in this period as a double-edged sword, effective in the protection of civil liberties in some instances, thwarting them in others. Section II will unpick the term 'political liberties' by distinguishing 'political rights' from 'civil'.[5] The focus will be on this second notion of 'civil liberties'. Section III explores the times when the common law was effective in protecting civil liberties. Section IV examines cases in which it thwarted them. Whether or not the common law was used to protect these liberties depended on which facets of the common law were put forward. By comparing and contrasting different ways in which the common law apprehended civil liberties in the nineteenth century, much will be said about the common law itself, specifically on its malleable and instrumental character. Ultimately, the conclusion will be drawn in Section V that protection of civil liberties in the Empire greatly depended on prevailing political attitudes.

## II. 'Political Liberty' – Breaking Down The Concept

The nebulous notion of 'political liberty' invokes different ideas relating to both positive and negative rights. Under this umbrella phrase, rights to freedom from state power are conflated with rights which invest individuals with a role in the conduct of their government. Mitchell proposes a useful distinction to make sense of this term.[6] Indeed, he notes that during the nineteenth century, a bright line was drawn between 'civil rights' (which were enjoyed by all) and 'political rights' (reserved for a small group of persons). A quasi-consensus existed in the political sphere which opposed granting these 'political rights' to subjects of the wider British Empire. John Stuart Mill, for example, firmly believed that uncivilised colonies should be run by bureaucrats selected by the metropolis – London would, in this way, keep a firm hold on overseas territories.[7] Expansion of the franchise to colonised territories was not credibly debated in England until the era of decolonisation. Furthermore, when this did happen, it was not the doing of

[3] Alfred A Fry, *Report of the Case of the Canadian Prisoners: With an Introduction of the Writ of Habeas Corpus* (A Maxwell 1839).

[4] See Rande W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2005).

[5] Taggart (n 2) 1013.

[6] Leslie Mitchell, *The Whig World 1760-1837* (Hambledon and London, 2005) ix, 141.

[7] See John Stuart Mill, *Collected Works of John Stuart Mill: Writings on India*, edited by John M. Robson, Martin Moir and Zawahir Moir (University of Toronto Press 1990) Vol XXX.

the common law, but rather the result of political struggle. To avoid anachronistic assessment of the period, and to centre the debate on aspects where the common law was determinant, this article will focus on the first notion of 'civil rights' or 'civil liberties', those which supposedly extended to all British subjects. This notion specifically addresses the liberty of individuals from the state – its protection therefore turns on the restraint of state authority by law.[8]

## III. The Common Law – Partially Effective in Protecting Civil Liberties in the Empire

### A. Two examples of the common law effectively protecting civil liberties in the empire

Several 'rule of law' moments in the nineteenth century captured the effective role sometimes taken by the common law in protecting civil liberties throughout the Empire. A first example occurred in the aftermath of the 1837-1838 rebellions in Upper Canada. Authorities decided against holding mass trials against the rebels for reasons of political expediency. Rather, the policy adopted consisted in punishing certain leaders with transportation to Van Diemen's land without trials. A writ of *habeas corpus* was sought by these prisoners in English courts. In the absence of conviction and sentence, the Queen's Bench struggled to find any legal power to transport these men. Thus, they were released.[9] This case raised two important points about the working of the common law. Firstly, the Canadian authorities' obdurate decision to avoid submitting rebels to a jury trial showed that they feared the possibility of 'normal' common law channels effectively protecting these men's civil liberties. The second point is that civil liberties were upheld through application of *habeas corpus*, even where this opposed the political will of both government and the judges. As Michael Lobban notes, this episode produced a sense that the common law was disseminating a 'cultural' rule of law value throughout the Empire.[10]

Another situation in which the common law was used to protect civil liberties arose in 1871, when mutineers on a 'coolie' (indentured labourer) ship from China sought the protection of British-ruled Hong-Kong. China sought to

[8] Abraham D. Kriegel, 'Liberty and Whiggery in Early Nineteenth-Century England' (1980) 52(2) Journal of Modern History 253.

[9] See Cassandra Pybus, 'Patriot Exiles in Van Diemen's Land' in Greenwood and Wright, *Canadian State Trials: Volume Two: Rebellion and Invasion in the Canadas*, 1837-1839 (University of Toronto Press, 2002) 190-92.

[10] Lobban (n 1) 30.

extradite one such subject, Kwok A Sing, for him to face the same punishment as the other mutineers - summary execution. The case was heard in Hong Kong by the radical abolitionist Chief Justice Smale.[11] In a surprising judgement, Smale CJ refused China's request. Several reasons for his decision were put forward. Firstly, Smale CJ refused extradition on the ground that China could not ask for the extradition of a prisoner whose crime was committed on the high seas.[12] Secondly, he held that Kwok, in a bid to break free, was justified in murdering the captain and crewmembers – this, he believed, equated to slave emancipation. He depicted Kwok as rightfully exercising self-defence.[13] Whether Smale CJ was justified in comparing the situation of slaves and coolies was fiercely debated,[14] but did not detract from the fact that he used the slave narrative to invoke common law protection. Influencing Smale CJ's judgement was a sentiment of deep distrust in the Chinese justice system, combined with an idea of the moral superiority of English common law. Smale CJ stated in his judgement that "China could not be trusted as a nation to do justice within her own territories".[15] The common law was used in this case as a shield, effectively protecting against the frustration of civil liberties in the Empire and the wider world.

### B. What aspects of the common law were put forward to protect civil liberties in the empire?

Specific facets of the common law were emphasised in the above cases, as well as in other cases where the common law effectively protected civil liberties throughout the Empire. These were: (i) viewing the common law as a unitary jurisdiction and (ii) thinking of common law values as universal.

#### *(i) Empire as One Common Jurisdiction with the Same Principles Applying in the Same Way Throughout*

Portraying the law of England and Wales as applying unitarily throughout the Empire enabled constitutional protections to be exported outside Britain. Importantly, these protections would apply in the same way as they did in the metropolis. Although some argued that in practice the common law did not apply

[11] Elliott Young, 'Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire' (2015) 227(1) Past & Present 121,123.

[12] ibid, 139.

[13] Smale CJ, 'Supreme Court, Hong Kong, 25 March 1871 — Judge Chambers Before the Hon. Chief Justice Smale, in the Matter of Kwok-a-sing on Habeas Corpus — Judgment', 195-207.

[14] Philip A Kuhn, *Chinese Among Others: Emigration in Modern Times* (Lanham MD: Rowman and Littlefield Publishers, 2008) 113-14.

[15] Smale CJ, 'Supreme Court, Hong Kong, 25 March 1871 — Judge Chambers Before the Hon. Chief Justice Smale, in the Matter of Kwok-a-sing on Habeas Corpus — Judgment', 199.

as one common jurisdiction,[16] the political and legal world persistently upheld the idea that it did. The cases of *Upper Canada* and *Kwok A Sing*, but also the case of *John Anderson*,[17] are examples of this: the constitutional writ of *habeas corpus* was invoked to protect the civil liberties of subjects throughout the Empire. As such, these judgements upheld that 'fundamental principles',[18] inherent to the common law, restricted the authorities' power to act, regardless of where the action was taking place.

*(ii) Common Law Values as Universal*

Transpiring from Smale CJ's judgement in the case of *Kwok A Sing*, where he discards the Chinese legal system, is a vision of the common law as morally superior to any opposing forms of law. The common law represented, on this view, a universal good as far as it diffused rights throughout the Empire. Equipped with universal principles, the common law was empowered to assert its jurisdiction wherever it sought to do so. As Young notes, on a strictly legal basis, the assertion of jurisdiction in the case of *Kwok A Sing* was rather questionable: "it was, after all, a British extraterritorial court in Hong Kong that was asserting jurisdiction over a French ship that left from a Portuguese territory and was on the high seas when the rebellion occurred".[19] And yet, in the name of universal rights, it was found to fall under the British courts' jurisdiction. Even when it was appealed, the Privy Council did not question the common law's right to intervene in such cases.[20]

This point connects narrowly with the aforementioned point about the unitary application of the common law. Indeed, if the rights and values safeguarded by the common law purport to have a universal scope, then the way in which the common law applies can itself only be unitary. It would be a logical fallacy to both assert that rights are universal, and then to refuse to protect these very same rights universally. The fear, within this strand of thought, was that if a different, weaker, standard of legality applied in the Empire, nothing would insulate England from being subjected to the corrosive influence of a weakened standard of legality.[21]

Such a position reflected the political thought of John Stuart Mill, who saw the English as endowed with a civilizing mission, bringing universal rights to the

[16] See Opinion of A-G Sir William Robson in *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA) [42].

[17] *Ex parte Anderson* (1861) 3 El & El 487, 121 Eng Rep 525, 30 LJQB 129 (QB).

[18] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Joseph Butterworth & Son 1820) 29.

[19] Young (n 11) 128.

[20] ibid.

[21] See Ian Baucom, *Out of Place: Englishness, Empire, and the Locations of Identity* (Princeton University Press 1999).

Empire and the wider world.[22] This was characteristic of Anglo-centric thought in the period. As Stapleton notes, a certain 'legal mindednesses' had come to be subsumed with 'Englishness' in collective consciousness.[23] And yet, although this played to the advantage of certain individuals such as Kwok A Sing, whose civil liberties would doubtlessly have been thwarted under a different jurisdiction, it also dragged with it an inherent justification of imperialism.[24] More specifically, the unchallengeable value of the common law created a moral obligation on the English to diffuse their system universally.[25] Exporting the rule of law was in fact one of the Empire's self-proclaimed justifications. Therefore, thinking of the common law as a universal good may have been instrumental in protecting civil liberties throughout the Empire, but it was also highly problematic.

## IV. The Common Law Could also be Used to Thwart Civil Liberties

### A. Two cases where the common law effectively thwarted civil liberties

Although at times the common law effectively protected civil liberties, it also had the capacity to justify curbing these liberties in the Empire. This occurred in several cases which challenged detention without trial, such as that of *Ex parte Sekgome*.[26] Because he was viewed as a political threat to British rule in Bechuanaland, Sekgoma was summarily detained by the region's High Commissioner under an Order in Council. He sought to obtain a writ of *habeas corpus*, arguing that the king's prerogative was limited by fundamental constitutional principles. This was refused.[27] The proclamation ordering detention was viewed as an exercise of crown power – the exercise of prerogative was limited by no principle. As such, Sekgoma's detention was justified under the law.

The Jamaican uprisings of 1865 also provided fertile ground for the common law to hamper civil liberties. After several rebellions occurred in the region of Morant Bay, Governor Eyre proclaimed martial law to ruthlessly suppress political uproar.[28] Within this context, the event that spurred the greatest debate involved Eyre's political opponent, George William Gordon, who had no hand in the uprisings. Yet, Eyre took advantage of the proclamation of martial law

[22] John Stuart Mill, *On Liberty* (2nd edn, John W Parker and Son 1859) 135-6.
[23] Jane Stapleton, 'Dicey and his Legacy' (1995) 16 History of Political Thought 234, 255.
[24] Young (n 11).
[25] ibid.
[26] *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA) [612].
[27] ibid.
[28] Kostal (n 4).

to detain Gordon, subject him to a sham trial in a martial court, and summarily execute him. As Dyzenhaus notes, Eyre was encouraged in his actions by the tacit bargain between government and the military according to which the acts of the military would not be subjected to justice.[29] Yet, this event caused political furore in England, so much so that Eyre and other officials were brought before the courts. Nevertheless, neither of the three trials that were held found Eyre and his officials to be acting outside the scope of their powers. Rather, they found that the common law empowered colonial legislatures to pass acts, such as the proclamation of martial law, which go against all 'fundamental laws'.[30] Gordon's fate was sealed, according to the common law courts, in strictly legal terms.

### B. Which aspects of the common law were put forward to thwart civil liberties in the empire?

Several facets of the common law point to the idea that it could also be effective in thwarting civil liberties throughout the Empire. This was the case (i) when a highly formalistic understanding of law was adopted and/or (ii) when the application of the common law was suspended.

#### *(i) A Highly Formalistic Understanding of Law within the Common Law*

A highly formalistic understanding of law enabled the Empire to be cut up into different jurisdictions. Indeed, on this reading, all that mattered was that laws were made by the correct legislative channels. Once this was guaranteed, the authorities of the Empire did not need to worry about protecting constitutional rights when applying law beyond the metropolis. A prime example of this is Bengal Regulation III, which effectively removed the writ of *habeas corpus* for the whole of India via statute.[31] Farwell LJ's dicta in the case of *Sekgome* also highlighted the supreme importance of tracking authority for action: he defended the High Commissioner's decision on the basis that it was taken under the Foreign Jurisdiction Act, which itself was a proper delegation of sovereign power from Parliament.[32] On this view, Parliamentary Sovereignty was the sole limiting constitutional principle. There existed no fundamental law which could limit the

[29] David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 U Toronto LJ 1.

[30] See William Francis Finlason, 'Report of the Case of The Queen v Edward John Eyre, on His Prosecution, in the Court of Queen's Bench, For High Crimes and Misdemeanours Alleged to have been Committed by Him in his Office as Governor of Jamaica; Containing the Evidence, (Taken from the Depositions), the Indictment, and the Charge of Mr. Justice Blackburn' (Chapman and Hall 1868) xxii (Blackburn, Case of *The Queen v Edward John Eyre*).

[31] Bengal State Prisoners Regulation (III of 1818).

[32] *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA), 615 (Farwell LJ).

will of Parliament. Through this highly formalistic understanding of law, however, it was possible for entirely different standards of legality to apply in the Empire.

*(ii) When Common Law Suspended its Own Jurisdiction by Allowing Application of Martial Law and Prerogative Powers*

Armed with the unwavering certitude that Parliamentary Sovereignty is the common law's sole constitutional principle, Parliament could effectively suspend the application of the common law. This occurred during the Jamaican uprisings when martial law was violently used to repress political opponents, but also when the British Empire was acting under the king's prerogative, as was the case in 1923 in Egypt.[33] According to Dicey, the use of such extraordinary powers did not undermine the principle of the rule of law – indeed, such powers would only be conferred when the rule of law itself was imperilled.[34] What Dicey's argument did not account for, however, was the wide and arbitrary use made of these powers. Ordinances were frequently employed for detention and deportation of political activists throughout the Empire,[35] in situations that could rarely be qualified as 'threats to the rule of law'. Kostal shows that, strikingly enough, the common law not only bowed down to executive power in times of emergency, but also provided a space within the constitutional framework for claims of power and survival to go unchallenged.[36] It effectively created the mechanism for suspending its own jurisdiction– and with it any protection of civil liberties.[37] Considering this, Dicey's assertion that "Englishemen are ruled by the law, and the law alone"[38] can be deemed, as Taggart puts it, "wishful thinking".[39] In any case, it was patently wishful thinking for subjects of the wider Empire.

One potential objection could be raised here, contending that breach of civil liberties in these cases was not strictly the fault of the common law, but rather the fault of political exercise. William Finlason, who proposed a theorisation of martial law, argued in this vein that when a war or rebellion arises, the common law is suspended.[40] It is replaced by acts of state which exist wholly outside the legal domain. This argument is not convincing, because it invites a logical fallacy –

[33] Lobban (n 1) 53.

[34] AV Dicey, *Lectures Introductory to the Law of the Constitution* (The Oxford Edition of Dicey, JWF Allison (ed), OUP 2013) 164.

[35] Lobban (n 1) 58.

[36] Kostal (n 4).

[37] Dyzenhaus (n 29) 11.

[38] AV Dicey, Introduction to the Study of the Law of the Constitution (first published 1885; London: Macmillan and Co, 8th ed 1915) 198.

[39] Taggart (n 2) 1025.

[40] William Francis Finlason, *A Treatise of Martial Law: As Allowed by the Law of England: In Time of Rebellion* (Stevens & Sons 1866).

namely, it purposefully ignores that in the first hand, the common law enabled the conditions for its own replacement by martial law and prerogative. At the start of the chain lies the common law. As such, the common law *is* to blame in these cases for failing to protect civil liberties throughout the Empire.

### C. What view was underpinning this conception of the common law?

A short point must be added to understand the political thought of those who put forward these facets of the common law. The predominant perspective here was different to the aforementioned 'universality' view. Indeed, subjects of the wider Empire were not seen as equally deserving of civil liberties. Rather, a racially informed perception of rights attribution was adopted. Farwell LJ, in the case of *Sekgome*, asserted that the "bulwarks of liberty might, if applied there [Africa]], well prove the death warrant of the whites".[41] This echoed the perspective of Vaughan Williams LJ, who, in the same case, contended that Mr Sekgoma was not a full British subject. Lobban notes that in Williams' view, "although the Englishman might be able to obtain a writ of *habeas corpus*, the African could not".[42] Such a vision informed these judges' use of the common law and allowed them to construe it in a way which effectively legalised the frustration of civil liberties throughout the Empire.

## V. Instrumental Nature of the Common Law - Allowing Political Views to Prevail

Emanating from the above discussion is an image of the common law as an instrument used to further divergent ends: At times, it enabled the protection of civil liberties in the Empire; at others, it undermined them. This depended, as has been argued, not only on the facets of the common law brought forward but also on its timing. The truth about the common law is that it captured and represented all these facets – it could not be subsumed into one.

As such, it then becomes important to look at the ends to which the common law was applied. This article has hinted at the contrasting political views which underpinned the contrasting uses of the common law. On the one hand, a liberal, Millian perspective informed the use of the common law to protect civil liberties.[43] English values, including the common law system, were seen as a

[41] R v Earl of Crewe, Ex parte Sekgome [1910] 2 KB 576 (CA) [616] (Farwell LJ).

[42] Lobban (n 1) 46.

[43] John Stuart Mill, *Three Essays: On Liberty, Representative Government, and the Subjection of Women* (Oxford University Press 1976) 409.

universal good which needed, on a moral imperative, to be diffused throughout the Empire.[44] It represented a form of political superiority over competing systems which nevertheless affirmed equality of all the Empire's subjects before the law. On the other hand, a more conservative, racist-informed perspective of rights used the common law as an instrument for undermining civil liberties in the Empire. To be precise, on this view, subjects of the Empire were not even seen as having civil liberties that could be thwarted – indeed, such liberties existed only for the Englishman.[45]

## VI. Conclusion

In summary, the common law was not fully effective in protecting civil liberties within the Empire. At times, it could be effective, when the common law was viewed as applying unitarily throughout the Empire and when English common law values were thought of as universal. However, in many other circumstances, the common law thwarted civil liberties – this occurred by way of a highly formalistic understanding of law, one which enabled it to suspend the protection of fundamental liberties. Transpiring from the discussion above is a picture of the common law as highly instrumental, made up of different facets that could be used to advance different causes. As such, the ends which were sought during this period are much more important in understanding the protection of civil liberties than an analysis of the common law itself. We have explored the tension between prevailing political attitudes during the nineteenth century, and seen how, ultimately, they instrumentalised the common law to set forth their world view.

I wish to raise two additional points in this conclusion. The first is that our study of the common law purposefully steered away from delving into a discussion of the 'rule of law'. Although this was done to avoid confusion, it must be noted that an important and fruitful overlap exists between the notions of common law and rule of law, as they appeared during this period. Exploring their relationship may therefore produce interesting insights. The second point is that our discussion confined itself to assessing how the common law protected civil liberties within the Empire. This was done to reflect the way in which liberties more generally were conceived during the nineteenth century. As Kostal notes, for instance, the liberal Jamaica Committee was set up explicitly to "defend public liberty from the incursions of the state".[46] Yet, liberty has since then taken on a fuller meaning, invoking not simply 'liberty from' the state's power, but also a more Arendtian

[44] Taggart (n 2) 1012.
[45] Lobban (n 1) 46.
[46] Kostal (n 4) 159.

sense of 'liberty to' act within the political sphere.[47] It may be of interest to assess the colonial era considering this fuller notion of liberty, exploring the extent to which subjects of the Empire were invested in the exercise of government.

[47] Hannah Arendt, *The Human Condition* (Chicago University Press 1998) 22-78.

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# The Bundesverfassungsgericht in *PSSP*: A Legal and Practical Assessment with a View to the Future

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Abstract

This article will examine the reasoning of the Bundesverfassungsgericht's *PSPP* ruling in which the court, for the first time in its history, overruled a CJEU judgment. It will outline how, whilst the ruling is based on an unconvincing interpretation of EU law and a strained proportionality analysis, it highlights deficiencies of the CJEU's general methodology and standard of review. After examining solutions to tackle this specific issue within monetary policy, it will evaluate potential reforms that prevent or reduce the risk of judicial clashes between the CJEU and Member State courts. Specifically, it will argue for the introduction of both preventive and reactive mechanisms that allow ex-post and ex-ante assertions of constitutional concerns by national courts without undermining the EU legal order.

*Keywords: EU law, EU constitutional law, PSPP, ultra-vires, doctrine of supremacy*

## I. Introduction

On 5 May 2020, the Bundesverfassungsgericht, Germany's Federal Constitutional Court (FCC), overruled a judgment of the European Court of Justice ('CJEU') and declared it to be *ultra vires.* The historically unprecedented ruling concerned

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the 2018 CJEU judgment in *Weiss and Others*,[1] in which the CJEU found that the European Central Bank's ('ECB') Public Sector Asset Purchase Programme ('PSPP') conformed with EU law. The FCC held that whilst the programme itself was not in breach of EU law, both the decision-making process of the ECB and the CJEU judgment lacked an appropriate proportionality analysis.[2] Using a sharp tone, the German court found the CJEU's ruling to be methodologically incomprehensible,[3] "objectively arbitrary",[4] and thus *ultra vires*. The decision made headlines across the world, with some speaking of an outright "declaration of war"[5] endangering the Euro and the European Union as we know it. Currently, the situation seems to have been defused, as the three-month period the FCC granted for conducting a more thorough proportionality assessment has passed: the Bundestag, reviewing ECB documents, came to the conclusion that the FCC's requirements had been met, thus allowing the Bundesbank to continue to participate in the PSPP.

Despite the alleviation of the immediate situation, the historic novelty and impact which this judgment could or is said to have on the EU legal order warrants further analysis and examination, especially with regard to the characterisation and future of the EU legal order. In the first part, this article will comprehensively examine the reasoning of this ruling both in legal and practical terms and the possible impact it may have for the future development of EU law. It will argue that the reasoning of the FCC was based on a strained proportionality analysis as well as a generally incorrect application of EU case law. The ruling will, however, be shown to be based on justified concerns in light of an expanding role of the ECB, highlighting potential deficiencies of the CJEU's review standards and the EU's division of competences. The article will then evaluate potential solutions to the specific area of monetary policy. The second part will focus specifically on the ruling's impact on the doctrine of supremacy as espoused by the CJEU in *Costa v ENEL*.[6] It will then proceed to outline possible reforms that reduce the risks of constitutional norm clashes, such as those witnessed in the German *PSPP* ruling,

1 Case C-493/17, *Heinrich Weiss and Others v Bundesregierung and Others* [2018].
2 BVerfG 32/2020 [138].
3 ibid [153].
4 ibid [112].
5 Financial Times, 'German court calls on ECB to justify bond-buying programme' (5 May 2020) <https://www.ft.com/content/a1beda5e-5c2d-429e-a095-27728ed2d72b> accessed 25 December 2020.
6 C-6/64, *Costa v ENEL* [1964] ECR 585.

by channelling such tensions in a way that does not undermine the coherence and long-term sustainability of EU law.[7]

## II. The FCC's Ruling and Reasoning in *PSSP*

To understand both the CJEU's as well as the FCC's reasoning, it is first necessary to understand what the PSPP actually is and how it was said by the plaintiffs in *PSPP* to affect both German constitutional norms and EU law. The PSPP, introduced in 2015, is a programme that allows the ECB and national central banks of the Euro Area to buy government bonds and other euro-based debt instruments issued mainly by Member States of the Eurozone. This is done to ease monetary and financial conditions for the monetary union.[8] In simple terms, the programme allows the ECB and national central banks to lend money to the Eurozone's members to increase the supply of money. According to the ECB, this helps achieve the desired target inflation rate of 2% and secure price stability.[9]

The complainants in *PSPP*, a group of more than seventeen hundred German citizens, argued that the PSPP constituted monetary financing of Member States in breach of Articles 123(1) and 125 of the Treaty of the Functioning of the European Union ('TFEU'). This was because the mass-scale lending of monies essentially assumes responsibilities of Member State governments without them providing any mutual financial guarantees for the received financial support.[10] The complainants also argued that this assumption of Member States' fiscal responsibilities had violated the German Basic Law's minimum standard of democratic legitimation, which requires Germany's overall budgetary responsibility to lie with the German legislature: under Article 20 of the Basic Law, "[a]ll state authority is derived from the people", as exercised through democratic elections. Thus, the purchase of sovereign debt by the *Bundesbank* under the PSPP, without control or authorisation from the German parliament, would "essentially amount

[7] I shall refer to the Bundesverfassungsgericht's ruling as '*PSPP*' and to the CJEU ruling as '*Weiss*'.

