Volume 9, Number 2 ❑ December 2023

Constitutional Review

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Constitutional Review is a law journal published by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia twice a year. The primary purpose of this journal is to disseminate research, conceptual analysis and other writings of a scientific nature on constitutional issues. Articles published cover various topics on constitutional courts, constitutional court decisions and issues on constitutional law, either in Indonesia or other countries. Designed as an international law journal, Constitutional Review is intended as a forum for legal scholarship that discusses ideas and insights from law professors, legal scholars, judges and practitioners.

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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

Constitutional Review, Volume 9, Number 2, December 2023

Editorial Team

TEH CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
Volume 9, Number 2, December 2023

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Note From the Editors

Constitutional Review (ConsRev) is pleased to introduce its second issue of 2023. Published biannually under the auspices of the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia, ConsRev is a distinguished and peer-reviewed publication. Dedicated to the exploration of various topics within the domain of constitutions, constitutional courts, their decisions, and the broader scope of constitutional law globally, each issue aims to provide insightful analysis and perspectives.

Our primary objective is to facilitate the dissemination of scholarly articles contributed by academics, researchers, observers, practitioners, law professors, legal scholars, and judges, both from Indonesia and around the world. Thus, ConsRev aims to contribute to the intellectual discourse surrounding legal matters and foster a global understanding of constitutional issues.

This issue contains six articles by thirteen authors from various backgrounds. The first article, **The Turkish Constitutional Court during the State of Emergency Between 2016 and 2018**, is authored by Engin Yıldırım, a Justice of the Constitutional Court of the Republic of Turkey. This article examines the judicial approach of the Turkish Constitutional Court (TCC) during the state of emergency between 2016 and 2018 in Turkey. The analysis focuses on the Court's response to the challenges of balancing the need to counter grave threats to the constitutional system with the protection of fundamental rights during times of public emergency. Furthermore, the author explores the TCC's stance in constitutionality review cases, influenced by a textualist interpretation of the constitution that explicitly prohibits the review of emergency decrees.

The second article, **Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts**, is by Simon Butt, a Professor of Indonesian Law and Director of the Centre for Asian and Pacific Law at the University of Sydney Law School. In this article, he examines the foundational principle of judicial independence as enshrined in the Indonesian Constitution, which ensures the autonomy of all courts in Indonesia. The focus of the study is on the Constitutional Court's limited number of decisions concerning the judicial independence of non-constitutional courts and judges in Indonesia. The article also evaluates whether the Constitutional Court's emphasis on strict adherence to judicial independence may, at times, unduly compromise effective judicial accountability and administration.

The third article, titled **Court-Packing Accomplished – The Changing Jurisprudence of a Subordinate Constitutional Court**, is by Zoltán Szente, Fernand Braudel Senior Fellow at the European University Institute in Florence and Research Professor of the Institute for Legal Studies at the Centre for Social Sciences in Budapest. The author looks at the impact of the global decline in democracy on the autonomy of constitutional courts, institutions crucial for upholding constitutionalism and the rule of law. While existing literature has appropriately focused on the erosion of judicial independence in various authoritarian contexts, there has been less scrutiny on the changes in the practices of these courts when subjected to direct or indirect government control. Specifically, this article explains the transformation of the Hungarian Constitutional Court subsequent to a successful court-packing maneuver by the government.

The fourth article, **Ministerial Authority in Formulating Regulations Related to Presidential Lawmaking Doctrine**, is co-authored by five writers: Charles Simabura, Associate Professor and Director of the Center of Constitutional Studies (PUSaKO) at the Faculty of Law at Andalas University; Satya Arinanto, Professor at the Faculty of Law at the University of Indonesia; Maria Farida Indrati, Professor at the Faculty of Law at the University of Indonesia; Saldi Isra, Constitutional Law Professor at the Faculty of Law at Andalas University and Deputy Chief Justice of the Constitutional Court of Indonesia; and Fitra Arsil, Professor at the Faculty of Law at the University of Indonesia. This article analyzes the basis for the formulation of ministerial regulations in a presidential system, examining ministerial regulations issued between 2005 and 2020 by 12 ministries. The analysis reveals that 65% of these regulations stem from ministerial authority, while 35% originate from higher regulatory directives. The authors argue that this unchecked proliferation of ministerial regulations deviates from constitutional principles, diminishing the role of presidential legislation serving as implementing regulations. Consequently, it shifts the regulation-making focus toward ministers, challenging the president's designated role as law executor.

The fifth article, **The Role of the Indonesian Constitutional Court in Preventing Social Conflict in a Diverse Society**, is by Rosa Ristawati, a lecturer at the Constitutional Law Department at the Faculty of Law at Airlangga University and a Distinguished Senior Fellow at the Constitutional Studies Program of the University of Texas in Austin, and Radian Salman, a lecturer at the Constitutional Law Department at the Faculty of Law at Airlangga University. This article analyzes the role of the Indonesian Constitutional Court in fostering social harmony and preventing conflicts within Indonesia's diverse society. It explores how the Court, particularly in cases related to judicial reviews and election disputes, indirectly contributes to mitigating social conflicts. The authors argue the Court plays a significant role in maintaining equilibrium amid Indonesia's diversity as its decisions indirectly have the potential to alleviate social tensions.

The final article, **The Need for a Constitutional Complaint Mechanism for Tax Matters in Indonesia**, is by Adrianto Dwi Nugroho, Associate Professor at the Tax Law Department at the Faculty of Law at Gadjah Mada University; Mahaarum Kusuma Pertiwi, a lecturer at the Constitutional Law Department and Head of the Indonesian Center for Tax Law (ICTL) at the Faculty of Law at Gadjah Mada University; and Praditya Janu Wisaksono, a Master of Laws student at Gadjah Mada University. Their article analyzes the current absence of a direct mechanism to safeguard taxpayers' constitutional rights from potential infringements arising from tax regulations and policies in Indonesia. Combining case law studies and theoretical perspectives, the authors propose the application of a constitutional complaint against tax regulations and policies in Indonesia to further the protection of taxpayers' rights.

We extend our sincere appreciation to all the contributors, reviewers, and our editorial team for their dedication in ensuring the scholarly rigor of this publication. As we embark on this new issue, we invite our readers to share their thoughts and contribute to this ongoing scholarly publication. Moreover, we are hopeful that this edition will serve as a catalyst for further discussions and inquiries within the legal community. The Editorial Team of ConsRev believes that the insights and analyses presented herein will attract interest among scholars, legal practitioners, readers, and researchers, inspiring them to contribute further to the ongoing discourse in their respective fields.

The Turkish Constitutional Court During the State of Emergency Between 2016 and 2018

Engin Yıldırım

Constitutional Review, Vol. 9 No. 2, December 2023, pp. 221-246

This article investigates the judicial approach of the Turkish Constitutional Court (TCC) during the period of state of emergency between 2016 and 2018 in Türkiye. Like its counterparts facing similar challenges, the TCC has endeavored to strike a balance between defeating grave threats to the constitutional system and defending fundamental rights in a time of public emergency. While constitutional courts should try to protect constitutional rights from executive abuse of emergency powers, they should do so without jeopardizing the effectiveness of these measures in countering threats to the nation. During the period of state of emergency, the TCC adopted a deferential stance in its constitutionality review cases arising from its textualist interpretation of the constitution, which explicitly prohibits the review of emergency decrees. However, the Court embraced a posture of rights protection in its individual applications procedure, which requires the TCC to follow case law of the European Court of Human Rights (ECtHR).

Keywords: Constitutionality Review; Individual Application; State of Emergency; Turkish Constitutional Court.

Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts

Simon Butt

Constitutional Review, Vol. 9, No. 2, December 2023, pp. 247-275

Judicial independence is a foundational principle of the Indonesian Constitution. It guarantees the independence of all Indonesian courts. However, most of the cases the Constitutional Court has handled relating to judicial independence have concerned the Constitutional Court's own independence, focusing, for example, on issues of judicial tenure and terms. This paper examines the handful of Constitutional Court decisions about the judicial independence of other courts and judges in Indonesia – that is, non-constitutional courts and judges. It examines what the Constitutional Court has said about judicial independence in relation to these other courts. It then considers whether, by emphasising (perhaps overly) strict observance of judicial independence, these Constitutional Court decisions compromise effective judicial accountability and administration.

Keywords: Constitutional Court; Corruption; Judicial Commission; Judicial Independence; Supreme Court; Tax Court.

Court-Packing Accomplished – The Changing Jurisprudence of a Subordinate Constitutional Court

Zoltán Szente

Constitutional Review, Vol. 9, No. 2, December 2023, pp. 276-296

The worldwide decline in democracy poses a major challenge to the independence of constitutional courts, which are the guardians of constitutionalism and the rule of law. The international literature on constitutional adjudication is therefore understandably concerned with how judicial independence is undermined in different types of authoritarian regimes. However, less attention has been paid to how the practice of these courts evolves when they are directly or indirectly controlled by the government. This article examines how the practices of the Hungarian Constitutional Court changed following the successful court-packing by its government, which exercised its constitution-making parliamentary majority to subvert the Court, which was once one of the most activist constitutional courts in Europe. In this case, political influence was fully exercised; this study shows how the Constitutional Court, in order to maintain a semblance of independence, uses several different methods to uphold the government's will. The Hungarian example may be instructive as it illustrates where the dismantling of judicial independence can lead.

Keywords: Constitutional Jurisprudence; Court Packing; Hungarian Constitutional Court; Judicial Independence.

Ministerial Authority in Formulating Regulations Related to Presidential Lawmaking Doctrine

Charles Simabura, Satya Arinanto, Maria Farida Indrati, Saldi Isra and Fitra Arsil

Constitutional Review, Vol. 9, No. 2, December 2023, pp. 297-331

As ministerial regulations increasingly play a larger role in government administration, they have become one of the main forms of legislation. This has resulted in a significant increase in the quantity of ministerial regulations, including those formed under the mandate of higher regulations, and those formed under the authority of ministers. According to the doctrine of making presidential laws, the president has a constitutional mandate to form implementing regulations for laws (delegated legislation). This normative research examines the basis for the formation of ministerial regulations in a presidential system. It analyzes quantitative data by using samples from ministerial regulations issued between 2005 and 2020 by 12 ministries. The analysis reveals that 65% of ministerial regulations come from ministerial authority (attribution), while 35% stem from higher regulatory directives. This has resulted in a proliferation of ministerial regulations in Indonesia. In the presidential system, the president holds the authority to formulate implementing regulations, with ministers acting as presidential aides and not lawmaking agents. Nevertheless, the unchecked formation of ministerial regulations on the basis of authority has contributed to a power imbalance, wherein ministerial regulations have gained ascendancy at the expense of presidential legislation products. This divergence from the Indonesian Constitution's Article 4, Paragraph (1), and Article 5, Paragraph (2) dilutes the role of presidential legislation products as implementing regulations. It deviates from the established tenets of the presidential system in Indonesia, wherein the president is designated as the law executor rather than the minister.

Keywords: Ministerial Authority; Ministerial Regulation; Presidential Lawmaking Doctrine.

The Role of the Indonesian Constitutional Court in Preventing Social Conflict in a Diverse Society

Rosa Ristawati and Radian Salman

Constitutional Review, Vol. 9, No. 2, December 2023, pp. 332-357

In the diverse society of Indonesia, the Constitutional Court plays a vital role in maintaining social harmony and preventing social conflict. Although this contribution is largely indirect, the Court exerts significant influence through its decisions. Since its establishment in 2003, the Court has rendered over 1,000 decisions, many of which carry profound implications for Indonesian society. This article addresses how the Constitutional Court, through its decisions, has contributed to mitigating social conflicts and fostering equilibrium within the nation's diversity. To analyze this main issue, a normative approach grounded in the nation's laws and the Constitutional Court's decisions will be employed. Several decisions, especially on judicial reviews and election disputes, will be examined to illustrate the Court's role in minimizing social conflict. From a social theory perspective, the study of social conflict has relevance in the context of law and society, given the potential for various types of conflicts in Indonesia's diverse society. The legal basis for addressing social conflicts in Indonesia is the 2007 Law on Social Conflict Management. According to this law, social conflicts may arise from various factors, including political issues, economic disparities, socio-cultural differences, inter-religious or inter-ethnic tensions, disputes over boundaries at the village, regency/municipal, or provincial levels, conflicts related to natural resources, and disparities in the distribution of these resources within society. The Constitutional Court indirectly plays a role in preventing social conflicts. Nevertheless, the Court faces challenges in fulfilling this role. Pressures from various parties and interests may hinder its ability to ensure constitutional justice, potentially compromising its principles of independence and impartiality in fulfilling its mandate.

Keywords: Constitutional Court; Court Decisions; Diversity; Judicial Independence; Social Conflicts.

The Establishment of Constitutional Complaint for Tax Matters in Indonesia

Adrianto Dwi Nugroho, Mahaarum Kusuma Pertiwi and Praditya Janu Wisaksono

Constitutional Review, Vol. 9, No. 2, December 2023, pp. 358-390

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 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.

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The Turkish Constitutional Court During the State of Emergency Between 2016 and 2018

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Abstract

This article investigates the judicial approach of the Turkish Constitutional Court (TCC) during the period of state of emergency between 2016 and 2018 in Türkiye. Like its counterparts facing similar challenges, the TCC has endeavored to strike a balance between defeating grave threats to the constitutional system and defending fundamental rights in a time of public emergency. While constitutional courts should try to protect constitutional rights from executive abuse of emergency powers, they should do so without jeopardizing the effectiveness of these measures in countering threats to the nation. During the period of state of emergency, the TCC adopted a deferential stance in its constitutionality review cases arising from its textualist interpretation of the constitution, which explicitly prohibits the review of emergency decrees. However, the Court embraced a posture of rights protection in its individual applications procedure, which requires the TCC to follow case law of the European Court of Human Rights (ECtHR).

Keywords: Constitutionality Review; Individual Application; State of Emergency; Turkish Constitutional Court.

I. INTRODUCTION

Constitutionalism has historically aimed to limit political power through a system of separation of powers and resolve conflicts that may arise between state organs. Since the second half of the last century, protecting fundamental

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rights and freedoms against encroachments by the branches of power has also become one of the most important functions of constitutionalism. Although constitutionalism derives its legitimacy from the democratic sovereignty of a nation, it endeavors to curb the emergence of authoritarian tendencies of a majoritarian democracy that may pose a threat to fundamental rights.

It is, in this context, the role of constitutional courts in many parts of the world has been to protect rights and freedoms in an increasingly challenging global political and economic environment where democracy is in decline and power-holders have become more prone to trade liberty for security. Under such circumstances, constitutional courts are being forced to utilize their authority, otherwise they may risk rendering themselves redundant. However, they should also exercise restraint to avoid overextending their constitutionally granted competencies at the expense of other branches of the state.

When there are exceptional conditions, such as the imposition of martial law or a state of emergency arising from an external or internal threat to the nation, in which rights and freedoms are inevitably curtailed to address these threats to the constitutional order, their responsibility to uphold the rule of law and protect human rights assumes a greater significance. On the other hand, writing in the aftermath of 9/11, some put forward the view that the constitution and the courts should not be limiting the emergency powers of a government.[1] For example, Mark Tushnet asserts that constitutional limitations rarely succeed in reducing the executive's propensity to exercise extreme discretion, "it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized".[2] He claims that this is necessary "in order to avoid normalizing the exception".[3] Similarly, others maintain that there may be instances where the best way to deal with grave threats is, at times, defying constitutional norms provided that

[1] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" *Yale Law Journal* 112, no. 6 (2003): 1011, 10.2139/ssrn.370800; Mark Tushnet, "Defending Korematsu? Reflections on Civil Liberties in Wartime," *Wisconsin Law Review*, no.2 (2003): 273.

[2] Tushnet," Defending Korematsu?" 306.

[3] Ibid., 307.

this measure is aptly applied.[4] Richard Posner even goes further arguing that "terrorism suspects should have no or very few guarantees in criminal proceedings against them due to the *sui generis* nature of the terrorist threat".[5]

It appears that these scholars base their arguments on dealing with threats in a timely manner because they believe that taking such a position will enable the executive to implement successful counterterrorism measures in "the war on terror" within a reasonably short period of time. However, states already have a wide range of tools at their disposal to deploy against grave threats and it is an open question whether compromising fundamental liberties would necessarily lead to better security.[6] For example, many constitutions enshrine emergency powers granting broad powers to the executive.[7]

Compared to normalcy, the executive is granted a wide range of powers to take necessary measures in extraordinary times because of the urgency of the situation. Of course, this is not to say that the exercise of emergency powers by the executive is unlimited or largely free from judicial scrutiny and legislative approval. After all, the overall protection of human rights is needed most in emergencies. On the other hand, while constitutional courts should strive for the protection of constitutional rights from the misuse of emergency powers by the executive, they should do so in a manner that does not hamper the efficacy of these measures in overcoming threats to the nation. In fact, some jurisdictions explicitly ban judicial review after the declaration of a state of emergency or of emergency measures taken by the executive and the legislature.[8] Even when there are no procedural or substantial constitutional hurdles, during the period of a state of emergency, courts tend to avoid considering cases on their merits or usually adopt the government's stance.[9] For example, during the radical left-

4 Gross," Chaos and Rules," 1097

5 Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 11.

6 David, Cole, "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11," *Stanford Law Review* 59, no. 6 (2007): 1735.

7 Oren Gross, "Constitutions and Emergency Regimes" in *Comparative Constitutional Law,* ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward): 336-337.

8 Gross, "Constitutions and Emergency Regimes," 342.

9 David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," *Michigan Law Review* 101 (2003): 2565; John C. Yoo, "Judicial Review and the War on Terrorism," *George Washington Law Review* 72 (2003): 427.

wing terrorism of the 1970s and 1980s, the German Constitutional Court found security measures to fight terrorism constitutionally in many cases by applying a balancing and proportionality analysis.[10] Likewise, in the early days of the "War on Terror" proclaimed after the September 11 terrorist attacks, the Supreme Court of the United States of America tended not to interfere with the executive's actions in this area. In this context, the Supreme Court did not touch the extremely broad powers of the military and the executive in the definition and application of the category of enemy combatant in criminal law.[11]

When courts are called upon to review governmental decisions and actions in times of emergencies, they are likely to assume a deferential attitude. They may avoid examining issues related to emergency powers and measures on their merits using legal tools like the political question doctrine or maintain that these issues are non-justiciable.[12][12] Even if they examine a legal challenge against the emergency powers, the decision tends to be in favor of the government.[13]

Not surprisingly, constitutional, and other high courts are forced walk a tightrope between liberty and security when an urgent situation arises, threating the existence of the nation and democratic political system. This is exactly what the Turkish Constitutional Court (TCC) experienced when a state of emergency was declared in the country following a failed bloody coup attempt in June 2016 by a faction within the Turkish Armed Forces consisting of followers of a religious group. It faced an uphill task to strike a balance between liberty and security as the government took a wide range of measures issued in the form of emergency decrees, which raised a great deal of significant constitutional and human rights issues and challenges.

This article aims to assess the TCC's behavior during this state of emergency between 2016 and 2018. It investigates the degree to which the TCC was able to

[10] Russell A. Miller, "Balancing Security and Liberty in Germany," *Journal of National Security Law and Policy* 4 (2010): 378-379.

[11] Renata Uitz, "Courts and the Expansion of Executive Power: Making the Constitution Matter," in *The Evolution of the Separation of Powers: Between the Global North and the Global South, ed. David Bilchitz and David Landau* (Cheltenham: Edward Elgar Publishers, 2018), 105, https://doi.org/10.4337/9781785369773.00010.

[12] Oren Gross, "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *The Yale Journal of International Law* 23 (1998): 491, 437-501.

[13] Oren Gross, "Once More unto the Breach," 491.

protect constitutional rights. Specifically, this study seeks to address the ensuing main questions: What justifications did the TCC provide in its judgments? Did its decisions vary depending on the type of review? Did it adopt a deferential attitude? We suggest that the type of review which enables applicants direct and easy access to the Court is more likely to be effective in protecting rights compared to traditional methods of constitutional justice such as concrete and abstract norm review. This article therefore contributes to the discussion on the court's behavior under state of emergency conditions.

This article is structured as follows: it begins with a brief outline of the constitutional background of the emergency system as enshrined in the constitution with a note on the competencies of the TCC. The following section examines the TCC's case law during the state of emergency between 2016 and 2018. The final section discusses the findings and contextualizes them in broader literature.

II. CONSTITUTIONAL FRAMEWORK OF THE STATE OF EMERGENCY REGIME IN TURKEY

Turkey's state of emergency powers are codified in the Constitution of 1982, which outlines the declaration procedure and delineates the conditions for the restriction of fundamental rights and freedoms under this extraordinary system. According to Article 119 of the Constitution, the executive has the authority to declare a state of emergency. Before the constitutional amendment that replaced the parliamentary system with the presidential one in 2017, the cabinet convened under the chair of the President was granted the sole power to declare a state of emergency. However, with the new arrangement, the president has the exclusive power to declare a state of emergency and issue executive decrees. A declaration of a state of emergency requires the seal of approval from parliament. A constitutionally recognized state of emergency may be legitimately declared in the following situations:

> In the event of war, the emergence of a situation necessitating war, mobilization, an uprising, strong rebellious actions against the motherland and the Republic, widespread acts of violence of internal or external origin threatening the indivisibility

> of the country and the nation, emergence of widespread acts of violence aimed at the destruction of the Constitutional order or of fundamental rights and freedoms, serious deterioration of public order because of acts of violence, occurrence of natural disasters, outbreak of dangerous epidemic diseases or emergence of a serious economic crisis; natural disaster, dangerous epidemic diseases, a serious economic crisis, serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms and "serious deterioration of public order because of acts of violence.[14]

In addition, Article 15 of the Turkish Constitution includes a specific review procedure for the suspension of fundamental rights and freedoms in times of war, general mobilization and a state of emergency. Article 15 emphasizes that measures taken should only be to "the extent required by the exigencies of the situation" and "obligations under international law should not be violated".[15] It also guarantees that the individual's right to life and the integrity of his/her corporeal and spiritual existence shall be inviolable throughout the state of emergency. Accordingly, even in these extraordinary times, certain fundamental rights such as the right to life and torture prohibitions are still in full force as they are considered absolute rights.

The Turkish Constitution distributes the emergency powers between the legislative and the executive with a power concentration in favor of the latter but excludes judicial scrutiny of the emergency decrees by the Constitutional Court. Article 148 of the Turkish Constitution states that "no action can be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war".[16] This provision explicitly bars the TCC from reviewing emergency decrees, granting a broad scope of discretion to the executive.

The Turkish Constitution gives precedence to international treaties over domestic statutes if their provisions are in conflict concerning fundamental freedoms and rights.[17] With the constitutional amendment in 2004, international

[14] Constitution of the Republic of Turkiye, Article 119, Law No 2709 of 1982, accessed 7 August 2022, https://global.tbmm.gov.tr/docs/constitution_en.pdf.
[15] Constitution of the Republic of Turkiye, Article 15, Law No 2709 of 1982. Accessed 7 August 2022.
[16] Constitution of the Republic of Turkiye, Article 148. Accessed 7 August 2022.
[17] Constitution of the Republic of Turkiye, Article 90. Accessed 7 August 2022.

treaties on fundamental rights and freedoms, especially the European Convention on Human Rights (ECHR) were attributed a greater value than domestic law. The judiciary is expected to take provisions of international treaties, notably the ECHR into consideration when adjudicating a case related to human rights issues. Turkey became a party to the ECHR in 1954. It adopted the right to individual application to the European Court of Human Rights (ECtHR) in 1987 and recognized the binding jurisdiction of the Strasbourg Court in 1990. The impact of the ECHR on Turkish constitutional order was amplified by the introduction of individual application to the TCC through an amendment of the Constitution in 2010.

Since the ECHR exerts a significant influence on the Turkish constitutional system, we also need to give a brief outline of the emergency regime within the ECHR system. Article 15 of the ECHR stipulates that measures taken in a state of emergency must be "proportionate to the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law".[18] In the ensuing provision, it also allows no derogation from the right to life, prohibitions against torture, slavery, servitude, and retrospective penal punishment. Derogation under Article 15 of the Convention may only be carried out if it is temporary in duration and limited in scope as this provision aims to achieve a balance between a contracting state's interest in weeding out security threats and protecting basic rights that may be considerably restricted during emergencies.

The ECHR defines a state of emergency as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed".[19] For the Court (Commission at the time of judgment), the effects of the emergency must involve the whole nation, the continuance of the organized life of the community must be threatened, and the crisis or danger should be exceptional. On the other hand,

[18] "The Convention for the Protection of Human Rights and Fundamental Freedoms," opened for signature 4 November 1950, Article 15.

[19] Decision of the European Court of Human Rights, *Lawless v. Ireland (3)*, App. no. 332/57, 01 July 1961, § 28.

unlike the United Nations Human Rights Council (UNHRC), the supervisory body of the International Convention on Civil and Political Rights (ICCPR), which expects that any derogation from the rights set out in the ICCPR be temporary, the Strasbourg Court has shunned adopting this criterion explicitly. For example, it held that although derogation measures can last for a considerable length of time, they cannot be ruled unjustified just because they are not temporary.[20]

III. THE TURKISH CONSTITUTIONAL COURT IN THE STATE OF EMERGENCY PERIOD

Since 1962, the Turkish Constitutional Court has been tasked with constitutional review. One of the first non-Western constitutional courts, its jurisprudence has echoed the highs and lows of the nation's volatile political history. The TCC, like many of its counterparts, has played a key role in domestic politics, and its decisions have drawn both praise and harsh criticism from various segments of society.[21] It was frequently charged with judicial activism that crossed constitutional boundaries to affect politics and was criticized for its propensity to rule in favor of the state and its reluctance to offer protection in situations involving abuses of human rights.[22] Although the TCC was not part of the "rights revolution", it has recently started to move towards more right-based adjudication. This change is largely attributable to the introduction of the individual application system in 2012, which required the Court to take the ECHR's case law into account. The TCC's powers, which include reviewing both abstract and concrete norms, conducting financial audits, dissolving political parties, and bringing high-ranking state officials to trial, have undergone a significant change because of the constitutional complaint mechanism. Under the amended Article 148 of the Constitution, any person may apply to the Constitutional Court with

[20] Decision of the European Court of Human Rights *A and others v. the United Kingdom*, App. no. 3455/05, 19 February 2009, § 178.

[21] Levent Köker, "Turkey's Political-Constitutional Crisis: An Assessment of the role of the Constitutional Court," *Constellations* 17, no. 2 (2010): 342; Ergun Özbudun, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy," *European Public Law* 12 (2006): 213.

[22] Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, no. 3, (2006): 654; Yasushi Hazama, "Hegemonic Preservation or Horizontal Accountability," *International Political Science Review* 33, no. 4 (2012): 421; Aslı Bali, "Courts and Constitutional Transitions: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no.3 (2013): 668.

an allegation that any of his or her constitutional basic rights and freedoms, within the scope of the European Convention of Human Rights, have been violated by public authority.[23]

Only those fundamental rights and freedoms set out in the Constitution, which are also guaranteed in the ECHR and its Additional Protocols may be invoked in the individual application procedure. This means that individual application has a relatively limited scope of protection against violations of rights as it is confined to protect fundamental rights regulated in the ECHR rather than all rights secured in the Turkish constitution. For example, claims related to the infringement of social rights are excluded from the individual application mechanism.

Unlike abstract and concrete norm reviews where the TCC deals with issues of more abstract nature, the individual application procedure calls for the Court to pinpoint alleged violations of constitutional rights by government authorities and provide the victim with effective remedies. The TCC has established leading principles that have acquired a quasi-precedent status and its rulings concerning, for example, the right to a fair trial, long and undue detention periods, curbing the excessive length of legal proceedings, freedom of expression, freedom of association and freedom of access to the internet have been generally acclaimed and have accorded well with the jurisprudence of the Strasbourg Court.[24]

On 15 July 2016, Turkey went through a bloody coup attempt which constituted a dire threat to the very existence of the state and the nation, and the government initially declared a state of emergency for a period of 90 days, which was later extended seven times. After the declaration of the state of emergency, the Council of Ministers issued several emergency decrees with the force of law granting wide discretionary powers to the executive and administrative authorities. During the period between 21 July 2016 and 23 July 2018, thirty-two emergency decrees were issued by the government with the aim of "fighting terrorism" and "protecting

[23] Constitution of the Republic of Turkiye, Article 148, accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[24] See, for example, Individual Application to Constitutional Court of the Republic of Turkiye, YouTube LLC Corporation Service Company and Others, B. No. 2014/4705 (29 May 2014); Individual Application to Constitutional Court of the Republic of Turkiye, Erdem Gül and Can Dündar, B. No: 2015/15867 (25 February 2016).

national security". Under the state of emergency, the executive acquired widened counter-terrorism powers through new terror-related legislation and amendments to existing laws. For example, the government was granted the authority to draft new laws without parliamentary approval.

Upon the declaration of the state of emergency, Turkey notified the Council of Europe and the United Nations of its intentions to derogate from certain obligations under the ECHR and the ICCPR as they allow derogations in cases of war involving armed conflicts and public emergencies posing a threat to the stability and existence of a nation. Although the derogation clauses of the ECHR and the ICCPR allow for the suspension of certain rights and freedoms during emergencies, the nature and scope of the derogations must be proportionate to the declared reason for the emergency, and measures taken to that effect must be strictly required by the exigencies of the situation. The derogation clauses also determine derogable and non- derogable rights and the suspension of the latter is not allowed even during a state of emergency.

This particular declaration of a state of emergency produced significant constitutional issues and challenges among which the constitutional review of emergency decrees issued by the Council of Ministers, meeting under the chairmanship of the President of the Republic, attracted the most attention. Under normalcy, the TCC has the competence to examine the constitutionality of decrees with the force of law, whereas, as alluded above, Article 148 of the Constitution explicitly states that decree laws issued during a state of emergency shall not be brought before the Constitutional Court.

When the government's power to issue emergency degrees was challenged by the main opposition party before the TCC, the Court held unanimously that it did not have the jurisdiction to review decree-laws issued under a state of emergency:

> Claims that the decrees having the force of law during the state of emergency covered unconstitutional regulations is not sufficient for them to be subject to constitutionality review. Such a constitutional power should be manifestly granted for the review of the decree laws introduced during the state of emergency, by the

> Constitutional Court. Considering the wording of Article 148 of the Constitution, the objective of the Constitution-maker and related legislative documents, the decree laws introduced during the state of emergency cannot be subject to any judicial review under any name whatsoever. A judicial review to be conducted despite the provision given above is not in conformity with Article 11 of the Constitution which regulates the supremacy and binding force of the Constitution and Article 6 of the Constitution which stipulates that no person or organ shall exercise any state authority that does not emanate from the Constitution.[25]

The Court observed that although decree laws must be scrutinized under judicial review in a democratic state of law, the existing constitutional provision does not allow the conduct of a such review, which is binding on the Court itself. It opined that since Article 148 of the Constitution explicitly stipulates that the decrees issued during a state of emergency, it does not have the authority to review the statutory decrees implemented during a state of emergency. In other words, it held that it lacked the competence to determine whether the decree laws approved during the state of emergency were compatible with the Turkish Constitution. For the TCC, it was bound by the constitution like all branches of the state and could not trespass constitutional boundaries. It pointed out that it is barred from assessing the constitutionality of decrees issued during a state of emergency "as to form or substance."[26] In addition, it argued that it may only examine emergency decrees when they are approved by parliament, rendering them into conventional statutes. Drawing on a textualist interpretation of the relevant constitutional provisions, it concluded that the constituent power had completely and explicitly prohibited the judicial scrutiny of emergency decrees. The TCC pointed out that the Constitution requires emergency decrees having the force of law to be submitted to the approval of parliament rapidly against the risk of a complete lack of review of these decrees adopted during a state of emergency. In the TCC's view, it could only review emergency decrees following their ratification by parliament as laws. It should be noted that when the

[25] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye 12 October 2016), § 23.

[26] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye 12 October 2016), § 23.

emergency decrees were enacted as statutes, the TCC began to review them and in several cases, it handed down annulling rulings.[27]

The TCC's ruling was tantamount to a complete reversal of its previous case law in which it argued that some decrees adopted during a state of emergency were not ordinary decrees in terms of their substance, as their provisions went beyond the period or location of the declared state of emergency. Despite the ban on constitutional scrutiny of emergency decrees, the TCC reviewed them in 1991, maintaining that it had the power to determine whether they satisfy the criteria set out by Articles 120 and 121 involving proportionality, temporariness, and geographical restriction.[28] Along the same lines, it found that the competence of the government to issue emergency decrees was subject to limitations provided in Articles 121 and 122 of the Constitution in another decision delivered in 2003.[29] It, therefore, held that the emergency decrees could be subject to constitutionality review.[30] Furthermore, the TCC observed that if the regulations defined as decrees having the force of law and adopted during a state of emergency cover issues other than those required by the exigencies of the situation under the state of emergency then they could not be seen as ordinary decrees and could therefore be reviewed as ordinary decrees.

According to the new precedent, the TCC no longer conducts constitutionality review of emergency decrees and leaves them to the political review of parliament. The Court assumes its constitutional review only after these norms consequently become law. Nevertheless, in Turkish practice, the legislative does not usually

[27] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E.2016/205, K.2019/63 (The Constitutional Court of the Republic of Türkiye 24 July 2019); Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2018/73, K.2019/65 (The Constitutional Court of the Republic of Türkiye 24 July /2019); Judicial Review of Constitutional Court, Decision of Constitutional Court E.2018/90, K.2019/85 (The Constitutional Court of the Republic of Türkiye 14 November 2019); Judicial Review of Constitutional Court, Decision of Constitutional Court, E.2018/74, K.2019/92 (The Constitutional Court of the Republic of Türkiye 24 December 2019).

[28] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye), 10 January 1991;

[29] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2003/28, K.2003/42 (The Constitutional Court of the Republic of Türkiye 22 May 2003).

[30] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye 10 January 1991); Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 1991/6, K. 1991/20 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

deliberate these decree laws and consequently these norms are excluded from judicial review because the Constitution does not have a provision for parliament to review state of emergency decrees.

The TCC previously adopted an activist stance regarding the review of emergency decrees despite the explicit prohibition in the constitutional text. Although this constitutional ban may be problematic from the standpoint of the separation of powers and the protection of human rights and it is susceptible to abuse by the executive, this does not change the fact that it is a constitutional provision which is binding for all branches including the judiciary. The TCC's new deferential approach to the review of emergency decrees was criticized some commentators who argued that the TCC's retreat from its former jurisprudence gave free rein to the executive.[31] It is not, nevertheless, uncommon that judicial oversight was generally restricted under emergencies as has happened for example, in France.[32]

In France, the enactment of a state of emergency has never been challenged under the abstract form of review, which allows bills to be presented before the *Conseil Constitutionnel* (Constitutional Council – CC) after being approved by Parliament but before becoming law.[33] The amended provisions of the 1955 Emergency Act was utilized in France between 2015 and 2017 following several serious terror attacks. Despite the potential unconstitutionality of several of the amendments, they were not challenged before the CC as the then Prime Minister claimed that "both the times and stakes were too dramatically important for juridical games to be played".[34] By contrast, another remedy known as *Question Prioritaire de Constitutionnalitte* (Priority Question of Constitutionality) that allows any person involved in court proceedings to challenge the constitutionality of a legislative provision that is to be applied to his or her case, subject only to

[31] Ece Göztepe, "The Permanency of the State of Emergency in Turkey: The rise of a Constituent Power or Only A New Quality of the State?" *Z Politikwiss* 28, no. 4 (2018): 531, doi.org/10.1007/s41358-018-0161-0 521-534; Pablo Castillo Ortiz "The illiberal abuse of constitutional courts in Europe," *European Constitutional Law Review* 15, no. 1 (2019): 48-72, https://doi.org/10.1017/S1574019619000026.

