Volume 10, Number 1 ❑ May 2024

Constitutional Review

Scan to access

consrev.mkri.id

PUBLISHED BY CENTER FOR RESEARCH AND CASE ANALYSIS AND LIBRARY MANAGEMENT
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

ISSN: 2460-0016 | E-ISSN: 2548-3870

Consrev
Constitutional Review

Editorial Office

Center for Research and Case Analysis and Library Management
The Constitutional Court of the Republic of Indonesia
Jl. Medan Merdeka Barat No. 6 Jakarta, Indonesia 10110
Phone. (+6221) 23529000 Fax. (+6221) 352177
E-mail: consrev@mkri.id

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.

CONSTITUTIONAL REVIEW is available in print and online versions. The online version can be downloaded from consrev.mkri.id.

The articles in this journal do not represent the opinion of the Constitutional Court of the Republic of Indonesia.

ISSN : 2460-0016 (print)
e-ISSN : 2548-3870 (online)

Citation is permitted with acknowledgement of the source

The articles in this journal do not represent the opinion of the Constitutional Court of the Republic of Indonesia

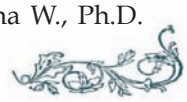
THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

Constitutional Review, Volume 10, Number 1, May 2024

Editorial Team

Advisory Board

Dr. Suhartoyo, S.H., M.H.
Prof. Dr. Saldi Isra, S.H., MPA.
Prof. Dr. Anwar Usman, S.H., M.H.
Prof. Dr. Arief Hidayat, S.H., M.S.
Prof. Dr. Enny Nurbaningsih, S.H., M.Hum.
Dr. Daniel Yusmic Pancastaki Foekh, S.H., M.H.
Prof. Dr. M. Guntur Hamzah, S.H., M.H.
Dr. H. Ridwan Mansyur, S.H., MH.
Dr. H. Arsul Sani, S.H., M.Si., Pr.M.
Muhidin, S.H., M.H.
Heru Setiawan, S.E., M.Si.
Pan Mohamad Faiz Kusuma W., Ph.D.



TEH CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
Volume 10, Number 1, May 2024

CONTENTS

Note From the Editors

Constitutional Review (ConsRev) is delighted to present its first issue of 2024. ConsRev is a distinguished peer-reviewed publication, published biannually by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. This journal covers various topics related to constitutions, constitutional courts, their decisions, and the broader scope of constitutional law. The primary objective of this journal is to provide meaningful perspectives and analysis on legal matters through the dissemination of articles by esteemed academicians, researchers, observers, practitioners, legal scholars, law professors, and judges from Indonesia and abroad. At the beginning of 2024, this journal has been classified as Quartile 3 (Q3) in the Scopus Index. Due to the high interest from authors in publishing their articles in ConsRev, we have increased the number of articles per edition to eight, starting with this volume.

This current issue contains eight articles by eight authors from various backgrounds and affiliations. The first article, **A Critical Review on the Composition of the Constitutional Court of Korea**, is authored by Sang-Hyeon Jeon, a law professor from Seoul National University, South Korea. This article discusses the composition of the Constitutional Court, especially the Constitutional Court of Korea, where the National Assembly elects three of nine justices. This raises issues about the lack of democratic legitimacy, judicial independence, and the expertise of the Constitutional Court.

The second article, **Local Chief Executive Political Accountability in Indonesia: A Historical-Legal Analysis**, is authored by Ahsanul Minan and Satya Arinanto from the University of Indonesia, and Djohermansyah Djohan from the Internal Affairs Governance Institute, Indonesia. This article discusses the local chief executive's (LCE) political accountability in the Local Government Acts (LGAs) using historical and theoretical approaches. The authors examine the influence of the political interests of the regimes on the changes of provisions regarding the LCE's political accountability in the LGAs from 1945 to date.

The third article, **Comparative Analysis of Jurisprudence on Interventions to the Rights to Property through Taxation: The Constitutional Court of Türkiye and European Court of Human Rights**, is authored by Betül Hayrullahoğlu, a scholar from Usak University, Türkiye. The article analyzes the right to property, which is closely related to taxes, focusing specifically on tax interventions affecting this right. The author argues that the right to property is not only significant because it is directly related to taxes but also because it is the second most violated right among the decisions of the European Court of Human Rights (ECtHR) against Türkiye between 1959 and 2022, following the right to a fair trial.

The fourth article, **The Constitutional Court and Forest Tenure Conflicts in Indonesia**, is authored by Yance Arizona, a Lecturer from the Department of Constitutional Law, Universitas Gadjah Mada, Indonesia, and Umi Illiyina, an advocate and independent researcher. This article examines the extent to which the Constitutional Court can contribute to the resolution of forest tenure conflicts through judicial review of forest laws. This article discusses twelve Constitutional Court decisions regarding the judicial review of the Forestry Law and the Law on Forest Destruction Prevention and Eradication. The authors found that the Constitutional Court has made a positive contribution to addressing the deficiency of forest legislation regarding local and customary land rights.

The fifth article, **Comity or Confrontation: Budgeting Independence of the American Judiciary**, is authored by Justin Apperson, a law scholar from William & Mary Law School, USA. This article discusses the roles of the court in securing funding protection. From the author's point of view, while many American court systems have constitutional funding protections for judicial salaries, the judiciary is in the position of bargaining for funding for staff, services, technology, facilities, supplies, and other goods to adequately fund the constitutional mission of adjudication. Courts have looked to two principal strategies in securing funding.

The sixth article, **Between the People and the Populists: Safeguarding Judicial Independence in a Changing World**, is authored by Fritz Edward Siregar, a law scholar from Indonesia Jentera School of Law, Indonesia. This article examines the impact of social media on the dissemination and influence of populist ideology, as well as the strategies populist movements have employed to erode the independence of the judiciary, including public resistance, constitutional amendments, and the expansion of the judiciary. This article then analyzes strategies and solutions designed to preserve and safeguard judicial independence.

The seventh article, **Assessment of de jure Judicial Independence of Constitutional Courts According to International Guidelines**, is authored by Osayd Awawda, a professor from Hebron University, Palestine. The article provides explanations about the independence of the constitutional court. This article also provides criteria for assessing de jure judicial independence of constitutional courts according to four renowned international documents that set normative standards for protecting judicial independence. These four guidelines are Basic Principles on the Independence of the Judiciary by the UN, Report of the Special Rapporteur on the Independence of Judges and Lawyers, the Universal Charter of the Judges, and International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors.

The eighth article, **The Vocabulary of Right Under the Indonesian Constitution: A Hohfeldian Analysis**, is authored by Adis Nur Hayati and Dewi Analis Indriyani from The National Research and Innovation Agency of the Republic of Indonesia (BRIN), Nurangga Firmanditya from Universitas Indonesia, and Harison Citrawan from The Pennsylvania State University, USA. This article demonstrates how the Indonesian Constitutional Court interprets the term 'right' when deciding issue-level questions involving constitutional doctrine. To do so, the authors employ the Hohfeldian scheme that configures rights into four different meanings of claim rights, privilege, power, and immunity.

The Editorial Team hopes that all articles in this edition will be a precious and comprehensive resource for legal practitioners, readers, and researchers. Moreover, the editorial team is optimistic that this edition will play an important role in fostering an intellectual environment that cultivates curiosity and encourages further research endeavors. Lastly, the Editorial Team of ConsRev believes that the insights and analyses presented within this edition will spark a profound interest among scholars, legal practitioners, readers, and researchers to delve into further exploration and scholarly inquiries.

A Critical Review on Composition of the Constitutional Court of Korea

Sang-Hyeon Jeon

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 001-032

The composition of the Constitutional Court is a crucial aspect for the realization of constitutionalism. While the Constitutional Court has been praised for its significant contributions to the establishment of constitutional democracy in Korea, there have been criticisms regarding the composition of the Court in both its institutional structure and operational practices. The Constitutional Court of Korea consists of nine justices. Although these nine justices are formally appointed by the President of Korea, three are elected by the National Assembly, and three are designated by the Chief of the Supreme Court. This means that the President, the majority of the National Assembly, and even the Chief Justice of the Supreme Court can each choose three justices on their own without any consent or approval from other branches. This raises concerns about the lack of democratic legitimacy, judicial independence and the expertise of the Constitutional Court. Additionally, there are constitutional issues such as the relatively short term of office, the reappointment, the absence of a specified term for the Chief Justice, and the potential for prolonged vacancies of seats.

Keywords: Appointment of Justices; Constitutional Court Composition; Constitutional Court of Korea; Democratic Legitimacy; Judicial Independence; Term of Office

Local Chief Executive Political Accountability In Indonesia: A Historical-Legal Analysis

Ahsanul Minan, Satya Arinanto, and Djohermansyah Djohan

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 033-066

This paper discusses the local chief executive's (LCE) political accountability in the Local Government Acts (LGAs). Using historical and theoretical approaches, this article examines the influence of the political interests of the regimes on the changes of provisions on LCE's political accountability in the LGAs from 1945 to date. The LCE was accountable to the local council (DPRD) from 1945-1958 and 1999-2004; and to the central government from 1959-1998. While since 2004, the LCEs are only had to report -but not be accountable- to the Central Government, local council and the local community. Two important academic questions arise when dealing with this phenomenon. First, to what extent are the political interests of the democratic and authoritarian regimes shaped the changes of provisions on LCE political accountability in the LGAs? Second, how do the provisions conform to the accountability principles? This study's result shows that the rulers' political orientation shaped the LCEs' political accountability system and ignored the principles of accountability, leading to the inconsistent institutional design of LCE accountability. Furthermore, the LGA has yet to regulate the electoral/political accountability of LCEs, which should be a consequence of adopting the LCE direct election. We recommend precise arrangements on the accountability principle in the Constitution to avoid the politicization of laws by legislators according to their political interests and improve the role of Citizens through a recall petition to strengthen the enforcement mechanisms.