[8] European Central Bank, 'Implementation aspects of the public sector purchase programme (PSPP)' (22 January 2020) <https://www.ecb.europa.eu/mopo/implement/app/html/pspp.en.html> accessed 25 December 2020.

[9] ibid.

[10] *Heinrich Weiss* (n 1) [13]–[16].

to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law".[11]

### A. The courts' respective judgments

The CJEU, as it had done in its earlier decision in *Gauweiler*,[12] dismissed the arguments based on EU law,[13] as well as the constitutional concerns noted in the preliminary reference.[14] It reiterated the ECB's contentions that the PSPP did not amount to an intrusion on fiscal policy as it was subject to a purchase limit of 33% of a particular bonds issue or outstanding securities of a Member State.[15] In addition, purchases were limited to the secondary markets as Article 123 TFEU prohibits direct purchases.[16] Furthermore, the distribution of purchases followed a capital key that prevented selective favouring of individual Member States and the ESCB[17] from becoming the majority creditor of one Member State.[18] Finally, the CJEU also found that the ECB enjoys "a broad discretion"[19] which entails that measures intended to have general application did not give rise to a duty to give reasons for "each of the technical choices made".[20]

In the FCC judgment, the German court concurred with the complainants' notion that Article 38(1) of the German Basic Law guaranteed citizens' right to democratic self-determination, not only with respect to the federal state power but also with regard to European institutions. It described how the Basic Law "protects against a manifest and structurally significant exceeding of competences by institutions, bodies, offices, and agencies of the European Union".[21] Specifically, "the Basic Law does not authorise the German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised […] to create new competences for itself".[22]

The German court then proceeded, interestingly, to concur with the CJEU by stating that the PSPP itself does not constitute monetary financing or "pose a

[11] BVerfG 32/2020 [227].
[12] A case concerning a similar monetary programme to the PSPP: C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* [2015] electronic Reports of Cases.
[13] Specifically Arts 123(1) and 125 TFEU.
[14] *Heinrich Weiss* (n 1) [14].
[15] ibid [124].
[16] ibid [155].
[17] Short for European System of Central Banks.
[18] *Heinrich Weiss* (n 1) [140].
[19] *Heinrich Weiss* (n 1) [30].
[20] ibid [32].
[21] BVerfG 32/2020 [98].
[22] ibid [101].

risk to the overall budgetary responsibility of the Bundestag".[23] However - and this is the core of the FCC judgment - it found that both the CJEU and the ECB had failed to properly apply the proportionality principle under Articles 5(1) and (4) TEU.[24] Thus, whilst the PSPP was not *ultra vires*, the way the ECB assessed the PSPP and the manner in which the CJEU policed the ECB's mandate under Article 127 TFEU were. With regard to the ECB, the FCC argued the EU body should have conducted a balancing test between the fiscal and monetary effects of its programmes, which, according to the FCC, was not done adequately.[25] With regard to the CJEU, the FCC found its review standard excessively deferential and "no longer tenable from a methodological perspective".[26] This approach, the German court found, exceeded the CJEU's mandate conferred in Article 19(1) TEU and resulted "in a structurally significant shift in the order of competences to the detriment of the Member States".[27]

### B. The judgments' merits

The FCC's accusation that the ECB did not conduct an assessment and balancing test of the monetary and fiscal effects of the PSPP is rather misguided. As the CJEU noted in its 2018 ruling, the

> "decisions of the ECB relating to the PSPP have consistently been clarified by the publication of press releases, introductory statements of the President of the ECB at press conferences […] and by the accounts of the ECB Governing Council's monetary policy meetings, which outline the discussions within that body".[28]

These accounts, according to the CJEU, "show, in that context, that the potential side effects of the PSPP, including its possible impact on the budgetary decisions of the Member States concerned, were taken into account".[29]

It is, however, true that the CJEU did not adopt a particularly strict proportionality review following its finding that the ECB must be afforded a broad discretion,[30] and that the CJEU essentially reiterated the data and analysis provided for by the ECB without much scrutiny. In this light, it is understandable why the

[23] ibid [116].
[24] ibid [138].
[25] ibid [165].
[26] ibid [116].
[27] ibid [119].
[28] *Heinrich Weiss* (n 1) [37].
[29] ibid [38].
[30] ibid [30].

German court reached the conclusion that this light-touch proportionality review "affords the ECB a (limited) competence to decide on its own competences",[31] essentially allowing the ECB "to conduct economic policy as long as the ECB asserts that it uses the means set out or provided for in the ESCB Statute",[32] in pursuit of the inflation target fixed by the ECB.

Contrastingly, most of the remainder of the FCC's proportionality analysis is not only unconvincing but itself "methodologically incomprehensible". In its analysis, the German court first set out the principle of proportionality as found in Article 5 TEU, followed by an outline of the three-stage proportionality test as found in German law.[33] In Germany, the proportionality test is based on elements of suitability, necessity and appropriateness, an approach which the FCC contended is followed similarly in Spain, Italy and other states including the United Kingdom.[34] This reference to other European countries seems to be the basis for finding that the CJEU exceeded its mandate, as the FCC contended the CJEU did so by manifestly disregarding "the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States".[35]

This reasoning and analysis of the FCC is strained for two reasons. Firstly, its mention of other Member States' use of the proportionality doctrine is arguably overstated and, in part, simply incorrect. This is because other states' use of the proportionality doctrine significantly differs in degree and scope from the German doctrine, which is applied far more strictly. As Spieker notes, whilst "the French, Belgian and Spanish review mechanisms tend towards soft-conflict identity reviews, it is especially the German and Hungarian doctrines which reveal a strong tendency towards the hard-conflict type".[36] Given these differences, it is not clear how exactly the mere usage of a doctrine with the same name justifies the FCC's contention that the CJEU ought to adopt a stricter proportionality test. This would bring the CJEU's test closer to the German doctrine but would be inconsistent with the approaches of the other mentioned jurisdictions. It is also unclear why the FCC made reference to the United Kingdom, given that it withdrew from the EU on 31 January 2020 and thus arguably had no bearing for this case. Indeed, even if the UK had continued its EU membership, the FCC's mention of it would

[31] BVerfG 32/2020 [136].
[32] ibid [133].
[33] BVerfG 32/2020 [124]–[125].
[34] ibid [125].
[35] ibid [112].
[36] L Spieker, 'Framing and managing constitutional identity conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts' (2020) 57 Common Market Law Review 361, 396.

be incredibly misleading, given the UK Supreme Court recently refused to adopt proportionality as a general review test in *Keyu v Foreign Secretary*.[37] It would therefore seem that the FCC's attempt at a comparative law analysis failed, making any legal relevance of this examination doubtful.

Similar observations can be made for the examination of the proportionality test as applied within EU law that followed the court's comparative law analysis. Here, the FCC first noted that the test in EU law differs from "German terminology and doctrine" and that the CJEU often "limits its review to whether the relevant measure is manifestly inappropriate having regard to the objective pursued".[38] Nonetheless, it found that the CJEU ruling in *Weiss* "contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law".[39] This is quite surprising given, as noted by de Búrca, that "when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used".[40] This is supported in the opinion of Advocate General Mischo in *Fedesa,* where he noted that in "complex economic and political situations" the CJEU "traditionally allows […] a wide area of discretion".[41] It is consequently not surprising that the same approach was followed when reviewing ECB action and monetary policy, which should have been more than clear after the judgment in *Gauweiler*.[42]

In light of the FCC's awareness of these varying levels of deference, it is indeed somewhat remarkable that the German court found *Weiss* to be inconsistent with prior CJEU case law, especially since the court itself cited *Fedesa* in its analysis.[43] A possible reason for doing so, perhaps on principle, can be found in paragraph 142 of the judgment. Here, the FCC set out the normative reasons for the stricter proportionality test it proposed, albeit in descriptive terms:

> "where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the

[37] *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, [2015] 3 WLR 1665.

[38] BVerfG 32/2020 [126].

[39] ibid [146].

[40] Grainne de Búrca, 'The principle of proportionality and its application in EC law' (1993) Yearbook of European Law 105, 146.

[41] C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health* [1990] ECR I-04023, Opinion of AG Mischo [11].

[42] C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* [2015] electronic Reports of Cases.

[43] BVerfG 32/2020 [126].

ECB without closer scrutiny".[44]

In other words, the FCC argued that the principle of conferral and the division of competences as found in the treaties are essentially superfluous when this division is not judicially monitored in a meaningful way. Indeed, it found that "it is imperative that adherence to the limits of the ECB's competence be subject to full judicial review".[45]

This assessment is again based on a descriptively incorrect examination of EU law. It has long been questionable to what extent, if at all, the principle of conferral is substantively monitored by the CJEU, especially given its bias towards further integration. The high level of deference afforded to EU institutions is, for example, evident in the monitoring of Article 114 TFEU. This provision allows measures to be taken provided they improve the functioning of the internal market. As Wyatt illustrates, the way in which Article 114 TFEU has been applied often leads to decisions arguably in breach of the EU's division of competences if read following the FCC's strict approach.[46] This is because improving the internal market under Article 114 automatically meets the requirements of Article 5(3) TEU, allowing EU bodies to legislate on measures that concern areas actually reserved for the national Member State level such as health.[47] This is the case even where such actually reserved interests are the predominant focus of a measure. Furthermore, in most cases, the CJEU rarely applies the constraining elements of subsidiarity and proportionality in a meaningful way, as the court does not actually examine the merits of measures' objectives and their impact on the national autonomy of States who do not wish to implement the measure.[48] Therefore, it is, again, surprising that the German court relied on Article 114 TFEU as evidence for the CJEU having conducted more thorough legal review in the past.[49]

In summary, the CJEU ruling in *Weiss*, albeit concerning monetary policy rather than Article 114 TFEU, does not indicate a shift in the court's methodology. It would seem the FCC overstepped the line between descriptive and normative analysis in its ruling and attempted to describe what it believed *ought* to be an appropriate review standard, rather than describing what the standard actually *is*. Indeed, more convincing reasoning would have been available to the German

44 ibid [142].

45 ibid [143].

46 Derrick Wyatt, 'Community Competence to Regulate the Internal Market' (2007) SSRN Electronic Journal.

47 Article 168(5) TFEU.

48 See C-210/03, *The Queen, on the application of Swedish Match AB, Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893 [31]; see also C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002] ECR I-11453 [62].

49 BVerfG 32/2020 [152].

court: it could, according to Garner, have argued that Article 4(2) TEU, which requires EU bodies to respect national and constitutional identity, was severely impacted by the PSPP, necessitating a second and more stringent review by the CJEU that went beyond its usually deferential approach.[50] However, whilst this analysis would have been based on a somewhat more accurate version of EU law, it is questionable to what extent it would have changed anything about the CJEU's first ruling and indeed any subsequent decisions. It was more than evident from the preliminary references in *Gauweiler* and *Weiss* that the constitutional court found its norms under attack by the ECB, concerns which were, nonetheless, dismissed by the CJEU.[51]

### C. The justifiability of the FCC's concerns regarding the ECB's mandate

Even though CJEU ruling in *Weiss* was, as illustrated, not a "structurally significant shift",[52] the question is posed whether, in normative terms, the FCC judgment warrants further consideration. One can indeed contend that if proportionality is never applied strictly when concerning EU bodies, this risks jeopardising proportionality's function as a way to avoid national constitutional review trumping EU law, as illustrated by the clash in *PSPP*. Furthermore, there are indicators that stricter review of the boundary between monetary and economic policy may be warranted, especially given the latter is primarily reserved for the Member States.[53]

As noted by Högenauer and Howarth, the ECB has, since the outbreak of the sovereign debt crisis, gradually expanded its range of policies and pushed its role well beyond the role originally envisaged by the EU treaty provisions. As they point out, the purchase of sovereign debt, even limited, was incredibly controversial and led to an inherent politicisation of the ECB. Several members of the ECB Governing Council expressed concerns with the "nonconventional monetary policies", which for them stretched the boundaries of the ECB's

[50] Oliver Garner, 'Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity' (2020) *VerfBlog*, 2020/5/22 <https://verfassungsblog.de/squaring-the-pspp-circle/> accessed 25 December 2020.

[51] For further discussion of the preliminary references and the indications of the collaborative relationship between FCC and CJEU eroding post-Gauweiler see Mark Dawson and Ana Bobić, 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: Weiss and Others' (2019) 56 Common Market Law Review 1005.

[52] BVerfG 32/2020 [154].

[53] Article 5 TFEU.

mandate. Indeed, Bundesbank President Axel Weber and ECB Chief Economist Jürgen Stark resigned because of their opposition to these measures.[54]

The strongest indication that the FCC's concerns are justified is that Mario Draghi himself, the former ECB President, initially insisted that quantitative easing programmes were not legally permitted by the ECB's mandate. Not long before introducing exactly such measures, he responded to a question on the ECB's past refusal to engage with quantitative easing with the following:

> "[E]ach central bank has its institutional set-up, within which it operates. The ECB operates within the limits of the Treaty, and I said a moment ago what our primary mandate is, and especially what the Treaty says the ECB cannot do. I think any central bank is constrained by its institutional set-up. In the United States, as you know, the primary mandate of the Federal Reserve is completely different from ours. And the same is true of the Bank of England".[55]

In addition to this, whilst the ban on direct purchases of sovereign debt evaded scrutiny of Article 123 TFEU, Tuori rightly points out that the outcome of the PSPP is essentially the same as if the ECB had lent money directly: the "Eurosystem is now the largest holder of Member States' government bonds".[56] This may give rise to future conflicts of interest between the ECB's pursuit of its monetary aims, seeing as it is now inextricably tied to Member States' fiscal policy as a main creditor.[57] Such observation would seem to counter criticism made by Waltraud Schelkle, who noted that it is ironic that the FCC is questioning the limits of the ECB's independence – a principle which the German government had originally insisted upon.[58] This criticism becomes somewhat obsolete given that the ECB, as outlined, has moved beyond the original vision of its mandate,

[54] Anna-Lena Högenauer and David Howarth, 'Unconventional Monetary Policies and the European Central Bank's problematic democratic legitimacy' (2016) 71 Zeitschrift für öffentliches Recht, 438.

[55] Mario Draghi and Vítor Constancio, 'Introductory statement to the press conference (with Q&A)', (ECB press conference, 8 December 2011), <https://www.ecb.europa.eu/press/pressconf/2011/html/is111208.en.html> accessed 25 December 2020.

[56] Klaus Tuori, 'The ECB's quantitative easing programme as a constitutional game changer' (2019) 26(1) Maastricht Journal of European and Comparative Law 94–107.

[57] For further possible ramifications see ibid 104–107.

[58] Waltraud Schelkle, 'Who said Germans have no sense of irony?' (LSE Blog, 19 May 2020) <https://blogs.lse.ac.uk/europpblog/2020/05/19/who-said-that-germans-have-no-sense-of-irony/> accessed 25 December 2020.

making it questionable whether the depoliticisation of monetary policy as originally proposed by the German government is still "democratically viable".[59]

### D. The practical impacts of the ruling and possible reasons for its outcome

Despite the fact that the FCC's concerns might be correct in principle, it did not, as noted, find the PSPP itself *ultra vires*, but agreed that its limits were sufficient to not constitute a breach of Articles 123 and 125 TFEU. One might question why, given the strong reservations and justifiable concerns articulated in the preliminary reference in *Gauweiler* as in *Weiss*, the FCC did not follow through on these concerns and force the Bundesbank to remove itself from the PSPP. Arguably, the FCC would have issued an injunction on the programme if it had been in the position of the CJEU in 2015.

If the FCC had, however, found the PSPP fully *ultra vires* and forced the Bundesbank to exit the programme at the time of its ruling in May 2020, it would have very likely risked the functioning of the Eurozone and the single currency. This is especially so given the COVID-19 pandemic had just begun, necessitating a whole new range of both monetary and fiscal policies. The judgment in May could have thus been the FCC's way of voicing disapproval of the ECB's policies and the lax monitoring of its mandate, without actually finding a result that could easily spell the end of the European Union. Under this view, even though the ruling initially seems to be a 'bite' rather than a 'bark' at the CJEU's methodology, it does not fully leave "the path of judicial rapprochement".[60] It could instead stand for a desire for increased transparency of ECB programmes, as well as a judicial review standard that gives actual meaning to the division of competences in EU law.

Speaking on the issue of conferral generally, a stricter review standard may indeed be warranted when EU law clashes with fundamental constitutional norms of national legal systems. Otherwise, the principle of conferral and the division of competences as found in the treaties are essentially meaningless. In relation to this, the FCC is correct in stating that the CJEU has itself "repeatedly emphasised the legitimizing function of judicial review",[61] which is why it might be valuable to

[59] Anna-Lena Högenauer and David Howarth, 'The democratic deficit and European Central Bank crisis monetary policies' (2019) 26(1) Maastricht Journal of European and Comparative Law 81–93.

[60] Andrej Lang, 'Ultra vires review of the ECB's policy of quantitative easing: An analysis of the German Constitutional Court's preliminary reference order in the PSPP case' (2018) 55 Common Market Law Review 923, 950.

[61] BVerfG 32/2020 [145]; see also C-518/07, *European Commission v Federal Republic of Germany* [2010] ECR I-01885 [42].

adopt a less deferential approach to treaty interpretation in the future. Craig has discussed how this could be done and, although his suggestions provide a valuable starting point in going forward, this article shall focus more on the specific area touched on in the *PSPP* ruling.[62]

With regard to the specific policy area of the case, namely monetary policy, Öberg suggests that a possible solution would be to give the ECB a wide discretion that does not impede its treaty-based independence, whilst also not granting an essentially limitless discretion. This would be in the form of a 'medium intensity' review standard, sitting between the deferential "manifestly inappropriate" test in *Phillip Morris Brand* and the very strict review standard in *Pfizer*.[63] However, while the FCC's concerns may be correct in principle, the CJEU is currently ill-suited to properly police the mandate of an institution such as the ECB. For example, as Lang correctly notes, the treaty provisions simply do not give much guidance on the scope of the ECB's mandate, and lack "the necessary tools to handle a sovereign debt crisis".[64] In addition, the disagreement within even the Governing Council of the ECB about the appropriate boundaries of monetary policy highlights the impossible task of objectively determining where the boundary between monetary and economic policy lies. Notwithstanding the constitutional implications that may arise from acknowledging this, it is simply not an objective and value-free question.[65]

Attempting to judicially review such questions regardless could indeed amount to the CJEU conducting essentially a second policy assessment, which would paradoxically reinforce criticisms of it as a 'policy-making' court with inherent biases.[66] This is especially likely in a supra-national context, where there are no agreed views on economic and monetary theory. Instead, as Maduro notes, *PSPP* suggests that the only way to avoid further constitutional clashes in relation to monetary policy is to strengthen European risk sharing and debt mutualisation via

[62] See Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395.

[63] C-547/14, *Phillip Morris Brands SARL and Others v Secretary of State for Health* [2016] electronic Reports of Cases; T-13/99, *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-03305; Jacob Öberg, 'The German Federal Constitutional Court's PSPP Judgment: Proportionality Review Par Excellence' (European Law Blog, 2 June 2020) < https://europeanlawblog.eu/2020/06/02/the-german-federal-constitutional-courts-pspp-judgment-proportionality-review-par-excellence/> accessed 25 December 2020.

[64] Tuori (n 55).

[65] For further discussion see Anne Marieke Mooij, 'The Weiss judgment: The Court's further clarification of the ECB's legal framework' (2019) 26(3) Maastricht Journal of European and Comparative Law 449, 465.

[66] As famously done by Hjalte Rasmussen in *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Kluwer Academic, 1986).

a strong fiscal union. Here, one could share risk "on the basis of limited liabilities",[67] authorised by national governments rather than the ECB. Crucially, this would be compatible with the FCC's requirements. Avbelj would support this notion as it reduces the need for the ECB to "[venture] with its monetary mechanisms into fiscal and hence democratic domains, for which it is neither competent nor accountable".[68]

It would seem that the ruling's true value, even if based on strained reasoning, is to illustrate the "shaky constitutional foundations on which the post crisis settlement rests".[69] Indeed, the case's "implicit call for a stronger economic pillar"[70] has arguably paved the way for exactly this fiscal union to emerge, irrespective of whether this was intentional or incidental. Since *PSPP*, there has been more impetus for EU Member States to adopt common fiscal approaches, witnessed in the ground-breaking Recovery fund agreement in July 2020, which shares risks under a scheme totalling €1.82 trillion.[71] Crucially, the ruling may have formed part of Angela Merkel's reasons for overstepping the traditional caution in German politics of introducing a fiscal union at the European level, in combination with the imminent need to handle the COVID-19 pandemic.

Simultaneously, the ECB has adopted a cautious approach, possibly in recognition that greater transparency and self-scrutiny may be advisable following the FCC's harsh criticism of its seemingly limitless mandate. For instance, it has followed its capital key on purchases under the new Pandemic Emergency Purchase Programme quite strictly, even though this programme has more flexible purchasing limits than the PSPP.[72] It has pursued the key limitations and others even more strictly than under the PSPP, which often missed these requirements,

[67] Miguel Poiares Maduro, 'Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court' (2020) *VerfBlog*, 2020/5/06 <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> accessed 25 December 2020.

[68] Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision' (2020) *VerfBlog*, 2020/5/06 <https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/> accessed 25 December 2020.

[69] Paul Dermine, 'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union' (2020) European Constitutional Law Review 525, 551.

[70] ibid 551.

[71] Special meeting of the European Council (17, 18, 19, 20, and 21 July 2020) – Conclusions, EUCO 10/20.

[72] Jan von Gerich, 'ECB Watch: Was the ECB bluffing?' (Nordea Corporate, 2 June 2020) <https://corporate.nordea.com/article/57914/ecb-watch-was-the-ecb-bluffing/research/topic/en-majors> accessed 25 December 2020.

again indicating that it may have changed its buying patterns in light of the FCC ruling.

## III. The *PSPP* Ruling and the Doctrine of Supremacy

Irrespective of the FCC's justifiable concerns and the positive developments since its *PSPP* ruling, its decision is nonetheless a direct attack on the CJEU's self-understanding as the final arbiter of EU law disputes and norm interpretation. This notion of the CJEU's well-known doctrine of supremacy was made clear both in *Costa v ENEL*[73] and in *Foto-Frost*,[74] and was hastily reiterated by the CJEU in a press release addressing the German court's judgment.[75]

### A. The emboldening of autocratic states: hungary and poland examined

One specific danger in relation to the FCC attacking the CJEU's doctrine of supremacy was suggested by former Advocate General Maduro, who argued that the ruling would directly lead to the emboldening of autocratic states such as Hungary and Poland.[76] For Iñiguez, this potential risk indicates a strong need for the Commission to begin infringement proceedings against Germany under Article 258 TFEU, to find Germany in breach of EU law.[77] I would argue in response to Iñiguez that it is now unnecessary to issue infringement proceedings, given the situation has subsided. It is questionable why one would further test where the loyalties of the German institutions and public lie should a full-on clash arise, given that the response to this may not be favourable to the CJEU.

Equally questionable is Maduro's fear that the decision "may open the doors for open revolt" by Hungary and Poland. As noted by von Bogdandy and Spieker,[78] since 2012, multiple Hungarian laws "amounting to a larger illiberal turn" have been passed, including laws restricting academic freedom and framing institutions such as the Open Society Foundation or the Central European University as

[73] *Costa* (n 6) 593.

[74] 314/85, *Foto-Frost v Hauptzollamt Lübeck Ost* [1987] ECR 04199 [14]–[15].

[75] Court of Justice of the European Union, 'Press release following the judgment of the German Constitutional Court of 5 May 2020' (8 May 2020) Press Release No 58/20.

