

# THE NEED FOR A CONSTITUTIONAL COMPLAINT MECHANISM FOR TAX MATTERS IN INDONESIA

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## Abstract

Currently, there is no available mechanism for directly protecting taxpayers' constitutional rights from potential violations resulting from tax regulations and policies in Indonesia. The Constitutional Court's authority for constitutional review, the Supreme Court's authority for judicial review, and the administrative appeal process before the State Administrative Court all fail to provide sufficient protection for taxpayers' constitutional rights. This article proposes the introduction of a constitutional complaint mechanism for tax matters in Indonesia, as a mechanism to directly protect these rights. The constitutional complaint process ensures direct conformity between the reviewed regulation or policy and the Constitution, with an emphasis on the application of a proportionality test. This test serves as a valuable tool for assessing the balance between taxpayers' constitutional rights and the government's duty to collect taxes. Striking this balance is essential for advancing the exercise of political

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accountability in taxation. This study employs a normative-empirical methodology, combining case law studies and theoretical perspectives to conceptualize the use of constitutional complaint against tax regulations and policies in Indonesia. The main finding of this research shows that the current constitutional review mechanisms put taxpayers at a disadvantage. Therefore, the authors conclude that the establishment of a constitutional complaint process will improve the protection of taxpayers' rights.

**Keywords:** Constitutional Complaint; Constitutional Court; Indonesia; Tax Regulation.

## I. INTRODUCTION

This article examines procedures for testing whether tax regulation and policy comply with constitutional limitations under Indonesian law. It identifies a gap in the availability of constitutional review by Indonesia's Constitutional Court (hereinafter, the Court) and proposes amendments to the laws governing the Court's operation. These proposed amendments would allow the Court to assess and review the constitutionality of tax regulation and policy. In the debates on constitutional complaint among constitutional law scholars in Indonesia, two distinct opinions have emerged. The first argues that the Court's competence for constitutional review falls short in adequately protecting constitutional rights, necessitating the adoption of an alternative procedure.<sup>1</sup> On the other hand, the second opinion holds that constitutional review is not the exclusive means of protecting constitutional rights, therefore a new procedure is unnecessary.<sup>2</sup> This article stands with the first opinion, asserting that the existing mechanisms are inadequate to protect constitutional rights, especially those of taxpayers, from

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<sup>1</sup> Nilwan Zen, Untung Hananto and Amalia Diamantina, "Jaminan Hak-Hak Konstitusional Warga Negara Dengan Implementasi Constitutional Complaint Melalui Mahkamah Konstitusi Di Negara Kesatuan Republik Indonesia (Studi Pelaksanaan Constitutional Complaint Di Korea Selatan) [Ensuring Citizens' Constitutional Rights by Implementing Constitutional Complaint through the Constitutional Court in the Unitary State of the Republic of Indonesia (A Study on the Implementation of Constitutional Complaint in South Korea)]," *Diponegoro Law Review* 5 (2016): 20, <https://doi.org/10.14710/dlj.2016.10809>; Heru Setiawan, "Mempertimbangkan Constitutional Complaint Sebagai Kewenangan Mahkamah Konstitusi [Considering Constitutional Complaints as the Authority of the Constitutional Court]," *Lex Jurnalica* 14, no. 22 (2017): 22, <https://doi.org/10.47007/lj.v14i1.1781>.

<sup>2</sup> Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara [Constitutional Complaints and Constitutional Questions and Protection of Citizens' Constitutional Rights]," *Jurnal Media Hukum* 19 (2012): 164, <https://doi.org/10.18196/jmh.v19i1.1984>.

potential abuse through the implementation of tax regulations and policies governed by taxation laws.

There are three prominent cases that illustrate how judicial review before the Court is insufficient in protecting taxpayers' constitutional rights, namely Case No. 63/PUU-XV/2017, Case No. 102/PUU-XV/2017, and Case No. 41/PUU-XVIII/2020. The first case was submitted by a tax lawyer who argued that his constitutional rights to equal treatment and standard of living were breached by Article 32 (3a) of the Law on General Provisions and Procedures for Taxation (the Tax Procedures Law)<sup>3</sup> concerning the discretionary power of the Minister of Finance to determine the terms and scope of the rights and obligations of tax lawyers. The second case centered around the claim that the Law on Access to Financial Information for Tax Purposes<sup>4</sup> has breached the constitutional right to equal treatment, the right to privacy, and the right to property. The third case focused on a review of Article 2(6) of the Tax Procedures Law,<sup>5</sup> addressing the discretionary power of the tax authorities to revoke a Tax Identification Number, and Article 32 (2), concerning the personal liability of a company's representation (i.e., board of directors) and its exemption determined by the discretionary power of the tax authority.

The above cases indicate the government is granted significant discretionary power in tax collection matters, including the enforcement of tax regulations and policies. It is therefore necessary to strike a balance between governmental authority and the rights of taxpayers. The Tax Procedures Law, in mandating the issuance of no fewer than 10 ministerial regulations, has inadvertently paved the way for conflicts between tax regulations and constitutional rights. One notable example is a regulation specifying that only a chartered tax consultant is eligible to represent a taxpayer in litigation. This particular clause has the potential to introduce unwarranted limitations on the qualification of taxpayers' representation, as determined by ministerial regulation discretion.

<sup>3</sup> At the time of review, the applicable law was Law No. 6 of 1983 on General Provisions and Procedures for Taxation, as amended by Law No. 28 of 2007.

<sup>4</sup> Law No. 9 of 2017 on Access to Financial Information for Tax Purposes.

<sup>5</sup> Law No. 6 of 1983 on General Provisions and Procedures for Taxation, as amended by Law No. 28 of 2007.

From a constitutional law perspective, this regulation has the potential to encroach upon the rights of a licensed advocate, specifically in terms of occupation and equal treatment. By stipulating that only chartered tax consultants can represent taxpayers, the regulation may hinder the advocate's ability to carry out professional duties and receive due compensation. Even in the absence of a mandated regulation, the provision within the Tax Procedures Law raises constitutional concerns when implemented in an unjustified manner. For instance, the indemnification of tax debts to a dissolved corporation's board member could infringe upon the individual's right to property. This occurs when the indemnification leads to the confiscation of personal assets. Concurrently, Indonesia has been utilizing numerous multilateral tax instruments, which arguably have influenced the trajectory of its tax laws. Notably, bank secrecy regulations were eased to facilitate the exchange of taxpayers' information, provided by domestic financial institutions, with treaty partners. This adjustment, made in the pursuit of a sustained global effort against tax avoidance and evasion, raises concerns about the compromise of citizens' rights to privacy. Without the presence of a constitutional complaint system, the ratification of these treaty laws could potentially impose limitations on constitutional rights, including the right to property and the right to privacy.

Unfortunately, there is no available procedure in the current legal framework to test the constitutionality of such regulations and policies, although there are three available judicial review mechanisms in Indonesia: (1) constitutional review before the Court; (2) judicial review before the Supreme Court; and (3) administrative appeal before the State Administrative Court. The problem with the first procedure is that the Court only has the authority to review the constitutionality of laws. This means that implementing regulations, including Ministerial Regulations, fall outside the Court's jurisdiction, even if they potentially violate the constitutional rights of taxpayers. On the other hand, the Supreme Court, as the second available option, can conduct a judicial review of such regulations. However, the review does not involve a direct examination of the regulation against the Indonesian Constitution. The third procedure is the State

Administrative Court, which is limited to reviewing specific, final, and individual administrative decisions and policies (decrees) based on actual cases. Similar to the Supreme Court's procedure, constitutional articles are not directly applied in examining cases before the State Administrative Court. This gap in the existing legal mechanisms underscores the need for a dedicated avenue to evaluate the constitutionality of regulations and policies beyond the scope of legislative acts.

The absence of a procedure to review these regulations and policies threatens the effective implementation of constitutional rights in Indonesia. It is our contention that this legal gap can be remedied by introducing a constitutional complaint mechanism into the Indonesian legal system. Such a mechanism would represent a significant step forward in protecting constitutional rights, especially those of taxpayers, by providing a means to assess the constitutionality of any regulation and policy that potentially infringes upon constitutional rights. To highlight the importance of having a specific constitutional complaint mechanism for taxation issues, this article addresses two main questions: (1) why is it important to introduce a constitutional complaint mechanism against tax regulation and policy in Indonesia; and (2) how should a constitutional complaint mechanism for tax regulation and policy be incorporated into the Indonesian legal system?

## II. METHOD

As this research proposes to design a constitutional complaint system, it is framed using a combination of normative and empirical data. In doing so, the law is directly connected to analyzing the empirical context it seeks to address. Its significance becomes apparent when considered in relation to that situation, recognizing the role it plays in establishing, sustaining, and influencing changes within that context. Furthermore, a carefully designed theoretical lens is used to conceptualize the proposed modelling to accommodate the institutionalization of constitutional complaint against tax regulation and collection in Indonesia.

### III. ANALYSIS AND DISCUSSION

#### 3.1. Reasons for Introducing A Constitutional Complaint Mechanism for Tax Matters in Indonesia

There are at least five reasons for establishing a constitutional complaint mechanism against tax regulation and policy in Indonesia: (1) it is necessary to redefine the philosophical relationship between the government and taxpayers, considering perspectives such as *res publica* (public matters) and the benefit principle of taxation; (2) practically, a proportionality test is required to balance between the constitutional rights of taxpayers and the constitutional mandate of the government to collect taxes; (3) empirical findings indicate the constitutional review mechanism has not adequately protected taxpayers' constitutional rights, hence any potential breach of rights must be reframed as an issue of constitutionality; (4) the likelihood of violating taxpayers' constitutional rights has increased, particularly with the ratification of multilateral tax treaties; (5) the discretionary power vested in the government requires that liability is guaranteed by reviewing whether its exercise of power violates taxpayers' constitutional rights from the perspective of legal certainty.

##### 3.1.1. Redefining Political Accountability on Taxation

Political accountability is necessary for building trust and a fair relationship between taxpayers and the government. If there is no political accountability, the government and taxpayers will not have any mutual trust. In the absence of such trust, tax avoidance and evasion are more likely to occur, which in turn means greater loss of tax revenues. Under such conditions, the government will eventually be unable to provide social welfare. In this context, borrowing the idea of consumer sovereignty to illustrate the relationship between taxpayers and the government is appropriate. The idea of consumer sovereignty is explained by Martin Lodge as "accountability-related debates need to consider what public services actually seek to achieve rather than regard accountability as an end in itself".<sup>6</sup> In tax collection, political accountability requires the government to

<sup>6</sup> Martin Lodge, "Accountability and Consumer Sovereignty," in *Accountability and Regulatory Governance*, ed. Andrea C. Bianulli (London: Palgrave Macmillan, 2015), 235.

provide a reasonable framework to improve the voluntary compliance of taxpayers. Further analysis of this matter can be best described using the *res publica* and benefit principles.

The *res publica* principle holds that a government is elected by the people to manage public matters.<sup>7</sup> In the *res publica*, tax must be paid by the people and used to fund the administration of public matters by the government.<sup>8</sup> The relationship between taxpayers and the government can be observed as revenue bargaining, which is explained by Nicholas Eubank as a process through which, “government dependency on local sources of revenue provided those in control of economic assets with significant leverage over the government which they were able to use to demand the development of more accountable and representative political institutions”.<sup>9</sup> Sovereignty of the people plays an important role in balancing the power of the government. In this regard, Mick Moore explains that “the dependence of governments on tax revenue encourages bargaining with taxpayers and an exchange of (quasi) voluntary compliance over tax payments for institutionalized influence over public policy”.<sup>10</sup> Therefore, it is legitimate to institutionalize a constitutional complaint mechanism in tax regulation and policy for political accountability purposes. Taxpayers’ standing in the constitutional complaint system is meant to represent their bargaining power in public policy.

The second argument is derived from the benefit principle. Devereux et al. define the benefit principle as requiring natural and legal persons to contribute their fair share for the receipt of public goods and services within the jurisdiction where they conduct business operations.<sup>11</sup> This does not imply a direct correlation between the amount of taxes paid and the specific public goods and services an individual receives from the government. Instead, it signifies that each individual is obligated to pay taxes in proportion to the benefits they receive.<sup>12</sup> Although

<sup>7</sup> Louise Hodgson, *Res Publica and The Roman Republic: Without Body or Form* (Oxford: Oxford University Press, 2017), 50.

<sup>8</sup> Hodgson, *Res Publica and The Roman Republic*, 50-51.

<sup>9</sup> Nicholas Eubank, “Taxation, Political Accountability and Foreign Aid: Lessons from Somaliland,” *Journal of Development Studies* 48, no. 8 (2012): 465, <https://doi.org/10.1080/00220388.2011.598510>.

<sup>10</sup> Deborah A. Bräutigam, Odd-Helge Fjeldstad and Mick Moore (ed.), *Taxation and State-Building in Developing Countries* (Cambridge: Cambridge University Press, 2008), 35.

<sup>11</sup> Michael P. Devereux, Alan J. Auerbach, Michael Keen, Paul Oosterhuis, Wolfgang Schön, and John Vella, *Taxing Profit in a Global Economy* (Oxford: Oxford University Press, 2021), 58.

<sup>12</sup> Liam Murphy and Thomas Nagel, *The Myth of Ownership* (Oxford: Oxford University Press, 2002), 84.

this principle holds operational implications, such as supporting a progressive-rate income tax, it remains an ideal concept. Its practical application hinges on determining the extent to which the marginal utility of income diminishes.<sup>13</sup>

From taxpayers' perspectives, it is important to earmark their taxes with the benefits received. This idea begins with the notion that "fairness in taxation requires that taxpayers contribute in proportion to the benefit they derive from government".<sup>14</sup> While the idea of *res publica* places the taxpayers as stakeholders of the state and thus given the role as a check on the government, the benefit principle sees the relationship between taxpayers and government more simply as 'transactional'. By this logic, taxpayers pay the government in return for benefits. Taxpayers have expectations of what benefits should they receive when they pay a certain amount of tax. Reciprocally, the same logic can be applied by the government in expecting better voluntary tax compliance if the government provides more benefits for to taxpayers and the public in general. Therefore, if the government offers its taxpayers a right to oversee it by giving them standing in the constitutional complaint system, then it can expect greater tax compliance. For the purpose of this article, this principle should be understood in its ideal form, in the sense that it is used to justify taxation by the government. It must be kept in mind that Article 1 of the Tax Procedures Law stipulates that taxes are paid without any tangible compensation claimable against the government. This means that it is virtually impossible to apply the principle in any operational sense.

