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Constitutional Complaint on Criminal and Civil Court Judgements: The German Judicial Practices of the Bundesverfassungsgericht and Proposal for the Mahkamah Konstitusi Republik Indonesia

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Abstract

This article examines constitutional complaints regarding criminal and civil court decisions in the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) practices. It proposes recommendations for the Indonesian Constitutional Court. In the German legal system, such constitutional complaints fall under the jurisdiction of the BVerfG. Based on data from 2020 to 2024, approximately 85% of BVerfG decisions pertain to ordinary court judgements, encompassing those of both criminal and civil courts. This legal mechanism is a very popular area of jurisdiction at the BVerfG, with around 5,000–6,000 cases resolved each year. Some notable cases include the Lüth case, the Soldiers are Murderers case, the Right to be Forgotten case, and others. The Lüth case cancelled a Hamburg civil court judgement, the Soldiers are Murderers case overturned several criminal courts' decisions, and the Right

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to be Forgotten case cancelled the German Supreme Court judgement. In its decisions on these cases, the BVerfG stated that the ordinary court rulings were contrary to the German Basic Law and principles of human rights, and that the rulings had violated the constitutional rights of citizens. The judicial practices of the BVerfG serve as a reference for constitutional courts worldwide, and it could potentially be adopted by the Indonesian Constitutional Court (MKRI) in the future through a constitutional amendment process to the 1945 Constitution. It is certainly motivated by the large number of constitutional complaints relating to criminal courts that have been resolved through the abstract judicial review mechanism, as well as concerns about miscarriages of justice and judicial corruption in the ordinary courts. The aim is to strengthen the protection of citizens' constitutional rights against all court decisions that violate these rights. At the same time, the Indonesian Constitutional Court's power serves as a counterbalance to ordinary court decisions based on Pancasila constitutional values, the 1945 Constitution, and Indonesian human rights principles.

Keywords: Civil Court; Constitutional Complaint; Criminal Court; Judgements

I. INTRODUCTION

The German Federal Constitutional Court (*Bundesverfassungsgericht,* hereinafter BVerfG) is an independent and impartial judicial institution from other constitutional organs. The locations of the BVerfG in Karlsruhe and separated and far from Berlin (the capital city of the Federal Republic of Germany). The BVerfG was established as a fundamental pillar of Germany, serving as the supreme guardian of the German Basic Law[1] and the creation of a reliable German constitutional culture.[2] On 6 May 1969, the BVerfG moved to its official residence in the Schlossbezirk, adjacent to the Karlsruhe Palace. The BVerfG is the constitutional court in the federal level, there are 16 constitutional courts at the country level.[3]

[1] Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford: Oxford University Press, 2015), 1.

[2] David Miles, *Democracy, the Courts, and the Liberal State: A Comparative Analysis of American and German Constitutionalism* (New York: Routledge, 2021), 214.

[3] The Constitutional Courts of the German Länder include Bayerischer Verfassungsgerichtshof [Bavarian Constitutional Court] (Munich, established 1947); Staatsgerichtshof des Landes Hessen [State Court of the State of Hesse] (Wiesbaden, established 1948); Staatsgerichtshof der Freien Hansestadt Bremen [State Court of the Free Hanseatic City of Bremen] (Bremen, established 1949); Verfassungsgerichtshof Rheinland-Pfalz [Constitutional Court of Rhineland-Palatinate] (Koblenz, established 1949); Verfassungsgerichtshof für das Land Nordrhein-Westfalen [Constitutional Court for the State of North Rhine-Westphalia] (Münster, established 1952); Hamburgisches

The BVerfG has made a substantial contribution to the formation and shaping of post-war Germany, gaining widespread popularity and adding to its reputation on both the European and international stages. Notably, it has established itself as a positive counter-model to the Supreme Court of the United States.[4] It has become a pivotal political institution, wielding considerable influence and often regarded as the 'most powerful constitutional court in the world' and the 'most original and interesting institution' in the German system.[5] The success of the BVerfG is symbolized by Karlsruhe's triumph as a representation of German constitutional continuity within the 'Karlsruhe Republic'.[6]

The establishment of the BVerfG was preceded by a debate in the Parliamentary Council on the institutional model of the Court. The initial proposal was the Supreme Court (*Staatsgerichtshof)*, modelled on the Weimar Republic's judiciary (similar to the United States' Supreme Court). The *Staatsgerichtshof* functioned as a constitutional court and was the highest federal court. However, concerns were raised by judges, who favoured the traditional model of the separation of ordinary judicial jurisdiction and the review of political decisions (the constitutionality of political decisions).[7] The second proposal established a constitutional court as envisaged by Hans Kelsen, an independent constitutional

Verfassungsgericht [Hamburg Constitutional Court] (Hamburg, established 1953); Verfassungsgerichtshof Baden-Württemberg [Constitutional Court of Baden-Württemberg] (Baden-Württemberg, established 1955); Landesverfassungsgericht Mecklenburg-Vorpommern [State Constitutional Court of Mecklenburg-Western Pomerania] (Greifswald, established 1957); Verfassungsgerichtshof des Saarlandes [Constitutional Court of Saarland] (Saarbrücken, established 1959); Verfassungsgerichtshof des Landes Berlin [Constitutional Court of the State of Berlin] (Berlin, established 1992); Verfassungsgericht des Landes Brandenburg [Constitutional Court of the State of Brandenburg] (Potsdam, established 1993); Verfassungsgerichtshof des Freistaates Sachsen [Constitutional Court of the Free State of Saxony] (Leipzig, established 1993); Verfassungsgericht des Landes Sachsen-Anhalt [Constitutional Court of the State of Saxony-Anhalt] (Saxony-Anhalt, established 1993); Niedersächsischer Staatsgerichtshof [Lower Saxony State Court] (Bückeburg, established 1995); Thüringer Verfassungsgerichtshof [Thuringian Constitutional Court] (Thuringia, established 1995); and Schleswig-Holsteinisches Landesverfassungsgericht [Schleswig-Holstein State Constitutional Court] (Schleswig-Holstein, established 2008).

4 Michaela Hailbronner, "Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism," *International Journal of Constitutional Law* 12 (2014): 626.

5 Jürgen Bröhmer, Clauspeter Hill, and Marc Spitzkatz, eds., *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* (Germany and Malaysia: Konrad-Adenauer-Stiftung and The Malaysian Current Law Journal Sdn Bhd, 2019), 103.

6 Donald P. Kommers and Russell A. Miller, "Das Bundesverfassungsgericht [The Federal Constitutional Court]: Procedure, Practice and Policy of the German Federal Constitutional Court," *Journal of Comparative Law* 3, no. 2 (2009): 210.

7 Christian Bumke and Andreas Voßkuhle, *German Constitutional Law: Introduction, Cases, and Principles* (Oxford: Oxford University Press, 2019), 10.

court separate from other German Supreme Court. This proposal was not comprehensive, nor did the framers plan for the new constitutional court to be a court that protected the rights of the strong majority, as they were not particularly concerned with constitutional review in general.[8] Indeed, even delegates at the *Herrenchiemsee* Convention[9] said that the new (constitutional court) constituted, at best, a matter of secondary importance. However, the conclusion of the debate resulted in the establishment of a separate Constitutional Court, the *Bundesverfassungsgericht* (BVerfG), which was endowed with exclusive jurisdiction over all constitutional disputes, including the power to review the constitutionality of the law. [10]

After the amendment of the German Basic Law in 2025, the powers of the BVerfG are regulated by Article 94 of the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*). The BVerfG has the following powers: judicial review (abstract review and concrete/ specific review), constitutional complaint, disputes between constitutional organs, election disputes, dissolution of political parties, and impeachment of the federal president and judges. The establishment of the BVerfG was the result of policies from Bonn (the capital of Germany at the time), values from Karlsruhe (where the BVerfG is located today), and input from the German people.

In 2025, the BverfG will have reached its 76-year milestone. By that time, it will have established itself as a reliable guardian of the German Constitution, a proponent of democratic principles, and a defender of human rights. Beyond its domestic role, the BVerfG has assumed a significant international responsibility, contributing to the development of European integration and the establishment of an international constitutional legal framework. In praxis,

[8] Hailbronner, "Rethinking the Rise of the German Constitutional Court," 626.

[9] The Constitutional Convention at Herrenchiemsee (German: *Verfassungskonvent auf Herrenchiemsee* [Constitutional Convention at Herrenchiemsee]) was a meeting of constitutional experts nominated by the minister-presidents of the western states of Germany, held in August 1948 at the former Herrenchiemsee Abbey in Bavaria. It formed part of the process of drafting and adopting the 1949 Basic Law (*Grundgesetz* [Basic Law]). The draft prepared by the Herrenchiemsee Convention served as the starting point for the deliberations of the *Parlamentarischer Rat* [Parliamentary Council] in Bonn during 1948–1949.

[10] Kommers and Miller, "Das Bundesverfassungsgericht [The Federal Constitutional Court]," 210.

the review of a multiplicity of executive acts and court decisions in individual cases is particularly essential. It's truly extraordinary power,[11] the "guardian of the constitution" (*Hüter der Verfassung),*[12] and protection of fundamental rights.[13] It is the most powerful independent constitutional court of the world with a particularly large set of competencies and political impact.[14] This role is greatly influenced by the exercise of authority in abstract-concrete judicial review and constitutional complaints.

In the German legal system, the BVerfG has the power to review decisions of both criminal and civil courts, thereby protecting citizens' constitutional rights. Such judicial decisions can be declared contrary to the Basic Law and have no binding legal force. The sanction can even include compensation for the losses suffered by the applicant during the dispute process. In the case of the BVerfG, the applicant who felt aggrieved by the court decision that had become legally binding filed a lawsuit because the court decision had violated the constitutional rights guaranteed by the Constitution. Legal consequences in the BVerfG decision relate to the cancellation of criminal and civil court decisions. If the decision is based on a law that has been cancelled or is not in accordance with the German Basic Law, the process can be reopened even after the decision is final.

The role and contribution of the BVerfG to the protection of citizens' constitutional rights in Germany and Europe, as demonstrated in the constitutional complaint, has established the court as a model for constitutional

[11] Tanto Lailam and Nita Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia," *Journal Bestuur* 11, no. 1 (2023): 75–94.

[12] Muhammad Siddiq Armia, "Constitutional Practice of ASEAN Countries: Questioning Judicial Review, Religions and Minority Issues," *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* [Petita: Journal of Legal and Sharia Studies] 7, no. 1 (2022): 42.