[76] Maduro (n 66).

[77] Guillermo Íñiguez, 'The Commission must bring enforcement proceedings against Germany' (The New Federalist, 7 May 2020) <https://www.thenewfederalist.eu/the-commission-must-bring-enforcement-proceedings-against-germany?lang=fr> accessed 25 December 2020.

[78] Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silence of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 406.

"enemies".[79] On the Polish side, similar observations are warranted: despite the CJEU's clear willingness to sanction Member State actions under Article 2 TEU, as witnessed in *Commission v Poland*,[80] the current Polish government has not stopped dismantling the independence of its judiciary – a process it started in November 2015.[81] In light of this, it is both illogical and far-fetched to suggest that the FCC's ruling substantively adds to already existing developments in both of these countries – developments which very much began and would have continued irrespective of the German court's findings.

### B. *PSPP*'S TRUE IMPACT AND HOW THE EU MUST RESPOND

It is worth noting that the FCC is not unique in directly overruling a CJEU judgment, as the Danish court in *Ajos*[82] and the Czech court in *Landtová*[83] have shown. However, the ruling in *PSPP* could have, as noted, been more far-reaching by endangering the entire monetary union and consequently the EU as a whole. This can be distinguished from the rather minor policy areas dealt with in the Danish and Czech cases. This illustrates that the risk of "judicial Armageddon",[84] as feared by Dyevre back when *Landtová* was decided, is not over. Consequently, in addition to changes to the CJEU's review standard, different steps to those outlined in Section II.D. for the area of monetary policy are needed to resolve future clashes within the overall framework of EU law. Merely continuing the dialogue - albeit often interactive - between the CJEU and constitutional courts is not enough.

Arguably, the key to sustaining the coherence and consistent application of EU law will be to channel any constitutional tensions that might result in such cases into an orderly resolution mechanism, as well as to prevent, as far as possible, such tensions from initially arising. This is because, as Raz notes, the degree to which two legal systems can coexist depends on these systems not "containing too many conflicting norms",[85] or in this case even interpretations. One possible solution, recently proposed by Weiler and Sarmiento, is to create a mixed CJEU chamber

[79] European Parliament, Resolution of 17 May 2017 on the situation in Hungary, 2017/2656(RSP).

[80] C-619/18, *Commission v Poland* [2019] not yet published.

[81] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, European Commission, page 2, 30.09.2020; note also the Polish government's refusal to comply with the Court of Justice's interim relief order in Commission v Poland (C-791/19 R), the third time the CJEU granted interim measures to preserve the rule of law in Poland.

[82] C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* [2016] electronic Reports of Cases.

[83] C-399-09, *Marie Landtová v Česká správa socialního zabezpečení* [2011] ECR I-05573.

[84] Arthur Dyevre, 'The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?' (2012) *VerfBlog*, 2012/2/29 <https://verfassungsblog.de/czech-ultra-vires-revolution-isolated-accident-omen-judicial-armageddon/> accessed 25 December 2020.

[85] Joseph Raz, *The authority of law: Essays on law and morality* (Oxford University Press, 1979), 118–119.

consisting of judges of the CJEU and of national constitutional courts to avoid clashes (as occurred in *PSPP*).[86]

This is, however, a rather protracted and bureaucratic option that would involve the creation of a new appellate body, which would be less politically feasible in light of the CJEU's emphasis on its status as the ultimate body for references and appeals.[87] A better solution can be found in Garner's proposal to introduce a mechanism that allows constitutional courts to issue declarations of incompatibility with CJEU interpretations and rulings, for which they could utilise the preliminary reference procedure, relying on Article 4(2) TEU.[88] As noted, this Article requires EU law to respect national identity and constitutional principles. Whilst it was argued in II.D. that this option would not necessarily lead to better results in the area of monetary policy, it provides the best option for the broader framework of EU law. This is because doing so would allow the CJEU to potentially revisit its rulings where such a declaration is made, thus more successfully preserving its supremacy claim whilst simultaneously giving weight to the considerations of national courts. Should the CJEU retain its initial interpretation, the declaration could, as Garner notes, trigger legislative procedures under Article 288 TFEU or amendments under Article 48 TEU.

Another possible benefit of such declarations, not discussed by Garner, is that they would simultaneously highlight a potential need for constitutional amendment within the concerned Member State, should the State be unable to garner support for EU legislative change or limited derogations. For instance, the (now) former President Voßkuhle of the FCC, who presided over the *PSPP* ruling, noted extrajudicially in 2010 that the German constitution would arguably need amendment for any further European integration, illustrating that national constitutional norms should not be taken as static when discussing constitutional clashes and the issues they give rise to.[89]

One issue not discussed by Garner is the question of liability for parties' legal costs as well as any particular losses they suffer from a national court's declaration of incompatibility, should the CJEU decline to reconsider its rulings. A simple solution to this might be to afford the CJEU a damage compensation

[86] Daniel Sarmiento and Joseph Weiler, 'The EU Judiciary After Weiss: Proposing A New Mixed Chamber of the Court of Justice' (2020) *VerfBlog*, 2020/6/02 <https://verfassungsblog.de/the-eu-judiciary-after-weiss/> accessed 25 December 2020.

[87] See *e.g.* CJEU's opinion on ECHR accession: Opinion 2/13.

[88] Garner (n 49).

[89] Andreas Voßkuhle in 'Mehr Europa lässt das Grundgesetz kaum zu' (Frankfurter Allgemeine Zeitung, 25 September 2011) <https://www.faz.net/aktuell/wirtschaft/konjunktur/vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html?printPagedArticle=true#pageIndex_3> accessed 25 December 2020.

scheme which would use the relevant Member State's EU budget to mitigate the impact the divergence of the national legal order has on litigants: the plaintiffs would receive damages from the CJEU, which would cover all cases in which monetary losses occur or where non-monetary losses can adequately be remedied by monetary compensation. Notably, this should not require additional costs and proceedings against Member States as in the case of *Francovich*-type liability, since a clear, intended, and explicit divergence from CJEU rulings arguably constitutes a 'sufficiently serious' breach of EU law on its own.

In addition, one could secure preventive rather than reactive mechanisms by introducing a type of pre-judicial dialogue forum between the CJEU and national constitutional and supreme courts, as suggested by former CJEU Judge da Cruz Vilaça.[90] This would be analogous to the Early Warning System that exists for national parliaments and allows for political monitoring of the subsidiarity principle.[91] It would provide "a constructive role on a preventive basis, affording the Court of Justice the possibility of hearing the voices of a representative number of constitutional and supreme courts before taking its decision on important and delicate constitutional issues".[92]

## IV. Conclusion

This article has shown that the FCC's overruling of *Weiss* was based on an unconvincing and in part simply false comparative law analysis, as well as a descriptively incorrect analysis of European case law on proportionality. However, the case did outline justified concerns regarding the ECB's mandate. These concerns cannot be resolved by stricter judicial review, but rather by strengthening a fiscal union at the European level. The ruling has arguably paved the way for this constitutionally sound option to proceed, making the ECB's intrusion on fiscal policy less likely in future.

With regard to the doctrine of supremacy, it is undeniable that the ruling attacks the absolute supremacy claim of the CJEU as espoused in *Costa v ENEL*. To reduce the risk of constitutional clashes, a preventive forum as well as reactive declarations of incompatibility should be introduced, providing a comprehensive framework that channels any potential for constitutional clashes into an orderly resolution system. This should be done whilst simultaneously securing an

[90] José Luís da Cruz Vilaça, 'The Judgment of the German Federal Constitutional Court and the Court of Justice of the European Union – Judicial Cooperation or Dialogue of the Deaf?' (5 August 2020). <https://www.cruzvilaca.eu/en/news/The-judgment-of-the-German-Federal-Constitutional-Court-and-the-Court-of-Justice-of-the-European/99/> accessed 25 December 2020.

[91] See Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[92] European Commission (n 90).

appropriate degree of legal certainty for litigants by virtue of a new compensation scheme, tied to Member States' budgets. Such a framework would allow the CJEU to maintain a mostly uniform application of EU law and insist on its supremacy claim on paper, whilst not ignoring the potential for future constitutional clashes with national courts.

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# Cultural Relativism and the *Sabarimala* Judgement

Jyotsna Vilva*

Abstract

With increasing exposure to globalisation, modernity, and the rise of an individual conception of rights, society is moving away from imposed cultural identities, and culture is increasingly characterised by dissent towards hegemonic narratives. Individuals want to remain within and identify with their cultural communities, yet also desire increased equality and autonomy within these spheres. This pushes them to broaden and modernise the terms of what constitutes cultural membership, and to challenge age-old discriminatory cultural and religious practices. Indian law, however, has struggled to keep pace with cultural transformations, and remains committed to the age-old conception of culture as being homogenous and frozen. With cultural relativism as its base, the law recognises diversity across cultures but elides diversity within them. Using the example of the legal challenges to the custom-based prohibition of entry of women between the ages of ten to fifty into the *Sabarimala* Temple in the state of Kerala in India, this article argues that Indian law's affirmation of cultural relativist arguments through the Essential Religious Practices Test leads to a static conception of culture. This ultimately stunts the religion's capacity for organic growth and reform. The law, therefore, needs to recognise and accommodate 'cultural dissents' – that is, challenges by individuals within a community to modernise or broaden the traditional terms of cultural

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membership – when deciding cases involving challenges to cultural and religious norms.

*Keywords: Sabarimala, cultural relativism, human rights, essential religious practices test, cultural dissent*

## I. Introduction

In 2006, six women activists of the Indian Young Lawyer's Association filed a Public Interest Litigation ('PIL') before the Supreme Court of India challenging the prohibition of entry of women between the ages of ten to fifty into the *Sabarimala* Temple ('Temple') in the state of Kerala, citing the right to equality under Article 14 and the right to practice their religion under Article 25 of the Constitution of India.[1] In 2018, a five-judge bench of the Supreme Court by a four to one majority held that this custom-based prohibition was not an "essential religious practice", and that it hence violated the fundamental right of women devotees to practice their religion ('2018 judgement').[2]

With increasing exposure to globalisation, modernity, and the rise of an individual conception of rights, society is moving away from imposed cultural identities, and culture is increasingly characterised by dissent towards hegemonic narratives, focussing on reason and autonomy. In India, however, the law has not kept pace with these transformations and remains committed to the age-old conception of culture as being homogenous and frozen. With cultural relativism as its base, the law recognises diversity across cultures but elides diversity within them.

This article argues that the law's affirmation of cultural relativist arguments leads to a static conception of culture which stunts its capacity for organic growth and reform. It further argues that the law therefore needs to accommodate "cultural dissents", that is, "challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership".[3] The article's scope is limited to an analysis of arguments made in the *Sabarimala* dispute regarding custom and practice, without undertaking a constitutional law analysis of the dispute.

Section I of this article details and critiques the cultural relativist arguments made in the 2018 judgement. Section II analyses the role of cultural relativism in the Essential Religious Practices Test, as applied in the 2018 judgement, and argues

1 'Sabarimala Controversy: Women Lawyers Move Supreme Court' (*The Hindu*, 31 July 2006) <https://www.thehindu.com/todays-paper/tp-national/tp-kerala/sabarimala-controversy-women-lawyers-move-supreme-court/article18470164.ece> accessed 10 April 2020.

2 *Indian Young Lawyers Association v The State of Kerala* (2019) 11 SCC 1.

3 Madhavi Sunder, 'Cultural Dissent' (2001) 54 Stanford Law Review 495, 498.

that the Test promotes a static conception of culture which disregards dissents within a community. Section III argues for a legal shift towards recognising cultural dissent when deciding cases involving challenges to cultural and religious norms.

## II. Cultural Relativist Arguments in the *Sabarimala* Judgement

Cultural relativism is rooted in anthropology and is based on the idea that a culture's practices and beliefs should not be judged by the standards of another culture, but rather in accordance with its own, thus rejecting the supposed self-evident nature of moral views and making judgments devoid of cultural context.[4]

Cultural relativists often present human rights as a product of Western liberalism,[5] arguing that universal human rights are incompatible with certain non-Western cultural characteristics and beliefs.[6] For example, a common argument is that an individual conception of rights is a Western product and members of most non-Western cultures identify as part of a larger community.[7] Therefore, that collective and communal rights should be privileged over individual rights.[8] Often, while a human right may not entirely be disagreed with by a culture, the classification of certain cultural practices as violating that right is rejected.[9] A commonly cited example is the debate between the religious rights of Muslim women to wear the veil versus the liberal assumption that their veil is an oppressive religious cultural practice.[10]

In the *Sabarimala* dispute, the submissions on behalf of the Temple substantially stressed that the petitioner's right to worship under Article 25(1) must be subservient to the Article 25(1) rights of other devotees, *and* of the Temple's

[4] JJ Tilley, 'Cultural Relativism' (2000) 22(2) Human Rights Quarterly 501; Melville J. Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (New York: Vintage 1972) 15.

[5] James C Hsiung, 'Human Rights in an East Asian Perspective' in James C Hsiung (ed.), Human Rights in East Asia, *A Cultural Perspective* (Paragon House 1985) 1; Ziyad Motala, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination' (1989) 12 Hasting International and Comparative Law Review 373, 383.

[6] Josiah-AM, 'Cobbah, African Values and the Human Rights Debate: An African Perspective' (1987) 9 Human Rights Quarterly 309; Heiner Bielefeldt, 'Muslim Voices in the Human Rights Debate' (1995) 17 Human Rights Quarterly 587, 601–606.

[7] Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19(1) Human Rights Quarterly 136, 145.

[8] ibid (n 7) 146.

[9] ibid (n 7) 143–144.

[10] See in general, Ratna Kapur, *Gender, Alterity, and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 120–150.

deity, Lord Ayyappa himself.[11] The primary objection against entry of women aged ten to fifty years was their being of menstruating age. It was argued that because of the impurity associated with menstruation, Hindu women could not participate in religious activities when menstruating, and therefore could not complete the 41-day *vrutham* (a fast involving the observance of celibacy and Temple visit) as part of the *Sabarimala* pilgrimage.[12] Another submission made was that the depiction of Lord Ayyappa in the Temple is in the form of a *Naisthika Bramhachari* — that is, that he had taken a vow of perpetual celibacy. Therefore, women must be prevented from entering the Temple to prevent any deviations from the celibacy of both the deity and the devotees during the *vrutham*.[13]

It was also strenuously asserted by the Temple that Hinduism does not discriminate against women,[14] that "the prohibition is *not a social discrimination* but is only a part of the *essential spiritual discipline related to this particular pilgrimage* […] (emphasis added)",[15] and that by allowing women to enter the Temple, the court would be irreparably altering the identity and character of the religious institution.[16]

These arguments are clearly rooted in cultural relativism: the essential particularities of the practices of the Temple, privileging of group rights over individual, and denial of it being a gender discrimination issue. The discourse during and after the dispute mostly centred around the backlash against liberal voices having misunderstood the practice as being gender discriminatory, and the

[11] Constitution of India 1950, Article 25(1): "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."; Mehal Jain, '[Sabarimala] [Day 6] Lord Ayyappa is a 'Legal Person' and Entitled to Maintain the 'Perpetual Celibate' Status under the Right to Privacy Under Article 21, Argues Adv. Sai Deepak' (*Livelaw*, 26 July 2018) <https://www.livelaw.in/sabarimala-day-6-lord-ayyappa-is-a-legal-person-and-entitled-to-maintain-the-perpetual-celibate-status-under-the-right-to-privacy-under-article-21-argues-adv-sai-deepak/> accessed 11 April 2020.

[12] *Indian Young Lawyers Association* (n 2) [44]–[46].

[13] ibid [42], [46], [53].

[14] ibid [7].

[15] ibid [47].

[16] 'Celibate Nature of Lord Ayyappa of Sabarimala temple Protected by Constitution, SC told' (*Economic Times*, 25 July 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/celibate-nature-of-lord-ayyappa-of-sabarimala-temple-protected-by-constitution-sc-told/articleshow/65137065.cms?from=mdr> accessed 10 April 2020.

rejection of the judgement because of its failure to understand both Hindu culture and the special culture of the Temple through its imposition of foreign values.[17]

However, as noted by both the 2018 judgement[18] and the 1991 judgement of the Kerala High Court which initially imposed the prohibition on entry ('1991 judgement'),[19] the practice of excluding women from the Temple was not uniform in application over the years — women had continued to visit the Temple for several reasons prior to the ban. Even amongst the administrators of the Temple — that is, the Tranavcore Dewasom Board ('Temple Board') and the Temple priests — there exists no consensus as to the reason for the ban. Some cite Lord Ayyappa's eternal celibacy,[20] some cite menstrual impurity,[21] some cite the practical difficulties for women making the pilgrimage including the lack of health and sanitation facilities,[22] and others claim that the presence of women would be a distraction to the male pilgrims undergoing forty-one days of celibacy.[23] The Temple Board's

[17] Kaleeswaram Raj, 'Do All Women Have a Right to Enter Sabarimala?' (*The Hindu*, 20 October 2017) <https://www.thehindu.com/opinion/op-ed/do-all-women-have-a-right-to-enter-sabarimala/article19883956.ece> accessed 10 April 2020; 'Sabarimala: Why Many Women Will Not Cross its Threshold' (*Gulf News,* 2 January 2019) <https://gulfnews.com/world/asia/india/sabarimala-why-many-women-will-not-cross-its-threshold-1.1546419921587> accessed 10 April 2020; Rajeev Chandrasekhar, 'I Oppose Sabarimala Verdict Because This is Not About Women's Discrimination At All' *The Print* (18 October 2018) <https://theprint.in/opinion/i-oppose-sabarimala-verdict-because-this-is-not-about-womens-discrimination-at-all/136444/> accessed 10 April 2020; 'Tens of Thousands Protest in India over Sabarimala Temple' (*Al Jazeera*, 1 January 2019) <https://www.aljazeera.com/news/2019/01/tens-thousands-protest-india-sabarimala-temple-190101140533525.html> accessed 10 April 2020; Smitha N, 'Shut Out of Sabarimala, Tribe to Light Protest Lamps to Assert Claim to Ritual' (*Deccan Chronicle*, 15 January 2020) <https://www.deccanchronicle.com/nation/in-other-news/150120/shut-out-of-sabarimala-tribe-to-light-protest-lamps-to-assert-claim-t.html> accessed 10 April 2020.

[18] *Indian Young Lawyers Association* (n 2) [292], [295].

[19] *S Mahendran v Secretary, Travancore Devaswom Board, Thiruvananthapuram and Others* AIR 1993 Ker 42 [7].

[20] MA Deviah, 'Here's Why Women are Barred from Sabarimala; It is Not Because They Are 'Unclean'' (*Firstpost*, 15 January 2016) <https://www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html> accessed 10 April 2020.

[21] *S Mahendran* (n 19) [38].

[22] 'Practical Impediments for Women to Trek at Sabarimala' *Deccan Chronicle* (Kochi, 29 September 2018) <https://www.deccanchronicle.com/nation/current-affairs/290918/kochi-practical-impediments-for-women-to-trek-at-sabarimala.html> accessed 10 April 2020.

[23] *Indian Young Lawyers Association* (n 2) [47]; MG Radhakrishnan, 'Ban On Women of Prohibited Age Group Visiting Sabarimala Shrine Comes Under Scrutiny' (*India Today*, 15 January 1995) <https://www.indiatoday.in/magazine/religion/story/19950115-ban-on-women-of-prohibited-age-group-visiting-sabarimala-shrine-comes-under-scrutiny-806703-1995-01-15> accessed 10 April 2020.

Chairman has previously stated that the exclusion of women is to prevent the Temple from turning into "a spot for sex tourism like Thailand".[24]

Thus, it is clear that the exclusion is less of an obligatory or essential age-old practice of the religion, the non-observance of which would change its fundamental character, but more of a practice imposed by the Temple management. This fact is noted in the 1991 judgement:

> "[t]here was thus no prohibition for women to enter the Sabarimala temple in olden days, but women in large number were not visiting the temple. *That was not because of any prohibition imposed by Hindu religion but because of other non-religious factors* (emphasis added)".[25]

In essence, practices which are not reflective of a religion were being propagated through the religious hegemony of the Temple Board under the garb of cultural or religious backing.

## III. The Essential Religious Practices Test and the Problem of Static Culture

The effects of modernisation and globalisation have increasingly spurred people to challenge the terms of what constitutes cultural membership and to broaden and modernise cultural practices and norms.[26] Individuals want to remain within and identify with their cultural communities, yet also desire increased equality and autonomy within these spheres. Pro-choice Catholics asserting that they are still good Catholics;[27] the Indian diaspora and LGBTQIA+ community wanting to celebrate not only their sexuality and identity, but also their Indian heritage;[28] Muslim women desiring religious interpretations fostering gender equality — these examples show a shift away from imposed cultural identities[29] and towards a culture of cultural dissent.[30] In the religion-versus-human-rights debate,

[24] Shaju Philip, 'Don't Want to Turn Sabarimala Temple into Thailand, says TDB chairman' (*Indian Express,* 14 October 2017) <https://indianexpress.com/article/india/dont-want-to-turn-sabarimala-to-thailand-tdb-chairman-4889519/> accessed 10 April 2020.

[25] *S Mahendran* (n 19) [7] (emphasis added).

[26] Sunder (n 3) 516–518.

[27] Alan Wolfe, 'Liberalism and Catholicism' (*The American Prospect*, 31 January 2000) <https://prospect.org/features/liberalism-catholicism/> accessed 11 April 2020; Sunder (n 3) 516–518.

[28] Gayathri Gopinath, 'Nostalgia, Desire, Diaspora: South Asian Sexualities in Motion' (1997) 5(2) Positions 467, 472; Sunder (n 3) 516–518.

[29] Amartya Sen, *Reason Before Identity* (OUP 1998) 13.

[30] Sunder (n 3) 522–523.

however, the law continues to be committed to a homogenous static conception of culture.[31]

This can be seen in the test evolved by the Indian judiciary to determine challenges to religious practices: The Essential Religious Practices Test ('ERP Test'), whereby practices considered *essential* to a religion that are followed with unhindered continuity are exempt from constitutional scrutiny. Originating from the *Shirur Math* case,[32] the Supreme Court articulated the ERP Test as follows: "what constitutes the essential part of a religion is primarily to be ascertained with reference to the *doctrines of that religion itself* (emphasis added)".[33] The Court further noted that a religious organisation or denomination has complete autonomy to decide what practices are considered essential by a religion and that no external authority has the right to interfere with this determination.[34] Further, a denomination's belief that a practice is essential would be taken into account.[35] The ERP Test is rooted in cultural relativism, as seen in its insistence on practices being understood only on the basis of a religion's own doctrines, by the religion's practitioners considering said practices as being essential, and in its denial of external judgement.

Cultural relativism protects cultures from imposition of external norms, but what happens when the challenges are internal? Our understanding of religious autonomy often privileges the rights of the group over individual rights, usually at the expense of its less powerful and marginalised members: sexual, gender, and social minorities. With the ERP Test, traditions and cultures are unhindered in practice and unchanging, or not an essential culture at all.[36] Thus, we must be cautious about two issues. First, the use of the ERP Test to exempt personal laws from the scrutiny of international human rights standards, especially regarding issues of family and sexuality of women.[37] Second, the construction and judicial enforcement of the notion that essential cultural or religious practices are static in nature. This is because the law often ends up elevating the most orthodox,

31 ibid 510–11.

32 *Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt* AIR 1954 SC 282.

33 ibid [20].

34 ibid [23].

35 *Indian Young Lawyers Association* (n 2) [284].

36 ibid [125].

37 Radhika Coomaraswamy, 'Different but Free: Cultural Relativism and Women's Rights as Human Rights' in Courtney W Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (Palgrave Macmillan 1999) 82.

majoritarian, or religiously elite practices into importance and protection.[38] This is in ignorance of the diversity within the religion, and internal dissent regarding the religious practices.[39]

For example, in determining that the exclusion of women constituted an ERP of the Temple, the Kerala High Court in the 1991 judgement largely based its decision on the word of the *Thanthri* (the highest religious authority of the Temple), opining that questions of spirituality could only be ascertained by him.[40] Taking solely the *Thanthri's* opinion as the authority on the practice legally thus sanctifies only the religious hegemonic and majoritarian view on the practice, with no space for dissent, and elides the chance for the culture to undergo change. The effect of this legal sanctity of a dominant practice can be especially seen in the fact that prior to the 1991 judgement, women entered the Temple on a small scale outside the pilgrimage season, and did so with the tacit permission of the *Thanthri*.[41] This progression was fettered by the judgement, which transformed a flexible practice into a rigid, enforceable order with police protection. While in 1991 the Temple Board had taken the stance that women should be restricted *only* during the pilgrimage period,[42] after 1991 the restriction by practice extended to *all* entry of women into the Temple.[43] Thus, the law not only legitimised but also further entrenched a discriminatory practice of the Temple Board.