To sum up, the assignment of a legal standing for taxpayers in a constitutional complaint system will be beneficial to both government and taxpayers by advancing political accountability. This is true, even when the power to hold proceedings on such complaints is vested to a power other than the executive (i.e., the judicial branch of power). The political accountability concept is unique to the relationship between taxpayers and government. It is also beneficial as to provide taxpayers with a stronger bargaining position with the government.

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<sup>13</sup> Murphy and Nagel, *The Myth of Ownership*, 82-83.

<sup>14</sup> *Ibid.*



### 3.1.2. Balancing Taxpayers' Constitutional Rights

With regard to taxation, the act of balancing includes assigning due weight to taxpayers' rights to privacy, property, and equal treatment, alongside the state's authority to impose taxes. These rights are protected by the provisions laid down in the Indonesian Constitution, particularly in Article 28G paragraph (1), Article 28H paragraph (4), and Article 28D paragraph (1). Meanwhile, the state's authority to tax is preserved in Article 23A of the Constitution. As a general rule, Article 28J of the Constitution stipulates limitations to constitutional rights, as follows: "In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society."

In a judicial proceeding of a constitutional review, the appropriation of citizens' constitutional rights might be realized through a proportionality test. Within the body of literature on constitutional law, these tests aim to establish a rational connection congruent with the objectives and determine whether the means adopted are the least restrictive measures necessary to attain those objectives.<sup>15</sup> The main element of the test involves balancing competing interests, which refers to the Court's exercise to reconcile two conflicting legitimate interests by way of classifying them into a hierarchy and determining the extent to which residual conflicts may arise.<sup>16</sup> The advantages of balancing include preventing the creation of a fictitious hierarchy of values, as it allocates specific weights to values relevant to the specific case at hand.<sup>17</sup> In many cases, the object of balancing lacks a common measurement for normative judgement.<sup>18</sup> For example, fulfillment of a citizen's right to privacy is incommensurable with the state's authority to

<sup>15</sup> Amir Attaran, "A Wobbly Balance? A Comparison of Proportionality Testing in Canada, the United States, the European Union, and the World Trade Organization," *University of New Brunswick Act Journal* 56 (2007): 261.

<sup>16</sup> Ibid.

<sup>17</sup> Niels Petersen, "How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law," *German Law Journal* 14 (2013): 1387-1388, doi: <https://doi.org/10.1017/S2071832200002315>.

<sup>18</sup> Petersen, "How to Compare," 1392.

conduct effective crime prevention through wiretapping.<sup>19</sup> The expected result is a balance of interests by which superior interests are affirmed while still allowing the inferior interests to co-exist insofar as they are compatible.<sup>20</sup>

The Court's case law on the right to privacy suggests that its protection is still upheld in a formalistic manner, instead of a substantive one. In a 2010 decision,<sup>21</sup> the Court weighed three competing interests: (1) the right to privacy; (2) the form of regulation (concerning the wiretapping interception procedure); (3) and the "instable and weak" state of law enforcement leading to potential violations of citizens' constitutional rights.<sup>22</sup> The Court held that while wiretapping constitutes restrictions on citizen's right to privacy, it serves the purpose of assisting law enforcement in solving crimes.<sup>23</sup> Moreover, the Court also held that although the right to privacy is a derogable right pursuant to Article 28J of the Constitution, the law must ensure that no abuse of power will arise.<sup>24</sup> This reasoning by the Court is consistent with its decisions in 2003 and 2006, which classified the right to privacy as non-derogable, and therefore its exercise may be restricted by stipulation of law. However, the Court held that sporadic regulations pertaining to wiretapping, such as those found in the narcotics and terrorism eradication laws, could potentially lead to the infringement of citizens' right to privacy.<sup>25</sup>

The Court also deployed the "derogable right" argument in its judgment on the constitutionality of the Access to Financial Information for Tax Purposes Law.<sup>26</sup> The Court justified restrictions to the right to privacy based on: (1) its limited enforcement in potential tax avoidance and evasion cases; (2) its contributions to fulfilling citizens' socio-economic rights in the form of tax policy; (3) its conformity with moral and religious values, as well as the maintenance of security and public order in a democratic society; and (4) its adherence to the principle

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<sup>19</sup> *Ibid.*

<sup>20</sup> Attaran, *A Wobbly Balance?* 261.

<sup>21</sup> Judicial Review of Constitutional Court Law, Case No. 5/PUU-VIII/2010, 24 February 2011.

<sup>22</sup> *Ibid.*, para. (3.20), 68.

<sup>23</sup> *Ibid.*, para. (3.21), 69.

<sup>24</sup> *Ibid.*, para. (3.24), 72.

<sup>25</sup> *Ibid.*, para. (3.19), 68.

<sup>26</sup> Judicial Review of Constitutional Court Law, Case No. 102/PUU-XV/2015, 9 May 2018, para. (3.10), 201.

of *pacta sunt servanda* (the obligation to honor agreements).<sup>27</sup> The Court did not define the scope of privacy rights, which according to the complainant includes the right to secrecy as governed in the laws on taxation, banking, capital market, and commodity futures trading. The Court's formalistic view on the fulfillment of citizens' constitutional rights means that it refrains from determining the scope of the constitutional right itself, but instead considers the right at its face value as a derogable right. While wiretapping constitutes a restriction on the right to privacy, it must be performed by an authorized person and that the tapped information must meet the actual and accurate (*velox et exactus*) criteria.<sup>28</sup> Formal and substantive arguments are imbalanced. In order to determine whether such a formalistic view is incidental to the right to privacy or traditional to other constitutional rights, analysis of the case concerning the protection of other constitutional rights is required.

The Court's case law on the right to property suggests that the Court has attempted to balance the state's authority to impose taxes, as conferred in Article 23A of the Constitution, and Adam Smith's four canons of taxation. In a 2014 decision,<sup>29</sup> the Court held that in order to prevent an abuse of power, tax policy must be based on the principles of certainty, equality (often intertwined with equity), convenience, and efficiency. The Court eventually ruled that the elucidation of the provisions of the law on regional taxes and governmental services fees was unconstitutional.<sup>30</sup> Admissibility of the case was ensured by the Court's competence to review the constitutionality of the law, including its elucidation. The Court, in this instance, considered the balance between regional governments' interests in enhancing their taxation power and the need for legal certainty in tax policy. Legal certainty is important because it encompasses not only the procedure by which taxpayers must meet their tax obligations voluntarily but also the method by which the government must fairly protect the right to

<sup>27</sup> *Ibid.*, para. (3.10), 193.

<sup>28</sup> *Ibid.*, para. (2.4), 123.

<sup>29</sup> Judicial Review of Constitutional Court Law, Case No. 46/PUU-XII/2014, 26 May 2015, para. (3.19), 65. In this case, the elucidation of the reviewed article confers the provisional rate of services fees related to supervision and control on telecommunication towers.

<sup>30</sup> *Ibid.*, para. (5), 67.

property.<sup>31</sup> In this context, the law should articulate tax policy in the wording of the provision of a law, not in its elucidation. Unfortunately, this was as deep as the Court got in weighing taxpayers' right to property, focusing once again on the form through which taxation is regulated.

The Court's case law on equal treatment indicates an effort to balance the government's constitutional authority to impose taxes, this time with the equal treatment principle laid down in Article 28D paragraph (1) of the Indonesian Constitution. In a 2017 decision,<sup>32</sup> the Court ruled that a provision of the Tax Procedures Law mandating the issuance of an implementing regulation (i.e., Minister of Finance Regulation) on taxpayers' representation (e.g., during tax audits or litigation) is unconstitutional insofar as it is not interpreted as prescribing technical and administrative matters, and not conferring norms that either restrict or expand the rights and obligations of a citizen.

The admissibility of the case was ensured by the Complainant's material losses (i.e., the right to remuneration). These losses resulted from discriminatory actions by the tax authority, which, based on the Minister of Finance Regulation on the Requirements, Rights, and Obligations of Tax Representatives – mandated by the Tax Procedures Law – denied the petitioner complainant the right to represent his taxpayer client during tax litigation.<sup>33</sup> In its reasoning, the Court initially held that the coercive nature of tax raises the potential for the abuse of power, while taxpayers may lack tax literacy and understanding. In this regard, the tax consultant is useful in balancing the government's interests in tax enforcement while protecting taxpayers' rights.<sup>34</sup> Nonetheless, the Court advanced the case by reasoning that the actual constitutional issue revolves around whether the delegation outlined in Article 32 paragraph (3a) of the Tax Procedures Law – to issue an implementing regulation on tax representation – is in line with the Constitution, taking into account the provisions on delegation of law as construed in Law No. 10 of 2004 on the Establishment of Legislation.<sup>35</sup>

<sup>31</sup> Ibid., Case No. 46/PUU-XII/2014, 26 May 2015, para. (3.22), 66.

<sup>32</sup> Judicial Review of Constitutional Court Law, Case No. 63/PUU-XV/2017, 26 April 2018, para. (5.2), 135.

<sup>33</sup> Ibid., para. (4.2), 134.

<sup>34</sup> Ibid., para. (3.7.2), 121.

<sup>35</sup> Ibid.

The Court proceeded with the case by deploying a doctrine that allows it, for the purpose of reasoning an effective constitutional review, to render a provision of a law ineffective, even without a petition submitted against that provision. The Court further held that while the delegation of a law as such is justified, the substance of the delegated implementing regulation may not be contrary to the provisions of the Constitution. Arguably, this went beyond the authority attributed to it by the law, because the Court had assumed the tasks attributed by the Constitution to the legislative power branch. This would not have happened if the case were examined by virtue of a constitutional complaint.

All the above elaboration on the protection of the taxpayers' constitutional rights must be construed as having an equal footing within the Constitution with the state's power to impose taxes, as stipulated in Article 23A of the Constitution. This provision lays down the constitutional norm by which taxes and other government levies may be imposed, provided that the laws on those levies are enforced. The identical value of this authority with the protection of constitutional rights means that both aspects may become objects of balancing. The Court's case law on Article 23A of the Constitution suggests that the state constitutional power to impose taxes is strongly linked to state constitutional duties (e.g., promotion of people's welfare), the performance of which requires sustainable financing sources, primarily taxes. In its 2016 decision, the Court held that although the imposition of taxes constitutes a 'special right' of the state, its exercise must not be done unlawfully. Furthermore, the constitutional obligation to enact a law on the policy of taxes is actually part of the protection of constitutional rights. Furthermore, in its 2013 decision, the Court held that the constitutionality of a law can be determined based on its conformity to the principles of equality, certainty, and benefit, even after the law has been enacted.

From the above analysis, it can be concluded that there is an urgency to introduce a constitutional complaint mechanism in order to enhance the understanding of the constitutional rights of taxpayers in Indonesia. The current scope of constitutional review has led the Court to take a formalistic approach when examining cases brought before it. This holds true, as complainants must,

in order to have their case admitted to the Court, demonstrate a contradiction between one provision (or a phrase in a provision, or elucidation to a provision) of a law against one or more provisions of the Constitution. For the Court, this means that drawing the scope of the constitutional rights is merely an auxiliary function, and the Court's assumption of the task would constitute an *ultra petita* (beyond what is sought). Therefore, any potential breach of taxpayers' constitutional rights must be reconstructed considering the Court's competence of reviewing the constitutionality of a law.

### **3.1.3. The Insufficiency of Current Constitutional Review Procedure in Protecting Taxpayers' Constitutional Rights**

The third reason to institutionalize constitutional complaint stems from the inadequacy of constitutional review in protecting taxpayers' constitutional rights. This deficiency arises because constitutional review in Indonesia has applied inconsistent logic, combining the models of concrete review and abstract review. The Court requires complainants to satisfy conditions of legal standing during preliminary hearings. This means that the Court will only assess the substantial pleading if the complainant is able to prove that they have lost or will potentially lose their constitutional rights. In 2005, the Court set a precedent<sup>36</sup> and further refined it in 2007<sup>37</sup> to establish legal standing for a constitutional review, examining five conditions: (1) the complainant must possess constitutional rights guaranteed by the Constitution; (2) the complainant presumes that their constitutional right has been breached by the law under review; (3) the complainant's loss is specific and actual, or at least potentially foreseeable based on reasonable foreseeability; (4) there is a causality between the loss of the complainant and the enactment of the reviewed law; and (5) there is a good reason to expect if the application is granted, the anticipated loss will be avoided.

It should be emphasized that complainants must convince the Court on all five conditions mentioned above before the Court begins to look at the substance of a case. In most cases, even when complainants have met the legal

<sup>36</sup> Judicial Review of Constitutional Court Law, Case No. 006/PUU-III/2005, 31 May 2005.

<sup>37</sup> Judicial Review of Constitutional Court Law, Case No. 11/PUU-V/2007, 20 September 2007.

standing criteria, the Court ultimately rejects the application. According to the Court's records, out of 1,680 constitutional review applications, 529 cases were deemed inadmissible, indicating that complainants could not fulfill the legal standing criteria. Among cases that progressed through the administrative process to substantive hearings, 634 were rejected, 107 were granted, 198 were partially granted, and 14 cases were deemed unfit for the Court's consideration.<sup>38</sup> These statistics indicate the stringent nature of satisfying the legal standing requirement, highlighting the considerable challenge in convincing the Court to grant an application.

There has been a case in which a complainant managed to satisfy the legal standing criteria but was later rejected by the Court. In 2020,<sup>39</sup> the Court ruled that holding a corporation's board of directors accountable for tax obligations in the event of insolvency is tantamount to establishing legal certainty for all creditors, including the state. The Court concluded that Article 32 paragraph (2) of the Tax Procedures Law is not contrary to Article 28D of the Constitution. The Court further ruled that the imposition of tax liability falls under tax policy, which is beyond the Court's jurisdiction. This judgment, however, put creditors' rights to property at stake. The issue lies in the Court's acknowledgement that the complainant had constitutional rights, and that these rights had indeed been breached. However, the Court found that the reviewed law was not the cause of this breach. This highlighted the insufficiency of constitutional review in protecting taxpayers' constitutional rights, even though the Court has adopted the doctrine of taxpayer legal standing since 2003.

The concept of taxpayer standing was initially introduced when the Court invoked the doctrine of 'no taxation without participation and no participation without taxation' in upholding the legal standing of taxpayers to file a constitutional review. This reasoning was subsequently refined by the Court, limiting taxpayers' standing in later decisions: a taxpayer's claimed constitutional

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<sup>38</sup> "Perkara," The Constitutional Court of the Republic of Indonesia, accessed 4 September 2023 <https://www.mkri.id/index.php?page=web.Perkaraz&menu=>.

<sup>39</sup> Judicial Review of Constitutional Court Law, Case No. 41/PUU-XVIII/2020, 14 January 2021.

loss must be directly linked to the issue of taxation.<sup>40</sup> The initial introduction of taxpayer standing in 2003 aimed for broad inclusivity. The slogan ‘no taxation without participation and no participation without taxation’ reflected the importance of taxpayers at the formal level, not the substantive aspect of the reviewed law. This implied that anyone paying taxes request the annulment of a law by alleging a contradiction between the reviewed law and the Constitution, simply because the government formulates laws using their paid taxes. In this sense, the taxpayer does not need to substantively prove the content of the reviewed law, regardless of its connection to taxation. This kind of review is acceptable in the so-called ‘abstract review,’ where the Court does not need to assess the standing of the complainant. In an abstract review, the Court assesses the constitutionality of a legal norm (i.e., legislation/law) without considering specific circumstances.<sup>41</sup> The abstract review can be justified because of its aim to annul the reviewed law entirely.

The other model is the ‘concrete review,’ in which the Court assesses a specific case delivered by a complainant to review whether the law in question is constitutional.<sup>42</sup> This resembles the concept of an appeal in court proceedings. Here, one may not submit a case for constitutional review solely based on taxpayer status. Rather, the complainant must convince the Court that the case is pertinent to tax matters and that their constitutional rights have been violated by the enactment of the reviewed law (ausall *verband*/causality).<sup>43</sup> If the complainant submits a case for constitutional review of an unrelated law, for example, the Marriage Law, the Court will not consider the complainant’s status as taxpayer suitable in this case. Thus, the case will be deemed inadmissible and not proceed further.

<sup>40</sup> Dian Agung Wicaksono and Enny Nurbaningsih, “Ratio Legis Penetapan Pembayar Pajak (Taxpayer) Sebagai Kedudukan Hukum Dalam Pengujian Undang-Undang [Legal Ratio of Taxpayer Standing Determination in Judicial Review by the Constitutional Court],” *Jurnal Konstitusi* 17, no. 3 (2020): 461, 485, <https://doi.org/10.31078/jk1731>.

<sup>41</sup> Jimly Asshiddiqie and Ahmad Syahrizal, *Peradilan Konstitusi Di Sepuluh Negara* [Constitutional Justice in Ten Countries] (Jakarta: Konstitusi Press, 2006): 53.

<sup>42</sup> Asshiddiqie and Syahrizal, *Peradilan Konstitusi di Sepuluh Negara* Jimly Asshiddiqie and Ahmad Syahrizal, *Peradilan Konstitusi Di Sepuluh Negara* [Constitutional Justice in Ten Countries], 53.

<sup>43</sup> Soedarsono, *Putusan Mahkamah Konstitusi Tanpa Mufakat Bulat: Catatan Hakim Konstitusi Soedarsono* [Constitutional Court Decision Without Consensus: Notes from Constitutional Justice Soedarsono] (Jakarta: Sekretariat Jenderal Mahkamah Konstitusi, 2008), 388.



Additional requirements that taxpayers must fulfill to even reach the stage of submitting a constitutional review before the Court have made it difficult for taxpayers to obtain seek redress against infringements on their constitutional rights. They need to convince the Court on two related claims: (1) they possess constitutional rights; and (2) their constitutional rights have been breached by the law under review. Thus, if a taxpayer can only claim that they have a constitutional right, or their constitutional right has been breached by omission or by a policy made by the government, the Court will also not consider the case for constitutional review. Here, another mechanism to protect taxpayers' constitutional rights is needed, and constitutional complaint could be used to accommodate such instances.

### **3.1.4. The Potential Incompatibility of Multilateral Tax Conventions with the Constitution**

The past decade has seen a notable increase in multilateralism in governing international tax law. Among the most prominent multilateral tax cooperations that have structurally changed the mode by which domestic tax law operates is the Global Forum on Exchange of Information for Tax Purposes. This cooperation was initiated by the Group of 20 (G-20) industrialized and developing nations and formulated by the Organization for Economic Cooperation and Development (OECD). The cooperation culminated in the signing of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol, which was opened for signing on 1 June 2011. Cooperation within this convention comprises of spontaneous, automatic, and on request exchange of information; recovery (of tax claims) assistance; document services; and facilitation of joint audits. In brief, the convention aims to solve information asymmetry, which had been identified as the main challenge in the fight against tax avoidance and evasion. In itself, the cooperation is not a measure against those practices, but rather as a tool to counteract. The Mutual Administrative Convention's regulation on information exchange is implemented through the establishment of the Common Reporting Standard Multilateral Competent

Authority Agreement. As of 6 July 2021, at least 111 jurisdictions had signed the agreement.

With the purview of combating tax avoidance and evasion practices, the Indonesian government placed its signature on the convention. From a constitutional law perspective, the operation of these conventions potentially restricts taxpayers' constitutional rights, particularly their rights to data privacy and legal certainty. Indonesia signed the Mutual Administrative Convention in 2011. Following this, Indonesia issued a Presidential Regulation in 2014 to ratify the Convention, which was enacted on 21 January 2015, and entered into force on 1 May 2015.<sup>44</sup> In order to meet its commitments to the Exchange of Information cooperation, the Government enacted the Access to Financial Information for Tax Purposes Law. This law structurally changed the financial services law from a secretive to a transparent regime. Under Article 2 paragraph (1) of the law, the Director General of Taxes (tax authority) is authorized to access financial information acquired and held by financial operators in accordance with the reporting standards applicable in international tax conventions. This information comprises the personal identity of the account holder, their account number, the identity of the financial service operator, the account balance or value, and income related to the account. The rigorous transparency procedure in the Access to Financial Information for Tax Purposes Law has arguably discouraged taxpayers from exercising their right to privacy, even when no provision in the law explicitly governs this right. Being a customer (or potential customer) of a financial service operator, a person has no option other than to provide the required information, otherwise the operator would deny them any requested financial services.

The access to financial information for tax purposes has the potential to violate taxpayers' right to privacy, as it omits the obligation to oversee the protection of taxpayers' data and information. No provision of the law stipulates a method by which the government would guarantee that the acquisition, storage, and

<sup>44</sup> "Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status as of 15 July 2021," OECD, n.d., [https://www.oecd.org/ctp/exchange-of-tax-information/Status\\_of\\_convention.pdf](https://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf), accessed 25 July 2021.

transmission of financial information would be in line with international law provisions. The Common Reporting Standard Multilateral Competent Authority Agreement confers that confidentiality rules and safeguard procedures require the limited use of exchanged financial information. Also, the tax authority must specify the method by which personal data protection would be implemented. Any breach of privacy must be reported to the Coordinating Body Secretariat, which will impose sanctions and remedies consequent to the misconduct.

The omission of such rules means that taxpayers' rights to privacy are not fulfilled. Empirically, the breach of privacy has become a serious concern in Indonesia. In May 2021, news outlets reported a significant data breach involving the personal information of over 200 million Indonesian citizens, which was stored and managed by the national health insurance agency. This breach led to the unauthorized access and trade of sensitive details, including names, ID numbers, and even wage information, by the alleged hackers.

In May 2021, the news reported that personal information of 200 millions plus Indonesian citizens stored and managed by the national health insurance agency was hacked, which resulted in information such as names, ID numbers, and even wage information being traded by alleged hackers.<sup>45</sup> More recently, the leak of personal information of customers of a state-owned enterprise's insurance unit were reportedly commercialized throughout the internet.<sup>46</sup> These occurrences raise concern over the protection of taxpayers' information, particularly in the case of an inadequate domestic legal framework.

To implement its provisions, the Access to Financial Information for Tax Purposes Law grants authority to the Minister of Finance to further regulate the application procedures for the exchange of information. Subsequently, the Minister enacted the Regulation on Technical Guidance on Access to Financial Information for Tax Purposes, outlining statements and provisions concerning

<sup>45</sup> A. Muh. Ibnu Aqil, "Alleged Breach of BPJS Data Points to Indonesia's Weak Data Protection: Experts," *The Jakarta Post*, 23 May 2021, <https://www.thejakartapost.com/news/2021/05/23/alleged-breach-of-bpjs-data-points-to-indonesias-weak-data-protection-experts.html>, accessed 28 August 2021.

<sup>46</sup> Fanny Potkin and Tabita Diela, "BRI Life Probes Reported Data Leak of 2 Million Users," *The Jakarta Post*, 28 July 2021, <https://www.thejakartapost.com/news/2021/07/28/bri-life-probes-reported-data-leak-of-2-million-users.html>, accessed 28 August 2021.

the protection of taxpayer” information. The ministerial regulation asserts that taxpayer” information must be safeguarded in accordance with the provisions of international agreements. However, this provision is misleading, because as the implementing regulation of a law, it does not explicitly specify the protection of taxpayers’ right to privacy. It becomes nearly impossible for the regulation to establish a sufficient legal framework for such protection, especially in instances where the breach of taxpayers’ information is carried out by third parties (e.g., during the transmission of information to foreign tax authorities).

To sum up, the ratification of multilateral agreements in taxation has considerable potential to infringe upon taxpayers’ constitutional rights, particularly when protective measures laid down in the agreements are deliberately omitted by the government. Recent leaks of citizens’ information stored and managed by government institutions or private institutions indicates that the government must strengthen its data protection capacity. This is important, as taxpayers’ trust in the government is an important aspect in establishing voluntary compliance.

### **3.1.5. The Legal Uncertainty in Tax Regulation and Policy**

The fifth reason to introduce a constitutional complaint mechanism for tax matters in Indonesia is to guarantee the fulfilment of the government’s liability in exercising its discretionary power. This study uses Harold Laski’s definition of discretionary power, noting that is the authority of the executive “whether in matters of substance or of procedure or both, which it is free to exercise as it thinks fit”.<sup>47</sup> In the Indonesian context, discretion is subject to the review by the State Administrative Court. However, the State Administrative Court will not review discretionary power in light of the Constitution, as it falls outside Court’s jurisdiction.

Reflecting on the previous Constitutional Court cases on constitutional review in tax matters, many cases have been declared inadmissible because the object of the review is beyond the Court’s authority. The Court held in one of its decisions that the problem faced by a complainant was the result of the

<sup>47</sup> Harold J. Laski, “Discretionary Power,” *Politica* 1, no. 3 (1935): 274.

implementation of the law, thus it was not a result of any inherent fault in the legal norm itself. The Court emphasized that evaluating the implementation of the law falls beyond its authority (i.e., absolute competence), making constitutional review in this case unfeasible. This case reaffirmed that there is a need for another mechanism to protect taxpayers' constitutional rights that cannot be attained by simple constitutional review, and thus a constitutional complaint is the answer to this demand.

### **3.2. Proposal for Constitutional Complaint in Tax Matters**

This article proposes that the constitutional complaint to be incorporated into the Indonesian legal system. The proposal includes the discussion on a viable legal framework to institutionalize it; subjective and objective requirements; procedural requirements; and measuring tools in the form of a proportionality test.

#### **3.2.1. Viable Legal Framework to Introduce Constitutional Complaint in Indonesia**

The adoption of a constitutional complaint mechanism in Indonesia has been advocated by former Court justices Palguna<sup>48</sup> and Zoelva, among other scholars.<sup>49</sup> From their analyses, there are two viable legal frameworks to introduce the constitutional complaint mechanism: (1) through an amendment of the Constitution, particularly by adding a new clause on Article 24C regarding the authority of the Court; or (2) through amendment of the Constitutional Court Law. The first framework provides a more stable guarantee for the work of the Court because the Constitution is the highest law applicable in Indonesia. Furthermore, explicitly stating the authority to institute a constitutional complaint mechanism in the Constitution would establish a secure legal foundation for the Court, considering the relative difficulty in amending the Indonesian Constitution.<sup>50</sup> However, it is acknowledged that it will be difficult to incorporate a constitutional

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<sup>48</sup> I Dewa Gede Palguna, *Pengaduan Konstitusional [Constitutional Complaint]: Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara [Constitutional Complaint: Legal Effort towards Violations of Citizens' Constitutional Rights]* (Jakarta: Sinar Grafika, 2013).

<sup>49</sup> Zoelva, "Constitutional Complaint dan Constitutional Question," 164.

<sup>50</sup> Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas, 2008), 236.

complaint mechanism through an amendment of the Constitution. This is where the second option is worth considering: amending the law on the Court.

Based on his review of the German model of constitutional complaint, Palguna proposes amending Articles 51, 56, and 57 of the Constitutional Court Law to accommodate a model for constitutional complaint in Indonesia.<sup>51</sup> Departing from Palguna's idea to incorporate constitutional complaint as a new authority of the Court, this study refines the proposal further. Prescribing the legal basis for the Court's authority in assessing constitutional complaint under the Constitutional Court Law is appropriate, justified, and valid, despite its somewhat diminished legal force compared to the Court's authorities mentioned in the Constitution. This is because the Constitution makes an open legal policy about the Court's authority. The only problem that may arise is regarding the legal force because parliament can easily remove such legal basis by amending the law. This is because the law is a product of parliament that only requires the approval from president to enforce it. This means it is relatively easier to change or modify a law than to amend the Constitution. Due to the procedural difficulties in amending the Constitution, it is more feasible to use the law as the legal basis to implement constitutional complaint in Indonesia even though it will not provide a long-term guarantee for such authority to last. In practice, the Court has to be given new authority: the constitutional complaint. The authority should be added in a new chapter in the Constitutional Court Law.

Having the provided the legal framework for constitutional complaint through a legal basis (the Constitutional Court Law), the next step is to discuss the more substantial parts of the proposal: assigning legal standing, procedural requirements, implementing a proportionality test, and defining the parameters of decisions and remedies.

### **3.2.2. Framework for Operation of the Constitutional Complaint Procedure**

The assignment of legal standing for a constitutional complaint in tax matters in Indonesia should consider the aforementioned body of case law. This

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<sup>51</sup> Palguna, *Pengaduan Konstitusional* (Constitutional Complaint), 19.

approach is necessary to prevent the unjustified formulation of complaints. In this regard, the criteria for legal standing should be determined by the following factors: a) the type of constitutional rights restricted or potentially restricted by the legislative norm, law, or government omission; b) the existence of material and non-material losses or potential losses suffered by the complainant taxpayer; and c) the entry point through which complaints may be submitted by the complainant taxpayer. Criterion a) will determine the admissibility of a complaint. Meanwhile, criterion b) will determine whether a complaint is filed for concrete or abstract review, whereas criterion c) will determine whether the complainant is granted direct or indirect access to the Court.

Building on the elaboration in the previous section, it is evident that Indonesian taxpayers are most vulnerable to restrictions on their rights to privacy, property, and equal treatment. The limitation of constitutional complaint to infringements or potential infringements of these rights is, therefore, empirically justifiable. It is acknowledged that infringements or potential infringements could also arise against other constitutional rights. Nevertheless, the restriction is deemed necessary to prevent an influx of applications during its early days of adoption. Should the constitutionality review fail to protect taxpayers' other constitutional rights (e.g., the right to practice religion and beliefs, the right to education), expansion may be warranted by endowing the Court with the authority to broaden its constitutional complaint procedure to include additional, or even all, constitutional rights enshrined in the Constitution.

In line with the above rationale, such a limitation will be beneficial in filtering out cases in which taxpayers lack compelling grounds to enter into proceedings before the Court, and their application of a complaint merely constitutes an attempt to exhaust all available remedies. It also offers the advantage of allowing constitutional justices to focus on delineating the true scope of those rights. Additionally, the limitation would also acknowledge the authority of the Supreme Court and its lower courts to deploy constitutional provisions in their own proceedings, including the constitutional provisions on the protection of human rights. It is conceivable that the Constitutional Court

and Supreme Court might divide the responsibilities of examining a complaint based on the typology of constitutional rights.

Similar to the requirement for an applicant seeking a constitutionality review, the necessity for a complainant to have incurred losses resulting from unconstitutional norms or government acts or omissions may be adopted. Nevertheless, since the Court's case law discussed above shows that restrictions on taxpayers' constitutional rights could also happen without any actual loss on the part of the applicant, a complainant should be afforded with the legal standing before the Court in cases where losses are only potential, not actual. This criterion has relevance in determining whether a complainant can file for an abstract or concrete review, or both. A concrete review would resemble a constitutionality review, with the addition that courts could rule that certain norms, or government acts or omissions have restricted taxpayers' constitutional rights. This is in line with the existing legal standing conditions for applicants of constitutional review. Meanwhile, an abstract review is performed even when constitutional rights are yet to be restricted, and losses are only potential. This would be novel to the Court but required in order to protect taxpayers' rights.

Conceptually, there are two methods by which a constitutional complaint mechanism may be applied. The first is the so-called direct complaint,<sup>52</sup> by which a complainant files a complaint directly to the judicial institution entrusted with the power to hold proceedings for constitutional complaint. This involves addressing the impact of a norm, government act, or omission on the fulfillment of their constitutional rights, without an actual case being tried by another court. The second is an indirect complaint, by which a complainant may request for a complaint to be filed to the judicial institution, but through the judges who are examining the actual case in which the restriction of constitutional rights is identified.<sup>53</sup> This means that losses are actual. An advocate of indirect complaint, Pfersman, submitted that this mechanism is beneficial, as it is "settling litigation while directly minding constitutional requirements".<sup>54</sup>

<sup>52</sup> Otto Pfersman, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective," *European Constitutional Law Review* 6 (2010): 223, 234-235.

<sup>53</sup> Pfersman, "Concrete Review as Indirect Constitutional Complaint," 230.

<sup>54</sup> *Ibid.*, 229.



The authors propose that abstract and concrete review be simultaneously put in place and may be applied for in accordance with the given circumstances. Direct access may be granted in cases where the incorporation of international treaties potentially restricts taxpayers' constitutional rights, such as in the case of the omission of data protection provisions. Meanwhile, concrete review may be requested for cases involving actual losses or infringements of the rights to privacy or equal treatment. In a system where the exhaustion of all other remedies is a prerequisite, the law (or specifically, the branch of power to which the power to legislate rests) must ensure that reviews on the potential of human rights are delegated to every level of court.<sup>55</sup> It will then become the task of the court (to which constitutional complaint power is vested) to review decisions of those lower courts and perform the "constitutional complaint of precedents".<sup>56</sup>

In accordance with the two models (constitutional complaint and constitutional question) proposed in this study, a distinction in their procedural requirements is also necessary. This subchapter provides detailed procedural processes proposed to be adopted by the Court to implement constitutional complaint and constitutional question in tax matters. The procedural processes considered in this study includes terms and conditions regarding the applicant, application content, submission procedure, preliminary hearing, trial proceedings, and the final decision.

The constitutional complaint mechanism in this study is modeled to review ratified international law on taxation. In this abstract review, any taxpayer may submit an application to the Court providing the legal reasoning of at least the potential loss of constitutional rights by the existence of the law in review. Indonesia's Law on International Treaties provides that any international treaties may be ratified in form of a law or presidential decree. As a law is an object of constitutional review, it should be excluded from the object of a constitutional complaint for the sake of legal certainty. In addition, there are international

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<sup>55</sup> Chien-Liang Lee, "A Comparative Study of Judicial Review Procedure Types – The Option of Constitutional Procedure System in Reform of the Constitutional Review of Taiwan," *National Taiwan Law Review* 5, no. 73 (2010): 116.

<sup>56</sup> Lee, "A Comparative Study," 116.

treaties that have being ratified by the Indonesian government using different legal forms, including the one related to the case illustration in this study.

In the previously mentioned case illustration, the ratified law was not reviewed in relation to the Constitution. Instead, the Court reviewed the Access to Financial Information for Tax Purposes Law in line with its jurisdiction. Interestingly, the Court ruled that this law is the domestic implementing regulation of the Multilateral Competent Authority Agreement. Beyond the emerging hierarchical problem, the Court was unable to review the substance of the international treaty in this case because of its domestic legal form as a Presidential Regulation. Thus, there arises a necessity to provide a review mechanism for this kind of law.

The written application for a constitutional complaint should be submitted by the applicant directly to Court and must contain the following information: (1) applicant's identity, (2) elaboration on the international law clauses to be reviewed, (3) constitutional articles to be reviewed, (4) causality to prove the (at least potential) loss of constitutional rights by the law under review, and (5) a specified petition (request). The applicant should also attach their proof of identity as a taxpayer and a list of evidence to support their claim. The Court will register valid applications and schedule preliminary hearings.

During the preliminary hearing, the Court appoints a panel of judges to examine the legal standing and causality of the application. If the judges consider a case admissible, it will proceed to trial. However, if a case is declared inadmissible, the applicant may resubmit the case with a different reasoning (not *ne bis in idem*). The trial of the constitutional complaint should be open to the public because the decision of the review will be binding for everyone beyond the applicant. During the trial, the applicant will need to convince the judges of their claim by presenting supporting evidence.

Supporting evidence may come in the form of physical and electronic documents as well as witnesses and expert opinion. The Court may, when necessary, invite the government, as the party ratifying the international treaties, to explain the object and purpose of enacting the law in review. The judges will then deliberate and rule on the case, either granting or rejecting the application. If

the Court grants the application, the international law in review will no longer be in effect domestically and the government must inform the related international law body about the decision and adjust Indonesia's reservation accordingly. If the Court rejects the application, the law in question will remain in effect.

A slightly different procedure is proposed in the second model, namely concrete review. Many experts advocate for the adoption of this model by the Court, particularly to assist judges in handling specific cases involving constitutional issues. The concrete review in this proposal is similar to the concept of a constitutional question, which is a referral in the sense that a court or judge requests a test of the constitutionality of law to help them in resolving the case at hand. As this study tries to contextualize the proposal in the issue of taxation, the application of concrete review in this model is submitted by a tax court judge whom, at the moment of the application, is undertaking their duty to examine a concrete case of taxation that involves an issue of constitutional right. However, a taxpayer as the party in concern in the concrete case may ask the tax court judge to submit a concrete review on behalf of their case.

The object of a concrete review is the constitutionality of implementing regulation, policy and/or discretionary power in regulating tax matters. The application for constitutional questions should be in written form and submitted by the tax court judge directly to the Court. The applicant should provide their proof of active duty as a tax court judge working on the actual case to be reviewed. The application needs to explain the case position and the claimed breach of constitutional articles by the implementing regulation, policy and/or discretionary power under review. The case position should be explained in the form of causality as to see if the breaching of a constitutional right is caused by the implementing regulation, policy and/or discretionary power in review. Lastly, the applicant needs to state the request made to the Court. This is important in the formal legal procedure to give legal basis for the Court to deliver its ruling.

Because the constitutional question is directly related to an actual case proceeding in the tax court, the Court must set a time limitation to complete the constitutional question process. During the constitutional question, the actual

case proceeding in the tax court should remain suspended, pending the ruling of the Court. This is necessary to avoid legal uncertainty. For efficiency purposes, the Court should examine the case through a desk evaluation. The Court will appoint a panel of judges to review the written application and the attached documents in the preliminary hearing to decide if the case is admissible. The Court will consider if the case is admissible on the basis of legal standing and causality. If the case is declared inadmissible, the applicant may resubmit the case with a different reasoning (not *ne bis in idem*). If the case is admissible, the case will proceed to trial.

During the hearing, the Court may request that the applicant submit more documents to strengthen their case. The Court will also invite the government (tax authority) to submit a written response to the application explaining the circumstances from their point of view. The judges will deliberate on the case and render a decision to the request, determining whether the implementing regulation or policy power is constitutional. If the Court's answer to the concrete review is to declare the implementing regulation or policy in review unconstitutional, it becomes automatically void. Conversely, if the Court's answer is to declare the implementing regulation or policy in review constitutional, the implementing regulation or policy remains in effect. As a follow up, the applicant or tax court judge will reopen their case in the tax court by considering the Court's ruling.

### 3.2.3. Measuring Tools: Proportionality Test

In any of the above procedures, judges are required to use a proportionality test to weigh the competing interests of taxpayers and the government. The idea of proportionality justification was first developed in German constitutional law and then spread across much of the world with the emergence of the idea of constitutional review.<sup>57</sup> Robert Alexy, a prominent German scholar, explains the idea of proportionality tests by elaborating on three sub-principles in the principle of proportionality: suitability, necessity, and proportionality in a narrow sense.<sup>58</sup>

<sup>57</sup> See Malcolm Thorburn, "Proportionality," in *Philosophical Foundation of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2016), 305, 307; for comparison, see e.g., Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013), 1.

<sup>58</sup> Robert Alexy, "Constitutional Rights and Proportionality," *Journal for Constitutional Theory and Philosophy of Law* 22 (2014): 51, 52.

Suitability signifies that any means taken to realize an aim or principle should not obstruct any (other) aim or principle for which it has been adopted.<sup>59</sup> As an illustration, within the exchange of information for tax purposes procedure, on one hand, there is the government's interest in complying with the obligations that have arisen with the signing of the international agreement on taxation, as elaborated above. On the other hand, taxpayers' right to privacy is at stake, as demonstrated by the increase in the occurrence of personal data leaks in Indonesia. In this regard, judges need to measure the suitability of the two conflicting interests.

The second sub-principle is necessity. Under this sub-principle, if there are alternate options of means that are equally suitable, we should choose the one with less intervention than other principles.<sup>60</sup> Also, in the exchange of information for tax purposes procedure, judges need to observe whether there are other available options for the government to achieve its objective of complying with the obligations arising from the signing of international treaties. If there is another option available to achieve that objective without costing the taxpayers their right to privacy, then the government should opt for that.

The third sub-principle is proportionality in a narrow sense. Alexy calls it the law of balancing, which states, "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".<sup>61</sup> The balancing is important when conflicting rights result in unavoidable cost.<sup>62</sup> Here, a cost and benefit analysis is taken to conclude the best option with more benefits. Alexy uses a 'Weight Formula' to count the colliding principles or rights.<sup>63</sup> However, qualitative argument must be made to explain the 'Weight Formula' to avoid a simplification of numbering (quantitative calculation). To have a more qualitative sense, he uses the triadic scale that classes values as light (l), moderate (m), and serious (s).<sup>64</sup> Further, an argument must be made

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<sup>59</sup> Alexy, "Constitutional Rights and Proportionality," 51, 52.

<sup>60</sup> *Ibid.*, 53.

<sup>61</sup> *Ibid.*, 51, 52.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

when we class a value.<sup>65</sup> In our example on the exchange of information for tax purposes, judges need to measure whether exchanging taxpayers' data would contribute more benefits than costs. If exchanging taxpayers' data would sacrifice their right to privacy, the government needs to make sure that the objective outweighs the potential loss.

Only after the proportionality test has been performed, may the judges deliberate to conclude on the case. By conducting the test, the scope of taxpayers' constitutional rights will be drawn. This will assist the government in formulating future tax policy in line with the Constitution.

#### IV. CONCLUSION

It has become evident that the introduction of a constitutional complaint mechanism against tax regulations and policies in Indonesia is crucial for improving the nation's tax system. Such a mechanism would be advantageous for both the government and taxpayers in strengthening political accountability. It would also delineate the scope of taxpayers' constitutional rights, particularly on the right to privacy, the right to property, and the right to equal treatment. Constitutional complaint complements the constitutional review mechanism by providing an opportunity to assess the constitutionality of tax regulations and policies. This assessment is especially necessary in light of Indonesia's ratification of multilateral tax treaties. Additionally, a constitutional complaint mechanism would guarantee the government's accountability in exercising its discretionary power.

The authors propose a model of constitutional complaint within a viable legal framework by amending the Constitutional Court Law. The proposal includes subjective and objective criteria for legal standing comprising of restricted rights, incurred losses, and type of complaint. Procedural requirements have been structured for both abstract and concrete reviews. It is suggested that proportionality test be used to equitably weigh competing interests between taxpayers and the government.

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<sup>65</sup> Ibid.

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