[13] 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 (Journal of Law)* 10, no. 2 (2023): 151.

[14] Iwan Satriawan et al., "Judicial Appointment of German *Bundesverfassungsgericht* [Federal Constitutional Court]: Lesson for Indonesia," in *Proceedings of the International Conference on Sustainable Innovation on Humanities, Education, and Social Sciences (ICOSI-HESS 2022)* (Atlantis Press, 2022), 142.

courts in various countries around the world. It has made a real scientific contribution to the development of legal systems in the world. Voßkuhle stated:[15]

> "Over the past decades, the interest in the jurisprudence of the BVerfG has increased considerably among academics and political actors from all over the world. This holds true not only for countries characterized by Continental-European law, but also for countries with an Anglo-American legal tradition. Independently here of, in the course of reforms towards the rule of law in many developing countries and countries in transition - at least in those where English is a working language - a demand for translations of decisions of the BVerfG has arisen".

Johannes Masing has stated the following: „The BVerfG is one of the most influential constitutional courts in the world - from a domestic perspective, perhaps currently the most powerful of all such courts. Having broad authority over all governmental entities of the states, it reaches reasoned decisions in detail with far-reaching political implications".[16]

Meanwhile, the Indonesian Constitutional Court (Mahkamah Konstitusi Republik Indonesia, hereinafter MKRI) has played a particularly important role in ensuring these higher levels of judicial independence. During its 20-year existence, the Court has heard numerous constitutional challenges to national statutes that touch on issues widely accepted as critical to establishing and maintaining judicial independence.[17] It has limited power to the mechanism of abstract judicial review,[18] without the constitutional complaints and concrete judicial review powers. It has resulted in constitutional complaint cases being 'forced' to use the abstract judicial review route, such as the Lese Majeste, Utomo, Wijaya and Lubis cases, among others. The MKRI rejects most constitutional complaint cases on the legal grounds that it does not have the power, but

[15] Andreas Voßkuhle, "Foreword by the President of the German Constitutional Court," in Jürgen Bröhmer, Clauspeter Hill, and Marc Spitzkatz, eds., *70 Years German Basic Law: The German Constitution and Its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* (Germany and Malaysia: Konrad-Adenauer-Stiftung e.V. and The Malaysian Current Law Journal Sdn Bhd, 2019), 9.

[16] Johannes Masing, "The Federal Constitutional Court," in Matthias Herdegen, Johannes Masing, Ralf Poscher, and Klaus Ferdinand Gärditz, eds., *Constitutional Law in Germany* (Germany: C.H. Beck, 2025), 737.

[17] Simon Butt, "Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts," *Constitutional Review* 9, no. 2 (December 2023): 246–75.

[18] Zainal Arifin Mochtar, "Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes," *Constitutional Review* 11, no. 1 (May 2025): 37–62.

there is case that have been granted by the MKRI, such as the Utomo case. Furthermore, the absence of constitutional complaint power means that the MKRI is not able to provide maximum protection of the constitutional rights of citizens.[19] In the context of criminal and civil court decisions, the absence of a constitutional complaint mechanism in the MKRI has resulted in weak legal protection against court decisions that violate the constitution and human rights principles in terms of substance and procedure of the law, especially since there are miscarriages of justice and judicial mafia are still common in criminal and civil court practices. These arguments form the research background for a proposal for a constitutional complaint regarding criminal and civil court judgments for the MKRI, with reference to the judicial practices of the BVerfG.

II. JUDICIAL REVIEW AND CONSTITUTIONAL COMPLAINT POWERS

Judicial review is an integral component of constitutionalism, without which the constitution cannot be utilised effectively. Judicial review of the constitutionality of laws is also regarded as a mechanism to regulate the abuse of legislative power by the majority in legislation making, thereby addressing the gaps of the rule of law, democracy, and identity in transnational governance.[20] It is defined as the power of judicial bodies to set aside ordinary legislative or administrative laws if Justices conclude that the conflict with the Constitution has emerged as an almost universal feature of Western-style democracy.[21] Judicial review is an examination of the constitutionality of the laws, which is carried out using constitutional measurement tools. Furthermore, every state institution has a constitutional obligation to protect and fulfil the fundamental rights of citizens. The abuse of power theory posits that government power is prone to corruption and violations of fundamental rights. Consequently, the

[19] Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (May 2016): 103–28.

[20] Doreen Lustig and J. H. H. Weiler, "Judicial Review in the Contemporary World: Retrospective and Prospective," *International Journal of Constitutional Law* 16, no. 2 (2018): 315.

[21] Georg Vanberg, *The Politics of Constitutional Review in Germany* (New York: Cambridge University Press, 2005), 1.

Constitution must ensure the availability of a judicial review mechanism for aggrieved parties to protect and fulfil these fundamental rights. Judicial review has the capacity to expand or restrict the exercise of state power, thereby protecting or diminishing human rights. Judicial review establishes the standard for determining the importance of specific rights and the circumstances in which the state may limit those rights.[22]

Dieter Grimm has asserted that the judicial review functions as a counterweight to the tendency of all political forces to detach themselves from their competitors as far as possible. It is important to note that competition is the most significant driver of democracy and the most effective means of government control.[23] Even at the European Union level, the need for judicial review is evident in maintaining institutional balance in disputes between political institutions. Additionally, it serves to maintain a balance between the European Union and its Member States in disputes about to the existence and exercise of the European Union competencies, which are not subject to significant dispute. The necessity to protect individual rights is indisputable.[24]

The BVerfG is vested with several powers, including the powers to undertake judicial review, resolve disputes between constitutional organs, adjudicate electoral disputes, dissolve political parties, and impeach the federal president and judges. In terms of judicial review competence, the three most frequently employed mechanisms are abstract judicial review (*Abstrakte Normenkontrolle*), concrete judicial review (*Konkrete Normenkontrolle*), and constitutional complaint (*Verfassungsbeschwerde*).[25]

First, abstract judicial review power. Abstract review is a process by which a court assesses the text of a law or its potential future implications in the absence of a concrete case. It is a significant power exercised by the courts

[22] Wendy K. Mariner, "Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States," *German Law Journal* 22 (2021): 1039.

[23] Dieter Grimm, "Constitutional Adjudication and Democracy," *Israel Law Review* 33, no. 2 (1999): 194.

[24] Alexander H. Türk, *Judicial Review in EU Law* (United Kingdom and United States: Elgar European Law, 2009), 1.

[25] Tanto Lailam, "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman dan Indonesia" [Comparison of Constitutional Review Designs in the German Federal Constitutional Court and the Indonesian Constitutional Court], *Arena Hukum: Jurnal Ilmu Hukum* [Arena of Law: Journal of Legal Studies] 16, no. 2 (August 2023): 74–101.

within the political system, closely related to the legislative drafting process. It has been argued that abstract review even influences the formation and change of law. From a political perspective, abstract review empowers unelected bodies such as the Courts to determine the constitutionality of laws enacted by elected political bodies, thereby ensuring the safeguarding of fundamental rights. Abstract review is part of the continental European tradition of constitutional courts, having the power to review laws passed by the legislature in the absence of an actual case in ordinary courts. It is a procedure whereby state authorities ask the court to rule on the constitutionality of a piece of legislation.[26] It is closely linked to the legislative process and even influences the creation and amendment of laws. Martin Shapiro and Alec Stone Sweet noted that abstract judicial review is the jargon of European constitutional law for reviewing the constitutionality of laws.[27]

Second, concrete judicial review power. The concrete review is a review requested by a judges from ordinary courts when they have doubts concerning the constitutionality of a law that is to be applied in a particular case. It is also termed "the constitutionality of law upon the request of the court". The request for a constitutional question from the general court to the Constitutional Courts generally also uses the terminology of submitting a judicial referral of referral cases from a court.[28] According to Kommers and Miller, concrete review is a judicial review mechanism employed by ordinary courts. If an ordinary court determines that the relevant federal or state law on which a case arises contravenes the 1949 Basic Law, it is obligated to refer the constitutional question to the BVerfG prior to proceeding with the resolution of the case. Judicial referrals are made irrespective of the issue of constitutionality raised by either party. The obligation to make such a referral arises when an ordinary

[26] David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton, NJ: Princeton University Press, 2010), 41.

[27] Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 347–48.

[28] Josua Satria Collins and Pan Mohamad Faiz, "Penambahan Kewenangan *Constitutional Question* di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara" [Adding the Constitutional Question Authority to the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights], *Jurnal Konstitusi* [Constitutional Journal] 15, no. 4 (December 2018): 691.

court is convinced that the law on which the case is based is contrary to the Constitution.[29]

The BVerfG power of concrete judicial review is divided into three cases: implementation of federal law by judges in ordinary courts; implementation of international law in Germany; the 1949 Basic Law interpretation by Lander Constitutional Courts. Object sengketa concrete review: Implementation of Federal Law in the Ordinary Court based on the Article 100 (1) of the Basic Law; (2) Implementation of International Law in Germany based on the Article 100 (2) of the Basic Law; (3) The 1949 Basic Law interpretation by State Constitutional Courts based on Article 100(3) of the Basic Law. The basis for this referral process is found in Article 100 of the 1949 Basic Law on concrete judicial review, Article 13 on court powers, and the procedural law on Articles 80 – 89 of the BVerfG Law. Judges of the Ordinary Court have the power to submit a constitutional question directly to the BVerfG.

Third, constitutional complaint power. The constitutional complaint constitutes a legal remedy designed to protect fundamental rights against regulations or ordinary court decisions that violate the constitution and human rights principles. According to Justice of the BVerfG, Dieter Grimm (1987–1999), individuals could request for a review of onerous laws using a constitutional complaint.[30] Similarly, Kommers emphasizes that constitutional complaints are available to individuals and entities vested with specific fundamental rights.[31] It is a formal legal challenge lodged by individual citizens (including legal entities) against an alleged violation of their basic rights by state powers,[32] encompassing administrative actions and judicial decisions.[33] The most prevalent causes of such violations are often the incorrect interpretation or implementation of the relevant articles of law.[34] Constitutional complaints represent an exceptional

[29] Kommers and Miller, "Das Bundesverfassungsgericht," 202.
[30] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 262.
[31] Kommers and Miller, "Das Bundesverfassungsgericht," 202.
[32] Vanberg, *Politics of Constitutional Review in Germany*, 87.
[33] Albert H. Y. Chen and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 8.
[34] Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (London: Yale University Press, 2009), 7.

and specific legal instrument, which can only be invoked if other national legal orders or state power fail to provide adequate solutions to protect citizens' fundamental rights. Constitutional complaints should therefore be invoked only after the exhaustion of all other legal mechanisms.