[32] Triestino Mariniello, "Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System," *German Law Journal* 20, no.1, (2019): 67 pp. 46-71, doi.org/10.1017/glj.2019.3.

[33] Stephanie Hennette Vauchez, "The State of Emergency in France: Days without End," *European Constitutional Law Review* 14, no. 4 (2018): 714, 700-720, doi.org/10.1017/S1574019618000391.

[34] Vauchez, "The State of Emergency," 715.

the condition that the provision in question must infringe upon "rights and freedoms guaranteed by the Constitution". Considering that various provisions of the 1955 Act were ruled to be unconstitutional, this legal avenue was far more successful for contesting the legitimacy of the state of emergency regime. On the other hand, the existence of a clause in the French Constitution allowing the CC to choose the date in which its ruling is put into effect allowed it to, in effect, choose to neutralize its findings of unconstitutionality by delaying the impact of its rulings. Because of this, the constitutional protection of rights and freedoms for those who had been subject to various measures, such as home arrest, or the seizure of electronic data, was less effective.[35]

Even when a parliament has the authority to review emergency measures like in Sweden where the government has broad unspecified emergency powers, the constitutional scope of review is unclear. Although a emergency regime is not recognized as a constitutional concept, a special parliamentary committee (the Committee on the Constitution) is charged with overseeing emergency regime measures, dubbed as a supra-legal state of emergency, which constitutes an exception to the principle of legality.[36] Sweden's supra-legal approach to domestic emergencies empowers the government to declare whether an emergency exists and to take emergency measures, which are subject to ex post political review by the Committee on the Constitution.[37]

In the Turkish case, as we have seen, the ban on the review of emergency decrees stems directly from the Constitution itself. It could be argued that the TCC could have overcome the ban with creative interpretations using teleological and systematic methods of constitutional interpretation as it had done in its previous case law, but this does not provide a satisfactory answer to the question of how to bypass an explicit prohibition specified in the Constitution. The adoption of the previous approach of the TCC may lead to a slippery slope in which open and explicit constitutional prohibitions may easily be sidestepped

35 Vauchez, "The State of Emergency," 716.

36 Anna Jonsson Cornell and Janne Salminen, "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland," *German Law Journal* 19, no.2 (2018): 236.

37 Cornell and Salminen, "Emergency Laws in Comparative Constitutional Law," 247.

by the Court, making the text of the Constitution meaningless. On the other hand, it is undeniable that the TCC's new case law concerning emergency decrees enabled the executive to take measures with widespread effects without being subject to any judicial scrutiny. The emergency measures implemented by the authorities substantially restricted the scope of many guarantees of the Turkish Constitution and of the ECHR. For example, one of the first decrees issued in the state of emergency extended the period of preventive detention up to 30 days for terrorism related charges excluding the period of time required to bring the suspect before a competent judicial body.[38] Likewise, in another decree, it was stipulated that any person who is a member of, affiliated with, otherwise connected to, or in any way in contact with terrorist organizations or structures, or groups that the National Security Council identified as carrying out activities against the national security of the State may be dismissed from the public service, his/her property may be confiscated and they may not enjoy certain rights such as travelling abroad.[39]

Although the TCC refused to review the emergency decrees, it continued to receive individual applications including those related to measures taken under the state of emergency and handed down decisions regarding whether the implementation of an emergency measure resulted in a breach of a constitutional right within the scope of the individual application. Not surprisingly, the TCC was flooded with individual applications by people alleging violations of their rights. Before the declaration of the state of emergency, the number of pending individual applications before the Court was about 22,500, whereas this rose to 107,000 in a year, indicating there were about 80,000 applications alleging violations of constitutional rights due to administrative and judicial emergency measures.[40] Unsurprisingly, this created a huge backlog of applications.

[38] Decree No 667, accessed on 12 August 2022, https://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm. When the state of emergency was lifted, a new legislation established a maximum of seven days for administrative detention.

[39] Decree No 672, accessed on 12 August 2022 https://www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm.

[40] "Bireysel Başvuru İstatistikleri (Individual Applications Statistics)" accessed on 25 March 2022, https://www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf. (23/9/2012- 31/3/2022/1).

Meanwhile, there were an upsurge of applications from Turkey lodged directly to the ECHR without exhausting domestic individual application remedies. The applicants claimed that there was not any effective remedy since they could not file a lawsuit against measures issued in the form of emergency decrees, arguing that the TCC conceded that it did not have the competence to review emergency measures and therefore could not be regarded as a remedy that could be exhausted.[41] The ECHR found these applications inadmissible on the grounds that the TCC could conduct this review by means of individual application instead of a norm review, thus it was accepted that "the right to lodge an individual application with the TCC constitutes an effective remedy."[42] For example, the Strasbourg Court issued an inadmissibility decision when a journalist complained about the duration of his individual application before the TCC. It noted that although the duration of 18 months and 3 days their case spent pending before the Constitutional Court could not be described as 'speedy' in an ordinary context, in the specific circumstances of the case there was no violation of Article 5 § 4 of the European Convention.[43]

To deal with the rising number of applications to the TCC, new measures were introduced by the state authorities. A special commission called the 'State of Emergency Inquiry Commission' was set up to examine complaints concerning emergency measures and administrative acts introduced by or taken under the emergency decrees, such as the dismissal of public servants, confiscation of property, and closure of private schools and associations. Following this step, applications filed to both the TCC and the ECHR were found to be inadmissible on the grounds that the remedy introduced by this commission should be exhausted.[44] The TCC declared over 70,000 complaints, which remained within

[41] Decision of the European Court of Human Rights Mercan v. Turkey, App. No. 56511/16, 17 November 2016, Decision of the European Court of Human Rights Zihni v. Turkey, App. No. 59061/16, 08 December.

[42] Decision of the European Court of Human Rights Mehmet Hasan Altan v. Turkey, App. No 13237/17, 20 March 2018) § 142 and Decision of the European Court of Human Rights Şahin Alpay v. Turkey, App. No 16538/17, 20 March 2018, § 121.

[43] Decision of the European Court of Human Rights Şahin Alpay v. Turkey, ECtHR, App. no. 16538/17, 20 March 2018, § 137. See also Decision of the European Court of Human Rights Mehmet Hasan Altan v. Turkey, ECtHR, App. no. 13237/17, 20 March 2018.

[44] Individual Application to the Constitutional Court of Türkiye, Hacı Osman Kaya, B. No. 2016/41934, 16 February 2017; Decision of the European Court of Human Rights Çatal v. Turkey, ECtHR, App. No. 2873/17, 07 March 2017.

the jurisdiction of the Commission, as inadmissible due to a failure to exhaust all available legal remedies.[45]

The TCC faced a formidable challenge to maintain its newly adopted rights-based approach as it had to examine applications arising from the issuance of emergency measures under Article 15 of the Constitution. This Article is clearly in line with provisions laid down in Article 15 of the ECHR that permits states to derogate "in time of war or other public emergency threatening the life of the nation" but only "to the extent strictly required by the exigencies of the situation." Article 15 of the Constitutions does not bring about a *Schmittian* state of exception.

In ordinary times, the TCC first reviews individual applications based on Article 13 of the Constitution, which reads that "fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of society and the secular republic and the principle of proportionality."(citation required) This article sets forth the backbone of the protection of human rights in normal times based on the concept of proportionality review.

Under the state of emergency, the TCC reviewed complaints regarding the emergency measures under Article 15 that authorizes substantial restrictions on human rights and freedoms. In a leading judgment, it held that while public authorities have a very broad margin of discretion in determining policies and means to eliminate threats causing the state of emergency, their powers are not unlimited.[46] For the Court, any interference with constitutional rights in a state of emergency must satisfy three criteria set by Article 15. Accordingly, first, an emergency measure must not interfere with non-derogable, absolute rights and

[45] Constitutional Cour of the Republic of Türkiye, "Anayasa Mahkemesi Başkanliği-Bireysel Başvuru İstatistikleri [Presidency of the Constitutional Court - Individual Application Statistics]," Constitutional Court of the Republic of Türkiye, 2022, www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf.

[46] Individual Application to the Constitutional Court of Türkiye, Aydın Yavuz and others. B. No. 2016/22169, 20 June 2017, § 166-167.

liberties stated in Article 15 of the Constitution such as the right to life and torture prohibition. Secondly, the interference or restriction must not violate obligations under international law. Thirdly, any restriction on derogable rights and liberties must be required by the exigencies of the situation. The last guardrail under Article 15 calls for the application of proportionality analysis.

In one of the leading decisions delivered under the individual application procedure, the TCC defined the concept of "state of emergency" stipulated in the Constitution of 1982 as follows:

> Extraordinary administration procedures are administration regimes with temporary nature that grant more comprehensive powers to public authorities with the aim to eliminate serious threats and dangers that emerge in cases where the state or the society or public order cannot be protected with the powers of ordinary period, and which consequently results in serious threats and dangers.[47]

For the TCC, emergency decrees may be issued only when the existence of the state or society or public order are faced with a serious threat. It maintains that emergency regimes in democratic countries are not arbitrary governments that disregard the rule of law since they aim to maintain and safeguard the constitutional order. Even though emergency regimes render significant powers to the executive and considerably restrict rights and freedoms, they are still regimes bound by the rule of law and constitutional order. Drawing attention to the "temporary and exceptional" nature of the emergency regime, the TCC observes that the ultimate goal of this regime is to return normalcy when threats to the democratic order are stamped out.[48] Emphasizing the temporary and exceptional feature of the emergency regimes, the TCC pursued a judicial approach dovetailing well with the UNHRC. According to the TCC, the emergency decrees can be applied only when the existence of state or society or public order is under serious threat or danger and if such a situation continues to exist.

When reviewing individual applications regarding the emergency measures, the TCC first applies the standards of normalcy as laid out in Article 13 and

[47] Aydın Yavuz and others, § 164.
[48] Aydın Yavuz and others, § 166.

if it finds a violation of a constitutional right, it, then, examines whether this infringement could be justified within the framework of a state of emergency regime under Article 15 of the Constitution. In its analysis, the Court considers if a violation is proportionate that is absolutely necessitated by a state of emergency and breaches the core of constitutional rights. For instance, in a ruling the Court held that a failure of bringing applicants detained in a coup investigation before a judge for a period of 8 months 18 days after the first trial would lead to a violation according to ordinary standards under Article 13, but this measure was necessary and proportionate under Article 15 due to the complexity of coup investigations and the workload of courts and public prosecutors.[49]

The TCC applied the above principles in its examinations of individual applications complaining about the implementation of the emergency measures. For example, the implementation of the principles can be observed in individual applications lodged by two famous journalists who had been arrested following the coup attempt on suspicion of having connections with the coup-plotters. They filed an individual application to the TCC challenging the unconstitutionality of their pre-trial detention. They alleged that their initial and continued pre-trial detention was a breach of their right to liberty and security and of their right to freedom of expression and freedom of press. In its judgment, the TCC first underlined that the coup attempt was a very serious threat to the existence of the Turkish nation. It noted that the detention of the two journalists was not lawful as there was not any concrete evidence corroborating terrorism charges apart from some newspaper articles penned by the applicants. The TCC opined that the articles did not prove sufficient evidence for the applicants' alleged engagement in terror-related activities. It underlined that the reasoning of the lower courts was not sufficient because the reasons for detention were not only based solely on newspaper articles, but these articles did not convincingly constitute evidence that the individuals were implicated in the failed coup attempt. The Court found that

[49] Aydın Yavuz and others § 359. Nevertheless, the TCC found 18 months contrary to the principle of proportionality. Even the state of emergency could not justify such a long period of time. See, Individual Application to the Constitutional Court of Türkiye, Erdal Tercan, B. No. 2016/15637, 12 April 2018.

the applicants' prosecution and detention did not correspond to any pressing social need and was, therefore, not proportionate even under the conditions of the state of emergency. The TCC concluded that the applicants' right to personal liberty and security and the rights to freedom of expression and freedom of press were infringed.[50] In this decision, the TCC closely incorporated the relevant ECHR's jurisprudence in its ruling.

IV. CONCLUSION

This article has examined one of the most daunting tasks of constitutional courts, which is the challenge in striking a balance between addressing threats to constitutional systems and protecting fundamental rights during public emergencies, using Turkey as a case study. Constitutional courts tasked with realizing the supremacy of the constitution and safeguarding constitutional order have a delicate and crucial function in extraordinary times in fulfilling this function. They discharge their rights-protection duties in an extraordinary time when the executive branch enjoys widely extended prerogatives under emergency provisions and may be tempted to go beyond exigencies of the situation in dealing with threats that brought about a public emergency. In extraordinary times, constitutional courts act as a bulwark of rights and liberties and are expected to be more attentive against encroachments of the government.

During emergencies, courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove the threat to the constitutional system as the executive and the legislative powers are tasked with addressing this problem. The role of the courts in such process is to ensure that the state authorities act within constitutional and statutory boundaries.

Even though the executive has the necessary expertise to assess the threats to the state and the means to eradicate them, this does not mean that it has unlimited powers because it must act within constitutional boundaries. Within

[50] Mehmet Hasan Altan, § 158, 242, Şahin Alpay, § 111, 147.

this perspective, the role of the constitutional or supreme courts is to ensure that the executive fights the threats by adopting measures within the framework of the law. These measures must be necessary in a democracy and proportionate to the aim of eliminating the dangers that caused the state of emergency. A democratic state under a public emergency must be a state governed by the rule of law just as in the normal times.

The TCC went through a challenging time in the state of emergency declared between 2016 to 2018 as it strived to protect basic rights while also respecting the executive's constitutionally granted prerogatives. As we have seen, the TCC came under severe attacks for overturning its precedence that had allowed it to review the emergency decrees, despite an explicit constitutional ban. The question of whether the ban legitimizes executive overreach, potentially leading to unconstitutional behavior and policies, is an important issue that cannot be overlooked. However, the existence of constitutional provisions restricts the avenues the TCC can pursue. It is evident that constitutional courts are also bound by their respective constitutions. They must safeguard constitutional rights by operating within the boundaries of constitutions themselves.

If the constituent power does not grant the judicial review of emergency decrees, constitutional courts should not overstep their competencies, as this could lead to judicial activism under the guise of rights protection. Such a situation could imply the substitution of constitutional provisions with the personal views of judges, no matter how well-intended they might be. Judges are expected to exercise the powers defined in the provisions of the constitution. The Turkish Constitution is very clear in this respect as Article 6 stipulates, "No person or organ shall exercise any state authority that does not emanate from the Constitution." From this perspective, the TCC's deferential interpretation regarding the constitutional review of emergency decrees appears to be in tandem with the constitutional requirement. Of course, it is preferable that the executive action should always be subject to restraints including judicial review and parliamentary approval. However, if the constituent power does not endow the court with such power, it would be unfair to blame

the TCC for all problems created by a state of emergency. It should be kept in mind that the Court continued to examine individual applications in the state of emergency period and delivered judgments citing violations arising from the application of the emergency measures.

BIBLIOGRAPHY

Bali, Asli. "Courts and Constitutional Transitions: Lessons from the Turkish Case." *International Journal of Constitutional Law* 11, no.3 (2013): 666-701. doi.org/10.1093/icon/mot025.

Belge, Ceren. "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey." *Law and Society Review* 40, no. 3 (2006):653-692. doi.org/10.1111/j.1540-5893.2006.00276.x.

"*Bireysel Başvuru İstatistikleri* [Individual Applications Statistics]: Accessed on 25 March 2022. https://www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf. (23/9/2012- 31/3/2022/1).

Castillo-Ortiz, Pablo. "The Illiberal Abuse of Constitutional Courts in Europe." *European Constitutional Law Review* 15, no. 1 (2019):48-72. doi.org/10.1017/S1574019619000026.

Cole, David. "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11." *Stanford Law Review* 59, no. 6 (2007): 1735-1751.

Cole, David. "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis." *Michigan Law Review* 101, no. 8 (2003): 2565- 2695. doi:10.2307/3595389.

Constitution of the Republic of Turkiye, Article 119, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 15, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 148, Law No 2709 of 1982, accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 90, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Decision of the European Court of Human Rights, Sahin Alpay v. Turkey, App. No 16538/17, 20 March 2018.

Decision of the European Court of Human Rights, *Mehmet Hasan Altan v. Turkey*, App. no. 13237/17, 20 March 2018.

Decision of the European Court of Human Rights, Çatal *v. Turkey*, ECtHR, App. No. 2873/17, 07 March 2017.

Decision of the European Court of Human Rights, *Mercan v. Turkey*, App. No. 56511/16, 17 November 2016.

Decision of the European Court of Human Rights, *Zihni v. Turkey,* App. No. 59061/16, 08 December 2016.

Decision of the European Court of Human Rights, *A and others v. the United Kingdom*, App. no. 3455/05, 19 February 2009.

Decision of the European Court of Human Rights, *Lawless v. Ireland* (3), App. no. 332/57, 01 July1961.

Decree No 667. Accessed on 12 August 2022. https://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm.

Decree No 672. Accessed on 12 August 2022. https://www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm.

Göztepe, Ece. "The Permanency of the State of Emergency in Turkey: The Rise of a Constituent Power or Only a New Quality of the State?" *Z Politikwiss* 28, no. 4 (2018): 521-534. doi.org/10.1007/s41358-018-0161-0.

Gross, Oren. "Constitutions and Emergency Regimes." In *Comparative Constitutional Law,* edited by Tom Ginsburg and Rosalind Dixon, 334-355. Cheltenham: Edward Elgar, 2011. doi.org/10.4337/9780857931214.00027.

Gross, Oren. "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112, no. 6, (2003): 1011-1134. doi. 10.2139/ssrn.370800.

Gross, Oren. "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies." *The Yale Journal of International Law* 23 (1998): 437-501. http://hdl.handle.net/20.500.13051/6386.

Hazama, Yasushi. "Hegemonic Preservation or Horizontal Accountability." *International Political Science Review* 33, no. 4 (2012): 421-440. doi.org/10.1177/0192512111414132.

Individual Application to the Constitutional Court of Türkiye, *Erdal Tercan,* B. No. 2016/15637 (Constitutional Court of the Republic of Turkiye, 12 April 2018).

Individual Application to the Constitutional Court of Türkiye, *Aydın Yavuz and others.* B. No. 2016/22169 (Constitutional Court of the Republic of Turkiye, 20 June 2017).

Individual Application to the Constitutional Court of Türkiye, *Hacı Osman Kaya*, B. No. 2016/41934 (Constitutional Court of the Republic of Turkiye, 16 February 2017).

Individual Application to Constitutional Court of the Republic of Turkiye, *Erdem Gül and Can Dündar,* B. No: 2015/15867 (Constitutional Court of the Republic of Turkiye, 25 February 2016).

Individual Application to Constitutional Court of the Republic of Turkiye, *YouTube LLC Corporation Service Company and Others*, B. No. 2014/4705 (Constitutional Court of the Republic of Turkiye, 29 May 2014).

Jonsson Cornell, Anna and Janne Salminen. "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland." *German Law Journal,* 19, no.2 (2018): 219-249. doi.org/10.1017/S2071832200022677.

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye, 12 October 2016).

Judicial Review of Constitutional Court, Decision of Constitutional Court, E.2018/74, K.2019/92 (The Constitutional Court of the Republic of Türkiye 24 December 2019).

Judicial Review of Constitutional Court, Decision of Constitutional Court E.2018/90, K.2019/85 (The Constitutional Court of the Republic of Türkiye 14 November 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E.2016/205, K.2019/63 (The Constitutional Court of the Republic of Türkiye, 24 July 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2018/73, K.2019/65 (The Constitutional Court of the Republic of Türkiye 24 July 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2003/28, K.2003/42 (The Constitutional Court of the Republic of Türkiye 22 May 2003).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 1991/6, K. 1991/20 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

Köker, Levent. "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court." *Constellations* 17, no. 2 (2010): 328-344. doi.org/10.1111/j.1467-8675.2010.00594.x.

Mariniello, Triestino. "Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System." *German Law Journal* 20, no.1 (2019): 46-71. doi.org/10.1017/glj.2019.3.

Özbudun, Ergun. "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy." *European Public Law* 12, no.2 (2006): 213-223. doi.org/10.54648/eurO2006014.

Posner, Richard. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. Oxford: Oxford University Press, 2006.

Russell A. Miller. "Balancing security and Liberty in Germany." *Journal of National Security Law and Policy* 4 (2010): 369-396.

"The Convention for the Protection of Human Rights and Fundamental Freedoms." Opened for signature 4 November 1950, Article 15. https://www.echr.coe.int/documents/convention_eng.pdf.

Tushnet, Mark. "Defending Korematsu? Reflections on Civil Liberties in Wartime." *Wisconsin Law Review* 2003, no.2 (2003): 273307. dx.doi.org/10.2139/ssrn.368323.

Uitz, Renata. "Courts and the Expansion of Executive Power: Making the Constitution Matter." In *The Evolution of the Separation of Powers: Between the Global North and the Global South*, edited by David Bilchitz and David Landau, 85-113. Cheltenham: Edward Elgar, 2018. doi.org/10.4337/9781785369773.00010.

Vauchez, Stephanie Hennette. "The State of Emergency in France: Days without End." *European Constitutional Law Review* 14, no. 4 (2018): 700-720. doi.org/10.1017/S1574019618000391.

Yoo, John C. "Judicial Review and the War on Terrorism." *George Washington Law Review* 72 (2003): 427-451. dx.doi.org/10.2139/ssrn.461721.

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Constitutional Court Decisions on the Judicial Independence of Other Indonesian Courts

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Abstract

Judicial independence is a foundational principle of the Indonesian Constitution. It guarantees the independence of all Indonesian courts. However, most of the cases the Constitutional Court has handled relating to judicial independence have concerned the Constitutional Court's own independence, focusing, for example, on issues of judicial tenure and terms. This paper examines the handful of Constitutional Court decisions about the judicial independence of other courts and judges in Indonesia – that is, non-constitutional courts and judges. It examines what the Constitutional Court has said about judicial independence in relation to these other courts. It then considers whether, by emphasising (perhaps overly) strict observance of judicial independence, these Constitutional Court decisions compromise effective judicial accountability and administration.

Keywords: Constitutional Court; Corruption; Judicial Commission; Judicial Independence; Supreme Court; Tax Court.

I. INTRODUCTION

Before the fall of Soeharto in 1998, Indonesia's courts were often described as lacking independence from government. From the last few years of the reign of Indonesia's first president, Soekarno, and through the New Order regime of

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Indonesia's second president, Soeharto, the government largely controlled the judiciary. Interference was even expressly authorised by law. For example, the 1964 Judicial Power Law called courts an instrument of the 'national revolution', and authorised the president to 'interfere' (*melakukan campur tangan*) in judicial affairs, including in individual cases.[1] Under that Law, the president could, by decree, direct courts to decide cases as he wished, requiring them to suspend proceedings and deliberate with prosecutors to give effect to his wishes.[2]

Under Soeharto (1966-1998), government control over the judiciary became more systematic and comprehensive. Judges' continuing employment, pay, promotion, and favourable postings became contingent on their compliance with the will of the state.[3] As a result, the courts almost always sided with the government. Judges reported receiving telephoned instructions from the presidential palace, dictating the decisions for them to issue in cases involving state interests.[4] Promotions were made on loyalty and time served, not on merit. At the same time, judges were underpaid and courts woefully under-resourced, encouraging (or even necessitating) corruption. Delay became a major problem, with litigants waiting years for cases to be heard and decided. By the end of the New Order, the Supreme Court's case backlog had reached almost 20,000 cases and was continuing to increase by 50 to 100 cases per month.[5]

When Soeharto fell in 1998, legal reformists pushed to have the judiciary disentangled from government. One of the main ways this was achieved – by most accounts, quite successfully[6] – was by transferring control over judicial administration from government departments (now called ministries) to the Supreme Court (*Mahkamah Agung*). Both the adjudicative functions and the

1 See Article 19 of the General Courts Law and its Elucidation.

2 Judicial Power Law of 1964, Articles 23(1)-(3).

3 Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat," *Law and Society Review* 13 (1978): 37–71, https://doi.org/10.2307/3053242.

4 Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 81.

5 Suara Pembaruan, "Tajuk Rencana: Negara Hukum Bukan 'Negara Undang-Undang [Editorial: The State of Law is Not a 'State of Laws]," Suara Pembaruan, published November 14, 1996; Jakarta Post, "Court Can't Review Law Says Oetojo," The Jakarta Post, published June 4, 1997.

6 Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?" *Indonesia* 97 (2014): 55–85, https://doi.org/10.5728/indonesia.97.0055. For discussion of cases raising doubt about judicial independence from government, see Rifqi Assegaf, "The Supreme Court Reformasi, Independence and the Failure to Ensure Legal Certainty," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. Melissa Crouch (Cambridge: Cambridge University Press, 2019), 40–2.

administration of the courts thereby came to be under 'one roof' (*satu atap*) of the Court – the common term for this reform.[7] Also significant was the creation of the Constitutional Court (*Mahkamah Konstitusi*) to exercise higher-order constitutional functions. As a new judicial institution, it quickly asserted its independence and established itself as a credible and independent check on the exercise of government power. Even though both the Supreme and the Constitutional courts have faced their own controversies and scandals, both have been able to maintain a level of independence from the government over the past two decades that surpasses any similar period in Indonesian history.

The Constitutional Court has played a particularly important role in ensuring these higher levels of judicial independence. During its 20-year existence, the Court has heard many constitutional challenges to national statutes touching on issues widely accepted as being critical to establishing and maintaining judicial independence. The Court has heard these cases under its constitutional review powers. Because judicial independence is a constitutional principle (Article 24(1) of the Constitution), the Court can examine whether national legislative provisions undermine it and, if necessary, invalidate those provisions.

Many of these constitutional review decisions have concerned the independence of the Constitutional Court itself – particularly, how its judges are appointed, their tenure, and the like.[8] These decisions generally result from constitutional challenges to the Constitutional Court's governing law – Law 24 of 2003 on the Constitutional Court, as amended. Decisions such as these have already attracted some scholarly and other attention.[9] In this paper, I instead focus on Constitutional Court decisions about the judicial independence of *other* courts and judges in Indonesia – that is, *non-constitutional* courts and judges.

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7 Mahkamah Agung [Supreme Court], *Blueprint for the Reform of the Supreme Court of Indonesia* (Jakarta: Supreme Court of Indonesia, 2003).

8 See, for example, Constitutional Court Decisions 48/PUU-IX/2011; 49/PUU-IX/2011; 7/PUU-XI/2013; 1-2/PUU-XII/2014; 93/PUU-XV/2017; 56/PUU-XX/2022.

9 Ibnu Sina Chandranegara, *Hukum Acara Mahkamah Konstitusi [Constitutional Court Procedural Law]* (Sinar Grafika, 2021), 79; Yanis Maladi, "Benturan Asas Nemo Judex Idoneus in Propria Causa dan Asas Ius Curia Novit [The Clash of the Principle of Nemo Judex Idoneus in Propria Causa and the Principle of Ius Curia Novit]," *Jurnal Konstitusi* 7, no. 2 (2010): 1–18, https://doi.org/10.31078/jk721; Hukumonline, "Diminta Hati-Hati, MK Berpotensi Langgar Asas Nemo Judex Ideoneus in Propria Causa [Asked to Be Careful, MK Has the Potential to Violate the Principle of Nemo Judex Ideoneus in Propria Causa]," Hukumonline, published December 8, 2016.

While there are far fewer of these decisions compared to those on the judicial independence of the Constitutional Court, the ramifications of these decisions are potentially larger. This is because these decisions involve the independence (and hence the operation) of the Supreme Court and its several dozen judges, as well as the several hundred courts and several thousand judges the Supreme Court administers.[10] Together, these courts hear several million cases per year,[11] compared to the Constitutional Court's one or two hundred.[12]

As this paper will demonstrate, the Court has generally accorded great weight to judicial independence as a constitutional concept. I argue, however, that the Court may have over-prioritised judicial independence to the detriment of equally-important principles – particularly judicial accountability. I develop this argument through an analysis of two cases in which the Constitutional Court was required to balance judicial independence against these other principles.

The first and most important of these was the 2006 *Supreme Court v Judicial Commission case*.[13] In it, the Court decided, amongst other things, that the Judicial Commission – established under the Constitution to ensure judicial transparency and accountability – lacked power to oversee the exercise of judicial authority by any court, such as by assessing decisions. Statutory provisions purporting to allow the Commission to exercise this power were unconstitutional for violating judicial independence. According to the Constitutional Court, to maintain judicial independence, only the Supreme Court could detect impropriety in the exercise of judicial power and then act against errant judges. For the Constitutional Court, the only appropriate way to assess judicial decisions was through the ordinary appeal process.

This decision has arguably undermined efforts to improve judicial quality and integrity in Indonesia, which are long-standing problems. The Supreme Court has since used the judicial independence the Constitutional Court granted

[10] Gumanti Awaliyah, "Jubir MA: Indonesia Kekurangan 4.000 Hakim [Supreme Court Spokesperson: Indonesia Short of 4,000 Judges]," Republika.co.id, published July 18, 2018.

[11] For example, in 2019 alone, Indonesian lower courts decided over 6.5 million cases: Supreme Court, *Supreme Court Annual Report 2019* (Jakarta: Supreme Court, 2020).

[12] Constitutional Court of the Republic of Indonesia, "Recapitulation of Law Cases," Constitutional Court of the Republic of Indonesia, accessed August 18, 2023.

[13] Constitutional Court Decision 005/PUU-IV/2006.

to it as a shield to avoid outside scrutiny of its own judges and the judges it administers. This shield appears to have been effective to block Commission-led investigations into judges and assessments of decision quality. This seems to have at least contributed to an environment in which judicial corruption has been able to flourish and high-profile decisions that make very little legal sense have emerged.

The second decision is the 2013 *Tax Court case*. Although clearly of a lesser order than *Supreme Court v Judicial Commission*, the *Tax Court* case demonstrates that, two decades later, the Constitutional Court still places great importance on judicial independence – perhaps even too much. In this case, the Constitutional Court decided that the Tax Court, previously administered by the Finance Ministry, needed now to be brought under the administrative control of the Supreme Court, for reasons of judicial independence. While this decision might make the Tax Court institutionally independent of government, it may well result in the Tax Court suffering some of the problems of the courts that the Supreme Court already administers, including lack of accountability for corruption. This is particularly significant, given that the Tax Court tends to hear high value disputes, which may be a fertile ground for increasing corruption.

This article is structured as follows. I begin in Part I by discussing the constitutional and statutory bases for judicial independence in Indonesia, before examining how the Constitutional Court has described and applied the concept in its decisions, focusing on the two case studies. In Part II, I explain and analyse *Supreme Court v Judicial Commission* and *Tax Court*. In Part III, I then argue that the preoccupation with judicial independence in these decisions, and the corresponding removal of outside scrutiny, has likely negatively affected (in the case of *Supreme Court v Judicial Commission*) and will likely negatively affect (in the case of *Tax Court*) judicial performance. Foundational principles such as judicial independence and accountability are difficult to balance, particularly when they come into conflict. However, I conclude that the Constitutional Court could now consider refocusing attention on accountability. I make this argument by drawing on international literature suggesting that judicial accountability

– including by analysing and assessing judicial decisions – can be effectively performed without judicial independence being damaged. However, even if increased accountability were to undermine judicial independence, this could be defensible, given that the Supreme Court has been unable to exercise that independence in a way that justifies its grants.

II. DISCUSSION

2.1. Judicial Independence

Judicial independence is an established principle of Indonesian law. It is reflected in the Constitution, in various statutes and in decisions of the Constitutional Court, which I discuss in this section.

2.1.1. The Constitution and Statutes

Article 24(1) of the Indonesian Constitution states that:

> Judicial power is an independent power to maintain a system of courts with the objective of upholding law and justice.

Article 3 of the 2009 Judiciary Law[14] states that:

(1) In performing their tasks and functions, judges and constitutional judges must guard judicial independence.
(2) Interference in judicial affairs by extra-judicial parties is prohibited, unless provided for by Indonesia's 1945 Constitution.

Article 3(3) of the Judiciary Law adds that anyone who deliberately breaches Article 3(2) is to be punished for committing a criminal offence.

An important plank of judicial independence is the guarantee of judicial tenure, so that the government cannot simply sack judges for making decisions unfavourable to it. In Indonesia, various statutes regulate suspension, honourable discharge and dismissal from judicial office. Judges of the general courts and the Supreme Court may be honourably discharged 'upon their own request';[15] if they are 'continuously physically or mentally ill',[16] to the extent that they are

[14] Law No. 48 of 2009.
[15] Article 19(1)(a) of Law 2 of 1986 on General Courts (as amended) (the 'General Courts Law'); Article 11(1)(c) of Law 14 of 1985 on the Supreme Court (as amended) (the 'Supreme Court Law').
[16] Article 19(1)(b) of the General Courts Law; Article 11(1)(d) of the Supreme Court Law

'unable to adequately perform [their] work obligations';[17] if they 'clearly do not have the capacity to perform their duties',[18] for example, if the judge 'has made many substantial errors when performing his or her duties';[19] or if they die.[20] Judges will also be honourably discharged if they reach the mandatory retirement age. The mandatory retirement age for district court judges is 65 years of age, for high court judges is 67,[21] and for Supreme Court judges is 70 (Article 11(b)).

Article 20 of the General Courts Law and Article 11A of the Supreme Court Law provide the following grounds for dishonourable discharge from office for general court and Supreme Court judges:

a) Improper conduct.[22]
b) Continual neglect of their work.[23]
c) Breach of their oath or pledge of office.[24]
d) Breach of Article 18 of the General Courts Law or Article 10 of the Supreme Court Law.[25] These provisions prohibit judges from holding judicial office and also working as an enforcer of judicial decisions; a guardian or a trustee connected to a case which he or she is hearing; a legal advisor; or a businessperson.

General court and Supreme Courts judges may also be dishonourably dismissed if they are convicted of an offence.[26] Judges must generally be given the opportunity to defend themselves before an Honour Council before being dishonourably removed.[27]

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17 Elucidation to Article 19(1)(b) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.
18 Article 19(1)(d) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.
19 Elucidation to Article 19(1)(d) of the General Courts Law; Elucidation to Article 11(1)(e) of the Supreme Court Law.
20 Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law. In the event of death, judges are to be honourably discharged by the President (Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law).
21 Article 19(1)(c) of the General Courts Law.
22 Article 20(1)(b) of the General Courts Law; Article 11A(1)(b) of the Supreme Court Law.
23 Article 20(1)(c) of the General Courts Law; Article 11A(1)(c) of the Supreme Court Law.
24 Article 20(1)(d) of the General Courts Law; Article 11A(1)(d) of the Supreme Court Law.
25 Article 20(1)(d) of the General Courts Law; Article 12(1)(d) of the Supreme Court Law.
26 Article 20(1)(a) of the General Courts Law; Article 12(1)(a) of the Supreme Court Law
27 Article 20(2) of the General Courts Law and its Elucidation; Article 12(2) of the Supreme Court Law. As for the process of dismissal, Supreme Court judges are to be honourably discharged by the President on the recommendation of the Supreme Court Chief Justice and dishonourably dismissed by the President on the recommendation of the Supreme Court (Article 11A of the Supreme Court Law).