The hurdle of religious diversity was acknowledged by Justice D.Y. Chandrachud in the 2018 judgement, noting that the application of the ERP Test would prove to be difficult when there existed rival contentions of conflicting religious practices. Therefore, the Court would be the ultimate determinant of an essential practice, on a case-by-case basis.[44] In the name of protecting religious

[38] Oonagh Reitman, 'Cultural Relativist and Feminist Critiques of International Human Rights - Friends or Foes?' (1997) 100(1) The Swedish Journal of Political Science 100, 106; Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) Economic & Political Weekly 12, 13.

[39] ibid.

[40] *S Mahendran* (n 19) [25], [36]–[37].

[41] ibid [7]; Gilles Tarabout, 'Chapter 3: Religious Uncertainty, Astrology and the Courts in South India' in Daniela Berti et al (eds.), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate 2015) 70–71.

[42] *S Mahendran* (n 19) [43].

[43] TA Ameerudheen, 'Now, Female Devotees Must Carry Proof of Age to Enter Sabarimala Temple' *Scroll* (21 April 2017) <https://scroll.in/article/835160/now-women-devotees-must-carry-proof-of-age-to-enter-sabarimala-temple> accessed 11 April 2020; 'Sabarimala Temple Purified After 35-Year-Old Woman Entered Shrine' (*India TV,* 19 December 2011) <https://www.indiatvnews.com/news/india/sabarimala-temple-purified-after-35-year-old-woman-entered-shrine-12976.html> accessed 11 April 2020.

[44] *Indian Young Lawyers Association* (n 2) [274]–[275].

freedoms, the courts would now assume a theological mantle.[45] This is problematic, seeing as the very reason why religious denominations were given a role in deciding its essential aspects was in furtherance of their autonomy under Article 26 of the Constitution of India.[46] The court would then be free to play a human rights reformist role in ignorance of religious views, thus falling into the very situation that cultural relativism sought to avoid: the imposition of external ideals.

Therefore, the application of the ERP Test is, at its best, supplanting a religion's views and morals with that of the court, and, at its worst, legally upholding a hegemonic religious narrative. In either circumstance, in its effort to paint culture as unchanging and homogenous, and in the concretisation of the inessentiality or essentiality of a practice, the law's overreach into religion has robbed the chance for religions to internally reform themselves if they so desire, and has furthered a singular imperialist notion of human rights.

## IV. A Cultural Dissent Approach Towards Religious Practices Disputes

It is important to distinguish between a religion and its practices because while its texts may not necessarily be problematic, its practices and codes developed over centuries may be sources of discrimination. This distinction between practices (such as by the Temple Board) rather than the religion itself being discriminatory is necessary to avoid the alienation of the religion's practitioners, and to increase acceptance of human rights norms in religion-dominated societies like India.

Acknowledging dissent and diversity within a culture makes it more difficult to justify discrimination carried out as flowing from the culture itself. By refusing to protect the rights and practices of the religious elite which are discriminatory in the name of religion or culture, a 'cultural dissent' approach to the '*religion vs human rights*' debate would acknowledge internal efforts within a culture to reform the religion. Further, avoiding the framing of the issue in purely external imperialist

[45] Tarunab Khaitan, 'The Essential Practices Test and Freedom of Religion – Notes on Sabarimala' (*Indian Constitutional Law and Philosophy*, 29 July 2018) <https://indconlawphil.wordpress.com/2018/07/29/guest-post-the-essential-practices-test-and-freedom-of-religion-notes-on-sabarimala/> accessed 11 April 2020.

[46] *Indian Young Lawyers Association* (n 2) [408]; Gautam Bhatia, 'Nine Judges, Seven Questions' (*Indian Constitutional Law and Philosophy*, 16 February 2020) <https://indconlawphil.wordpress.com/2020/02/16/nine-judges-seven-questions/> accessed 11 April 2020; Constitution of India 1950, art 26: "Freedom to manage religious affairs. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right: (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law".

human rights terms could increase the community's acceptance of the change argued for.

This balance between group rights and individual dissents could be realised within the 'anti-exclusion' principle, an alternative to the ERP Test proposed by Justice D.Y. Chandrachud in the 2018 judgement.[47] This principle states that:

> "[t]he State and the Court *must respect the integrity of religious group life* (and thereby treat the subjective understandings of religious adherents as determinative of the form and content of religious practices) *except* where the practices in question lead to the exclusion of individuals from economic, social or cultural life in a manner that *impairs their dignity, or hampers their access to basic goods* (emphasis added)".[48]

Not only does this principle allow religious groups the autonomy to determine their own doctrines and tenets (thus protecting the freedom of religion), it also provides deference to individual rights when the dignity or access to basic goods of persons within the community is hampered (thus protecting human rights and the values of a liberal Constitution). Since this is a fairly high standard, not *every* practice of a culture or religious group will be subjected to equality claims,[49] and the Court no longer has to delve into complex theological questions and replace religious values with its own.[50]

An important caveat, however, is that someone belonging to the community must claim the denial of dignity or access to basic goods – that is, dissenters of a religious or cultural practice must themselves articulate assertions of cultural dissent. Otherwise, this principle risks suffering from the same pitfalls of an imperialist and external application of human rights, and the change will not be organic or arise from within the community. Cultural dissent needs to come from dissenters within a religious or cultural community in order to ensure diversity within human rights movements. This diversity would prevent the advancement of the notion that there can be only one specific, homogenous vision of what freedom

[47] *Indian Young Lawyers Association* (n 2) [414]–[415].

[48] Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution' (2016) 5(3) Global Constitutionalism 351, 374.

[49] ibid 380.

[50] ibid 382. See generally, Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala' (2020) 3(2) University of Oxford Human Rights Hub Journal 123, 147–150, suggesting a possible manner for practical application of this principle.

can mean (especially in the context of what it means to be a liberal women), and that all those who are unfree must aspire to that same vision of freedom.[51]

Herein lies the problem with the 2018 *Sabarimala* petition and judgement. Justice Malhotra's dissenting judgement, though flawed in its application of the ERP Test,[52] points out that the right to approach the Supreme Court under Article 32 is based on personal rights having been violated.[53] The petitioners in this case were social and women's rights activists, and not devotees of Lord Ayyappa as present in the Temple.[54] Indeed, nowhere in the 2018 judgement were the efforts of any women devotees to enter the Temple post-1991 mentioned.

The problem with this, as Justice Malhotra notes, is that not only is the Court again substituting its own rationality and sense of morality over those of the religious community,[55] but also that allowing such PILs in religious matters "would open the floodgates to interlopers to question religious beliefs and practises",[56] which would spell grave peril for religious minorities. The head of the Hindu Mahasabha filing a petition challenging the non-allowance of Muslim women into mosques for prayers along with men[57] is a very different exercise of religious and human rights advocacy than the All India Muslim Personal Law Board declaring that entry would be allowed, after it was petitioned by a Muslim woman.[58]

The additional effect of this change in the Temple's cultural practice is that it has not been seen as organic or emanating from within the community, but, as previously noted, as an imposition of Western and external morals.[59] Consequently, the judgement has not been accepted, with devotees and protesters continuing to prevent women from entering the Temple.[60] Most women who attempted to enter the Temple immediately following the 2018 judgement were journalists

51 Kapur (n 10) 120–121.

52 Gautam Bhatia, 'The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent' (*Indian Constitutional Law and Philosophy*, 29 September 2018) <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/> accessed 11 April 2020.

53 *Indian Young Lawyers Association* (n 2) [446].

54 ibid [446].

55 ibid.

56 ibid [447].

57 '"Let a Muslim Woman Challenge It": SC Dismisses Hindu Mahasabha Plea on Mosque Entry' (*The Wire*, 8 July 2019) <https://thewire.in/law/supreme-court-hindu-mahasabha-plea-muslim-women-mosque-entry> accessed 11 April 2020.

58 'Muslim Women Permitted to Enter Mosques to Offer Namaz, AIMPLB tells SC' (*The Economic Times*, 29 January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/muslim-women-permitted-to-enter-mosques-to-offer-namaz-aimplb-tells-sc/articleshow/73743386.cms?from=mdr> accessed 11 April 2020.

59 Raj (n 17); *Gulf News* (n 17); Chandrasekhar (n 17).

60 *Al Jazeera* (n 17); Smitha (n 17).

and activists,[61] which further contributed to this narrative. This is not to deny the existence of women devotees of Lord Ayyappa who wish to make the pilgrimage, but merely to stress that the process by which change is created is as important as the change itself. Such liberal interventions run the risk of creating a rift between organic dissent and the religious community, again compelling women to choose between their religion and their equality.[62]

While an exception can certainly be granted when marginalised groups have been effectively silenced and are incapable of making claims, it would be bordering on patronising to assume that *all* women devotees of Lord Ayyappa are incapable of exercising their agency and that they would fall under this category.[63]

## VI. Conclusion

In the battle between women's rights, human rights, and cultural relativism, cultural imperialist ideals of women's freedom are often used to wage war against traditional male imperialism, while cultural relativists regard any feminist and human rights ideals as a Western constructs. Absolutist positions on both sides only lead to deadlocks. When it comes to age-old cultural and religious practices in a society like India's, adopting a purely legal approach is not only arrogant, but also lacking in enforceability. This is why cultural reforms must come from within, and must be complemented with public education strategies.

The story of the *Shani Shingnapur* Temple in the Indian state of Maharashtra is a testament to this. In the course of an activist mounting a challenge to lifting a ban on temple entry to women based on a four-hundred year old custom, women devotees engaged in constant dialogue with the villagers, temple heads, cultural

[61] Ramesh Babu, 'Sabarimala Row: Devotees Attack Journalists, Stop Women From Approaching Temple' (*Hindustan Times*, 17 October 2018) <https://www.hindustantimes.com/india-news/tension-mounts-in-kerala-as-sabarimala-set-to-open-today/story-YRZuiWacJvlZc8Agn1gfJK.html> accessed 11 April 2020; Charul Singh, 'New York Times journalist, colleague forced to return from Sabarimala amid protest' (*Deccan Chronicle*, 18 October 2018) <https://www.deccanchronicle.com/nation/current-affairs/181018/new-york-times-journalist-forced-to-return-sabarimala-amid-protest.html> accessed 11 April 2020; Shalini Lobo, 'Chased Away From Sabarimala by Angry Devotees, 11 Women Activists Vow to Return' (*India Today*, 24 December 2018) <https://www.indiatoday.in/india/story/chased-away-from-sabarimala-by-angry-devotees-11-women-activists-vow-to-return-as-it-happened-1416032-2018-12-24> accessed 11 April 2020; 'Sabarimala: Activist Trupti Desai Cancels Plan to Visit Shrine After Police Deny Protection' (*Scroll*, 27 November 2019) <https://scroll.in/latest/945015/sabarimala-activist-trupti-desai-cancels-plan-to-visit-shrine-after-police-deny-protection> accessed 11 April 2020.

[62] Kapur (n 10).

[63] Bhatia (n 52).

leaders, temple trustees, and other stakeholders.[64] This process of dialogue and dissent proved crucial to the villagers respecting the order of the Bombay High Court in lifting the ban.[65]

It is worth noting that the issues of the competency of the judiciary to inquire into essential practices and the permissibility of PILs against religious practices by persons not belonging to that denomination are currently under review before a nine-judge bench of the Supreme Court.[66] In the absence of internal discourse and dissent, and with protesters continuing to block the entry of women into the Temple, it remains to be seen whether an outcome similar to *Shani Shingnapur* can be achieved with the *Sabarimala* Temple as well.

[64] Alka Dhupkar, 'What If Sabarimala Was in a BJP-Ruled State?' (*The Wire*, 3 January 2019) <https://thewire.in/religion/sabarimala-women-entry-shani-shingnapur> accessed 11 April 2020.

[65] 'Shani Shingnapur entry row: High Court Asks Maharashtra Government to Protect 'Fundamental Right' of Women' (*The Economic Times*, 1 April 2016) <https://economictimes.indiatimes.com/news/politics-and-nation/shani-shingnapur-entry-row-high-court-asks-maharashtra-government-to-protect-fundamental-right-of-women/articleshow/51646037.cms?from=mdr> accessed 11 April 2020.

[66] *Kantaru Rajeevaru v Indian Young Lawyers Association* (2020) 2 SCC 1 [5.4], [5.7].

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# Bullets and Ballots in Bangladesh: Does the Bangladeshi Government's Usage of Coercion and Co-Optation Breach Article 25 of the International Covenant on Civil and Political Rights?

Imran Dewan*

Abstract

State violations of human rights are typical in autocracies where governments are unaccountable to their people. These governments lack the deterrence required to prevent human rights abuses. Meanwhile, the domestic democratic infrastructure is too weak or non-existent to threaten autocracies with regime change or legal penalties. Undeterred, these governments utilise state power to viciously pursue autocratic interests, which centre around keeping the ruling elite in power. To address this, Articles 25(a) and (b) of the International Covenant on Civil and Political Rights mandate electoral rights for citizens to ensure they can partake in stately matters and progress their political interests through elections. Despite its commendable aspirations, a question remains: How comprehensive is Article 25 as a legal instrument to deliver electoral rights under autocratic governments? The People's Republic of Bangladesh is used as a case study to provide insight into this question. This article takes an interdisciplinary approach, drawing from both legal and political science literature as well as primary sources in the form of cases submitted to the Human Rights Committee. Bangladesh's attempts to curtail electoral rights from 2011 through 2020 will be analysed from the perspective of

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'coercion' and 'co-optation', a method of analysis endorsed by political science researchers including Gerschewski. This research will contribute to both political science and legal disciplines by applying Gerschewski's framework to Bangladesh, and by assessing the capacity of Article 25 to respond to coercion and co-optation. This article will conclude that while coercive activities are extensively dealt with by Article 25, the status of some co-optative activities under Article 25 is relatively ambiguous.

*Keywords: coercion, co-optation, human rights, Bangladesh, Public International Law*

## I. Introduction

The People's Republic of Bangladesh (Bangladesh) is a party to the International Covenant on Civil and Political Rights (ICCPR).[1] Amongst the rights the ICCPR guarantees, Article 25 is the most explicit in requiring states parties to grant its citizens the opportunity to participate in the state's political affairs. Political violence has been a persistent issue in Bangladesh since its liberation in 1971.[2] This challenges Bangladesh's ability to comply with the ICCPR. In 2011, political violence gained new momentum when the political party that formed the government since 2009, namely, the 'Bangladesh Awami League' (BAL), abolished the 'Caretaker Government' using its parliamentary majority.[3] The Caretaker Government was formed to ensure fair elections during interim periods when a ruling government completed their tenure.[4] The BAL has since accumulated power rapidly, building upon its ruling party status to dramatically shift the climate of political violence in its favour.[5] Prominent journalist Sayemi described the beginnings of the BAL's current tenure as "the thieves have been replaced by a dangerous gang of robbers".[6]

Gerschewski, as part of his in-depth research concerning autocracies, provides a useful political science framework to comprehend the disempowerment

1 International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171, entered into force 23 March 1976 (ICCPR).

2 Mohammed Moniruzzaman, 'Party Politics and Political Violence in Bangladesh: Issues, Manifestation and Consequences' (2009) 16(1) South Asian Survey 81, 84.

3 Mirza Hassan and Sohela Nazneen 'Violence and the Breakdown of the Political Settlement: An Uncertain Future for Bangladesh?' (2017) 17(3) Conflict, Security & Development 205, 210.

4 ibid 211.

5 Jasmin Lorch, 'Civil Society Support for Military Coups: Bangladesh and the Philippines' (2017) 13(2) Journal of Civil Society 184, 192.

6 M Sayemi, 'Awami Atrocities Know No Bounds' Bulletin (New York, 31 July 2010) 1.

the BAL's political activities cause to Bangladesh's citizens.[7] The framework analyses autocratic strategies comprehensively, classifying them into the categories of coercion and co-optation.

Coercion involves using or threatening to use physical sanctions against actors to force them into complying with the regime's demands.[8] High intensity coercion involves visible acts which are either targeted at widely-known individuals or at significant oppositional organisations.[9] These acts include violently repressing mass demonstrations and assassinating opposition party members.[10] Low intensity coercion generally takes more subtle forms.[11] Examples include denying employment opportunities and political rights, such as the freedom of assembly.[12] Coercion reduces pressure on the regime to change its policies or allow for a replacement per popular opinion.[13]

Alternatively, co-optation is used by ruling regimes to secure relationships among strategically relevant actors who hold powers suited to maintaining the *status quo*.[14] Formal channels of co-optation include creating alliances between the regime and other political candidates and parties.[15] These channels also include nurturing political affiliations from and within civil society organisations.[16] Informal channels of co-optation include using clientelism, patronage, and corruption for the regime elite to rule by a close network involving indirect and direct ties to subordinate actors.[17] Co-optation is instrumental to autocratic survival and the maintenance of political order as it builds the regime's support whilst dislodging and dividing its opponents.[18]

Although such power accumulating behaviours are characteristic of Bangladesh's political context, the BAL surpasses its predecessors with its extensive use of co-optation and coercion. For example, previous governments were generally restricted to controlling their armed cadres, some factions within the

7 Johannes Gerschewski, 'The Three Pillars of Stability: Legitimation, Repression, and Co-optation in Autocratic Regimes' (2013) 20(1) Democratization 13.

8 ibid 16.

9 ibid.

10 ibid.

11 ibid.

12 ibid.

13 Erica Frantz and Andrea Kendall-Taylor, 'A Dictator's Toolkit: Understanding How Co-optation Affects Repression in Autocracies' (2014) 51(3) Journal of Peace Research 332, 334.

14 Gerschewski, 'The Three Pillars of Stability' (n 7) 22.

15 ibid.

16 ibid.

17 ibid.

18 ibid.

bureaucracy, and law enforcement.[19] Unlike the BAL, they were not able to extend their control to factions, such as Bangladesh's armed forces, civil societies, and others.[20] Tensions particularly arise between the BAL's interests in eliminating any challenges to its power and upholding the object and purpose of Article 25. A politically empowered citizenry, as demanded by Article 25, will render the BAL's largely unchecked political control over Bangladesh vulnerable against the nation's political demands.

Article 25 has three subsections detailing the rights of political participation, which Bangladesh must respect. This article will deal with the first two. These are the right to participate in "public affairs, directly or through freely chosen representatives",[21] and the right "to vote and be elected at genuine periodic elections".[22] As implied by the wording of the text, the first is a 'catch-all' broad provision designed to ensure fair access to political power, whilst the second provides a method to realise the first. Accordingly, violating the second right, by manipulating the electoral process, also infringes on the first one. The impact autocratic activities in Bangladesh have on these interrelated Articles is considered by the research question: since 2011, does the Bangladeshi government's political strategies of coercion and co-optation violate the rights of political participation set out in Articles 25(a) and (b) of the ICCPR?

In answering the research question, this article aims to highlight gaps in the current understanding of Article 25. This will ideally stimulate future dialogue towards refining the protections of Article 25 by altering its interpretation. This article also aims to provide a more nuanced lens to view the protections offered by Article 25, by combining the political science and legal literature when analysing Bangladesh's electoral process. Having Bangladesh as a case study, it aims to identify the specific and general activities of Bangladesh's government which violate Article 25. Thereby, it will help guard against such activities to uphold the purpose of Article 25 ensuring democratic representation for the citizenry.

This article will address the research question through an interdisciplinary methodology. It combines qualitative doctrinal research under a legal positivist tradition with insights from the political science literature. The analysis aims to clarify the relationships between three broad categories of information: information relevant to interpreting the law, such as cases and commentary; political science literature to deconstruct co-optation and coercion, and track their effects; and

[19] Bert Suykens, 'The Bangladesh Party-State: A Diachronic Comparative Analysis of Party-Political Regimes' (2017) 55(2) Commonwealth & Comparative Politics 187, 197.

[20] ibid.

[21] ICCPR Article 25(a).

[22] ibid Article 25(b).

information regarding the BAL's political activities since 2011, the sources for which include news Articles, reports from Non-Governmental Organisations (NGO), and correspondences between the BAL and the Human Rights Committee (HRC).

Gerschewski's political science framework will be used to shed light on the BAL's autocratic strategies of coercion and co-optation.[23] Then the interactions these strategies have with Article 25 will be categorised in two ways: strategies which constitute clear violations, and strategies where Article 25 is relatively silent, though their effects can be demonstrated to undermine the electoral process. By establishing these categories and relationships, this article will explicate how Article 25 addresses each strategy. This explanation will help reveal the adequacy of Article 25 when considering the impact these strategies have on the electoral process.

This article consists of four chapters. It will first engage in literature review, highlighting the originality and significance of this research. The legal and electoral impacts of coercion and co-optation will then be discussed in sections III and IV, respectively. The article will conclude that the activities associated with coercion *prima facie* violate Article 25. Only two activities under co-optation, however, do the same whilst the rest await further legal discourse to determine their status with the same level of certainty.

## II. Literature Review

The HRC, in its 2017 Concluding Observations on Bangladesh, only had one concern regarding Bangladesh's compliance with Article 25.[24] The concern was that the excessive force the government uses during elections deters people from voting.[25] This can lead one to assume that Article 25 is narrow in its application or that the BAL does not engage in any other activity subverting the electoral process, or both. Both assumptions, upon a review of legal literature, lack positive support.

The legal literature identifies, broadly and specifically, a range of political actions which Article 25 obligates or prohibits.[26] Such literature includes the HRC's General Comments (GC), which provide authoritative guidelines to interpret Article 25, though they are not legally binding on states parties. The GC are different from the Concluding Observations; the former focusses on the law, and

[23] Gerschewski, 'The Three Pillars of Stability' (n 7) 16-22.

[24] Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) CCPR/C/BGD/CO/1 at 7 [29] (Concluding Observations on the Initial Report of Bangladesh).

[25] ibid.

[26] Human Rights Committee, 'General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights' (27 August 1996) CCPR/C/21/Rev.1/Add.7 at 3–8 (GC).

its analysis is not restricted to evidence sent by various stakeholders. They indicate that many activities associated with coercion and co-optation violate Article 25. For example, they assert that adherence to Article 25 requires states to allow the freedoms of assembly, association, and expression.[27]

The GC, however, do not directly deal with the strategies themselves. This observation holds true for three other general categories of sources, which are nevertheless useful to attain more specific information regarding Article 25 and its applicability: journal Articles applying Article 25 to the political systems of states, including Russia, Sri Lanka, and Turkey;[28] the HRC's decisions on individual complaints submitted to it;[29] and the Concluding Observations the HRC compiles on various states.[30] The absence of existing literature making this linkage deprives the legal field from a multidimensional understanding regarding the effectiveness of Article 25 in the complex arena of state-based politics.

Incorporating the political science literature here is useful due to the in-depth analysis it provides to understand autocratic behaviour. This includes Gerschewski's framework, which follows the recent wave in autocracy research as it has been continuing since the end of the 1990s.[31] This framework highlights the immense utility, besides significance, of coercion and co-optation as characteristic political strategies strengthening autocratic power. Though the GC state that autocracies run contrary to the purposes of Article 25, they do not provide insight into their strategies, nor provide specifics on how they violate Article 25.[32] Thus, this article will attempt to provide this insight through the political science literature, then apply Article 25 and clarify potential violations.

The political science literature has also neglected how autocratic strategies affect domestic and international laws, including Article 25. If under rare

[27] ibid 4 [8].

[28] See Mariya Riekkinen, 'Russian Legal Practices of Citizens' Involvement in Political Decision-Making: Legal Study of their Genesis under the Influence of International Law' (2013) 17(1) International Journal of Human Rights 79; Ben Saul, 'Election Violence in Sri Lanka: Implementing the Right to a Free and Fair Election' (2002) Asia-Pacific Journal on Human Rights and the Law 1; Zachary Towle, 'Why Article 25 of the International Covenant on Civil and Political Rights should be Explicitly Excluded from Derogation under Article 4' (2018) 14(2) Suffolk Transnational Law Review 479.

[29] See Human Rights Committee, 'Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights' (16 January 2007) CCPR/C/88/D/1047/2002 (Views of the Human Rights Committee under Article 5, Paragraph 4).

[30] See Human Rights Committee, 'Concluding Observations on the Second Periodic Report of Honduras' (22 August 2017) CCPR/C/HND/CO/2 at 8 [44] (Concluding Observations on the Second Periodic Report of Honduras).

[31] Gerschewski, 'The Three Pillars of Stability' (n 7) 17.

[32] Concluding Observations on the Initial Report of Bangladesh (n 24) 4 [5].

circumstances the literature mentions law, it occurs in the context of how the law advances autocratic strategies rather than asking how the strategies violate the law.[33] When conducting research into autocracies, the literature generally focusses on the characteristics of coercion and co-optation,[34] their effects,[35] and their prevalence.[36]

Whilst the political science literature has elaborated on the coercion and co-optation activities of the BAL,[37] none have distinguished them into clear categories. This has precluded the literature from achieving an additional layer of analysis by contextualising the BAL's activities within the discipline of autocratic research. Sections III and IV will now focus on how Article 25 responds to coercion and co-optation, respectively, and provide further insight into Bangladesh's position under international law.

## III. Coercion

For Article 25 to be effective against autocracies, it must deal with what is described as the "hallmark" of autocracies,[38] namely, coercion. The BAL's coercion co-ordinates various state apparatus to reduce reliance on dialogue-based democratic sources for power, but instead consolidate power through force.[39] This section will examine the extent to which the BAL's coercion constitutes a breach of Articles 25(a) and (b). It will first analyse the BAL's coercion targets, including dissident gatherings, opposition party leaders, and voicers of dissent. Then the

[33] See Lee Morgenbesser, 'The Autocratic Mandate: Elections, Legitimacy and Regime Stability in Singapore' (2016) 30(2) The Pacific Review 205, 210.

[34] See Gerschewski, 'The Three Pillars of Stability' (n 7) 16-22.

[35] See Mauricio Rivera, 'Authoritarian Institution and State Repression: The Divergent Effects of Legislatures and Opposition Parties on Personal Integrity Rights' (2017) 61(10) Journal of Conflict Resolution 2183, 2202.

[36] See Jørgen Møller & Svend-Erik Skaaning, 'Autocracies, Democracies, and the Violation of Civil Liberties' (2013) 20(1) Democratization 82, 89.

[37] See Adeeba Aziz Khan, 'Power, Patronage, and the Candidate-nomination Process: Observations from Bangladesh' (2020) 54(1) Modern Asian Studies 314.

[38] Frantz, 'A Dictator's Toolkit' (n 13) 332.

[39] Shelly Feldman, 'Bangladesh in 2014: Illusive Democracy' (2015) 55(1) Asian Survey 67, 68.

major coercion sources will be analysed, which include arbitrary detention, violence from law enforcement, judicial bias, and financial deprivation.

### A. Protests, campaigns, and peaceful assembly

Coercion is highly apparent when used to disperse gatherings held against the BAL or its policies, such as protests and campaigns, or both.[40] The informal method of dispersion involves the BAL's hired thugs and the BAL's student wing 'Chattro League', which clashes with dissidents and turn a politically meaningful gathering into a violent brawl.[41] The formal and more commonly used method involves police swinging batons, lobbing tear gas shells, spraying water cannons, and driving armoured vehicles in the dissidents' direction.[42] The police justify these on grounds of "maintaining public order" and "national security".[43] They frequently deny the opposition to hold political rallies, leaving them without domestic legal protections and subject to dispersion by police.[44] The police typically escalate tensions and use excessive force against dissidents irrespective of the legality or peacefulness of the gathering, often accusing the dissidents of initiating the conflict.[45] Even informal gatherings are not safe from coercion. In an incident named the 'Uttara dinner fiasco', police stormed and dissolved a gathering in the private residence of an opposition leader, which included a former President.[46] They later denied knowledge despite vast media evidence suggesting

[40] Bert Suykens and Aynul Islam, 'Hartal as a Complex Political Performance: General Strikes and the Organisation of (Local) Power in Bangladesh' (2013) 47(1) Contributions to Indian Sociology 61, 72.

[41] 'Bangladesh: Stop Attacks on Student Protesters, Critics' (*Human Rights Watch*, 6 August 2018) <https://www.hrw.org/news/2018/08/06/bangladesh-stop-attacks-student-protesters-critics> accessed 11 November 2020.

[42] David Jackman, 'The Threat of Student Movements in Bangladesh: Injustice, Infiltrators and Regime Change' (2019) Effective States and Inclusive Development Research Centre Working Paper 125, 14 <http://www.effective-states.org/wp-content/uploads/working_papers/final-pdfs/esid_wp_125_jackman.pdf> accessed 11 November 2020.

[43] US Department of State, '2018 Country Reports on Human Rights Practices: Bangladesh' (Report, 2018) 7–21.

[44] Faisal Mahmud, 'Is Bangladesh Moving Towards One Party State' (Al Jazeera, 4 April 2018) <https://www.aljazeera.com/features/2018/4/4/is-bangladesh-moving-towards-one-party-state> accessed 11 November 2020.

[45] Bert Suykens, 'A Hundred Per Cent Good Man Cannot do Politics': Violent Self-sacrifice, Student Authority, and Party-State Integration in Bangladesh' (2018) 52(3) Modern Asian Studies 883, 907.

[46] C R Abrar, 'Compromising freedom of assembly' (*Daily Star*, 3 August 2017) <https://www.thedailystar.net/opinion/human-rights/compromising-freedom-assembly-1442614> accessed 11 November 2020.

the contrary.[47] Accordingly, the constant threat of violence has increased dissidents' costs of gathering, discussing political issues, campaigning, and mobilising to voice their grievances. The citizenry is unable to fully perceive and understand the gravity and nature of political issues, as dissident gatherings are deterred from responding adequately to the respective issue. This can leave many uninformed and unmotivated to exercise their rights through the electoral process.[48]

Using street clashes and police brutality to disrupt protests, campaigns, and other political gatherings violates Article 25 through its interference with the freedom of peaceful assembly. This freedom, as found under Article 21,[49] is explicitly mentioned as essential to realising the rights under Article 25.[50] Still, this freedom is also found under Articles 17, 18, and 22.[51] This suggests that Article 21 covers assemblies not covered by the other articles, specifically those concerned with the proclamation and discussion of ideas.[52] The gatherings it deals with can include informal ones, such as the Uttara dinner fiasco, which can also attract the protections under Article 17 as it is concerned with private gatherings. Restrictions to this freedom can only be justified if it is "necessary in a democratic society"[53] and in accordance with the law. The HRC found that a severe restriction to the freedom of assembly in Kazakhstan was the frequent denial of permission to hold assemblies.[54] The denial placed demonstrators at a risk of being arrested and charged with civil disobedience.[55] Similarly, the denial of permission and subsequent clashes with demonstrators in Bangladesh taints Bangladesh's adherence to Article 25. In Bangladesh, demonstrators are not only at risk of being arrested, but also being murdered or charged with attempted murder of police officers, even when it is the police who escalated the conflict. Therefore, Bangladesh violates Article 25

47 ibid.

48 Guillermo Trejo, 'The Ballot and the Street: An Electoral Theory of Social Protest in Autocracies' (2014) 12(2) Perspectives on Politics 332, 347.

49 ICCPR Article 21.

50 'GC' (n 26) 4 [8].

51 ICCPR Articles 17(1), 18(1), 22(1).

52 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Kehl am Rhine: Engel 2005) 485.

53 ICCPR Article 21.

54 Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (21 July 2011) CCPR/C/KAZ/CO/1 at 7 [26].

55 ibid.

as dissidents are unable to freely gather and participate politically in a collective manner.

### B. The opposition and free association

The existence of dissidents themselves, in the form of opposition leaders and their supporters, is a major focus for the BAL's coercion. The harassment of opposition leaders overtly signals that one's place in the hierarchy of political power does not save them from coercion.[56] This demotivates the opposition as a whole to oppose the regime.[57] During the 2018 elections, sixteen opposition party candidates were jailed,[58] whilst nineteen political activists were reported dead.[59] Harassment against the opposition signals that the BAL is committed to retain their power at all cost, since it breaks a taboo which used to save political leaders from coercion in the event of a regime change.[60] This casts doubt on the opposition's commitment and strength levels to protect its supporters, a fact confirmed by interviews conducted with opposition members in 2018.[61] Hence, the citizenry is deterred and dissuaded from freely associating with the opposition when their leaders cannot even save themselves. The coercion eliminates existing candidates and deters future candidates from allying with the opposition in the electoral process. The opposition's lack of affiliates can also portray the opposition as unworthy of support, even though the affiliation is actually withheld due to deterrence.[62]

To effectively implement Article 25, voters must have a "free choice of candidates", which cannot be granted if candidates are deterred and thereby restricted from contesting elections.[63] The mistreatment of the opposition's leaders and supporters further undermines the freedom of association and violates Article

[56] David Armstrong, Ora John Reuter and Graeme Robertson, 'Getting the Opposition Together: Protest Coordination in Authoritarian Regimes' (2020) 36(1) Post-Soviet Affairs 1, 4.

[57] ibid.

[58] Galib Shraf, 'Litigation, Arrest, Legal Barriers Plague BNP Campaign' Prothom Alo (18 December 2018) <https://en.prothomalo.com/bangladesh/Litigation-arrest-legal-barriers-plague-BNP> accessed 11 November 2020.

[59] Saif Khalid, 'Opposition Crushed, Hasina to Rule over Bangladesh Unchallenged' (*Al Jazeera*, 3 January 2019) <https://www.aljazeera.com/news/2019/1/3/opposition-crushed-hasina-to-rule-over-bangladesh-unchallenged> accessed 11 November 2020.

[60] Mohammad Mozahidul Islam, 'Electoral Violence in Bangladesh: Does a Confrontational Bipolar Political System Matter?' (2015) 53(4) Commonwealth and Comparative Politics 359, 374.

[61] David Jackman, 'Violent Intermediaries and Political Order in Bangladesh' (2019) The European Journal of Development Research 705, 717–18.

[62] Carl Henrik Knutsen, Håvard Mokleiv Nygård and Tore Wig, 'Autocratic Elections: Stabilizing Tool or Force for Change?' (2017) 69(1) World Politics 98, 111.

[63] GC (n 26) 5 [15].

25. The freedom of association, as found under Article 22[64] is adjunct to Article 25.[65] This freedom permits people to formally gather into groups, including political parties, to progress common interests.[66] It can be restricted alike Article 21 when "necessary in a democratic society"[67] through legally compliant measures. In its 4th periodic report to the United Nations General Assembly, the HRC expressed concerns at Armenia's intimidation and "detention and conviction of some opposition leaders",[68] which signify violations of Article 25. These concerns are visible in Bangladesh as exemplified during its 2018 elections with the BAL's imprisonment and extrajudicial killings of opposition members and supporters. Hence, the BAL's activities against political dissidents violates Article 25 as people are coerced to distance themselves from the opposition, jeopardising the citizenry's power to politically contend the regime.

### C. Dissidence and speech

Exposing the BAL's coercive practices for public awareness is hindered as the BAL also coerces the voices of political dissent, such as journalists. In 2017 alone, eleven journalists were threatened, nine were assaulted, twenty-four were injured and one was killed.[69] Similar treatment extends to those posting political dissent on social media.[70] To legitimise and promote this, the BAL uses broad legislation which incriminates many forms of speech. Under the Digital Security Act 2018, offenders can be sentenced to life imprisonment and fined heavily for digitalised speech "against liberation war, father of the nation, National Anthem or National Flag".[71] They can be jailed for up to ten years for speech destroying "any communal harmony or create unrest".[72] Police can arrest anyone without warrants when merely suspicious about a potential crime through digital media.[73] Approximately one thousand three hundred and twenty-five people were arrested

64 ICCPR Article 22.
65 GC (n 26) 8 [26].
66 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 652.
67 ICCPR Article 22.
68 Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Azerbaijan' (16 November 2016) CCPR/C/AZE/CO/4 at 9 [42].
69 Odhikar, 'Annual Human Rights Report 2017' (Report, January 2018) 11.
70 ibid 8.
71 Digital Security Act 2018 (Bangladesh) s 21.
72 ibid s 31(1).
73 ibid s 42.

under this act in 2019 alone.[74] The Information and Communication Technology Act 2006 further criminalises electronic communications which "[tend] to deprave or corrupt"[75] the state's image. This was used to arrest prominent journalist Shahidul Alam in front of mass media, due to an Al Jazeera interview where he exposed the BAL's coercion.[76] The arrest was unprecedented, as previously, non-political urban intellectuals would be coerced into secrecy.[77] Furthermore, the meaning of 'sedition' under the Penal Code 1860[78] is also stretched to excuse criminal penalties against those publicising mere comments against the BAL.[79] To appeal these charges, victims are subjected to gruelling administrative and procedural requirements, such as extensive wait times, filing requirements and legal costs.[80] They are also typically urged to pay hefty bribes.[81] Thus, the citizenry is coerced into self-censorship when expressing dissident opinions in political matters.

The BAL's crackdown on dissident views violates Article 25 by infringing on the freedom of expression,[82] which is guaranteed under Article 19.[83] This freedom includes to impart ideas and information in political discourse.[84] Means of expression include banners, posters, pamphlets, newspapers, books, legal submissions, and dress.[85] Expression can also be through the internet.[86] The HRC explicitly highlights that states must protect this right even from private entities.[87]

74 'Bangladesh: Rising Attacks on Freedom of Expression and Peaceful Assembly must be Urgently Stopped' (*Amnesty International*, 11 August 2020) <https://www.amnesty.org/en/latest/news/2020/08/rising-attacks-on-freedom-of-expression-and-peaceful-assembly-in-bangladesh-must-be-stopped/> accessed 11 November 2020.

75 Information and Communication Technology Act 2006 (Bangladesh) s 57.

76 Qumr Ahmed, 'Why did Bangladesh Arrest Shahidul Alam?' Al Jazeera (9 August 2018) <https://www.aljazeera.com/indepth/opinion/bangladesh-arrest-shahidul-alam-180809112820231.html>. accessed 11 November 2020.

77 ibid.

78 Penal Code 1860 (Bangladesh) s 124A.

79 Mark Lacy and Nayanika Mookherjee, 'Firing Cannons to Kill Mosquitoes': Controlling Virtual 'Streets' and the 'Image of the State' in Bangladesh' (2020) 54(2) Contributions to Indian Sociology 280, 289.

80 See Kim A Young and Shahidul Hassan, 'How Procedural Experiences Shape Citizens' Perceptions of and Orientations toward Legal Institutions: Evidence from a Household Survey in Bangladesh' (2020) 86(2) International Review of Administrative Sciences 278, 291.

81 ibid 292.

82 GC (n 26) 4[8].

83 ICCPR Article 19.

84 Human Rights Committee, 'General Comment No. 34, Article 19: Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34 at 3 [11] (General Comment No. 34).

85 ibid 5 [12].

86 ibid.

87 ibid 2 [7].

It is recognised as the "foundation stone"[88] for all democratic societies and integral to exercising the right to vote. This right is necessary to realise the principles of accountability and transparency, which are essential to promote and protect human rights.[89] The GC on Article 25 require this accountability in the electoral process to ensure effective democratic representation.[90] The freedom does not protect hate speech and can be limited to respecting others' rights and reputation, and protect national security, public order, health, and morals.[91] These restrictions do not allow harassing journalists who report on general political issues, which aroused concern in the HRC over Armenia.[92] According to the HRC, journalists can be a wide range of actors including reporters, analysts, and bloggers.[93] The BAL's various methods of attacking journalists, including through legislation, therefore constitutes a violation as they should be allowed to "comment on public issues without censorship or restraint".

### D. Detentions, legislations, and executions

Arbitrary detentions massively augment the BAL's coercive armoury.[94] Under the Special Powers Act 1974, people can be indefinitely detained without a charge when authorities are satisfied that this is necessary to prevent broadly ranging "prejudicial acts"[95] from being committed. The only safeguard is that the detention will be reviewed after four months by an advisory board constituted by the government.[96] Reviews are confidential and lawyers cannot assess the evidence on which the detention is based.[97] All dissident activity, including writing media articles critical of the BAL, is subject to this act due to its broadness.[98] Thus, these wide powers allow security forces to disrupt the electoral process with arrests.

Alternatively, extrajudicial killings decrease the present dissident population whilst deterring others from becoming dissidents in the future. The BAL uses the

88 ibid 1 [2].
89 ibid 1 [3].
90 GC (n 26) 4 [9].
91 ICCPR Articles 19(3), 20.
92 Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (19 November 1998) CCPR/C/79/Add.100 at 4 [20].
93 General Comment No. 34 (n 84) 11 [44].
94 Hussain Md Fazlul Bari, 'Evolution of the Criminal Justice System in Bangladesh: Colonial Legacies, Trends and Issues' (2019) 45(1) Commonwealth Law Bulletin 25, 40.
95 Special Powers Act 1974 (Bangladesh) sections 2–3.
96 ibid sections 9, 10, 12.
97 Human Rights Watch, 'Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces' (Report, 18 May 2009).
98 M Ehteshamul Bari, 'Preventive Detention Laws in Bangladesh and Their Increased Use during Emergencies: A Proposal for Reform' (2017) 17(1) Oxford University Commonwealth Law Journal 45, 60.

police and the Rapid Action Battalion (RAB) the most in extrajudicial killings.[99] The RAB is a high-ranking security force comprising of members from the police and the military.[100] In 2017, from the one hundred and fifty-five extrajudicially killed, the police killed one hundred and seventeen, and the RAB killed thirty-three.[101] They jointly conduct 'anti-drug drives' which killed two hundred and twenty-eight between May and August 2018.[102] Many families of the victims claim that the victims were not involved in activities relating to drugs.[103] These killings were likely to stop the opposition from mobilising or speaking against the regime; many victims were dissidents whilst none killed were affiliated with the BAL.[104] The excuses provided for these killings are commonly that the victim was killed in "self-defence" or in a "crossfire".[105] Families are hindered from contesting these claims through the judiciary as it is also engaged in coercion.[106]

Both these methods, implemented through law enforcement, have demonstrated violations of Article 25. When reviewing the Islamic Republic of Iran's adherence to Article 25, the HRC raised concerns at the arrests and arbitrary detentions of multiple dissident types, including political and human rights activists.[107] Furthermore, the HRC expressed concern at the murder of approximately twelve opposition candidates and activists in Honduras' electoral campaign, as undermining Honduras' Article 25 obligations.[108] In Bangladesh, the arrests and murders of such dissidents and more have been given legislative sanctions, which domestically encourage them to be done on a large scale. Therefore, Bangladesh veers towards violating Article 25 through these laws and activities.

### E. Tyranny through the judiciary

The judicial system is used to reinforce coercion by denying procedural fairness to the BAL's rivals. Dissidents are harshly sentenced even if the evidence

[99] Md Sazzad Hossain, 'Extra-judicial Killings and Human Rights Law: Bangladesh Perspective' (2017) 59(6) International Journal of Law and Management 1116, 1117.

[100] ibid 1118.

[101] Odhikar, 'Human Rights Monitoring Report on Bangladesh' (Report, September 2018) 30.

[102] ibid 20.

[103] ibid.

[104] C Christine Fair, 'Bangladesh in 2018: Careening Toward One-Woman Rule' (2019) 59(1) Asian Survey 124, 130.

[105] Md Saidul Islam, 'Trampling Democracy: Islamism, Violent Secularism, and Human Rights Violations in Bangladesh' (2011) 8(1) Muslim World Journal of Human Rights 1, 14.

[106] Ali Riaz, 'Legislature as a Tool of the Hybrid Regime: Bangladesh Experience' (2019) 52(2) Political Science and Politics 275.

[107] Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (29 November 2011) CCPR/C/IRN/CO/3 at 26 [6] (Consideration of Iran).

[108] Concluding Observations on the Second Periodic Report of Honduras (n 30) 8 [44].

does not establish guilt.[109] Specifically, the BAL's prosecution of the 'war crimes' offence eliminates and intimidates the opposition through the judiciary.[110] The offence frames the accused as a wartime collaborator with Pakistan when it was at war with Bangladesh.[111] As Samad observes, the trials do not comply with the "basic standards of international criminal procedure".[112] All one hundred and ninety-five commonly-known war criminals were excluded from being tried.[113] The judiciary, therefore, provides a way to challenge the opposition under a façade of legality, whilst tarnishing the relevant opposition member's reputation to those that do not investigate further into these trials and uncover the bias present.[114]

Legal material regarding Article 25 has yet to explicitly consider fake trials as an issue of concern. Nevertheless, in *Sinistin v Belarus*, the HRC clarified that giving effect to Article 25 requires state adherence to Article 14, which deals with the right to a fair trial.[115] This was in the context where the plaintiff's right to stand in elections was not enforced by the judiciary.[116] The HRC concluded that the plaintiff's right under Article 25 was violated through an infringement of Article 14.[117] Albeit this context, as the HRC references Article 14, it is not farfetched to consider that Article 25 can be violated when the judiciary itself is the one that violates the victim's political rights. The right to a fair trial is diminished when the judiciary does not consider the defendant's arguments and evidence, instead passing judgment due to political reasons. Thus, coercion through the judiciary in Bangladesh violates Article 25 by compromising judicial independence, which is necessary to a fair trial guaranteed under Article 14.

### F. Economic coercion

Economic rights of the BAL's rivals are also subjected to coercion. The considerable influence the BAL has in the public and private sectors is used to hinder employment opportunities for dissidents and their ability to progress through the ranks.[118] Military and police officers are regularly forced into retirement or

[109] Riaz, 'Legislature as a Tool of the Hybrid Regime' (n 106) 276.
[110] Md Awal Hossain Mollah, 'War Crimes Trial in Bangladesh: Justice or Politics' (2020) 55(5) Journal of Asian and African Studies 652, 658.
[111] Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27(3) Criminal Law Forum 257, 258.
[112] ibid 290.
[113] Islam, 'Trampling Democracy' (n 105) 11.
[114] Ali Riaz, 'Shifting Tides in South Asia: Bangladesh's Failed Election' (2014) 25(2) Journal of Democracy 119, 121.
[115] Views of the Human Rights Committee under Article 5, Paragraph 4 (n 29) 9 [2].
[116] ibid 6 [4].
[117] ibid 8 [8].
[118] Islam, 'Trampling Democracy' (n 105) 27.

dismissed for associating with the opposition.[119] Through legislation, NGOs that voice dissent can be prohibited from receiving foreign donations.[120] Electorates where the opposition has more support are sidelined from state investment.[121] These economic disadvantages reinforce each other to sabotage the prosperity and economic status the opposition has or might have had in the future.

Economic coercion against these dissidents is identified as a potential method to violate Article 25. The HRC expressed concern over NGO independence in the Russian Federation as it introduced laws discouraging foreign funding for NGOs.[122] The BAL's laws prohibiting selected NGOs from receiving foreign funding has the same effect of pressuring NGOs to placate the BAL. The laws decrease the power and ability of NGOs to remain independent. Moreover, when reviewing the Republic of Chile, the HRC was concerned at reports of dismissal when workers engaged in dissident political activities.[123] The BAL's informal policy against dissidents in the private and public sectors where it has influence is similarly alarming as redundancy and employment procedures sideline dissident employees. There is, however, relatively less guidance on determining the effect of state investment sidelining areas where the opposition has more influence than the BAL. The practical effect is akin to making employees redundant, though they do not achieve employment in the first place due to the lack of investment.

Overall, the BAL's coercion against dissident gatherings, the political opposition, and expressers of dissent, respectively, violate the freedoms of assembly,[124] association,[125] and speech.[126] The positive correlational relationships these freedoms have with Articles 25(a) and (b) in the electoral process indicate violations of Article 25. The BAL's usage of law enforcement, the judiciary, and economy against dissidents, further signals such violations.