The BVerfG has become an important institution for the protection of the Basic Law and the realisation of the rule of law and modern democracy. It also fulfils one of the basic requirements of the rights protected under the principles of the new constitutionalism in Europe.[35] The constitutional complaint marked a significant development in the constitutional review process, which now "reflects a long tradition in Germany"; hovewer this seems exaggerated.[36] The constitutional complaint was adopted in the BVerfG Law 1951 (*Gesetz über das Bundesverfassungsgerichts 16 März 1951*) and has since become the most common form of application.[37]

a. Article 14 (1) of the BVerfG Law 1951 states: The First Senate of the BVerfG shall have jurisdiction in the cases referred to in Article 13 No. 1 to 3, 6, 11, 14 and in constitutional complaints (Articles 90 to 96), and the Second Senate shall have jurisdiction in the cases referred to in Article 13 No. 4, 5, 7 to 9, 12.[38]
b. Article 34 (4) of the BVerfG Law 1951 states: If a constitutional complaint or a general complaint is rejected as inadmissible or unfounded under Article 41(2) of the Basic Law (Section 13 No. 3),[39] the court of appeal shall impose

[35] Denis Preshova, *On the Rise While Falling: The New Roles of Constitutional Courts in the Era of European Integration* (PhD diss., University of Cologne, 2020), 25.

[36] Martin Borowski, "The Beginnings of Germany's Federal Constitutional Court," *Ratio Juris* 16, no. 2 (June 2003): 155.

[37] Anja Seibert-Fort, "Judicial Independence and Democratic Accountability: The German Function and Legitimacy of the German Federal Court," in Ernest Hirchs Balin, Gerhard van der Schyff, and Marteen Stremler, eds., *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limit in Democratic Society* (Berlin: Asser Press and Springer, 2020), 46.

[38] Original text: "*Der Erste Senat des Bundesverfassungsgerichts ist zuständig in den Fällen des § 13 Nr. 1 bis 3, 6, 11, 14 sowie für Verfassungsbeschwerden (§ 90 bis 96), der Zweite Senat in den Fällen des § 13 Nr. 4, 5, 7 bis 9, 12*" [The First Senate of the Federal Constitutional Court has jurisdiction in the cases listed in section 13 nos. 1 to 3, 6, 11, and 14, as well as for constitutional complaints (sections 90 to 96); the Second Senate has jurisdiction in the cases listed in section 13 nos. 4, 5, 7 to 9, and 12].

[39] *Gesetz über das Bundesverfassungsgericht* [Federal Constitutional Court Act], March 16, 1951, art. 13(3): "on complaints against decisions of the Bundestag regarding the validity of an election or the gain or loss of a seat in the Bundestag (art. 41(2) of the Basic Law)."

a fee of twenty Deutsche Marks to Deutsche Marks on the complainant if the filing of the complaint constitutes an abuse (Article 34 (4).[40]

In addition to the aforementioned provisions, Articles 90 (1), 91, 92, 93 (1), 94 (1) and 95 (1) of the BVerfG Law 1951 pertain to law enforcement and the procedure for the submission of a constitutional complaint. The constitutional complaint power was based on the BVerfG Law 1951 for a period of 18 years, from 1951 to 1969, after which it underwent a change through an amendment to the Basic Law in 1969, specifically Article 93 (1) number 4a of the Basic Law (May 23, 1949).[41]

a. Article 93 (1) No. 4a of the Basic Law: on constitutional complaints, which may be filed by any person alleging that one of his or her fundamental rights under Article 20(4)[42], Article 33[43], Article 38[44], Article 101[45], Article 103[46], Article 104[47] or Article 104 has been infringed by public authority (individual complaint)
b. Article 93 (1) No.4b of the Basic Law: on constitutional complaints filed by municipalities or associations of municipalities alleging that their right to

[40] "*Wird eine Verfassungsbeschwerde oder eine Beschwerde gemäß Artikel 41 Abs. 2 des Grundgesetzes (§ 13 Nr. 3) als unzulässig oder unbegründet zurückgewiesen, so kann das Bundesverfassungsgericht dem Beschwerdeführer eine Gebühr von zwanzig Deutsche Mark bis zu eintausend Deutsche Mark auferlegen, wenn die Einlegung der Beschwerde einen Mißbrauch darstellt*" [If a constitutional complaint or a complaint pursuant to article 41(2) of the Basic Law (section 13 no. 3) is rejected as inadmissible or unfounded, the Federal Constitutional Court may impose a fee of twenty to one thousand Deutsche Mark on the complainant if the filing of the complaint constitutes an abuse of process]..

[41] Hailbronner, "Rethinking the Rise of the German Constitutional Court," 630.

[42] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 20(4): "All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."

[43] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 33 (equality of political rights and duties; equality of eligibility, qualifications, and professional achievements for public office; and public service according to law).

[44] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 38 (elections to the German Bundestag, electoral mechanism, and minimum age requirements).

[45] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 101 (prohibition of extraordinary courts).

[46] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 103: "(1) In the courts, every person shall be entitled to a hearing in accordance with law; (2) an act may be punished only if a law defined it as a criminal offense before the act was committed; (3) no person may be punished for the same act more than once under the general criminal laws."

[47] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], Deprivation of liberty (Article 104a), Financial assistance for investments (Article 104b), Financial assistance for investments in municipal education infrastructure (Article 104c), and financial assistance for investments in social housing (Article 104d).

self-government under Article 28 has been violated by law; in the case of infringement by Land law, however, only if the law cannot be challenged in the Land's constitutional court (complaints by municipalities or associations of municipalities).

After the 1969 amendment of the Basic Law, the BVerfG Law of 1951 was revised on 11 August 1993, and the final amendment was introduced in Article 2 of the Law on 8 October 2017. The following are several important points of the constitutional complaint: The First is the powers. The constitutional complaint is regulated in Article 13 (8a)/ Article 13 (8a) of this Law: The BVerfG shall decide on constitutional complaints (Article 93 (1) No. 4a and 4b of the Basic Law). In implementing the complaint, the BVerfG established the distribution of power by the First and Second Senates. The First Senate shall have jurisdiction over constitutional complaints, with the exception of matters related to Article 91 and associated electoral legislation. Conversely, the Second Senate shall not transfer constitutional complaints to the First Senate (Article 14, paragraphs (1,2)).

During the constitutional amendment of the German Basic Law in 2025, there were substantive changes to Articles 93 and 94 of the German Basic Law. Article 93 focuses on institutions and Justices. Meanwhile, Article 94 regulated the court's power. Article 94 No 4 (a,b,c,) of the German Basic Law specifically regulates the constitutional power of the BVerfG, namely:

a. Article 94 No.4a: on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority (individual complaint)
b. Article 94 No.4b: on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land (municipalities complaints)

c. Article 94 No.4c: on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the *Bundestag* (election complaint).

This article focuses solely on the individual constitutional complaint (Article 94, No. 41). The BVerfG's practices demonstrate that individual constitutional complaints possess the capacity to evaluate the constitutionality of laws and ordinary courts decisions from the perspective of individual complaints. Primarily, a complaint is lodged against a judgment (*Urteilsbeschwerde*), in which the BVerfG undertakes a review to determine whether the fundamental rights enshrined in the Constitution have been violated by the application of law in ordinary court decisions. There is no advantage for rebellious courts not to follow the jurisprudence of the BVerfG, as this might lead a Chamber to quash a decision for its arbitrariness quickly. It is noteworthy that this is something that hardly any Justice is willing to have on their track record.[48] It is evident that these remedies accounted for more than 90% of the BVerfG caseload.[49] In her capacity as President of the BVerfG from 1994- 2002, Jutta Limbach articulated the criteria for the adjudication of a constitutional complaint, which are as follows: (a) the complaint must possess fundamental constitutional importance; (b). The alleged violation of fundamental rights must be of an exceptionally high severity; and (c). The complainant must be susceptible to significant harm if the complaint is not adjudicated.

Articles 90–95 of the BVerfG Law of 11 August 1993 (Federal Law Gazette I, p. 1473) regulate the procedure for cases referred. Several points regarding the constitutional complaint procedure on criminal and civil court judgements are as follows: (a) Applications must be submitted in the German language; (b) Applicants who are citizens of Germany or other countries, both individuals, groups, and countries; (c) The BVerfG stipulates that there is no obligation to use a lawyers when applying, but applicants may be represented by a lawyers or

[48] Armin von Bogdandy and Davide Paris, "Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court," *MPIL Research Paper Series* no. 01 (2019): 5.

[49] Jibong Lim, "Comparative Study of the Constitutional Adjudication System of the U.S., Germany and Korea," *Tulsa Journal of Comparative and International Law* 6, no. 2 (1999): 151.

professor of law from a university in Germany or the university in a European Union member state; (d) There is no fee for applying; (e) Constitutional complaint case are decided without oral hearings (meeting for the applicant and public) and the process of resolving legal disputes takes only one month; (f) Case decisions of the Chamber (three Justices) shall be adopted by unanimous vote and admission by the Senate of the BVerfG Justice is granted if at least three Justices agree; (g) BVerFG decision in the form of an order, not a judgment, and cannot be appealed (final and binding decision); (h) The federal or state government may be required to bear the procedural costs if the applicant is successful/their decision is accepted (succesfull), and (i) The BVerfG's decision may order the general court to revise its criminal/ civil decision in accordance with the BVerfG's decision.

III. CONSTITUTIONAL COMPLAINT ON CIVIL AND CRIMINAL COURT JUDGEMENTS

3.1. Constitutional Complaint on Ordinary Court Judgements

The BVerfG has historically been regarded as a highly reliable and impartial judicial institution, offering a beacon of hope for those seeking justice. Evidence for this can be found in the significant number of constitutional complaint cases that are decided on an annual basis. The BVerfG has become the most popular and effective citizens' court for the protection of constitutional rights. One of the key factors that has enabled the BVerfG to maintain a strong position in the German political system is the high level of trust that citizens place in the court. This level of trust is significantly higher than the level of trust in other central political institutions, [50] including the legislature.[51]

In the context of BVerfG practice, types of decisions regarding constitutional complaints can be categorised into several distinct types. The following categories

[50] Oliver W. Lembcke, "The German Federal Constitutional Court: A Court Unbound?" in Kálmán Pócza, ed., *Constitutional Review in Western Europe: Judicial-Legislative Relations in Comparative Perspective* (New York: Routledge, 2024), 144.