2.1.2. Judicial Independence According to the Constitutional Court

As mentioned, in *Supreme Court v Judicial Commission* (2006), the Constitutional Court gave its fullest discussion of judicial independence yet. In its reasoning, the Court decided that judicial independence:

- Was a prerequisite to the *negara hukum* (literally 'law state', commonly translated as 'rule of law') and the separation of powers, which the Constitutional Court described as the 'soul' of the Constitution.[28]
- Was a pre-requisite to legal guarantees, justice and citizens' human rights. These included the right to a fair trial (but presumably also any other rights that might be upheld in trials).
- Was an inherent right of judges.
- Applies to individual judges and judicial institutions.
- Requires that judges be able to be impartial, and follow their own beliefs about the law and its application, even if this contradicts the interests of powerholders. Judges must, therefore, not fear retaliation for their decisions.
- Requires, therefore, that judges be free from pressure, coercion, threats and offers of recompense (in the form of benefits, including economic benefits and benefits of office).

The Court also pointed to Indonesia's history of judicial dependence on government. The Court noted that while the pre-amended Constitution required that judicial power be independent, 'structural' independence was not achieved until 2004, when the *satu atap* reforms were completed. Under them, the administration of most Indonesian courts was brought under the Supreme Court.[29]

Supreme Court v Judicial Commission has been widely cited by the Court in many of its subsequent cases that touch on judicial independence, some of which also contain several-paragraph excerpts from the judgment. The Court has made significant supplementary comments about the concept in those subsequent

[28] Supreme Court v. Judicial Commission (2006), 169. See also Constitutional Court Decision 43/PUU-XIII/2015 [3.7.1].
[29] Supreme Court v. Judicial Commission (2006), 172, 182–3.

cases. The Court has, for example, reiterated that judges must exercise their independence responsibly – that is:

> within the corridor of the order of the law, according to procedures ... and without being influenced by the government, interests, pressure groups, the media, and influential individuals.[30]

As the Court has put it, independence goes 'hand in hand[31] with accountability realised by supervision'.

In a 2011 case, the Constitutional Court also acknowledged that judicial independence requires adequate infrastructure, funds for hearings, and welfare guarantees for judges.[32] This case was brought by a Semarang administrative court judge, who argued that his constitutional right to judicial independence in handling cases was impeded by these institutional and budgetary impediments. While emphasising the importance of judicial independence, the Constitutional Court rejected the application for two reasons. First, the case related to the 'concrete' practical impediments that the applicant faced (over which the Court lacks jurisdiction), rather than an unconstitutional statutory norm (over which the Court has jurisdiction). Second, judicial independence was not merely an inherent right of judges; it was also an obligation. Judges (such as the applicant) must guard themselves against intervention, even from court chairpersons and deputy chairpersons. This legal obligation remained regardless of any practical impediments.[33]

In other cases, the Court has also linked judicial tenure and terms to judicial independence of other courts, and has considered the ramifications of that independence of the Judicial Commission's involvement in selecting ad hoc and Supreme Court judges.[34]

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[30] Constitutional Court Decision 10/PUU-XVIII/2020 [3.13.1.1].

[31] The Constitutional Court observed that judicial independence is counterbalanced by judicial accountability, and that both principles are essential in a *negara hukum*: Constitutional Court Decision 39/PUU-XIII/2015 [3.7].

[32] Constitutional Court Decision 28/PUU-IX/2011. Ibid [3.12].

[33] The Court made similar findings in Constitutional Court Decision 37/PUU-X/2012 [3.18].

[34] Constitutional Court Decision 85/PUU-XVIII/2020 [3.12.4]. Here, the Court has pointed to international standards including the UN Basic Principles; Constitutional Court Decision 85/PUU-XVIII/2020; Constitutional Court Decision 10/PUU-XVIII/2020 [3.13.1.1], where the Court discussed the process of appointment of the chairperson and deputy chairperson of the Tax Court.

2.2. The Two Cases

2.2.1. Supreme Court v. Judicial Commission

2.2.1.1. Background

The Constitutional Court's most important decision on judicial independence – *Supreme Court v Judicial Commission* – was handed down on 16 August 2006, around the time of its second anniversary. The decision arose from a constitutional challenge brought by 31 Supreme Court judges against provisions of the Judicial Commission Law that authorised the Commission to supervise Supreme Court judges, including by assessing judicial decisions. By way of background, the Supreme Court had, since the Commission's establishment, generally refused to act on any Judicial Commission recommendations to take action against judges over which it had administrative control. Then, the Supreme Court refused to cooperate with a Commission investigation into corruption allegations involving several Supreme Court judges. Chief Justice Bagir Manan explained that the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) was already investigating the allegation and the Commission, therefore, did not need to intervene. In response, the Judicial Commission met with President Susilo Bambang Yudhoyono, asking him to endorse a comprehensive performance assessment of all Supreme Court judges. He did not oblige. In the meantime, a list of so-called 'problematic judges' (*hakim bermasalah*) was leaked to the media.[35]

In retaliation, the Supreme Court judges lodged this challenge in the Constitutional Court, arguing that the Judicial Commission lacked constitutional jurisdiction to monitor their performance, particularly by assessing the exercise of judicial power, including by reviewing decisions or calling judges to account for their decisions. According to the judges, these types of monitoring and assessment compromised judicial independence.

[35] "Sampai Kapan Pintu Rekonsiliasi MA Dan KY Tertutup? [How Long Will the Door to Reconciliation Between MA and KY Be Closed?]" Hukumonline, published March 15, 2006.

2.2.1.2. Decision

After discussing the importance of judicial independence, as described above, the Court emphasised that it can never be absolute. According to the Court, it must 'remain within the limits prescribed by law', and justice and fairness, and should not be misused 'as a means to hide from supervision'.[36] Nevertheless, according to the Court, 'sensitivity' about judicial independence meant that care was required when devising accountability mechanisms so as not to 'adversely affect ongoing judicial processes'. Indeed, the Court noted that maintaining judicial independence was particularly important in Indonesia, given that levels of public trust in the courts were, in the words of the Constitutional Court, in a 'critical state'. For the Court, even these very low levels of trust needed to be protected, apparently so that judicial decisions would be respected (and hence obeyed and accepted).

> ...[n]o matter how thin, the level of remaining trust must be guarded so that it does not disappear completely, so that the intention to maintain the honour, dignity, and behaviour of judges, actually becomes counter-productive and in turn creates legal chaos.

This view led the Constitutional Court to decide that the Judicial Commission could not formally examine the Supreme Court's exercise of judicial power, including by reviewing its judges' decisions. The Court said:

> [E]ven though assessing the technical–judicial skills of judges by reading judicial decisions might assist the Judicial Commission to identify a breach of a code of conduct or ethics, reviewing judicial decisions might place unjustifiable pressure on the judges, thereby breaching judicial independence.[37]

If a decision was wrong, then, according to the Court, it could be corrected using legal avenues, namely appeals. And, the Court stated, citizens and legal experts could continue to evaluate judicial decisions in academic seminars and writings.

Nevertheless, the Constitutional Court was critical of the Supreme Court for failing to impose sufficient accountability mechanisms of its own to ensure that its judges remained free from impropriety, particularly corruption. The Court said:

[36] Supreme Court v. Judicial Commission (2006), 201–2.
[37] Ibid.

> It is hoped that the Supreme Court increases supervision, especially by being more open in responding to criticism, hopes and suggestions from various parties. The principle of judicial independence must be interpreted by judges as [including] an obligation to realise *fair trials*, which is a prerequisite for upholding the *rule of law*. Therefore, the principle of judicial independence embodies an obligation for judges to free themselves from persuasion, pressure, coercion, threats, or fear of retaliation because of certain political or economic interests from the government or political forces in power, groups or factions, with recompense or promises of recompense in the form of benefits of office, economic benefits, or other forms, and not to abuse the principle of the freedom of judges as a shield to protect against supervision [emphasis in original][38]

In the course of reaching its decision, the Constitutional Court also observed that the Judicial Commission lacked authority to review or assess the performance of *Constitutional* Court judges. The Court gave various reasons for reaching this conclusion, which was controversial because it involved the Court passing judgment on its own interests (and even though the applicants made no arguments about the Judicial Commission's supervision of the Constitutional Court). One reason was that Judicial Commission scrutiny might compromise the Court's ability to impartially adjudicate disputes between state institutions – particularly if the Judicial Commission was one of the parties to the dispute, as in this case.[39] The Court observed that the independence of the Constitutional Court might be compromised, either in fact or in perception, if a decision against the Judicial Commission resulted in an adverse evaluation by the Commission. In any event, the Court noted, a mechanism already existed to monitor Constitutional Court judges and process alleged improprieties, predating the Judicial Commission Law and the establishment of the Judicial Commission: an Honour Council.[40]

2.2.2. Tax Court Case[41]

2.2.2.1. Background

In 2023, the Constitutional Court issued another decision involving judicial independence – this time about the Tax Court. A single court, located in Jakarta,[42]

[38] Ibid., 192.
[39] Ibid., 175–6, 199.
[40] Ibid., 199.
[41] Constitutional Court Decision 26/PUU-XXI/2023.
[42] Although it can hear cases in other places: Article 4, Law 14 of 2002 on the Tax Court.

the main function of the Tax Court is resolving disputes between citizens and the government about tax liability.[43] For around two decades, it had been an outlier in the Indonesian judiciary for two main reasons.

First, it was the only court administered by a government department – here the Finance Ministry. As mentioned above, this was true of all courts before the *satu atap* reforms were completed in 2004. More specifically, throughout the Soeharto and early post-Soeharto eras, the general and administrative courts were administered by the Justice Department (now called the Ministry of Law and Human Rights), the religious courts by the Religious Affairs Department, and the military courts by the Defence and Security Department.

Second, the system of appeals from Tax Court decisions is different to those from other courts. The Supreme Court is responsible for the technical-legal competence of Tax Court judges – a responsibility it has in relation to all courts it administers.[44] One of the main ways it meets this responsibility in relation to most of these other courts is by overseeing appeals to high courts and itself hearing appeals on cassation and then on final appeal (reconsideration or *peninjauan kembali*). However, unlike most of these other courts, Tax Court judgments are not subject to appeal through the high courts or cassation. Instead, dissatisfied applicants have only one judicial avenue: a direct application to the Supreme Court for a final appeal.[45] The applicants in the *Tax Court* case asked the Constitutional Court to bring the administration of the Tax Court under the Supreme Court.

2.2.2.2. Decision

Like in *Supreme Court v Judicial Commission*, the Court pointed out that Indonesia is a *negara hukum*, and that a *negara hukum* requires judicial independence. This was, in part, because courts needed to decide disputes

[43] The Tax Court is not the first tax court to be established in Indonesian territory – the Dutch established one, in 1915. See: Hary Djatmiko, "Problematik Sengketa Pajak dalam Peradilan Pajak [Problematic Tax Disputes in Tax Court]," in *Putih Hitam Pengadilan Khusus [White Black Special Court]*, ed. Roejito and Titik Ariyati Winahyu (Jakarta: Judicial Commission, 2013), 323.

[44] Formally, Tax Court decisions are classified as 'special decisions within the judicature of the administrative courts' (Article 27(2) of Law 6 of 1983 on General Tax Rules and Procedures, as amended by Law 28 of 2007).

[45] Article 77(3) of Law 14 of 2002 on the Tax Court. Even the grounds upon which a Reconsideration can be lodged are different to those available in other cases: see Article 91 of the Tax Court Law.

between the govern-*ers* and the govern-*ed*. The applicants had pointed to significant 'cross-over' between the Tax Court and the Finance Ministry. For example, the secretariat of the Tax Court was in the Finance Ministry and the Tax Court's website was hosted on the Finance Ministry's website. Perhaps the most problematic connection was that the Directorate General of Taxation (which was part of the Finance Ministry) was almost always a party in disputes the Tax Court heard. Many retired Tax Director Generals also served on the Tax Court.

The Constitutional Court decided that this crossover and administrative control interfered – or could potentially interfere – with judicial independence. For the Court, then, administrative and technical-legal functions needed to be integrated, primarily because they could not be disentangled. In other words, the tasks and supervision exercised by the Supreme Court and the Ministry necessarily overlapped; judicial independence required that they be performed by only the Supreme Court.

The Court noted that independence was particularly important in tax cases, because it could affect tax compliance levels. The Court did not explain this argument. Presumably, the suggestion was that tax subjects are unlikely to readily comply with a Tax Court decision imposing tax liability if they think the government controls the Tax Court and its decisions. The Court said:

> Without actual independence in judicial institutions or at least if judicial institutions can be potentially influenced by the government or the executive, this can expand opportunities for misuse of power or arbitrariness in government, including by ignoring human rights and the constitutional rights of citizens by the rulers, as a result of the independence of judicial bodies being ignored.[46]

This was certainly not the first case in which the Constitutional Court was asked to rule on the constitutionality of Article 5 of the Tax Court Law – the provision under which the Finance Ministry exercised administrative, organisational and financial control over the Tax Court.[47] Of particular importance

[46] Constitutional Court Decision 26/PUU-XXI/2023, 66.

[47] Previous constitutional challenges to the Ministry's control include Constitutional Court Decision 10/PUU-XVIII/2020 and Constitutional Court Decision 57/PUU-XVIII/2020. However, the Court pointed out that they were argued on a sufficiently different basis to distinguish them from this application, thereby allowing this case to proceed.

was a 2016 case, in which the Constitutional Court raised concerns that the Finance Ministry's control over the Tax Court had:

> already reduced the independence of tax court judges in examining and deciding tax disputes. According to the Constitutional Court, to guard the dignity of the tax court in efforts to create independent judicial power, it is appropriate for the tax court to be pointed toward efforts to create an independent judicial system, also known as the 'one roof system' ... This has already been done in respect of the other branches of the judicature under the Supreme Court, whose technical-administrative development and organisation, administration and financial affairs fall under the authority of the Supreme Court and not the Ministry ... This must be noted as a matter of importance for lawmakers in the future.[48]

In the 2023 *Tax Court* case, the Court observed that lawmakers had taken no action in response to these decisions. To prevent the 2023 decision also being treated as a 'mere message' (*sekadar pesan-pesan*), the Court ordered the administration of the Tax Court to be brought under the one roof of the Supreme Court by the end of 2026 – a deadline that the Court described as 'just and rational'.[49]

2.2.2.3. Critique

While this decision is certainly a boon for judicial independence, additional aspects of the decision were problematical, three of which I discuss here. First, because the decision's ultimate effect is bringing the Tax Court under the administration of the Supreme Court, the most significant ramifications of this decision resemble those that flowed from *Supreme Court v Judicial Commission* in respect of other non-constitutional courts. All courts (including, now, the Tax Court) fall under the Supreme Court's supervision. As covered in more detail below in Part III, this does not bode well for the future of the Tax Court. The Supreme Court tends to shield judges working in these courts from outside scrutiny and does very little to lift judicial quality.

[48] Constitutional Court Decision 26/PUU-XXI/2023.

[49] Constitutional Court Decision 26/PUU-XXI/2023, [3.13]. Formally, the decision was that Article 5(2) of the Tax Court Law was unconstitutional unless it was read to mean that the Tax Court is administered by the Supreme Court, which is to take place in stages before 31 December 2026: Ibid, 72.

The second problematic aspect relates to how the Constitutional Court used a *draft* of the 2002 Tax Court Law to reach its conclusion. Article 5(3) of this draft stated that the administration of the Tax Court was to be transferred from the Finance Ministry to the Supreme Court 'in stages'. The Constitutional Court decided that this indicated that lawmakers always intended that the Supreme Court would become responsible for the administration of the Tax Court.

This argument is not convincing. Article 5(3) of the Draft was removed before the Tax Court statute was enacted. Presumably, then, lawmakers intended the *precise opposite* to what the Constitutional Court concluded. Because lawmakers left Article 5(3) out, it can be safely presumed that they deliberated the provision and deliberately chose to reject it. They would have included Article 5(3) if they wanted the Supreme Court to eventually administer the Tax Court.

The third problematic aspect is that the Constitutional Court did not provide details about how its decision should be complied with, stating only that:

> When this decision is read out, stakeholders are, in stages, to immediately prepare regulations related to all legal necessities, including procedural law within the framework of increasing the professionalism of Tax Court human resources, and prepare other issues related to the intended integration of jurisdiction under the Supreme Court. Accordingly, by 31 December 2026 at the latest, all administration of the Tax Court is to already be under the Supreme Court.[50]

While the Court very rarely specifies which institutions must take action in response to its decisions,[51] I argue that it should have done so in this case, given the complexity of the task of transferring administrative control over the Tax Court. Instead, the Court was vague, referring to unspecified stakeholders. The Finance Ministry and the Tax Directorate General will need to consider (and probably revoke) the suite of regulations and orders they have made that relate to the Tax Court and its operation. The Supreme Court will need to make significant institutional adjustments (and issue new regulations) to accommodate the Tax Court (and the Supreme Court's new responsibilities in respect of that Court).

[50] Ibid., [3.13].

[51] Simon Butt and Prayekti Murharjanti, "What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia," *International Journal of Constitutional Law* 20, no. 1 (January 2022): 428–53, https://doi.org/10.1093/icon/moac014.

Presumably, to affect the required change, the national legislature will also need to significantly amend or replace the Tax Court Law (with extensive input from relevant ministries). Many provisions of the current Tax Court Law deal with ministerial control over aspects of the Tax Court and its judges, including their salaries, allowances, appointments and dismissals.[52] In this context, more specific directions to the legislature about how compliance with the Court's decision could have been effected may have made compliance more likely.

Given the large number of Tax Court Law provisions that presuppose or give effect to ministerial control, it is surprising that the Court did not invalidate the Law in its entirety, as it has done in several cases, one of which was its first case. This was the *Electricity Law* case (2003),[53] where the Court decided, by allowing excessive private-sector involvement in the electricity industry, the state had relinquished its control over an important branch of production or industry. The maintenance of this control was required by Article 33(3) of the Constitution. Because so many of the Law's provisions reflected the privatisation goal, the Court found that the 'spirit' of the law violated the Constitution and, accordingly, invalidated the entire statute.[54]

Instead, the *Tax Court* decision seems to follow a similar approach to the one taken in the *Anti-Corruption Court case* (2006).[55] Here, the Constitutional Court decided that the Anti-Corruption Court was unconstitutional, and imposed a three-year deadline for the enactment of a new, constitutional, governing law for the Anti-Corruption Court. The legislature met this deadline. However, the major difference between the Tax Court case and the *Anti-Corruption Court* case, was that the Constitutional Court was specific in its order to the legislature (*pembuat undang-undang*) in the *Anti-Corruption Court* case.

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[52] See, for example, Articles 13(1) and (2), 14, 16, 17, 22 and 25. Indeed, in a 2020 constitutional challenge brought by three judges, the Constitutional Court removed the Minister's statutory ability to suggest to the president who should be appointed as chief and deputy chief justice of the Court: Constitutional Court Decision 10/PUU-XVIII/2020.

[53] Constitutional Court Decision 001-021-022/PUU-I/2003.

[54] Simon Butt and Tim Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33," *Bulletin of Indonesian Economic Studies* 44, no. 2 (2008): 239–62, https://doi.org/10.1080/00074910802169004.

[55] Constitutional Court Decision 012-016-019/PUU-IV/2006.

2.3. Observations

Putting aside some of these criticisms, the basic thrust of the Supreme Court's decisions in *Supreme Court v Judicial Commission* and *Tax Court* is entirely defensible. Judicial independence is clearly a prerequisite to a functioning judiciary and hence democracy, the rule of law and human rights protections.[56] Judges the world over emphasise its importance and legitimately resist intrusions (actual or perceived). There is a basis for the fear that outside assessment of the exercise of judicial power could undermine judicial independence, because assessment might make judges decide cases in ways they think their assessors will like, rather than according to their own conviction about the relevant facts and law. Judicial independence is not the only concern. Some argue that having judicial assessments at all suggests that judges *need* assessing, which might reduce faith in the judiciary – even more so if the assessment is negative.[57] Others wonder whether, if judges really are the legal leaders (with superior legal knowledge) that they should be, any assessor would be sufficiently credible or competent to assess them. The Constitutional Court expressed all these concerns in *Supreme Court v Judicial Commission*, as mentioned.

Yet judicial independence can provide too much protection for judges if they use it to insulate themselves from criticism of their decisions, performance or actions. In some systems, it is even feared that judges use the strong theoretical ground of judicial independence to avoid investigation for outright illegal behaviour such as corruption or to avoid detection of lower-than-ideal levels of competence.[58]

This seems to be precisely what is happening in Indonesia. Legitimate concerns are often expressed about whether Indonesian courts exercise the independence the Constitutional Court has guaranteed for proper purposes. Since 2010, more than 20 judges have been convicted of judicial bribery in open court proceedings,

[56] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge Mass: Harvard University Press, 2004), 31–2.2004

[57] Troy Riddell, Lori Hausegger, and Matthew Hennigar, "Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy," *Osgoode Hall Law Journal* 50, no. 2 (2012): 403, 10, 23, https://doi.org/10.60082/2817-5069.1025.

[58] Maria Dakolias and Kimberley L. Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform," *Wisconsin International Law Journal* 18 (2000): 354, https://heinonline.org.

after relatively rigorous investigation and prosecution by the KPK. The convicted judges, both career and ad hoc, came from almost all branches of Indonesia's first instance judicature, as well as higher courts and the Constitutional Court itself. The judges, some senior, were found guilty of accepting bribes in a wide variety of cases and disputes, sometimes after being caught red-handed receiving the bribe. The revelations from the cases have been damning. Most judges were proactive, not hesitating to negotiate and receive bribes in their chambers, and using their judicial discretion as leverage to extract bribes. The decisions also reveal other practices, such as bribes being sought and paid for favourable pre-trial decisions; payments being made by provision of 'entertainment services' rather than cash; judges nominating themselves to chair panels after being offered a bribe to better control the process and the decision; judges being willing to accept or even extort money for cases which they have no power to influence; and first instance judges acting as intermediaries to assist parties with their appeals, including by connecting them to corrupt high court judges.

Worse, the Supreme Court has done very little to identify errant judges and to bring them to heel. Because the Judicial Commission has been resoundingly marginalised – mainly because of *Supreme Court v Judicial Commission* – pursuing judicial misconduct is a largely Supreme Court-controlled endeavour. Several consequences of this have emerged.

2.3.1. Few Allegations Pursued

First, only a relatively small proportion of misconduct allegations are pursued, despite many thousands of reports of judicial impropriety being received annually by the Supreme Court, the Judicial Commission, and the national Ombudsman. The Ombudsman and the Judicial Commission can only *recommend* that the Supreme Court investigate and issue sanctions. The Commission cannot even compel judges to attend for questioning, as the facts leading up to *Supreme Court v Judicial Commission* amply illustrate.[59] The Supreme Court is notorious for ignoring Commission recommendations: for example, in 2019, the Commission

[59] Karina M. Tehusijarana, "Supreme Court Snubs Most Judicial Commission's Recommendations," The Jakarta Post, published January 4, 2019.

complained that the Court had followed up on only 10 of the 130 judges it recommended for punishment.[60] For its part, the Supreme Court maintains that many of the complaints the Commission receives, and many of the allegations the Commission investigates, relate to technical-judicial matters, which, for reasons of judicial independence (and supported by the Constitutional Court's decision in *Supreme Court v Judicial Commission*), the Commission lacks authority to pursue.[61]

2.3.2. Protecting Errant Judges?

Second, the Supreme Court appears to have misused its control over misconduct processes. The Supreme Court Supervisory Body (*Badan Pengawasan*, or *Bawas*) can impose punishments on errant judges, including recommending their dismissal to the President.[62] Judges upon whom sanctions have been imposed can then defend themselves before the Judicial Honour Council (*Majelis Kehormatan Hakim* or MKH).[63] The Supreme Court usually discloses the outcome of punishments and Council processes in its annual reports, including indicating how many were dismissed, suspended, or admonished. Between 2009 and 2020, for example, a total of 35 judges were dismissed and 16 were suspended and admonished. Almost 50% of the 50 or so Council hearings between 2009 and 2017 concerned alleged bribery, and almost 35% concerned 'adultery and harassment' (*perselingkuhan-pelecehan*). Of the remainder, three

[60] Agus Sahbani, "2019, MA Hanya Tindak Lanjuti 10 Usulan Sanksi Hakim [2019, The Supreme Court Only Followed Up on 10 Judges' Sanction Proposals]," Hukumonline, published December 26, 2019.

[61] To be sure, the Supreme Court does not reject all of the Commission's recommendations. Indeed, a reading of the more recent annual reports of the Judicial Commission and the Supreme Court reveals that a significant proportion of Judicial Honour Council proceedings are initiated by the Judicial Commission – usually just under half. See, for example, Mahkamah Agung [Supreme Court], *Laporan Tahunan 2014 [Annual Report 2014]* (Jakarta: Mahkamah Agung, 2015), 146; Mahkamah Agung [Supreme Court], *Laporan Tahunan 2015 [Annual Report 2015]* (Jakarta: Mahkamah Agung, 2016), 133; Mahkamah Agung [Supreme Court], *Laporan Tahunan 2016 [Annual Report 2016]* (Jakarta: Mahkamah Agung, 2017), 360.

[62] Article 11A(1), Supreme Court Law (as amended); Article 20(1), General Courts Law (as amended).

[63] Article 11A(6), Supreme Court Law (as amended); Article 20(6), General Courts Law (as amended). The MKH comprises four members from the Judicial Commission, and three from the Supreme Court (usually Commissioners and judges). If the initial proposal to sanction the judge comes from the Commission, then the Commission nominates the panel chair; if the proposal comes from the Supreme Court, then it chooses the chairperson. If the decision of the Council is not unanimous, a majority vote suffices. These composition rules may appear to tilt the balance of decision-making in the Judicial Commission's favour. But the Supreme Court ultimately retains power to determine whether sanctions should be imposed on a judge and, accordingly, whether a misconduct case ever reaches the MKH. If the Supreme Court wishes to prevent the Commission from passing judgment on a judge, it can impose either no sanction, or a sanction lighter than a dismissal.

involved narcotics.[64] While these processes are sometimes reported in the press or by the Supreme Court itself, the Supreme Court does not disclose the names of judges the MKH sanctions, but merely provides their initials. Precisely why is unclear. If the Court's goal is to maintain the anonymity of errant judges and other officials, then this is not achieved. It is easy to identify sanctioned judges from a list of judges working in the court, which *is* specified.

Two clear patterns emerge from an examination of MKH processes and outcomes. First, judges who were not pursued for corruption were often sanctioned for acts that bear no relation to their judicial functions. Most of these judges were punished for an extramarital affair, with no clear link drawn between this and their judicial performance. Adultery might conceivably affect judicial performance where it involves judges or officials from the same court, particularly if it becomes scandalous and distracting. Otherwise, however, it is doubtful whether sanctioning consenting adults for activities in their personal lives serves any legitimate purpose.

Second, MKH processes appear to divert corrupt judges away from the criminal process. Most judges found to have received bribes were merely either dismissed or suspended as judges, with no further action, even in serious cases. In only two cases were judges sanctioned by the Council also prosecuted before an anti-corruption court. The impression that emerges is that a two-track system is now operating. A judge who manages to have an allegation dropped by the Supreme Court, handled internally by the Supreme Court, or decided by the MKH, will likely avoid criminal trial and punishment. This is significant because the heaviest punishment the Council can issue is dismissal; unlike Indonesia's anti-corruption courts, it cannot impose imprisonment for corruption. If this impression is correct, then even if the Council process is genuinely intended to punish and discourage misconduct, it may be having the opposite effect. It diverts judges from the ordinary criminal process and its more severe punishments, including for receiving bribes.

[64] Agus Sahbani, "13 Tahun Berkiprah, KY Telah Usulkan 657 Hakim Dijatuhi Sanksi [13 Years of Operation, KY Has Proposed 657 Judges to be Sanctioned]," Hukumonline, published August 16, 2018.

2.3.3. Failure to Reduce Corruption and Miscarriages of Justice

The reported cases of judicial corruption and the sanctions imposed for integrity-related misconduct mentioned above, as well as the various admissions of chief justices and other senior officials about the extent of judicial corruption, support the conclusion that corruption is widespread.[65] It may even be the norm rather than the exception, if the overwhelming number of anecdotal accounts conveyed to the author over the past two decades are to be believed. It can be concluded, then, that if the Supreme Court had genuinely attempted to reduce corruption, then its efforts have been unsuccessful. The lack of success is brought into sharp relief by the prosecution, ongoing at the time of writing, of a number of Supreme Court judges and staff for corruption.

Even where corruption is not a factor, decisions with incomplete or absurd reasoning, or based on weak or no evidence, raise suspicions that they might have been driven by considerations other than the law and relevant facts – such as judicial bias or public pressure. These suspicions legitimately arise even in high profile cases, where the courts reached decisions not reasonably open to them on the evidence presented.[66] Many of these cases have been simply confirmed by the Supreme Court, without much evidence of scrutiny.[67]

These problems also put pay to suggestions that judicial assessments would undermine public trust – a concern the Constitutional Court raised in *Supreme Court v Judicial Commission*. Indonesian courts and judges already fare badly in public-perception surveys conducted in Indonesia,[68] and conducted elsewhere but published in Indonesia.[69] In any event, many judicial decisions are already the subject of publicly available and highly critical scholarly and practitioner analysis.

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[65] Simon Butt and Tim Lindsey, "Judicial Mafia: The Courts and State Illegality in Indonesia," in *The State and Illegality in Indonesia*, ed. Edward Aspinall and Gerry van Klinken (Leiden: KITLV Press, 2011).

[66] For a discussion, see Simon Butt, "What Makes a Good Judge? Perspectives from Indonesia," *Asian Journal of Law and Society* 8 (2021): 1–42, https://doi.org/10.1017/als.2020.27.

[67] For example, Simon Butt, "Indonesia's Criminal Justice System on Trial: The Jessica Wongso Case," *New Criminal Law Review* 24, no. 1 (2021): 3–58, https://doi.org/10.1525/nclr.2021.24.1.3.

[68] Hukumonline. "Kepercayaan Publik Terhadap Pengadilan Masih Lemah [Public Trust in the Courts is Still Weak]," Hukumonline, published March 25, 2013.

[69] Jon Vrushi, *Global Corruption Barometer Asia 2020: Indonesia* (Jakarta: Transparency International Indonesia, 2020), 10; Muhamad Yasin, "Antara Definisi dan Praktik Rule of Law di Indonesia [Between the Definition and Practice of the Rule of Law in Indonesia]," Hukumonline, published April 23, 2021.

2.3.4. Accountability Without Compromising Independence?

As mentioned, in *Supreme Court v Judicial Commission*, the Constitutional Court suggested the best way to ensure judicial accountability without compromising judicial independence was through the appellate system. This is a 'solution' – commonly voiced in the international literature – to the judicial independence/accountability conundrum.[70] However, it is unconvincing, particularly in the Indonesian context, for various reasons. First, it assumes that the quality of the appeal court is superior to that of the lower court. But there is very little evidence to support this assumption, which in any event seems to be dispelled by the much higher rate of appeal against high court decisions compared with other court decisions.[71] It is, therefore, quite possible – even likely – for a lower court judge's decision to be wrongly assessed as incorrect in an appeal decision that is itself incorrect. Also possible is that the appeal decision may have been distorted or fixed through bribery, in which case that decision should certainly not be used to guide, much less impose any accountability on, lower court judges.

In any event, there appears to be increasing acceptance in the international literature that the judicial quality and competence embodied in a judgment *can* be assessed without undermining judicial independence.[72] Indeed, some scholars have argued persuasively that adjudication can be 'broken down into smaller parts and the quality of these can be assessed with measurable criteria' independent of the particular outcome in a given case.[73] These include whether the decision interpreted the law correctly, whether it employs appropriate jurisprudence and legal sources, whether the reasons are sound, and whether the decision is clearly written, structurally comprehensible, and the like.[74]

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[70] Many of these weaknesses in the appellate-system-as-quality-control approach have been widely discussed in the general literature (that is, outside the context of Indonesia). See, for example, Matyas Bencze and Gar Yein Ng, *How to Measure the Quality of Judicial Reasoning* (Springer: Berlin Heidelberg, 2018), 13-5.

[71] The average appeal rate against district court decisions and against Supreme Court cassation decisions sat at just under and just over 10% respectively, according to the Supreme Court's annual reports (2017-2020). However, the average appeal rate against high courts appears to tell another story. On average, appeals against their decisions occur far more regularly – in around 60% of cases.

[72] Joe McIntyre, "Evaluating Judicial Performance Evaluation: A Conceptual Analysis," *Oñati Socio-Legal Series* 4, no. 5 (2014): 916, https://ssrn.com/abstract=2533854.

[73] Matyas Bencze and Gar Yein Ng, *How to Measure*, 7.

[74] Ibid., 14.

Applied to the Indonesian context, there should be nothing objectionable about imposing a bare minimum standard for decision quality – without compromising independence. The standard should be a legally defensible decision that addresses all arguments of the parties, and is made within the shortest possible time. In reaching their decisions, judges must demonstrate that they have considered all relevant evidence and arguments. If they reject evidence or arguments, they must explain why – rather than simply dismissing them out of hand or ignoring them altogether. Meeting this standard should not affect their independence, if it is understood that there can be more than one legally defensible conclusion in any given case. This approach should minimise, or even remove, the scope for judges to cherry-pick arguments and evidence to suit the result they wish to reach, while ignoring arguments and evidence that might point to a contrary result. As far as is practicable – without imposing any formal system of precedent – Indonesian judicial decisions must also follow like cases. And sentencing guidelines should become the norm – as in some corruption cases.

III. CONCLUSION

How the Judicial Commission might have fared had the Constitutional Court rejected the Supreme Court's application in *Supreme Court v Judicial Commission* is something about which observers can only speculate. There is certainly no guarantee that judicial accountability in Indonesia today would be markedly better if the Constitutional Court had decided the case differently. The Supreme Court may well have simply found another way to circumvent the Commission.

But perhaps it is time for the Constitutional Court to reconsider the balance between judicial independence and accountability, when or if an opportunity like that presented in *Supreme Court v Judicial Commission* next arises. After all, the Constitution itself does not prefer judicial independence over judicial accountability. It requires both judicial independence and that Supreme Court judges have 'unblighted integrity and character, be just and professional' (Article 24A(2)). The current system is not reliably ensuring that non-constitutional judges exhibit these characteristics.

BIBLIOGRAPHY

Assegaf, Rifqi. "The Supreme Court Reformasi, Independence and the Failure to Ensure Legal Certainty." In *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, edited by Melissa Crouch, 31–58. Cambridge: Cambridge University Press, 2019.

Awaliyah, Gumanti. "Jubir MA: Indonesia Kekurangan 4.000 Hakim [Supreme Court Spokesperson: Indonesia Short of 4,000 Judges]." Republika.co.id, published July 18, 2018. https://nasional.republika.co.id/berita/nasional/hukum/18/07/18/pc1x0s335-jubir-ma-indonesia-kekurangan-4000-hakim.