Keywords: Constitution; Decentralization; Local Accountability; Political Configuration

Comparative Analysis of Jurisprudence on Interventions to the Rights to Property Through Taxation: The Constitutional Court of Türkiye and European Court of Human Rights

Betül Hayrullahoğlu

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 067-102

Fundamental rights and freedoms of individuals are guaranteed in both constitutions and international treaties. One of the most important treaties protecting fundamental rights and freedoms is the European Convention on Human Rights (ECHR). Türkiye, which adopts a monist understanding, is one of the countries that are party to the ECHR. Since it was founded in 1959, Türkiye has been one of the three countries that are subject to the most judgments by the European Court of Human Rights (ECtHR). In order to make this bad record better and to protect fundamental rights and freedoms more effectively, the individual application mechanism to the Constitutional Court has been entered into force in Türkiye since 2012. This paper argues whether the case law of the Constitutional Court of the Republic of Türkiye, which is necessary to reduce the applications made to the ECtHR against Türkiye and the violation decisions given by the ECtHR, is compatible with the case law of the ECtHR. The paper analyses the right to property, which is one of the most related rights to taxes, and focuses only on tax interventions to this right. The right to property is important not only because it is directly related to taxes, but also because it is the second most violated right among the violation decisions made by the ECtHR against Türkiye between 1959-2022, after the right to a fair trial. The methodology employed is based on a comparative jurisprudential analysis of the Constitutional Court of the Republic of Türkiye and ECtHR. In this way, the similarities and differences between the way the two courts dealt with the cases in the interventions to the right to property through taxes can be analyzed. As a result, it is understood that both Courts treat the right to property in the same way, but the Turkish Constitutional Court adopts a stricter and more protective interpretation than the European Court of Human Rights in terms of legality criteria.

Keywords: Taxes; Right to Property; Individual Application; Constitutional Court; EctHR

The Constitutional Court and Forest Tenure Conflicts in Indonesia

Yance Arizona and Umi Illiyina

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 103-135

With regard to access to land and forest resources, forestry legislation maintains an imbalance between the state, corporations, and local communities. Since the colonial era, forestry regulation has facilitated restrictions on the ability of local communities to benefit from land and forest resources, while also concentrating power in the hands of the state. To uphold state ownership, forestry law criminalizes customary practices, putting local communities at risk. In this sense, conflicts between local communities, corporations, and government agencies arise because of structural issues in the legal framework of laws and regulations that undermine the land rights of local communities. The establishment of the Constitutional Court in Indonesia in 2003 has enabled local communities and NGOs to challenge the Forestry Law. They use the Constitutional Court to support the resolution of forestry tenure conflicts. This article examines the extent to which the Constitutional Court can contribute to the resolution of forest tenure conflicts through judicial review of forest laws. This article discusses twelve Constitutional Court decisions regarding judicial review of the Forestry Law and the Law on Forest Destruction Prevention and Eradication. We found that the Constitutional Court has made a positive contribution to addressing the deficiency of forest legislation regarding local and customary land rights. The implementation of Constitutional Court's ruling is not, however, a matter of self-implementation. The ruling of the Constitutional Court will only have significance if it is continuously promoted by various stakeholders in support of forest tenure reform to facilitate the resolution of forest tenure conflicts.

Keywords: Constitutional Court; Customary Land Rights; Forestry Law; Forest Tenure Conflicts; Indonesia

Comity or Confrontation: Budgeting Independence of the American Judiciary

Justin Apperson

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 136-169

While many American court systems have constitutional funding protections judicial salaries, the judiciary in the position of bargaining for funding for staff, services, technology, facilities, supplies, and other goods to adequately fund the constitutional mission of adjudication. Courts have looked to two principal strategies in securing funding. First, courts have tried to improve the relationship with the other branches through long-term connections and demonstrations of sound judicial governance. Courts have sought to improve their strategic planning, incorporating novel uses of data including performance measures, with the collateral hope of enhancing budget justifications. Courts have also tested political strategies for self-advocacy, including elevating judicial officers as spokespersons for the judicial branch, mobilizing stakeholders, and lobbying key officials. Second, courts have invoked the inherent powers of the judiciary as a separate and co-equal branch to compel funding that is reasonably necessary to administration of justice. Judicial leaders have typically disfavored this technique, which presents its own risks of trespassing on legislative power and impairing longer-term strategies for building bridges and understanding between the branches, except in patterns of legislative neglect or hostility towards judicial independence.

Keywords: Judicial Independence; Budgeting; Communications Strategies; Inherent Powers

Between the People and the Populists: Safeguarding Judicial Independence in a Changing World

Fritz Edward Siregar

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 170-201

This article examines the impact of social media on the dissemination and influence of populist ideology, as well as the strategies populist movements have employed to erode the independence of the judiciary, including public resistance, constitutional amendments, and the expansion of the judiciary. This article analyzes strategies and solutions designed to preserve and safeguard judicial independence. The in question strategy includes strengthening the legal and institutional framework, cultivating a culture that upholds the supremacy of law, increasing judicial accountability, and encouraging collaborative dialogue between judicial institutions. This paper employs a case study methodology to examine the resistance of the judiciary to populist pressures in South Africa, Colombia, and Indonesia. This article's conclusion demonstrates that the court faces a dilemma between the importance of maintaining judicial independence from populist interests over legal requirements and the necessity of popular opinion for public legitimacy. In the context of populism, this is a challenge for judicial independence. Therefore, this paper encourages collaboration between academics, practitioners, and policymakers to safeguard judicial independence in an increasingly interconnected and rapidly developing world.

Keywords: Constitutional Court; Judicial Independence; Populist Movement; Public Support

Assessment of De Jure Judicial Independence of Constitutional Courts According to International Guidelines

Osayd Awawda

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 202-233

Judicial independence of constitutional courts is of paramount importance because it upholds the rule of law, protects individual rights, and maintains checks and balances in a democracy. Moreover, it ensures impartiality, prevents the abuse of power, and fosters public trust in the legal system. By interpreting and applying the law without external influence, an independent judiciary safeguards the principles of justice and democratic governance. This Article provides criteria for assessing de jure judicial independence of constitutional courts according to four renowned international documents that set normative standards for protecting judicial independence. These four documents are synthesises the literature about the definition of judicial independence, particularly in the context of constitutional courts, and analyses four international guidelines that set essential standards for protecting the independence of the judiciary. These four guidelines are: Basic Principles on the Independence of the Judiciary by the UN, Report of the Special Rapporteur on the Independence of Judges and Lawyers, the Universal Charter of the Judges, and International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Using conceptual and doctrinal analysis, this Article identifies three key elements of de jure judicial independence: personal, institutional, and procedural. It also establishes practical criteria to evaluate whether the laws governing a specific constitutional court uphold or undermine its de jure judicial independence. Importantly, it is crucial to distinguish between de jure and de facto judicial independence because merely enacting constitutional provisions and laws to safeguard the judiciary does not automatically guarantee an independent judiciary in practice. The discussion of these principles highlights how personal, institutional, and procedural independence can be established and preserved within the courts. This Article concludes that the common purpose of these principles is to protect judges from unwarranted interference, especially from the executive branch. Among the various principles, the most crucial ones were found to be independent judicial appointment procedures and ensuring judges' tenure is protected against retaliatory actions by the governing regime.

Keywords: De Jure and De Facto Judicial Independence; Personal Independence; Institutional Independence; Procedural Independence

The Vocabulary of Right Under the Indonesian Constitution: A Hohfeldian Analysis

Adis Nur Hayati, Dewi Analis Indriyani, Nurangga Firmanditya, and Harison Citrawan

Constitutional Review, Vol. 10 No. 1, May 2024, pp. 234-265

This article demonstrates how the Indonesian Constitutional Court interprets the term 'right' when deciding issue-level questions involving constitutional doctrine. In doing so, we employ the Hohfeldian scheme that configures right into four different meanings of claim right, privilege, power, and immunity. By looking at the molecular configuration of rights in the context of freedom of religion, natural resource control, educational policies, and fair trial, this we contend that the right under the constitution is interpreted by the Court in a dynamic-yet-configured fashion. In this sense, 'dynamic' implies that the Court's interpretation does not adhere to a fixed or consistent vocabulary, while 'configured' suggests that the vocabulary of right is fundamentally configured by both (1) non-relational liberty and (2) power that provides intervention, limitations, or even change over the nature of liberty into liability (i.e., duty to refrain from acting in a certain way). It is manifest that right is hardly expounded by the Court when the term is juxtaposed with any relevant governmental duties and powers. This demonstrates a judicial fabrication of a flexible legal concept used by the judicial authority to justify certain normative objectives.

Keywords: Constitution; Hohfeld; Interpretation; Legal Concept; Right

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1011

A Critical Review on Composition of the Constitutional Court of Korea

Sang-Hyeon Jeon*
Seoul National University (SNU), Seoul, Korea
jeonshine@snu.ac.kr

Received: 4 April 2023 | Last Revised: 7 December 2023 | Accepted: 10 March 2024

Abstract

The composition of the Constitutional Court is a crucial aspect for the realization of constitutionalism. While the Constitutional Court has been praised for its significant contributions to the establishment of constitutional democracy in Korea, there have been criticisms regarding the composition of the Court in both its institutional structure and operational practices. The Constitutional Court of Korea consists of nine justices. Although these nine justices are formally appointed by the President of Korea, three are elected by the National Assembly, and three are designated by the Chief of the Supreme Court. This means that the President, the majority of the National Assembly, and even the Chief Justice of the Supreme Court can each choose three justices on their own without any consent or approval from other branches. This raises concerns about the lack of democratic legitimacy, judicial independence and the expertise of the Constitutional Court. Additionally, there are constitutional issues such as the relatively short term of office, the reappointment, the absence of a specified term for the Chief Justice, and the potential for prolonged vacancies of seats.

Keywords: Appointment of Justices; Constitutional Court Composition; Constitutional Court of Korea; Democratic Legitimacy; Judicial Independence; Term of Office

* B.A.(SNU) LL.M.(Fordam University) Ph.D. in Law (SNU), Law Professor at Seoul National University School of Law. This Article is based on the author's presentation at the 6th Indonesian Constitutional Court International Symposium on August 10, 2023. This article was funded by the 2024 Research Fund of the Seoul National University Asia-Pacific Law Institute, donated by the Seoul National University Foundation.

I. INTRODUCTION

The Constitutional Democracy in Korea began with the current Constitution, which established the Constitutional Court of Korea in 1988. Although the Korean had Constitutions even before 1988, those Constitutions were nominal. At the inception of the current Constitution, the primary objective was to establish constitutionalism, wherein the Constitution is regarded and enforced as the supreme legal norm, binding all state actions. Over the past thirty-five years since the establishment, the Constitution has exercised normative power as the highest norm both in name and reality through constitutional adjudication by the Constitutional Court, which has invalidated a number of statutes repugnant to the Constitution, remedied infringements of constitutional rights of individuals. The Constitutional Court has played a pivotal role in establishing constitutional democracy in Korea and the Constitution has been perceived as the paramount norm, binding all branches of the state - legislative, executive, and judicial.