[119] ibid.
[120] Foreign Donations (Voluntary Activities) Regulation Act 2016 (Bangladesh) s 14.
[121] Suykens, 'The Bangladesh Party-State' (n 19) 213.
[122] Human Rights Committee, 'Concluding Observations on the Seventh Periodic Report of the Russian Federation (28 April 2015) CCPR/C/RUS/7 at 10 [22].
[123] Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant' (18 May 2007) CCPR/C/CHL/CO/5 at 4 [14] (Consideration of Chile).
[124] ICCPR Article 19.
[125] ibid Article 21.
[126] ibid Article 22.

Table I

| Coercion in Bangladesh | | |
|---|---|---|
| *Coercive action in Bangladesh* | *Effect on Electoral Process* | *Violation of Article 25* |
| Dispersing dissident gatherings. | Limits outlets to voice dissent. Gives the citizenry the impression that the lack of such dissent means that issues are not severe. Demotivates gathering for a political cause to influence government. | Clear violation through the violation of the "freedom of peaceful assembly" under Article 21. |
| Coercing those affiliated with the opposition. | Reduces the range of candidates people can vote for. Showcases the opposition as weak. | Clear violation through the violation of the "freedom of association" under Article 22. |
| Suppressing dissident speech. | Decreases the availability of material criticising the regime. Undermines voter education and their full political development to understand the political arena from multiple perspectives for their effective participation. Precludes citizens from exercising an informed vote. | Clear violation through the violation of the "freedom of speech" under Article 19. |
| Arbitrary detention, extrajudicial killings, show trials, and economic coercion. | Deters, eliminates, and defames the opposition. | Signifies violations of Article 25. |

## IV. Co-optation

If the BAL's coercion can be described as a sword, co-optation is its shield. Co-optation protects the BAL and its sources of coercion from accountability when they disrupt the electoral process. It placates potential rivals and cultivates support amongst the elite to limit venues for regime change. This section will analyse

the methods and effects of the BAL's co-optation with regard to political elites, the judiciary, law enforcement, private sector elites, and those involved in ballot counting. It will examine the potential these activities have in violating Articles 25(a) and (b).

### A. Politicians, patronage, and political participation

With its control over public funds, the BAL provides strong incentives for political cooperation when co-opting elite politicians.[127] State resources are often channelled through the BAL's ministers and parliamentary members under circumstances making embezzlement easy.[128] As a recent example, over two hundred tonnes of food relief meant for distribution during the COVID-19 lockdowns were uncovered as being hoarded by politicians affiliated with the BAL. In one electorate, only twenty percent of the relief reached their intended targets.[129] These activities subvert a dynamic democratic dialogue representing opposing viewpoints as representatives exchange their electorate's interests for personal gain.

Notably, internal party democracy is absent within the BAL, which would otherwise allow politicians to voice and represent their electorate's interests.[130] The BAL does not routinely conduct party meetings where this dialogue can occur; the meeting dates in its charter are not adhered to.[131] Additionally, the BAL's politicians rarely meet with the citizenry they are supposed to represent, if ever.[132] They generally reside in the nation's capital, Dhaka, away from their electorates. Even if they wish to progress their electorate's interests, they are required by the Constitution to ultimately make decisions based on the party's interests when voting on parliamentary issues, regardless of how their electorate is affected.[133] Therefore, co-optation rewards politicians for pursuing self-interest, which becomes associated with the party's interest, discouraging them from painstakingly representing their electorate. The corruption it causes places candidates on an uneven platform in the

[127] Arild Engelsen Ruud and Mohammad Mozahidul Islam, 'Political Dynasty Formation in Bangladesh' (2016) 39(2) South Asia: Journal of South Asian Studies 401, 412.

[128] M Naiz Asadullah and N N Tarun Chakravorty, 'Growth, Governance and Corruption in Bangladesh: A Re-assessment' (2019) 40(5) Third World Quarterly 947, 959.

[129] 'Rice Theft Goes on, the Poor Bear Brunt' (*Daily Star*, 13 April 2020) <https://www.thedailystar.net/frontpage/news/rice-theft-goes-the-poor-bear-brunt-1892383> accessed 11 November 2020.

[130] Inge Amundsen, 'Democratic Dynasties? Internal Party Democracy in Bangladesh' 22(1) Party Politics 49, 50.

[131] ibid 55.

[132] Tim Meisburger, 'Strengthening Democracy in Bangladesh' (The Asia Foundation Occasional Paper No 13, June 2012) 5.

[133] Constitution of Bangladesh Article 70.

electoral process.[134] Power becomes reserved for those loyal to the regime, who can then campaign effectively and violently with their acquired resources.[135]

The relationship between co-opting politicians and Article 25 is multifaceted. Recourse to embezzlement as a method for co-optation is expressed by the HRC as a point of concern challenging Honduras' obligations under Article 25.[136] There was a "lack of transparency in campaign financing"[137] which undermined the authenticity of Honduras' 2013 elections. The sources of the BAL's campaign financing are similarly concealed from being publicised in official documents. The GC also expressed concern that democratic processes can be distorted by disproportionate expenditure by candidates and parties.[138] This is cited as a reason that can justify legislating a limitation on campaign expenditure.[139] This concern in the GC advocates against the expenditure politicians tend to engage in following co-optation, which grants them access to the vast pool of state resources the BAL has control over. Moreover, the GC do not completely ignore the overall impact that co-optation has, which douses democratic dialogue representing voters' interests and replacing them with those of their patron, the regime.[140] The GC advocate that states should ensure that the internal management of political parties uphold Article 25, to ensure political participation for the citizenry.[141] This can imply that representatives be given the opportunity and encouragement to voice their electorate's interests and concerns, instead of merely those of the elite. The BAL's intra-party co-optation can therefore violate Article 25 by nurturing an autocratic culture. Additionally, the corruption and the extravagant campaign expenditure it ushers is also of concern.

### B. Cronies, courts, and clemency

Other than political elites, the BAL has extensively focussed on co-opting the judiciary.[142] The twelve judges the BAL appointed to the High Court are well-known among legal practitioners to have political affiliations with the BAL.[143] The

[134] Abu Sarker and Mohammad H Rahman, 'The Role of Social Accountability in Poverty Alleviation Programs in Developing Countries: An Analysis with Reference to Bangladesh' 15(2) Public Organization Review 317, 321.

[135] Khan, 'Power, Patronage, and the Candidate-nomination Process' (n 37) 332.

[136] Concluding Observations on the Second Periodic Report of Honduras (n 30) 8 [44].

[137] ibid.

[138] GC (n 26) 6 [19].

[139] ibid.

[140] ibid 8 [26].

[141] ibid.

[142] Adeeba Aziz Khan, 'NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics' (2012) 1(3) Cambridge Journal of International and Comparative Law 254, 272.

[143] Islam, 'Trampling Democracy' (n 105) 9.

BAL restructured the High Court benches to give its own politically-affiliated judges key legal responsibilities and powers.[144] Approximately a hundred affiliated legal personnel were assigned as judges in lower courts.[145] They include those with criminal records and charged with murder.[146] Many junior judges, due to their loyalty to the BAL, superseded their seniors.[147] Hence, the legal sector is encouraged to work for the BAL, as political affiliation is valued more than capability when progressing or maintaining employment.

A co-opted judiciary enables the BAL and its associates to escape legal accountability when undermining the electoral process.[148] For example, when the BAL called the judiciary to withdraw four thousand six hundred and eighty-seven "politically-motivated cases" in 2011, the BAL was the only beneficiary of most of those withdrawn.[149] Contrariwise, cases filed against the opposition were retained.[150] Accordingly, when voters are unable to exercise their electoral rights due to obstacles the BAL creates, they are demotivated to approach the judiciary in response.[151] Successfully obtaining a legal verdict against the BAL is unlikely irrespective of evidence suggesting otherwise, due to the political bias present during trials.[152] Instead, the initiators can find themselves bearing substantial legal costs and the risk of becoming political targets.[153] Thus, the electoral process is left vulnerable to abuse in the absence of an independent judiciary.

The dangers of a co-opted judiciary are recognised in legal material regarding Article 25. The GC clarify that easy access to judicial review should be granted for the review to independently assess the quality of voting and approve the counting process whenever contentions arise.[154] This is to ensure that voters have "confidence in the security of the ballot and the counting of votes".[155] In *Sinistin v Belarus*, the HRC found that Article 25 was violated as "the author could not secure the protection of his right under Article 25 by a competent, independent

[144] Khan, 'Power, Patronage, and the Candidate-nomination Process' (n 37) 273.
[145] Islam, 'Trampling Democracy' (n 105) 10.
[146] ibid.
[147] ibid 9.
[148] ibid 8.
[149] ibid 10.
[150] US Department of State, 'Country Reports on Human Rights Practices for 2011: Bangladesh' (Report, 2012) 23.
[151] Mohammad Mohabbat Khan and Md Shahriar Islam, 'Democracy and Good Governance in Bangladesh: Are They Compatible?' 5(1) Millennial Asia 23, 31.
[152] ibid.
[153] ibid 33.
[154] GC (n 26) 6 [20].
[155] Human Rights Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2250/2013' (31 August 2018) CCPR/C/123/D/2250/2013 at [7.2].

and impartial authority and had no remedy by which to secure such protection".[156] Co-optation of the judiciary erodes judicial independence and faith in the judicial system, placing doubt on the legitimacy of rulings.[157] Therefore, in Bangladesh, the co-optation of the judiciary and its coercion violate Article 25.

### C. Evading law enforcement

The BAL's co-optation also extends to the police and the military. Recruitment and appointment processes in these agencies favour those with political alliances with the BAL.[158] Key considerations for awarding higher positions include the candidate's past activities for the BAL and their potential for further political utilisation.[159] The police need not worry about the 'Police Internal Oversight Unit' when serving the BAL; this internal system for police accountability is largely non-transparent with reports suggesting that it also suffers from the BAL's co-optation.[160] Furthermore, the BAL allows the military to participate in commercial activities and manage its own non-transparent budget.[161] This allows the military to renumerate itself for the services it provides the BAL, even if those services involve breaching stately duties.[162] Therefore, instead of upholding and enforcing the law, these agencies have privilege-based interests to keep the BAL in power through legal and illegal means.

Co-optation enters the military and the police into a mutually beneficial relationship with the BAL, where they save each other from legal accountability. The BAL takes advantage of Article 46 of the Constitution, which gives it power to pass legislation providing indemnity to any state officer for acts done to 'restore' or 'maintain' order within Bangladesh.[163] Military and police officers cannot be prosecuted in courts for criminal offences without the government's sanction.[164] Furthermore, the military is legally protected from the civilian criminal justice system,[165] nor does it need to worry about prosecution in internal courts as they lack independence and impartiality.[166] Members of the RAB enjoy wider immunity

156 Views of the Human Rights Committee under Article 5, Paragraph 4 (n 29) 9 [2].
157 ibid 9 [3].
158 Mohammad Mozahidul Islam, 'The Toxic Politics of Bangladesh: A Bipolar Competitive Neopatrimonial State?' (2013) 21(2) Asian Journal of Political Science 148, 161.
159 Hassan and Nazneen (n 3) 213.
160 Anirudha Nagar, 'Police Investigating the Police' (*Daily Star*, 28 March 2013) <https://www.thedailystar.net/news/police-investigating-the-police> accessed 11 November 2020.
161 Hassan and Nazneen (n 3) 213.
162 ibid.
163 Constitution of Bangladesh Article 46.
164 The Code of Criminal Procedure 1898 (Bangladesh) s 197.
165 ibid.
166 Human Rights Watch (n 97).

as they cannot be tried for anything "done or intended to be done in good faith".[167] The BAL further protects both the police and the military from accountability as the mechanism for external civilian oversight, the 'National Human Rights Commission' is ineffective against the Ministry of Home Affairs.[168] Legislation does not permit it to investigate violations by a 'disciplined force', but it can simply request the Ministry to provide investigation reports, which the Ministry can ignore without consequence.[169] These requests go ignored in most cases.[170] Thus, the BAL's disruptive activities in the electoral process are ignored by law enforcement, whilst the law enforcement is protected from the law.

Legal material regarding the relationship between co-opting law enforcement and Article 25 is less conclusive than that focussing on judicial independence. Still, the GC hint that law enforcement should remain neutral.[171] The GC clarify that lawful restrictions can be imposed on law enforcement to join political parties.[172] These restrictions are to ensure their neutrality.[173] These restrictions, however, are not mandatory, though they are permitted and perhaps even encouraged as suggested by the wording and context.[174] Although this can imply that a co-opted and factionalised law enforcement can signal violations of Article 25, this cannot be confirmed without further legal commentary. Nevertheless, some effects of co-optation can violate Article 25. The GC assert that penal laws should prohibit abusive interferences with voter registration and the coercion of voters, and that these laws should be "strictly enforced".[175] Strict enforcement cannot occur where law enforcement does not enforce the law on the regime, but merely on its opponents. The GC, however, do not provide further details on where else strict enforcement is required in the electoral process and what is meant by strict enforcement. This is unhelpful as even if judicial independence is assured to protect electoral rights, its verdicts may remain unenforced. For example, the lack of enforcement can encourage the Chattro League to disperse dissident political assemblies,[176] though judicial discourse supports the freedom of assembly

[167] Armed Police Battalions Ordinance 1979 (Bangladesh) s 13.
[168] National Human Rights Commission Act 2009 (Bangladesh) s 18.
[169] ibid.
[170] Nagar, 'Police Investigating the Police' (n 160).
[171] GC (n 26) 6 [18].
[172] ibid.
[173] ibid.
[174] ibid.
[175] GC (n 26) 5 [11].
[176] Aparupa Bhattacherjee, 'Behind Bangladesh's Protests: Rising Frustration', (*The Diplomat*, 22 August 2018) <https://thediplomat.com/2018/08/behind-bangladeshs-protests-rising-frustration/> accessed 11 November 2020.

guaranteed under the Constitution.[177] Hence, it is of similar importance that both the judiciary and law enforcement remain independent in Bangladesh, though it is unclear whether this importance is recognised by Article 25, however implied.

### D. Private sector partnerships

Alike the public sector, the BAL co-opts private sector business elites and elites within civil societies such as NGOs, labour unions, and business associations. The BAL allows cooperating elites to monopolise government contracts,[178] and forcibly seize land from Bangladesh's rural population who do not have the means to protect their land rights.[179] With administrative compliance, they easily forge certificates of title in their name, giving them a legal right to remove people living on their respective land.[180] Thus, businesses and financial interests urge private sector elites to support the BAL and compete effectively in a politicised marketplace.

Co-opted private sector elites subvert the electoral process for the BAL at a microlevel. Many key positions in their businesses and societies are reserved for the BAL's affiliates.[181] This constrains upward social mobility to the BAL's supporters, politically factionalising the population and economically discriminating against the opposition.[182] Earning favour due to political affiliation, beneficiaries are socially required to express their gratefulness to the regime through overt displays of loyalty.[183] This includes keeping and respecting a portrait of the Prime Minister in their office or desk, and praising the regime in formal and informal conversations.[184] These displays help spread political propaganda and give a false impression of widespread support for the regime to the public.[185] It also provides a 'bandwagon' for the layperson to join without fully understanding the political

[177] Constitution of Bangladesh Article 37.

[178] Andy McDevitt, Transparency International, 'Overview of Corruption and Anti-corruption with a Focus on the Health Sector (Report, 31 March 2015).

[179] Benjamin K Sovacool, 'Bamboo Beating Bandits: Conflict, Inequality, and Vulnerability in the Political Ecology of Climate Change Adaptation in Bangladesh' 102 World Development 183, 190.

[180] Shelley Feldman and Charles Geisler, 'Land Expropriation and Displacement in Bangladesh' (2012) 39(3) The Journal of Peasant Studies 971, 982.

[181] Suykens, 'The Bangladesh Party-State' (n 19) 200.

[182] David Lewis, 'Organising and Representing the Poor in a Clientelist Democracy: The Decline of Radical NGOs in Bangladesh' (2017) 53(10) The Journal of Development Studies 1545, 1548.

[183] Farhat Tasnim, 'Politicized Civil Society in Bangladesh: Case Study Analyses' (2017) 9(1) Cosmopolitan Civil Societies: An Interdisciplinary Journal 98, 104.

[184] ibid 105.

[185] ibid 118.

ramifications and wider societal consequences.[186] Such activities reduce civil spaces for politically unbiased dialogue that allow the citizenry to objectively comprehend social issues and the policies of various political parties to resolve them.[187] The BAL's implantation of political agendas especially perverts the key role civil society plays in achieving social justice, empowerment, and structural changes.[188] Civil societies largely lose their independence as high-ranking members support and blindly endorse the BAL's policies, despite their implications on furthering the society's purpose. The citizenry accordingly loses its power to campaign, lobby, and gain unbiased political information to assert its rights effectively in the electoral process due to private sector co-optation.

Co-optation in the private sphere potentially conflicts with Article 25. The GC stress that voters should be allowed to form opinions independently, free from "inducement or manipulative interference".[189] Furthermore, the HRC highlighted 'vote buying' as a concern when reviewing Honduras' obligations under Article 25.[190] Without further detail, it is unclear whether building personal patronage networks with select private individuals amounts to vote buying, though that is conceivable. In the context of compulsory memberships in associations being a requirement to engage in employment, it was asserted in *Gauthier v Canada* that the state should be called to demonstrate that this is "necessary in a democratic society" in conformity with Article 25.[191] Still, it is unclear whether this ruling extends to disparage situations where the state informally requires an association with itself before rewarding the individual with employment. Though not being a formal requirement, the BAL's informal co-optation has the same implication in the private sector, as it grants more employment opportunities for its supporters. The silence of legal commentary is unhelpful in confidently determining an

[186] Michael F. Meffert et. al., 'More than Wishful Thinking: Causes and Consequences of Voters' Electoral Expectations about Parties and Coalitions' (2011) 30(4) Electoral Studies 804, 807.

[187] Gordon Schochet, 'Vices, Benefits, and Civil Society: Mandeville Habermas, and the Distinction between Public and Private' (2008) 18(3) Prose Studies 244, 256.

[188] Caroline Hodges Persell, 'The Interdependence of Social Justice and Civil Society' (1997) 12(2) Sociological Forum 149, 150.

[189] GC (n 26) 6 [19].

[190] Concluding Observations on the Second Periodic Report of Honduras (n 30) 8 [44].

[191] Human Rights Committee, 'Views Communication No 633/1995' (5 May 1999) CCPR/C/65/D/633/1995 at 16.

unbroken link between the BAL's informal inducements and the vote buying and undemocratic conduct, which violates Article 25.

### E. Easy elections

Co-optation of these groups has rendered easier the BAL's ballot manipulation during elections.[192] The police at many polling stations facilitate this by ordering voters to wait long hours before being allowed to go inside.[193] Many voters give up on voting as the wait times endure, for reasons including disillusionment with the voting process, and the outside heat becoming unbearable to continue waiting.[194] As the general voters wait, those known to support the BAL are discretely allowed inside to cast their votes.[195] In numerous instances, the supporters also cast other people's votes and stuff the ballots.[196] When voters finally enter the polling station to vote, many are told to go home as their vote has already been cast.[197] Furthermore, as the electoral commission has been co-opted, its new rules make it difficult for neutral groups to register and observe the ballots.[198] The Bangladesh Election Commission no longer allows observers to remain the entire day in one polling station.[199] This breaks the chain of observation and diminishes transparency and credibility in the ballot counting procedure.[200] Hence, the interplay of co-opted agents allows the BAL to distort elections and essentially vote for itself.

Co-optation surrounding electoral authorities is incompatible with Article 25. Co-opted electoral authorities can skew election results, tainting the citizenry's ability to politically express itself through its representatives.[201] If its vote does not count, the citizenry also cannot hold its representatives "accountable through the

[192] Marzia Casolari, 'Bangladesh 2018: Sheikh Hasina's Triumph' (2018) 24 Asia Maior 247, 254.

[193] 'Police-aided Ballot Stuffing' Daily Star (*Daily Star*, 31 December 2018) <https://www.thedailystar.net/bangladesh-national-election-2018/police-aided-ballot-boxes-stuffing-bangladesh-election-2018-1681033> accessed 11 November 2020.

[194] ibid.

[195] ibid.

[196] 'Bangladesh: Election Abuses Need Independent Probe' (*Human Rights Watch*, 2 January 2019) <https://www.hrw.org/news/2019/01/02/bangladesh-election-abuses-need-independent-probe> accessed 11 November 2020.

[197] ibid.

[198] Md Awal Hossain Mollah and Rawnak Jahan, 'Parliamentary Election and Electoral Violence in Bangladesh: The Way Forward' (2018) 60(2) International Journal of Law and Management 741, 749.

[199] Meisburger, 'Strengthening Democracy in Bangladesh' (n 132) 5.

[200] ibid.

[201] GC (n 26) 7 [21].

electoral process",[202] a right which is emphasised in the GC. The GC expressly require that electoral authorities be 'independent' to supervise the electoral process and ensure it is conducted impartially and fairly.[203] The voting process should be free from 'arbitrary' interferences.[204] The electoral authority must guarantee the security of ballot boxes.[205] Candidates or their agents should be present where the votes are counted.[206] The voting and counting process should undergo "independent scrutiny" for voters to have confidence "in the security of the ballot" and trust that their vote was counted.[207] Accordingly, the BAL's co-optation of electoral authorities, hinderance of independent scrutiny, and other interferences during the electoral process, such as by forcing voters to wait long hours before voting, is incompatible with Article 25. These practices erode public confidence in the ballot, manipulate election results against voters' wishes, and prevent the electoral process from being scrutinised by independent authorities. They present a major obstacle for elections to uphold Article 25, as it denies opportunities for the public to identify and demand corrections in the electoral process where corruption has been identified.

Ultimately, the clearest violations of Article 25 through co-optation are through the judiciary and electoral authorities. Co-optation erodes judicial independence guaranteed by Article 14, leaving victims without recourse to assert their electoral rights. Co-opting electoral authorities similarly allows the regime to manipulate elections without accountability. Though it is hinted, it is relatively unclear whether co-opting law enforcement attracts the same criticism as it leaves the BAL similarly unaccountable. It is also unclear whether co-opting political elites and the private sector is also prohibited, though their effects can be tracked to douse the representation of the public's interest.

[202] ibid 4 [7].
[203] ibid 6 [20].
[204] ibid.
[205] ibid.
[206] ibid.
[207] ibid; See also Human Rights Committee, 'Views Communication No. 1392/2005' (21 October 2009) CCPR/C/97/D/1392/2005 at 11 [8.3].

Table II

Co-optation in Bangladesh

| *Co-optive Action in Bangladesh* | *Effect on Electoral Process* | *Violation of Article 25* |
|---|---|---|
| Co-opting political elites. | Douses democratic dialogue. Discourages representing voter's interests. Encourages corruption. | The lack of internal party democracy is acknowledged as problematic in the GC. The corruption allowed through co-optation has also raised concerns. |
| Co-opting the judiciary. | Violations of electoral rights by the regime are left without legal redress. | Clear violation by dissolving judicial independence guaranteed by Article 14. |
| Co-opting law enforcement. | The law is not enforced on the regime when it violates electoral rights. | The GC encourage law enforcement to be neutral, and hint that electoral laws be 'strictly' enforced. |
| Co-opting the private sector. | Creates a social 'bandwagon' to support the regime. Decreases spaces for politically unbiased dialogue for the citizenry to objectively understand political issues. Subverts civil societies and other politically empowering agencies, forcing the citizenry to lose their power to effectively assert their rights in the electoral process. | Legal commentary negatively views 'vote buying' and the inducement of voters. |
| Co-opting electoral authorities. | Allows ballot manipulations and distortions of election results in the regime's favour. | Clear violation as electoral authorities must be independent, and politicians must be held accountable through the electoral process. |

## V. Conclusion

The reports examined regarding the BAL's coercion and co-optation indicate violations of Articles 25(a) and (b) of the ICCPR. As Bangladesh's government, the BAL's acts are considered "acts of state" capable of violating international law.[208] Considering that they are attributable to the BAL, some of these acts are clear in their capacity to violate Article 25. Others, however, are relatively unclear, though their effects on the electoral process can be traced to hinder political participation for the citizenry.

The characteristic autocratic recourse to coercion for power has clearly attracted the concern of Article 25. The BAL's usage of the judiciary, law enforcement, and economics to coerce dissidents has been addressed to signify violations of Article 25 in previous cases.[209] Using them to forcefully disperse dissident gatherings, attacking those affiliating with the opposition, and silencing critics conflicts with Article 25 as it violates the freedoms of assembly, association, and expression. These rights, protected by Articles 21, 22 and 19 of the ICCPR, respectively, are recognised by the HRC as sharing a positive relationship with article 25.[210] Securing these rights is necessary to realise those under Article 25, due to their significance in allowing political rights to be exercised through the electoral process, as is clarified in section V. The freedom of assembly allows people to demonstrate the nature and extent of their grievances or political support, influencing people's views and motivation to participate in political activities. The freedom of association is necessary for people to engage in politics by becoming political candidates or voting for candidates which represent their interests. The freedom of expression is essential for the citizenry to exercise an informed vote and accordingly realise its political rights. Therefore, the BAL's coercion violates article 25 by infringing Articles 19, 21, and 22.

Comparatively, the threat posed by co-optation against Article 25 is unclear. Only two clear instances have been identified where the BAL's co-optation conflicts with Article 25: co-optation of the judiciary; and co-optation of electoral authorities. The mere possibility of a biased judiciary, which infringes Article 14 of the ICCPR is enough to establish a violation of Article 25 as it leaves the BAL unaccountable when it subverts political rights.[211] Co-opting electoral authorities violates Article 25 since it undermines the authenticity and legitimacy of elections;

[208] United Nations General Assembly 'Responsibility of States for Internationally Wrongful Acts' (28 January 2002) A/RES/56/83.

[209] See Views of the Human Rights Committee under Article 5, Paragraph 4 (n 29) 9 [2]; Consideration of Iran (n 107) 26 [6]; Consideration of Chile (n 123) 4 [14].

[210] 'GC' (n 26) 4 [8].

[211] Views of the Human Rights Committee under Article 5, Paragraph 4 (n 29) 9 [2].

votes become easier to manipulate as abuses are left unmonitored.[212] Though a co-opted law enforcement has a similar effect of allowing the BAL to escape the law, it is not directly addressed as an issue, but hinted as a potential threat to the strict enforcement of electoral law as demanded by Article 25.[213] The co-optation of political and private sector elites is also unclear, though some of their effects on democracies are vaguely acknowledged as problematic when considering the purposes of Article 25.[214] Hence, although all the BAL's co-optation activities further the regime's interests even when they contradict the peoples', only those aimed at co-opting the judiciary and electoral authorities clearly violate Article 25; the rest require further jurisprudence to clarify the extent to which they violate Article 25.

In summary, this article concludes that the BAL's coercion clearly violates Article 25. The relationship between the BAL's co-optation and Article 25 requires further jurisprudence as only two instances have been identified as clear violations. Nevertheless, this article answers the research question regarding whether Bangladesh violates Articles 25(a) and (b) through coercion and co-optation in the affirmative. Several coercive and co-optative activities have been identified to be clear violations (Table I & Table II).

Accordingly, this article has achieved its three aims: providing a nuanced lens to view Article 25; highlighting the gaps in understanding Article 25; and identifying the activities which violate Article 25. Firstly, it integrated Gerschewski's political science framework and illustrated how coercion and co-optation interact with Article 25; secondly, gaps in understanding Article 25 were demonstrated in the case of co-optation, as co-opting law enforcement, political elites, and the private sector are merely hinted as potential violations; and thirdly, all coercive activities and the co-optative activities concerning the judiciary and electoral authorities were shown to bring Bangladesh in violation of Article 25. This understanding of what constitutes violations can also be applied to other states to deter violations of Article 25 and ensure that the citizenry can participate in political matters.

This article has contributed to legal and political literature through two modes of analysis: applying Article 25 to the BAL's coercion and co-optation strategies through the electoral process; and clearly classifying the BAL's political activities into the categories of coercion and co-optation. This analysis has made clearer the BAL's legal position regarding Article 25, and the comprehensiveness of Article 25 in achieving effective political participation for the citizenry. It helped deconstruct and comprehend the various ways in which the BAL interacts with

[212] GC (n 26) 6 [20].
[213] ibid 5 [11].
[214] ibid 8 [26].

the electoral process and their international legal implications. More broadly, this article facilitated a holistic interdisciplinary understanding of autocratic power accumulation strategies. It presented Article 25 as an applicable international legal mechanism that can be used to defend against such strategies in Bangladesh and other states, where relevant.

Though the article did not consider issues of state attribution in-depth, the BAL's *prima facie* violations of Article 25 can be attributed to Bangladesh under international law.[215] International law recognises two relevant actions that warrant attribution: the first is where the action is done by an 'organ' or 'official' of a state even if they are acting *ultra vires*;[216] the second is where the action is done by a person or entity which is under the 'direction' or 'control' of a state.[217] As illustrated by sections III and IV, the BAL's political activities threaten Bangladesh's compliance with Article 25.

Considering the threat posed by the various autocratic power accumulation strategies in undermining the democratic ideals of Article 25, this article recommends adopting a balanced interpretation of Article 25. This interpretation should be broad enough, in that, Article 25 becomes easily referable when calling out and criticising such strategies as being undemocratic and illegal under international law. It should appropriately and clearly deal with the various co-optation strategies which hamper democratic participation, including the co-optation of political elites, law enforcement, and the private sector. The power these strategies grant a government comes at the expense of the people, widening the door to human rights abuse. These strategies keep the *status quo* in favour of the regime, regardless of whether it is beneficial for the people or desired by them. The government becomes increasingly parasitic, using state resources to pursue elitist interests instead of performing the duties it was assigned for. In such cases, Article 25 should offer a way for the international community to pressure a government and allow democracy to flourish.

At the same time, it must be specific enough to allow for genuine statecraft. Governments may need to use coercion to deter threats and safeguard civilians. They may also need to use a certain degree of co-optation to ensure that various groups are satisfied with the state and the government can run smoothly to accomplish legitimate stately objectives. Guidance as to how this balance in interpretation is to be achieved is beyond the scope of this article and will require further academic and legal discourse. Nevertheless, to stimulate such discourse,

[215] UNGA 'Responsibility of States for Internationally Wrongful Acts' (28 January 2002) A/RES/56/83.

[216] ibid Articles 5, 7.

[217] ibid Article 8.

this article has provided a detailed insight into autocratic power accumulation, its dangers, and how they can undermine democratic systems in a manner offensive to Article 25, as in the case of Bangladesh.

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# Who Will Watch the Watchmen? Evaluating the Prosecution Review Commission in Japan

Margarita Avramtcheva*

Abstract

The Prosecution Review Commission (PRC) in Japan is tasked with strengthening the rule of law by acting as a counter weight to the power of the Japanese prosecutors, while simultaneously aiming at improving the public trust in the legal system as a whole. This institution has the power to force the prosecutor's hand and indict individuals and groups who might have been shielded by the prosecutors up to this point and whom thus might have been beyond the reach of justice. It is therefore faced with a difficult task of delivering this justice and gaining the public trust, without having actual legal expertise. In order to include the perspective of citizens in the legal system the new lay-participation system results in the PRC only being made up of randomly selected citizens. This article reviews whether the PRC has succeeded in reaching its two goals. Despite the PRC having successfully reached its goal of increasing public trust in the system, it still has room for improvement. When it comes to checking the prosecutors, the analysis following the statistics and case studies concerning the Commission reveals that the PRC's activity is lacking. Much is left to be desired when it comes to statistical success and influence upon the prosecutor's behaviour. There are also several 'traps' that the PRC might fall into, such as the subjective focus on public opinion and the misapplication of legal principles. Therefore, this article argues that the PRC should include legal

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expertise in its Committees in order to strike a balance between achieving public trust and checking the power of prosecutors in Japan.

*Keywords: public prosecutors, Japan, legal reform, public trust, rule of law*

## I. Introduction

Two of the central aims of Japan's judicial reform in the last two decades have been to increase public trust in the judiciary and to strengthen the rule of law within the Japanese justice system. In order to achieve these objectives, the government has decided to actively involve and encourage the participation of citizens in the justice system in a process known as 'lay-participation'. This research explores the functioning of one such lay-participation organ: The Prosecution Review Commission ('*Kensatsu Shinsakai*' or "*検察審査会*"), henceforth the 'PRC'. Composed solely of citizens, this institution has the power to force the prosecutor's hand and indict individuals and groups who might have been shielded by the prosecutors and have remained beyond the reach of justice. The PRC is one of the few checks on the power of the prosecutors in Japan; its ability to function is, therefore, of vital importance. This article examines the influence that the PRC has had on the prosecution system and the extent to which the PRC has fulfilled its role as originally outlined in the Reform Report that created it.

Firstly, in order to adequately illustrate the context in which the PRC operates, a short history of the Japanese justice system is needed. Following this, the 2001 Reform Report is analysed, part of which specifically outlines the powers and goals of the PRC. This Report made the judgments of the PRC binding, thereby forcing prosecutors to indict a person after the PRC has reviewed the case twice. It also underlines the goal and rationale of the PRC, namely incorporating a citizen's perspective into the prosecution system. Despite emphasising the 'rule of law' as being generally of vital importance, the rule of law, or, indeed, the PRC's checking power, are never mentioned explicitly in this report; it is this curious omission that prompted this article in the first place. The Report raises the question *does the PRC succeed in checking the prosecutors?* This article will focus specifically on the PRC's role as the sole check on the power of the prosecutors, and the Commission's goal of gaining the trust of the public. The members of the PRC are faced with a difficult task of delivering this justice and gaining public trust, whilst lacking actual legal expertise and, therefore, depending solely on their experiences as a lay citizen. This article will assess their success by weighing the PRC's functioning against the overarching rule of law criteria emphasised by the Reform Report. Lastly, this article proposes the inclusion of legal expertise into the PRC in order to strike a

balance between gaining the trust of the public and checking the functioning of the prosecutors.

## II. The Historical Development Of The Japanese Justice System

### A. Similarities with foreign systems

In order to fully grasp the prosecutorial culture of the Japanese legal system, a brief history and summary of the timeline to current developments is needed. The Meiji era (1868-1912) marked a turning point in the Japanese culture towards modernisation and, essentially, Westernisation.[1] During this period the legal system was reformed according to French and German models, abandoning its feudal indigenous roots. As a part of these reforms, the position of the prosecutor was introduced. Initially, the prosecutors did not have independence to investigate. However, due to significant difficulties in effectively finding evidence resulting in the acquittal of a large number of cases in 1897, the power of the prosecutor was subsequently expanded, thereby allowing more liberty and independence in their investigations. Due to the increasing number of convictions as a result of these modifications, the public confidence in the prosecutorial system grew.[2] After Japan's defeat in the Second World War, the legal system was transformed once more, and the prosecutors were given almost complete independence.[3] Significant changes instigated by the Occupation Forces included the creation of a new constitution as well as both a new code of criminal procedure and a new penal code. Consequently, the Japanese criminal system incorporated distinctly American elements merging within its the existing European legal structure.[4] As a result, the Japanese legal system is, on the surface, something of a mixture between Anglo-American law and continental European law.

### B. Philosophical japanese elements in the justice system

Although, *prima facie*, distinctly indigenous elements appear to have been usurped entirely in the Japanese legal system by Western characteristics, many elements of the indigenous Japanese moral philosophy in fact remain present.[5]

1 Masaki Abe, 'The Internal Control of a Bureaucratic Judiciary: The Case of Japan' (1995) 23 International Journal of the Sociology of Law 303.

2 A. Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) 16(1) Pacific Basin Law Journal 38.

3 ibid 39.

4 Abe (n 1).

5 Mari Kita, 'Kin, Crime, and Criminal Justice in Contemporary Japan' in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018).

When examining how the law works in practice, such Japanese legal traits form the rule rather than the exception.[6] For example, a separate system of alternative dispute resolution has been created and is promoted by the government, entailing reconciliation through mediation rather than verdict and, potentially, incarceration through a trial.[7] This preference for reconciliation stems from traditional Japanese values, placing particular importance on the avoidance of conflict. Another example is the strong reliance on confessions in many cases.[8] This characteristic also finds its roots in the cultural importance placed by indigenous Japanese society upon saving one's reputation. Case law reflects the importance in Japanese society of defendants showing remorse for their actions, because this empowers a sense of morality deemed as important as the punishment itself.[9] In fact, showing remorse has the potential to reduce a sentence, whereas doing the opposite can lead to a sentence being increased.[10]

Similar Japanese traits can also be found in the functioning of prosecutors. Japanese prosecutors, for example, focus more on the circumstances of defendants and what would have possibly led them to commit a crime than would usually be the case in Western countries with similar legal systems, since the latter would usually focus more on the evidence of the crime.[11] Furthermore, respect for authority is at the centre of Japanese culture, thereby entrusting significant individuality and discretion to prosecutors.[12] Castberg masterfully illustrates their significance in power: "[…] such independence allows Japanese prosecutors to investigate, and indict if warranted, the most powerful politicians and captains of industry, as well as suspend prosecution of those who have committed serious crimes".[13]

6 Abe (n 1).

7 The Act on Promotion of Use of Alternative Dispute Resolution (*裁判外紛争解決手続の利用の促進に関する法律*) Act Number 151 of 2004.

8 Carl F Goodman, 'Prosecution Review Commission, the Public Interest, and the Rights of the Accused: the Need for a "Grown Up" in the Room' (2013) 22(1) Pacific Rim Law & Policy Journal 12; Mark A Levin, 'Considering Japanese Criminal Justice from an Original Position' in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018) 175-176.

9 Erik Herber, 'The (Japanese) Administration of Justice and the Will to Truth' (2003) 31 International Journal of the Sociology of Law 111.

10 ibid.

11 Castberg (n 2).

12 David T Johnson, 'Japan's Prosecution System' (2012) 41(1) Crime and Justice 35.

13 ibid 39-40.

This shows the responsibility that is being shouldered by the prosecutors, which is elaborated on at a later stage in this research.

### C. Miscarriages of justice: innocents convicted

In the 1980s, however, a series of wrongful death row convictions shook confidence in the legal system. Four inmates that had been on death row for 25 years were granted re-trials, and duly found innocent.[14] The inmates had previously been found guilty through confession, which they renounced immediately prior to and during the trial. As a result, the legal system was subject to heightened scrutiny, with many scholars suggesting various types of reforms.[15] The fact that four innocent men were close to their execution was as equally alarming as the subsequent report of the prosecutor's office on the issue since it did not acknowledge the mistakes of the prosecutors.[16] The report, in fact, suggested the expansion of the prosecutorial powers, in order to prevent similar cases in the future.[17] Foote goes even as far as stating that "the prosecutors are resistant to any fundamental changes that might reduce their authority or strengthen external checks on their activities".[18] These miscarriages of justice resulted in mistrust in the judicial system among the public which caused great alarm amongst the Japanese government.

The discussions that were fuelled by these cases throughout the 1980s and 1990s resulted in the eagerness of the Japanese government to create a Reform Council that would investigate and report on how to reform the Japanese legal system.

### D. The role and power of japanese prosecutors

According to the constitution, the police refers cases to prosecutors who decide whether to prosecute or drop the case.[19] There is no obligation to prosecute; instead, the Principle of Opportunity (henceforth 'PoO') gives the prosecutors the freedom to drop any case, even if there is enough evidence to prosecute a suspect.[20] They may do so on the basis of "the character, age, environment, gravity of the

[14] Daniel H Foote, 'From Japan's Death Row to Freedom' (1992) 11 Pacific Rim Law & Policy 13.
[15] ibid.
[16] David T Johnson, 'Wrongful Convictions and the Culture of Denial in Japanese Criminal Justice' (2015) 13(6) The Asia-Pacific Journal 4.
[17] Johnson (n 12) 77.
[18] ibid 78.
[19] Outline of Criminal Procedure in Japan, 12.
[20] Code of Criminal Procedure of 1948, Article 248.

offense, circumstances or situation after the offence"[21] of the suspect. Adding to the powers of public prosecutors, the Japanese criminal system has also adopted the 'principle of discretion', which ensures that a judge cannot exercise any authority over a case or potential suspect until the prosecutors file an indictment.[22] During an investigation the police and the prosecutors work together.[23] Although there is no hierarchy between the two authorities, public prosecutors may give general instructions and even orders to the police regarding the investigation[24] -all of this illustrates the freedom and powers of the Japanese prosecutors.

## III. The Reform Report

### A. Regaining the public's trust: the functioning of the japanese prosecutor

The Japanese Justice System Reform Council published its final report containing recommendations on the reform of the justice system in 2001. Through large scale interviews, surveys, fact-finding inspections and comparative research visits to foreign countries (such as the UK, the US, Germany, and France) the Council was able to determine the weaknesses and the goals of the Japanese justice system.[25] Faced with issues and points of public criticism, such as the system being too distant because of its complexity making it difficult for civilians to understand how it functions, the failure to exercise the 'check-function against administration' and the shortage of staff in judicial institutions, the Council set out to reconstruct the justice system. One of the Report's more specific focal points is the Council's encouragement of civil participation in legal proceedings in order to establish public trust and a "popular base".[26] In fact, two out of the three main goals of the Reform Council focused on the public: (1) Construction of a justice system responding to *public expectations*; (2) reforming the legal profession supporting the justice system and; (3) establishing a *popular base*.[27] Therefore, it can be safely assumed that one of the central goals of these reforms was to strengthen the public's trust and positive

[21] ibid; Stacey Steele, Carol Lawson, Mari Hariyama and David T Johnson, 'Lay Participation in Japanese Criminal Justice: Prosecution Review Commissions, the Lay-Judge System, and Penal Institution Visiting Committees' (2020) 7 Asian Journal of Law and Society 168.

[22] Castberg (n 2) 43.

[23] Code of Criminal Procedure of 1948, Article 193.

[24] ibid.

[25] Justice System Reform Council, *Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century* (2001) 6.

[26] ibid 11.

[27] ibid 11–13.

opinion of the justice system. Hence, there was less focus on developing new legal principles.

The Reform Council chose to introduce a system of lay-participation (inclusion of citizens in the justice system) on a grand scale and in many areas of the legal system. An example of this is the introduction of the 'lay-judges' system,[28] in which a group of citizens is included during the trial phase of highly sensitive cases, similar to the jury system in common law countries.[29] As argued by Fukurai, this specific measure is aimed at challenging the "symbiotic power relations among three key agencies of Japan's criminal justice system, namely the police, prosecutors' office, and the court".[30] Ideally, this measure would check the prosecutions pursued by Japanese prosecutors, while simultaneously increasing the transparency of the system and regaining the public trust in the judiciary.[31]

Why this extensive focus on public trust? A possible explanation for this shift might be the fact that the Reform Council was instigated by the Japan Business Federation in close partnership with the Liberal Democratic Party.[32] The Business Federation was of the opinion that the power of individual legal professionals should be lessened and transferred to the strict application of law and towards the public.[33] Additionally, the Reform Council fell under the Cabinet, instead of the Justice Ministry, as would usually be the case.[34] Out of the thirteen members of the Reform Council, there was only one representative for each legal profession: judiciary, procuracy and attorneys.[35] Therefore, it is understandable that the proposed reforms were not focussed on the development of legal principles. In fact,

[28] Also referred to in the Reform Report as 'saiban-in' (裁判員).

[29] Hiroshi Fukurai and Richard Krooth, 'What Brings People to the Courtroom? Comparative Analysis of the People's Willingness to Serve as Jurors in Japan and the U.S.' (2010) 38(4) International Journal of Law, Crime and Justice 38; Mari Hirayama, 'A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan- the Roles of the Lay Judge System There' in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018) 203.

[30] Hiroshi Fukurai, 'A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation' (2014) 36(2) Hastings International & Comparative Law Review 518.

[31] The Justice System Reform Council (n 25) 70.

[32] Setsuo Miyazawa and Mari Hirayama, 'Introduction of the Videotaping of Interrogations and the Lessons of the Imaichi Case: A Case of Conventional Criminal Justice Policy-Making in Japan' (2017) 27(1) Pacific Rim Law & Policy Journal 156.

[33] Setsuo Miyazawa, 'Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue' (2013) 36(2) Hastings International and Comparative Law Review 315.

[34] The Justice System Reform Council (n 25) 156.

[35] Setsuo Miyazawa, 'The Politics of Judicial Reform in Japan: The Rule of Law at Last?' (2001) 2(2) Asian-Pacific Law & Policy Journal 107.

in several of his articles, Miyazawa argues that the same businesspeople that form part of the Japan Business Federation spearheading the reforms, wished to exclude members of the legal profession from the committee wherever possible, since it was the Justice Ministry itself which was put under review.[36] The Business Federation's new-found interest in possible legal reforms is argued by Miyazawa to have originated from the opportunity for businesses to interfere with the law. The aim of this influence is to transform the "rule *by* law" into the "rule *of* law", as Miyazawa puts it. This entails that instead of the government ruling the people through the law, the law will promote and protect people's interest from the government.[37]

However, these reforms are put together in such a way, Miyazawa continues to argue, that it will therefore only serve the Business Federation and the Liberal Democratic Party's own interest, without improving ordinary people's access to justice.[38] This observation was made before the Reform Council published its final report; it is, therefore, important to analyse the report with this context in mind. The proposed reforms encompassed not only procedural and structural changes, but, moreover, they introduced a whole new philosophy behind the justice system to be adopted, to which the Report's opening chapter is dedicated. In the case of the prosecution's office, the role of the prosecutor in the Japanese society has been wholly re-defined according to the Report: the prosecutor is, first and foremost, the representative of the public.[39] The aforementioned inherent Japanese social principles, stemming from their innate roots, can be found in the Reform Council's description of the role and duties of the Japanese prosecutors:

> "[A prosecutor must] possess abundant humanity rich in appreciation for human rights, must of course have common sense *for society*, must have deep understanding and discernment of the delicate nature and feelings of human relationships, *must fully consider the feelings and positions of the people concerned such as the suspect and the victim*, and, based on appropriate cooperation and collaboration with primary investigative organs such as the police, must always keep the attitude to sincerely and actively try to resolve the cases appropriately and fairly (emphasis added)".[40]

Evidently, great emphasis is put on the feelings of those citizens involved in criminal procedure. The Reform Council wants to "enable the voices of the people

[36] ibid 106.
[37] The Justice System Reform Council (n 25).
[38] Fukurai and Krooth (n 29) 118.
[39] The Justice System Reform Council (n 25) 62.
[40] ibid.

to be heard and reflected in the management of the public prosecution offices".[41] It is understandable that the public must have faith in prosecutors, and it is also true that the proper functioning of the prosecution system greatly impacts the public's safety. Therefore, big cases whose outcome might significantly impact the public require great legal as well as social delicacy, and knowledge of a citizen's perspective on the prosecutor's part. Cases such as (but not limited to) the Akashi Fireworks and the Fukushima Nuclear Disaster that have claimed many lives and whose outcome might have a great impact on public opinion of the justice system have to be prosecuted (or not) with this in mind; this goes some way to explaining why the PRC reviewed these cases.

### B. Specific focus: the prosecution review system

The strengthening of the public trust in the judiciary can also be seen in the reforms aimed at the PRC. The PRC is essentially the checking organ designed to balance out the heavy weight of the prosecutorial monopoly of the Japanese prosecutors, through checking whether the non-prosecution of a case is justified.[42] The Prosecution Review Commission consists of Committees for the Inquest of Prosecution (or 'Committees of Inquiry'); it is a platform which allows citizens to appeal to a case that was not prosecuted by the prosecutor's office.[43] These Committees consist of eleven citizens selected by lottery, each on a six-month term, who serve as a check on the PoO of prosecutors.[44] It is important to note that the only organ that has the power to check the judiciary's non-prosecution of cases is made up of citizens who have a maximum of six months' experience within the judicial system; there is no explanation for the lack of intrinsic legal expertise within the PRC. It might be useful for the temporarily appointed citizens of the PRC to receive some automatic guidance on the functioning of the system and on applicable legal principles in the form of the mandatory inclusion of a legal expert in the group during the initial stages of the proceedings. The importance of the inclusion of such an expert will be further discussed in Section IV.C.

When there is a petition for a review of a non-prosecution decision, a Committee is formed, investigating the records of incidents received from the public prosecutor's office.[45] The Committee is also free to investigate a case of non-prosecution on its own

[41] ibid 63.
[42] Steele, Lawson, Hariyama and Johnson (n 21) 161.
[43] The Justice System Reform Council (n 25) 12.
[44] Act on Committee for Inquest of Prosecution (*検察審査会法*) Act Number 147 of 1948, last revised in 2006, Articles 10, 13, 14.
[45] ibid Article 2.

when it learns about such a case from other sources, such as newspaper articles.[46] If the Committee decides that there is reason for a prosecution, the prosecutor is obliged to review the case, therein including the report of the Committee.[47] The whole process is then repeated; if the prosecutors once again finds that the case should not be prosecuted, the Committee has the right to again review the case. The second time around, however, an examination assistant shall be appointed by the Committee to examine the case based on special legal knowledge.[48] This demonstrates that it is important to include legal expertise in this reviewing process. After this second appeal, if the Committee's final decision is to prosecute, a lawyer will be appointed to exercise the duties of the prosecutor and prosecute the suspect.[49] The specific recommendations made by the Reform Council are: (1) make the PRC's decisions binding, which strengthens the rule of law; and (2) focus more on informing the public about the PRC to gain their trust.[50]

The Reform Council recommended that the reports of the Prosecution Review Commission become binding in the second phase, meaning that after the first review round the prosecutor still has the discretion to reconsider the decision to prosecute even if the PRC has already decided that a case should be prosecuted.[51] If, after the second round, the PRC still maintains that the non-prosecution is still not justified, a lawyer is then appointed to exercise the duties of the prosecutor's office to prosecute the suspect. This obligation of mandatory prosecution after the second round is noticeably different from the initial advisory function that the PRC had. This is a significant change, since the PRC can exercise its checking function on the power of prosecutors more forcefully than before, thereby allowing for a much-needed, new-found balance in the prosecution system.

## IV. The Functioning of the Prosecution Review Commission

### A. Numbers on Japan's criminal justice standing internationally

In order to contextualise the environment in which the PRC operates, it is important to illustrate the (international) standing of Japan's justice system. Looking at Japan on a global scale, the 2020 Rule of Law Index placed Japan 15th in the

[46] Supreme Court of Japan, *Outline of the Prosecution Review Commission* (*検察審査会の概要*) (2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.

[47] Act on Committee for Inquest of Prosecution (*検察審査会法*) Act No. 147 of 1948, last revised in 2006, Article 41.1.

[48] ibid Articles 41.2, 41.3.

[49] ibid Articles 41.9, 41.10.

[50] The Justice System Reform Council (n 25) 6–7, 12.

[51] ibid 12.

world (128 States), and 4th out of 15 countries at the regional level.[52] However, when compared to countries that are in the same income rank, Japan scores repeatedly in the lower half, notably in 'Constrains on Governmental Powers', 'Open Government' and 'Fundamental Rights'. The 2015 Open Government Index reveals that there is significant room for improvement *vis-à-vis* the complaint mechanisms through which citizens express their concerns to the government.[53] The complaint handling procedure against local officials seems to be especially lacking in Japan according to the survey results, with only a 33% efficiency rate. This is a significant issue since the PRC's main instigation method is through the receiving of citizen complaints.

On a more local scale, statistics show that the rate of successful prosecution in Japan exceeds 99%.[54] This creates a public stigma, with the assumption that if you are arrested, you are guilty, even though you have not faced trial yet.[55] This stigma places an extra responsibility on prosecutors, since they are aware of the social repercussions that might follow if they prosecute someone that is innocent.[56] Negative social stigmatisation might result in a loss of face and reputation, a loss of employment, forced resignation, issues in one's personal life, and so on.[57] Therefore, Japanese prosecutors are very selective as to which cases to prosecute and only engage in a case when they are absolutely sure that the person is guilty.[58] Thus, it could be the case that when they dismiss a case due to lack of evidence, it does not mean that there is no evidence at all, but rather it implies that there might be a lot of evidence, be it not enough to be sure that a person is guilty beyond any doubt.[59] This is a cycle that enforces itself as seen in Table IV.1. The Reform

[52] Editorial, 'Japan' (*The World Justice Project*, 2020) https://worldjusticeproject.org/rule-of-law-index/pdfs/2020-Japan.pdf accessed 15 November 2020.

[53] Editorial, 'Japan' (*WJP Open Government Index*, (2015) http://data.worldjusticeproject.org/open-gov/#/groups/JPN accessed on 15 November 2020.

[54] Erik Herber, 'Jurymembers, Victims and the Public Prosecution Service: Reform and Continuity in the Japanese Criminal Process (*Juryleden, slachtoffers en het OM: Hervorming en continuïteit in het Japanse strafproces*)' (2016) Ars Aequi 735.

[55] ibid.

[56] Erik Herber, 'The 2011 Fukushima Nuclear Disaster - Japanese's Citzens' Role in the Pursuit of Cirminal Personality' (2016) 21 Zeitschrift für japanisches Recht 102–103.

[57] ibid; Eric Rasmusen, 'Stigma and Self-Fulfilling Expectations of Criminality' (1996) 39(2) The Journal of Law & Economics 519–520.

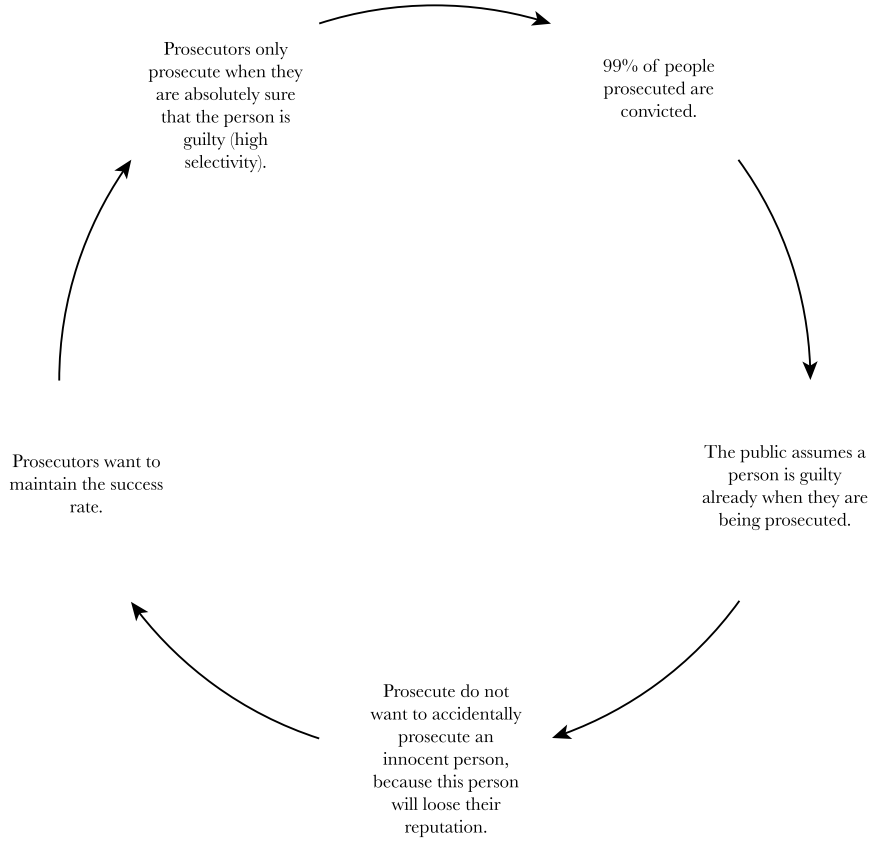
[58] Mari Hirayama and David Johnson, 'Japan's Reformed Prosecution Review Commission: Changes Challenges, and Lessons' (2019) 14 Asian Journal of Criminology 77; Steele, Lawson, Hariyama and Johnson (n 21) 169.

[59] ibid 78.

Report reinforces this stigma by strengthening the weight that cases have on public trust.

TABLE IV.1

*Cycle Sustaining the 99% Success Rate of Japanese Prosecutors*



### B. Statistics on the activity of the prosecution review commission

The Japanese Prime Minister's office conducted a poll in 1990 which revealed that up to 70% of the public admitted not to be familiar with the prosecutorial review system.[60] This was 27 years ago and the public knowledge of the criminal justice system has probably improved due to the efforts of the government. Nevertheless, the PRC's Committees of Inquiry had already been functional for over forty years by that point, thus the lack of binding review in these first four decades has to be kept in mind when looking at statistics. Therefore, the results of the statistical findings are separated into two categories: pre- and post-2009 reforms. This is done in order to measure any changes that the reforms might have brought to the PRC's activity pattern. Such changes might be significant when determining the productivity of the PRC and the extent to which it has reached its goal as a checking power that facilitates public trust.

As seen in Table IV.2 below, so far, the PRC has examined approximately 177,000 cases since its commencement (1949), of which 2,422 cases resulted in prosecution, which composes around one out of every 73 cases (1.4%) that are being reviewed.[61] This number has been collected over a period of at least 60 years. Between the years 1949 and 1989 (before the reform) out of every 10,000 cases of non-prosecution, the PRC reviewed 34.5 cases (0.345%).[62]

[60] Chén Xiào (*效，陈*), 'Comment on the Current Situation of Japan Procurator Review System (*日本检察审查会制度实施现状评析*)' (2014) 7 Institute of Law, Chinese Academy of Social Sciences, 69.

[61] Supreme Court of Japan, Number of cases accepted by Prosecution Review Committee (*検察審査会の受理件数*, 2020) https://www.courts.go.jp/vc-files/courts/2020/R1kensintoukei.pdf accessed 28 November 2020. Note: The figures of 2019 are preliminary figures.

[62] ibid.

TABLE IV.2

*Number of Cases Accepted by the Prosecution Review Committee*

| | New requests | | Finished | | | | | |
|---|---|---|---|---|---|---|---|---|
| Year | By petition | In total | Prosecuted | Unjustified non-prosecution | Justified non-prosecution | Rejection of motion (Other reasons) | In total | In progress |
| 2015 | 2,174 | 2,209 | 4 | 118 | 1,801 | 248 | 2,171 | 836 |
| 2016 | 2,155 | 2,191 | 3 | 101 | 2,023 | 216 | 2,343 | 684 |
| 2017 | 2,507 | 2,544 | 1 | 67 | 1,895 | 311 | 2,274 | 954 |
| 2018 | 2,215 | 2,242 | 3 | 81 | 1,958 | 287 | 2,329 | 867 |
| 2019 | 1,733 | 1,797 | 9 | 134 | 1,640 | 285 | 2,068 | 596 |
| **Total since 1949** | | | **2,422** | | | | **177.405** | |

Between 2015 and 2019 a total of approximately 11,200 cases were reviewed in the first stage of the PRC, as seen in Table IV.2 when adding up the total amount of cases of those five years, in the vertical grey row. In 2019 alone, the total amount of finished cases in the first stage amounted to 2,068 cases.

TABLE IV.3

*Persons Not Prosecuted in Period 2015-2017 (By Reason)*

| **Year** | **Total *(100%)*** | Suspension of prosecution | Insufficiency of evidence | Withdrawal of complaint | Insanity | Others |
|---|---|---|---|---|---|---|
| | | 113,130 | 31,712 | 8,046 | 551 | 9,809 |
| **2015** | **163,248** | *(69.3%)* | *(19.4%)* | *(4.9%)* | *(0.3%)* | *(6.0%)* |
| | | 112,809 | 31,668 | 7,478 | 507 | 7,764 |
| **2016** | **160,226** | *(70.4%)* | *(19.8%)* | *(4.7%)* | *(0.3%)* | *(4.8%)* |
| | | 112,263 | 32,169 | 6,657 | 501 | 7190 |
| **2017** | **158,780** | *(70.7%)* | *(20.3%)* | *(4.2%)* | *(0.3%)* | *(4.5%)* |

Table IV.3 shows the number of cases that were not prosecuted in general.[63] The category 'Suspension of Prosecution' entails the number of cases dropped by the prosecutor despite the availability of sufficient evidence to prosecute. As mentioned above, this dismissal is possible due to the Principle of Opportunity, which gives the prosecutors the discretion to dismiss a case on the basis of the character, age, environment, gravity of the offense, circumstances or situation after the offence of the suspect.[64] The categories 'Suspension of Prosecution' and 'Insufficiency of Evidence' amount to roughly 90% of the cases. Hence, Tables IV.2 and IV.3 will be used when talking about the cases of non- prosecution in this article, since other reasons such as "insanity" and "withdrawal of complaint" are exceptions that are not encompassed into this topic. Therefore, the total amount of non-prosecuted cases, minus the withdrawal and insanity cases, was 144,432 in 2017.

If we compare the total amount of cases that were not prosecuted in 2017 in Table IV.3 (144,432 cases), with the number of reviewed cases by the PRC in 2017 in Table IV.A.2 (2274 cases), we can see that the PRC has reviewed 1.6% of all the cases that prosecutors decided not to pursue. In the time 2015-2017 period, the average review rate was also 1.6%. This is a significant improvement compared to the 0.345% reviewed cases of the total case load before the reforms, showing a sharp (and, therefore, encouraging) increase in activity, demonstrating that the reforms did have an effect here. In order for the PRC to be an effective checking power on the prosecutors and to deliver the public representation and inclusion that the Reform aimed at achieving, the PRC should have significant weight on the prosecutors, hence the question: is 1.6% enough?

### C. Case studies of the prosecusion review commission

To answer this question, it is important to look not only at the quantity but also at the quality of the cases selected by the PRC. 'Quality', in this context, refers to the scope of influence that the PRC has as a checking power on mainly three factors: public trust, the rule of law and the functioning of the prosecutors. Since the cases reviewed by the PRC are few, they must often be high-profile cases with either many victims or important (public) figures in order to exert a significant influence on all objectives identified by Reform Report. Noticeable cases which the PRC prides itself on are the Akashi firework stampede incident, the Minamata disease case and the crash of the Nikko Jumbo Jet case.[65] Each of these cases an

[63] Editorial, 'Section 2 Dispositions' (*White Paper on Crime*, 2015, 2016 and 2017) <http://hakusyo1.moj.go.jp/en/65/nfm/n_65_2_2_2_2_0.html> accessed 28 November 2020.

[64] See Section II.D.

[65] Supreme Court of Japan, Outline of the Prosecution Review Committee (*検察審査会の概要*, 2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.

immense amount of media and public attention, due to their high death tolls.[66] In addition to these cases, the following case study shows that powerful individuals and groups, who otherwise would have been shielded by the old power monopoly that the prosecutor's Principle of Opportunity provided, are no longer immune from prosecutorial indictment.[67]

In his articles, Fukurai demonstrates that the PRC typically reviews high-profile cases involving, for example, politically and economically powerful individuals and groups whom otherwise would not be prosecuted and stand above the law.[68] Fukurai highlights how the cases of powerful individuals who had avoided prosecution were reviewed by the PRC due to many public complaints and petitions, which then lead to their prosecution after the PRC's investigation.[69] Fukurai gives the case of Ichiro Ozawa, who was the leader of the Liberal Democratic Party and became Prime Minister in 1972.[70] Ozawa was twice alleged to have violated the Political Fund Control Law; on both occasions, prosecutors chose not to file charges.[71] The official explanation for not prosecuting Ozawa was that there was that there was insufficient evidence to file charges.[72] Important to note in this regard is the social stigma that a prosecution would have had on Ozawa's reputation. Ozawa was a key figure on the political stage of Japan; if, therefore he was prosecuted, due to the stigma of the 99% success rate of the prosecutors, everyone would already had assumed that he was guilty, which not only would had destroyed Ozawa's career, but also would had shaken the political stage in Japan. Therefore, it follows that the prosecutors did not want to initiate prosecution without having enough proof to convict him. However, the PRC did find evidence during its subsequent investigation: A testimony of Tomohiro Ashikawa (Ozawa's former aid and Lower House member) saying that he received approval to prepare the allegedly fraudulent tax report,[73] which was not enough proof to convict him beyond doubt, but still was evidence.

After reviewing the case twice, the PRC enacted its mandatory prosecution powers and indicted Ozawa in 2011. Interesting to note is that alongside the original allegations against Ozawa, the PRC included an additional charge on top

66 ibid.

67 Hiroshi Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86(2) Chicago-Kent Law Review 800.

68 ibid 801.

69 ibid 800.

70 ibid 799.

71 Editorial, 'Indictment of Mr. Ozawa' (*The Japan Times,* 2 February 2011) www.japantimes.co.jp/opinion/2011/02/02/editorials/indictment-of-mr-ozawa/> accessed 15 November 2020.

72 ibid.

73 ibid.

of the original allegations.[74] The media described this as the PRC going "beyond the purview of its responsibility", and called for expert discussions on "whether a *citizens'* legal panel may add such an item".[75] The possibility to include a legal expert in the initial stages of the PRC process has already been mentioned in Section III.B. This option might not only aid the citizens in the PRC in navigating through the judicial process and legal principles, but it could also be a solution to the dismay of the public; if judicial expertise is included in the PRC, in the eyes of the public, the organ would not just be a mere 'citizens' legal panel', but rather a group that represents the public *and* includes expertise that validates and strengthens its judgments. Therefore, the mandatory inclusion of a legal expert in the PRC could serve as reassurance to the public that the PRC will not be crossing any judicial lines.

This case shows that the PRC is the only institution that checks the power of prosecutor, hence it is the single organ that can reach high-profile individuals and groups that are otherwise be beyond the reach of justice given that they are shielded by prosecutors. Needless to say, this is of vital importance within a well-functioning justice system. At the same time, this case also illustrates how the two goals of the PRC can oppose one another, where the PRC focusses too much on checking the prosecution's power which then results in public dismay.

The PRC also has to be careful of the pendulum swinging too much the other way if it relies too much on public perceptions, as Goodman warns.[76] The goal of the inclusion of citizens within the justice system through the PRC was to (1) include a citizen's perspective in significant cases and (2) thereby strengthen public faith in the justice system, with the inclusion of citizens bringing the public closer to the justice system. A shortcut, however, is to include public opinion in the assessment of cases. For example, a public poll showed that roughly 70% of the public wanted Ozawa to resign; therefore it would have been very easy for the PRC to achieve public trust by looking at the general opinion and act accordingly.[77] Deciding on a case by looking at whether the public favours prosecution, even when the evidence is not all-convincing, does not conform to the rule of law. The PRC has to be careful not to become a "brake on the public prosecutor's ability

[74] ibid.

[75] Goodman (n 8).

[76] Editorial, 'Indictment of Mr. Ozawa' (*The Japan Times*, 2 February 2011) https://www.japantimes.co.jp/opinion/2011/02/02/editorials/indictment-of-mr-ozawa/ accessed 15 November 2020. Emphasis added.

[77] Editorial, 'Poll: Majority want Ozawa resignation' (*United Press International*, 17 January 2010) https://www.upi.com/Top_News/World-News/2010/01/17/Poll-Majority-want-Ozawa-resignation/55131263788002/ accessed 15 November 2020.

to safeguard the unpopular but innocent".[78] By including more legal expertise in the PRC the chance of it falling in this trap is reduced significantly, because the citizen's point of view will not be the only relevant perspective.

Precisely because of this dichotomy, it is vital that the PRC be aware of the extent of its power and of the stigma existing within the context in which it operates. A balance must be achieved between the two goals. If there is one piece of evidence that might not be significant enough to convict a person, should this one item be reason enough to initiate prosecution, thereby bringing about the aforementioned stigma and running the risk of ruining a person's public image and career? Should these considerations be made without the legal expertise specialising in such assessments? Admittedly, the PRC's review has brought prosecution and subsequent justice to many cases that otherwise would have been left untouched; it is fighting impunity as we speak. However, it has to be aware of the context and stigma within which it operates. Focussing too much on either of its goals (public trust vs. checking mechanism) might cause an imbalance that could otherwise be prevented by including mandatory legal expertise from the first stage of review.

Another reason to support such a balance is the impact it can have through strengthening the PRC's influence on the functioning of prosecutors. If more legal expertise is added to the PRC, it will stand stronger against prosecutors when it is needed, since its arguments will not only rest on morality and public opinion but will also focus on the prosecutor's conformity with the rule of law. Keeping the Ozawa case in mind, in 2013 Goodman wrote:

> "considering that all the PRC mandatory indictment cases to date either have not been, or likely will not be, successful and weighing the unsuccessful record against the almost one hundred percent conviction rate when prosecutors charge, there is a great reason to doubt that the PRC process is working as it should".[79]

Hence, the weight that the PRC has on the functioning of the prosecutors is probably not as significant as it should be.[80] From this it could be concluded that the PRC succeeds in attracting significant media and public attention, and including a citizen's perspective in the justice system, without actually having any significant weight on the functioning of the prosecutors. The next section will strive to answer the question: has the PRC been able to check the Japanese prosecutors,

[78] Joseph Sanders, 'A Norms Approach to Jury "Nullification:" Interests, Values and Scripts' (2008) 30(1) Law & Policy 20.

[79] Goodman (n 8) 35.

[80] Kenny Yang, 'Trust the People or Business as Usual? An Examination of Lay Participation in the Japanese Criminal Justice System' (2017) 42 University of Western Australia Law Review 86.

facilitate public trust and adhere to the rule of law, as it should according to the Reform Report?

## V. Compatibility of Goals: Public Trust and a Checking Mechanism

Even before the reforms the PRC consisted of citizens. Thus, nothing has changed in this aspect, but the change rather lies in the purpose of the PRC. The probable reason for the PRC being composed of citizens instead of legal experts is to ensure "popular participation in the criminal proceedings-system",[81] thus turning the Committees of Inquiry into an opportunity for public scrutiny to increase popular trust, while simultaneously functioning as a system of legal review. In fact, being aware of the "attitudes and feelings of the general public" and "understanding the feelings of victims of crime" is essential in order to be a good prosecutor, according to the Reform Council.[82] This also implies that prosecutors should be aware of the political impact of non-prosecution, since the public's trust is valued greatly and there is immense public focus on prosecutors' decisions. Trying to strike a balance between its checking function and obtaining public trust can prove difficult in some cases. Evidently, there is solid logic in gaining people's trust by bringing citizens closer to the justice system; there is, in fact, nothing wrong with outreach which facilitates people's trust in the system.

It is important to note, however, that the review of the PRC is conducted from a citizen's perspective, without much prior knowledge of legal affairs, and only upon request for additional information can the Committee receive clarification from a lawyer regarding legal problems.[83] One could challenge the strict observance of the rule of law of an institution that is supposed to check prosecutors without a priori legal expertise; why does the PRC consist solely of citizens? The fact that in the second phase the appointment of a legal expert is mandatory shows the need for including such expertise in the Committee from the onset since the drafters of the law deemed it necessary to include legal expertise at this stage of procedure.

[81] The Justice System Reform Council, Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century (2001)< https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html> accessed 12 November 2020.

[82] ibid.

[83] Act on Committee for Inquest of Prosecution (*検察審査会法*) Act No. 147 of 1948, last revised in 2006, Articles 38, 39.2.

Therefore, why does the Reform Report insist on conducting prosecutorial review purely from the citizen's point of view?[84]

Yielding judicial power solely to citizens to increase public trust in the judiciary does not promote the strict rule of law. Leaving such key-functions solemnly to citizens with minimal knowledge of the law does not strengthen the law, because there is a higher chance of it being applied inappropriately. The argument made here is not one that preaches the abolition of any inclusion of citizens in the justice system, but rather it argues that the sole check on the monopolised power of prosecutors should not be solely left in the hands of citizens. Legal expertise should be included as well starting from the onset. Thus the PRC should include a legal expert in order to balance its goals of checking prosecutorial discretion and obtaining 'public trust/ a citizen's perspective'.

## VI. Conclusion

The problems within the Japanese prosecution system, as identified in the Reform Report, are the lack of public trust and the need for a checking power to balance the monopoly of the prosecutors. The Reform Report has thus introduced and strengthened a new lay-participation system that includes the perspective of citizens. As part of this system, the PRC has fulfilled its goal of increasing public trust in the system, but in certain areas it still has room to improve. When it comes to checking prosecutors, much is left to be desired when it comes to statistical success and influence upon the prosecutor's behaviour. There are also several "traps" that the PRC might fall into, such as the focus on public opinion and the misapplication of legal principles. Therefore, this article argues that the PRC should include legal expertise in its Committees in order to strike a balance between achieving public trust and checking the power of prosecutors in Japan.

[84] Supreme Court of Japan, Outline of the Prosecution Review Commission (*検察審査会の概要*, 2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.