Bencze, Matyas, and Gar Yein Ng. *How to Measure the Quality of Judicial Reasoning*. Springer: Berlin Heidelberg, 2018.

Butt, Simon. "Indonesia's Criminal Justice System on Trial: The Jessica Wongso Case." *New Criminal Law Review* 24, no. 1 (2021): 3–58, https://doi.org/10.1525/nclr.2021.24.1.3.

Butt, Simon. "What Makes a Good Judge? Perspectives from Indonesia." *Asian Journal of Law and Society* 8 (2021): 1–42, https://doi.org/10.1017/als.2020.27.

Butt, Simon and Tim Lindsey. "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33." *Bulletin of Indonesian Economic Studies* 44, no. 2 (2008): 239–62, https://doi.org/10.1080/00074910802169004.

Butt, Simon and Tim Lindsey. *Indonesian Law*. Oxford: Oxford University Press, 2018.

Butt, Simon, and Tim Lindsey. "Judicial Mafia: The Courts and State Illegality in Indonesia." In *The State and Illegality in Indonesia*, edited by Edward Aspinall and Gerry van Klinken. Leiden: KITLV Press, 2011.

Butt, Simon and Prayekti Murharjanti. "What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia." *International Journal of Constitutional Law* 20, no. 1 (January 2022): 428–53, https://doi.org/10.1093/icon/moac014.

Butt, Simon and Nicholas Parsons. "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?" *Indonesia* 97 (2014): 55–85, https://doi.org/10.5728/indonesia.97.0055.

Chandranegara, Ibnu Sina. *Hukum Acara Mahkamah Konstitusi [Constitutional Court Procedural Law]*. Sinar Grafika, 2021.

Constitutional Court Decision 001-021-022/PUU-I/2003.

Constitutional Court Decision 005/PUU-IV/2006.

Constitutional Court Decision 012-016-019/PUU-IV/2006.

Constitutional Court Decision 28/PUU-IX/2011.

Constitutional Court Decision 48/PUU-IX/2011.

Constitutional Court Decision 49/PUU-IX/2011.

Constitutional Court Decision 37/PUU-X/2012.

Constitutional Court Decision 7/PUU-XI/2013.

Constitutional Court Decisions 1-2/PUU-XII/2014.

Constitutional Court Decision 39/PUU-XIII/2015.

Constitutional Court Decision 43/PUU-XIII/2015.

Constitutional Court Decision 93/PUU-XV/2017.

Constitutional Court Decision 85/PUU-XVIII/2020.

Constitutional Court Decision 10/PUU-XVIII/2020.

Constitutional Court Decision 85/PUU-XVIII/2020.

Constitutional Court Decision 56/PUU-XX/2022.

Constitutional Court Decision 57/PUU-XVIII/2022.

Constitutional Court Decision 26/PUU-XXI/2023.

Constitutional Court Decision 26/PUU-XXI/2023.

Dakolias, Maria and Kimberley L. Thachuk. "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform." Wisconsin International Law Journal 18 (2000): 353.

Djatmiko, Hary. "Problematik Sengketa Pajak dalam Peradilan Pajak [Problematic Tax Disputes in Tax Court]." In *Putih Hitam Pengadilan Khusus [White Black Special Court]*, edited by Roejito and Titik Ariyati Winahyu, 318–92. Jakarta: Judicial Commission, 2013.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge Mass: Harvard University Press, 2004.

Hukumonline. "Diminta Hati-Hati, MK Berpotensi Langgar Asas Nemo Judex Ideoneus in Propria Causa [Asked to Be Careful, MK Has the Potential to Violate the Principle of Nemo Judex Ideoneus in Propria Causa]." Hukumonline, published December 8, 2016. https://www.hukumonline.com/berita/a/diminta-hati-hati--mk-berpotensi-langgar-asas-inemo-judex-ideoneus-in-propria-causa-i-lt58492a61665ee/.

Hukumonline. "Kepercayaan Publik Terhadap Pengadilan Masih Lemah [Public Trust in the Courts is Still Weak]." Hukumonline, published March 25, 2013. https://www.hukumonline.com/berita/baca/lt51501b6f0b4f5/kepercayaan-publik-terhadap-pengadilan-masih-lemah/.

Hukumonline. "Sampai Kapan Pintu Rekonsiliasi MA Dan KY Tertutup? [How Long Will the Door to Reconciliation Between MA and KY Be Closed?]" published March 15, 2006. https://www.hukumonline.com/berita/baca/hol14538/sampai-kapan-pintu-rekonsiliasi-ma-dan-ky-tertutup?page=all/.

Jakarta Post. "Court Can't Review Law Says Oetojo." Jakarta Post, published June 4, 1997.

Law of 1964 on the Judicial Power.

Law No. 6 of 1983 on the General Tax Rules and Procedures.

Law No. 14 of 1985 on the Supreme Court.

Law No. 2 of 1986 on the General Courts.

Law No. 14 of 2022 on the Tax Court.

Law No. 48 of 2009 on the Judicial Power.

Lev, Daniel S. "Judicial Authority and the Struggle for an Indonesian Rechtsstaat." *Law and Society Review* 13 (1978): 37–71, https://doi.org/10.2307/3053242.

Mahkamah Agung [Supreme Court]. *Blueprint for the Reform of the Supreme Court of Indonesia*. Jakarta: Supreme Court of Indonesia, 2003.

Mahkamah Agung [Supreme Court]. *Laporan Tahunan 2014 [Annual Report 2014]*. Jakarta: Mahkamah Agung, 2015.

Mahkamah Agung [Supreme Court]. *Laporan Tahunan 2015 [Annual Report 2015]*. Jakarta: Mahkamah Agung, 2016.

Mahkamah Agung [Supreme Court]. *Laporan Tahunan 2016 [Annual Report 2016]*. Jakarta: Mahkamah Agung, 2017.

Maladi, Yanis. "Benturan Asas Nemo Judex Idoneus in Propria Causa dan Asas Ius Curia Novit [The Clash of the Principle of Nemo Judex Idoneus in Propria Causa and the Principle of Ius Curia Novit]." *Jurnal Konstitusi* 7, no. 2 (2010): 1–18, https://doi.org/10.31078/jk721.

McIntyre, Joe. "Evaluating Judicial Performance Evaluation: A Conceptual Analysis." *Oñati Socio-Legal Series* 4, no. 5 (2014): 898–926, https://ssrn.com/abstract=2533854.

Media Indonesia. "Kepercayaan Publik Terhadap Lembaga Peradilan Menurun Drastis Sumber [Public Trust in Judicial Institutions Declines Drastically Source]." Media Indonesia, published June 17, 2016. https://mediaindonesia.com/politik-dan-hukum/51485/kepercayaan-publik-terhadap-lembaga-peradilan-menurun-drastis.

Riddell, Troy, Lori Hausegger, and Matthew Hennigar. "Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy." *Osgoode Hall Law Journal* 50, no. 2 (2012): 403, 10, 23, https://doi.org/10.60082/2817-5069.1025.

Sahbani, Agus. "13 Tahun Berkiprah, KY Telah Usulkan 657 Hakim Dijatuhi Sanksi [13 Years of Operation, KY Has Proposed 657 Judges to be Sanctioned]." Hukumonline, published August 16, 2018. https://www.hukumonline.com/berita/baca/lt5b74841ee2ad3/13-tahun-berkiprah--ky-telah-usulkan-657-hakim-dijatuhi-sanksi.

Sahbani, Agus. "2019, MA Hanya Tindak Lanjuti 10 Usulan Sanksi Hakim [2019, The Supreme Court Only Followed Up on 10 Judges' Sanction Proposals]." Hukumonline, published December 26, 2019. https://www.hukumonline.com/berita/baca/lt5e048ddfoce81/2019--ma-hanya-tindak-lanjuti-10-usulan-sanksi-hakim?r=9&p=8&q=%22MKH%22&rs=1847&re=2021.

Suara Pembaruan. "Tajuk Rencana: Negara Hukum Bukan 'Negara Undang-Undang [Editorial: The State of Law is Not a 'State of Laws]." Suara Pembaruan, published November 14, 1996.

Supreme Court. *Supreme Court Annual Report 2019*. Jakarta: Supreme Court, 2020.

Supreme Court v. Judicial Commission (2006).

Tehusijarana, Karina M. "Supreme Court Snubs Most Judicial Commission's Recommendations." The Jakarta Post, published January 4, 2019. https://www.thejakartapost.com/news/2019/01/04/supreme-court-snubs-most-judicial-commissions-recommendations.html.

Vrushi, Jon. *Global Corruption Barometer Asia 2020: Indonesia*. Jakarta: Transparency International Indonesia, 2020.

Yasin, Muhamad. "Antara Definisi dan Praktik Rule of Law di Indonesia [Between the Definition and Practice of the Rule of Law in Indonesia]." Hukumonline, published April 23, 2021. https://www.hukumonline.com/berita/baca/lt5a1c25c633cb6/kisah-japin-dalam-penegakan-hukum-perkebunan.

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Court-Packing Accomplished – The Changing Jurisprudence of a Subordinate Constitutional Court

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Abstract

The worldwide decline in democracy poses a major challenge to the independence of constitutional courts, which are the guardians of constitutionalism and the rule of law. The international literature on constitutional adjudication is therefore understandably concerned with how judicial independence is undermined in different types of authoritarian regimes. However, less attention has been paid to how the practice of these courts evolves when they are directly or indirectly controlled by the government. This article examines how the practices of the Hungarian Constitutional Court changed following the successful court-packing by its government, which exercised its constitution-making parliamentary majority to subvert the Court, which was once one of the most activist constitutional courts in Europe. In this case, political influence was fully exercised; this study shows how the Constitutional Court, in order to maintain a semblance of independence, uses several different methods to uphold the government's will. The Hungarian example may be instructive as it illustrates where the dismantling of judicial independence can lead.

Keywords: Constitutional Jurisprudence; Court Packing; Hungarian Constitutional Court; Judicial Independence.

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I. INTRODUCTION

If the decline of democracy is indeed a worldwide trend, it is reasonable to assume that this process affects the role of constitutional courts in those countries where these bodies are the guardians of democracy and the rule of law. Experiences in Europe seem to confirm this presumption, showing that in countries such as Hungary and Poland, where nationalist populist governments have long been in power, constitutional courts, which used to play a significant role, have been effectively packed with justices sympathetic to the ruling governments. This is particularly noticeable in Hungary, where the Constitutional Court, one of Europe's most powerful and firmly activist such bodies in the 1990s, has become a servant to the will of the majority government. It is now widely accepted that the Court has been packed by the ruling parties that came to power in 2010 and has since served the interests of the government under a populist, semi-authoritarian regime.[1]

Not surprisingly, this situation has attracted wide scholarly interest, and a number of studies have investigated this process and its political-legal circumstances.[2] However, this work generally aims to describe only how the Hungarian Constitutional Court was neutralised and how its composition was changed to be advantageous to the government. Much less attention has been

[1] See, for example, Matthijs Bogaards, "De-Democratization in Hungary: Diffusely Defective Democracy," *Democratization* 25, no. 8 (2018): 8, https://doi.org/10.1080/13510347.2018.1485015; Pablo Castillo-Ortiz, "The Illiberal Abuse of Constitutional Courts in Europe," *European Constitutional Law Review* 15, no. 1 (2019): 61-3, https://doi.org/10.1017/S1574019619000026; Bojan Bugarič, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism," *International Journal of Constitutional Law* 17, no. 2 (2019): 605, https://doi.org/10.1093/icon/moz032; Theo Fournier, "From Rhetoric to Action, A Constitutional Analysis of Populism," *German Law Journal* 20, no. 3 (2019): 370-72, https://doi.org/10.1017/glj.2019.22; Gábor Halmai, "Populism, Authoritarianism, and Constitutionalism," *German Law Journal* 20, no. 3 (2019): 307, http://dx.doi.org/10.1017/glj.2019.23; Fruzsina Gárdos-Orosz, "Challenges to Constitutional Adjudication in Hungary After 2010," in *The Role of Courts in Contemporary Legal Orders*, ed. M. Belov (The Hague: 2019), 324, 336-39; Nóra Chronowski, Ágnes Kovács, Zsolt Körtvélyesi and Gábor Mészáros, "The Hungarian Constitutional Court and the Abusive Constitutionalism" (Working Papers (published) presented for Research Center for Social Sciences of the Hungarian Academy of Sciences, 2022).

[2] On the Hungarian Constitutional Court, see, for example, Attila Vincze, "Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court," *Vienna Journal on International Constitutional Law* 8, no. 1 (2014), https://doi.org/10.1515/icl-2014-0105; Imre Vörös, "The Constitutional Landscape After the Fourth and Fifth Amendments of Hungarian Fundamental Law," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 55, no. 1 (2014): 1-20, https://doi.org/10.1556/ajur.55.2014.1.1; Zoltán Szente, "The Political Orientation of the Members of the Constitutional Court Between 2010 and 2014," *Constitutional Studies* 1, no. 1 (2016): 123-49, https://constitutionalstudies.wisc.edu.

paid to the real impact of these changes on the functioning of the Constitutional Court. Even in these circumstances, several scenarios are conceivable. Given that the erosion of the Court's independence was a gradual process spanning several years, the Court could, in principle, have resisted the political demands of the majority government and the newly elected members. It could have insisted on the formal guarantees of its independence and asserted the role defined for the Court by the Constitution. Nevertheless, complete passivity is also conceivable in such circumstances – a scenario in which the Constitutional Court neither attempts to obstruct the will of the government nor actively supports it. Finally, it is also possible for the Court to become a submissive instrument of the government, showing loyalty and serving its political interests.

As far as the role of the Hungarian Constitutional Court and its place in contemporary constitutional polity is concerned, its behaviour and general strategy are grey zones that are less well researched. Therefore, this article will examine the changes in the jurisprudence of the government-friendly packed Constitutional Court, paying special attention to those cases and controversies which are politically meaningful.

This article will also demonstrate how the Constitutional Court has become a servant of government interests and how this has occurred. Considering the circumstances, where the populists have usually held a two-thirds majority in parliament since 2010[3] – a constitution-making majority – an authoritarian transition has taken place. This was perhaps not surprising, although it was not inevitable.

For the purpose of this study, Part 1 explains the situation of the Constitutional Court and constitutional review in the run-up to and after the turning point of 2010. Part 2 presents an analytical framework for assessing the political bias of the Court. The third part analyses the practice of the Court after 2010, exploring whether and how the Court's jurisprudence has evolved as a result of these changes. In doing so, these subsections describe the behavioural strategies developed and used by the Court to support the government.

[3] Between 2015 and 2018, the government did not reach a two-thirds majority.

II. DISCUSSION

2.1. Constitutional Court and Constitutional Review Before and After 2010

The Constitutional Court was one of the newly established institutions after the fall of communism in the course of the democratic transition of Hungary in 1989-90. The Court was established in the mould of the German *Bundesverfassungsgericht,*[4] establishing a European model of a centralized system of constitutional review with constitutional guarantees of independence and wide-ranging powers. From 1990 onwards, the Constitutional Court established a rich and extensive jurisprudence; it dealt with virtually almost all the classical issues typical in Western countries with much longer constitutional traditions. Undoubtedly, the Court achieved a preeminent position in the Hungarian constitutional system and played a major role in elaborating and standardizing living constitutional law. In the first nine years of its operation, the Court pursued strongly 'activist' practices in terms of its jurisdiction and interpretations.

In 2010, the former right-wing opposition party Fidesz and its satellite party, the Christian Democratic People's Party, won a two-thirds, constitution-making parliamentary majority. The new government, exploiting its overwhelming majority in Parliament, sought to neutralise all institutions whose role was to counterbalance the executive power. It was, therefore, essential for the government to put the once powerful Constitutional Court under political dominion. In doing so, one of the first steps was transforming the process of nominating Constitutional Court justices, practically introducing the partisan selection of members of the Court. Beyond this, the number of constitutional justices was increased from 11 to 15. In this way, pro-government judges became the majority, and since 2016, all the members of the Constitutional Court have been nominated by the governing parties.

Nevertheless, the government was distrustful of the Constitutional Court from the very beginning. The ruling coalition parties felt that this body could

[4] Gábor Halmai, "The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (Kluwer Law International, 2002), 195-208.

be an effective obstacle to their ambition of comprehensively overhauling the legal system. Therefore, using its parliamentary supermajority, the government severely curbed the Court's powers, depriving it of the power of review of public finance legislation. In parallel, the scope of responsibility of the Constitutional Court has also been significantly reduced by the abolishing of the so-called *actio popularis* – that is, every citizen's right, even if lacking any personal interest, to turn to the Court to ask for a review of the constitutionality of a statutory act. As a result, only the government, at least one-quarter of the members of parliament, the President of the *Kúria* (the supreme court), the Prosecutor General, and the Commissioner for Fundamental Rights may initiate ex-post reviews of legislation at the Constitutional Court. However, in 2011, following the German model, the possibility of lodging individual constitutional complaints was extended to cases where the final judgment itself was unconstitutional because it violated a constitutional right. As a result, the outcome of many of the Court's decisions has changed significantly: more than 95 percent of its decisions have been made with regard to constitutional complaints. At the same time, abstract constitutional reviews have been significantly reduced. This means that the Court's constitutional role has substantially shifted from being a check on the legislative branch to controlling the judiciary.

It is also worth noting that a constitutional amendment in 2013 repealed all previous rulings of the Constitutional Court made prior to the entry into force of the Fundamental Law on 1 January 2012. Consequently, the justice-packing of the Constitutional Court has been fully achieved. The institutional safeguards of the judicial independence of the Court have not proved to be sufficient to protect the integrity of the body. But this is only one side of the coin. Although it can plausibly be assumed that a packed court will not be an obstacle to the legal aspirations of the executive power, this is only a presumption. In Hungary, however, quite a lot of time has passed since the Court was subverted, so it is worth examining whether the jurisprudence of the Constitutional Court has really changed to when it was ostensibly independent of the government, and if so, how.

2.2. How to Assess the Political Bias of a Constitutional Court? An Analytical Framework

If the legislative or the executive branch of a country not only infringes on the independence of the constitutional court but also undermines it, i.e., it successfully packs the court with government-friendly justices, it is reasonable to assume that the constitutional body will make politically motivated decisions. This is likely to lead, at least in part, to new rulings and outcomes whereby the constitutional court will rule in accordance with the vested interests of the ruling parties. However, this cannot be taken for granted: although the purpose of packing the court in one's favour is clearly undertaken to neutralise the constitutional court as a counterweight to governmental power, the intended change in jurisprudence, at least in principle, is not self-evident. Even justices who are appointed to the bench as a result of their political loyalty can become genuinely autonomous, and, in accordance with their oath, undertake their constitutional functions impartially and independently of the interests of the government. Therefore, it is not enough to only identify breaches of judicial independence, but it is also worth examining whether the case law of the court has been altered as a result. Of course, it is reasonable to hypothesize that the jurisprudence of the constitutional court in such a case is tailored to the political interests that were able to influence its composition or functioning, but this is still a rational assumption that requires proof.

Although there are no generally accepted standards for assessing political bias, this does not mean that it cannot be tested. The effectiveness of subverting a court, i.e., the political bias of a captured constitutional court, can be affirmed if its practice meets the following criteria:

1. a well-defined political force (e.g., governing parties) or institution(s) (such as the bodies that nominate constitutional justices) is able to unilaterally and significantly influence the composition of the court;
2. the integrity of the court is then substantially skewed in a way that cannot be justified by legal or professional arguments; and

3. the new case law, at least in politically significant cases, favours the political force or institution that influenced the composition of the court.

It is hard to imagine these conditions being met simultaneously or repeatedly in respect to an independent constitutional court. It is not necessary for the verification of the latter criteria that such bias should extend to all cases or be without exception. Even a genuinely partisan constitutional court needs to maintain a semblance of independence. Additionally, a change in jurisprudence must be definite; i.e., it must support the interests of the same political force in the most important cases.

The recent changes in the jurisprudence of the Hungarian Constitutional Court seem to be an ideal case study for such an examination because, as explained above, the latter has for some time been a fully biased court whose composition and powers have been unilaterally determined by the parties in government since 2010.

Nevertheless, some disclaimers must be made. First, the ruling party factions, taking advantage of their parliamentary supermajority, unilaterally adopted a new constitution in April 2011, which came into force on January 1, 2012, under the name of "Fundamental Law". It should be noted, however, that the new constitution largely left the previous system of power-sharing unchanged, and the constitutional regulations of basic rights did not fundamentally differ from the previous constitutional text. At the same time, when there was a shift from the previous case law of the Constitutional Court, it must be taken into account whether it was a natural change resulting from a change in the text of the constitution. Second, the Fundamental Law also contains some rules for constitutional interpretation, which, in principle, bind the Constitutional Court so that jurisprudential changes may be a consequence. Here, too, however, it is worth drawing attention to the fact that these interpretative canons are not arranged in a hierarchy, and there is no way to enforce them, as a result of which the Constitutional Court has, in principle, considerable wiggle room regarding the methods it applies to interpretation. Past practice has confirmed

this; although the Court refers relatively often (albeit irregularly) to specific methods of interpretation prescribed in the Fundamental Law, the actual effects can hardly be demonstrated in case law.

2.3. Changing Constitutional Jurisprudence After 2010

A pro-government bias has been on the rise in the rulings of the Hungarian Constitutional Court since 2010, in parallel with the government majority's ability to gradually occupy the Court and to impose its own conceptions through constitutional amendments, the adoption of a new constitution and the regulation of the Constitutional Court Act. Following the 2010 election, when some original members of the Court remained who had been elected on the basis of political consensus, the Court still showed some resistance to overtly unconstitutional governmental aspirations, annulling several laws passed by the new parliamentary majority. Thus, in 2011, it invalidated a law that imposed a 98 percent tax on the extremely large severance payments of public officials with retroactive effect, arguing that a legally acquired severance payment cannot be regarded as unfairly acquired income, as the contested law did, and that retroactive taxation was contrary to the rule of law.[5] In 2012, it repealed the laws that empowered public authorities to sanction the use of public spaces for living accommodation for the homeless,[6] as well as the so-called "Transitional Provisions", which contained a number of rules completing and detailing the new constitutional text.[7] In the same year, the Court struck down specific provisions of the Church Law of 2013, which deprived more than 300 religious denominations, with the exception of 32 churches, of their church status and made this granting conditional on parliamentary approval.[8] It is to be noted, however, that most of these unconstitutional provisions were incorporated into the text of the constitution by Parliament, with the votes of the governing party MPs, in the Fourth Amendment to Fundamental Law in 2013.

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5 Constitutional Court, Decision no. 184/2010. (X. 28). The European Court of Human Rights declared the application of the law to be contrary to the European Convention on Human Rights. See Decision of ECtHR of 14 May 2013 on the case of N.K.M. v. Hungary, no. 66529/11. See Decision of ECtHR of 25 June 2013 on the case of Gáll v. Hungary, no. 49570/11. See Judgment of ECtHR of 2 July 2013 on the case of R. Sz. v. Hungary, no. 41838/11.

6 Constitutional Court, Decision no. 38/2012. (XI. 14).

7 Constitutional Court, Decision no. 45/2012. (XII. 29).

8 Constitutional Court, Decision no. 6/2013. (III. 1).

Notwithstanding this, the Court's initial resistance to the new parliamentary majority should not be overestimated. Thus, for example, the Constitutional Court tacitly acknowledged the exemption of public finance legislation from constitutional review. However, the Fundamental Law allows for review in certain narrowly defined cases (e.g., in the case of the violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and rights related to Hungarian citizenship). Despite these exceptions, the Court has never made use of these possibilities. Therefore, constitutional review has not been applied in blatant cases such as the simple withdrawal by the State, without compensation, of savings held in private pension funds in 2011[9] or the openly discriminatory and arbitrarily imposed so-called extra-profit taxes introduced in 2010 and 2022.

However, as time progressed and the number of members loyal to the government increased within the Constitutional Court, leading to the Court finally being composed exclusively of candidates from the governing parties, the institution developed several judicial strategies and interpretative patterns which, depending on the nature of the given case, and also by trying to preserve the appearance of the Court's independence, were suitable for supporting the government's political interests.

2.3.1. Silence of the Court

On several occasions, the Constitutional Court has avoided uncomfortable decisions by simply not taking them.[10] In this respect, these cases can be considered uncomfortable ones, which are clearly unconstitutional, but an annulment decision would have caused some inconvenience to the government.

The most prominent example of this was the so-called CEU Case. The Central European University (CEU) was founded and sponsored by George Soros, who was portrayed by government-sponsored campaigns as a public

[9] Zoltán Szente, "Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary," in *Constitutions in the Global Financial Crisis: A Comparative Analysis*, ed. C. Xenophon (Farnham, 2013), 255-56.

[10] András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary," *The American Journal of Comparative Law* 68, no. 4 (2020): 775-76, https://doi.org/10.1093/ajcl/avaa031.

enemy. The university was persecuted by legislation that defined impractical and unprecedented conditions for foreign-funded universities with the apparent aim of making it impossible for the CEU to operate in Hungary. The law was clearly unconstitutional for several reasons.[11] The Constitutional Court first postponed issuing a decision on the grounds that it had set up an ad hoc working group to study the case, although this working method had not been used before. Later, it suspended the proceeding, saying that it had to wait for the outcome of a parallel case before the European Court of Justice, although it had never done so in other cases (because the CJEU does not base its decisions on Hungarian Fundamental Law). The Court thus postponed the issue for years until the CEU moved to Vienna. The CJEU subsequently ruled that the law was contrary to European Union law,[12] and the legislation was amended accordingly. Finally, in 2021, the Constitutional Court terminated its proceedings for a formal technicality, treating the case as moot, saying that the petitioners who had lodged the initial constitutional complaint in this case had not extended their petition to cover the new law.[13]

2.3.2. Changing the Dominant Interpretation of Constitutional Provisions

The changes in constitutional jurisprudence could easily be justified by the fact that a new constitution had entered into force, but in many cases, the constitutional text had not changed substantially, and the Constitutional Court itself stated that in such cases, earlier case law could be taken into account even if the Fourth Amendment repealed all decisions taken before the entry into force of the Fundamental Law.[14]

However, the Court has always been ready to reinterpret even substantive constitutional concepts if the government had a serious interest in doing so. For example, it changed the previous practice concerning the relationship between domestic law and European Union law, declaring that if the EU institutions

[11] See details in Nóra Chronowski and Attila Vincze, "The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied," *European Constitutional Law Review* 17, no. 4 (2021): 688-706, https://doi.org/10.1017/S1574019621000407.

[12] Decision of CJEU of 6 October 2020 on the case of Commission v. Hungary, C-66/18.

[13] Constitutional Court, Decision no. 3318/2021. (VII. 23); Constitutional Court, Decision no. 3319/2021. (VII. 23).

[14] Constitutional Court, Decision no. 22/2012. (V. 11); Constitutional Court, Decision no. 13/2013. (VI. 17).

implement the shared competences in an 'incomplete' way, national authorities may unilaterally take measures necessary to ensure the effective exercise of them.[15] In the same judgment, the Court spectacularly reinterpreted the right to human dignity. Despite its doctrinal foundation being deeply entrenched in Hungarian constitutional law since the early 1990s as a "mother right" (even of unenumerated rights) and a source of individual autonomy, the inherently individualistic nature of the right to human dignity was essentially reversed. It was reinterpreted on a community basis and linked to the recently invented constitutional identity. According to the otherwise embarrassing argumentation, the personal identity of citizens belongs to their human dignity. But this is threatened if "the traditional social environment, which the individual occupies at birth and is independent of him" changes because of people coming from other cultures and who do not conform to the traditional social identity of the Hungarian population.[16, 17] In fact, the judgment tries to support the government's anti-migrant policy and its stance, conflicting with EU institutions on this issue.

It was also a blatant change in case law when the intimidated Constitutional Court, after having declared unconstitutional and annulling a law that imposed a 98 percent tax on the extreme severance payments (as mentioned earlier) with retroactive effect in 2010,[18] the following year upheld retroactive taxation if it extended only to the beginning of the current tax year.[19]

2.3.3. Defining Constitutional Requirements in Order to Save Contested Laws

Another method the Constitutional Court uses is to legitimize constitutionally questionable governmental will by formulating constitutional requirements for the application or interpretation of contested law rather than annulling manifestly unconstitutional provisions. This was the case, for example, with the law giving

[15] Constitutional Court, Decision no. 32/2021. (XII. 20).
[16] Ibid.
[17] For further examples of changing constitutional court practice, see Nóra Chronowski, "The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court Under a Rule by Law Governance," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 61, no. 2 (2020): 36-158, http://dx.doi.org/10.1556/2052.2020.00267.
[18] Constitutional Court, Decision no. 184/2010. (X. 29)
[19] Constitutional Court, Decision no. 37/2011. (V. 10).

the Minister of Justice the power to authorise secret surveillance by anti-terrorist authorities without providing basic guarantees. In this case, the Court considered it sufficient to compensate for the lack of judicial review by stating that the Minister is required to state the reasons for issuing such authorisations.[20]

In addition, when the constitutionality of some measures of the 2011 judicial reform was challenged before the Constitutional Court, among other things, on the grounds that the new legislation allowed for the manipulation of judicial appointments, the Court merely found that it is a constitutional requirement that the invalidation of the otherwise valid applications for judicial posts must be reasoned. The background to this was that the presidents of the *Kúria* and the National Office for the Judiciary (the central organ of judicial administration) had repeatedly declared applications invalid if their preferred candidates had not won them.[21] However, this did not prevent similar cases from occurring later.

This is precisely the weakness of the practice of establishing a constitutional requirement. It is not, in fact, an appropriate method of eliminating an unconstitutional situation, and such kind of disputes as *res iudicata* (claim preclusion) cases are not subsequently returned to the Constitutional Court.

2.3.4. Annulling Unconstitutional Statutes Without Effective Judicial Protection

For the pro-government Constitutional Court, reviewing laws that are clearly unconstitutional is more challenging. Over the past decade or more, despite the overwhelming parliamentary majority of the governing parties and their legislative omnipotence, a number of laws have been passed whose constitutionality has been strongly contested. In such cases, it used different methods, depending on the political significance of the subject of the law.

For example, when a law is clearly unconstitutional, the Court tries to save it by striking down some less important provisions but is careful to preserve the essential content. In this way, while it appears to act against such legislation, it does not eliminate the unconstitutionality. Another method is for the Court

[20] Constitutional Court, Decision no. 32/2013. (IX. 22).
[21] Constitutional Court, Decision no. 13/2013. (VI. 17).

to annul the contested law, but without providing any real legal protection for the damage or harm caused by the unconstitutional law. This is the case, for example, when a law is annulled but no guidance is given by the Constitutional Court on how to remedy the unconstitutional situation it has caused. And if no other body takes action, the unconstitutional effects of the law may linger without the persons concerned having been granted any subsequent legal protection. This happened precisely when Act CLXII on the Legal Status and Remuneration of Judges reduced the mandatory retirement age of judges from 70 to 62, as a result of which, in 2012, 274 judges – almost 10% of all serving judges – had to retire. The change especially affected court leaders since most of the latter were older judges.[22]

The Constitutional Court in 2012 invalidated several provisions of the Act, holding that such age limits can only be determined by a cardinal act.[23] However, the Court's ruling failed to provide any real remedy to the judges illegally removed since it did not contain any provisions on how to reinstate or compensate them. Then, neither the National Office for the Judiciary nor the President of the Republic, which are responsible for the appointment of judges, saw it necessary to take any action to reinstate the removed judges.

Another way to save the government's unconstitutional policy is for the Constitutional Court to invalidate the relevant law only with *ex nunc* (i.e., "from now") effect rather than *ex tunc* (retroactively to the date of the lawmaking). While this may, in some cases, be a legitimate method precisely for reasons of legal certainty (for example, when it is no longer possible to change a large number of closed legal relations afterwards), in other cases, it has the fundamental flaw of not providing legal protection against mass violations of rights caused by unconstitutional legislation.

The pro-government tactics of the Constitutional Court can be clearly seen in the case of the 2011 social security reform, which transformed former disability pensions into significantly reduced allowances regardless of the medical

[22] Zoltán Szente, *Constitutional Law in Hungary* (Alphen aan den Rijn: Wolters Kluwer, 2021), 210.
[23] Constitutional Court, Decision no. 33/2012. (VII. 17).

condition of the persons concerned. In a decision in 2013, the Court upheld the legislation,[24] but later, the European Court of Human Rights ruled that under this law, had violated the European Convention on Human Rights in several cases.[25] In 2018, the Constitutional Court declared that the 2011 legislation had violated the European Convention on Human Rights,[26] but did not annul the relevant part of the law, but merely found an unconstitutional omission of Parliament and called on the National Assembly to bring the legislation in sync with Hungary's international obligations, and, using a familiar technique, established a constitutional requirement. However, by then, the reclassification of disability pensions had long been completed, and the Court's decision did not provide any effective remedy to the more than 100,000 citizens[27] who had suffered rights violations.

2.3.5. Legitimizing the Government's Aspirations

Although the governing parties have always unscrupulously exploited their parliamentary supermajority to adjust legislation and, eventually, the whole legal system to their own interests (as evidenced by, for example, the eleven amendments to the Fundamental Law that entered into force on 1 January 2012), the Constitutional Court has played an auxiliary role in serving governmental interests. This was necessary because the Fidesz-KDNP government, on the one hand, has greatly accelerated the law-making process, resulting in frequent errors, and on the other, has been less sensitive to constitutional standards, which has often led to constitutional controversies. In playing this role, the Court, especially after 2013, has frequently assisted the government in upholding a number of laws whose constitutionality was thoroughly disputed or which were later found to be contrary to EU law. For this purpose, the Court has used several different methods, from changing the previously established constitutional standards to

[24] Constitutional Court, Decision no. 3027/2013. (II. 12).

[25] Decision of ECtHR of 13 December 2016 on the case of Béláné Nagy v. Hungary, no. 53080/13; Decision of ECtHR of 7 March 2017 on the case of Bactzúr v. Hungary, no. 8263/15.

[26] Constitutional Court, Decision no. 21/2018. (XI. 14).

[27] According to the data of the Central Statistical Office, the number of people receiving disability pensions fell by around 180,000 between 2011 and 2016. Központi Statisztikai Hivatal, *Mikrocenzus 2016 - A népesség gazdasági aktivitása* (Budapest: Központi Statisztikai Hivatal, 2017), 4-25, https:/www.ksh.hu/docs/hun/xftp/idoszaki/mikrocenzus2016/mikrocenzus_2016_5.pdf.

resorting to extra-constitutional sources or even departing from the constitutional text when necessary to achieve the desired interpretation.

For example, in the "foreign currency loan case",[28] the Court could only support the government's policy of retroactively amending thousands of private contracts by law by overruling its previous practice in some respects regarding the rule of law, legal certainty and the right to a fair trial.[29] When the government's political interests required it, the Court interfered in market and property relations, regardless of its previous practice concerning the defence of the market economy. Thus, it did not provide protection against market-restrictive measures of the state that transformed or decisively influenced the previous property and market structures. The purpose of these interventions was to build patronage and create a national capitalist class. For instance, re-regulating the retail and wholesale distribution of tobacco products, which first involved withdrawing retail licences by law and then redistributing them in the form of concession contracts, was considered constitutional.[30] The decision significantly narrowed the scope of property protection against direct government intervention in the market compared to previous practice. Although the European Court of Human Rights declared changes of ownership under the law to be in breach of the European Convention on Human Rights, this could provide for effective legal protection only in certain cases[31] and did not affect the constitutionality of state-assisted changes of ownership or the underlying legislation.