Simultaneously, the Constitutional Court of Korea has risen as a powerful institution, wielding significant influence. Notably, the Court nullified the Capital Relocation Plan, which was a pivotal policy announced by the then-President, citing the customary constitution that designates Seoul as the capital of Korea.[1] Additionally, in a case involving the dissolution of a political party, the Court dissolved the party and deprived its five members of their positions as members of the National Assembly.[2] Above all, the Court has presided over impeachment trials of the President of Korea twice,[3] resulting in the removal of the President from office in one instance.[4] These events have captured immense public attention, prompting a shift in focus from the mere realization of constitutionalism

[1] 2004 Hun-Ma 554, October 21, 2004, 16-2(2) KCCR 1. Hereinafter, "KCCR" is abbreviation of "Korean Constitutional Court's Report" which is the official report book of the Court's decisions. "2004 Hun-Ma 554" denotes the case number, with "October 21, 2004" indicating the date of the decision. "16-2(2) KCCR 1" signifies that the case begins on page 1 of volume number 16-2(2) of the official report.

[2] 2013 Hun-Da 1, December 19, 2014, 26-2(2) KCCR 1.

[3] 2004 Hun-Na 1, May 14, 2004, 16-1 KCCR 609(case against President Moo-Hyun Roh); 2016 Hun-Na 1, March 10, 2017, 29-1 KCCR 1 (case against President Geun-Hye Park).

[4] 2016 Hun-Na 1, March 10, 2017, 29-1 KCCR 2016 Hun-Na 1. The Court ruled that the President Geun-Hye Park should be removed from her office of the President of Republic of Korea.

through constitutional adjudication to the justification of such adjudication and ensuring democratic oversight over the Court itself. Consequently, organizing the Constitutional Court from a perspective of democracy has become a pressing issue. Given the political implications and ramifications of the cases handled by the Court, the political stances of the Justices are also significant, as they may impact the outcomes of individual cases. Thus, the appointment of Justices to the Constitutional Court holds political significance.

The composition of the Constitutional Court, like other constitutional institutions, should adhere to constitutional principles such as popular sovereignty, democracy, and the rule of law.[5] Given that the authority wielded by the Constitutional Court is derived from the people, its organization must reflect the will of the people. Moreover, to safeguard the Court's effective operation, it is imperative to ensure its independence and professionalism.[6] The Constitution of Korea assigns the task of composing the Constitutional Court to the President, the National Assembly, and the Chief Justice of the Supreme Court. However, questions arise regarding whether this method of composition aligns with principle of democracy or ensures the independence of the Constitutional Court. In other words, there are concerns about whether those institutions - the President, the National Assembly, and the Chief Justice of the Supreme Court – appropriately wield their authority for this purpose. Despite the Constitutional Court's decisive role in establishing constitutional democracy in Korea, criticisms have been raised regarding the composition of the Court both in terms of institutional structure and practices surrounding the appointments of Justice.

This paper seeks to delve into the experience of composing the Constitutional Court in Korea and explore the related issues. After briefly looking over the history of the constitutional adjudication in Korea (Section II), it examines the problems concerning the composition of the Court, particularly appointment of Justices, covering both the provisions of the Constitution and their practical

[5] Nak-In Sung, *Heonbeonhak* [Constitutional Law] (Paju Bookcity: Bobmun Sa, 2023), 765; Jong-Sup Chong, *Heonbeobsosongbeob* [Constitutional Litigation] 5th ed (Seoul: Parkyoung Publishing & Company, 2008) 38.

[6] Ha-Yurl Kim, *Heonbeonsosongbeob* [Constitutional Litigation] (Seoul: Parkyong Publishing & Company, 2021) 77.

application (Section III). Subsequently, it explores matters concerning the terms of office, reappointment and vacancies of seats (Section IV).

II. BRIEF HISTORY OF THE CONSTITUTIONAL ADJUDICATION IN KOREA

During the drafting of the Constitution of 1948, often referred as "the Founding Constitution", there were debates about which type of constitutional adjudication system should be adopted, between the centralized (or concentrated) model and the decentralized (or diffuse) model.[7] The centralized model refers to constitutional review system where a separate independent institution, distinct from the ordinary courts exercises the power of constitutional review. In contrast, the decentralized model confers the power of judicial review to ordinary courts, as seen in U.S.

The drafters of the Constitution adopted the centralized system and established the Constitutional Committee. According to the memoirs of a late Professor *Jin-Oh Yoo*,[8] who is considered to have influenced significantly the constitution-drafting process, he believed that granting the power for constitutional review to the ordinary courts would be improper. This was partly due to absence of experienced judges in terms of constitutional review at the time and considerable doubts about the ability of ordinary court's judges to engage in constitutional adjudication.[9] Additionally, there might have been distrust of the judges from their history of cooperating with the Japanese ruling during the colonial era before 1945. The Constitutional Committee was composed of five Members of National Assembly and five Justices of the Supreme Court, with the Vice President assuming the chairmanship of the Committee.[10] Concurrently, the Founding Constitution established the Impeachment Tribunal which would take

[7] For distinction of judicial review into two models, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, Kansas City, New York: The Bobbs-Merrill Company, 1971), 46-51.

[8] He was a prominent professor of public law at that time and participated the drafting of the Constitution of 1948 as an expert member of the Constitution-Drafting Committee.

[9] Jin-Oh Yoo, *Heonbeob-Gicho-Hoegorok* [The Memoirs of Drafting the Constitution] (Seoul: Iljogak, 1980), 41-42.

[10] The Constitution of 1948, Art.81.

charge of impeachment cases.[11] The composition of the Impeachment Tribunal was in the same way as the Constitutional Committee.

The Constitution of 1960, known as the Constitution of the Second Republic, introduced the Constitutional Court for the first time in Korea, replacing the Constitutional Committee with the Constitutional Court. In 1961, the National Assembly enacted the Constitutional Court Act. However, the establishment of the Constitutional Court was thwarted as the constitutional system collapsed by a military coup in the same year.[12] The Constitutional Court adopted in the 1960 Constitution, while not realized in practice, serves as a precursor of the current Constitutional Court of Korea. The Constitution of 1960 provided that the Constitutional Court should be composed of nine Justices, with three appointed by the Senate of National Assembly, three by the President, and three by the Supreme Court.[13] The Constitutional Court Act stipulated that the three Justices appointed by the Supreme Court should be elected at the Council of Supreme Court's Justices with the votes of majority of the sitting Justices.[14]

The Constitution of 1962,[15] regarded as having most similarities to the U.S. Constitution in terms of structure of government, granted the Supreme Court the authority of constitutional review, including the power to decide constitutionality of statutes and dissolution of political parties.[16] The Constitution established the Committee for Impeachment as a separate institution to handle impeachment cases.[17] Less than 10 years after the introduction of constitutional review by the Supreme Court, the constitutional review system underwent another change. The Constitution of 1972, as known as *Yushin* Constitution,[18] revoked the Supreme Court's authority for constitutional review and reinstated the Constitutional Committee system, previously adopted in the Constitution of 1948. Prior to

[11] The Constitution of 1948, Art.47.
[12] The military coup broke out on May 16th, 1961 approximately one month after the enactment of the Constitutional Court Act on April 17th of the same year.
[13] The Constitution of 1960, Art.83-4.
[14] The Constitutional Court Act of 1961, Art. 3(1).
[15] The Constitution of 1962 was enacted by the military government that launched the coup in the previous year and approved by national referendum of people.
[16] The Constitution of 1962, Art.7(3), 102(1).
[17] The Constitution of 1962, Art.62.
[18] *Yushin* means reformation or revitalizing reform.

this change, the Supreme Court had ruled that the State Compensation Act, which restricted state compensation to military soldiers or policemen injured while performing their official duties, was unconstitutional.[19] The Constitution of 1972 was enacted for the establishment of an authoritarian regime, conferring absolute power to the President of the Republic and eliminating the limitation on the President's reelection.[20]

Although the Constitution of 1972 went back to the Constitutional Committee system, the jurisdiction and composition of the Committee differed from those of the Founding Constitution. The Constitutional Committee's jurisdiction included the impeachment and dissolution of political party,[21] and the Committee consisted of nine members appointed by the President.[22] Among these nine members, three were elected by the National Assembly, and three were designated by the Chief Justice of the Supreme Court.[23] The President also had power to appoint the chairperson among the Committee members.[24] The Constitutional Committee Act under the Constitution of 1972 included provisions that significantly restricted the opportunity for the Committee's review. According to the Act, if a court sought the Committee's review of a statute's constitutionality, the request had to be submitted via the Supreme Court, and the panel of the Supreme Court, comprised of Justices of the Supreme Court, held the authority to determine whether the request was necessary and decide not to forward it to the Committee.[25] The Constitutional Committee system persisted under the Constitution of 1980, and continued until the end of 1987 when the current Constitution was enacted. However, during this period, the constitutional adjudication did not function effectively and remained nominal. It is notable that there was not a single

[19] The Supreme Court, June 22th, 1971, 70 Da 1010 (Plenary Session).
[20] For example, under the *Yushin* Constitution, the President could actually appoint one third members of the National Assembly, and had the power to promulgate Presidential Emergency Decree to suspend the constitutional rights and to intervene the judicial power. The Constitution of 1972, Art.40, Art.53.
[21] The Constitution of 1972, Art.109(1).
[22] The Constitution of 1972, Art.109(2).
[23] The Constitution of 1972, Art.109(3).
[24] The Constitution of 1972, Art.109(4).
[25] The Constitutional Committee Act, Art.15.

decision of the Constitutional Committee throughout the duration of both the Constitution of 1972 and the Constitution of 1980.[26]

The current Constitution was the result of Democratization Movements, which culminated in the June Uprising of 1987, bringing an end to the authoritarian regime that had lasted since 1972. The most important aim of the drafters of the current Constitution was realization of democratic constitutionalism. The Constitutional Court was regarded as the guarantor of this aim. Finally, the current Constitution adopted the Constitutional Court and the Constitutional Court was established through the Constitutional Court Act in September 1988.[27]

III. APPOINTMENT OF JUSTICES

3.1. Overview

The Constitutional Court is composed of nine Justices,[28] a composition method similar to that of the Constitutional Committee under the Constitutions of 1972 and 1980. While all nine Justices are appointed by the President, among the nine, the President appoints three who are elected by the National Assembly and three designated by the Chief Justice of the Supreme Court(hereinafter, "Chief of SC").[29] The President cannot refuse to appoint those elected by the National Assembly or designated by the Chief of SC. In other words, the President has authority to select only three Justices of his own choice. It is noteworthy that the Constitution of 1960, which first adopted the Constitutional Court system, outlined the method of composition for the Court slightly different from the current Constitution. Under the 1960 Constitution, the President was granted the authority to appoint only three Justices, not all nine, and the authority to designate three Justices was vested in the Supreme Court itself, not specifically in the Chief of SC.[30]

---

[26] The Constitutional Court of Korea, *The Twenty Years Of The Constitutional Court* (Seoul, The Constitutional Court of Korea: 2008), 84-86.

[27] The Constitutional Court Act was enacted on August 5, 1988 and came into effect on September 1 of the same year. On September 12, six Justices were appointed by the President including three designated by the Chief of SC of the Supreme Court, and the remaining three were elected by the National Assembly on September 15.

[28] CONST. Art.111(2).

[29] CONST. Art.111(3). The National Election Commission is organized through the same way as the Constitutional Court under the current Constitution of Korea. CONST. Art.114(2).

[30] The Constitution of 1960 Art.83-4.

There are several countries that have adopted similar composition for the Constitutional Courts.[31] For example, the Mongolian Constitutional Court is composed of nine Justices who are all appointed by the National Parliament, upon the nomination of three of them by the National Parliament, three by the President, and the remaining three by the Supreme Court.[32] In Indonesia, the Constitutional Court consists of nine Justices, three of whom are nominated by the House of Representatives (DPR), three by the President, and three by the Supreme Court. All nine nominees shall be confirmed by the President.[33] The Bulgarian Constitutional Court consists of 12 Justices, with one-third elected by the National Assembly, one-third appointed by the President, and one-third elected by a joint meeting of the judges of the Supreme Court of Cassation and the Supreme Administrative Court.[34] The Constitutional Court of Italy is composed of fifteen Justice. One third of them are nominated by the President of the Republic, one third by Parliament in joint session, and one third by the ordinary and administrative supreme courts.[35] In Spain, the Constitutional Court consists of twelve Justices, appointed by the King. Among the twelve, four are nominated by the Congress, four by the Senate, two by the Government, and the remaining two by the General Council of the Judiciary.[36]

The way of composing the Constitution Courts, as observed in the examples above, may be perceived as a cooperation among three branches, each contributing equally to the composition of the Constitutional Court. However, it is more accurate to say that each department independently exercise the power of appointment regardless of other branch's opinion. The President can appoint three Justices without consent of the National Assembly, and the National Assembly can select

[31] For brief introduction to the Constitutional Court's composition of those countries, Dong Hoon Han et al, *Heonbeobjaepanso Jepangwanuie Jagyeok, Guseongbangsik Mit Imgi* [The Composition of Constitutional Court, Qualifications and Term of Office of a Justice] (Seoul, Constitutional Research Institute, 2011), 38.

[32] The Constitution of Mongolia, Art.65(1)

[33] The Constitution of Indonesia, Art.24C(3). For brief introduction to Indonesian constitutional review system, *see* Hae-Cheol Byun, "Indonesia Heonbeobjaepanjedo-e Gwanhan Sogo"[A Study on The Indonesian Constitutional Review System], *HUFS Law Review* 41, no.1 (2017): 103-119

[34] The Constitution of the Republic of Bulgaria, Art. 147(1).

[35] The Constitution of Italy Art.135(1). For constitutional adjudication system of Italy, *see,* Hakseon Jeon, "Italia-ui Heonbeobjepanjedo [The Justice constitutionnelle in Italy]," *World Constitutional Law Review* 16, no.3 (2010): 543-560.

[36] The Constitution of Spain Art.159(1).

Justice-candidates for election by itself without any nomination or designation from other departments. There is neither prior procedural intervention, such as recommendations from other institutions, nor post-control, such as confirmation processes by other branches, in the designation of Justices by the Chief of SC. No branch holds veto power against the selection made by another branch. In essence, the composition of the Constitutional Court is not the product of cooperation among three branches, but rather the result of the separate and independent exercise of authority by each branch.

This raises several constitutional issues from the perspective of democratic legitimacy, judicial independence and neutrality of the Constitutional Court. Especially noteworthy is the unique characteristic of the Korean system, where the Chief of SC, rather than the Supreme Court itself or an institution consisting of courts, holds the sole power to appoint Justices without any checks or controls.

3.2. The President's Appointment

3.2.1. Unilateral Appointment without Parliament Consent

Among the nine Justices who the President appoints, three are selected directly by the President himself. As the President's appointment does not require consent from the National Assembly, the selection of candidates essentially equates to their appointment as Justices. This raises some problems.

Firstly, the President's appointing Justices without parliament's consent lacks democratic legitimacy compared to those appointed with parliamentary consent. One of the most challenging questions in constitutional review by the Constitutional Court is the justification for Justices, who are not elected by the people, to invalidate laws enacted by parliament, the representatives elected by the people. This raises the vexing question of whether constitutional review is consistent with the principles of democracy or popular sovereignty.[37] In the United States, where judicial review has been firmly established since the Marbury Case in 1803, arguments persist for the abolition of judicial review even today.[38] The

[37] It was famously formulated as "counter-majoritarian difficulty" by Alexander Bickel. Alexander Bickel, *The Least Dangerous Branch* (New York: The Bobbs-Merrill Co., Inc., 1962).

[38] For example Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

ongoing debates over the legitimacy of judicial review in the U.S. may stem from the absence of an explicit provision for judicial review in the Constitution. However, even in Korea, where the Constitution expressly provides for the Constitutional Court's authority for constitutional review, questions about the legitimacy of constitutional review can still arise in relation to the constitutional principles of democracy or popular sovereignty. Requiring parliamentary consent for appointment of the Justices would undoubtedly supplement the democratic legitimacy of the Constitutional Court's Justices. However, achieving this seems very challenging as it would require constitutional amendment with very difficult process.[39]

Cases and controversies handled by the Constitutional Court are often more closely linked to issues of democracy and popular sovereignty compared to those within the jurisdiction of ordinary courts, including the Supreme Court. Therefore, ensuring democratic legitimacy is of greater importance in the composition of the Constitutional Court than the Supreme Court. The same holds true for the judicial independence of the Constitutional Court. Considering this, it is somewhat paradoxical that Constitutional Court's Justices can be appointed without the consent of the National Assembly, while Supreme Court's Justices require such consent.

Secondly, there is no effective procedure to check and control the President's selection. Neither Constitution nor the Constitutional Court Act provides an institution or process to actually verify the competence and qualification of the candidates whom the President appoints. Although a parliamentary hearing before the President's official appointment was introduced by the Constitutional Court Act in 2005,[40] the President is not bound by the result of the hearing. The Legislation and Judiciary Committee, which takes charge of hearing process, submits the report on the hearing to the Speaker of the National Assembly after hearing is finished, and the Speaker forwards the report

[39] The draft proposed by the President or a majority of the total member of the National Assembly shall require approval by two thirds of the total member of the National Assembly. Subsequently, it must be approved by a majority of all votes cast by more than half of the voters eligible for national referendum. CONST. Art.130(1),(2).

[40] The National Assembly Act, Art.65-2(2). The operation and procedure of personnel hearing is regulated by the Personnel Hearing Act.

to the President.[41] However, the report has no binding effect on the President's appointment. In other words, the President can appoint a Justice nominee to the position regardless of the result of the hearing. When public criticism against the candidate is particularly intense, the President may choose to withdraw the appointment, accepting the public opinion. Even then, it is still possible for the President to push ahead with appointment. There was a notable instance in 2017 when the President withdrew a nomination following intense criticism of the candidate's morality after a parliamentary hearing.[42] The nominee faced accusations of engaging in suspicious lucrative stock trading, which led to her decision to step down from the nomination. Typically, a nominee's stepping down is interpreted as the President withdrawing the nomination. However, the President's withdrawal of a Justice nominee is exceptionally rare in Korea because the President can proceed with the appointment despite objections of the opposition party or public opinion. Nevertheless, the President would not insist on the appointment if it costs substantial loss of political support. Therefore, the pressure from external institutions such as interest groups, news media, and public opinion should be considered to play comparatively more significant role, especially in the Korean context.[43]

3.2.2. Criterion of Selection

What is the most important factor for the President to select Justices? It is difficult to pinpoint one or two factors that have played a prominent role in the President's selection of candidates for the Constitutional Court's Justices. However, it is so important issue that on what criteria the President should choose a candidate.

In the context of the United States, the criteria for presidential selection of Justices have been identified as merit, ideology, personal friendship and

41 The Personnel Hearing Act, Art.9(2), 11(2).

42 Kim Hyo-jin, "Constitutional Court's Justice nominee Accused of Illegally Trading," *The Korea Times*, August 31, 2017.

43 Even in United States, where the Justices of the Supreme Court are appointed by the President with the consent of the Senate, the role of external actor such as interest groups, the news media, and public opinion is regarded as important. See Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford: Oxford University Press, 2005), 24-30.

representativeness.[44] Because the Justiceship of the Supreme Court demands a high level of professional ability as a lawyer, the objective merit can be considered a crucial factor for the selection. However, defining what constitutes merit for the Justiceship and how to evaluate it fairly and objectively is not easy question.[45] It is understandable that the Presidents would seek to appoint someone who shares political position, given that the nature and impact of the Supreme Court's decisions. While appointing personal friends to high-ranking offices may be tempting for Presidents, such appointments are likely to face backlash,[46] especially when the office requires a high degree of independence from external institutions. Even though the judicial branch is not an institution representing the people directly and the composition of courts need not mirror the composition of the population, the balancing of representation of the people has been regarded as one of the criteria selecting Supreme Court's Justices.[47] This balancing aims to promote diversity within the judiciary, which is generally perceived as legitimate. The specific categories to be considered depend on the demographic dynamics of each country, particularly identifying which categories constitute minorities.[48]

It is safe to say that these selections have been based on various factors including the candidate's merit, ideology, personal relationship with the President, and representativeness. These factors may vary depending on the circumstances and priorities of each President. For example, during President Moon Jae-In's

[44] Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (Oxford: Oxford University Press, 1992), 5. Similarly, Epstein and Posner identify four models depending on what factors the President mainly considers when appointing the Supreme Court's Justices. They are merits model(who is most qualified for the position), patronage model(to whom he owes a favor or whom he trusts to carry out his agenda), ideology model(who can be trusted to vote in an ideologically consistent way) and constituency model(characteristics that are in political demand, such as a regional pedigree or a specific racial, ethnic, or religious identity). Epstein and Posner, "Supreme Court's Justices' Loyalty to the President," *The Journal of Legal Studies* 45, no.2, (June 2016): 407.

[45] Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford: Oxford University Press, 2005), 43-44.

[46] Davis, *Electing Justice*, 45-46.

[47] Davis, *Electing Justice*, 46.

[48] For example, in the early days of the United States, the region of origin was considered as a factor for selecting Justices. However, today, categories such as race, ethnicity, gender are perceived as important factors in the selection process. Davis, *Electing Justice*, 47-51.

tenure (2017-2022), there appeared to be a consideration for representation in his appointments. He appointed one relatively young female judge and one local judge who had been serving in a specific region. Prior to this, President Roh Moo-Hyun (2003-2008) attempted to appoint a female Justice as the Chief Justice of the Constitutional Court, marking the first such appointment in Korea's history. More Recently, the incumbent President *Yoon Suk-Yeol* appointed his college classmate to the Chief Justice of the Constitutional Court with consent of the National Assembly.

In the Korean system, where the President is able to appoint Justices without anyone's consent, the President may prioritize personal relationships or political alignment of the candidate over their professional qualifications or integrity. While not always the case, Justices often tend to align their decisions with the President who appointed them.[49] The Presidents may expect that the Constitutional Court's Justices, whom they appointed, will refrain from opposing the President's major policies. Conversely, the Justices may feel a psychological obligation not to challenge the policies of the President who appointed them.

In Korea, particularly, the Constitutional Court handled impeachment trials against the President twice,[50] with the Court deciding to remove the President from office in the second case.[51] Out of this historical experience, the Presidents may prioritize personal friendship or loyalty over anything else as those appointees may take charge of an impeachment trial against the President himself in the future.[52]

---

[49] For the study about voting behavior of the Justices of the Supreme Court of U.S., see Lee Epstein & Eric A. Posner, "Supreme Court's Justices' Loyalty to the President," *The Journal of Legal Studies* 45, no.2 (June 2016): 401. According to Epstein & Posner, the Justices in the U.S. Supreme Court vote in a way that favors the Presidents who appointed them.

[50] 2004 Hun-Na1, May 14, 2004, 16-1 KCCR 609 (Case against President Moo-Hyun Roh); 2016Hun-Na1, March 10, 2017, 29-1 KCCR 1(case against President Geun-Hye Park).

[51] 2016Hun-Na1, March 10, 2017, KCCR 29-1, 1.

[52] However, there is no guarantee that Justices will make judgment in favor of the President who appointed them. In fact, in the impeachment case against President Park, the two Justices whom Park had appointed participated the opinion of the Court ruling to remove her from the office of President. 2016Hun-Na1, March 10, 2017, 29-1 KCCR 1.

3.3. Election by the National Assembly

3.3.1. The Political Parties' Selection

The three Justices of the Constitutional Court are elected by the National Assembly through voting during plenary session. Since the formation of the Court in 1988, the National Assembly has established a practice for distributing the power to recommend candidates among major parties. According to this practice, out of three seats for Justices elected by the National Assembly, one is recommended by the ruling party, one by the largest opposite party, and the third either by agreement between the ruling party and the largest opposition party or by the recommendation of the second largest opposition party, provided it holds considerable seats in the National Assembly. This practice originated as a political compromise between political parties.

Following the first general election under the current Constitution in April 1988, where no single party held a majority in the National Assembly and three opposition parties shared the majority,[53] the election of Justices of the Court was delayed due to the inability of political parties to agree on candidates. After prolonged debates, the three major parties reached a consensus, with each of them recommending one candidate respectively. The fourth largest party, holding 35 seats at that time, was excluded from this agreement. The National Assembly elected three Justices on September 15, 1988, two weeks after the Constitutional Court Act was went into effect on September 1.

After six years, when the term of office for Justices expired, the election process once again became a subject of debate due to the merger of the ruling party and two opposition parties, the third and fourth largest ones.[54] This merger led to the emergence of a dominant ruling party holding more than two-thirds of the total seats. The second largest party before the merger became a lone opposition party holding less than one-third of the total seat. The opposition

[53] Of the total 299 seats of the National Assembly, the Democratic Justice Party, a ruling party, won 125, the Peace Democratic Party 70, the Reunification Democratic Party 59, the New Democratic Republican Party 35, and the remaining seats, including independent members, accounted for 10.

[54] In January 1990, The Democratic Justice Party, the Reunification Democratic Party, the New Democratic Republican Party 35 announced to consolidate into a newly formed the Democratic Liberal Party.

party proposed that each of the ruling party and the opposition party nominate one Justice, while the remaining nominee would be recommended jointly by both parties. However, the ruling party insisted on its right to recommend two Justices in proportion to its number of seats. In the end, acceding the ruling party's insistence, among the three Justices elected, two were recommended by the ruling party, while one was recommended by the opposition party.

After that, no party managed to secure a two-thirds majority of the seats in the National Assembly. Consequently, the ruling party and the largest opposition party each recommended one candidate, while the remaining candidate was jointly recommended by these two parties. In 2018, with no political party holding a majority, the third largest party, wielding a casting vote, strongly asserted its right to recommend a candidate for the Constitutional Court's Justice. As a result, each of the three major party recommended a candidate respectively.

These practices illustrate that the authority to elect three Justices of the Constitutional Court, bestowed upon the National Assembly, is actually partitioned among major political parties through political negotiations. In reality, the selection of Justices is determined by the decisions of these major political parties, rather than through consensus among National Assembly members. In the process, appointment of a Justice requires a majority vote at a plenary session of the National Assembly, followed by the President's formal appointment.

However, it is exceedingly rare to be rejected by voting at the plenary session because political parties generally approve the candidates recommended by other parties in order to gain support for their own recommendations.[55] Additionally, the President's role in the appointment is purely ceremonial, lacking presidential veto power. Consequently, the election within the National Assembly effectively amounts to the appointment of the Justice. Put differently, the selection of a candidate by political party results in the appointment of a Justice without encountering significant difficulty. Consequently, there is a likelihood of political

[55] As seen below, there has been a case where a nominee recommended by an opposition party was rejected through voting during a plenary session.

and partisan lawyers being selected as Justices because political parties often consider political ideology as crucial factor for choice of the candidates.

3.3.2. Simple Majority for Election

The Constitution and the Constitutional Court Act do not stipulate the quorum for the election of a Justice of the Court. The Constitution of Korea provides that the quorum required for decision-making in the National Assembly is a simple majority, except as otherwise provided for in the Constitution or in Act.[56] Consequently, the quorum for election of Justices is a simple majority, allowing a political party with even a narrow majority to unilaterally select a Justice. There have been criticisms of this simple majority requirement, with some advocating for a supermajority such as three-fifths or two-thirds.[57]

The requirement for a supermajority of two-thirds votes often necessitates compromise between political parties, unless one political party holds more than two-thirds of the seats in the Parliament. Requiring a supermajority for the election of Justices could be expected to prevent the election of partisan candidates and ensure that more qualified people are appointed as Justices. In Germany, where requires the quorum for electing Justices requires a two-thirds majority,[58] it appears that politically moderate Justices are more likely to be elected.[59] In Spain, the quorum for the election of Justices is a three-fifths votes of either the House or the Senate.[60]

It is true that even the supermajority cannot always guarantee the qualification of Justice-elected. Even under requirement of supermajority, major parties sharing two-thirds of the parliamentary seats can circumvent the supermajority

[56] CONST. Art.49.

[57] Soo-Woong Han, *Heonbeobhak* [Constitutional Law] (Seoul: Bobmun Sa, 2021), 1411. In the case of Germany, as shown below, a two-thirds majority vote is required for the election of a Justice.

[58] The Bundestag elects Justices with a two-thirds majority of the votes cast and at least the majority of the votes of the Members of the Bundestag. The election shall be based upon proposals by the Selection Committee responsible for selecting the Justices. The Committee is composed of twelve Members of the Bundestag, in accordance with the principles of proportional representation. The Bundesrat elects Justices by two thirds of the votes of the Bundesrat. Bundesverfassungsgerichtsgesetz [Act on the Federal Constitutional Court] Part 1, Section.6(1), Section.7.

[59] Christoph Möllers, "Legality, Legitimacy, and Legitimation of the Federal Constitutional Court," in *The German Federal Constitutional Court: The Court Without Limit*, ed. Justin Collings (Oxford: Oxford University Press, 2020), 169.

[60] The Constitution of Spain, Art.159(1). The Spanish Constitutional Court's Justices are twelve. four of them are elected by the House of Representatives and four by the Senate.

requirement by agreeing on the distribution of opportunities for selecting Justices between each party.[61] More crucial than the quorum are stances of political parties regarding candidate selection and the political ethos emphasizing inter-party collaboration and compromise. Nonetheless, a supermajority can be a factor in shaping such attitudes and culture.

3.3.3. Hearing and Voting

Until the year 2000, there was no formal procedure for assessing the suitability of candidates before voting during plenary sessions in the National Assembly. In 2000, the National Assembly implemented a compulsory hearing process preceding voting during plenary sessions.[62] These hearings, often broadcasted either on air or online, aim not only to scrutinize candidate eligibility but also to influence public opinion about them. Nevertheless, these hearings often fall short of expectations. They frequently degenerate into arenas for political battles, devoid of substantive discussion on the candidates' qualifications for the position and their professional expertise.

Most candidates have been elected without difficulty because the recommendation powers were distributed and mutually recognized between major parties. There has been only one instance in which a candidate recommended by a political party was rejected during plenary session. In 2011, the ruling party-dominated National Assembly voted down a candidate recommended by the opposition party. The candidate, *Cho Yong-hwan*, was a well-known human rights lawyer who had led several decisions of the Constitutional Court declaring statutes and state actions unconstitutional, and his qualification and eligibility as a lawyer was not disputed. However, the ruling party criticized the candidate's statement regarding military submarine explosion, purportedly caused by a North Korean attack. During the hearing, the candidate said that he respected the government's announcement about the accident, but he also mentioned that

[61] In fact, the power of election of Justices has long been divided between two major parties, the Christian Democratic Union (CDU) and the Social Democratic Party (SPD) in Germany. Christoph Schönberger, "Karlsruhe", in *The German Federal Constitutional Court: The Court Without Limit*, ed. Justin Collings (Oxford: Oxford University Press, 2020), 6.

[62] The National Assembly Act, Art.46-3(1).

he could not be certain due to a lack of access to the documents relating the accident. This case can be seen as an example that political attacks against a candidate outweighed any considerations of a candidate's merit or qualification.[63]

3.4. Designation of the Chief of SC

3.4.1. Unusual Method of Appointment and Its Origin

In Korea, the Chief of SC holds the power to designate three Justices of the Constitutional Court.[64] Although it is the President who ultimately appoints them to Justices, the President's appointment is just formal and ceremonial without authority to refuse to appoint. Moreover, there is no additional process such as consent of the National Assembly. While parliamentary hearing is required by the National Assembly Act,[65] the opinion of the hearing committee of the National Assembly has no binding effect. In essence, the Chief of SC has actually the power to appoint three Justices.

There are the Constitutions, as seen above, in which the judiciary has the power to appoint of nominate the Constitutional Court's Justices. However, even in those cases, the power to appoint or nominate is vested in the judiciary itself as an institution or in joint meetings such as the General Council of the Judiciary, not in the Chief of SC individual. In Korea, judges other than Supreme Court's Justices are appointed by the Chief of SC, however, their appointments require the consent of the Council of Supreme Court's Justices.[66] Although, the Chief of SC can appoint three Justices of the Constitutional Court unilaterally without anyone's consent.

This method of appointment, granting the substantial power of appointment to the Chief of SC individually, originated from the Constitution of 1972.[67] As

[63] For an attempt to analyze the behavior of the members of the National Assembly at the confirmation hearing, based on this case, SeaYoung Sung & Joon Hyung Hong, "The Legislative-Judiciary Relationship Reflected in the Confirmation Hearings of the Constitutional Court's Justice of Korea: A Content Analysis of the Confirmation Committee Sessions of the Justice Nominee Cho Yong-hwan," *Korean Society and Public Administration*, 23(3) (2012): 349.

[64] CONST. Art.111(3).

[65] The National Assembly Act, Art.65-2(2).

[66] CONST. Art.104(3).

[67] Jong-Sup Chong, *Heonbeobhak-wonlon [Constitutional Law]* (Seoul: Parkyoung Publishing & Company, 2018), 1482.

explained above, the Constitution of 1960 had stipulated that the Constitutional Court would be composed by the nine Justices, appointed by the Senate of National Assembly, the President, and the Supreme Court, with three appointments each.[68] Importantly, it was "the Supreme Court" that had the authority to appoint, not "the Chief of SC". Subsequently, the Constitutional Court Act of 1961 provided that the authority to appoint the three Justices of the Constitutional Court belonged to the Council of Supreme Court's Justices, comprised of the Justices of the Supreme Court.[69] However, due to the military coup in 1961, the Constitutional Court could not be realized and the regime of the Constitution of 1960 fell down. Following the Constitution of 1962, which granted the judicial review to the Supreme Court, The Constitution of 1972 established the Constitutional Committee as an institution for constitutional adjudication.

The Constitution of 1972, as previously explained, was a nominal and decorative constitution, of which primary aim was not to guarantee individual's freedom and rights, but rather to strengthen the state power, particularly that of the President. Consequently, it was hardly expected for the Constitutional Committee to function effectively.[70]

The decision to confer the power to designate three members of the Constitutional Committee on the Chief of SC, rather than on the Council of the Supreme Court consisting of all Justices, may have been intended to facilitate the President's influence on the appointment of Constitutional Court's Justices. This approach makes it much easier to exert influence over a single Chief of SC rather than over all the Justices who comprise the Council of Supreme Court's Justices. Put differently, when the authority to select the three members of the Committee belongs solely to the Chief of SC rather than to an institution composed of many Justices, the intervention of the President in the Judiciary's selection process becomes much more feasible.

[68] The Constitution of 1960, Art.83-4.
[69] The Constitutional Court Act, Art.3(1).
[70] As mentioned above, there was not even a single decision by the Constitutional Committee.

3.4.2. Lack of Democratic Legitimacy

The Constitutional Court wields enormous power, including the authority to nullify laws passed by the legislature, dissolve political parties, and even remove high-level public officials, including the President, from office. In making these decisions, the Constitutional Court may act against the preferences of the majority of the population, raising questions about the principles of popular sovereignty and democracy. Constitutional adjudication inherently creates tension with democratic principles.

In order for the people to accept decisions that may contradict the will of the majority, it's crucial for people to have a stake in the selection process of decision-makers. While direct election of Constitutional Court's Justices might be impractical, people should have a means to influence or oversee the composition of the Court, at least through their representatives. From a standpoint of democratic legitimacy, granting the Chief of SC authority to designate three Justices is hardly to be justified, given the Chief of SC is neither elected by nor accountable to the people. The provision that confer on the Chief of SC the power to compose the Constitutional Court is the result of reception of the provision stipulated by the previous Constitution, which was enacted for authoritarian regime. Currently, most constitutional law scholars in Korea criticize the Chief of SC's power to designate three of the Constitutional Court's Justices, pointing out its lack of democratic legitimacy.[71]

In response to criticisms of the Chief of SC's authority to designate the Constitutional Court's Justices, the Supreme Court enacted a bylaw in 2018 (The Bylaw for the Committee of Recommendation Candidates for the Constitutional Court). The bylaw requires the Chief of SC to designate a Justice among those recommended by the Committee of Recommendation of Candidates for the Constitutional Court's Justice.[72] According to the bylaw, the Supreme Court

[71] For example, Nak-In Sung, *Heonbeonhak[Constitutional Law]* (Paju Bookcity: Bobmun Sa, 2023), 765; Jong-Sup Chong, *Heonbeobhak-wonlon [Constitutional Law]* (Seoul: Parkyoung Publishing & Company, 2018) 1482; Ha-Yurl Kim, *Heonbeonsosongbeob[Constitutional Litigation]* (Seoul: Parkyong Publishing & Company, 2021), 78; Hyo-Won Lee, Heonbeobjaepangangui[Lecture On Constitutinal Litigation] (Seoul: Parkyoung Publishing & Company, 2022), 59.

[72] The Bylaw for the Committee of Recommendation of Candidates for the Constitutional Court's Justice (enacted and enforced in April 18, 2018).

shall establish the Committee of Recommendation of the Constitutional Court's Justice candidates, composed of nine members including two Supreme Court's Justices, an ordinary court judge, the President of the Korean Bar Association, law professors and non-lawyers.[73] The Committee recommends candidates at least three times the number of the nominees be designated by the Chief of SC,[74] and the Chief of SC should respect the recommendation.[75]

The bylaw is not a regulation or court-rule, a kind of statutory norms that the Constitution explicitly authorizes,[76] but rather an internal rule that the Supreme Court can make and amend at its discretion. In addition, while the Chief of SC has to respect the recommendation, there is no legal obligation for the Chief of SC to comply it. Given the criticisms against the Chief of SC's designation of the Constitutional Court's Justices, it seems to be difficult for the Chief of SC to ignore the recommendations of the Committee. However, the recommendation by the Committee falls by far short of redeeming the lack of democratic legitimacy. Many of the members of the Committee are legal professionals, including two Supreme Court's Justices, and even the three non-lawyer members cannot represent the people. Although the Committee's recommendation by the Committee may help limit the abuse of the Chief of SC's designation power, it could not be considered a comprehensive solution. The legitimate solution lies in repealing the provision that grants the Chief of SC authority to compose the Constitutional Court through constitutional amendment.

3.5. Neutrality and Expertise

One of the justifications for granting the Chief of SC the power of designation is to enhance the political neutrality and expertise of the Constitutional Court.

---

[73] The members consist of senior Justices of the Supreme Court, the Minister of Court Administration who holds the post of Justice of the Supreme Court, the President of the Korean Bar Association, the President of the Korea Law Professors Association, the President of the Korean Association of Law Schools, a judge who is not a Justice of the Supreme Court, and three esteemed individuals with profound expertise in their respective fields, including at least one female member. The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.2.

[74] The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.8(2).

[75] The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.8(4).

[76] CONST. Art.108 "The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court."

Political neutrality is indeed a fundamental requirement for Justices. However, it's important to acknowledge that the Chief of SC also holds a political position personally. Moreover, the President may seek to appoint politically credible individuals to both the Supreme Court and the Constitutional Court. In this context, it may be advantageous for the President to nominate individuals who align politically and exhibit loyalty to the Chief of SC, who holds authority over the designation of three Constitutional Court's Justices and the recommendation of Supreme Court's Justice candidates for presidential appointment.[77] Essentially, the Chief of SC himself could have been chosen based on his political stance.

Therefore, relying solely on the Chief of SC to enhance the political neutrality of the Constitutional Court is a vague expectation. To ensure political neutrality, it would be preferable to grant the power of designation to the Conference of the Supreme Court's Justices rather than to the Chief of SC alone. In a draft of constitutional amendment proposed by the President in 2018, the Chief of SC's authority to designate Constitutional Court's Justices was indeed proposed to be transferred to the Conference of the Supreme Court's Justices.[78]

Another justification for the Chief of SC's designation of the Constitutional Court's Justices is to enhance professionalism and expertise. The constitutional adjudication is basically judicial action while it is different from traditional judicial action of ordinary courts in terms of jurisdiction and the impact of its decisions.[79] This is the reason why the Constitution requires qualification as judge for the Constitutional Court's Justices.[80] Therefore, expertise is a crucial factor in selecting candidates for Justices.[81] The Chief of SC's authority to designate

[77] In Korea, the Supreme Court's Justices shall be appointed by the President on the recommendation of the Chief of SC and with the consent of the National Assembly. CONST. Art.104(2).

[78] The President's Proposition for Amendment of the Constitution, Art.111(3). The Proposition was proposed by the then President Jae-In Moon, but rejected and discarded in the National Assembly.

[79] Some Constitutions explicitly state that the Constitutional Court's actions belong to the judicial power. For example, the German Basic Law provides "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the Länder." in Article 92. Similarly, the Indonesian Constitution makes it clear that the Constitutional Court implements the judicial power in Art.24(2).

[80] CONST. Art.111(2).

[81] For explanation of the principles of the composition of the Constitutional Court as democracy, professionalism, and independence, Jongcheol Kim, "Heonbeobjaepanso Guseongbangbeob-ui Gaehyeoglon [A Proposal for Reform in the Composition of the Constitutional Court]," *Constitutional Law* 11, no.2 (June 2005): 18-24.

presupposes that the Chief of SC would prioritize merit or qualifications as a lawyer than the National Assembly or the President when selecting candidates for Justices. It might be expected that the Chief of SC, as the head of the judiciary, would be able to find and designate the most suitable persons for Justices, considering their expertise.

However, the reality in Korea differs from this ideal. Firstly, it is difficult to assert that the expertise has been always the primary criterion in selecting Justices. Among the Justices designated by the Chief of SC since establishment of the Constitutional Court, all but one have been incumbent or former judges of the ordinary courts.[82] However, experience as a judge in ordinary court does not necessarily guarantee the expertise in constitutional adjudication. Interpreting the Constitution, which provides highly abstract provisions and implies fundamental values, is different from interpreting other statutory provisions.[83] As explained above, when the Korean Constitution was first enacted in 1948, one of the reasons for establishing the Constitutional Committee for constitutional adjudication separate from was due to doubts about the capability of ordinary court judges for constitutional adjudication.[84] Even today, under the dualized system of the Judiciary, which consists of ordinary courts and the Constitutional Court, it can be generally said that the ordinary court's judges are not familiar with constitutional adjudication.

More problematic is the situation where the Supreme Court of Korea competes with the Constitutional Court for the position of the highest body in judicial power. In this context, the Chief of SC has often utilized the power to designate the Constitutional Court Justices in a manner that diminishes the status of the Constitutional Court. This is achieved by appointing comparatively lower-profile or lower-ranked judges, in the name of promoting diversity. These designations may foster a sense of gratitude and loyalty to the Chief of SC among the

[82] Out of twenty-one Justices the Chief of SCs designated since the establishment of the Constitutional Court, seventeen were incumbent judges and three were former judge.

[83] He-Su Choi, "*Heonbeobjaepanso Gusung Immyoung Deonggwa Gwanleonhan Gaejongbanghyang* [Directions for Amending the Constitutional Law and Constitutional Court Law for the Appointment, Personnel Structure, etc. of Constitutional Judges in the Korean Constitutional Court]," *Constituional Law* 17, no.2 (June 2011): 172-173.

[84] See Jin-Oh Yoo, *Heonbeob-Gicho-Hoegorok* [The Memoirs of Drafting the Constitution] (Seoul: Iljogak, 1980), 41-42.

designated Justices. The revelation that the authority to designate Constitutional Court Justices could be intentionally used to weaken the Constitutional Court's status by the Chief of SC came as a significant shock, particularly when it was confirmed in internal reports of the Supreme Court revealed during the criminal prosecution of a former Chief of SC.[85]

IV. TERM OF OFFICE, REAPPOINTMENT AND VACANCIES

4.1. Term of Office

4.1.1. Short Term of Office

The Constitution provides that the term of the office of the Constitutional Court's Justice is six years.[86] The Constitutional Court's Justice's term of office varies among countries, many constitutions establish terms from nine to twelve years.[87] Six-year term may be considered comparatively short for the Constitutional Court's Justice. While long terms, such as those of the U.S. Supreme Court's Justices with life tenure raises concerns about legal stagnation, short term of Justiceship is also problematic.

Primarily, frequent replacement of Justices may threaten the stability of constitutional interpretation. Changes in the composition of the Constitutional Court can lead to shifts in the interpretation of the Constitution. Even though the change of interpretation of the Constitution is unavoidable and even necessary, excessive fluctuation in constitutional meaning is undesirable. The Constitution, being the highest norm, ought to maintain stability in its textual content and meaning. The frequent Justice's replacement is detrimental to the coherence of the case law of the Court. The relatively frequent overruling of precedents of the Korean Constitutional Court may be attributed to the short terms of its Justices.

Additionally, the relatively short term of the office presents concerns about expertise. In Korea, where the ordinary courts and the Constitutional Court are separated, the newly appointed Justices lack expertise in constitutional

[85] Hangyooreh newspaper, "The Chief of SC Yang's Supreme Court Plans to Weaken the Constitutional Court Through Designating Low-profile Judges," August 8, 2018.

[86] CONST. Art.112(1).

[87] There are countries of which Constitutional Court's Justice's term is nine years, such as France, Italy, Spain and Portugal, and 12 years such as Germany, South Africa and Hungary.

adjudication. It may be exacerbated when most Justices are appointed from among former judges of the ordinary courts. While the expertise can be partly supplemented by the assistance of rapporteur judges, who are the judicial assistants employed by the Court,[88] it is undeniable that the expertise of Justices holds significantly more weight for proper constitutional adjudications. The short tenure of office compels Justices to retire before they can develop thorough expertise in constitutional adjudication.

Furthermore, the Constitutional Court Act stipulates a retirement age of seventy, [89] which poses a problem as it shortens the term of office guaranteed by the Constitution through legislative means. This is particularly concerning because it further diminishes the already brief tenure of Justices.

4.1.2. The Chief Justice's Term

The Chief Justice of the Constitutional Court (hereinafter, "the Chief Justice") represents the Constitutional Court, oversees the affairs of the Constitutional Court, and directs and supervises the public officials under his or her authority.[90] The Constitution provides that the Chief Justice shall be appointed by the President from among the Justices with the consent of the National Assembly.[91]

The Constitution does not specify the term of the Chief Justice, and the Constitutional Court Act also remains silent on this matter. In the past, the President had appointed an individual who was not an incumbent Justice as the Chief Justice. When the President appoints someone who is not currently a Justice to the Chief Justice, the appointee serves for six years, the term of a Justice. Since 1988, four consecutive Chief Justices had served six-year terms. However, a shift occurred after the appointment of the fifth Chief Justice in 2013, where Presidents began appointing incumbent Justices to the role of the Chief Justice. Since then, the four subsequent Chief Justices were appointed

[88] The Rapporteur Judges are public officials in special service for investigation and research concerning the review and adjudication of cases under the order of the President of the Constitutional Court. The Constitutional Court Act, Art.19. For discussion of various model of the judicial assistant of the constitutional courts, see Hwanghee Lee, "*Heonbeob-Yeongugwan-Jedo-ui Model* [Models of Judicial Assistants at Constitutional Courts]," *Public Law* 49, no.4 (June 2021): 81.

[89] The Constitutional Court Act, Art.7(2).

[90] The Constitutional Court Act, Art.12(3).

[91] CONST. Art.111(4).

while they were serving as Justices. This practice raises concerns regarding the independence of the Constitutional Court.

Firstly, the President can appoint Chief Justices more than twice and to make the influence on the Court last longer. Given the absence of provisions regarding the term of office for the Chief Justice in both the Constitution and the Constitutional Court Act, when an incumbent Justice is appointed as Chief Justice, the length of the Chief Justice's term depends on the remaining term of the incumbent. If the President appoints an incumbent whose remaining term is shorter than the President's own remaining term in office, the President will have another opportunity to appoint a Chief Justice after the term of the newly appointed Chief Justice ends. Since Constitutional Court Justices serve a six-year term, longer than the President's five-year term, the President cannot appoint the same seats of Justices during their own presidential term. A similar consideration should be applied to the appointment of the Chief Justice. Therefore, it is undesirable for the President to appoint an incumbent Justice as Chief Justice if the incumbent's term is shorter than the President's term.

Secondly, appointing an incumbent Justice as Chief Justice gives the President more influence in shaping the composition of the Court. According to the Constitution, the President can select only three Justices while appointing all nine Justices. When the President appoints a non-incumbent as Chief Justice, the President can choose two Justices and one Chief Justice who concurrently holds the position of Justice. However, if the President appoints an incumbent Justice as Chief Justice, then the President can choose three Justices and additionally pick another person as Chief Justice from among the incumbent Justices.

4.2. Reappointment

Under the Constitution of Korea, Justices are allowed to be reappointed.[92] There were two Justices reappointed in the early days of the Constitutional Court. Justices can be appointed as the Chief Justice when being reappointed.[93] As there

[92] CONST. Art.112(1). Before 2014, there was difference between the associate Justice and the Chief of SC in retirement age, the former was sixty-five and the latter seventy.

[93] In 2013, a former Constitutional Court's Justice was nominated as Chief of SC of the Court, but he resigned from the position of nominee after big controversies over various allegations raised at the personnel hearing.

is no regulation about the reappointment of the Chief Justice, the Chief Justice also can be reappointed theoretically. It is worth to note that the Constitution prohibits reappointment of the Chief of SC.[94]

The reappointment of Justices threatens the judicial independence of the Constitutional Court, especially when Justice terms are short. Justices seeking to be reappointed may be inclined to be align their decisions with the political position of the appointing authority. It is desirable to lengthen the term of office for Justices for enhancing their expertise and to prohibit reappointment for reinforcing judicial independence of the Court. However, these changes would require an amendment to the Constitution.

4.3. Prolonged Vacancies

The Constitution stipulates that Constitutional Court consists of nine Justices. Therefore, the filling the vacancy of Justice seats is not just an authority, but also a constitutional obligation of those state agencies which have authority to comprise the Court. The Constitutional Court Act provides that the successor should be appointed by no later than on the date the vacancy occurs when the term of office of the Justices expires and the Justices reaches retirement age.[95] In case that the vacancy occurs unexpectedly on which during the term, the successor should be appointed by within 30 days from the date.[96] Notwithstanding these provisions, Justice vacancies often extend the 30-day period.

Occasional delays in the Justice appointment process may be understandable due to the time required to identify potential candidates and assess their qualifications and abilities. Although the Constitutional Court has interpreted the aforementioned provisions of the Constitutional Court Act as non-binding, the Court has ruled that failure by the National Assembly to elect a successor within a reasonable period amounts to unconstitutional nonfeasance.[97] This decision was about the case where a Justice's vacancy lasted for a year and two

[94] CONST. Art.105(1).
[95] The Constitutional Court Act Art.6(3).
[96] The Constitutional Court Act Art.6(4).
[97] 2012Hun-Ma2, April 24, 2014, 26-1(2) KCCR 209, 214-217. The vacancy began on July 8, 2011 and finished on September 20, 2012 when successor took the office.

months. The prolonged vacancies have occurred with even Chief Justice seats, lasting from three months to nine months.

The prolonged vacancy of the Justice may pose obstacles to the proper functioning of the Constitutional Court and could potentially distort the outcomes of specific cases. The Constitution mandates a super-majority quorum for many decisions, such as those concerning the unconstitutionality of laws, impeachment, dissolution of political parties, or infringements of constitutional rights, which require six or more votes, rather than a simple majority of the Justices.[98] Additionally, the Constitutional Court Act stipulates that overruling precedents also requires a super-majority of six or more votes.[99] Furthermore, under the Constitutional Court Act, a case can be reviewed and decided upon with the presence of seven or more Justices.[100] Therefore, even the absence of one Justice can significantly impact the conclusions of decisions. On the other hand, individuals have the right to a fair trial, including the right to a fair trial in constitutional adjudication. Trial by the Constitutional Court with a vacancy in the Justice seat may infringe upon the petitioner's right to a fair trial in a constitutional complaint.[101]

Although the substitute justices may be considered, the introduction of a substitute justice system raises constitutional concerns under the current Constitution, which explicitly stipulates the number of Justices of the Constitutional Court and the process of their appointment.

V. CONCLUSION

The composition of the Constitutional Court is a crucial aspect for the realization of constitutionalism. While the founder of the current Constitution may have prioritized the establishment of constitutional democracy through the Constitutional Court, less attention may have been paid to how the Court should be organized. Despite the Constitutional Court's significant contributions

[98] CONST. Art.113(1).
[99] The Constitutional Court Act, Art.23(2).
[100] The Constitutional Court Act, Art.23(1).
[101] 2012Hun-Ma2, April 24, 2014, 26-1(2) KCCR 209, 214.

to the establishment of constitutional democracy in Korea, criticisms have been raised regarding the composition of the Court in both its institutional structure and operational practices.

The Constitution of Korea entrusts the composition of the Constitutional Court to the President, the National Assembly, and the Chief of the Supreme Court. While this method of composition may be perceived as a cooperative effort among the three branches of government, it also allows each department to independently exercise their composing power without considering the opinions of the other branches.

Under the current system of composition of the Constitutional Court, several issues have been highlighted, including the process of appointment, the relatively short term of office, the allowance for reappointment, the absence of a specified term for the Chief Justice, and the potential for prolonged vacancies of seats. These issues are examined in light of democratic legitimation, judicial independence, and the professionalism of the Constitutional Court, and ultimately could be resolved only through amending the Constitution.

BIBLIOGRAPHY

Abraham, Henry J. *Justices and Presidents: A Political History of Appointments to the Supreme Court*, Oxford: Oxford University Press, 1992.

Act on the German Federal Constitutional Court, Part 1, Section 6(1), 7.

Bickel, Alexander. *The Least Dangerous Branch*, New York: The Bobbs-Merrill Co., Inc., 1962.

Cappelletti, Cappelletti. *Judicial Review in the Contemporary World*. Indianapolis, Kansas City, New York: The Bobbs-Merrill Company, 1971.

Chong, Jong-Sup. Heonbeonsosongbeob [Constitutional Litigation]. Seoul: Parkyoung Publishing & Company, 2008.

Davis, Richard. *Electing Justice: Fixing the Supreme Court Nomination Process*. Oxford: Oxford University Press, 2005.

Epstein, Lee and Eric A. Posner. "Supreme Court's Justices' Loyalty to the President." *The Journal of Legal Studies* 45, no.2, (June 2016): 401. https://www.journals.uchicago.edu/doi/epdf/10.1086/688395.

Hae-Cheol, Byun. "*Indonesia Heonbeobjaepanjedo-e Gwanhan Sogo* [A Study on The Indonesian Constitutional Review System]." *HUFS Law Review* 41, no.1 (2017): 103.

Hakseon, Jeon. "*Italia-ui Heonbeobjepanjedo* [La Justice constituionnelle en Italie]." *World Constitutional Law Review* 16, no. 3 (2010): 543.

Hangyooreh Newspaper. "The Chief of SC Yang's Supreme Court Plans to Weaken the Constitutional Court Through Designating Low-profile Judges." August 8, 2018. https://www.hani.co.kr/arti/society/society_general/856847.html

Han, Dong-Hoon et al. *Heonbeobjaepanso Jepangwanuie Jagyeok, Guseongbangsik Mit Imgi* [The Composition of Constitutional Court, Qualifications and Term of Office of a Justice]. Seoul: Constitutional Research Institute, 2011.

Han, Soo-Woong. *Heonbeobhak* [Constitutional Law]. Seoul: Bobmun Sa, 2021.

He-Su, Choi. "*Heonbeobjaepanso Gusung Immyoung Deonggwa Gwanleonhan Gaejongbanghyang* [Directions for Amending the Constitutional Law and Constitutional Court Law for the Appointment, Personnel Structure, etc. of Constitutional Judges in the Korean Constitutional Court]." *Constituional Law* 17, no.2 (June 2011): 161.

Hwanghee Lee. "*Heonbeob-Yeongugwan-Jedo-ui Model* [Models of Judicial Assistants at Constitutional Courts]." *Public Law* 49, no.4 (June 2021). 81.

Hyo-jin, Kim. "Constitutional Court's Justice nominee accused of illegally trading." *The Korea Times*, August 31, 2017. https://www.koreatimes.co.kr/www/nation/2024/03/113_235734.html.

Jongcheol, Kim. "*Heonbeobjaepanso Guseongbangbeob-ui Gaehyeoglon* [A Proposal for Reform in the Composition of the Constitutional Court]." *Constitutional Law* 11, no.2 (June 2005): 9.

Kim, Ha-Yurl. *Heonbeonsosongbeob* [Constitutional Litigation]. Seoul: Parkyong Publishing & Company, 2021.

Korean Constitutional Court, 2004 Hun-Na 1, May 14, 2004, vol.16 no.1, Korean Constitutional Court's Report, 609.

Korean Constitutional Court, 2004 Hun-Ma 554, October 21, 2004, vol.16, no.2-2, Korean Constitutional Court's Report, 1.

Korean Constitutional Court, 2012 Hun-Ma 2, April 24, 2014, vol.26-1, no.2, Korean Constitutional Court's Report, 209.

Korean Constitutional Court, 2013 Hun-Da 1, December 19, 2014, vol.26, no.2-2, Korean Constitutional Court's Report, 1.

Korean Constitutional Court, 2016 Hun-Na 1, March 10, 2017, vol.29, no.1, Korean Constitutional Court's Report, 1.

Lee, Hyo-Won. *Heonbeobjaepangangui* [Lecture On Constitutinal Litigation]. Seoul: Parkyoung Publishing & Company, 2022.

Möllers, Christoph. "Legality, Legitimacy, and Legitimation of the Federal Constitutional Court." In *The German Federal Constitutional Court: The Court Without Limit*, ed. by Justin Collings, 131-196. Oxford: Oxford University Press, 2020.

Schönberger, Christoph. "Karlsruhe." In *The German Federal Constitutional Court: The Court Without Limit*, edited by Justin Collings, 1-31. Oxford: Oxford University Press, 2020.

Sung, Nak-In. *Heonbeonhak* [Constitutional Law]. Paju: Bobmun Sa, 2023.

Sung, Sea Young and Hong Joon Hyung. "*Heonbeobjaepanso Jaepangwan Insacheongmunhoee Natanan Jeongchiwa Sabeob-ui Gwangye* [The Legislative-Judiciary Relationship Reflected in the Confirmation Hearings of the Constitutional Court's Justice of Korea: A Content Analysis of the Confirmation Committee Sessions of the Justice Nominee Cho Yong-hwan]." *Korean Society and Public Administration* 23, no.3 (2012): 349.

The Constitutional Court of Korea. *The Twenty Years Of The Constitutional Court*. Seoul: The Constitutional Court of Korea, 2008.

The Constitution of Korea 1948, Article 47, 81.

The Constitution of Korea 1960, Article 83-4.

The Constitution of Korea 1962, Article 7(3), 62, 102(1).

The Constitution of Korea 1972, Article 40, 53, 109.

The Constitution of Korea 1987, Article 49, 104, 108, 111, 112, 114(2), 105(1), 130.

The Constitution of Indonesia, Article 24, 24C(3).

The Constitution of Italy, Article 135(1).

The Constitution of Mongolia, Article 65(1).

The Constitution of the Republic of Bulgaria, Article 147(1).

The Constitution of Spain, Article 159(1).

The German Basic Law, Article 92.

The Constitutional Committee Act of Korea, Article 15.

The Constitutional Court Act of Korea 1961, Article 3(1).

The Constitutional Court Act of Korea, Article 6(3), 6(4), 7(2), 12(3), 19, 23(1), 23(2).

The National Assembly Act of Korea, Article 46-3(1), 65-2(2).

The Personnel Hearing Act of Korea, Article 9(2), 11(2).

The Supreme Court, June 22th, 1971, 70 Da 1010 (Plenary Session).

Tushnet, Mark. *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press, 1999.

Yoo, Jin-Oh. *Heonbeob-Gicho-Hoegorok* [The Memoirs of Drafting the Constitution]. Seoul: Iljogak, 1980.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1012

Local Chief Executive Political Accountability In Indonesia: A Historical-Legal Analysis

Ahsanul Minan[*]
University of Indonesia
ahsanul.minan81@ui.ac.id

Satya Arinanto[**]
University of Indonesia
satya.arinanto@ui.ac.id

Djohermansyah Djohan[***]
The Internal Affairs Governance Institute (IPDN)
djohermansyah@ipdn.ac.id

Received: 7 March 2022 | Last Revised: 8 February 2023 | Accepted: 15 January 2024

Abstract

This paper discusses the local chief executive's (LCE) political accountability in the Local Government Acts (LGAs). Using historical and theoretical approaches, this article examines the influence of the political interests of the regimes on the changes of provisions on LCE's political accountability in the LGAs from 1945 to date. The LCE was accountable to the local council (DPRD) from 1945-1958 and 1999-2004; and to the central government from 1959-1998. While since 2004, the LCEs are only had to report -but not be accountable- to the Central Government, local council and the local community. Two important academic questions arise when dealing with this phenomenon. First, to what extent are the political interests of the democratic and authoritarian regimes shaped the changes of provisions on LCE political accountability in the LGAs? Second, how do the provisions conform to the accountability principles? This study's result shows that the rulers' political orientation shaped the LCEs' political accountability system and ignored the principles of accountability, leading to the inconsistent

[*] Doctoral student in the Constitutional Law program at the Faculty of Law, University of Indonesia; Lecturer at the Law Department, Faculty of Law, University of Nahdlatul Ulama Indonesia.
[**] Lecture at the Constitutional Law Department, Faculty of Law, University of Indonesia.
[***] Lecture at The Faculty of Political Government, Internal Affairs Governance Institute (IPDN).

institutional design of LCE accountability. