Constitutional Review, Volume 12, Number 1, May 2026
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1216

Constitutional Tort As A Constitutional Complaint: Reconstructing Governmental Unlawful Acts Regulation

Bimo Fajar Hantoro*
Universitas Jenderal Soedirman
bimo.fajar@unsoed.ac.id

Fathimah Azzahro**
Universitas Jenderal Soedirman
fathimah.azzahro.10@unsoed.ac.id

Received: 4 June 2025 | Last Revised: 20 February 2026 | Accepted: 18 March 2026

Abstract

A chorus of academics has echoed constitutional complaint as an expansion of the Constitutional Court's jurisdiction to strengthen the protection of citizens. In this context, the proposal is hampered by the procedural barriers of constitutional amendment. Therefore, this research aims to propose a more viable alternative by reconstructing the existing State Administrative Courts' governmental unlawful acts jurisdiction into a *de facto* constitutional complaint mechanism. Governmental unlawful acts cause of action is reconstructed by adopting certain aspects of constitutional tort in the United States as a point of comparison and inspiration. This doctrinal research adopts statutory, comparative, and conceptual approaches, using primary and secondary legal materials. The

* Bimo Fajar Hantoro, S.H., LL.M., is a lecturer at Universitas Jenderal Soedirman, specializing in constitutional law, election law, and statutory interpretation. He earned his LL.M. with honors from the University of Illinois Urbana-Champaign in 2023, winning the CALI Excellence for the Future Award in Federal Courts. This paper was presented at the 7th Indonesian Constitutional Court International Symposium (ICCIS) on "Constitutional Complaint". The authors express their utmost gratitude to the experts and reviewers for their feedback and comments. In addition, the authors would like to thank Universitas Jenderal Soedirman for its support in writing this article.

** Fathimah Azzahro, S.H., M.H., is a lecturer at the Faculty of Law, Universitas Jenderal Soedirman, specializing in constitutional law, state institutional law, and gender equality. She earned her Master of Laws (M.H.) from Universitas Jenderal Soedirman in 2024, graduating cum laude. Her research focuses on the institutional frameworks and gender advocacy within the constitutional system.

Copyright © 2026 by Constitutional Review. All writings published in this journal are personal views of the authors and do not represent the views of the Constitutional Court.

results show that reconstruction of State Administrative Courts' governmental unlawful acts jurisdiction into a *de facto* constitutional complaint mechanism depends on four specific and crucial reforms to State Administrative Courts Law, the Governmental Administration Law, and the implementing regulations. First, the authority of State Administrative Courts covers factual actions and includes blocking the enforcement of written state administrative decisions. Second, an explicit statutory authorization should be provided for the state administrative court judges to use the 1945 Constitution as a standard of rseview. Third, there needs to be procedural safeguards to ensure legal certainty and consistency in constitutional interpretation. State Administrative Courts are obligated to give full effect to the Constitutional Court's interpretation whenever available and applicable to the case at hand, and to stay proceedings when a related case is pending at the Constitutional Court relevant to the case at hand. Lastly. Finally, existing damages regulations must be amended to ensure legal certainty and provide just relief. This prevents remedies from becoming symbolic rather than effective in stopping constitutional violations and wrongdoings.

Keywords: Constitutional Tort, Constitutional Complaint, Governmental Unlawful Acts

I. INTRODUCTION

1.1. Background

The discourse of constitutional complaint has been widely echoed as a potential effort to protect citizens' constitutional rights in Indonesia. Many scholars state that the current judicial review authority is insufficient in protecting citizens' rights as guaranteed by the 1945 Constitution.[1] Under the current scheme, the Constitutional Court only has the jurisdiction to examine the constitutionality of laws, and the nature of the decision is declarative and constitutive.[2] Consequently, this bars the possibility of remedies in the form of damages or an injunction for concrete and imminent constitutional violations.

[1] Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (August 27, 2016): 105; Tanto Lailam, Putri Anggia, and Irwansyah Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (August 30, 2022): 695.

[2] Andri Setiawan, Antikowati Antikowati, and Bayu Dwi Anggono, "Kekuatan Mengikat Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Terhadap Putusan Pengujian Peraturan Perundang-Undangan Oleh Mahkamah Agung" [The Binding Force of Constitutional Court Decisions on Judicial Review of Laws Against Supreme Court Decisions on Review of Laws and Regulations], *Jurnal Legislasi Indonesia* [Indonesian Journal of Legislation] 18, no. 1 (March 31, 2021): 21.

Considering the current lack of damages or injunctive remedies, the availability of a new cause of action in the form of a constitutional complaint mechanism, *arguendo,* strengthens the protection and promotion of citizens' rights.[3] As a concept, I Dewa Gede Palguna defined "constitutional complaint" as a legal remedy in the form of a lawsuit filed by a citizen who claims a constitutional right has been violated by an act or omission committed by a governmental body or official.[4] For example, the German constitutional complaint offers only injunctive relief.[5] This limitation on remedies renders any past constitutional violations effectively without redress.

Most Indonesian legal experts advocate for constitutional complaints to be granted jurisdiction.[6] This is an intuitive conclusion, considering the Court's existing jurisdiction to interpret the 1945 Constitution in judicial review of laws.[7] However, the proposal faces two distinct constitutional barriers. First, Constitutional Court's jurisdiction in Article 24C paragraph (1) of the 1945 Constitution is exhaustive or closed in nature. The jurisdiction cannot be

---

3 Gautama Budi Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi" [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court], *Jurnal Konstitusi* [Journal of Constitutional Law] 14, no. 4 (February 9, 2018): 825–26.

4 I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3, no. 1 (August 2, 2017): 2; Ruth Weber, "Law-Making Activity of the German Federal Constitutional Court," in *Judicial Law-Making in European Constitutional Courts*, ed. Monika Florczak-Wątor (London: Routledge, 2020), 31.

5 Palguna, "Constitutional Complaint and the Protection of Citizens," 13–14; Karl-Peter Sommermann, "Constitutional State and Public Administration," in *Public Administration in Germany*, ed. Sabine Kuhlmann et al. (Birmingham: Pelgrave Macmillan, 2021), 27–28.

6 Arundhati, "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court]," 834–35; M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, no. 1 (May 31, 2019): 130–31; Palguna, "Constitutional Complaint and the Protection," 20; Faiz, "A Prospect and Challenges," 120–21; Lailam, Anggia, and Irwansyah, "The Proposal of Constitutional Complaint," 165; Tanto Lailam and M. Lutfi Chakim, "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences," *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023): 161; Galuh Candra Purnamasari, "Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint) [Legal Remedies for Violations of Citizens' Constitutional Rights through Constitutional Complaint]," *Veritas et Justitia* 3, no. 2 (December 26, 2017): 267–68; Sri Warjiyati et al., "Complaint Authority for Constitutional Complaint by Indonesia's Constitutional Court," *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 2 (August 24, 2022): 313; Standy Wico et al., "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty," *Indonesian Journal of Law and Society* 2, no. 1 (February 12, 2021).

7 Theunis Roux, "Indonesia's Judicial Review Regime in Comparative Perspective," *Constitutional Review* 4, no. 2 (December 31, 2018): 205–16; Saldi Isra and Pan Mohamad Faiz, "The Indonesian Constitutional Court: An Overview," in *Courts and Diversity*, ed. Bertus De Villiers, Saldi Isra, and Pan Mohamad Faiz (Leiden: Brill | Nijhoff, 2024), 63–69.

expanded by statute and requires a formal constitutional amendment.[8] **Second**, Article 24C paragraph (3) of the 1945 Constitution limits the Court to only nine justices, reducing the capacity to handle tsunami of new cases a constitutional complaint would create.[9]

The prevailing truism in Indonesia's constitutional paradigm is the supremacy of the Constitutional Court in constitutional interpretation.[10] However, the truism is often misunderstood, blurring the distinction between finality and exclusivity. This has silenced dissonant voices, leaving a void where proposals to attribute constitutional complaint jurisdictions to courts outside the Constitutional Court are non-existent. While the Constitutional Court is indeed the final interpreter of the 1945 Constitution, it is by no means the exclusive one. Other state institutions necessarily engage in constitutional interpretation in exercising their constitutional authority.[11] Under this departmentalist view of constitutional interpretation, the President and the People's Representative Council are engaging in constitutional interpretation while exercising their lawmaking authority under Article 20 of the 1945 Constitution.[12] Therefore, a proper understanding balances departmentalism

[8] Bimo Fajar Hantoro, "Pembatasan Yudisial Dan Perluasan Kewenangan Mahkamah Konstitusi Dalam Memutus Sengketa Hasil Pilkada [Judicial Limitation and Expansion of the Constitutional Court's Authority in Deciding Regional Election Result Disputes]," *Media Iuris* 7, no. 1 (February 29, 2024): 102; Lailam and Chakim, "A Proposal to Adopt Concrete Judicial Review," 161; Simon Butt, Melissa Crouch, and Rosalind Dixon, "Special Issue: The First Decade of Indonesia's Constitutional Court," *Australian Journal of Asian Law* 16, no. 2 (2016).

[9] Josua Satria Collins and Pan Mohamad Faiz, "Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]," *Jurnal Konstitusi* 15, no. 4 (January 15, 2019): 704; Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint," 113–14; Bayu Dwi Anggono, "Pembatasan Pengajuan Perkara Sengketa Hasil Pemilihan Kepala Daerah Di Mahkamah Konstitusi Dan Implikasinya Terhadap Jaminan Keamanan Nasional [Restrictions on Filing Regional Head Election Result Disputes in the Constitutional Court and Their Implications for National Security Guarantees]," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 5, no. 1 (2016): 88–89.

[10] Luthfi Widagdo Eddyono, "Independence of the Indonesian Constitutional Court in Norms and Practices," *Constitutional Review* 3, no. 1 (August 2, 2017): 73; Rahayu Prasetianingsih, "Judicial Activism in Indonesia: Constitutional Culture by the Constitutional Court," *PETITA: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 2 (November 1, 2020): 171.

[11] Richard H. Fallon Jr., "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age," *Texas Law Review* 96, no. 3 (2018): 488–92; Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review* 92, no. 4 (July 2004): 1031–34; Dawn E. Johnsen, "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?," *Law and Contemporary Problems* 67, no. 3 (2004): 105–47; Neal Devins and Louis Fisher, "Judicial Exclusivity and Political Instability," *Virginia Law Review* 84, no. 1 (February 1998): 98–104; Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110, no. 7 (May 1997): 1359–61.

[12] M. Jeffri Arlinandes Chandra, Bayu Dwi Anggono, and Febrian Febrian, "Rekonsruksi Tahapan Pembentukan Perundang-Undangan: Urgensi Re-Harmonisasi Dan Evaluasi Sebagai Siklus Pembentukan Undang-Undangan Yang Berkualitas [Reconstruction of the Stages of Lawmaking: The Urgency of Reharmonization and Evaluation as a Cycle of Quality Lawmaking]," *Jurnal Legislasi Indonesia* 19, no. 4 (December 31, 2022): 556–58

with judicial supremacy. Other institutions make valid interpretations, while Constitutional Court retains the ultimate plenary authority as the final interpreter.

A more feasible alternative to a constitutional amendment exists by reconstructing the existing State Administrative Courts' jurisdiction to review governmental unlawful acts. Even though most academics focus on Constitutional Court, State Administrative Courts have the jurisdiction to adjudicate governmental unlawful acts per Law Number 30 of 2014 on Governmental Administration (hereinafter Governmental Administration Law).[13] This existing cause of action allows individuals aggrieved by governmental acts to sue for damages or injunctions.[14] Comparatively, the United States employs a similar "constitutional tort" concept, allowing citizens to sue for damages or injunctive relief for constitutional rights violations resulting from an act of governmental bodies and officials.[15] The clear parallels suggest that Indonesian governmental unlawful acts cause of action can be reconstructed into an effective instrument for constitutional protection, warranting a closer analysis.

Previous research on the adoption of complaints has uniformly focused on Constitutional Court. For example, I Dewa Gede Palguna discusses the mechanism as an expansion of the Constitutional Court's jurisdiction.[16] Pan Mohamad Faiz explores the integration of constitutional complaint and question into the Constitutional Court's authority.[17] Even though this foundational research confirms the need for a constitutional complaint mechanism, the proposals exclusively consider the Constitutional Court as the proper venue. This research diverges from the consensus and fills a critical gap by analyzing the adoption of a constitutional

[13] M. Aunul Hakim and Sheila Kusuma Wardani Amnesti, "Problematika Penanganan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah (Onrechtmatige Overheidsdaad) Pada Peradilan Tata Usaha Negara [Problems in Handling Claims of Unlawful Acts by Government (Onrechtmatige Overheidsdaad) in the State Administrative Court]," *De Jure: Jurnal Hukum dan Syar'iah* [De Jure: Journal of Law and Sharia] 14, no. 1 (June 29, 2022): 127–29.

[14] Bagus Oktafian Abrianto, Xavier Nugraha, and Nathanael Grady, "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014),]" *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 11, no. 1 (June 23, 2020): 55–60; E. Garrett West, "Refining Constitutional Torts," *The Yale Law Journal* 134 (2025): 875–79.

[15] Richard H. Fallon Jr., "Bidding Farewell to Constitutional Torts," *California Law Review* 107 (2019): 946–50; West, "Refining Constitutional Torts," 875–79; Gregory Sisk, "Recovering the Tort Remedy for Federal Official Wrongdoing," *Notre Dame Law Review* 96, no. 5 (2021): 1801.

[16] Palguna, "Constitutional Complaint and the Protection," 1–23.

[17] Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint," 103–28.

complaint mechanism under the jurisdiction of State Administrative Courts. The method is developed by drawing a comparative analysis with the concept of constitutional tort in the United States.

1.2. Research Questions

1. How are governmental unlawful acts cause of action regulated under Indonesian law?
2. How is the concept of constitutional tort implemented in the United States, and what role does it play in remedying constitutional violations?
3. How should the aspects of constitutional tort be adopted as a form of constitutional complaint in Indonesia by reconstructing governmental unlawful acts regulation?

1.3. Method

This doctrinal research employs statutory, comparative, and conceptual approachesmethod.[18] The statutory approach analyzes relevant laws, regulations, and court decisions governing governmental unlawful acts in Indonesia and constitutional tort in the United States by clarifying the semantic meaning of legal texts, determining their validity, and examining their construction for their application to factual circumstances. The comparative approach analyzes the defining aspects of constitutional tort in the United States for the purposes of offering the framework for reform proposals to the governmental unlawful acts cause of action in Indonesia.[19] The conceptual approach explores relevant concepts to provide contexts and theoretical bases in addressing legal issues of this research.[20]

This research relies on primary and secondary legal materials. Primary legal materials consist of laws, regulations, and court decisions that govern

[18] Theresia Anita Christiani, "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object," *Procedia - Social and Behavioral Sciences* 219 (May 2016): 203–4.

[19] Robert Leckey, "Review of Comparative Law," *Social & Legal Studies* 26, no. 1 (February 24, 2017): 14; David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values," *Annual Review of Law and Social Science* 12, no. 1 (October 27, 2016): 49–52; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014), 235–38.

[20] Sanne Taekema, "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice," *Law and Method* 2018, no. 2 (February 2018): 3–5, https://doi.org/10.5553/REM/.000031; Marzuki, *Penelitian Hukum: Edisi Revisi*, 114.

governmental unlawful acts in Indonesia and constitutional tort in the United States.[21] Secondary legal materials include journal articles and books relevant to the issue.[22] These legal materials are collected through a literature review and are analyzed, synthesized, and systematized to answer the research questions.[23]

II. RESULTS AND DISCUSSION

2.1. Governmental Unlawful Acts Regulation in Indonesia

The recent development of governmental unlawful acts after the enactment of Governmental Administration Law has several legal consequences.[24]

Table 1. The Differences of Governmental Unlawful Acts Lawsuit Before and After the Enactment of the Governmental Administration Law

	Pre-Governmental Administration Law	Post-Governmental Administration Law
Legal Bases	Article 1365 of the Civil Code.	1. Governmental Administration Law; 2. State Administrative Courts Law; and 3. Supreme Court Regulation 2/2019.
Forum	General Courts	State Administrative Courts
Review Bases	1. Violating laws and regulations; 2. Violating the subjective rights of others; 3. Violating decency and/or 4. Violating propriety in society.	1. Violating laws and regulations; and 2. Violating the principles of good governance.

[21] P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford: Oxford University Press, 2019), 114.

[22] Bhat, *Idea and Methods of Legal Research*, 114.

[23] Bhat, *Idea and Methods of Legal Research*, 158–61; Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (October 1, 2012): 116–18.

[24] Muhamad Raziv Barokah and Anna Erliyana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities (Onrechtmatige Overheidsdaad)]," *Jurnal Hukum & Pembangunan* 51, no. 4 (2021): 829–38; Abrianto, Nugraha, and Grady, "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014]," 48–60.

	Pre-Governmental Administration Law	Post-Governmental Administration Law
Remedies	1. Monetary award; 2. Damages in equivalent form or restitution to the original state; 3. Statement that the act performed is unlawful; and/or 4. Prohibition to act.	1. Court orders to government officials to do or refrain from doing certain governmental action; and 2. Rehabilitation and/or damages relief.

Source: processed by the Authors, 2025.

First, regarding the objects of dispute and forum, the judicial review jurisdiction in State Administrative Courts was initially limited to only written state administrative decisions.[25] Article 87 of the Governmental Administration Law expanded the definition of state administrative decisions to include "*[not only] written determinations [but] also encompass factual actions*."[26] The inclusion of factual actions transferred the governmental unlawful acts lawsuit from the jurisdiction of the general courts to the State Administrative Courts.[27] This jurisdictional shift was affirmed by the enactment of Supreme Court Regulation Number 2 of 2019 on Guidelines for Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (hereinafter Supreme Court Regulation 2/2019).[28]

Second, regarding the standard of review. As a direct consequence of the jurisdictional shift, the bases for reviewing governmental unlawful acts are subject to the standards in Article 53 paragraph (2) of Law Number 5 of 1986 on State Administrative Courts, as lastly amended by Law Number 51 of 2009 on the Second Amendment to Law Number 5 of 1986 on State Administrative

[25] Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 1, para. (3).

[26] Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 87.

[27] Barokah and Erliyana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities (Onrechtmatige Overheidsdaad)]," 827.

[28] Barokah and Erliyana, " Pergeseran Kompetensi Absolut."

Courts (hereinafter State Administrative Courts Law).[29] This change is significant since the concept replaces the four broad standards from the Civil Code with established administrative law criteria. Specifically, a violation of "laws and regulations" under the framework can take three forms: 1) procedural conflicts; 2) material/substantive conflicts; and 3) the state administrative decision was issued by unauthorized governmental officials.[30]

Third, regarding remedies. Supreme Court Regulation 2/2019 provides two categories of relief: 1) injunctive orders to take, refrain from, or cease a Governmental Action, and 2) the imposition of rehabilitation and/or damages.[31] However, these remedies are not clearly defined by the regulation. Article 121 of State Administrative Courts Law provides rehabilitation in state employment disputes, rendering the concept irrelevant for most governmental unlawful acts cases.[32] The "damages" remedy is rendered practically useless by the governing regulation. Governmental Regulation Number 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts (hereinafter Government Regulation 43/1991) caps the maximum payable amount at Rp. 5.000.000 (five million rupiahs).[33] Given the decades of inflation since 1991 regulation was enacted, this cap is not "inadequate," but functionally obsolete. A citizen's potential remedy is also reduced to a symbolic and insulting amount.[34]

A common counter-argument is that Supreme Court Circular Number 2 of 2019 "supposedly" abolished the damages cap for factual actions, limiting it only

[29] Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 53, para. (2).

[30] Barokah and Erliyana, "Pergeseran Kompetensi Absolut," 831.

[31] Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]), art. 5, paras. (2)–(3).

[32] Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 121.

[33] Republik Indonesia [Republic of Indonesia], Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts, art. 3; Barokah and Erliyana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara," 825; Bambang Arwanto, "Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah" [Legal Protection for the People Resulting from Factual Government Actions], *Yuridika* 31, no. 3 (August 24, 2017): 379.

[34] Barokah and Erliyana, "Pergeseran Kompetensi Absolut," 875; Bambang Arwanto, "Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah [Legal Protection for the People Resulting from Factual Government Actions]," *Yuridika* 31, no. 3 (September 2016): 380.

to written state administrative decisions.[35] The logic for this flawed argument is from Article 97 paragraphs (9) and (10) of State Administrative Courts Law.[36] The damages cap is only applied to written state administrative decisions since Article 97 paragraph (9) uses "annulment" and "issuance" when authorizing "compensation" in paragraph (10). This interpretation is untenable and ignores the text of Article 87 of the Governmental Administration Law, which normatively expands the definition of "state administrative decisions" to include factual actions. The broader statutory definition overrides the older, narrower implications of Article 97. Therefore, the damages cap is applied to the entire unified definition of state administrative decisions.

The text of Government Regulation 43/1991 confirms the conclusion. The regulation never states that it only applies to written state administrative decisions. Article 1 paragraph (1) provides a broad, general definition of damages "*payment ... based on a decision of State Administrative Courts ...*."[37] The wording is not limited to a specific type of case, only to the existence of a State Administrative Courts decision. Considering the general definition, the most plausible and consistent interpretation is that Government Regulation 43/1991 applies to the entire unified jurisdiction. The obsolete cap is in full effect for governmental unlawful acts cases.

2.2. Constitutional Tort in the United States and Its Role in Remedying Constitutional Violations

In the United States, "constitutional tort" is a critical mechanism for protecting citizens' constitutional rights as guaranteed by the federal Constitution.[38] As a doctrine, the concept provides a cause of action to sue government bodies and

[35] Supreme Court of the Republic of Indonesia, Supreme Court Circular No. 2 of 2019 on the Implementation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Performance of Court Duties, chap. E, no. 3.

[36] Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 97, paras. (9)–(10).

[37] Republik Indonesia [Republic of Indonesia], Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts, art. 1, para. (1).

[38] West, "Refining Constitutional Torts," 862.

officials for constitutional violations.[39] This non-monolithic doctrine refers to two distinct types of lawsuits against government officials:[40]

1. Section 1983 Lawsuit: lawsuits filed against state government officials and local government entities under 42 U.S.C. § 1983, originally enacted in the Civil Rights Act of 1871 (Ku Klux Klan Act); and
2. *Bivens* Lawsuit: lawsuits filed against federal government officials based on the cause of action established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (hereinafter *Bivens*).

These lawsuits provide two primary forms of relief: (1) monetary damages for past constitutional violations, or (2) injunctive relief to prevent imminent constitutional violations. In brief, both causes of action have the following characteristics:[41]

Table 2. Section 1983 and Bivens Lawsuits' Characteristics

	Section 1983 Lawsuit	**Bivens Lawsuit**
Legal Basis	federal statute (42 U.S.C. § 1983, originally enacted in the Civil Rights Act of 1871)	implied from the 4th Amendment of the United States Constitution
Defendant	state or local officials and local governmental bodies	federal officials
Plaintiff	citizens and noncitizens	citizens and noncitizens
Remedies	monetary damages and/or injunctive relief	monetary damages and/or injunctive relief
Forum	federal or state court	federal court

Source: processed from deLisle, 2014.

2.2.1. Section 1983 Lawsuit

Section 1983 Lawsuit is based on a cause of action established under 42 U.S.C. § 1983 of the Civil Rights Act of 1871 and enacted following the American

[39] Fallon Jr., "Bidding Farewell to Constitutional Torts," 946–50.
[40] West, "Refining Constitutional Torts," 875.
[41] Jacques deLisle, "Damages Remedies for Infringements of Human Rights Under U.S. Law," *American Journal of Comparative Law* 62, no. 1 (July 1, 2014): 474–83.

Civil War with ratification of the Reconstruction Amendment.[42] Section 1983 provides that any individual may sue for damages or injunctive relief to remedy the "*deprivation of any rights, privileges, or immunities secured by the Constitution and laws*" of the United States.[43] However, in the eight decades after its enactment, Section 1983 has been in a state of dormancy until the rulings in *Monroe v. Pape* (hereinafter *Monroe*) and *Monell v. Department of Social Services* (hereinafter *Monell*) revitalized its potency as a cause of action.[44]

The revival started with *Monroe,* where state government officials could be sued for violating citizens' federal constitutional rights.[45] The Supreme Court expanded the scope of Section 1983 to include local government entities in *Monell* when the official policy, custom, practice, or usage caused constitutional violation.[46] This expansion did not extend to state governments, which were protected by the longstanding doctrine of state's sovereign immunity.[47]

The revival of Section 1983 is widely viewed as an attempt by the Supreme Court to fill the remedial gap left by *Ex Parte Young.*[48] *Ex Parte Young*'s prospective remedies are useless when a constitutional violation has occurred in the past.[49] Justice William O. Douglas, writing for the majority in *Monroe*, affirmed this purpose, stating the statute has three primary purposes: 1) to "*override certain*

[42] Bailey D. Barnes, "The Constitution's Waning Enforceability: Constitutional Torts After Egbert & Vega," *Hastings Constitutional Law Quarterly* 50, no. 1 (2023): 74–75.

[43] Fallon Jr., "Bidding Farewell to Constitutional Torts," 946.

[44] Fallon Jr., "Bidding Farewell to Constitutional Torts," 946; Noah Smith-Drelich, "The Constitutional Tort System," *Indiana Law Journal* 96, no. 2 (2021): 575; Katherine Mims Crocker, "Qualified Immunity, Sovereign Immunity, and Systemic Reform," *Duke Law Journal* 71, no. 8 (2022): 1727–28; Barnes, "The Constitution's Waning Enforceability: Constitutional Torts After Egbert & Vega," 75.

[45] Barnes, "The Constitution's Waning Enforceability," 76.

[46] Samuel Rossum, "Constitutional Whodunnits: Maintaining Section 1983 and Bivens Suits Against Unidentified State Actors," *University of Pennsylvania Journal of Constitutional Law* 25, no. 3 (2023): 620–23; Alexander A. Reinert, Joanna C. Schwartz, and James E. Pfander, "New Federalism and Civil Rights Enforcement," *Northwestern University Law Review* 116, no. 3 (2021): 754–55; Fallon Jr., "Bidding Farewell to Constitutional Torts," 995.

[47] Michael L. Wells, William P. Marshall, and Gene R. Nichol, *Cases and Materials on Federal Courts*, 4th ed. (St. Paul: West Academic Publishing, 2020), 33; Aaron L. Nielson and Christopher J. Walker, "Qualified Immunity and Federalism," *The Georgetown Law Journal* 109, no. 2 (2020): 253; Fred Smith, "Local Sovereign Immunity," *Columbia Law Review* 116, no. 2 (2016): 449–54.

[48] Katherine Mims Crocker, "Constitutional Rights and Remedial Consistency," *Virginia Law Review* 110, no. 3 (2024): 542–43; Richard H. Fallon Jr., "Constitutional Remedies: In One Era and Out the Other," *Harvard Law Review* 136, no. 5 (2023): 1350; James E. Pfander and Jacob P. Wentzel, "The Common Law Origins of *Ex Parte Young*," *Stanford Law Review* 72 (2020): 1283–90; Fallon Jr., "Bidding Farewell to Constitutional Torts," 947–48.

[49] Wells, Marshall, and Nichol, *Cases and Materials on Federal Courts*, 23.

kinds of state laws" that amount to "*invidious legislation by States against the rights or privileges of citizens of the United States*", 2) to offer a remedy where the state's remedy is inadequate; and 3) to provide a federal remedy where the state remedy, while adequate in theory, was not available in practice.[50]

Even though Section 1983 permits suits against state officials and local government entities, the effectiveness is constrained by significant limitations. The most formidable barrier is the doctrine of qualified immunity, which shields state officials from liability for damages unless the conduct violated "clearly established" statutory or constitutional law.[51] Another limitation applies to the payment of damages, where state governments may cap the amount of indemnification provided to state officials.[52] Furthermore, local governments may develop indemnification policies or criteria to deny indemnification in certain cases.[53]

2.2.2. *Bivens* Lawsuit

Bivens Lawsuit provides a non-statutory cause of action, allowing citizens and noncitizens to sue federal officers for constitutional violations.[54] Unlike Section 1983 which is statutory, *Bivens* is implied directly from the United States Constitution based on the theory of a self-executing constitution.[55] The Supreme Court initially expanded the scope of rights protected under *Bivens* to include the 5th Amendment right to due process (*Davis v. Passman*) and the 8th Amendment

[50] Barnes, "The Constitution's Waning Enforceability," 76.

[51] Teressa Ravenell, "Unincorporating Qualified Immunity," *Loyola University Chicago Law Journal* 53, no. 2 (2022): 379–86; Kelsey Joyce Dayton, "Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine," *The University of Chicago Law Review* 86, no. 6 (2019): 1614.

[52] Reinert, Schwarts, and Pfander, "New Federalism and Civil Rights Enforcement," 764; Nielson and Walker, "Qualified Immunity and Federalism," 268–82.

[53] Reinert, Schwarts, and Pfander, "New Federalism and Civil Rights Enforcement," 764; Joanna C. Schwarts, "Qualified Immunity and Federalism All the Way Down," *The Georgetown Law Journal* 109, no. 2 (2020).

[54] Andrew Kent, "Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers," *Notre Dame Law Review* 96, no. 5 (2021): 1756.

[55] Peter Margulies, "Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases," *Case Western Reserve Law Review* 68, no. 4 (2018): 1154; Helen Gugel, "Remaking the Mold: Pursuing Failure-to-Protect Claims under State Constitutions via Analogous Bivens Actions," *Columbia Law Review* 110, no. 5 (2010): 1315–18; Susan Bandes, "Reinventing Bivens: The Self-Executing Constitution," *Southern California Law Review* 68 (1995): 289–91.

prohibition against cruel and unusual punishment (*Carlson v. Green*).[56] However, this expansion was short-lived. The Supreme Court subsequently focused not on broadening the doctrine, but on severely limiting its application and efficacy.[57]

This judicial retreat exemplifies the reasons *Bivens* serves as a cautionary tale. The Court has created a gauntlet of limitations, such as precluding suits where an "alternative remedy" exists (*Bush v. Lucas* and *Minneci v. Pollard*) based on a vague "special factors counseling hesitation" test used in *Ziglar v. Abbasi* to shield post-9/11 detention policies from review.[58] Furthermore, *Bivens* plaintiffs must defeat qualified immunity.[59]

Bivens decision is viewed as a judicial anomaly, which is a federal common law remedy after *Erie Railroad Co. v. Tompkins* prohibited the creation of federal general common law.[60] Critics argue that this was an act of policymaking, creating a cause of action in a manner better suited to Congress or the states.[61] Despite the theoretical tension, *Bivens* was seen as the Court's commitment to racial justice, economic inequality, and limited government[62] through the means of deterrence. Chief Justice William Rehnquist affirmed in *Correctional Services Corp v. Malesko* that the doctrine's main purpose was to deter *"[federal]* officers from engaging in constitutional wrongdoing.[63]

---

[56] Aseem Chipalkatti, "A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act," *University of Pennsylvania Journal of Constitutional Law* 23, no. 5 (2021): 13.

[57] E. Garrett West, "Torts Stories After Bivens," *Harvard Law Review Forum* 138 (2025): 103–4; Chipalkatti, "A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act," 13.

[58] Joanna C. Schwartz, Alexander A. Reinert, and James E. Pfander, "Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims," *Notre Dame Law Review* 96, no. 5 (2021): 1857–58; Alexander J. Lindvall, "Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation," *Missouri Law Review* 85, no. 4 (2020): 1022; Ben Shattuck, "Bivens or Nothing: Constitutional Torts and Cross-Border Shootings," *Arizona State Law Journal* 53 (2020): 1385; Stephen I. Vladeck, "The Disingenuous Demise and Death of Bivens," *Cato Supreme Court Review* (2019): 273–74.

[59] Lindvall, "Gutting Bivens: How the Supreme Court Shielded Federal Officials Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation," 1059–60.

[60] Ann Woolhandler and Michael G. Collins, "Was Bivens Necessary?" *Notre Dame Law Review* 96, no. 5 (2021): 1893–94.

[61] West, "Torts Stories After Bivens," 108; Crocker, "Constitutional Rights and Remedial Consistency," 552–55; Woolhandler and Collins, "Was Bivens Necessary?" 1894.

[62] Katherine Mims Crocker, "A Scapegoat Theory of Bivens," *Notre Dame Law Review* 96, no. 5 (2021): 1949.

[63] Lindvall, "Gutting Bivens: How the Supreme Court," 1025.

2.3. Reconstructing the Governmental Unlawful Acts Regulation Based on the Concept of Constitutional Tort as a Form of Constitutional Complaint

This article proposes four main reforms to reconstruct Indonesian governmental unlawful acts cause of action. **First**, the reform must address State Administrative Courts' inability to review a written decision when hearing a governmental unlawful acts case. This flaw is from the definition of "Governmental Action" in Article 1 paragraph (1) of Supreme Court Regulation 2/2019, "*the actions of Government Officials or other state organizers to perform and/or not perform concrete actions in the context of government administration*".[64] However, theoretically, there are two types of factual actions:[65]

1. Type 1: factual action based on a written state administrative decision, and
2. Type 2: factual action not based on a written state administrative decision.

By limiting the scope of review to the "concrete action," the regulation precludes the court from invalidating the underlying written state administrative decision in a Type 1 case by limiting the scope of review to the "concrete action".[66] This creates an absurd condition where a court can enjoin the enforcement of an unlawful order but cannot invalidate the order itself.

The first reform of the article does not propose granting State Administrative Courts the power to invalidate the underlying written administrative decision.[67] In this context, the reform must focus on the legal effect of the injunction. To close this loophole, the law should be clarified to ensure that an injunction by State Administrative Courts against a Type 1 factual action automatically renders

[64] Supreme Court of the Republic of Indonesia, Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]), art. 1, para. (1).

[65] Raines Wadi et al., "Tindakan Faktual Hasil Putusan Etik DKPP Sebagai Objek Pengujian Pengadilan Tata Usaha Negara [Factual Acts Resulting from DKPP Ethics Decisions as Objects of Review in the State Administrative Court]," *Jurnal Penelitian Hukum De Jure* 23, no. 1 (2023): 81–83; Arwanto, "Perlindungan Hukum Bagi Rakyat," 372–73.

[66] Agus Budi Susilo, "Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara [Reformulation of Unlawful Acts by Government Agencies or Officials in the Context of the Absolute Competence of the State Administrative Court]," *Jurnal Hukum dan Peradilan* 2, no. 2 (July 31, 2013): 299–301.

[67] deLisle, "Damages Remedies for Infringements of Human Rights Under U.S. Law," 474–83.

the related administrative decision unenforceable. Even though the injunction is technically aimed at the "factual action," the practical legal effect must neutralize the unlawful written state administrative decision.[68]

Second, in terms of judicial review standard, a governmental unlawful acts lawsuit has the same basis for review as judicial review of written state administrative decisions. The basis for review can be inferred from the following normative bases.[69]

Table 3. Basis for Review under State Administrative Courts Law and the Governmental Administrative Law

No.	Law	Provision	Texts
1.	State Administrative Courts Law	Art. 53 par. (2)	The grounds that can be used in the lawsuit, as referred to in paragraph (1) are: a. the state administrative decision being challenged conflicts with the applicable laws and regulations; b. ...

[68] Alexandra Nickerson and Kellen R. Funk, "When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action," *California Law Review* 111 (2023): 1771–72.

[69] Republik Indonesia [Republic of Indonesia], Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts, art. 53, para. (2); Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 7, para. (2b), art. 8, para. (2), and art. 9, paras. (1)–(2).

No.	Law	Provision	Texts
2.	Governmental Administrative Law	Art. 7 par. (2b)	Governmental officials have the duty to]: a. comply with ... the applicable laws and regulations; b. ...
		Art. 8 par. (2)	Agencies and/or Government Officials, in exercising Authority, must base their actions on: a. laws and regulations; and b. ...
		Art, 9 par. (1) and (2)	(1) Every Decision and/or Action must be based on the provisions of laws and regulations ... (2) The laws and regulations referred to in paragraph (1) include: a. laws and regulations that are the basis of Authority; and b. laws and regulations that are the basis for establishing and/or carrying out Decisions and/or Actions.

Source: processed by the Authors, 2025.

Table 3 shows that laws and regulations (*peraturan perundang-undangan*) are important grounds for review in governmental unlawful act lawsuits. The term "laws and regulations" is not defined in the Governmental Administration Law. Article 7 paragraph (1) of Law Number 12 of 2011 on the Establishment of Laws and Regulations specifies the following types of laws and regulations:[70]

a. The 1945 Constitution;
b. People's Consultative Assembly's Decree;

[70] Republik Indonesia [Republic of Indonesia], Law No. 12 of 2011 on the Establishment of Laws and Regulations, as lastly amended by Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the Establishment of Laws and Regulations, art. 7, para. (1).

c. Law/Government Regulation in Lieu of Law;
d. Government Regulation;
e. Presidential Regulation;
f. Provincial Regional Regulation; and
g. Regency/Municipal Regional Regulation.

The general use of the phrase "laws and regulations" in Governmental Administration Law implies that the term may include the 1945 Constitution. Thus, under the current regulatory scheme, the 1945 Constitution could serve as the basis for review in a governmental unlawful acts lawsuit.

An implied power is insufficient to overcome the deep-seated "truism" of Constitutional Court exclusivity; State Administrative Court judges will not use a power that is not explicit. Therefore, the second major reform is to make the power explicit. The law must be amended to provide clear, unambiguous statutory authorization for State Administrative Courts to employ the 1945 Constitution as a standard of review in governmental unlawful acts cases. The United States comparison is instructive here. The implied *Bivens* remedy is textually weak and has been judicially dismantled, while the explicit Section 1983 remains a durable and clear grant of authority for courts to hear constitutional tort claims.[71] Indonesia must follow the Section 1983 model instead of *Bivens*.

Third, clear procedural safeguards must be established to protect the Constitutional Court's role as the final interpreter of the constitution. This article proposes two guarantees:

1. Binding Interpretation: State Administrative Courts must give full effect to any existing Constitutional Court interpretation relevant to the case, and
2. Stay of Proceedings: State Administrative Courts must stay "constitutional complaint" proceedings when a relevant case is pending at the Constitutional Court.

[71] Michael A. Mazzuchi, "Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism," *Michigan Law Review* 90, no. 5 (1992): 1092.

The "stay" provision is analogous to Article 55 of the Law Number 24 of 2003 on Constitutional Court, as lastly amended by Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on Constitutional Court (hereinafter Constitutional Court Law) and Constitutional Court Decision Number 93/PUU-XV/2017. This is essential for ensuring legal certainty and consistency between Constitutional Court and State Administrative Courts' interpretations.[72] The approach includes practical risks since the substantial caseload can cause an overly broad stay to indefinitely suspend legitimate proceedings in State Administrative Courts. Therefore, this stay provision must be balanced with two specific caveats as follows:

1. A stay is only mandatory when the pending Constitutional Court case is factually or legally similar that its outcome would dispositively affect the basis of the "constitutional complaint" case, and
2. A stay is not required for Constitutional Court cases in the preliminary examination stage.

Lastly, regarding damages remedy. Prior to the transfer of jurisdiction to adjudicate governmental unlawful acts to the state administrative court, the amount of payable damages was not limited because it was still subject to the jurisdiction of the general courts.[73] The amount of payable damages was not regulated by the Civil Code or the Regulations on Civil Procedure, allowing the courts to tailor the amount of damages remedy proportional to the harm suffered by the plaintiffs.[74] Therefore, there needs to be an amendment to Government Regulation 43/1991 to provide legal certainty and the guarantee of just relief to plaintiffs. Absent an amendment, the damages cap discourages potential plaintiffs from filing a lawsuit and renders recovery "virtually meaningless", reducing

[72] Suparto Suparto, "The Problematics Implementation of Law and Regulations Testing in Indonesia," *Yuridika* 37, no. 1 (March 1, 2022): 264; Collins and Faiz, "Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]," 691; Adhitya Widya Kartika, "The Existence of Decision Norms of the Constitutional Court as a Source of Legislative and Executive Laws," *Lentera Hukum* 6, no. 2 (July 29, 2019): 315

[73] Republik Indonesia [Republic of Indonesia], Law No. 30 of 2014 on Government Administration, art. 88; Barokah and Erliyana, "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara," 825.

[74] Abrianto, Nugraha, and Grady, "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 (Development of Lawsuit for Law Violation by the Government Post Statute/Law Number 30 of 2014)," 48–59.

the effectiveness of "constitutional complaint" as a deterrent to constitutional violations.[75]

III. CONCLUSION

With no constitutional amendment in sight, the attribution of constitutional complaint authority in the form of a constitutional tort to State Administrative Courts becomes a viable alternative to the expansion of the Constitutional Court's jurisdiction that certainly would require a constitutional amendment. This is accomplished by reconstructing the existing jurisdiction of State Administrative Courts in adjudicating governmental unlawful acts lawsuits currently governed by laws (*undang-undang*). The reconstruction can be accomplished by borrowing some aspects of constitutional tort as it is known in the United States. Even though the current regulatory scheme provides a textual basis for the adoption of constitutional tort, a clear statutory authorization for state administrative judges to interpret the 1945 Constitution in reviewing governmental unlawful acts is necessary. A statutory grant of authority creates a strong legal basis for the plaintiffs to sue government officials for constitutional wrongdoings. This grant does not undermine the constitutionally assigned authority of the as the final interpreter of the 1945 Constitution, since state administrative judges are required to defer to the Constitutional Court's interpretation where available and applicable.

Remedies are at the core of the adoption proposal, representing the fundamental pursuit of plaintiffs in a constitutional tort case. Injunctions and damages relief become the "bread and butter" of governmental unlawful acts litigation. These concepts are not available under the current constitutional review authority. Imminent violations of citizens' constitutional rights remain unchecked, past constitutional wrongs go unremedied, and government officials who engage in misconduct act without deterrence without injunctions, or damages. This goal is to achieve a balanced system that protects citizens' constitutional rights while allowing government officials to carry out duties effectively.

[75] John C. Jeffries, "Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts," *Virginia Law Review* 75, no. 8 (November 1989): 1461–64.

BIBLIOGRAPHY

Abrianto, Bagus Oktafian, Xavier Nugraha, and Nathanael Grady. "Perkembangan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah Pasca-Undang-Undang Nomor 30 Tahun 2014 [Development of Lawsuit for Law Violation by the Government Post Law Number 30 of 2014]." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 11, no. 1 (2020). https://doi.org/10.22212/jnh.v11i1.1574.

Alexander, Larry, and Frederick Schauer. "On Extrajudicial Constitutional Interpretation." *Harvard Law Review* 110, no. 7 (1997). https://doi.org/10.2307/1342175.

Anggono, Bayu Dwi. "Pembatasan Pengajuan Perkara Sengketa Hasil Pemilihan Kepala Daerah Di Mahkamah Konstitusi Dan Implikasinya Terhadap Jaminan Keamanan Nasional [Restrictions on Filing Regional Head Election Result Disputes in the Constitutional Court and Their Implications for National Security Guarantees]." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 5, no. 1 (2016). https://doi.org/10.33331/rechtsvinding.v5i1.6.

Arundhati, Gautama Budi. "Kemungkinan Penerapan Preliminary Ruling Procedure Sebagai Media Constitutional Complaint Di Mahkamah Konstitusi [The Possibility of Applying a Preliminary Ruling Procedure as a Means of Constitutional Complaint in the Constitutional Court]." *Jurnal Konstitusi* 14, no. 4 (2018). https://doi.org/10.31078/jk1446.

Arwanto, Bambang. "Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah [Legal Protection for the People Resulting from Factual Government Actions]." *Yuridika* 31, no. 3 (2017). https://doi.org/10.20473/ydk.v31i3.4857.

Bandes, Susan. "Reinventing Bivens: The Self-Executing Constitution." *Southern California Law Review* 68 (1995). https://via.library.depaul.edu/lawfacpubs/1535/.

Barnes, Bailey D. "The Constitution's Waning Enforceability: Constitutional Torts After *Egbert* & *Vega*." *Hastings Constitutional Law Quarterly* 50, no. 1 (2023). https://scholarship.law.missouri.edu/facpubs/1292.

Barokah, Muhamad Raziv, and Anna Erliyana. "Pergeseran Kompetensi Absolut Dari Peradilan Umum Ke Peradilan Tata Usaha Negara: Gugatan Perbuatan Melawan Hukum Oleh Penguasa (Onrechtmatige Overheidsdaad [unlawful acts by the government]) [The Shift of Absolute Competence from the General Courts to the State Administrative Courts: Claims for Unlawful Acts by the Authorities]." *Jurnal Hukum & Pembangunan* 51, no. 4 (2021). https://doi.org/10.21143/jhp.vol51.no4.3290.

Bhat, P. Ishwara. *Idea and Methods of Legal Research*. Oxford University Press, 2019.

Butt, Simon, Melissa Crouch, and Rosalind Dixon. "Special Issue: The First Decade of Indonesia's Constitutional Court." *Australian Journal of Asian Law* 16, no. 2 (2016). https://ssrn.com/abstract=2745100.

Chakim, M. Lutfi. "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions." *Constitutional Review* 5, no. 1 (2019). https://doi.org/10.31078/consrev514.

Chandra, M. Jeffri Arlinandes, Bayu Dwi Anggono, and Febrian Febrian. "Rekonsruksi Tahapan Pembentukan Perundang-Undangan: Urgensi Re-Harmonisasi Dan Evaluasi Sebagai Siklus Pembentukan Undang-Undangan Yang Berkualitas [Reconstruction of the Stages of Lawmaking: The Urgency of Reharmonization and Evaluation as a Cycle of Quality Lawmaking]." *Jurnal Legislasi Indonesia* 19, no. 4 (2022). https://doi.org/10.54629/jli.v19i4.980.

Chipalkatti, Aseem. "A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act." *University of Pennsylvania Journal of Constitutional Law* 23, no. 5 (2021). https://scholarship.law.upenn.edu/jcl/vol23/iss5/6.

Christiani, Theresia Anita. "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object." *Procedia - Social and Behavioral Sciences* 219 (2016). https://doi.org/10.1016/j.sbspro.2016.05.006.

Collins, Josua Satria, and Pan Mohamad Faiz. "Penambahan Kewenangan Constitutional Question Di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-Hak Konstitusional Warga Negara [Adding Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights]." *Jurnal Konstitusi* 15, no. 4 (2019). https://doi.org/10.31078/jk1541.

Crocker, Katherine Mims. "A Scapegoat Theory of Bivens." *Notre Dame Law Review* 96, no. 5 (2021). https://scholarship.law.nd.edu/ndlr/vol96/iss5/7.

Crocker, Katherine Mims. "Constitutional Rights and Remedial Consistency." *Virginia Law Review* 110, no. 3 (2024). https://virginialawreview.org/articles/constitutional-rights-and-remedial-consistency/.

Crocker, Katherine Mims. "Qualified Immunity, Sovereign Immunity, and Systemic Reform." *Duke Law Journal* 71, no. 8 (2022). https://scholarship.law.wm.edu/facpubs/2070.

Dayton, Kelsey Joyce. "Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine." *The University of Chicago Law Review* 86, no. 6 (2019).

deLisle, Jacques. "Damages Remedies for Infringements of Human Rights Under U.S. Law." *American Journal of Comparative Law* 62, no. 1 (2014). https://doi.org/10.5131/AJCL.2013.0033.

Devins, Neal, and Louis Fisher. "Judicial Exclusivity and Political Instability." *Virginia Law Review* 84, no. 1 (1998). https://doi.org/10.2307/1073808.

Eddyono, Luthfi Widagdo. "Independence of the Indonesian Constitutional Court in Norms and Practices." *Constitutional Review* 3, no. 1 (2017). https://doi.org/10.31078/consrev314.

Faiz, Pan Mohamad. "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court." *Constitutional Review* 2, no. 1 (2016). https://doi.org/10.31078/consrev215.

Fallon, Richard H., Jr. "Bidding Farewell to Constitutional Torts." *California Law Review* 107 (2019). https://www.californialawreview.org/print/bidding-farewell-to-constitutional-torts.

Fallon, Richard H., Jr. "Constitutional Remedies: In One Era and Out the Other." *Harvard Law Review* 136, no. 5 (2023). https://harvardlawreview.org/print/vol-136/constitutional-remedies-in-one-era-and-out-the-other/.

Fallon, Richard H., Jr. "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age." *Texas Law Review* 96, no. 3 (2018). https://texaslawreview.org/judicial-supremacy-departmentalism-rule-law-populist-age/.

Gugel, Helen. "Remaking the Mold: Pursuing Failure-to-Protect Claims under State Constitutions via Analogous Bivens Actions." *Columbia Law Review* 110, no. 5 (2010). https://www.jstor.org/stable/27806651.

Hakim, M. Aunul, and Sheila Kusuma Wardani Amnesti. "Problematika Penanganan Gugatan Perbuatan Melanggar Hukum Oleh Pemerintah (Onrechtmatige Overheidsdaad [unlawful acts by the government]) Pada Peradilan Tata Usaha Negara [Problems in Handling Claims of Unlawful Acts by Government in the State Administrative Court]." *De Jure: Jurnal Hukum dan Syar'iah* 14, no. 1 (2022). https://doi.org/10.18860/j-fsh.v14i1.15833.

Hantoro, Bimo Fajar. "Pembatasan Yudisial Dan Perluasan Kewenangan Mahkamah Konstitusi Dalam Memutus Sengketa Hasil Pilkada [Judicial Limitation and Expansion of the Constitutional Court's Authority in Deciding Regional Election Result Disputes]." *Media Iuris* [Legal Media] 7, no. 1 (2024). https://doi.org/10.20473/mi.v7i1.41871.

Hirschl, Ran. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press, 2014.

Hutchinson, Terry, and Nigel Duncan. "Defining and Describing What We Do: Doctrinal Legal Research." *Deakin Law Review* 17, no. 1 (2012). https://doi.org/10.21153/dlr2012vol17no1art70.

Isra, Saldi, and Pan Mohamad Faiz. "The Indonesian Constitutional Court: An Overview." In *Courts and Diversity*, edited by Bertus De Villiers, Saldi Isra, and Pan Mohamad Faiz. Leiden: Brill | Nijhoff, 2024. https://doi.org/10.1163/9789004691698_004.

Jeffries, John C. "Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts." *Virginia Law Review* 75, no. 8 (1989). https://doi.org/10.2307/1073245.

Johnsen, Dawn E. "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" *Law and Contemporary Problems* 67, no. 3 (2004). https://www.jstor.org/stable/27592054.

Kartika, Adhitya Widya. "The Existence of Decision Norms of the Constitutional Court as a Source of Legislative and Executive Laws." *Lentera Hukum* 6, no. 2 (2019). https://doi.org/10.19184/ejlh.v6i2.10495.

Kent, Andrew. "Lessons for Bivens and Qualified Immunity Debates from Nineteenth-Century Damages Litigation Against Federal Officers." *Notre Dame Law Review* 96, no. 5 (2021). https://scholarship.law.nd.edu/ndlr/vol96/iss5/1.

Lailam, Tanto, and M. Lutfi Chakim. "A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences." *Padjadjaran Jurnal Ilmu Hukum* 10, no. 2 (2023). https://doi.org/10.22304/pjih.v10n2.a1.

Lailam, Tanto, Putri Anggia, and Irwansyah Irwansyah. "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court." *Jurnal Konstitusi* 19, no. 3 (2022). https://doi.org/10.31078/jk1939.

Leckey, Robert. "Review of Comparative Law." *Social & Legal Studies* 26, no. 1 (2017). https://doi.org/10.1177/0964663916670718.

Lindvall, Alexander J. "Gutting Bivens: How the Supreme Court Shielded Federal Officials from Constitutional Litigation." *Missouri Law Review* 85, no. 4 (2020). https://scholarship.law.missouri.edu/mlr/vol85/iss4/7.

Margulies, Peter. "Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases." *Case Western Reserve Law Review* 68, no. 4 (2018).

Marzuki, Peter Mahmud. *Penelitian Hukum: Edisi Revisi* [Legal Research: Revised Edition]. Jakarta: Kencana, 2017.

Mazzuchi, Michael A. "Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism." *Michigan Law Review* 90, no. 5 (1992). https://repository.law.umich.edu/mlr/vol90/iss5/6.

Nelken, David. "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values." *Annual Review of Law and Social Science* 12, no. 1 (2016). https://doi.org/10.1146/annurev-lawsocsci-110615-084950.

Nickerson, Alexandra, and Kellen R. Funk. "When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action." *California Law Review* 111 (2023). https://doi.org/10.15779/Z384X54H8W.

Nielson, Aaron L., and Christopher J. Walker. "Qualified Immunity and Federalism." *The Georgetown Law Journal* 109, no. 2 (2020). https://ssrn.com/abstract=3544897.

Palguna, I Dewa Gede. "Constitutional Complaint and the Protection of Citizens the Constitutional Rights." *Constitutional Review* 3, no. 1 (2017). https://doi.org/10.31078/consrev311.

Pfander, James E., and Jacob P. Wentzel. "The Common Law Origins of *Ex Parte Young*." *Stanford Law Review* 72 (2020).