The Constitutional Court also directly served the government's political aspirations when it 'discovered' the concept of constitutional identity in a 2016 decision. This followed the government's fierce opposition to the EU's refugee and immigration policy, but due to a momentary lack of a constitution-making

[28] Constitutional Court, Decision no. 34/2014 (XI. 14).

[29] Nóra Chronowski and Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court and the Financial Crisis," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 58, no. 2 (2017): 139-54, https://doi.org/10.1556/2052.2017.58.2.2; Fruzsina Gárdos-Orosz, "Constitutional Justice in Credit Crisis: The Hungarian Case," *Südosteuropa: Journal of Politics and Society* 66, no. 1 (2018): 94, https://doi.org/10.1515/soeu-2018-0006; Fruzsina Gárdos-Orosz and P. Gárdos, "Decision 34/2014 (XI. 14.) – Foreign Currency Loan," in *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020)*, eds. Fruzsina Gárdos-Orosz and K. Zakariás (Baden-Baden, 2022), 393-411.

[30] Constitutional Court, Decision no. 3194/2014. (VII. 15).

[31] See, for example, the Decision of CJEU of 13 January 2015, on the case of Vékony v. Hungary, no. 65681/13.

majority in Parliament, it was unable to pass a constitutional amendment that would have banned the admission of asylum seekers to the country, which the EU had called for on the grounds of the principle of solidarity between member states. This decision, at the petition of the Commissioner of Fundamental Rights, stipulated the Court's own powers to review the validity of EU law in the future to protect Hungary's sovereignty and constitutional identity.[32] This was an innovation, as the notion of constitutional identity had hitherto been completely unknown in Hungarian constitutional law.[33]

In the case of the voting rights of Hungarians living abroad, the Constitutional Court once again openly represented the interests of the government in a case that could have directly influenced, at least in theory, the outcome of the general elections. The constitutional controversy was triggered by the law that allows Hungarians living abroad to vote by post to promote their willingness to participate in parliamentary elections. However, the same possibility was refused for Hungarian citizens who live in Hungary but are abroad on election day. They may only cast their votes in person at Hungary's diplomatic missions abroad, which often makes it very difficult for them to exercise their right to vote. The reason for the clear discrimination was that while Hungarians living abroad are predominantly Fidesz voters, citizens working abroad are more likely to be opposition sympathisers. However, the partisan Court did not declare the apparent discrimination unconstitutional, saying that the protection afforded to the right to vote as a fundamental right does not extend to how the fundamental right is exercised.[34]

Nevertheless, apart from the highly controversial or even clearly erroneous decisions and a reduction in the level of constitutional protection, the strongest proof of the lack of independence or political bias of the Constitutional Court is that it has failed to prevent the systematic erosion and dismantling of the rule of law since 2010. In fact, it has not been an obstacle to the authoritarian

[32] Constitutional Court, Decision no. 22/2016. (XII. 5).
[33] The concept of constitutional identity was introduced only by the Seventh Amendment to the Fundamental Law in May 2018.
[34] Constitutional Court, Decision no. 3086/2016. (IV. 26).

transition, but its promoter, and thus bears a heavy responsibility for destroying democracy because it was precisely the defence of constitutional democracy that was to have been its basic function and *raison d'être*. This institution not only fails to fulfil its constitutional function but also works adversely: it is not a defender of constitutionality but a legitimizer of the political aspirations of the government, even against Fundamental Law, if necessary.

III. CONCLUSION

In Hungary, nationalist-populist parties won such a supermajority in the parliamentary elections in 2010 that allowed them to overhaul the entire constitutional system and eliminate institutional checks and balances that could limit the will of the executive. This led to the Constitutional Court becoming a completely biased court: all its members were chosen by the ruling parties. The practice of the Court subsequently evolved in such a way that constitutional interpretation became a means of legitimising the will of the government majority.

The Constitutional Court has used various methods to serve the interests of the government. This is because the Constitutional Court has always been concerned with maintaining the appearance of independence and, therefore, has taken care in some cases to balance the political expectations of the government with professional requirements. For this purpose, the Court has developed various techniques, which, however, share the common characteristic of ensuring and legitimising the government's will in all politically important cases.

In sum, the fact that its composition is determined exclusively by the governing parties, which have a constitution-making majority in Parliament, has fundamentally transformed the character of the Court: from being the supreme guardian of the Constitution, the very active counterweight of the legislative and executive powers, to becoming a submissive servant and legitimiser of the government's will.

The post-2010 developments in the Hungarian Constitutional Court highlight the importance of institutional guarantees of independence. At the same time, they also show that these safeguards themselves are insufficient to defend the

rule of law and constitutional democracy; a supportive constitutional culture must be built up to serve as a barrier against an authoritarian transition and the erosion of these guarantees. However, once the courts are subordinated to political will, these guarantees no longer have any particular value; they become empty institutions and procedures designed to mask the subordination of the courts.

BIBLIOGRAPHY

Bactzúr v. Hungary, no. 8263/15 (2017).

Béláné Nagy v. Hungary, no. 53080/13 (2016).

Bogaards, Matthijs. "De-Democratization in Hungary: Diffusely Defective Democracy." *Democratization* 25, no. 8 (2018): 8, https://doi.org/10.1080/13510347.2018.1485015.

Bugarič, Bojan. "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism." *International Journal of Constitutional Law* 17, no. 2 (2019): 605, https://doi.org/10.1093/icon/moz032.

Castillo-Ortiz, Pablo. "The Illiberal Abuse of Constitutional Courts in Europe." *European Constitutional Law Review* 15, no. 1 (2019): 61-3, https://doi.org/10.1017/S1574019619000026.

Chronowski, Nóra and Attila Vincze. "The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied." *European Constitutional Law Review* 17, no. 4 (2021): 688-706, https://doi.org/10.1017/S1574019621000407.

Chronowski, Nóra and Fruzsina Gárdos-Orosz. "The Hungarian Constitutional Court and the Financial Crisis." *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 58, no. 2 (2017): 139-54, https://doi.org/10.1556/2052.2017.58.2.2.

Chronowski, Nóra, Ágnes Kovács, Zsolt Körtvélyesi and Gábor Mészáros. "The Hungarian Constitutional Court and the Abusive Constitutionalism." Working Papers, Research Center for Social Sciences of the Hungarian Academy of Sciences, 2022.

Chronowski, Nóra. "The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court Under a Rule by Law Governance." *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 61, no. 2 (2020): 36-158, http://dx.doi.org/10.1556/2052.2020.00267.

Constitutional Court Decision no. 184/2010.

Constitutional Court Decision no. 37/2011.

Constitutional Court Decision no. 22/2012.

Constitutional Court Decision no. 33/2012.

Constitutional Court Decision no. 38/2012.

Constitutional Court Decision no. 45/2012.

Constitutional Court Decision no. 6/2013.

Constitutional Court Decision no. 13/2013.

Constitutional Court Decision no. 32/2013.

Constitutional Court Decision no. 3027/2013.

Constitutional Court Decision no. 34/2014.

Constitutional Court Decision no. 3194/2014.

Constitutional Court Decision no. 22/2016.

Constitutional Court Decision no. 3086/2016.

Constitutional Court Decision no. 21/2018.

Commission v. Hungary, C-66/18 (2020).

Constitutional Court Decision no. 32/2021.

Constitutional Court Decision no. 3318/2021.

Constitutional Court Decision no. 3319/2021.

Fournier, Theo. "From Rhetoric to Action, A Constitutional Analysis of Populism." *German Law Journal* 20, no. 3 (2019): 370-72, https://doi.org/10.1017/glj.2019.22.

Gáll v. Hungary, no. 49570/11 (2013).

Gárdos-Orosz Fruzsina and P. Gárdos. "Decision 34/2014 (XI. 14.) – Foreign Currency Loan." In *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020)*, edited by Fruzsina Gárdos-Orosz and K. Zakariás, 393-411. Baden-Baden, 2022.

Gárdos-Orosz, Fruzsina. "Challenges to Constitutional Adjudication in Hungary After 2010." In *The Role of Courts in Contemporary Legal Orders*, edited by M. Belov, 324, 336-39. The Hague, 2019.

Gárdos-Orosz, Fruzsina. "Constitutional Justice in Credit Crisis: The Hungarian Case." *Südosteuropa: Journal of Politics and Society* 66, no. 1 (2018): 94, https://doi.org/10.1515/soeu-2018-0006.

Halmai, Gábor. "Populism, Authoritarianism, and Constitutionalism." *German Law Journal* 20, no. 3 (2019): 307, http://dx.doi.org/10.1017/glj.2019.23.

Halmai, Gábor. "The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court." In *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski, 195-208. Kluwer Law International, 2002.

Hivatal, Központi Statisztikai. *Mikrocenzus 2016 - A népesség gazdasági aktivitása*. Budapest: Központi Statisztikai Hivatal, 2017. eBooks.

Jakab, András. "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary." *The American Journal of Comparative Law* 68, no. 4 (2020): 775-76, https://doi.org/10.1093/ajcl/avaa031.

N.K.M. v. Hungary, no. 66529/11 (2013).

R. Sz. v. Hungary, no. 41838/11 (2013).

Szente, Zoltán. "Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary." In *Constitutions in the Global Financial Crisis: A Comparative Analysis*, edited by C. Xenophon, 255-56. Farnham, 2013.

Szente, Zoltán. "The Political Orientation of the Members of the Constitutional Court Between 2010 and 2014." *Constitutional Studies* 1, no. 1 (2016): 123-49, https://constitutionalstudies.wisc.edu.

Szente, Zoltán. *Constitutional Law in Hungary* (Alphen aan den Rijn: Wolters Kluwer, 2021), 210.

Vékony v. Hungary, no. 65681/13 (2015).

Vincze, Attila. "Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court." *Vienna Journal on International Constitutional Law* 8, no. 1 (2014), https://doi.org/10.1515/icl-2014-0105.

Vörös, Imre. "The Constitutional Landscape After the Fourth and Fifth Amendments of Hungarian Fundamental Law." *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 55, no. 1 (2014): 1-20, https://doi.org/10.1556/ajur.55.2014.1.1.

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Ministerial Authority in Formulating Regulations Related to Presidential Lawmaking Doctrine

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Abstract

As ministerial regulations increasingly play a larger role in government administration, they have become one of the main forms of legislation. This has resulted in a significant increase in the quantity of ministerial regulations, including those formed under the mandate of higher regulations, and those formed under the authority of ministers. According to the doctrine of making presidential laws, the president has a constitutional mandate to form implementing regulations for laws (delegated legislation). This normative research examines the basis for the formation of ministerial regulations in a presidential system. It analyzes quantitative data by using samples from ministerial regulations

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issued between 2005 and 2020 by 12 ministries. The analysis reveals that 65% of ministerial regulations come from ministerial authority (attribution), while 35% stem from higher regulatory directives. This has resulted in a proliferation of ministerial regulations in Indonesia. In the presidential system, the president holds the authority to formulate implementing regulations, with ministers acting as presidential aides and not lawmaking agents. Nevertheless, the unchecked formation of ministerial regulations on the basis of authority has contributed to a power imbalance, wherein ministerial regulations have gained ascendancy at the expense of presidential legislation products. This divergence from the Indonesian Constitution's Article 4, Paragraph (1), and Article 5, Paragraph (2) dilutes the role of presidential legislation products as implementing regulations. It deviates from the established tenets of the presidential system in Indonesia, wherein the president is designated as the law executor rather than the minister.

Keywords: Ministerial Authority; Ministerial Regulation; Presidential Lawmaking Doctrine

I. INTRODUCTION

1.1. Background

Inadequate alignment between the institutions responsible for creating laws and regulations can result in contradictory legislation. Similarly, an excessive authority to these institutions has led to an overwhelming profusion of laws and regulations.[1] The emergence of ministerial authority to create ministerial regulations has contributed to the surge of regulations in Indonesia. President Joko Widodo has often spoken publicly about this deluge of regulations.[2] According to the website of the Ministry of Law and Human Rights' , https://peraturan.go.id, there are 3,865 regulations at the central level; 16,995 ministerial regulations; 4,565 non-ministerial governmental institution regulations; and 15,982 regional regulations/ordinances.[3] At the central level, in particular, there are a total of 25,425 regulations, most of which are ministerial regulations.

[1] Indonesian Cabinet Secretariat, "*Reformasi Hukum: Menuju Peraturan Perundang-undangan yang Efektif dan Efisien* [Legal Reform: Towards Effective and Efficient Legislations]," (Paper (unpublished) presented on National Seminar in Jakarta, 2018), 11.

[2] Andi Saputra, "*Jokowi Keluhkan Banyaknya Regulasi, Kini Ada 43.005 Peraturan di Indonesia* [Jokowi Complains about the Number of Regulations, Now There are 43,005 Regulations in Indonesia]," *Detik News*, November 14, 2019, https://news.detik.com/berita/d-4784463/jokowi-keluhkan-banyaknya-regulasi-kini-ada-43005-peraturan-di-indonesia.

[3] Ministry of Law and Human Rights of the Republic of Indonesia, "List of Laws and Regulations," last modified March 30 2022, https://peraturan.go.id.

In principle, there are two sources of authority that serve as the basis for the creation of ministerial regulations, i.e., higher legislations orders (delegation) or on the basis of the authority possessed (attribution/discretion).[4] The authority has potential implications for the overlapping of ministerial regulations with presidential regulations, government regulations and even laws. This is a result of the difficulty in avoiding an overlap of authority amongst ministries.[5] Another influencing factor is the sectoral approach in which ministerial regulations are drafted which is more popular than a systematic approach.[6] A lack of coordination in the formation of ministerial regulations has created friction and contradictory legislation because it does not involve various relevant agencies and certain particular legal disciplines.[7]

The ministerial discretion in the formation of regulations is also strengthened by the direct delegation/mandate provided by Laws to form ministerial regulations.[8] Substantially, the contents of ministerial regulations are most often formulated without the approval of the President.[9] This structure poses the potential to diminish the President's power as head of government in forming regulations. As ministers are appointed, dismissed and held responsible to the President,[10] on the one hand, all executive regulations issued should be sourced from the President. On the other hand, ministries have gradually become autonomous institutions relying on their own authority in forming ministerial regulations. Conceptually, this practice is clearly contrary to the presidential system which places ministers as assistants to the President.[11] The existence of a delegation

4 H.A.S. Natabaya, *Sistem Peraturan Perundang-undangan Indonesia* [System of Legislations in Indonesia] (Jakarta: Secretariat General of the Indonesian Constitutional Court, 2006), 53.

5 Simon Butt and Tim Lindsey, *Indonesian Law* (London: Oxford University Press, 2018), 53.

6 Butt and Lindsey, *Indonesian Law,* 53.

7 Indonesian Cabinet Secretariat, "Reformasi Hukum," 34.

8 Jimly Asshidiqie, *Perihal Undang-undang* [On the Subject of Laws] (Jakarta: Konstitusi Press, 2006), 215.

9 In the formation of Ministerial Decree, there is a mechanism referred to as 'harmonization' by the Ministry of Law and Human Rights through the Directorate General of Legislations, based on the Regulation of the Minister of Law and Human Rights No. 23 of 2018.

10 Hanta Yuda, *Presidensialisme Setengah Hati, dari Dilema ke Kompromi* [Half-hearted Presidentialism, from Dilemma to Compromise] (Jakarta: Gramedia, 2010), 130.

11 Saldi Isra, *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* [The Shift of Legislation Functions: The Strengthening of Parliamentary Legislation Model in Indonesian Presidential System] (Jakarta: Rajagrafindo, 2010), 40.

obtained by the minister by law has placed the minister as recipient of a direct delegation from the DPR (*Dewan Perwakilan Rakyat*; House of Representatives), the legislature. This is because conceptually the recipient of the delegation is held responsible to the provider of the delegation (in this case the DPR).

The theories of Hans Kelsen[12] and Hans Nawiasky,[13] suggest that law is a hierarchical system, where the legal order is not a system of coordinated norms of equal status, but a hierarchy of legal norms within various levels. Hence, within the hierarchical framework, the position and content of each statutory regulation that is formed within the realm of the Presidential Power does not stand alone because its formation is based on the authority possessed as regulated in Article 8 paragraph (2) of Law 12/2011.[14] The laws and regulations referred to include government regulations, presidential regulations, and ministerial regulations. The hierarchical nature of the norm, if associated with Bronwen Morgan's opinion, starts from the assumption of the nature of the state and government that works in a hierarchical manner.[15]

Since the amendment of the 1945 Indonesian Constitution, the existence of ministerial regulations has been questioned, especially by local governments. However, Baharuddin Lopa, as the Minister of Justice in 2001, issued Circular Letter No. M.UM.01.06-27 dated February 23, 2001 declaring that ministerial decrees that were regulatory in nature serve as a type of legislation and are hierarchically positioned between Presidential Decrees and Regional Regulations.[16] According to Satya Arinanto, this is the basis for the enactment of the Regional Regulation and its position as one of the statutory regulations. In its further

[12] Hans Kelsen, *General Theories of Law* (New Jersey: Transaction Publisher, 2006), 123.

[13] Maria Farida Indrati S, *Ilmu Perundang-undangan: Jenis, Fungsi, dan Materi Muatan-Edisi Pertama* [Legislation Theories: Types, Functions, and Contents-First Edition] (Yogyakarta: Penerbit Kanisius, 2007), 10.

[14] Constitutiona of the Republic of Indonesia, Article 8, Law No 12 of 2011 on Revision of Law No 15 of 2019.

[15] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation Text and Materials* (*Law in Context*) (Cambridge: Cambridge University Press, 2007), 4 and 112.

[16] Satya Arinanto, *Kedudukan Keputusan menteri dalam Ketetapan MPR Nomor III/MPR/2000: Problema Yuridis yang Dihadapi Pemerintah Pusat dan Pemerintah Daerah* [The Status of Ministerial Decrees within the MPR Stipulation No. III/MPR/2000: Judicial Issues Faced by Central and Regional Governments] cited in Budiman Ginting et al. (ed) *Refleksi Hukum dan Konstitusi di Era Reformasi* [A Reflection of Law and Constitution in the Reform Era] (Medan: Pustaka Bangsa Press, 2002), 246. Also see in Farida Indrati, *Legislation Theories*, 94.

development, the formation of ministerial regulations has increased significantly, especially since the promulgation of Law 10/2004.[17]

One of the main contributing factors to this is that the existence of a ministerial regulation is recognized and legally binding whenever the formation is ordered by a higher legislation or on the basis of authority.[18] Consequently, ministerial regulations that are originally delegated regulations can then be formed independently on the basis of the authority held by each ministry. According to Saldi Isra, the number of ministerial regulations that have been formed may also be due to the lack of detailed regulations that limit the content of ministerial regulations. Thus, it is crucial to re-examine the extent to which the formation and contents of the ministerial regulation shall not pose a conflict of norms or are indeed aimed at matters of a technical-administrative nature.[19]

With the position as an official assisting the Presidential power in certain specific government affairs,[20] the entire implementation of the authority to form laws by the minister must be integrated under the authority of the President. Integration is a form of consistency and a consequence of the presidential system adopted by Indonesia. Thus, amid the strengthening of the minister's authority to form ministerial regulations as implementing regulations of the law (delegated legislation), it is vital to redesign such authority.[21] The legislative power of the President that has been "stolen" by the minister needs to be reconstructed so that it is in line with the presidential system according to the Indonesian Constitution.

1.2. Research Question(s)

Critical questions that can be raised are: First, the extent to which ministerial regulations are needed in the context of implementing the laws and regulations

[17] According to Pramono Anung (Cabinet Secretary), Indonesia has experienced an "obesity of regulations" since 2000 through 2017. There has been 20,283 regulations issued with an average of 1,193 regulations per annum. See also in: Christie Stefanie, "Istana Siapkan Badan Tunggal Perumus Regulasi Pemerintahan [The Palace Prepares Sole Agency for Formulating Government Regulations]," *CNN Indonesia*, November 28, 2018, https://www.cnnindonesia.com/nasional/20181128154327-32-349959/istana-siapkan-badan-tunggal-perumus-regulasi-pemerintahan.

[18] Law of Indonesia, Law No 10 of 2004, State Gazette No 53 of 2004, and Article 7 Sentence (4), Supplementary State Gazette No 4389. See also Article 17 of the Indonesian Constitution.

[19] Saldi Isra, "*Merampingkan Regulasi* [Downsizing Regulations]," *Kompas*, March 13, 2017, 6.

[20] Indonesian People's Consultative Assembly, Article 4 Sentence (1) and Article 17 Sentence (1).

[21] Horst P. Ehmke, "Delegata Potestas Non Potest Delegari a Maxim of American Constitutional Law," *Cornell Law Review* 47, no. 1 (1961): 51.

above. In fact, implementing regulations are formed with the potential to repeat and even deviate from the content of regulations with higher authority. Second, the extent to which ministerial regulations of a sectoral nature do not conflict/ contradict ministerial regulations in other sectors. Third, the extent to which the ministry as an institution under the authority of the President has the power to form regulations that are self-regulating as has been the case thus far.

1.3. Method

The research that was used in writing this study was normative legal research, namely research that aims to examine legal principles, legal systematics, legal synchronization, legal history and legal comparisons.[22] This research is prescriptive, namely: "research that aims to provide an overview or formulate a problem in accordance with existing conditions or facts with existing standards/ norms." According to Prasetyo Hadi Purwandaka, "Prescriptive research is research aiming to get suggestions in overcoming certain problems."[23] The prescriptive nature of the legal discipline requires recommendations regarding the rule of law, including to the legislature, courts or state administration administrators.[24] In this study, the approaches used include the general framework approach to institutional design[25] and statute approach, black letter approach, and comparative approach.[26]

To select research samples, the study randomly chose 12 ministries and identified five ministerial regulations per year for each ministry. This resulted in a total of 747 ministerial regulations as research samples. Although the peraturan.go.id website does not have complete data, the author was able to obtain data from ministry websites. However, only ministerial regulations established from 2005 to 2020 were used due to time limitations for this research.

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[22] Soerjono Soekanto, *Pengantar Penelitian Hukum* [Introduction to Legal Research] (Jakarta: UI Press, 2007), 51.

[23] Suteki and Galang Taufani, *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik* [Legal Research Methodologies (Philosophy, Theories, and Practices)] (Jakarta: Rajawali Pers, 2018), 137.

[24] Jan M. Smits, *The Mind and Method of the Legal Academic*, (Cheltenham: Edward Elgar Publishing, 2012), 44. See also: Mike McConville and Wing Hong Chui (ed), *Research Methods For Law* (Edinburgh: Edinburgh University Press, 2007), 137.

[25] Tom R. Tyler, "Methodology in Legal Research," *Utrecht Law Review* 13, (2017): 14.

[26] Michael Salter and Julie Mason, *Writing Law Dissertations an Introduction and Guide to the Conduct of Legal Research* (Preston: Lancashire Law School University of Central Lancashire, 2007), 44.

II. RESULTS AND DISCUSSION

2.1. The Influence of the Parliamentary Model in Presidential Lawmaking Power in Indonesia

The formation of laws is a common feature of most democratic societies, although the specific processes involved can vary greatly between countries. Presidential power in the field of legislation is in reality not exercised by the president himself, as adopted in the presidential system of government in general.[27] In the presidential system of government in Indonesia, the power to form laws and regulations is also held by ministers as assistants to the President, both based on the authority of delegation and attribution. This authority is obtained both from the law that delegates and from the authority of the minister in carrying out government affairs. In the separation of power doctrine in the United States, after Congress enacts legislative products, the President is fully responsible for implementing them.

In the parliamentary system, such as in the United Kingdom, the existence of the formation of laws and the delegation of regulations from laws are the main characteristics. This system fosters cooperation between the holders of executive and legislative powers, as the prime minister and parliament work together to form laws. Since the two branches are inseparable in a unitary system of government,[28] party politicians in parliament have an obligation to be responsible for the formation of laws that are presented to the public. Therefore, demands for accountability must be a concern when these laws are delegated to delegation regulations.[29]

In the presidential system, if the broad authority held by ministers as assistants to the president is taken into account, then the hierarchical existence of ministerial regulations as one type of legislative regulation must be reconstructed in the

[27] M. Patrick Moore and Kate R. Cook, "Executive Orderstrike of A Pen, Law Of the Land?" *Boston Bar Journal Summer* 61 (2017): 14.

[28] Fitriani A. Sjarif, "*Pembentukan Peraturan Delegasi Dari Undang-Undang Pada Kurun Waktu 1999-2012* [The Formation of Delegated Statutories from Laws in the Period of 1999-2012]" (Thesis, University of Indonesia, 2015), 37.

[29] Uwe Kischel, "Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law," *Administrative Law Review* 46, no. 2 (1994): 215.

Indonesian legal system. Within the framework of the rule of law, the flexibility of this system has resulted in a flood of regulations that do not necessarily serve a beneficial purpose. However, it is important to understand that the flood of regulations cannot be completely shut off, but at least it can be controlled and corrected.[30] Consequently, it is necessary to correct various laws and regulations, especially ministerial regulations, with laws and regulations at a higher level to achieve effective and coherent legislation.

The existence of ministerial regulations in Indonesia can be traced back to parliamentary practices that were implemented from 1945 to 1959. This legacy is reflected in the recognition of ministerial regulations as implementing regulations in the order of laws and regulations. This acknowledgment is based on MPRS Decree Number XX/MPRS/1966 on the DPR-GR Memorandum on the Source of the Order of Law of Indonesia and the Order of Legislation of Indonesia. Based on Annex II of the Stipulation of MPRS No. XX /MPRS/1966, the types of legislation in Indonesia, as specified in the 1945 Constitution, are as follows:

a. The 1945 Constitution of the Republic of Indonesia;
b. Stipulations of the MPR;
c. Law or Government Regulation in lieu of Law;
d. Government Regulation;
e. Presidential Decree;
f. Other implementing Regulations, such as:
    1. Ministerial Regulation;
    2. Ministerial Instruction;
    3. And so forth.

This stipulation recognizes the existence of ministerial regulations because they had previously existed and were recognized as a legitimate form of state regulation.

[30] A. Hamid S. Attamimi, "*Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu PELITA I – PELITA IV* [The Roles of Indonesian Presidential Decrees in the State Governance Administrations: A Study on the Analysis on Regulatory Presidential Decrees during the Five Year Developments I – IV" (PhD diss., University of Indonesia, Jakarta, 1990), 11.

Norman Singer explained that in a presidential system, non-legislative government departments carry out lawmaking functions based on specific constitutional arrangements or by historical precedent. Thus, in the US, the President only exercises legislative power under the constitution by cooperating with the Senate in the formation of treaties and may contravene in the legislative process by exercising veto power. Therefore, the function of the executive is to "execute" or implement laws formulated by the legislative. The executive does not have the authority to create new laws. On the other hand, executive departments can form regulations based on the delegation of lawmaking power to carry out certain tasks while still being given strict limitations on these powers. Doak J. Wolfe said, The General Assembly may limit and define the functions of the agencies it creates but may properly exercise non-legislative functions "only to the extent that their performance is reasonably incidental to the full and effective exercise of the legislative powers." The legislature must ensure that its delegation of authority does not infringe on the executive department's constitutional duties. [31]

In Indonesia, in addition to the existence of ministerial regulations, the mechanism for joint discussion in the formation of laws is also the adoption of a parliamentary legislation process which is also practiced in the Netherlands and other parliamentary countries.[32] The influence of the Dutch on the Indonesian legal system, and in the existence of ministerial regulations, can be classified as indirect because Indonesia's constitutional structure is quite different from that of the Netherlands. The lasting effects are felt in the existence of government regulations. Government regulations in the realm of Dutch East Indies legislation were known as *Regeringsverordening* and they were issued by the Governor-General in order to run the government or to act as the head of government in the former colony.[33]

The use of government regulations was adopted as the main delegated legislation formed by the president as the head of government based on Article

[31] Doak J. Wolfe, "Esq: Constitutional Law, Executive-Legislative Conflicts," *South Carolina Jurisprudence* 19 (2018): 30.
[32] Ismail Suny, *Pergeseran Kekuasaan Eksekutif* [The Shift in Executive Powers] (Jakarta: Aksara Baru, 1977), 17.
[33] Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi* [Constitutional Law and Pillars of Democracy] (Jakarta: Konpress, 2005), 170.

5 paragraph (2) of the Indonesian Constitution. In fact, when referring to the presidential system, what should be made note of is the executive order model or presidential decree which in Indonesian law,[34] is recognized as the attributive authority of the president based on Article 4 paragraph (1) of the Indonesian Constitution. Thus, if it is associated with the presidential legislative power, the existence of ministerial regulations as implementing regulations in the Indonesian presidential system has constitutional and conceptual contradictions. Usually, ministerial regulations are formed in a parliamentary government system because the minister is responsible to parliament so the minister is appointed a delegation from parliament to regulate further in addition to the government regulations in general.[35] The situation is different from several other countries where the form of law that regulates subordinate legislation is usually known as "rules" in the United States, "statutory instruments" in the UK and "*Rechtsverordnungen*" in Germany.[36] The government in a parliamentary system is collegial (collegial national executive) while the presidential system adheres to a hierarchical model of government (hierarchical national executives).[37] Although the pattern of this relationship cannot be proven unequivocally, the collegial character is often based on the assumption that all cabinet members must be active, whereas in a hierarchical system their activity is not taken into account.[38]

2.2. The Formation of Ministerial Regulations within the Indonesian Legislation System

Along with the agenda of constitutional amendment in 1999-2002, Indonesia faced a new era of purifying the presidential system.[39] This change in order was

[34] Brian H. Mix, "Kelsen, Hart, and Legal Normativity," *Revus Journal for Constitutional Theory and Philosophy of Law* 34 (2018): 3.

[35] Hermann Punder, "Democratic Legitimation Of Delegated Legislation, A Comparative View On The American, British And German Law," *International and Comparative Law Quarterly (ICLQ)* 58 (April 2009): 354. *Rechtsverordnungen* is a piece of legislation that is not passed by Bundestag through a formal legislative proceedings, but issued by the federal government, federal minister, or a state's government. The authority to issue a legislation must be determined in the law.

[36] People's Consultative Assembly, Article 2, MPR's decision No III/MPR/2000.

[37] Herbert Barry, "The King Can Do No Wrong," *Virginia Law Review* 11, no. 5 (1925): 353.

[38] Jean Blondel and Nick Manning, "Do Ministers Do What They Say? Ministerial Unreliability, Collegial and Hierarchical Governments," *Political Studies* 50 (2002): 457.

[39] Saldi Isra and Hilaire Tegnan, *Vers une démocratie présidentielle en Indonésie* [Towards Presidential Democracy in Indonesia], *Pouvoirs: Revue Française d'études Constitutionnelles et Politiques*, no. 179 (2021): 131-133. See also Saldi Isra, Fahmi Idris and Hilaire Tegnan, "Designing a Constitutional Presidential Democracy in Indonesia," *Journal of Politics and Law* 13, no. 2 (2020): 26.

also followed by the strengthening of the presidential system, which maintained the concept that the President would be the center of executive decision-making power. The constitutionally recognized executive prerogative has allowed the President to act unilaterally against (vis-a-vis) the legislative branch.[40] It also brings differences in the perspective of the distribution of power within the cabinet concerning the bargaining power of the ministers against the chief executive (the power of the ministers vis-a-vis the executive chief).[41] The amendment of the constitution, especially in the second amendment made by the MPR, revoked the 1966 MPRS Decree, formulated during the New Order period, and then replaced it with MPR Decree Number III/MPR/2000 concerning Legal Sources and the Hierarchy of Legislative Regulations which in essence reorganized the new structure of laws and regulations in Indonesia.

The previous ministerial regulation was included in the category "other implementing regulations" but based on TAP III/MPR/2000, the existence of ministerial regulation was recognized based on Article 4 Sentence (1): *In accordance with this hierarchy of legislations, each lower law shall not contradict higher law*. Paragraph (2) declares: *Regulations or decisions of the Supreme Court, the Supreme Audit Agency, ministers, Bank Indonesia, agencies, institutions, or commissions of the same level established by the Government may not conflict with the provisions contained in the order of laws and regulations*. Thus, the existence of a ministerial regulation is recognized and only stated that it can be formed as long as it does not conflict with higher laws and regulations.

The difference between the two TAPs is that TAP MPRS Number XX/MPRS/1966 incorporates ministerial regulations and ministerial instructions into the order of legislation, while TAP MPR Number III/MPR/2000 does not place ministerial regulations in the hierarchy of laws and regulations. In subsequent developments, the existence of ministerial regulations and other institutional regulations was later recognized based on Article 7 paragraph (4) of Law 10/2004, "*Types of Legislation other than those referred to in paragraph (1), their existence*

[40] Octavio Amorim Neto, "The Presidential Calculus Executive Policy Making and Cabinet Formation in The Americas," *Comparative Political Studies* 39, no. 4 (2006): 416.

[41] Juan José Linz, "The Perils of Presidentialism," *Journal of Democracy* 1, no. 1 (1990): 61.

is recognized and has binding legal force as long as it is ordered by the Legislative Regulations". Higher laws have legal force in accordance with their hierarchy".[42] The laws and regulations referred to are in accordance with the hierarchy of laws and regulations as previously explained.[43]

Unlike Law 12 of 2011 concerning the Formation of Legislations,[44] Law 10/2014 does not recognize clauses "on the basis of authority" or "attribution" as the basis for the formation of other regulations. This means that Law 10/2004 only recognizes other statutory regulations and is only formed at the behest of higher statutory regulations or delegations.[45] Article 8 Sentence (2) of Law 12/2011 adds a clause "on the basis of authority" in addition to orders from higher laws and regulations as the basis for the formation of other regulations.[46] This provision seems to give legality to the attribution/discretion practice that was carried out at the time Law 10/2004 came into effect, which incidentally does not recognize such a provision.

If it is related to the duties and functions of ministers according to Article 17 of the Indonesian Constitution, the functions of ministerial regulations that have been practiced so far include:

1. Organization of general arrangements in the context of administering governmental power in their respective fields. The implementation of this function is based on Article 17 of the Indonesian Constitution after amendments and conventions.
2. Implementation of further provisions in presidential regulations. Because the ministerial regulation in this case is a delegation of the presidential regulation, the ministerial regulation is a further regulation pertaining to matters regulated in the presidential regulation which is the policy of the President.

[42] The Republic of Indonesia, Elucidation of Article 7 Sentence (4), Law No 10 of 2004.
[43] Law 12/2011 is a betterment and revokes the enforcement of Law 10/2004 due to:
   a. Contents of Law 10/2004 created ambiguity and led to confusion, hence, failed to provide legal certainty;
   b. Many inconsistencies in the formulation writing techniques;
   c. New development brought new things that needed regulation in line with legal development or necessities in terms of legislation; and
   d. Elucidation of contents are in line with the chapters contained in the writing system.
[44] Law of Indonesia, Article 7 Sentence (4), Law No 10 of 2004.
[45] Law of Indonesia, Article 8 Sentence (2), Law No 12 of 2011.
[46] Farida Indrati, "*Legislation*," 225-227.