[51] Franz C. Mayer, "Judicial Power and European Integration: The Case of Germany," in Christine Landfried, ed., *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge: Cambridge University Press, 2019), 186.

comprise the identified subjects of review: (i) Court decisions, (ii) Laws and ordinances (directly); (iii) Omissions on the part of the legislator; (iv) Other sovereign acts of European authorities; (v) Other sovereign acts of the highest federal authorities; (vi) Other sovereign acts of land authorities; (vii) Other sovereign acts of municipal authorities; (viii) Other general objects of legal challenges. In this context, the review of criminal and civil court decisions is one of the mechanisms in constitutional complaints. The statistics of cases is as follows:

Table 1.
Types of Constitutional Complaint Proceedings 2020 -2024[52]

No.	Type of Cases	2020	2021	2022	2023	2024
1.	Court decisions	4.462	4.016	3.862	3.804	3.830
2.	Laws and Ordinances (Directly)	237	581	350	121	110
3.	Other General object of Legal Challenges	323	317	349	214	264
4.	Other Sovereign Acts of Land authorities	121	96	78	99	89
5.	Other Sovereign Acts of the Highest Federal Authorities	37	24	9	41	28
6.	Other Sovereign Acts of Municipal Authorities	9	11	12	9	15
7.	Omissions on the part of the legislator	1	8	6	6	99
8.	Other Sovereign Acts of European Authorities	4	6	4	2	1
Total		5.194	5.059	4.607	4.296	4.436

The majority of constitutional complaints in the BVerfG from 2020 to 2024 were resolved through court decisions. These included judgements from civil and criminal courts (*Bundesgerichtshof*), administrative courts (*Bundesverwaltungsgericht*), social courts (*Bundessozialgericht*), labour courts (*Bundesarbeitsgericht*), finance or tax courts (*Bundesfinanzhof*), patent courts (*Bundespatentgericht*), constitutional courts of the 16 states, as well as

[52] Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany], *2020 Annual Report*, 49; *2021 Annual Report*, 42; *2022 Annual Report*, 54; *2023 Annual Report*, 54; *2024 Annual Report*, 54.

disciplinary courts, professional disciplinary courts in matters of lawyers and notaries. However, this study focuses on criminal and civil court decisions at the *Bundesgerichtshof*.

Table 2.
Statistic of Judicial Review on Criminal and Civil Court Judgements 2020-2024[53]

No.	Type of Cases	2020			2021			2022			2023			2024		
		*	**	***	*	**	***	*	**	***	*	**	***	*	**	***
1.	Civil Courts	1.702	1.713	27	1.645	1.599	17	1.482	1.488	20	1.455	1.641	13	1.431	1.145	13
2.	Criminal Courts	1.215	1.267	35	1.141	1.206	29	1.207	1.207	17	1.149	1.289	20	1.032	1.198	14
3.	Adiministrative Courts	810	778	20	613	750	11	488	488	10	464	495	10	496	491	5
4.	Social Courts	426	566	6	344	346	1	306	306	3	436	443	4	496	544	1
5.	Labour Courts	127	222	3	95	140	0	90	90	0	98	105	0	184	131	0
6.	Finance Courts	131	97	0	112	156	1	148	148	0	161	179	5	149	151	0
7.	State Constitutional Courts	34	28	0	42	39	0	115	115	0	27	106	0	35	41	0
8.	Disciplinary Courts, Professional Disciplinary Tribunals	15	20	1	20	24	0	23	23	1	13	12	0	7	7	0
9.	Patent Courts	2	1	0	4	0	0	3	3	0	1	1	0	0	4	0
Total		4.462	4.692	92	4.106	4.260	59	3.865	3.849	51	3.804	4.271	52	3.830	3.712	33
Note: * New Proceedings ** Decisions *** Successful Applications																

The number of successful applications for constitutional complaints that result in judicial decisions is notably low. In 2020, there were 92 successful applications out of 4,692 (1.96%), in 2021, 59 out of 4,260 (1.38%), and in 2022, 51 out of 3,849 (1.32%). In the year 2023, there were 52 successful applications out of a total of 4,271 (1.21%). This decision warrants further examination, given that approximately 99% of decisions handed down by the BVerfG reject constitutional complaints. In particular, data are available on constitutional complaints against the decisions of the five highest federal courts, namely the Federal Court of Justice (*Bundesgerichtshof*), the Federal Labour Court (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*), the Federal Finance Court (*Bundesfinanzhof*) and the Federal Administrative Court (*Bundesverwaltungsgericht*).

53 Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany].

The following section presents the proceedings and success rates of constitutional complaints against decisions of the five federal courts in the years 2020-2024:

Table 3.
Statistic of Constitutional Complaint on Supreme Court decisions 2020-202454

No.	The Supreme Federal Courts	2020			2021			2022			2023			2024		
		*	**	***	*	**	***	*	**	***	*	**	***	*	**	***
1.	Federal Court of Justice	491	444	2	359	394	1	313	326	1	329	356	1	309	259	0
2.	Federal Administrative Court	80	71	0	58	68	1	55	81	1	51	59	3	64	55	0
3.	Federal Finance Court	113	77	0	62	93	1	88	62	0	109	116	3	110	105	0
4.	Federal Labour Courts	110	247	0	55	99	0	59	66	0	62	69	0	125	71	0
5.	Federal Social Courts	203	269	0	144	143	0	117	155	1	124	151	2	106	123	0
Note: * New Proceedings ** Decisions *** Successful Applications																

As the table above indicates, the mean number of constitutional complaints on Federal Court decisions granted by the BVerfG is 1-3 per year, representing a minor proportion of the hundreds of cases filed by applicants. This suggests that the average number of decisions rendered by the BVerfG in favour of granting constitutional complaints is relatively low. Despite the low statistic of cases granted by the BVerfG, the guarantee that the Federal Court's judgements are fair and do not conflict with human rights is evidence of a modern, credible and reliable court.

3.2. Constitutional Complaint on Civil and Criminal Court Judgements

This subsection will analyse judicial review of civil and criminal court decisions, including landmark cases such as the Lüth case, the Soldiers are Murderers case, and the Right to be Forgotten case, as well as several cases on constitutional complaints in 2024 and 2025.

54 Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court of Germany].

1. Lüth case

The Lüth case is a constitutional complaint on civil court judgement decide d by the First Senate of the BVerfG on 15 January 1958 (No.1 BvR 400/51). The case was brought by Erich Lüth against a decision of the Hamburg Civil Court (*Landgericht Hamburg*) of 22 November 1951 - Az. 15.O.87/51. Lüth as Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office, and in his capacity as President of the Hamburg Press Club, gave a speech to film distributors and directors at the opening of the 'German Film Week' on 20 September 1950. In his speech, he proposed a boycott of films that were deemed to lack morality and character, and which were believed to be damaging to the international reputation of the German film industry. This included Veit Harlan's film production "Unsterbliche Geliebte".[55]

Lüth's statement was challenged by Veit Harlan and the film companies Domnick-Film-Produktion and Herzog-Film in the Hamburg Civil Court. The Hamburg Regional Court decided that Lüth had committed a civil offence by causing financial loss to Harlan and his film companies. Lüth was accused by the production and distribution company Unsterbliche Geliebte of damaging their legitimate business on the basis of the German Civil Code or *Bürgerliches Gesetzbuch* (BGB). After losing the case, Lüth challenged the Hamburg Regional Court's decision by filing a constitutional complaint with the the BVerfG. The following are the main disputes and Judicial Review decisions filed in the Lüth case:

Table. 4
Lüth case

Petition	Decision
Decision of Hamburg Supreme Court (Landgericht Hamburg) dated 22 November 1951 - Az. 15.O.87/51 which found Lüth guilty of violating Articles 823 and 826 of the German Civil Code (Bundesgesetzblatt/ BGB).	1. The judgment of the Hamburg Civil Court of 22 November 1951 - Ref. 15. O. 87/51 - violates the complainant fundamental right under Article 5 (1)[56] paragraph 1 of the Basic Law and is therefore annulled 2. The case was referred back to the Hamburg Regional Court.

[55] *Lüth* case, 1.

[56] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and

The Lüth decisions is very interesting and contribute to the legal systems of each country, especially in the area of freedom of opinion and expression. The BVerfG found that the decision of the Hamburg Civil Court was contrary to the Basic Law. In the Lüth case, Lüth was sentenced to pay civil damages for boycotting Harlan's film products. This was based on Article 823 of the BGB and he was found guilty under Article 826 of the BGB of defaming Harlan.[57] Articles 823 and 826 of BGB:

Article 823 of the German Civil Code (Liability in damages):

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Article 826 of the BGB:

"A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".

Lüth filed a constitutional complaint with the BVerfG claiming that the Hamburg court's decision applying Articles 823 and 826 of the BGB had violated Article 5(1) of the Basic Law of the Federal Republic of Germany (West Germany), i.e. his right to freedom of expression as guaranteed by the Basic Law.[58] In its judgment, the BVerfG stated:[59]

> "... that the Regional Court, in its assessment of the complainant's conduct, failed to recognise the particular importance that the fundamental right to freedom of expression also has when it comes into conflict with the private interests of others". The judgment of the Regional Court is based

to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

[57] Hugh Riedley, *Law in West German Democracy: Seventy Years of History as Seen Through German Courts* (Netherlands: Brill, 2019), 67–78.

[58] Donald P. Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany," *Southern California Law Review* 53 (1980): 687.

[59] *Lüth* case, 75.

> on this failure to apply fundamental rights standards and thus violates the complainant's fundamental right under Article 5 (1) sentence 1 of the Basic Law. It must therefore be set aside.[60]

The final result of Lüth's constitutional complaint case, the BVerfG has granted Lüth's request and stated that the Hamburg Court's decision is contrary to Article 5 (1) of the Basic Law which clearly regulates freedom of expression.[61] In this context, the legal arguments used by the justices of the BVerfG were the articles in particular Article 5 (1) sentence 1 of the Basic Law "Every person shall have the right freely to express and disseminate his opinions in speech" and the principle of unstructured balance as supporting arguments. From the perspective of the protection of constitutional rights, the BVerfG decision demonstrates a notable strong decision, exhibiting a marked preference for the protection of constitutional rights. The BVerfG places a high priority on safeguarding constitutional rights, proffering solutions to prevailing issues and offering protection to concrete cases in ordinary court, including final court decisions.

In its judgement, the BVerfG recognised that Hamburg Civil Court judgements can infringe on the right to freedom of expression if not applied correctly. In this context, the BVerfG justices were able to provide cogent legal arguments regarding the relationship between public and private law, where there are limits to freedom of speech and expression that should not be violated by civil courts. The BVerfG, in addition to declaring the Hamburg Civil Court decision null and void, also ordered the court to decide the case in accordance with the BVerfG's decision, i.e. cancelling the damages sanction against Lüth.

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60 "*... daß das Landgericht bei seiner Beurteilung des Verhaltens des Beschwerdeführers die besondere Bedeutung verkannt hat, die dem Grundrecht auf freie Meinungsäußerung auch dort zukommt, wo es mit privaten Interessen anderer in Konflikt tritt. Das Urteil des Landgerichts beruht auf diesem Verfehlen grundrechtlicher Maßstäbe und verletzt so das Grundrecht des Beschwerdeführers aus Art. 5 Abs. 1 Satz 1 GG. Es ist deshalb aufzuheben*" [... that the Regional Court, in assessing the complainant's conduct, failed to recognize the special significance of the fundamental right to freedom of expression, even where it comes into conflict with the private interests of others. The judgment of the Regional Court rests on this failure to apply constitutional standards and thus violates the complainant's fundamental right under article 5(1), first sentence, of the Basic Law. It must therefore be set aside].

61 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

The BVerfG's Justices consider the Lüth decision to be an important milestone in the 1950s with respect to its impact on the meaning and shaping of its constitutional jurisdiction in the protection of citizens' constitutional rights (particularly in the case of freedom of speech and expression).[62] The Lüth decision has also contributed to the refinement of mechanisms and the articulation of standards and methods for the protection of fundamental rights. The Lüth decision is widely regarded as a foundational moment for at least two transformative post-war developments in constitutional thinking that continue to influence legal systems around the world.[63] Indeed, Lüth is widely considered by many to be the birth point of the now globally dominant conception of constitutional rights, which holds that constitutional rights are not only concerned with limiting state power,[64] but also the protection of individual rights against civil cases.

2. The Soldier are Murderer case

The Soldier are Murderer case is judicial review on criminal court judgement by the the First Senate of the BVerfG in its verdict of 10 October 1995, with decision numbers no. 1 BvR 1476/91, no. 1 BvR 1980/91, no. 1 BvR 102/92, no. 1 BvR 221/92. It is the extreme hate speech cases. The Soldiers are Murderers case is an insult to soldiers who are trained to kill. Soldiers in this context is a general term and does not refer to specific individuals.. This case was brought by 4 convicted persons who had been convicted by the criminal court for hate speech/insult in the sense of the Criminal Code of the Federal Armed Forces and individual soldiers by statements such as "Soldiers are murderers" or "Soldiers are potential murderers".[65]

[62] Ruth Weber, "Law-Making Activity of the German Federal Constitutional Court: A Case-Law Study," in Monika Florczak-Wątor, ed., *Judicial Law-Making in European Constitutional Courts* (London: Routledge, 2020), 33–34.

[63] Jacco Bomhoff, "Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing," *German Law Journal* 9, no. 2 (February 2008): 121–24.

[64] Kai Möller, "Lüth and the 'Objective System of Values': From 'Limited Government' Towards an Autonomy-Based Conception of Constitutional Rights," in Sujit Choudhry, Michaela Hailbronner, Mattias Kumm, et al., eds., *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford: Oxford University Press, 2024), 255–68.

[65] Complainant 1, represented by Attorney Thomas Scherzberg, requested annulment of the decision of the Bayerisches Oberstes Landesgericht [Bavarian Highest Regional Court], the decision of the Landgericht Ansbach [Regional Court of Ansbach], and the decision of the Amtsgericht Ansbach [Local Court of Ansbach]. Complainant

Table.5
Soldiers are murderers case

Petition	Decision
Court decisions in several States, Regions/ Municipalities that imposed criminal penalties on the applicants for committing the offence of contempt of Soldier, comprising 4 cases Applicant 1, Applicant 2, Applicant 3, and Applicant 4.	The BVerfG ruled that the Criminal Justice Decision in the Soldier-murderer case had violated Article 5(1)[66] of the Basic Law. Several States had to reimburse the costs incurred by the Applicant.

The decision of the BVerfG partially annulled the decision of the criminal court, as it was considered to be contrary to the applicants' fundamental rights under Article 5(1) sentence 1 of the Constitution. In the judgement, the justices of the BVerfG stated that:[67]

> The BVerfG agrees with the Federal Court (*Bundesgerichtshof* - BGH) that the insulting criticism (*Schmähkritik*) concerns a collective that amounts to an attack on the personal honour of its members. The BVerfG also agrees that the (active) soldiers of the *Bundeswehr* (German Federal Armed Forces) constitute a sufficiently defined group. However, the condemnation must refer to *Bundeswehr* soldiers specifically, not to all soldiers in the world. In this case, the condemnation is general and directed at all soldiers in the world, not the *Bundeswehr* or individual German soldiers.

In the Soldier are murderer case, it has been clearly proven that the insult was a very strong one to the army profession, and that it clearly caused an uproar in the community at that time. However, due to the ambiguity surrounding

2, represented by Konrad Kittl, requested annulment of *den Beschluß des Bayerischen Obersten Landesgerichts* [the order of the Bavarian Highest Regional Court], *das Urteil des Landgerichts Augsburg* [the judgment of the Augsburg Regional Court], and *das Urteil des Amtsgerichts Landsberg* [the judgment of the Landsberg Local Court]. Complainant 3, represented by Attorneys Wilhelm Steitz and Gert Thomas, requested annulment of *den Beschluß des Oberlandesgerichts Koblenz* [the order of the Koblenz Higher Regional Court], *das Urteil des Landgerichts Mainz* [the judgment of the Mainz Regional Court], and *das Urteil des Amtsgerichts Mainz* [the judgment of the Mainz Local Court]. Complainant 4, represented by Attorney Frank Niepe, requested annulment of *den Beschluß des Bayerischen Obersten Landesgerichts* [the order of the Bavarian Highest Regional Court], *das Urteil des Landgerichts München* [the judgment of the Munich Regional Court], *das Urteil des Amtsgerichts München* [the judgment of the Munich Local Court], and *den Strafbefehl des Amtsgerichts München* [the penal order of the Munich Local Court].

[66] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

[67] *Soldiers are Murderers* case, 38-42

the specific "individual" or "group of soldiers" to whom the insult was directed, the act was not classified as a "criminal offence". Instead, it was regarded as a form of freedom of expression aimed at criticising the army in general. In the case of Soldier-Murderer, the criminal court that had found the applicant guilty and sentenced him to criminal punishment was required to correct its decision. This was due to the fact that the BVerfG's decision had the legal consequence of requiring the criminal court to retry the case. The BVerfG's decision was not only to annul the criminal court's decision, but also to order the criminal court to correct its decision in accordance with the BVerfG's decision. This decision is applicable retroactively, encompassing legal events that transpired prior to the BVerfG's ruling.

The BVerfG ruled that the restriction of constitutional rights in the criminal court judgement was contrary to the German Basic Law. The judgement established the standard of freedom of expression guaranteed under the German Basic Law in this case, namely:

a. Article 5(1) of the Basic Law stipulates the evaluation of the significance of freedom of expression, juxtaposed against the interests of the restricted law.
b. The act of severe criticism directed towards the army constitutes a freedom of expression that is guaranteed by the Constitution, provided that it does not entail the insulting of a particular, explicitly named individual or group, such as the German Army.
c. Insults directed towards individual soldiers and insults directed towards the German army are subject to legal sanction. However, insults directed towards soldiers in a general context (soldiers around the world) are not subject to legal sanction, as the insulting statements pertain to the army as a whole, not individual soldiers or the German army specifically.

3. The Right to be Forgotten case

The Right to Be Forgotten is a dispute between a private citizen and a broadcasting corporation regarding the applicant's request to delist links to online information. In this case, the BVerfG also articulated an autonomous,

domestic standard of the right to be forgotten.[68] It is highly significant in that the decision effectively removes the imagined normative hierarchy between national law and European Union law.[69] This decision is an order of the First Senate of the BVerfG, November 6, 2019. Constitutional complaint regarding a private law judgment of the Federal Court of Justice (*Bundesgerichtshof)*, which had rejected the complainant's action seeking injunctive relief against the availability, in an online archive, of press articles from more than 30 years ago.

The Judgment of the *Bundesgerichtshof* of November 13, 2012 – VI ZR 330/11. In 1982, the complainant was found guilty of murder and sentenced to life imprisonment for killing two people by shooting them in 1981. In 1982 - 1983, the magazine *Der Spiegel* published three articles about the case in its print edition, which mentioned the complainant's name. In 1999, Spiegel Online GmbH – the defendant in the ordinary court proceedings – uploaded the articles to the magazine's online archive, where they could be accessed free of charge and without restriction. When the complainant's name was entered into one of the major internet search engines, the articles in question appeared among the top search results.

In 2009, the complainant discovered that the articles were available online and sent a cease-and-desist letter to *Der Spiegel* magazine; however, the request was ignored. He then filed a lawsuit to prohibit the defendant from disseminating any information about the crime containing the plaintiff's surname in the *Bundesgerichtshof*, but the lawsuit was rejected. In its legal considerations, the German Supreme Court ruled that the public interest in obtaining information and the defendant's freedom of expression outweighed the plaintiff's interest in protecting his personality. The court ruled that the public had a legitimate interest in obtaining information about important events in contemporary history (including murder trials) that could not be separated from the plaintiff's name and identity by accessing the original, unaltered news reports.

[68] Federico Fabbrini and Edoardo Celeste, "The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders," *German Law Journal* 21 (2020): 55–65.

[69] Matthias Goldmann, "As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism," *German Law Journal* 21 (2020): 45–54.

After failing in the *Bundesgerichtshof*, the petitioner filed a constitutional complaint with the BVerG to challenge the Supreme Court's ruling. In this case, the BverfG ruled that: (1) the Judgment of the Federal Court of Justice of 13 November 2012 – VI ZR 330/11 – violates the complainant's fundamental right under Article 2(1)[70] in conjunction with Article 1(1)[71] of the German Basic Law (*Grundgesetz*); (2) the Judgment is reversed. The matter is remanded to the Federal Court of Justice; (3) the Federal Republic of Germany must reimburse the complainant for necessary expenses.

In addition to the three cases mentioned above, several constitutional complaints were filed against court decisions in 2024 and 2025. In 2024, a constitutional complaint was filed regarding the requirements for reasons in criminal prosecution based on victim requests (Decision No. 2 BvR 350/21). This case was decided by the First Chamber of the Second Senate of the BVerfG on September 19, 2024. In this case, the complainant was a victim of sexual abuse, with the perpetrator being a doctor who forced the victim to perform sexual acts. The Regional High Court heard the criminal report, but its decision rejected the report due to the lack of clarity in the facts and evidence submitted by the applicant. Because the application was rejected, the applicant then filed a constitutional complaint against the court's decision with the BVerfG. In this ruling, the BVerfG granted part of the petition because the Regional High Court interpreted the requirements for grounds in the petition to compel criminal prosecution too broadly, inadequately, and with irrelevant arguments, thereby violating the petitioner's constitutional rights.

Several important cases were decided in 2025. These included the constitutional complaint No. 2 BvR 373/25 concerning judicial perversion of justice and No. 2 BvR 1277/23 and 2 BvR 85/24 regarding the validity of arbitration clauses in investment agreements. The three cases were constitutional complaints

[70] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 2(1): "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

[71] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art. 1(1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

against the decision of the German Federal Court of Justice (*Bundesgerichtshof*). In the first case, a judge in a family court was convicted of judicial perversion and sentenced to two years' imprisonment for an offence involving the abuse of judicial power, as specified in Article 339 of the German Criminal Code[72]. The suspension of the sentence was granted on probation. The judicial perversion of justice occurred because the judge decided on his authority, designed the application, contacted the prospective applicant and expert witnesses via his personal email account, and filed the application in the court in which he worked. The case concerns to the judge's desire to prohibit two schools from requiring children to wear masks, maintain physical distancing and undergo Covid-19 testing, and to require these schools to continue with face-to-face learning. The BVerfG rejected the petition on the legal grounds that interpreting ordinary criminal law and applying it to individual cases is the prerogative of ordinary courts and cannot generally be reviewed by the BVerfG. The BVerfG can only do so exceptionally if the applicant claims a violation of the principle of equality in its manifestation as a prohibition of arbitrariness.

Secondly, the validity of arbitration clauses in investment agreement cases. In the BverfG decision No. 2 BvR 1277/23, the constitutional complaint was filed by investors from European Union (EU) member states against the Federal Republic of Germany based on the Energy Charter Treaty. The Bundesgerichtshof rejected the petitioners' request on the grounds of referring to the Court of Justice of the European Union (CJEU)'s ruling in the Achmea case. The CJEU ruling established that Articles 267[73] and 344[74] of the Treaty on

[72] *Strafgesetzbuch* (StGB) [German Criminal Code], sec. 339: "Judges, other public officials or arbitrators who, in the course of conducting or deciding a legal matter, bend the law for the benefit or to the detriment of a party incur a penalty of imprisonment for a term of between one year and five years."

[73] Treaty on the Functioning of the European Union, art. 267: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

[74] Treaty on the Functioning of the European Union, art. 244: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

the Functioning of the European Union (TFEU) prohibit the incorporation of arbitration clauses within international agreements between EU member states. Furthermore, in its decision No. 2 BvR 85/24, a constitutional complaint was filed by the Republic of India, which considered that the Bundesgerichtshof had failed to rule on the arbitration clause in the bilateral investment agreement signed between Germany and India in accordance with European Union law. In its ruling, the *Bundesgerichtshof* stated that the Achmea case law cannot be applied to bilateral investment agreements between European Union member states and third countries (India). The two constitutional complaints were both unsuccessful due to the applicants' inability to provide sufficient evidence to substantiate the alleged violations of their rights.

IV. PROPOSAL FOR THE MKRI: OPPORTUNITIES AND CHALLENGES?

From a constitutional systems perspective, Germany and Indonesia share similarities in terms of state ideology. The Basic Law thus established a State Philosophy or even State Ideology unalterable by future amendments of the constitution, very similar to the function Pancasila fulfils in the Indonesian 1945 Constitution. The State philosophy of the Basic Law is evidently based on the tradition of constitutionalism predicated on the realisation of freedom as the fundamental legitimation of state authority.[75] Additionally, the principle of social justice is central to the political cultures of Germany and Indonesia. The state is considered the only institution capable of achieving this goal.[76] This includes the Constitutional Court, which acts as the guardian of social justice.

Furthermore, the President of the MKRI (2013-2015), Hamdan Zoelva proposed that the BVerfG be designated as a suitable comparative legal reference for

[75] Christoph Enders, "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court," *Constitutional Review* 6, no. 2 (December 2020): 190–203.

[76] Herbert Küpper, "The Indonesian Constitution Read with German Eyes," *Constitutional Review* 7, no. 1 (May 2021): 53–91.

MKRI. A detailed elaboration accompanied this proposal on several key reasons in support of this recommendation: [77]

> "...The constitutional review model of both the BVerfG and MKRI is identical and is based on the European model of constitutional review. In terms of legal tradition, Indonesia and Germany are part of the same legal tradition, namely the civil law tradition. The BVerfG is one of a number of constitutional courts around the globe that has been explicitly granted the power to hear constitutional complaints.[78]

This perspective is endorsed by Justice of the MKRI I Dewa Gede Palguna (2003-2008, 2015-2020[79] and Deputy of the Constitutional Court Saldi Isra (2017 - present).[80] They posit that the BVerfG functions as a point of reference for comparative studies on the drafting of constitutional complaints in the MKRI for the following reasons, Firstly, a constitutional complaint constitutes a component of a constitutional review, a process which Indonesia and Germany adopt similarly. *Secondly*, regarding the respective legal traditions, it is evident that both Indonesia and Germany are situated within the same legal tradition, namely civil law tradition. Thirdly, Germany is one of the countries that was referenced during discussions about the establishment of a MKRI at the meetings of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly.[81]

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77 Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara" [Constitutional Complaint and Constitutional Question and the Protection of Citizens' Constitutional Rights], *Jurnal Media Hukum* [Journal of Legal Media] 19, no. 1 (2012): 152–65.

78 Indonesian version: *Model constitutional review pada MK Jerman dan MKRI sama, yaitu merujuk pada model constitutional review Eropa dan secara tradisi hukum (legal tradition) Indonesia dan Jerman juga berada dalam tradisi hukum yang sama, yaitu tradisi civil law. Pengadilan Konstitusi Jerman adalah salah satu dari pengadilan konstitusi di dunia yang secara tegas memiliki wewenang constitutional complaint yang diatur dalam konstitusi dan Undang-undang MK Jerman* [The model of constitutional review in the German Constitutional Court and the Indonesian Constitutional Court is the same, namely, it refers to the European model of constitutional review, and by legal tradition Indonesia and Germany also belong to the same legal tradition, namely the civil law tradition. The German Constitutional Court is one of the constitutional courts in the world that expressly has the authority of constitutional complaint as regulated in the constitution and the German Constitutional Court Act].

79 I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens' Constitutional Rights," *Constitutional Review* 3, no. 1 (May 2017): 4–5.

80 I Dewa Gede Palguna, Saldi Isra, and Pan Mohammad Faiz, *The Constitutional Court and Human Rights Protection in Indonesia* (Jakarta: Rajawali Pers, 2022), 186–88.

81 I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara* [Constitutional Complaint: Legal Remedies for Violations of Citizens' Constitutional Rights] (Jakarta: Bumi Aksara, 2013), 1–740.

In the context of the Indonesian legal system, the Lüth case, the Soldier are murderers case, the Right to be forgotten case, and several cases that occurred in 2024 and 2025 in BVerfG are of particular interest and inspiration for a legal order that prioritises the protection of constitutional rights. In the Lüth case, the primary issue raised is a Hamburg Civil Court judgment that has been legally enforceable, yet is regarded as violating freedom of expression in the Basic Law. The Soldier-Murderer case is a criminal court judgment that contradicts the freedom of expression guaranteed in Article 5 (1) of the German Basic Law. Hence, the Right to be Forgotten case is a German Supreme Court decision that contradicts Article 2(1) in conjunction with Article 1(1) of the German Basic Law. These cases are of particular significance as they concern civil and criminal law cases, which are typically disputes between individuals, and are adjudicated by the BVerfG due to their impact on freedom of expression. In the German legal system, if a judge in a criminal or civil court decides a case that conflicts with the human rights guarantees in the constitution, the decision must be overturned by the BVerfG. In contrast, the Indonesian legal system operates within a distinct framework, where constitutional law and civil/ criminal law are considered separate entities. As a result, decisions issued by civil and criminal judges cannot be reviewed by the MKRI.

A review of the data cases of the BVerfG reveals a common thread: criminal and civil court decisions that have permanent legal force and no further legal recourse can be the subject of constitutional complaints in the BVerfG. In MKRI practice, there are several cases related to constitutional complaints on criminal cases, namely the Lèse-majesté case, Utomo, Wijaya – Lubis cases:

1. Lèse-majesté case

The MKRI's decision on the lèse-majesté case demonstrates the implementation of criminal justice through the utilisation of the abstract mechanism of judicial review. The aforementioned cases were initiated by two Indonesian citizens, namely Eggi Sudjana and Pandapotan Lubis. Stefanus Hendrianto's commentary on the lèse-majesté judgement underscores the

significant ramifications it has for the Indonesian legal system, asserting that:[82] "...Lèse majesté articles are irrelevant in a democratic state like Indonesia because they could negate the principle of equality before the law, and moreover, it could harm the freedom of expression, freedom of information, and the principle of legal uncertainty". The lèse-majesté decision has been categorised as a "weak decision". However, it still poses challenges in terms of protecting constitutional rights. MKRI's decision merely pertained to the cancellation of articles in the Indonesian Penal Code, and it was unable to extend the protection of constitutional rights to criminal cases currently under adjudication in the Criminal Court of Jakarta Pusat. When viewed in the context of the theory of constitutional rights protection in the practice of concrete judicial review, this decision is weak. It lacks binding force for the criminal court, thereby not guaranteeing fair legal certainty for the applicants.

Furthermore, in accordance with the provisions enshrined in MKRI Law No.24/2003, the defamation article in question has been annulled and is no longer subject to any legally binding constraints, given that it was pronounced during a session that was open to the general public. It is therefore erroneous for the judge at the Criminal Court of Jakarta Pusat to have utilised the revoked article in his case. Instead, the Judges at the Criminal Court considered that "MKRI's decision cannot apply to previous criminal cases and applies to future cases of defamation of the President".[83] In this case, the Criminal Court of Jakarta Pusat proceeded with the criminal trial and sentenced the petitioners to three months' imprisonment. In the cassation process, the Indonesian Supreme Court upheld this decision No. 153 PK/PID/2010, which stated that:[84]

> "The act committed/charged against the accused occurred on 3 January 2006, while the MKRI decision was handed down on 6 December 2006. Consequently, the case a quo does not apply retroactively and cannot be considered based on the MKRI cecision.[85]

[82] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 83.

[83] Pengadilan Negeri Jakarta Pusat [Central Jakarta District Court], Decision No. 1411/PID.B/2006/PN.JKT.PST, 20.

[84] Mahkamah Agung Republik Indonesia [Supreme Court of the Republic of Indonesia], Decision No. 153 PK/PID/2010, 18

[85] Indonesian version: *Perbuatan yang dilakukan/didakwakan kepada Terdakwa terjadi pada tanggal 3 Januari 2006 sedangkan Putusan Mahkamah Konstitusi dijatuhkan pada tanggal 6 Desember 2006 sehingga terhadap perkara a*

In this case, the decisions of the MKRI and the Indonesian Supreme Court demonstrate a lack of harmony in the judiciary's understanding of the constitution, with conflicting decisions actually undermining the structure of the rule of law based on Pancasila. This is undoubtedly due to the absence of a constitutional complaint mechanism, as there would never be a conflict between an abstract judicial review decision and a court decision in a specific criminal case. Abstract judicial review decisions have implications for legislation and its impact on the legal system, whereas concrete judicial review has an impact on ongoing criminal proceedings. The constitutional complaint mechanism can be invoked after all other mechanisms have been exhausted. In this case, ideally, a constitutional complaint mechanism could be used to re-examine Indonesian Supreme Court decision No. 153 PK/PID/2010, with the main point being that the Indonesian Supreme Court's decision contradicts the MKRI decision.

2. Utomo case

The Utomo case involves hate speech, which was an action taken by the applicant in the form of a demonstration against the government, particularly the Reconstruction and Rehabilitation Agency (Badan Rekonstruksi dan Rehabilitasi/ BRR), which handled rehabilitation issues after the 2004 tsunami in Aceh and Nias. MKRI's decision on the Hate Sowing case was a case characterised as a constitutional complaint that used an abstract judicial review mechanism. The case was filed by R. Panji Utomo, an Indonesian citizen and a doctor, as well as the Director of FORAK (*Forum Komunikasi Antar Barak*), a communication forum for refugees following the earthquake and tsunami that struck Aceh and Nias. Utomo organised a peaceful demonstration to highlight what he perceived as the misappropriation of funds by the BRR for victims of the earthquake and tsunami.

Consequently, Utomo was apprehended and convicted of perpetrating an act of criminal defiance against the public interest, specifically characterised

quo tidak berlaku surut dan tidak dapat dipertimbangkan berdasarkan putusan MKRI tersebut [The act committed/ alleged against the defendant occurred on January 3, 2006, whereas the Constitutional Court's decision was rendered on December 6, 2006; therefore, in the *a quo* case, it does not apply retroactively and cannot be considered on the basis of that Constitutional Court decision].

by the expression of sentiments of hostility, hatred or contempt towards the Government of Indonesia. He was tried and sentenced to three months of imprisonment based on the decision of the Criminal Court of Banda Aceh No. 232/Pid.B/2006/PN/BNA dated 18 December 2006 because he was found guilty of committing the crime as set out in Articles 154 and 155 of the Indonesian Penal Code. The applicant did not appeal to the Criminal High Court of Aceh (*Pengadilan Tinggi Aceh*) and the Indonesian Supreme Court, and the decision is legally binding.

The case involved a critique of the government's performance in overseeing post-tsunami rehabilitation, without naming any individual specifically. The applicant was convicted on charges of violating public order. Although MKRI cancelled the hate-sowing provision, it did not order the criminal court of Banda Aceh to change its decision in accordance with the decision. In the context of protecting human rights in relation to criminal cases, MKRI was only able to annul the norm; its decision, however, did not correct the decision of the Criminal Court of Banda Aceh, which had incorrectly applied the article.

The limitation argument employed by MKRI is particularly pertinent when considering the applicant's experience, the act of criticism in demonstrations carried out by the applicant and other communities, and the alleged "disturbance of public interest" as asserted by the Public Prosecutor. The demonstrations in question were organised to demand transparency and accountability from the institution responsible for the rehabilitation of the earthquake and tsunami. The demonstrations were intended to ensure that "displaced communities get their rights". However, it should be noted that this limitation decision cannot be applied retroactively by "cancelling a previous district court decision", as is the case with the legal implications of the constitutional complaint mechanism in the BVerfG. Despite the declaration of nullity of Articles 154 and 155 of the Indonesian Penal Code by the MKRI, the applicant in this case was still subjected to a 3-month prison sentence.

The Utomo case is a constitutional complaint because it essentially challenges the decision of the Criminal Court of Banda Aceh to impose a prison sentence for an act that falls under the category of freedom of expression (criticising the government's performance). However, because the MKRI does not have a constitutional complaint mechanism, the case was filed using the abstract judicial review mechanism, which essentially challenges the legal norm/article in the Indonesian Penal Code that formed the basis of the criminal court decision. From the perspective of international judicial review practices in various countries, including Germany, filing a constitutional complaint through the abstract judicial review mechanism is inappropriate because the subject matter of the dispute and the basis for assessment are different. Ideally, in this case, the Constitutional Court could assess whether the procedure and substance of the Banda Aceh criminal court's ruling were in contravention of the constitution and human rights principles.

3. Wijaya and Lubis case

Risang Bima Wijaya is a journalist who was convicted of criminal defamation due to his reporting in the mass media. The Sleman District Court, in its decision No. 39/Pid B/2004/PN.Slmn ruled that Wijaya had been proven legally and convincingly to have committed defamation against Soemadi Martono Wonohito as referred to in Article 310 paragraph (2) in conjunction with Article 64 paragraph (1) of the Criminal Code and sentenced the applicant to 9 months' imprisonment. On 27 December 2004, the convicted person filed an appeal with the Yogyakarta High Court, and the Yogyakarta High Court decided to uphold the Sleman District Court's decision No. 39/Pid B/2004/PN.Slmn and reduce the prison sentence to 6 months. On 14 May 2005, Wijaya filed a cassation appeal with the Indonesian Supreme Court again. On 13 January 2006, the court issued a decision that essentially upheld the court of first instance's decision, sentencing the Petitioner to 6 months' imprisonment.

Furthermore, Bersihar Lubis, as a columnist/journalist, was reported for committing the criminal offence of defamation or libel against the National Public Prosecutor as stipulated in Article 310 paragraph (1), Article 316, and Article 207 of the Criminal Code. Lubis's case was heard at the Depok District Court, which in its ruling No. 744/Pid.B/2007/PN.DPK found Lubis legally and convincingly guilty of a criminal offence and sentenced him to one month in prison with a three-month probation period.

Wijaya and Lubis rejected the judgments of both Sleman and Depok criminal courts and submitted constitutional complaints to the MKRI through the abstract judicial review mechanism. The constitutionality of the dispute was examined in relation to Articles 310(1), 310(2), 311(1), 316, and 207 of the Indonesian Penal Code in conjunction with the 1945 Constitution. However, in its decision No. 14/PUU-VI/2008, the MKRI decided that Wijaya and Lubis' petition was rejected. In this case, if the MKRI has the power to hear constitutional complaints against criminal court decisions, then the petitioners would no longer have questioned the constitutionality of article in the Indonesian Penal Code thourgh the abstract judicial review, but the main issue that the petitioners would have questioned would have been the criminal court of Sleman and Depok decisions, which the petitioners considered to be inappropriate or contrary to the guarantee of freedom of expression. Additionally, the primary objective of the petition was for the MKRI to evaluate the application of human rights principles in criminal court proceedings. If the substance and process of the trials in the Depok and Sleman criminal court decisions violate the 1945 Constitution and human rights principles, the MKRI will overturn those decisions and order the two courts to reconsider the criminal acts based on the MKRI's decision.

Furthermore, the Indonesian Judicial Commission (*Komisi Yudisial Republik Indonesia*)[86] research indicates that there are numerous complaints from individuals seeking justice (plaintiffs) and the wider community regarding the quality of ordinary judges' decisions. These include concerns about the

[86] The 1945 Constitution of the Republic of Indonesia, art. 24B(1) (*Komisi Yudisial* [Judicial Commission] is autonomous and has the authority to propose the appointment of Supreme Court justices and to safeguard and uphold the honor, dignity, and conduct of judges).

perceived unfairness of decisions and allegations of human rights violations.[87] For example, criminal and civil court decisions categorised as miscarriages of justice. A miscarriage of justice is a wrong or erroneous decision by a court of law that results in the conviction of a person even though there is insufficient evidence, or the conviction of a person who has not committed any crime. Miscarriage of justice is caused by weaknesses in the application of the law, a lack of capacity and integrity among law enforcement officials, limited valid evidence, and the existence of corruption, collusion, nepotism, and judicial mafia. Several cases of miscarriage of justice in Indonesia include the cases of Sengkon and Karta, two farmers who were convicted of robbery and murder in 1974, the case of the wrongful conviction in the murder of Asrori in Jombang, and others.

Moreover, numerous criminal and civil cases indicate judicial corruption. Simon Butt and Tim Lindsey, both Indonesian constitutional law experts from the University of Melbourne Australia have observed that the Indonesian joke, even when told by *hakim* (judges), employs the word "*hakim*" as an abbreviation for "*hubungi aku kalau ingin menang*," which translates to "contact me if you want a winner."[88] Deputy Minister of Law and Human Rights of the Republic of Indonesia 2011-2014 Denny Indrayana posited that the fundamental problem in court decisions is the judicial corruption (*mafia peradilan*), which he identified as a significant threat to the judiciary.[89] A comparable argument is put forth by Artidjo Alkostar (Supreme Court Justice 2000-2018), who posits that: "…. this judicial corruption destroys the legal system and democratisation, forms of violation of universal human rights, the dignity of the judiciary (contempt of court) and creates a situation of public distrust towards the law".[90] Chairman of the Indonesian Judicial Commission 2010-2013 Eman Suparman argues that:

[87] Sulistyowati Irianto et al., *Problematika Hakim Dalam Ranah Hukum, Pengadilan, dan Masyarakat di Indonesia: Studi Sosio-Legal* [Problems of Judges in the Sphere of Law, Courts, and Society in Indonesia: A Socio-Legal Study] (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2017), 198.

[88] Simon Butt and Tim Lindsey, "Judicial Mafia, the Courts and State Illegality in Indonesia," in Edward Aspinall and Gerry van Klinken, eds., *The State and Illegality in Indonesia* (Netherlands: Brill Publishers, 2010), 189.

[89] Denny Indrayana, *Negeri Para Mafioso: Hukum di Sarang Koruptor* [A Land of Mafiosi: Law in the Nest of Corruptors] (Jakarta: Kompas Media Nusantara, 2008), 10.

[90] Artidjo Alkostar, "*Masalah Mafia Peradilan dan Penanggulangannya* [The Problem of Judicial Mafia and Its Countermeasures]," *Jurnal Hukum* 9, no. 21 (September 2002): 1.

> "...in fact, the judicial corruption creates manipulated legal cases, both civil and criminal, starting from the process of investigation, prosecution, correctional institutions, to decisions. In the end, it is a game of power that determines the law, both money and political power".[91] Judicial corruption involves judges, prosecutors, lawyers and suspects influencing verdicts, for example, acquitting defendants who have clearly committed murder, among other things.

The proposal for the constitutional complaint on criminal and civil court judgements has implications for the structure of the Indonesian rule of law system, as well as for reforming the national legal system to achieve better human rights protection. First, the mechanism of constitutional complaint against criminal and civil court judgements strengthens the concept of the Pancasila rule of law. In a State based on the rule of law, there must be a guarantee of legal dispute resolution if an ordinary court decision harms the public, whether it involves a violation of the principles of a fair trial by criminal and civil court judges or a violation of the applicant's constitutional rights. From the rule of law perspective, every person should have the right to a fair trial and fair criminal and civil court decisions, and the State must fulfil this right, especially as evidence of its commitment to implementing the law based on the Constitution and human rights principles. In the context of criminal and civil law perspectives in Indonesia, the process for filing objections to court decisions is through the mechanisms of appeal, cassation, and case review (*peninjauan kembali kasus*). However, in the context of constitutional law and human rights, the constitutional court or an equivalent court can examine whether the criminal and civil court decisions are contrary to the constitution or human rights principles.

Second, strengthening the human rights and constitutional rights of citizens. Ideally, a court decision should not conflict with the constitution and human rights principles, so in the context of human rights, it is necessary to guarantee the protection of these constitutional rights, and there must be an institution

[91] Eman Suparman, "Menolak Mafia Peradilan: Menjaga Integritas Hakim—Menyelaraskan Perbuatan dan Nuraninya" [Rejecting the Judicial Mafia: Safeguarding Judicial Integrity—Aligning Conduct and Conscience], *Jurnal Hukum & Pembangunan* [Journal of Law and Development] 47, no. 1 (2017): 63.

that can overturn ordinary court decisions if they are proven to conflict with the constitution and human rights principles. In addition, this mechanism also strengthens the democratic order and civil society, as it enhances the guarantee of freedom of expression in Indonesia. In the context of checks and balances between the Indonesian Constitutional and the Supreme Courts, this system is ideal in that three Justices are elected by the Supreme Court, and Justices assess whether ordinary and Supreme Court decisions violate the constitution or human rights principles. This is in line with the checks and balances model between the MKRI and the legislators (the President and the House of Representatives), whereby the MKRI reviews the laws enacted by them. In addition, this mechanism aims to strengthen the principles of accountability and prudence in the judiciary and among judges when deciding criminal and civil cases, while promoting a fair criminal and civil justice system, especially in cases involving nuanced criminalisation.

Specifically, court decisions can be submitted as objects of constitutional complaints to constitutional courts in various countries around the world for several reasons: (1) Constitutional courts provide protection against judicial processes and decisions that violate constitutional rights; (2) there is a possibility that court decisions violate constitutional rights guaranteed by the Constitution; (3) violations of human rights principles in court proceedings cause constitutional rights violations of the petitioners; (4) Ordinary court judges in the process of law enforcement may be prone to errors that result in decisions that are contrary to the Constitution and cause violations of constitutional rights; (5) Ordinary court judges in the process of law enforcement may be prone to errors in interpreting certain provisions of the law, resulting in violations of constitutional rights guaranteed in the Constitution.

In the context of legal policy, there are considerable challenges in adopting constitutional complaints in the Indonesian legal system:

First, MKRI Decision No. 28/PUU-XVII/2019 rejected the addition of constitutional complaints to the authority of the MKRI. The public's desire for

the MKRI to have the power to initiate constitutional complaints was addressed by submitting a review of Judicial Powers Law No. 48/2009. In this case, the applicant requested that the MKRI interpret constitutional complaints as part of its judicial review power. The MKRI Justices dismissed the petition because, while constitutional complaints form part of the constitutionality of laws as a theoretical matter, in this particular context, they fall outside the scope of the MKRI's powers. The MKRI's power cannot be expanded through the use of constitutional interpretation. This ruling closes the possibility of adding authority through the method of constitutional interpretation.

Secondly, in Indonesian legal theory and practice, there is no constitutional complaint model for reviewing criminal and civil court decisions on the legal grounds that they violate the constitution and human rights. Currently, there are legal remedies against court decisions through the mechanism of 'criminal and civil case reviews (*peninjauan kembali kasus pidana dan perdata*) by the Supreme Court. However, this constitutional complaint regarding civil and criminal judgments differs from the concept of judicial review by the Supreme Court in criminal and civil cases. It is a form of extraordinary legal remedy designed to correct decisions that are considered unfair or erroneous. The main purpose of a review is to correct errors in final decisions, whether due to significant new evidence, judicial error, or significant changes in relevant law.

Meanwhile, constitutional complaints regarding ordinary court judgements focus on assessing whether the ordinary court's decision is contrary to the constitution and human rights principles, both in terms of the substance of the case and violations of human rights principles during the trial procedure. Substantively, for example, criminalisation that contradicts citizens' freedom of expression for criticising the government. Procedurally, for example, violations of the principles of balance between the parties in court proceedings may violate the constitutional rights of one of the parties, for example, the application of the principle of *audi el alteram partem* (hearing both sides parties of the case proportionally). Furthermore, there is a difference in the institutions that conduct

the assessment. The Supreme Court assesses the substance of criminal/civil acts based on the provisions of the law. At the same time, constitutional complaints focus on whether the court's decision is in accordance with or contrary to the constitution and human rights principles, both in terms of substance and the trial process. Additionally, there has been no academic discussion among legal experts on this issue, particularly regarding the interpretation of general court decisions that violate human rights. Furthermore, likely, the Supreme Court, lower court judges, and legal experts will reject this proposal.

Legal policy in adding constitutional complaint powers over criminal and civil court judgements to the MKRI is not an easy task. It requires a strong commitment from all components of the main state institutions, the President, the Constitutional Court, the Supreme Court, the House of Representatives, the People's Consultative Assembly, and other state institutions. The constitutional interpretation approach is relatively challenging to apply when granting such power, as demonstrated by the arguments of several Justices in the aforementioned MKRI decisions. Furthermore, legal policies related to the addition of power through the revision of the MKRI Law No.24/2003 are very possible to be carried out by the President and the DPR as legislators if we refer to the pattern of adding power in the BVerfG and German legal system pratices, because the constitutional complaint model at the BVerfG was first regulated in the BVerfG Law and was not regulated in the German Basic Law. Additionally, a significant policy development is the addition of power through the Fifth Amendment of the 1945 Constitution, which modifies Article 24C of this constitution.[92] This amendment redesigns the paragraph that clearly regulates the provisions of abstract judicial review, concrete judicial review, and constitutional complaints.

[92] Tanto Lailam, Putri Anggia, and Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (September 2022): 693–719.

V. CONCLUSION

In the German legal system, the BVerfG's power to hear constitutional complaints regarding criminal and civil judgments falls under the jurisdiction of constitutional complaints. This power is a highly popular legal mechanism that significantly contributes to the protection of citizens' constitutional rights. Based on data from 2020 to 2024, approximately 85% of all decisions involved constitutional complaints on ordinary court decisions, including those from criminal and civil courts. Some well-known cases include the Luth case, the Soldiers are murderers, the Right to be Forgotten, and others. The Luth case was a BVerfG ruling that overturned a Hamburg civil court ruling and has become a landmark ruling in the field of freedom of expression in Germany and Europe. The "Soldiers are Murderers" case was a BVerfG ruling that cancelled a decision made by several criminal courts because it violated the constitutional rights of citizens. Meanwhile, the Right to be Forgotten case was a BVerfG ruling that overturned a German Supreme Court judgment. The BVerfG's primary consideration in several of these rulings was that the criminal and civil court rulings had violated the constitutional rights of citizens as clearly stipulated in the Constitution, particularly in relation to the guarantee of freedom of expression in Article 2(1), Article 5(1) of the German Basic Law.

In the future, this may be adopted as the power of the MKRI through a constitutional amendment process. It is certainly driven by the large number of constitutional complaints related to criminal courts that have been resolved through the abstract judicial review mechanism, as well as concerns about injustice and judicial corruption in the general courts. The Lese Majeste, Utomo, Wijaya, and Lubis cases are constitutional complaints that were resolved through the mechanism of abstract judicial review. This resolution mechanism is a weakness in the protection of constitutional rights, because the main issue is the applicant's rejection of the "criminal court decision," but what is being reviewed is the constitutionality of the articles in the Indonesian Penal Code. The purpose of this proposal is to enhance the protection of citizens' constitutional

rights against all court decisions that infringe upon these rights. At the same time, it serves as a counterbalance to court decisions based on the values of Pancasila, the 1945 Constitution, and human rights principles.

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