Post, Robert, and Reva Siegel. "Popular Constitutionalism, Departmentalism, and Judicial Supremacy." *California Law Review* 92, no. 4 (2004). https://doi.org/10.2307/3481316.

Prasetianingsih, Rahayu. "Judicial Activism in Indonesia: Constitutional Culture by the Constitutional Court." *PETITA: Jurnal Kajian Ilmu Hukum dan Syariah* 5, no. 2 (2020). https://doi.org/10.22373/petita.v5i2.106.

Purnamasari, Galuh Candra. "Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint) [Legal Remedies for Violations of Citizens' Constitutional Rights through Constitutional Complaint]." *Veritas et Justitia* 3, no. 2 (2017). https://doi.org/10.25123/vej.2668.

Ravenell, Teressa. "Unincorporating Qualified Immunity." *Loyola University Chicago Law Journal* 53, no. 2 (2022). https://lawecommons.luc.edu/luclj/vol53/iss2/5.

Reinert, Alexander A., Joanna C. Schwartz, and James E. Pfander. "New Federalism and Civil Rights Enforcement." *Northwestern University Law Review* 116, no. 3 (2021). https://scholarlycommons.law.northwestern.edu/nulr/vol116/iss3/3.

Republik Indonesia [Republic of Indonesia]. Government Regulation No. 43 of 1991 on Damages and Procedures for Implementation in State Administrative Courts.

Republik Indonesia [Republic of Indonesia]. Law No. 12 of 2011 on the Establishment of Laws and Regulations, as lastly amended by Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the Establishment of Laws and Regulations.

Republik Indonesia [Republic of Indonesia]. Law No. 30 of 2014 on Government Administration.

Republik Indonesia [Republic of Indonesia]. Law No. 5 of 1986 on State Administrative Courts, as lastly amended by Law No. 51 of 2009 on the Second Amendment to Law No. 5 of 1986 on State Administrative Courts.

Rossum, Samuel. "Constitutional Whodunnits: Maintaining Section 1983 and Bivens Suits Against Unidentified State Actors." *University of Pennsylvania Journal of Constitutional Law* 25, no. 3 (2023). https://doi.org/10.58112/jcl.25-3.3.

Roux, Theunis. "Indonesia's Judicial Review Regime in Comparative Perspective." *Constitutional Review* 4, no. 2 (2018). https://doi.org/10.31078/consrev422.

Schwartz, Joanna C. "Qualified Immunity and Federalism All the Way Down." *The Georgetown Law Journal* 109, no. 2 (2020). https://ssrn.com/abstract=3565362.

Schwartz, Joanna C., Alexander A. Reinert, and James E. Pfander. "Going Rogue: The Supreme Court's Newfound Hostility to Policy-Based Bivens Claims." *Notre Dame Law Review* 96, no. 5 (2021). https://scholarship.law.nd.edu/ndlr/vol96/iss5/3.

Setiawan, Andri, Antikowati Antikowati, and Bayu Dwi Anggono. "Kekuatan Mengikat Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Terhadap Putusan Pengujian Peraturan Perundang-Undangan Oleh Mahkamah Agung [The Binding Force of Constitutional Court Decisions on Judicial Review of Laws Against Supreme Court Decisions on Review of Laws and Regulations]." *Jurnal Legislasi Indonesia* 18, no. 1 (2021). https://doi.org/10.54629/jli.v18i1.796.

Shattuck, Ben. "Bivens or Nothing: Constitutional Torts and Cross-Border Shootings." *Arizona State Law Journal* 53 (2020). https://arizonastatelawjournal.org/2021/02/23/bivens-or-nothing-constitutional-torts-and-cross-border-shootings/.

Sisk, Gregory. "Recovering the Tort Remedy for Federal Official Wrongdoing." *Notre Dame Law Review* 96, no. 5 (2021). https://scholarship.law.nd.edu/ndlr/vol96/iss5/2.

Smith, Fred. "Local Sovereign Immunity." *Columbia Law Review* 116, no. 2 (2016). https://www.jstor.org/stable/43744120.

Smith-Drelich, Noah. "The Constitutional Tort System." *Indiana Law Journal* 96, no. 2 (2021). https://www.repository.law.indiana.edu/ilj/vol96/iss2/6.

Sommermann, Karl-Peter. "Constitutional State and Public Administration." In *Public Administration in Germany*, edited by Sabine Kuhlmann et al. Birmingham: Palgrave Macmillan, 2021. https://doi.org/10.1007/978-3-030-53697-8_2.

Suparto, Suparto. "The Problematics Implementation of Law and Regulations Testing in Indonesia." *Yuridika* 37, no. 1 (2022). https://doi.org/10.20473/ydk.v37i1.28627.

Supreme Court of the Republic of Indonesia. Supreme Court Circular No. 2 of 2019 on the Implementation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as Guidelines for the Performance of Court Duties.

Supreme Court of the Republic of Indonesia. Supreme Court Regulation No. 2 of 2019 on Guidelines for the Settlement of Government Action Disputes and Authority to Adjudicate Unlawful Acts by Government Agencies and/or Officials (Onrechtmatige Overheidsdaad [unlawful acts by the government]).

Susilo, Agus Budi. "Reformulasi Perbuatan Melanggar Hukum Oleh Badan Atau Pejabat Pemerintahan Dalam Konteks Kompetensi Absolut Peradilan Tata Usaha Negara [Reformulation of Unlawful Acts by Government Agencies or Officials in the Context of the Absolute Competence of the State Administrative Court]." *Jurnal Hukum dan Peradilan* 2, no. 2 (2013). https://doi.org/10.25216/jhp.2.2.2013.291-308.

Taekema, Sanne. "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice." *Law and Method* 2018, no. 2 (2018). https://doi.org/10.5553/REM/.000031.

Vladeck, Stephen I. "The Disingenuous Demise and Death of Bivens." *Cato Supreme Court Review* (2019).

Wadi, Raines, et al. "Tindakan Faktual Hasil Putusan Etik DKPP Sebagai Objek Pengujian Pengadilan Tata Usaha Negara [Factual Acts Resulting from DKPP Ethics Decisions as Objects of Review in the State Administrative Court]." *Jurnal Penelitian Hukum De Jure* [De Jure Journal of Legal Research] 23, no. 1 (2023). https://doi.org/10.30641/dejure.2023.V23.071-086.

Warjiyati, Sri, et al. "Complaint Authority for Constitutional Complaint by Indonesia's Constitutional Court." *Jurnal IUS Kajian Hukum dan Keadilan* 10, no. 2 (2022). https://doi.org/10.29303/ius.v10i2.1070.

Weber, Ruth. "Law-Making Activity of the German Federal Constitutional Court." In *Judicial Law-Making in European Constitutional Courts*, edited by Monika Florczak-Wątor. London: Routledge, 2020. https://doi.org/10.4324/9781003022442-2.

Wells, Michael L., William P. Marshall, and Gene R. Nichol. *Cases and Materials on Federal Courts*. 4th ed. St. Paul: West Academic Publishing, 2020.

West, E. Garrett. "Refining Constitutional Torts." *The Yale Law Journal* 134 (2025). https://www.yalelawjournal.org/feature/refining-constitutional-torts.

West, E. Garrett. "Torts Stories After Bivens." *Harvard Law Review Forum* 138 (2025).

Wico, Standy, et al. "Constitutional Complaint in Indonesia Through the Lens of Legal Certainty." *Indonesian Journal of Law and Society* 2, no. 1 (2021). https://doi.org/10.19184/ijls.v2i1.21449.

Woolhandler, Ann, and Michael G. Collins. "Was Bivens Necessary?" *Notre Dame Law Review* 96, no. 5 (2021). https://scholarship.law.nd.edu/ndlr/vol96/iss5/5.