3. Implementation of further rulings of provisions in a law that explicitly mentions it.
4. Implementation of further rulings in the provisions in government regulations which expressly mention it.[47]

According to Bagir Manan and Kuntana Magnar, the material restrictions on the content of ministerial regulations that can be contained are:

a) The regulatory authority is limited to the confines to state administration, both in instrumental and contractual (protection) functions.
b) The regulatory authority is limited to the fields that are the duties and authorities and responsibilities of the minister concerned.
c) It must not conflict with the above laws and regulations and general principles of proper governance (*Algemene beginselen van behoorlijk bestuur*).[48]

According to Maria Farida Indrati, delegating laws to ministerial regulations is inappropriate and should be avoided because the system adopted is presidential, whose ministers are responsible to the President. [49] Although often questioned in terms of content and the basis for their preparation, ministerial regulations are often used as implementing laws. As evidenced in the research data, there is a tendency to strengthen the role of ministerial regulations as implementing regulations for the law.

2.3. Ministerial Regulations Compared to Legislative Delegation Regulations from 2004 to2019

Based on research of the performance of presidential legislation, from 2005 to 2020,[50] a total of 414 laws, 1,412 PPs, 1,960 presidential regulations, and 15,996

[47] Bagir Manan and Kuntana Magnar, *Beberapa Masalah Hukum Tata Negara* [Various Issues of Constitutional Law] (Bandung: Alumni, 1997), 155; See also in Bagr Manan, "Fungsi dan Materi Peraturan Perundang-Undangan [Functions and Contents of Legislations]" (Paper (unpublished) presented in the Training of Lecturers and Training for Legal Skills for BKS-PTN in Law for Western Indonesia at the Faculty of Law of Lampung University, in Bandar Lampung, 1994), 32, as cited in Moh. Fadli, *Peraturan Delegasi di Indonesia Edisi Pertama* [Delegated Regulations in Indonesia First Edition] (Malang: UB Press, 2011), 39; Interview with Prof Bagir Manan on December 27 2021.

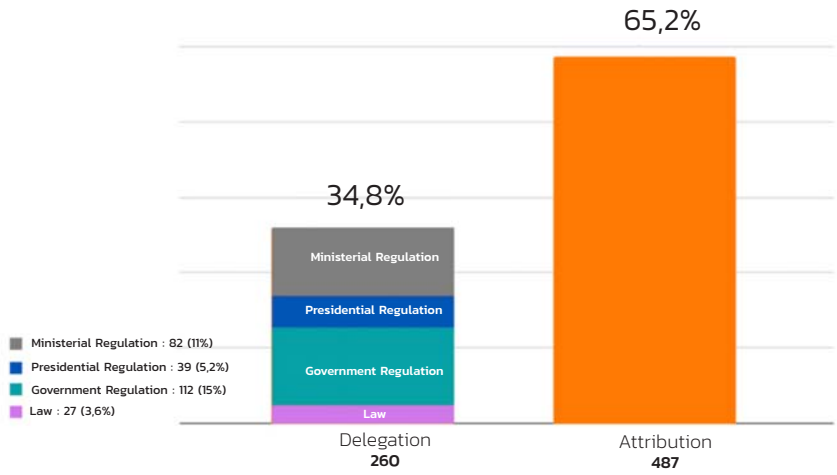
[48] Indrati S, *Legislation*, 228.

[49] Ministry of Law and Human Rights of the Republic of Indonesia, "List of Laws and Regulations," Last modified March 30 2022, https://peraturan.go.id.

[50] Asshiddiqie, *On the Subject,* 375.

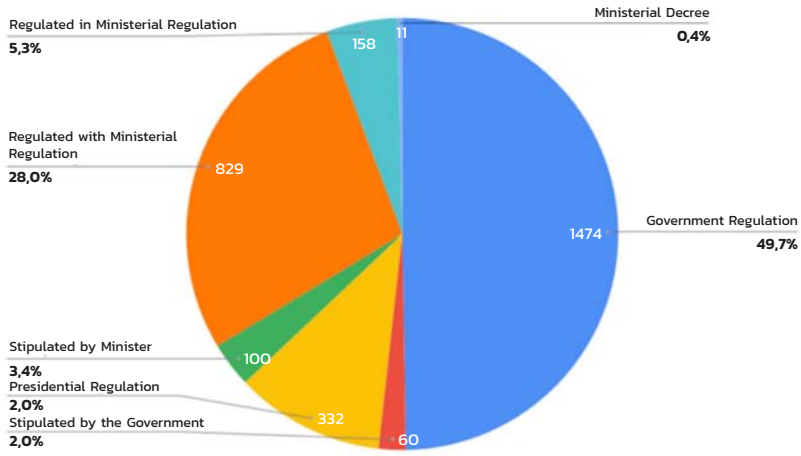
ministerial regulations were passed and issued. Referring to the data, several forms of delegation can be found in the delegation of regulations by law to implementing regulations for the years 2004 to2019. The form of delegation from laws to lower laws and regulations includes: a. ... regulated in or ... regulated by a government regulation; b. determined by the Government; c. ... regulated in or regulated by presidential regulation; d. determined by the Minister; e. ...is stipulated in a Ministerial Regulation; f. ... is regulated by a Ministerial Regulation; g. ...is regulated in a Ministerial Regulation; h. Ministerial decree. In total, laws have delegated as many as 2,964 delegations from 414 laws in the period between 2004 to2019 which can be seen in **Diagram 1.**

Diagram 1.



The diagram also confirmed that ministers were given more delegations, with 1,098 delegations (37.1%) compared to presidential regulations which only amounted to 332 delegations (11.2%). However, the number was still lower than afforded to Laws which amounted to 1,474 delegations (49.7%). If we compare the total number of statutory regulations under the law with the number of delegations given, it is clearly very different. An explanation for this is that apart from those formed by delegation, the rest are most likely formed on the basis of attribution.

Diagram 2



To find the basis for the formation of ministerial regulations, from 747 ministerial regulations that were used as research samples, data showed that 65.2% or as many as 487 ministerial regulations were formed on the basis of attribution. Delegations amounted to 260 ministerial regulation (34.8%) the largest of which was given by PP with 112 ministerial regulations (15%). The second highest number of delegations came from ministerial regulations, which amounted to 82 ministerial regulations (11%). Perpres delegations in that period only amounted to 39 ministerial regulations (5.2%) and the rest from Law delegations were 27 ministerial regulations (3.6%) **Diagram 2.**

2.4. Formation of a Ministerial Regulation Based on a Higher Legislation Delegation

The granting of authority by legislators to law enforcers to regulate certain matters further in the form of lower implementing regulations is referred to as the delegation of legislative authority (legislative legislation of rule making power).[51] These implementing regulations are also commonly referred to as regulations.[52] Delegation of authority to regulate the new can be exercised under three prerequisites:

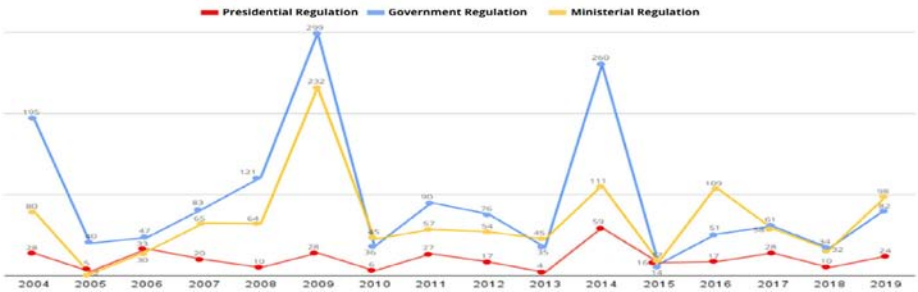
[51] Ibid., 376.
[52] Ibid., 381.

i. there is a firm order regarding the subject of the implementing agency that is given the delegation of authority and the form of implementing regulations to set out the delegated regulatory materials; or
ii. there is a firm order regarding the form of forced regulations to disseminate the delegated regulatory materials; or
iii. there is a firm order regarding the delegation of authority from the law or law-making institution to the institution receiving the delegation of authority, without mentioning the form of arrangement that will receive the delegation.[53]

Thus it can be concluded that the delegation can be in the form of mentioning the name of the legislation, mentioning the delegation to certain institutions and mentioning the institution by mentioning the type of legislation.

The following is a graph that proves the increase in delegations from laws to ministerial regulations from 2004 to 2019 **Graph 1**.

Graph 1



In the last 5 years studied, the number of delegations to ministerial regulations has increased and the number even exceeds the number of delegations to presidential regulations and governmental regulations (2010, 2013, 2015, 2016 and

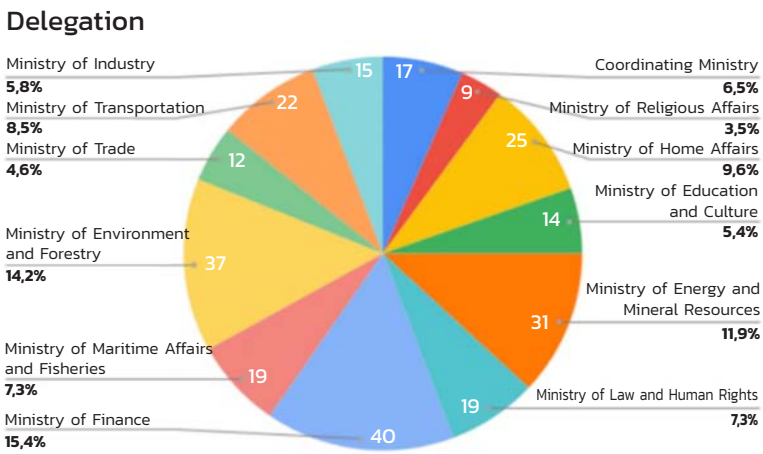
[53] Out of the 260 ministerial regulations, 2 vaguely mention the sources of delegations, i.e.: (1) Minister of Transportation Regulation No. 59 of 2007 and (2) Minister of Energy and Mineral Resources Regulation No. 29 of 2009. There are 10 ministerial regulations sourced from more than 1 delegations i.e.: (1) Minister of Transportation Regulation No. 93 of 2011; (2) Minister of Internal Affairs Regulation No. 37 of 2009 (3) Minister of Internal Affairs Regulation No. 20 of 2009; (4) Minister of Internal Affairs Regulation No. 18 of 2008; (5) Coordinating Minister of Economics Regulation No. 13 of 2017; (6) Finance Minister Regulation No. 117/PMK.02/2016; (7) Minister of Trade Regulation No. 44/M-DAG/Per/6/2016; (8) Minister of Trade Regulation No. 49 of 2018; (9) Minister of Trade Regulation No. 50 of 2018; 10. Minister of Trade Regulation No. 58 of 2019.
In total, there are 268 sources listed as the sources of delegation for the formation of ministerial regulations illustrated in **Graph 3.32**.

2019). In previous years, the numbers remained relatively the same. The graph shows the significant role of ministerial regulations as delegation regulations, even as a whole it has become the second alternative after government regulations. Even though the president also has other delegative powers, namely to form presidential regulations, the amount is incomparable to ministerial regulations.

Based on the results of the research, the distribution of ministerial regulation delegation can be seen in the following diagram. From 747 samples of ministerial regulations examined in 12 ministries, it was found that the Ministry of Finance and the Ministry of Environment and Forestry formed the largest contingent of ministerial regulations based on delegations with a percentage of 15.4% and 14.2%, respectively. Of the total ministerial regulations formed by the Ministry of Finance in the 2005-2020 there were 2,925 ministerial regulations as delegation regulations **Diagram 3.**

Furthermore, from the research, of the 747 ministerial regulations depicted in Diagram 2, 260 of them are delegations or sub-delegations of higher or equivalent legislation.[54] The pattern of delegations found are as follows:

Diagram 3

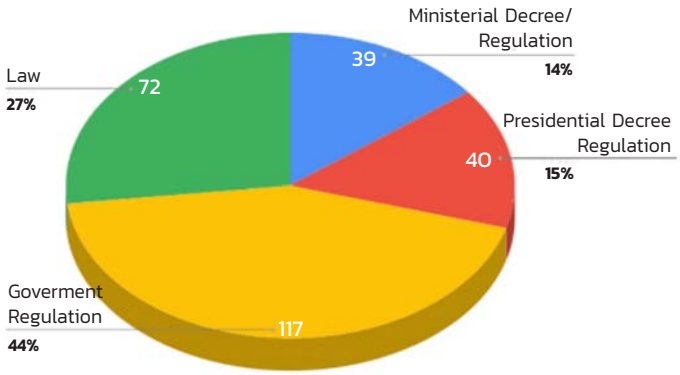


The delegate patterns found are: a) delegation of laws to ministerial regulations (as many as 72 ministerial regulations); b) sub-delegation of government

[54] A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, (New Jersey: Pearson Education, 2007), 78.

regulations to ministerial regulations (117 ministerial regulations); c) delegation and sub-delegation from presidential regulations to ministerial regulations (40 ministerial regulations); d) sub-delegation of ministerial regulations to ministerial regulations (39 ministerial regulations). The comparison and percentage of each can be seen in **Diagram 4.**

Diagram 4



Furthermore, of the 747 ministerial regulations studied as described in **Diagram 2**, 260 ministerial regulations are delegations or sub-delegations from higher or equivalent laws and regulations. 43 The delegate patterns found are: a) delegation of laws to ministerial regulations (as many as 72 ministerial regulations); b) sub-delegation of government regulations to ministerial regulations (117 ministerial regulations); c) delegation and sub-delegation from presidential regulations to ministerial regulations (40 ministerial regulations); d) sub-delegation of ministerial regulations to ministerial regulations (39 ministerial regulations). The comparison and percentage of each can be seen in **Diagram 4.**

1) Act

In a presidential system, the delegation of laws to the President is a consequence of the doctrine of presidential lawmaking as an adjustment to the non-delegation doctrine as described in the previous chapter. There are several different theories of delegation of authority which are a product of legislation.

Theses difference are the result of the theory of delegation of authority over delegation regulations, which ia tied to several factors such as the theory of the rule of law adopted by a country, the theory of separation of powers and the theory of law-making institutions (legislative products) including the government system used such as presidential or parliamentary.[55]

Based on **Diagram 4** there are at least 27 ministerial regulations (3.6%) that were formed based on delegation from law. Although the number is small, it at least confirms that there is a direct delegation of legislation to ministerial regulation and when compared to the Law delegations from **Diagram 1** to ministerial regulations, they are given in various forms, including: ...as determined by the Minister..., ...regulated by ministerial regulations... and ...regulated in the ministerial regulations... the total number is 1,098 delegations or equivalent to 37% of all delegations granted by the Act to the lower authority.

2) Government Regulations

Government regulations based on Article 5 of the Indonesian Constitution can be categorized as implementing regulations (delegated legislation/*pouvoir reglementaire*) and are included as objects of state administrative law studies. In terms of constitutional law, government regulations can be seen in the history of their constitutionalism which is contained in Article 5 Paragraph (2).[56] Based on the Indonesian legal system and several principles of delegation regulations, A. Hamid S. Attamimi formulated several characteristics of government regulations, i.e.:

a. Looking at the history of legislation during the Dutch East Indies era, regulations of the *Regeringsverordening* type can be equated with the current government regulations, which are empowered with the authority to impose criminal sanctions.
b. Government regulations may be established even though the relevant laws do not explicitly require them; or should the Law not state in its provisions

[55] Attamimi, *Law*, 14.
[56] Attamimi, *The Roles of,* 178-179.

a government regulation is needed. Because Article 5 Paragraph (2) has given authority to the President as a form of regulatory power.

c. Government Regulations are regulations used to implement higher regulations, i.e. Laws, so that government regulations may not amend nor reduce the content of the Law, and they do not modify the provisions therein so as to change the meaning of the parent Law.
d. Government Regulations only contain the nature of regulatory norms or a combination of regulations and stipulations. However, a government regulation cannot merely be stipulating.
e. Judging from its function, government regulations were created for implementing statutes. So, if it is not necessary, it is better not to delegate powers to lower Regulations.[57]

Based on the research data in the Diagram. 4 at least it was found that there were 117 ministerial regulations which were delegations from PP or 15% of the total ministerial regulation studied. This number is the highest in giving delegations to ministerial regulations.

3) Presidential Regulation

The contents of the presidential regulation (commonly referred to as 'Perpres) according to Law 12/2011 in Article 13 contain material prescribed by a Law, material for implementing government regulations, or material for executing the administration of governmental power, expressly or indirectly ordered to be formed.[58] Such a formulation is not much different from the understanding provided by Law 10/2004, Article: "The material on the content of a Presidential Regulation contains material ordered by law or material to implement a government regulation." In the elucidation of the article it is stated: "In accordance with the position of the President according to the Indonesian Constitution, a Presidential Regulation is a regulation made by the President in administering the state government as an attribution of Article 4 paragraph

[57] Law of Indonesia, Elucidation of Article 13, Law No 12 of 2011.
[58] Asshiddiqie, *On the Subject*, 385.

(1) of the Indonesian Constitution." The existence of this affirmation places the *Perpres* that can be used freely by The President as a form of exercise of state power based on Article 4 of the 1945 Constitution of the Republic of Indonesia.[59]

There are three possibilities that can be developed regarding the meaning of "unequivocal mandate", i.e.:

(1) the regulatory mandate does exist but does not explicitly specify what form of regulation is chosen as the place for containing the material for the provisions delegated to the regulation;
(2) the regulatory mandate does exist, but it is not clearly defined which institution has delegated the authority or the form of regulation that must be determined for containing the delegated provisions;
(3) such regulatory mandates are not mentioned or specified in the relevant law at all, but the need for such arrangements is real and unavoidable in the context of implementing the provisions of the law itself.[60]

Thus, the Presidential Decree that was issued on the basis of "Freies Ermessen" or the principle of "beleidsvrijheid" is only needed in the context of executing the duties and authorities as the highest government administrator.[61] It is limited to: i) that the further regulatory material as outlined in the presidential regulation is only internal in the context of the needs of government administration; and ii) that the material in the provisions concerned is only of an administrative procedural nature to assist law- implementing agencies in carrying out the provisions of the law in question. Its contents do not include the adding norms or changing norms that are reducing the provisions of the law.[62]

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[59] Matthew J. Steilen, "How to Think Constitutionally about Prerogative a Study of Early," *Buffalo Law Review* 66, no. 3 (2018): 564.

[60] Asshiddiqie, *On the Subject*, 385.

[61] In the legislative process and policy formation in general, referring to the Latin American presidential model, Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg stated that the Latin American presidential power model has a vital and broad role for the president in forming regulations (decree power/decree-law) and regulations. Emergency (emergency power). Jose Antonio Cheibub, Zachary Elkins, Tom Ginsburg, "Latin American Presidentialism in Comparative and Historical Perspective," *Texas Law Review* 89 (2011): 2.

[62] Rod Hague and Martin Harrop, *Comparative Government and Politics*, Sixth Edition (London: Palgrave Macmillan, 2004): 268.

The position of the presidential regulation, apart from being an implementing regulation (delegation), is also a regulation that forms the basis for the formation of a ministerial regulation. Based on the study, it can be identified that at least 39 ministerial regulations (5.2%) studied are ministerial regulations formed by Presidential Decree delegation. This means that Perpres are not overrepresented when issuing delegation compared to PP. If it is related to the tiered delegation and the material contained within the presidential regulation, it can be said that the dominance of the presidential regulation as a statutory regulation originating from the President is quite high. From the recapitulation of laws and regulations for the 2005-2020 period, the presidential regulations formed during that period amounted to 1960 presidential regulations. Most of these Perpres are formed on the basis of articulation because they are based on **Diagram 1**. There are only 332 Perpres that are given by law. It is possible that this amount was obtained from PP delegations outside those formed attributively

4) Ministerial Regulation

The vital role played by a minister in making policy, in this case, ministerial regulations in the Indonesian presidential system, is the influence of the parliamentary system on the presidential system. Ministers are an important part of "the political executive" which is defined as: "The political executive is the core of government, consisting of political leaders who form the top slice of the administration: presidents and ministers, prime ministers and cabinets. The executive is the regime's energizing force, setting priorities, making decisions and supervising their implementation. Governing without an assembly or judiciary is perfectly feasible but ruling without an executive is impossible".[63] There is a significant difference regarding the source of delegation for the formation of regulations by a minister where in a parliamentary system it can be given directly by law[64] while in a presidential system, this is not the case. This, according to C.F.

[63] Timothy Endicott, *Administrative Law* (Oxford: Oxford University Press, 2011), 125 and 580.
[64] C. F. Strong, *Modern Political Constitution*: *An Introduction to the Study of Their History and Existing Forms* (London: Sidgwick & Johnson, 1973), 212.

Strong, is a consequence of there being no separation between the executive and the legislative where the executive cabinet is very dependent on the legislature.[65]

In a presidential system, the executive cabinet is independent of the legislative under the power of the president.[66] The authority of a minister to make policies is included in the administrative realm, either in the form of decisions or actions meant to carry out government affairs or executive power (executive power).[67] In Indonesia, because it is influenced by the parliamentary system, the formation of ministerial regulations has penetrated the realm of regulations (regeling). Even though they are normatively limited to technical and administrative matters, this is in fact not the case, ministerial regulations have become one type of legislation in the executive toolbox in addition to PP and Perpres. According to Nicoleta Yordanova and Asya Zhelyazkova, this is the cause of the parliament's ineffective control of delegation regulations.[68]

If we refer to the parliamentary system model, there is a ministerial act or ministerial rule:

> "*Ministerial Act: A ministerial act is an act performed in a prescribed manner and in obedience to a legal authority, without regard to one's own judgment or discretion. The distinction between ministerial acts and acts that are discretionary is often important to determine whether a public official is shielded by qualified immunity. Generally, ministerial acts are unshielded by*

[65] Administrative includes the implementation of public policies or regulations on particular cases including the actions of ministers that are commonly described as "administrative". Unlike *the Report of the Committee on Ministers' Powers (1932),* framers of administrative decisions:

a. *may need to consider and weigh submissions and arguments and collate evidence (in addition to acting on the basis of evidence); and*
b. *does not have an unfettered discretion as to the grounds upon which to act nor the means which the decision maker takes to inform itself before acting.*

A great number of what is called administrative decrees that might involve larger or smaller scopes, including certain attributes of what is called "judicial or quasi-judicial decrees". The phrase is "the mandate to act juridically." The context of administrative decision making refers to the mandate to act "fairly" in a sense that the procedural fairness in the in the making of administrative decisions that affect one's rights, interests on legitimate expectation. Compare with C.F. Strong, *Modern,* xxiv.

[66] Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (2000): 694.

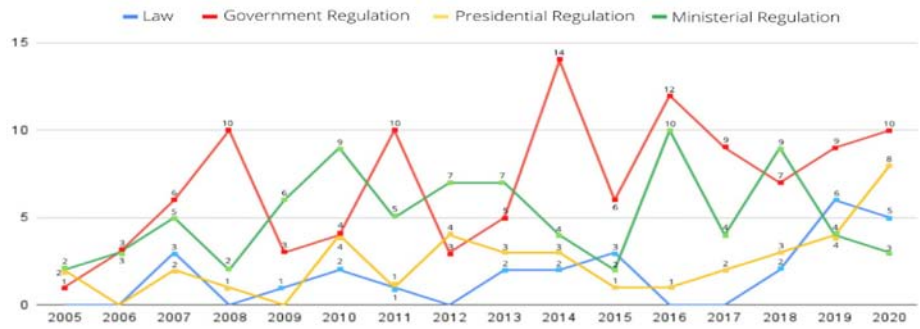
[67] Cornell Law School, "Ministerial Act," last accessed on May 2 2021, https://www.law.cornell.edu/wex/ministerial_act. Several instances of ministerial regulations are, among others: the preparation of ballots, the registration of voters, the recording of documents and filing of papers, the care for prisoners, the driving of vehicles, the repair of highways, the collection of taxes.

[68] Nikoleta Yordanova and Asya Zhelyazkova, "Legislative Control over Executive Law, making/Delegation of Quasi-legislative Powers to the European Commission," *Journal of Common Market Studies* (2019): 16.

qualified immunity, which protects only actions taken pursuant to discretionary functions. In other words, noncompliance with ministerial duty bars qualified immunity."[69]

This definition may be viewed as a clear-cut distinction between actions, but it remains to be seen as distinctive between the presidential and parliamentary systems. Based on the study, at least one point of interest worth nothing was that there were 82 ministerial regulations, or 11% of ministerial regulations, formed on the basis of the Ministerial Delegation. This number occupies is the second most popular source of Ministerial Delegation after the PP. Based on the research results, the overall development of delegation regulations in the 12 sample Ministries studied in **Diagram 3** each year can be seen in **Graph 2**.

Graph. 2

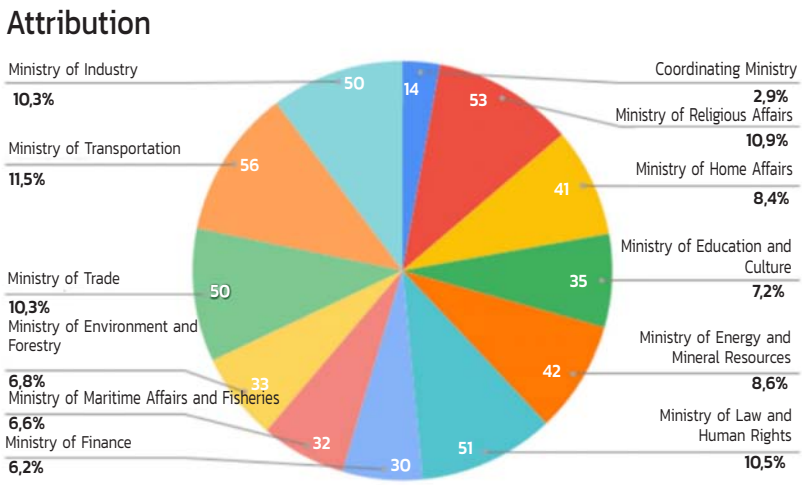


2.5. Formation of Ministerial Regulations Based on Attributions in the Administration of Certain Governmental Affairs

Based on the provisions of Law 12/2011, Ministerial Regulations can be categorized as statutory regulations. The inclusion of ministerial regulations is due to the notion of statutory regulations which are interpreted to include all statutory regulations relating to laws and sourced from legislative power. The types of legislation are laws and other regulations that are formed based on the attribution authority or the delegation of authority from the law.

[69] Attamimi, *Law,* 8.

Diagram 5



Therefore, certain laws and regulations are limited in type considering that the attribution authority is certain and limited, while the delegation's authority cannot be delegated further without the "approval" of the delegate (delegatus non potest delegare).[70] The content of other laws and regulations is the "leftover" content that has been regulated in the law.[71] This proves the importance of regulation at the legal level even though it is difficult, complicated, time-consuming and expensive.[72]

Quantitatively, it can be seen that the Ministerial Regulation must be the most widely formed regulation. However, what must be criticized is the basis for the formation of the ministerial regulation. Referring to the results of data processing, the inter-ministerial attribution performance studied can be seen in Diagram. 5 below.

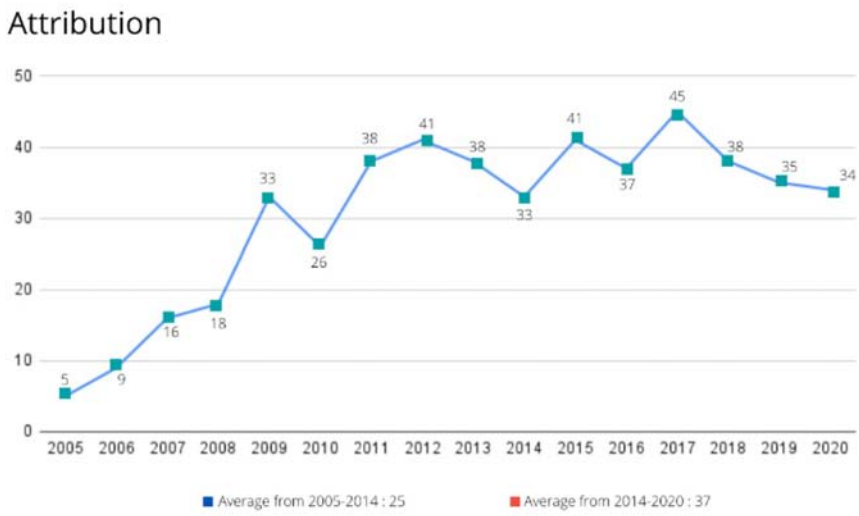
The Ministry of Transportation has the highest percentage of all attribution ministerial regulation studied at 11.5%, while the Ministry of Finance occupies the

[70] Ibid., *Law*, 9.
[71] Ibid, *Law*, 10.
[72] Ministry of Law and Human Rights of the Republic of Indonesia, "List of Laws and Regulations," Last modified March 30 2022, https://peraturan.go.id.
The data on ministerial regulation of the Ministry of Education and Culture is the accumulation of ministerial regulations issued by the Ministry of National Education, the Ministry of Education and Culture, and the Ministry of Research, Technology, and Higher Education. The data on Minister of Environment and Forestry Regulations is the accumulation of ministerial regulations issued by the Ministry of Environment and the Ministry of Forestry.

lowest position. The Coordinating Ministry for the Economy was not counted because the data studied was too insignificant.

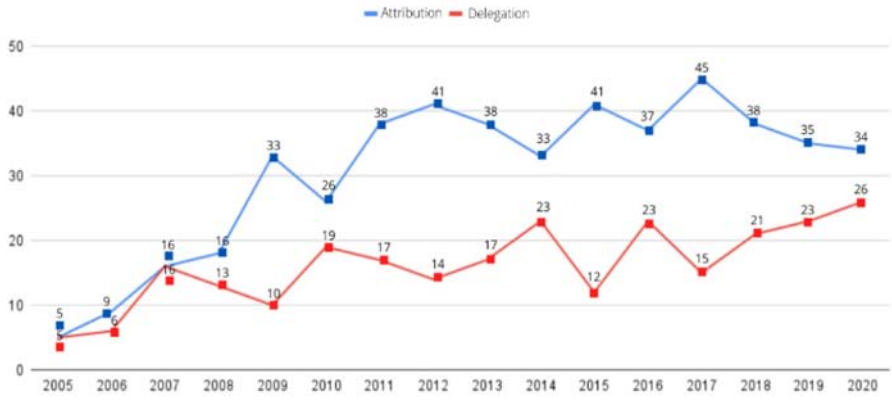
The development of the number of formations of attribution ministerial regulations in general can be seen in Graph 3. In terms of numbers, if taken on average, at least 37 Attribution Regulations are formed per year. This number clearly exceeds the highest number of delegations, which was only 14 ministerial regulations in 2014.

Graph 3.1.



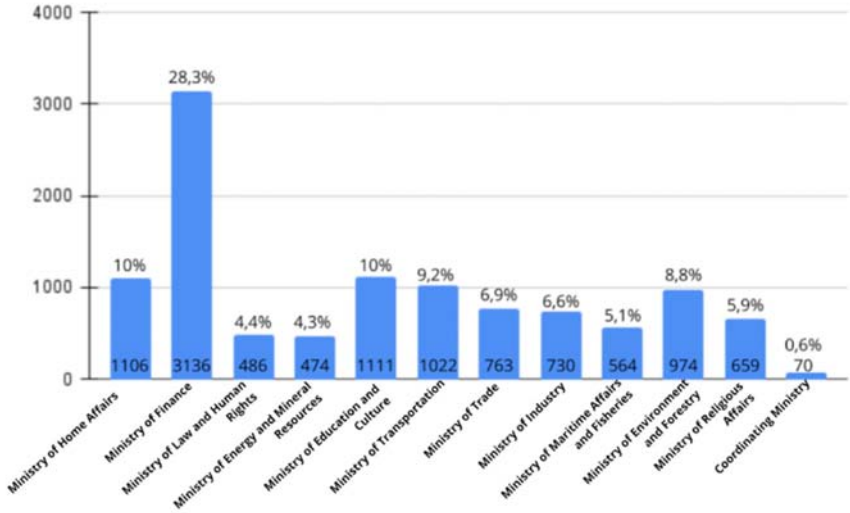
If we compare the performance of attribution and delegation in the formation of ministerial regulation, it can be seen in the graph., that attribution becomes the most dominant basis in the formation of ministerial regulation every year. The average attribution per year is 31 ministerial regulations while the delegations are only around 15 ministerial regulations per year. This means that twice as many attributions are formed as compared to delegations. The factual productivity of the formation of ministerial regulation, both derived from the delegation and the respective attributions of the 12 Ministries studied in the period from 2005 to2020, can be compared in Graph 4.

Graph 4



The Ministry of Finance is the Ministry that issues the most ministerial regulations, but factually based on research data, the Ministry of Finance forms ministerial regulations mostly based on orders from delegations, both UU, PP and the Minister of Finance itself (sub-delegation). The ministerial regulation that comes with attribution places the Ministry of Finance as the ministry that issues the least amount of ministerial regulation **Diagram 6**.

Diagram 6



The research data shows the fact that ministerial regulations are increasingly becoming an option in containing legislative delegation regulations. Based on research data from 2004 to 2019 it was found that only 35% of the formation of ministerial regulations was based on the authority of the delegation, far below the attribution authority which reached 65%. This shows that the ministers were very expansive in forming ministerial regulations based on authority. On the other hand, ministerial regulations that are formed on the basis of delegation authority receive delegations from: laws, government regulations, presidential regulations and even ministerial regulations (sub-delegations).

The is an absence of limitations and criteria for delegation in the law, not only for government regulations but also ministerial regulations. Even the delegation of ministerial regulations became the second choice after government regulations.[73] In the presidential system, the delegation of laws should be given to the president as the holder of power in the field of legislation other than the DPR, known as the "presidential lawmaking" doctrine. In fact, the president has a reduced role. Although the number is still dominated by government regulations, the increase in the delegation of laws to ministerial regulations must be evaluated immediately. It is time for the formation of delegation regulations to be returned to the concept of the Indonesian Constitution.

The expansion of ministerial authority in forming laws and regulations in the Indonesian presidential system represents a departure from the Constitution's provisions of Article 5 paragraph (2) and Article 4, as the power to delegate and make laws that rightfully belongs to the President has been shifted to ministers in the role of presidential assistants. This shift has resulted in an over-reliance on ministerial regulations, which is largely due to the absence of restrictions on the authority of ministers to create regulations. However, based on Article 17 (3) of the Indonesian Constitution each minister is responsible for a particular area of government affairs, and this responsibility should not replace the authority of the president as chief executive to make regulations.

[73] Charles Simabura, "Non-Delegation Doctrine of Presidential Legislative Power in The Presidential Government System: A Comparative Study Between Indonesia and In The United States Of America," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 6 (2021): 4.

III. CONCLUSION

The research indicated that the delegation of the rulings of laws into executive legislations both in the forms of government regulations and presidential regulation is a necessity under the doctrine of presidential lawmaking. Even though the theory of separation of power recognizes nondelegation doctrine, such doctrine has experienced a weakening. However, the principle that the legislative power should be possessed by the legislature should remain the primary bases for the creation of delegated regulations for serving the purpose of both meeting the needs of constitutional law and implementing the president's constitutional authorities. Any forms of delegation should be based on the directives of the constitution and delegations from the DPR as the primary legislative power within the presidential system.

Conceptually and constitutionally, governmental and presidential regulations are the primary forms of delegated legislation based on the Indonesian Constitution. A form of delegation to the ministers to create ministerial decrees is obviously in contrast to the presidential system theory wherein the power to create delegated regulations is the authority of the president. The president shall lose legislative power if the delegation is directly given by law to the ministers. Ministers, in their positions as assistants to the president in executive affairs, should have acquired their delegated authority from the president, not the legislature.

When ministers acquire delegations from the laws, they should be responsible to the framers of laws and not only to the president. This will shift the mechanism of responsibility of ministers from the presidential model to the parliamentary. In the delegated concept, the recipients of delegations (ministers) would be responsible to the party that provides them with delegations (legislators) and not to the president as commonly found in the presidential system. The parliamentary model of legislation that recognizes the common discussion between the DPR and the President has led to the weakening of presidential lawmaking power as the power is in fact passed to the ministers. The passing includes the status as

representatives of the president in the discussions during the legislative process and the creation of ministerial regulations as the implementing statutory of laws.

The non-delegation doctrine in the separation of powers concept allows the president to create delegation regulations in the presidential system. To uphold the doctrine of presidential lawmaking and restore legislative power, the Indonesian Constitution mandates that laws be delegated to government regulations, not ministerial regulations. Presidential legislation should be subject to public, DPR, and judicial control, while ministerial regulations should be classified as policy regulations and comply with the Government Administration Law.

To structure the president's legislative powers under the Indonesian Presidential Government System, government regulations and presidential regulations should be strengthened as implementing regulations. The authority of ministers in forming laws and regulations should be clarified, and ministerial regulations should be categorized as either legislation or policy regulations. The formation of ministerial regulations should be subject to the president's delegation and supervision, while government and presidential regulations can be categorized as one type of statutory regulation.

BIBLIOGRAPHY

Ackerman, Bruce. "The New Separation of Powers." *Harvard Law Review* 113, no. 3 (2000).

Asshiddiqie, Jimly. *Hukum Tata Negara dan Pilar-Pilar Demokrasi* [Constitutional Law and Pillars of Democracy]. Jakarta: Konpress, 2005.

Asshidiqie, Jimly. *Perihal Undang-undang* [On the Subject of Laws]. Jakarta: Konstitusi Press, 2006.

Attamimi, A. Hamid S. "*Peranan Keputusan Presiden Republik Indonesia Dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu PELITA I – PELITA IV* [The Roles of Indonesian Presidential Decrees in the State Governance Administrations: A Study on the Analysis on Regulatory

Presidential Decrees during the Five Year Developments I – IV]. PhD diss., University of Indonesia, Jakarta, 1990.

Barry, Herbert. "The King Can Do No Wrong." *Virginia Law Review* 11, no. 5 (1925).

Blondel, Jean, Nick Manning. "Do Ministers Do What They Say? Ministerial Unreliability, Collegial and Hierarchical Governments." *Political Studies* 50 (2002).

Bradley, A. W. and K. D. Ewing. *Constitutional and Administrative Law*. New Jersey: Pearson Education, 2007.

Butt, Simon and Tim Lindsey. *Indonesian Law*. London: Oxford University Press, 2018.

Calabresi, Steven G. "Some Normative Arguments for The Unitary Executive." *Arkansas Law Review* 48 (1994).

Cheibub, Jose Antonio, Zachary Elkins, Tom Ginsburg. "Latin American Presidentialism in Comparative and Historical Perspective." *Texas Law Review* 89 (2011).

Cook, M. Patrick Moore a1 Kate R. "Executive Orderstrike Of A Pen, Law Of The Land?" *Boston Bar Journal Summer* 61 (2017).

Cornell Law School. "Ministerial Act." Last accessed on May 2 2021. https://www.law.cornell.edu/wex/ministerial_act.

Edinburgh University. *Research Methods for Law*. Edinburgh: Edinburgh University Press, 2007.

Ehmke, Horst P. "Delegata Potestas Non Potest Delegari A Maxim of American Constitutional Law." *Cornell Law Review* 47, no. 1 (1961).

Endicott, Timothy. *Administrative Law*. Oxford: Oxford University Press, 2011.

Fadli, Moh. *Peraturan Delegasi di Indonesia Edisi Pertama* [Delegated Regulations in Indonesia First Edition]. Malang: UB Press, 2011.

Ginting, Budiman et al. (eds). *Refleksi Hukum dan Konstitusi di Era Reformasi* [A Reflection of Law and Constitution in the Reform Era]. Medan: Pustaka Bangsa Press, 2002.

Hague, Rod and Martin Harrop. *Comparative Government and Politics*. London: Palgrave Macmillan, 2004.

Indonesian Cabinet Secretariat. "*Reformasi Hukum: Menuju Peraturan Perundang-undangan yang Efektif dan Efisien* [Legal Reform: Towards Effective and Efficient Legislations]." Paper (unpublished) presented on National Seminar in Jakarta, 2018.

Indonesian People's Consultative Assembly, Article 4 Sentence (1) and Article 17 Sentence (1).

Indrati, Maria Farida. *Ilmu Perundang-undangan: (Jenis, Fungsi, dan Materi Muatan): Edisi Pertama* [Legislation Theories (Types, Functions, and Contents): First Edition]. Yogyakarta: Penerbit Kanisius, 2007.

Interview with Prof Bagir Manan on December 27 2021.

Indonesian's People's Consultative Assembly, Article 2, MPR's decision No III/MPR/2000.

Isra, Saldi. "*Merampingkan Regulasi* [Downsizing Regulations]." *Kompas Newspaper*, March 13, 2017.

Isra, Saldi. *Pergeseran Fungsi Legislasi, Menguatnya Model Legislasi Parlementer Dalam Sistem Presidensial Indonesia* [The Shift of Legislation Functions: The Strengthening of Parliamentary Legislation Model in Indonesian Presidential System]. Jakarta: Rajagrafindo, 2010.

Isra, Saldi, Fahmi Idris and Hilaire Tegnan. "Designing a Constitutional Presidential Democracy in Indonesia." *Journal of Politics and Law* 13, no. 2 (2020).

Isra, Saldi and Hilaire Tegnan. "*Vers une démocratie présidentielle en Indonésie* [Towards Presidential Democracy in Indonesia]." *Pouvoirs*: *Revue Française d'études Constitutionnelles et Politiques* 179 (2021). https://revue-pouvoirs.fr/auteurs/isra-saldi/.

Kelsen, Hans. *General Theories of Law*. New Jersey: Transaction Publisher, 2006.

Kischel, Uwe. "Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law." *Administrative Law Review* 46, no. 2 (1994).

Law of Indonesia, Article 8 Sentence (2), Law No 12 of 2011.

Law of Indonesia, Article 7 Sentence (4), Supplementary State Gazette No 4389.

Law of Indonesia, Article 7 Sentence (5), Law No 10 of 2004.

Law of Indonesia, Gazette, State No 53 of 2004.

Linz, Juan José. "The Perils of Presidentialism." *Journal of Democracy* 1, no. 1 (1990).

Manan, Bagir and Kuntana Magnar. *Beberapa Masalah Hukum Tata Negara* [Various Issues of Constitutional Law]. Bandung: Alumni, 1997.

Ministry of Law and Human Rights of the Repulic of Indonesia. "List of Laws and Regulations." Last modified March 30 2022, https://peraturan.go.id.

Mix, Brian H. "Kelsen, Hart, and Legal Normativity." *Revus Journal for Constitutional Theory and Philosophy of Law* 34 (2018).

Morgan, Bronwen and Karen Yeung. *An Introduction to Law and Regulation Text and Materials* (*Law in Context*). Cambridge: Cambridge University Press, 2007.

Natabaya, H.A.S. *Sistem Peraturan Perundang-undangan Indonesia* [System of Legislations in Indonesia]. Jakarta: Secretariat General of the Indonesian Constitutional Court, 2006.

Neto, Octavio Amorim. "The Presidential Calculus Executive Policy Making and Cabinet Formation in The Americas." *Comparative Political Studies* 39, no. 4 (2006).

Punder, Hermann. "Democratic Legitimation of Delegated Legislation, A Comparative View On The American, British And German Law." *International and Comparative Law Quarterly (ICLQ)* 58 (2009).

Salter, Michael and Julie Mason. *Writing Law Dissertations an Introduction and Guide to the Conduct of Legal Research*. Preston: Lancashire Law School University of Central Lancashire, 2007.

Saputra, Andi. "*Jokowi Keluhkan Banyaknya Regulasi, Kini Ada 43.005 Peraturan di Indonesia* [Jokowi Complains about the Number of Regulations, Now There are 43,005 Regulations in Indonesia]." *Detik News*, November 14,

2019, https://news.detik.com/berita/d-4784463/jokowi-keluhkan-banyaknya-regulasi-kini-ada-43005-peraturan-di-indonesia.

Simabura, Charles. "Non-Delegation Doctrine of Presidential Legislative Power in The Presidential Government System: A Comparative Study Between Indonesia and in The United States Of America." *Journal of Legal, Ethical and Regulatory* 24. no. 6 (2021).

Singer, Norman. "Legislative Power Exercised by Other Departments." *Sutherland Statutes and Statutory Construction* 7th (2018).

Sjarif, Fitriani A. "*Pembentukan Peraturan Delegasi Dari Undang-Undang Pada Kurun Waktu 1999-2012* [The Formation of Delegated Statutories from Laws in the Period of 1999-2012]." Thesis, University of Indonesia, 2015.

Smits, Jan M. *The Mind and Method of the Legal Academic*. Cheltenham: Edward Elgar Publishing, 2012.

Soekanto, Soerjono, *Pengantar Penelitian Hukum* [Introduction to Legal Research], Jakarta: UI Press, 2007.

Spiller, Pablo T. "A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law or Regulatory Specificity?" *Southern California Law Review* 69 (1996).

Stefanie, Christie. "*Istana Siapkan Badan Tunggal Perumus Regulasi Pemerintahan* [The Palace Prepares Sole Agency for Formulating Government Regulations]." CNN Indonesia, November 28, 2018. https://www.cnnindonesia.com/nasional/20181128154327-32-349959/istana-siapkan-badan-tunggal-perumus-regulasi-pemerintahan.

Steilen, Matthew J. "How to Think Constitutionally About Prerogative a Study of Early." *Buffalo Law Review* 66, no. 3 (2018).

Strong, C. F. *Modern Political Constitution*: *An Introduction to the Study of Their History and Existing Forms*. London: Sidgwick & Johnson, 1973.

Suny, Ismail. *Pergeseran Kekuasaan Eksekutif* [The Shift in Executive Powers]. Jakarta: Aksara Baru, 1977.

Suteki and Galang Taufani. *Metodologi Penelitian Hukum (Filsafat, Teori dan Praktik)* [Legal Research Methodologies (Philosophy, Theories, and Practices)]. Jakarta: Rajawali Pers, 2018.

The 1945 Constitution of the Republic of Indonesia.

Tyler, Tom R. "Methodology in Legal Research." *Utrecht Law Review* 13 (2017).

Wolfe, Doak J. "ESQ: Constitutional Law, Executive-Legislative Conflicts." *South Carolina Jurisprudence* 19 (2018).

Yordanova, Nikoleta and Asya Zhelyazkova. "Legislative Control over Executive Law, making/Delegation of Quasi-Legislative Powers to the European Commission." *Journal of Common Market Studies* (2019).

Yuda, Hanta. *Presidensialisme Setengah Hati, dari Dilema ke Kompromi* [Half-hearted Presidentialism, from Dilemma to Compromise]. Jakarta: Gramedia, 2010.

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The Role of The Indonesian Constitutional Court in Preventing Social Conflict in A Diverse Society

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Abstract

In the diverse society of Indonesia, the Constitutional Court plays a vital role in maintaining social harmony and preventing social conflict. Although this contribution is largely indirect, the Court exerts significant influence through its decisions. Since its establishment in 2003, the Court has rendered over 1,000 decisions, many of which carry profound implications for Indonesian society. This article addresses how the Constitutional Court, through its decisions, has contributed to mitigating social conflicts and fostering equilibrium within the nation's diversity. To analyze this main issue, a normative approach grounded in the nation's laws and the Constitutional Court's decisions will be employed. Several decisions, especially on judicial reviews and election disputes, will be examined to illustrate the Court's role in minimizing social conflict. From a social theory perspective, the study of social conflict has relevance in the context of law and society, given the potential for various types of conflicts in Indonesia's diverse society. The legal basis for addressing social conflicts in Indonesia is the 2007 Law on Social Conflict Management. According to this law, social conflicts may arise from various factors, including political issues, economic disparities, socio-cultural differences, inter-religious or inter-ethnic tensions, disputes over boundaries at the village, regency/municipal, or provincial

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levels, conflicts related to natural resources, and disparities in the distribution of these resources within society. The Constitutional Court indirectly plays a role in preventing social conflicts. Nevertheless, the Court faces challenges in fulfilling this role. Pressures from various parties and interests may hinder its ability to ensure constitutional justice, potentially compromising its principles of independence and impartiality in fulfilling its mandate.

Keywords: Constitutional Court; Court Decisions; Diversity; Judicial Independence; Social Conflicts.

I. INTRODUCTION

Indonesia, a diverse nation, exhibits pluralism in terms of ethnicity, language, race, culture and religion. Embracing the motto Unity in Diversity, and emblematic of the coexistence of its various cultures and ethnicities, the country's people predominantly live in harmony. As one of the world's most ethnically diverse societies, Indonesia is the dwelling place of over 1,300 distinct self-identified ethnic groups living on approximately 6,000 islands.[1]

Minority migrant ethnic groups, including the Chinese, Arab and Indian communities, make up the remaining segment of Indonesia's diverse populace. The prevailing perception among some is that diversity poses a challenge to national unity, often correlating it with adverse social consequences.[2] Indonesia's diverse society, in reality, does have the potential for localized conflicts, driven by factors such as poverty, inequality, miscommunication, ethnic and religious diversity and disparities, as well as variations in community-level associations and security arrangements. A study reveals notable correlations between local conflict and unemployment, inequality, natural disasters, changes in sources of income, and the clustering of ethnic groups within villages. Simultaneously, institutional variables indicate that the presence of places of worship tends to be associated with a lower incidence of conflict, whereas the presence of religious groups and traditional (*adat*) cultural institutions is associated with an increased

[1] Badan Pusat Statistik [Statistics Indonesia], "Mengulik Data Suku di Indonesia [Digging into Ethnic Tribes Data in Indonesia]," Badan Pusat Statistik [Statistics Indonesia], accessed August 7, 2022.

[2] Samuel Bazzi, et al., "Unity in Diversity? How Intergroup Contact Can Foster Nation Building," *American Economic Review* 109, no. 11 (2019): 3978, https://doi.org/10.1257/aer.20180174.

likelihood of conflict.[3] Since its establishment in 2003, Indonesia's Constitutional Court has introduced a new alternative to setting legal mechanisms aimed at reducing potential social conflicts in the nation's diverse society. Among the Court's competencies, as stipulated by the Indonesian Constitution, is the power of judicial review, which allows the evaluation of the constitutionality of the Laws, as well as adjudicating disputed election results. The Court has, over the past 20 years, delivered more than 1,000 decisions relevant to the ongoing effort to create equilibrium within this diverse society. This article explores the Constitutional Court's role as one of the institutions that reduces the risk of social conflict within a diverse society. It also considers how the Court's decisions have made a significant contribution to upholding the constitutional values that serve to foster community cohesion in Indonesia. In general, the potential for social conflict in Indonesia may have its roots in various sources, such as political rivalries, economic and social disparities, religious and cultural differences, and tribal or ethnic conflicts.

According to Article 18B (2) of the Indonesian Constitution, "The state recognizes and respects entities of the *adat* (indigenous) law communities along with their traditional rights as long as these remain in existence and are in accordance with the development of community and the principles of the Unitary State of the Republic of Indonesia, are regulated by law." This constitutional provision serves as the basis for protecting indigenous rights and imposes upon the government the responsibility to recognize and respect the rights of indigenous communities. The government also has the constitutional duty to ensure that indigenous communities can live in harmony within Indonesia's diverse society while securing their traditional rights. Furthermore, Article 28G (1) of the Constitution stipulates that, "Every person has the right to protection of self, family, honor, dignity, and their property, and has the right to security and protection from threats of fear to exercise or not to exercise his human rights." This article is the constitutional basis for the right to protection, peace and security from any threats.

[3] Menno Pradhan, Patrick Barron, and Kai Kaiser, *Local Conflict in Indonesia: Measuring Incidence and Identifying Patterns*, Policy Research Working Papers (The World Bank, 2004), https://doi.org/10.1596/1813-9450-3384.

II. DISCUSSION

2.1. Social Conflicts: Inherent Risks for Diverse Society in Indonesia

Social theory posits that conflicts within and between societal groups, collectively known as social conflict, can act as a deterrent against the gradual erosion of creativity resulting from long-established compromises and entrenched norms. The clash of values and interests, the tension between the existing state of affairs and the envisioned ideals of certain groups, and the conflict between established interests and emerging strata and groups demanding their share of power, wealth and status, have historically generated vitality. We can note, for example, the contrast between the 'frozen world' of the Middle Ages and the burst of creativity that accompanied the thaw that set in with the Renaissance civilization.[4] Furthermore, according to Lewis Coser, social conflicts can be categorized into internal and external social conflicts. According to Coser, social conflict plays an important role in shaping the broader social environment by establishing the positions of various subgroups within the system and helping to define the power relations between them.[5] In terms of external conflicts, Indonesia's geopolitical position may put the country at risk because it is an archipelagic state with significant influence in the Southeast Asia region. Conversely, Indonesia's diversity in ethnicity, race, cultures and religions may expose it to a multitude of potential threats stemming from conflicts within this multi-cultural society.

In Indonesia, the normative concept for understanding social conflict is established by Law No. 7/2007 on Social Conflict Management. Article 1 of this Law defines social conflict as a conflict characterized by enmity and/or physical clashes with violence between two or more community groups, lasting for a certain time and having a broad impact, resulting in insecurity and social disintegration, disrupting national stability and hindering national development. Furthermore, according to the Law, there are at least five factors that can trigger social conflict: political, economic and socio-cultural issues; inter-religious issues

[4] Lewis A. Coser, "Social Conflict and the Theory of Social Change," *The British Journal of Sociology* 8, no. 3 (September 1957): 201, https://doi.org/10.2307/586859.

[5] Lewise Closer, *The Functions of Social Conflict* (New York: The Free Press, 1956), 155.

and/or inter-religious enmity, racial and inter-ethnic tensions; disputes over village, regency/municipal or provincial boundaries; natural resource disputes between communities and/or between communities and business entities; and the unequal distribution of natural resources in society. The Law states that the local government is responsible to maintain peace and a conducive situation against social conflict that may arise in society. From a legal perspective, when a situation indicates there is social conflict, the declaration of such conflict can be made according to the territorial level. This means that such declarations may be issued by mayors at the city/municipality level, governors at the provincial level, and the president at the national level. Subsequently, the mayor, governor and president bear the responsibility for implementing measures to address the situation arising from any social conflict.

In the reality of Indonesia's diverse society reality, social conflicts may occur as both vertical and horizontal conflicts. Vertical conflicts can be characterized as those arising between the government and society. On the other hand, horizontal conflicts manifest among individuals within society, often stemming from factors such as ethnicity, religion, race, and inter-group dynamics. Such horizontal conflicts have been observed with various regions of Indonesia, such as Papua, Poso, Sambas, and Sampit.[6] Moreover, both vertical and horizontal conflicts have the potential to escalate into severe disintegration. There are many aspects to consider when anticipating the escalation of such conflicts, including intervention by state institutions. As one of the institutions upholding the supremacy of the Constitution, the Constitutional Court plays a significant role in not only pre-empting social conflict but also in mitigating their adverse impacts on society. The Court issues decisions that can indirectly have a significant impact on preventing social conflicts. As part of legal structure, the Constitutional Court is expected to have the capacity to address uncertainties, abuses of power and social conflicts.[7]

[6] Herlina Astri, "Penyelesaian Konflik Sosial Melalui Penguatan Kearifan Lokal [Social Conflict Resolution through Strengthening Local Wisdom]," *Aspirasi* 2, no. 2 (December 2011): 153, https://doi.org/10.46807/aspirasi.v2i2.439.

[7] Helmut Goerlich, "The Role of Constitutional Court in Resolution of Constitutional Disputes — A Critical Outline Guided by the German Example," *Journal of the Indian Law Institute* 44, no. 1 (January-March 2002): 31, http://www.jstor.org/stable/43951792.

2.2. The Court and Indirect Intervention in Social Conflict Management

In line with the typical functions of a court, one of the Constitutional Court's roles is conflict resolution.[8] With regard to social conflict, the Constitutional Court may function not only as an institution conducting conflict resolution but also plays a role in minimizing the negative impacts of such conflict through its decisions. In fact, the decisions of the Constitutional Court may have both direct and indirect implications for society. According to César Rodríguez-Garavito, the indirect effects of a court's decision may include a wide range of consequences, affecting not only the parties to a case but also other social entities. Conversely, direct material effects may manifest through the court's mandated policy formation.[9] These indirect material effects can significantly contribute to social conflict by introducing new actors in debates, reshaping media coverage, or changing public perceptions regarding the decision at hand. Across all of the Indonesian Constitutional Court's five competencies outlined in the Constitution – determining the constitutionality of laws, resolving disputes over the authority of state institutions, deciding on the dissolution of political parties, adjudicating disputed election results, and deciding on parliament's suspicions of alleged violations by the president and/or vice president – the Court is indirectly shaping the dynamics of living society.

Law No. 7/2012 on Social Conflict Management has been an object of judicial review before the Constitutional Court. The main aim of the review was to assess the constitutionality of the president's authority to declare social conflicts at the city/municipality level. The Court's Decision 8/PUU-XII/2014 specifically centered on the judicial review of the constitutionality of Article 16 and Article 26 of Law No. 7/2012. The applicant filed the case to challenge the constitutionality of Article 16 and Article 26. These articles stipulate that the declaration of a social conflict at the regency/city level is the responsibility of regents/mayors after consultation with the local representative (the Regional

[8] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (September–December 2010): 408, https://doi.org/10.1017/S1598240800003672.

[9] César Rodríguez-Garavito, "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America," *Texas Law Review* 89, no. 7 (2011): 1681, https://www.corteidh.or.cr/tablas/r27171.pdf.

House of Representatives, or DPRD), and Article 26 outlines the measures to be taken by the local government once a conflict status is declared. In essence, the applicant drew parallels between the declaration of a dangerous emergency situation by the president and the declaration of a social conflict situation, which, according to Law No. 7/2012, falls under the authority of the regent or mayor. The petitioner stated that this delegation of authority between the central government and local government exceeds reasonable expectations.

In its decision, the Court rejected the application, placing particular emphasis on the differentiation between the concepts of social conflict and an emergency situation. According to the Court, conflict can be understood within a sociological framework, where it signifies a social process involving one or more individuals attempting to eliminate other parties through various violent means. In contrast, the concept of a state of emergency in Indonesia derives its legal basis from the Emergency Law of 23/1959, which defines a state of emergency as civil emergencies, military situations, or wartime scenarios. In general, the concept of a state of emergency covers a broader scope of situations, while the concept of a conflict situation has a more restricted scope, often localized to specific territories or regions. However, in the Law on Social Conflict Management, a state of emergency may be limited to civil emergencies. The Law stipulates that if a social conflict shows signs of evolving into a state of emergency related to war or military operations, the response measures may vary. A state of emergency may be indicated whenever a conflict situation transforms into a scenario that jeopardizes the state's peace and security. This can occur due to a rebellion, an internal disturbance or a natural disaster.

2.3. The Court's Decisions as Suppressors of Social Conflict Triggers

In addition to the Constitutional Court's decision highlighting its stance on distinguishing between the concepts of social conflict and a state emergency, the Court has displayed a tendency for mitigating social conflicts in several of its rulings. This article will examine at least five clusters of aspects that may trigger social conflicts, drawing from the provisions set out in law.

On the aspect of political issues, the Court exercise its competence in accordance with Article 24C (1) of the Constitution, which empowers it to resolve election disputes. While debates often surround the Court's decisions on election results, this competency plays a significant role in protecting society from potential conflicts. This may be because the Court is generally trusted by the society. Since its establishment in 2003, the Court has decided on 676 cases involving disputed national election results and 1,136 local election disputes.[10] Given Indonesia's direct election mechanism for the legislative, presidential, vice presidential and local government positions, any disputes concerning election results fall under the purview of the Constitutional Court. Indeed, the two regimes of direct elections pose potential risks of social conflict, both at the regional and national level. The community always experiences more pressure in the period surrounding both these elections. Social conflicts may arise once the election results are announced, particularly in the case of presidential elections, as losing candidates may incite their supporters to engage in violence. The escalation of social conflict may also arise from issues of ethnicity, race and religion. In this context, the Constitutional Court emerges as an institution that has a significant role to play in reducing the social conflict. It serves as a beacon of hope for election participants seeking electoral justice in disputes over election results. In its experience, the Court has adjudicated cases of disputed results in presidential elections. One such petition was filed by the losing presidential candidate in 2019. In Decision No. 01/PHPU-PRES/XVII/2019, the Court rejected the case and all of the petitioner's arguments, mostly because the applicant failed to produce any strong evidence.[11] There was significant societal tension and polarization in period surrounding the 2019 presidential election because of the intense political competition. These circumstances had the potential to contribute to social conflicts. In the current landscape, social conflicts are not limited to physical confrontations among rival supporters, but also include the sensitive issues of race, ethnicity and religion, often exploited through online attacks. In this context, the political cyberwars

[10] The Constitutional Court of the Republic of Indonesia, "Rekapitulasi Putusan [Decision Recapitulation]," The Constitutional of the Republic of Indonesia, accessed August 12, 2020.

[11] Constitutional Court Decision No. 01/PHPU-PRES/XVII/2019.

are a serious threat to state security as they can trigger social conflict. During vote counts and the handling of election disputes, the potential for heightened social conflicts is exacerbated when cyber warfare threats are directed towards the stability and security of the state.[12]

In relation to economic and socio-cultural aspects that can trigger or avert social conflict, the Court has established a new framework for marriage, carrying substantial implications for society. In Decision No. 46/PUU-VII/2010, the Court ruled that Article 43 (1) of the Marriage Law was unconstitutional. A judicial review had been filed to challenge the 1974 Marriage Law, which stipulated that only mothers and their immediate families have responsibility for children born out of wedlock. The Court set a new standard for the civil rights of children born to unmarried couples. It was determined that a child has a legal relationship with their biological father, as long as there is scientific and technological evidence supporting the relationship. This decision represented a departure from the prevailing legal framework, which in cases of a child born out of wedlock had only recognized a legal relationship between the child and the mother. The Court's decision suggests its aim is to reduce any societal stigma that might be faced by the child.

In another case, in Decision No. 69/PUU-XII/2015, the Court decided that Article 29 (1) of the Marriage Law upholds the validity of prenuptial agreements. As a result of this decision, a married couple can legally create a pre-marriage agreement at any point, whether before or during the marriage. This decision suggests the Court aims to minimize family conflicts that could have external repercussions on society and potentially incite social conflicts within the community where the couple resides.[13]

Furthermore, the Court has established a new standard for the marriage age limit. In Decision No. 22/PUU-XV/2017, the Court ruled that the marriage age limit

[12] Chastiti Mediafira Wulolo and Edward Semuel Renmaur, "Meredam Konflik dalam Pusaran Siber dalam Proses Penetapan Hasil Rekapitulasi Pemilu Serentak 2019 [Reducing Conflict in the Cyber Vortex in the Process of Determining the Result of the 2019 Simultaneous Election Recapitulation]," *Jurnal Penelitian Politik* 16, no. 2 (2019), https://doi.org/10.4203/jpp.v16i2.801.

[13] Marilang, "Keadilan Sosial Terhadap Anak di Luar Kawin [Social Justice for Child Born to Unmarried Parents]," *Al-Daulah, Jurnal Hukum Pidana dan Ketatanegaraan* 7, no. 2 (December 2018), https://doi.org/10.24252/ad.v7i2.7549.

of 16 years old for females is unconstitutional. The Court's rationale was partly based on the fact that child marriage in Indonesia had increased significantly in recent years, which was perceived as a potential trigger for the social conflict within the nation's diverse society. In this context, such a situation could disrupt the social and cultural framework, potentially changing society and provoking social problems leading to conflicts in society. More seriously, child marriage could result in children being deprived of their rights, hindering the achievement of the state's purpose as outlined in the preamble of the Constitution.[14]

On the aspect of inter-religious issues and/or inter-religious enmity, racial, and inter-ethnic tensions, in Decision No.97/PUU-XIV/2016, the Court decided that the word "religion" in Article 61(1) and in Article 64 (1) of the Law on Population Administration was unconstitutional unless it also included the word "belief". The Court's decision established a new standard, mandating the inclusion of the word "belief" in the religion column of identity cards and family cards. This landmark decision can reduce the possibility of discrimination in Indonesia. In this context, the Court aims to prevent social conflicts that may arise from discrimination against people who follow beliefs that fall outside the mainstream religions recognized by the Indonesian state.[15] This decision may set a new foundation for religious freedom in Indonesia, reinforcing the constitutional guarantee of protection for the rights of Indonesian citizens to choose their religion and beliefs. The decision also reflects the Court's desire to foster religious harmony in Indonesia. The Court exhibits a clear inclination toward addressing the challenges of managing the diversity of Indonesia's populace and preventing religious tensions by ruling in favor of religious harmony and moderation.[16]

On the aspect of disputes over village, regency/municipal and/or provincial boundaries, the Court in Decision No. 3/PUU-XX/2022 reviewed the Village Law.

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[14] Hadiati and Ramadhan argue the Court decision is to adjust social values on legal products by the judicial review. See here: Mia Hadiati and Febriansyah Ramadhan, "Observing the Differences in Constitutional Court Decision about the Legal Age of Marriage," *Jurnal Konstitusi* 19, no. 3 (September 2022): 646, https://doi.org/10.31078/jk1937.

[15] "Putusan MK 'Angin Segar' dan 'Memulihkan Martabat' Penghayat Kepercayaan [The Constitutional Court Decision a Fresh Wind and Restoring Dignity for the Believers]," BBC News Indonesia, published November 8, 2017.

[16] Hamka Husein Hasibuan, "Moderasi Islam Pencantuman Penghayat Kepercayaan di Kolom KTP/KK dalam Nalar Maqasid [Islamic Moderation, Inclusion of Adherents of Belief in the Column of Identity Card in Maqasid Reason]," *Jurnal AQLAM – Journal of Islam and Plurality* 4, no. 2 (December 2019), http://dx.doi.org/10.30984/ajip.v4i2.1011.

Even though the Court ultimately rejected the case, it considered that the term of office for village heads is set at six years, allowing for re-election for up to three terms, thereby permitting a maximum of 18 years. Meanwhile, the Court said the term of office for heads of "Adat" villages will be in accordance with Article 109 of the Village Law, which specifies that the role of the head of the "Adat" village will adhere to customary "Adat" law. This decision signified the Court's intent to protect indigenous "Adat" communities in line with the Constitution, while also aiming to prevent social conflicts within these indigenous communities. In general, the Court considered the Village Law to be in accordance with local wisdom because it recognizes and respects the diversity of cultural villages that existed before and after the establishment of the Republic of Indonesia. Therefore, the Court recognized that preserving the "Adat" village entails the preservation of the village's origins without encroaching upon local wisdom. This constitutes an endeavor to prevent social conflicts within Indonesia's diverse culture and society. The Court's decision also illustrates its commitment to the goal of averting social conflict within these villages.

In Decision No. 4/PUU-XVII/2020, which concerned the judicial review of Law No. 21/2001 on Special Autonomy for Papua Province, the Court rejected the case. The special status of Papua province (previously known as Irian Jaya) is founded on People's Consultative Assembly (MPR) Resolution No. IV/MPR/1999 on the Broad Guidelines of State Policy for 1999–2004, which stipulate that, in order to maintain the nation's integration within the unitary state of the Republic of Indonesia, the socio-cultural equality and diversity of Irian Jaya society will be addressed through special autonomy established by law. Furthermore, in accordance with Article 18B(2) of the Constitution, along with MPR Decree No. IV/MPR/1999 and MPR Decree No. IV/MPR/2000, these provisions have been enshrined in Law No. 21/2001. One of the key points in this law relates to the endorsement of the local representative body in the Papua province, the Papuan People's Representative Council (DPRP). The Court elucidated that the special autonomy granted to Papua province covers a broader sense of delegating authority. It highlights that the people of Papua possess the right to autonomy

and to establish their administration within the Unitary State of the Republic of Indonesia. The primary objective of this special autonomy is to promote the empowerment of the community in Papua and to provide equitable opportunities for the indigenous people in Papua, including indigenous women, to assume significant roles in public policy and community development, all while preserving their local values and indigenous culture. This endeavor serves as an attempt to mitigate potential social conflicts that may arise from the modernization of communities within the diverse landscape of Indonesia.

Among the various decisions handed down by the Court, Decision No. 35/PUU-XVII/2019 addressed a significant issue concerning the state's integrity and the potential for social conflicts. This decision was on the constitutionality of Law No. 12/1969 on the Establishment of West Irian Autonomous Province and the Autonomous Districts in West Irian Province. This law was the basis for the integration of former Dutch New Guinea into Indonesia following a limited referendum in 1969 called the Act of Free Choice, held under the auspices of the United Nations (UN). A group of Papuan lawyers and traditional leaders challenged the constitutionality of the law at the Constitutional Court, which rejected the case. The Court reasoned there was no constitutional harm arising from the referendum that determined West Irian's status as part of Indonesia. The Court said the Act of Free Choice was an expression of the people's collective aspirations. It further said the referendum process yielded a positive outcome, indicating that the people of West Irian made a conscious choice to become part of Indonesia. The decision to integrate with Indonesia was deemed final and legitimate. In this context, the Court appeared to be resisting the potential conflicts that could emerge concerning the legitimacy of the 1969 referendum. The Court emphatically noted its lack of competence to review a referendum conducted under UN supervision and recognized by the UN General Assembly (UNGA Resolution 2504 (XXIV)).

Papua had earlier been under the Court's focus in 2003, regarding a law that had allowed for the establishment of new provinces and regencies in Irian Jaya. Decision No. 018/PUU-I/2003 concerned the review of Law No. 45/1999

on the Establishment of Central Irian Jaya Province, West Irian Jaya Province, Paniai Regency, Mimika Regency, Puncakjaya Regency, and Sorong City. This law was subsequently modified by Law No. 5/2000, which revised the provisions of Law No. 45/1999 related to the formation of the new provinces, regencies and city. The Court ruled that the law in question was unconstitutional. The Court's reasoning was grounded in the belief that varying interpretations of the law could foster legal ambiguity and, from a social policy perspective, might cause potential social conflicts. The Court stated that to prevent and mitigate legal uncertainty and anticipate social conflicts, divergent interpretations of Law No. 45/1999 were incongruous with the Constitution, particularly Article 18B(1) of the Constitution. However, as previously discussed, Article 18B(1) serves as the constitutional basis for Law No. 21/2001 and can potentially be utilized as the foundation for reviewing the legitimacy of Law No. 45/1999, particularly with regard to the issue of the requirement for the expansion of the province of Papua as outlined in Article 76 and Article 77 of Law No. 21/2001. The Court maintained that these requirements, which could be enforced after the enactment of Law No. 21/2001, do not necessitate the establishment of the provinces of Central Irian Jaya and West Irian Jaya, as stipulated in Law No. 45/1999. The Court took into account that the establishment of West Irian Jaya province had indeed been effectively implemented, with the local government of West Irian Jaya and its provincial House of Representatives (DPRD) having been established through the 2004 general election, along with the local representatives of the Regional Representative Council (DPD) for West Irian Jaya. In contrast, the establishment of the Central Irian Jaya Tengah province had yet to be realized. In light of this, the Court asserted that the existence of West Irian Jaya (later renamed West Papua) and the regent/city already created by Law No. 45/1999 is legitimate.

On the aspect of natural resource disputes, whether between communities or involving business entities, as well as the unequal distribution of natural resources in society, the Court took a stance in 2015 when it revoked the 2004 Law on Water Resources, deeming it unconstitutional because it allowed the private ownership of water resources. More recently, in Decision No. 73/PUU-

XVIII/2020, the Court rejected a petition challenging provisions in the new Water Resources Law (No. 17/2019), ruling that the petitioners, employees of the state-owned electricity firm, lacked legal standing and failed to establish a direct correlation between their interests and the contested provisions related to water resource management fees. In the first decision especially, the Court's decision can be seen as an effort to prevent social conflict over water resources.

Land and agricultural resources were highlighted in cases when the Court issued decisions concerning its reviews of various iterations of the Plantations Law. In its decision on Law No. 39/2014 on Plantations, the cases presented before the Court were related to disputes involving farmers and indigenous communities. The Court also issued Decision No. 55/PUU-VII/2010-2011 on the constitutionality of the Plantations Law (Law No. 18/2004). In this decision, Article 21 and Article 47 of the Plantations Law were revoked and deemed unconstitutional. The Court also reviewed several other articles within the law, including Article 12(1) and Article 13, in response to complaints that the rights of indigenous communities regarding land ownership had been curtailed by discriminatory legal provisions.

In Decision No. 135/PUU-XIII/2015 on the judicial review of Law No. 39/2014 on Plantations, the Court placed strong emphasis on the ability of small-enterprise farmers to engage in seed breeding to discover the most suitable seed varieties. The Court declared that the term "individual" in Article 27, paragraph (3) of the Plantations Law, which states, "The activities of searching and collecting genetic resources as referred to in paragraph (2) can be carried out by individuals or legal entities based on the permission of the Minister," is inconsistent with the Constitution unless it is interpreted to exclude "individual small farmers". Moreover, Article 9, paragraph (3) of Law No. 12 of 1992 on Plant Cultivation Systems, which was conditionally declared unconstitutional in Decision Number 99/PUU-X/2012, essentially acknowledged the individual rights of small farmers to engage in plant breeding without the need to seek permission.

Separately, Court Decision Number 99/PUU-X/2012 ruled that the conditional phrase "can" in Article 29 of the Plantations Law, which states, "The Central

Government, Regional Government, or Plantation Business Actors may carry out plant breeding to find superior varieties," is unconstitutional unless it is interpreted to include "individual small farmers". The Court also addressed the phrase "breeding varieties" in Article 30, paragraph (1) of the Plantations Law, which states, "Varieties resulting from breeding or introduction from abroad before being circulated must first be released by the Central Government or launched by the owner of the variety." The Court also stated that the provisions of Article 30, paragraph (1) of the Plantation Law do not apply to varieties resulting from breeding carried out by individual small domestic farmers for their own communities, in line with the Constitution. Furthermore, the Court's decision recognized that members of customary law communities may legally use, occupy, and/or control plantation land.

In Decision No. 138/PUU-XIII/2015, the Court emphasized that small farmers can seek and find superior plant breeding varieties without the permission of the Minister of Agriculture. The Court declared the phrase "individual" in Article 27 paragraph (3) and Article 29 of the Plantation Law to be unconstitutional as long as it is interpreted as referring to individuals, including small farmers. One of the considerations was, the Court said, that the norms of Article 27 paragraph (3) of the Plantation Law are the same as the substance of the norms in Article 9 paragraph (3) of Law No. 12 of 1992 on Plant Cultivation Systems, which had been declared conditionally unconstitutional based on Decision No. 99/PUU-X/2012.

The Court also declared as unconstitutional a condition in Article 30 paragraph (1) of the Plantations Law, which stated that (plant) varieties resulting from breeding or introduction from abroad must first obtain approval from the Central Government or be authorized by the variety owner before being circulated. The Court clarified that this condition should not apply to individual small farmers in the country who breed varieties for their own communities. The Court also eliminated a special prohibition on members of legal customary law communities to engage in activities related to plantation business areas or lands, as stipulated in Article 55 of the Plantations Law. The phrase "any person

illegally" in Article 55 of the Plantations Law was declared unconstitutional, provided it is not interpreted to include members of customary law community units who meet the requirements outlined in Constitutional Court Decision No. 31/PUU-V/2007. Another relevant decision aimed at preventing social conflicts in society was Court Decision No. 35/PUU-X/2012, which reviewed Law No. 41/1999 on Forestry and ruled that Customary Forests are those located in indigenous land areas and should no longer be classified as State Forests.

2.4. The Court's Challenges in Minimizing Social Disintegration

The Constitutional Court may face challenges in carrying out its role as an institution that seeks to minimize social conflicts. The Court might occasionally step out of line and go beyond its jurisdiction. In recent years, several constitutional courts have shown a proclivity for judicial activism. In the context of judicial activism, aimed at preventing social conflicts, the Court may at times make decisions that could be perceived as extending beyond its legal boundaries in an effort to manage and mitigate social conflicts. The Court may resort to judicial activism when it appears to be going beyond the explicit directives of the Constitution to constrain the actions of other government branches.[17] For example, in Court Decision No.97/PUU-XIV/2016, the Court decided that the term "belief" should be incorporated into the religion column on identity cards and family cards, becoming a landmark decision on matters of equality. While the decision was intended to minimize discrimination in Indonesia, it also revealed the Court's inclination toward judicial activism. This decision, involving the addition of the "belief" column, falls primarily within the executive domain, as the Court's role should be limited to determining the constitutionality or unconstitutionality of laws.

Another challenge faced by the Court is judicial populism. The Constitutional Court may make decisions that are popular, and in doing so, it may be inclined to address issues it should not.[18] For example, in the Court's review of the

[17] Keenan D. Kmiect, "The Origin and Current Meanings of 'Judicial Activism'," *California Law Review* 92, no. 5 (October 2004): 1441-65, https://doi.org/10.2307/3481421.

[18] Mátyás Bencze, "Explaining Judicial Populism in Hungary – a Legal Realist Approach," *Iuris Diction* 25 (June 2020): 83, https://doi.org/10.18272/iu.v25i25.1635.

presidential threshold, it declared that the presidential threshold is an open legal policy. The presidential threshold issue is indeed popular, but the fact that it has been challenged before the Constitutional Court over 30 times indicates that the Court's decisions have not been universally accepted as the definitive solution for electoral justice.[19] In its attempts to balance social conflict, the Court may make decisions that are popular in some segments of society while not being accepted as electoral justice in other parts of society.

Apart from the Court's role in suppressing or minimizing social conflict, there is also the potential tendency for the Court to contribute to conflicts. For instance, the Court's decisions may lack firmness, as seen in cases where it ruled matters both conditionally constitutional and conditionally unconstitutional, indicating hesitancy. Furthermore, the recurrence of filed cases suggests skepticism towards the Court's decisions, which is particularly evident in instances such as the challenges to the presidential threshold. The filing of 28 cases against the norm in Article 222 of Law No. 7/2017 on Elections and the existence of dissenting opinions among constitutional judges shows that the Court played a role in political polarization in the early stages of the 2024 presidential election.[20] In Court Decision No. 52/PUU-XX/2022, the Court expressed doubt that eliminating the presidential threshold would eliminate oligarchies and polarization in society.[21] This may indicate that while the Court is trying to prevent social conflict, its stance on the presidential threshold has seen it justify having oligarchies and social polarization. In its societal role, the Court indirectly contributes to conflict avoidance by maintaining independence from interest groups and proactively communicating its decisions to the public.[22] The Court must carefully consider the risk of compromising its independence while aiming for consistency and moderation in its decisions to reconcile public perception.[23]

[19] Mahatma Chryshna, "Judicial Review Mahkamah Konstitusi Atas Ketentuan Presidential Threshold [Judicial Review of Constitutional Court on the Presidential Thresholds Rules]," Kompas Pedia, published July 19, 2022.
[20] "MK Menyumbang Polarisasi Pilpres 2024 [The Constitutional Court of Republic of Indonesia on Contributing to the Polarization in the 2024 Presidential Election]," Info Riau, published July 10, 2022.
[21] Tareq Muhammad Aziz Elven, "Masihkah Mahkamah Menjaga Konstitusi? [Does the Constitutional Court Still Uphold the Constitution?"] Detiknews, published July 25, 2022.
[22] Andrew Harding, *The Fundamentals of Constitutional Courts* (Sweden: International IDEA Constitution Brief, 2017).
[23] Elven, "Masihkah Mahkamah [Does the Constitutional Court]."

2.5. Ways to Maintain Judicial Independence in a Diverse Society

In a diverse society such as Indonesia, the Constitutional Court has to have strong commitment and show its independence in delivering its decisions. This commitment is essential to anticipate the potential risks of social fragmentation and polarization within Indonesia's diverse society. While marking judicial reform in Indonesia, the Court has not shied away from addressing significant and controversial issues related to religion and ethnicity. It has rendered numerous statutes unconstitutional in these areas over the years.[24]

Judicial independence should not be confused with judicial autonomy or construed as the principle of rule by judges.[25] To uphold judicial independence, the Court must prioritize transparency, accountability, ethics and integrity in its decision-making processes. In this context, the Court must make decisions impartially, based on facts and in accordance with the law, without any constraints, undue influences, incentives, pressures, threats, or interferences, whether direct or indirect, originating from any source or for any societal reasons.[26] To this extent, the Court must remain free from external pressures, threats, and other influences that could undermine its independence. For example, when the Court is handling a landmark case that could stir up public emotions, it must make the best decision based on what is right and just, guided by principles of equity and conscience. The Court should prioritize fairness and justice in its decisions, even if it means disregarding potential conflicts in society that may arise as a result of its decision. Furthermore, according to the Bangalore principles of judicial conduct, judges must maintain independence in relation to society as a whole. In their application of the law, judges must also be mindful of and consider the diversity and differences that exist in society, including those based on factors such as race, color, sex, religion, national origin, caste, disability, age,

[24] Simon Butt, "The Indonesian Constitutional Court Implying Rights from the 'Rule of Law'," in *The Invisible Constitution in Comparative Perspective*, ed. Rosalind Dixon and Adrienne Stone (Cambridge: Cambridge University Press, 2018), 300.

[25] Markus Böckenförde, Nora Hedling, and Winluck Wahiu, *A Practical Guide to Constitution Building: The Design of the Judicial Branch* (Sweden: International IDEA Constitution Brief, 2011), 29.

[26] Rechters voor Rechters, *Matters of Principle Codes on the Independence and Impartiality of the Judiciary* (The Netherlands: Eleven International Publishing, 2019), 24.

marital status, sexual orientation, social and economic status, and other similar attributes ("irrelevant grounds").[27]

In Indonesia, judges play an essential role in the law-finding and interpretation process, to ensure the legitimacy of rights and interests. According to Barack, there exists a relationship between the laws that govern interactions among people and reflects the values of society, and judges have to know the purpose of law in society.[28] In this context, the Constitutional Court has to accommodate the different cultures, traditions, and norms in the diverse society of Indonesia. Consequently, the pluralism of cultures and legal traditions in Indonesia are actually contributing to the significant challenges faced by the nation.

Maintaining judicial independence is a vital part of the Court's broader aim to promote social diversity in a multicultural state. This role may be relevant in fostering widespread tolerance between the majority and minority groups in society. Bridging the gap between majority and minority is one way to prevent complicated social conflicts from occurring in the diverse society of Indonesia. In this context, the Court derives strength from its commitment to consistently embrace differences in society and cultures while ensuring equality among Indonesia's diverse population. Article 24 (1) of the Constitution serves as the constitutional basis for judicial independence. This article, in alignment with Law No. 48/2009, underscores the importance of an independent judicial branch in upholding the principles of law enforcement, justice for all, and the rule of law.

The composition of the judges in the Constitutional Court, reflecting the diversity of their origin, race, ethnicity, and religion, may be one of the efforts to mitigate the potential risks of social conflicts stemming from the Court's decisions. In Indonesia, there are no specific rules addressing the proportionality of the judges' backgrounds. The composition and the background of constitutional judges may also influence the judges' reasoning when delivering Court decisions. According to the Constitution, the requirements for serving as a constitutional

[27] Rechters, *Matters of Principle,* 30.

[28] Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review* 116, no. 16 (November 2002): 29, https://doi.org/10.2307/j.ctv19x569.30.

judge are relatively broad. These requirements indicate that a constitutional judge must possess integrity and an unimpeachable personality, exhibit impartiality, demonstrate statesman-like qualities, possess a deep understanding of the constitution and the constitutional system, and hold no other concurrent public office positions. In this context, the Constitution may offer a means of addressing potential issues related to ethnicity, race, and religion during the process of appointing judges. Beyond concerns of fairness and impartiality, such provisions may also serve as a measure to prevent social conflicts within society. In addition to the Constitution, specific requirements for becoming a constitutional judge are further regulated by the law.

Article 15 paragraph (2) of Law 7/2020 clarifies that a constitutional judge must be an Indonesian citizen; hold a doctoral degree (strata three) with a bachelor's (strata one) background in the field of law; demonstrate a reverence for God Almighty and possess a noble character; be at least 55 years old; be physically and spiritually capable of fulfilling duties and obligations; have no history of imprisonment based on a court decision that has obtained permanent legal force; not be declared bankrupt based on a court decision; and have at least 15 years of work experience in the legal field. For prospective judges originating from the Supreme Court, they should currently be serving as high judges or supreme judges.

The special requirements for being a constitutional judge reflect the professionalism in line with the judge's expertise in constitutional law. The stipulation that a judge must have reverence for God Almighty and possess a noble character is not tied to any specific religion, making these requirements neutral and based on the nominee's professionalism. This requirement primarily addresses the need to avoid bias in judgments, serving as an effort to anticipate controversial decisions that might lead to societal conflicts. However, although the multicultural composition of Constitutional Court judges does not guarantee decisions with a lower risk of contributing to social conflicts, it becomes a proportional composition when judges hail from diverse backgrounds, representing different religions, ethnicities, races and cultures. In the experience of

the Indonesian Constitutional Court, the qualifications for a constitutional judge are both general and specific, centered on professionalism. A study suggests that judgments may vary in relevance to different cultural contexts.[29] Through several terms of judges' offices at the Constitutional Court, the composition consistently reflects diverse origins and cultural, religious, and ethnic backgrounds. There is an assumption that a diverse composition in terms of ethnicity, religion and race among judges contributes to a proportional composition, potentially impacting judgments for fairness and justice.

Lastly, as Mietzner has argued, the Constitutional Court serves as an institutional mechanism for political conflict resolution.[30] In addition, for social conflict resolution, the Court also offers a legitimate avenue for settling disputes that may trigger social conflicts. In this regard, the Court plays a role in preventing the exacerbation of conflicts in a diverse society, potentially mitigating their adverse impacts. Conversely, the Court's decisions can serve as indicators of the conclusion of a social conflict. These decisions may symbolize the potential termination of conflicts through their legal ramifications, although they may not directly resolve the conflicts in practice.[31] In this regard, the Court can offer a legitimate legal alternative through its decisions to manage the triggers for social conflicts. Nonetheless, in order to address public concerns about the Court's role in preventing social conflicts, the Court must maintain communication with the public. This is essential to raise public awareness regarding the Court's message in its decisions, signaling its commitment to providing dispute resolution for potential or existing social conflicts within society. Several conditions must be met for the Court to effectively communicate its judicial decisions, including ensuring that the decisions are tailored to the prevailing circumstances and the specific target audience that the Court aims to reach.[32]

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[29] Karlsson BSA and Allwood CM, "Cultural Differences in Answerability Judgments," *Front Psychol* 9 (September 2018): 1641, https://doi.org/10.3389/fpsyg.2018.01641.

[30] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (September-December 2010): 397-424, https://doi.org/10.1017/S1598240800003672.

[31] Austin T. Turk, "Law as a Weapon in Social Conflict," *Social Problems* 23, no. 3 (February 1976): 286, http://dx.doi.org/10.4324/9781315091983-10.

[32] Turk, "Law as a Weapon," 245.

III. CONCLUSION

Social conflicts are a common occurrence in the diverse society of Indonesia, with the potential to yield both negative and positive impacts on the development of society. These conflicts can manifest in various forms, particularly within the context of today's globalized digital society. Any social conflict has the potential to escalate into a chaotic situation, necessitating government intervention to address the situation. In accordance with the law, measures taken to address social conflicts may be legally justified. The authority to take such measures lies with the executive branch, with the president at the national level and the heads of local governments in their respective territorial jurisdictions within Indonesia.

With regard to social conflicts and their detrimental impacts, the Constitutional Court, as authorized by the Constitution, may indirectly play a role in helping to minimize and eliminate potential factors contributing to social conflicts, thereby reducing the tensions arising from such conflicts within Indonesia's diverse society, and also to guard national unity. Through its decisions, the Court can be perceived as an institution that offers conflict resolution and delivers justice to society. Nonetheless, the Court's role is not without its challenges. In the process of making decisions, the Court may even inadvertently exacerbate social conflicts. While on the one hand, the Court's decisions are in line with what should be determined legally, they can serve as triggers for social conflicts in Indonesia's diverse society. In this context, the Court must avoid any self-interest and maintain its independence. This aligns with Barack's argument that a judge must reflect the beliefs of society, even when those beliefs are not his or her own beliefs. This is because the values of the Constitution may find expression in the judges' decisions as they are understood through the lens of the cultures and traditions of the population as it evolves over time.[33]

[33] Barak, "Foreword: A Judge."

BIBLIOGRAPHY

Astri, Herlina. "Penyelesaian Konflik Sosial Melalui Penguatan Kearifan Lokal [Social Conflict Resolution through Strengthening Local Wisdom]." *Aspirasi* 2, no. 2 (December 2011): 153, https://doi.org/10.46807/aspirasi.v2i2.439.

Badan Pusat Statistik [Statistics Indonesia]. "Mengulik Data Suku di Indonesia [Digging into Ethnic Tribes Data in Indonesia]." Badan Pusat Statistik [Statistics Indonesia], accessed August 7, 2022. https://www.bps.go.id/news/2015/11/18/127/mengulik-data-suku-di-indonesia.html.

Barak, Aharon. "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy." *Harvard Law Review* 116, no. 16 (November 2002): 29, https://doi.org/10.2307/j.ctv19x569.30.

Bazzi, Samuel, et al. "Unity in Diversity? How Intergroup Contact Can Foster Nation Building." *American Economic Review* 109, no. 11 (2019): 3978, https://doi.org/10.1257/aer.20180174.

Bencze, Mátyás. "Explaining Judicial Populism in Hungary – a Legal Realist Approach." *Iuris Diction* 25 (June 2020): 83, https://doi.org/10.18272/iu.v25i25.1635.

Böckenförde, Markus, Nora Hedling, and Winluck Wahiu. *A Practical Guide to Constitution Building: The Design of the Judicial Branch*. Sweden: International IDEA Constitution Brief, 2011. eBooks.

BSA, Karlsson and Allwood CM. "Cultural Differences in Answerability Judgments." *Front Psychol* 9 (September 2018): 1641, https://doi.org/10.3389/fpsyg.2018.01641.

Butt, Simon. "The Indonesian Constitutional Court Implying Rights from the 'Rule of Law'." In *The Invisible Constitution in Comparative Perspective*, edited by Rosalind Dixon and Adrienne Stone, 300. Cambridge: Cambridge University Press, 2018.

Chryshna, Mahatma. "Judicial Review Mahkamah Konstitusi Atas Ketentuan Presidential Threshold [Judicial Review of Constitutional Court on the Presidential Thresholds Rules]." Kompas Pedia, published July 19, 2022. https://kompaspedia.kompas.id/baca/paparan-topik/judicial-review-mahkamah-konstitusi-atas-ketentuan-presidential-threshold.

Closer, Lewise. *The Functions of Social Conflict*. New York: The Free Press, 1956.

Constitutional Court Decision No 01/PHPU-PRES/XVII/2019.

Coser, Lewis A. "Social Conflict and the Theory of Social Change." *The British Journal of Sociology* 8, no. 3 (September 1957): 201, https://doi.org/10.2307/586859.

Elven, Tareq Muhammad Aziz. "Masihkah Mahkamah Menjaga Konstitusi? [Does the Constitutional Court Still Uphold the Constitution?"] Detiknews, published July 25, 2022. https://news.detik.com/kolom/d-6197461/masihkah-mahkamah-menjaga-konstitusi.

Garavito, Rodríguez-César. "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America." *Texas Law Review* 89, no. 7 (2011): 1681, https://www.corteidh.or.cr/tablas/r27171.pdf.

Goerlich, Helmut. "The Role of Constitutional Court in Resolution of Constitutional Disputes — A Critical Outline Guided by the German Example." *Journal of the Indian Law Institute* 44, no. 1 (January-March 2002): 31, http://www.jstor.org/stable/43951792.

Hadiati, Mia and Febriansyah Ramadhan. "Observing the Differences in Constitutional Court Decision about the Legal Age of Marriage." *Jurnal Konstitusi* 19, no. 3 (September 2022): 646, https://doi.org/10.31078/jk1937.

Harding, Andrew. *The Fundamentals of Constitutional Courts*. Sweden: International IDEA Constitution Brief, 2017. eBooks.

Hasibuan, Hamka Husein. "Moderasi Islam Pencantuman Penghayat Kepercayaan di Kolom KTP/KK dalam Nalar Maqasid [Islamic Moderation, Inclusion of

Adherents of Belief in the Column of Identity Card in Maqasid Reason]." *Jurnal AQLAM – Journal of Islam and Plurality* 4, no. 2 (December 2019), http://dx.doi.org/10.30984/ajip.v4i2.1011.

Kmiect, Keenan D. "The Origin and Current Meanings of 'Judicial Activism'." *California Law Review* 92, no. 5 (October 2004): 1441-65, https://doi.org/10.2307/3481421.

Mietzner, Marcus. "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court." *Journal of East Asian Studies* 10, no. 3 (September-December 2010): 397-424, https://doi.org/10.1017/S1598240800003672.

"MK Menyumbang Polarisasi Pilpres 2024 [The Constitutional Court of Republic of Indonesia on Contributing to the Polarization in the 2024 Presidential Election]." Info Riau, published July 10, 2022. https://www.inforiau.co/news/read/mk-menyumbang-polarisasi-pilpres-2024-3339303432.

Marilang. "Keadilan Sosial Terhadap Anak di Luar Kawin [Social Justice for Child Born to Unmarried Parents]." *Al-Daulah, Jurnal Hukum Pidana dan Ketatanegaraan* 7, no. 2 (December 2018), https://doi.org/10.24252/ad.v7i2.7549.

Mietzner, Marcus. "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court." *Journal of East Asian Studies* 10, no. 3 (September-December 2010): 408, https://doi.org/10.1017/S1598240800003672.

"Putusan MK 'Angin Segar' dan 'Memulihkan Martabat' Penghayat Kepercayaan [The Constitutional Court Decision a Fresh Wind and Restoring Dignity for the Believers]." BBC News Indonesia, published November 8, 2017. https://www.bbc.com/indonesia/indonesia-41886935.

Pradhan, Menno, Patrick Barron, and Kai Kaiser. *Local Conflict in Indonesia: Measuring Incidence and Identifying Patterns*. Policy Research Working Papers. The World Bank, 2004. https://doi.org/10.1596/1813-9450-3384.

Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeal Chamber), 2 October 1995.

Rechters voor Rechters. *Matters of Principle Codes on the Independence and Impartiality of the Judiciary*. The Netherlands: Eleven International Publishing, 2019. eBooks.

The Constitutional Court of the Republic of Indonesia. "Rekapitulasi Putusan [Decision Recapitulation]." The Constitutional Court of the Republic of Indonesia, accessed August 12, 2020. https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=1&menu=5.

Turk, Austin T. "Law as a Weapon in Social Conflict." *Social Problems* 23, no. 3 (February 1976): 286, http://dx.doi.org/10.4324/9781315091983-10.

Wulolo, Chastiti Mediafira and Edward Semuel Renmaur. "Meredam Konflik dalam Pusaran Siber dalam Proses Penetapan Hasil Rekapitulasi Pemilu Serentak 2019 [Reducing Conflict in the Cyber Vortex in the Process of Determining the Result of the 2019 Simultaneous Election Recapitulation]." *Jurnal Penelitian Politik* 16, no. 2 (2019), https://doi.org/10.14203/jpp.v16i2.801.

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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.[1] 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.[2] This article stands with the first opinion, asserting that the existing mechanisms are inadequate to protect constitutional rights, especially those of taxpayers, from

[1] 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.

[2] 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)[3] 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[4] 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,[5] 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.

[3] 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.
[4] Law No. 9 of 2017 on Access to Financial Information for Tax Purposes.
[5] 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".[6] In tax collection, political accountability requires the government to

[6] 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.[7] In the *res publica*, tax must be paid by the people and used to fund the administration of public matters by the government.[8] 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".[9] 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".[10] 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.[11] 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.[12] Although

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

[8] Hodgson, *Res Publica and The Roman Republic,* 50-51.

[9] 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.

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

[11] 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.

[12] 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.[13]

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".[14] 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.

[13] Murphy and Nagel, *The Myth of Ownership*, 82-83.
[14] 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.[15] 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.[16] 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.[17] In many cases, the object of balancing lacks a common measurement for normative judgement.[18] For example, fulfillment of a citizen's right to privacy is incommensurable with the state's authority to

[15] 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.
[16] Ibid.
[17] 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.
[18] Petersen, "How to Compare," 1392.

conduct effective crime prevention through wiretapping.[19] 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.[20]

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,[21] 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.[22] 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.[23] 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.[24] 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.[25]

The Court also deployed the "derogable right" argument in its judgment on the constitutionality of the Access to Financial Information for Tax Purposes Law.[26] 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

[19] Ibid.
[20] Attaran, A Wobbly Balance?" 261.
[21] Judicial Review of Constitutional Court Law, Case No. 5/PUU-VIII/2010, 24 February 2011.
[22] Ibid., para. (3.20), 68.
[23] Ibid., para. (3.21), 69.
[24] Ibid., para. (3.24), 72.
[25] Ibid., para. (3.19), 68.
[26] 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).[27] 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.[28] 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,[29] 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.[30] 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

[27] Ibid., para. (3.10), 193.
[28] Ibid., para. (2.4), 123.
[29] 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.
[30] Ibid., para. (5), 67.

property.[31] 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,[32] 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.[33] 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.[34] 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.[35]

[31] Ibid., Case No. 46/PUU-XII/2014, 26 May 2015, para. (3.22), 66.
[32] Judicial Review of Constitutional Court Law, Case No. 63/PUU-XV/2017, 26 April 2018, para. (5.2), 135.
[33] Ibid., para. (4.2), 134.
[34] Ibid., para. (3.7.2), 121.
[35] 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[36] and further refined it in 2007[37] 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

[36] Judicial Review of Constitutional Court Law, Case No. 006/PUU-III/2005, 31 May 2005.
[37] 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.[38] 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,[39] 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

[38] "Perkara," The Constitutional Court of the Republic of Indonesia, accessed 4 September 2023 https://www.mkri.id/index.php?page=web.Perkara2&menu=.

[39] 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.[40] 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.[41] 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.[42] 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 ausal*l verband*/causality).[43] 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.

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[40] 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.

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

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

[43] 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.[44] 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

[44] "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., 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.[45] More recently, the leak of personal information of customers of a state-owned enterprise's insurance unit were reportedly commercialized throughout the internet.[46] 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

[45] 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.

[46] 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 'o 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".[47] 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

[47] 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[48] and Zoelva, among other scholars.[49] 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.[50] However, it is acknowledged that it will be difficult to incorporate a constitutional

[48] 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).

[49] Zoelva, "Constitutional Complaint dan Constitutional Question," 164.

[50] 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.[51] 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 comsider the aforementioned body of case law. This

[51] 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,[52] 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.[53] 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".[54]

[52] Otto Pfersman, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective," *European Constitutional Law Review* 6 (2010): 223, 234-235.
[53] Pfersman, "Concrete Review as Indirect Constitutional Complaint," 230.
[54] 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.[55] 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".[56]

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

[55] 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.

[56] 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.[57] 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.[58]

[57] 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.

[58] 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.[59] 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.[60] 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".[61] The balancing is important when conflicting rights result in unavoidable cost.[62] 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.[63] 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).[64] Further, an argument must be made

59 Alexy, "Constitutional Rights and Proportionality," 51, 52.
60 Ibid., 53.
61 Ibid., 51, 52.
62 Ibid.
63 Ibid.
64 Ibid.

when we class a value.[65] 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.

[65] Ibid.

BIBLIOGRAPHY

Alexy, Robert. "Constitutional Rights and Proportionality." *Journal for Constitutional Theory and Philosophy of Law* 22 (2014).

Aqil, A. Muh. Ibnu. "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.

Asshiddiqie, Jimly and Ahmad Syahrizal. *Peradilan Konstitusi Di Sepuluh Negara* [Constitutional Justice in Ten Countries]. Jakarta: Konstitusi Press, 2006.

Attaran, Amir. "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).

Bianulli, Andrea C. *Accountability and Regulatory Governance*. London: Palgrave Macmillan, 2015.

Bräutigam, Deborah A., et al. *Taxation and State-Building in Developing Countries*. Cambridge: Cambridge University Press, 2008.

Cohen-Eliya, Moshe and Iddo Porat. *Proportionality and Constitutional Culture*. Cambridge: Cambridge University Press, 2013.

Devereux, Michael P., et al. *Taxing Profit in a Global Economy*. Oxford: Oxford University Press, 2021.

Dyzenhaus, David and Malcolm Thorburn. *Philosophical Foundation of Constitutional Law*. Oxford: Oxford University Press, 2016.

Eubank, Nicholas. "Taxation, Political Accountability and Foreign Aid: Lessons from Somaliland." *Journal of Development Studies* 48, no. 8 (2012).

Hodgson, Louise. *Res Publica and The Roman Republic: 'Without Body or Form'*. Oxford: Oxford University Press, 2017.

Indrayana, Denny. *Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition*. Jakarta: Kompas, 2008.

Laski, Harold J. "Discretionary Power." *Politica* 1, no. 3 (1935).

Lee, Chien-Liang. "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).

Murphy, Liam and Thomas Nagel. *The Myth of Ownership*. Oxford: Oxford University Press, 2002.

OECD. "Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters: Status as of 15 July 2021." n.d. https://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf.

Palguna, I Dewa Gede. *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.

Petersen, Niels. "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).

Pfersman, Otto. "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective." *European Constitutional Law Review* 6 (2010).

Potkin, Fanny 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.

Setiawan, Heru. "*Mempertimbangkan Constitutional Complaint Sebagai Kewenangan Mahkamah Konstitusi* [Considering Constitutional Complaints as the Authority of the Constitutional Court]." *Lex Jurnalica* 14, no. 22 (2017).

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.

Wicaksono, Dian Agung 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).

Zen, Nilwan, et al. "*Jaminan Hak-Hak Konstitusional Warga Negara (The Protector of Citizen's Constitutional Rights) Dengan Implementasi Constitutional Complaint Melalui Mahkamah Konstitusi Di Negara Kesatuan Republik Indonesia (Studi Pelaksanaan Constitutional Complaint Di Korea Selatan)* [The Protector of Citizen's Constitutional Rights by Implementing Constitutional Complaints through the Constitutional Court in the Unitary State of the Republic of Indonesia (the Study of the Implementation of Constitutional Complaints in South Korea)]." *Diponegoro Law Review* 5 (2016).

Zoelva, Hamdan. "*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).

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AUTHOR GUIDELINES

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Board of Editors of the Constitutional Review Journal invite those who are interested to submit articles based on the criteria above and the manuscript submitted must conform to author guidelines as stated below.

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   Example:

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   Corte Costituzionale Italiana [Italian Constitutional Court]. Sent. 194/2013 Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality] No. 194/2013 (July 17, 2013).

   Foreign language in footnote:

   Carlo Azeglio Ciampi, Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d'oro ai benemeriti della cultura e dell'arte [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the delivery of the Gold Medals for Culture and Arts merit], May 5, 2003.

Foreign language in body text:

Therefore, the founding fathers of the Indonesian Constitution made the Negara Kesatuan [Unitary State] the central feature of the new Indonesian statehood, as it is set out most prominently in article 1(1)6 and 25A.

3. The authors who are not native speakers of English need to seek the assistance of a native speaker to proofread their articles before submitting them to the committee.
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9. Main headings, sub-headings, and sub-sub-headings of the article should be numbered in the manuscript with the following example:

   I. Main Heading
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         1.1.1. Sub-sub-heading

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10. The following is the structure of the journal:

    I. Title

    - Title of manuscripts should be specific and concise in no more than 10 words or 90 hits on the key pad which describes the content of the article comprehensively.

- It is typed by using Times New Roman 16, upper case, alignment: center text.

II. Identity

- The identity covers the author's name, affiliation, and e-mail address.
- The name is typed under the title by using Times New Roman 12, bold, alignment: center text then put asterisk after the name.
- The content of the asterisk is about short explanation of the author(s), could be short biography (short bio) or gratitude, and placed in a footnote. Example:

Example of identity with the asterisk

INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

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Example of the explanation of the asterisk:

of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

* Professor of Law at The University of New South Wales (UNSW) Sydney, former, Secretary-General of the International Association of Constitutional Law (IACL), and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.

- Font: Times New Roman, font size: 12, alignment: justify text, space: 1.5, margin: Normal.
- Total words: No more than 350 words.

IV. Keywords

- Preceded by the word "Keyword" in bold style (**Keywords**).
- Font: Times New Roman, font size: 12, lower case, alignment: justify text.
- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

V. Body

The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/ aim of the article.
- **Method:** It is an optional section for articles which are based on research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
- **Conclusion:** This section is the most important section of your article. It contains the overall explanation of your article. It should be clear and concise.
- **Reference:** The paper needs to cover at least 10 articles from reputable journal. Our reference uses The Chicago Manual of Style (CMS).

  Consult to: http://www.chicagomanualofstyle.org/ https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide- 1.html.

- **Example of Table:**

TABLE 2. Real-world magnitudes of the relationship between tort reform and death rates

Tort reform	Annual death rates (%)	Number of deaths in 2000	Deaths across all years
Cap on noneconomic damages	−3.54	−333	−5,242
Higher evidence standard for punitive damages	−2.57	−982	−11,798
Product liability reform	−3.83	−1,267	−16,841
Prejudgment interest reform	−4.88	−647	−9,060
Collateral source reform			
Offset awards	+4.71	+938	+14,160
Admit evidence	+2.43	+294	+4,468
Net effect		−1,998	−24,314

Note: Values presented are average changes. These computations are based on the coefficients from the primary regression (table 3) and the average annual populations and average annual death rates in the states that had each reform. The sums of the individual reforms differ by one from the net effects owing to rounding.

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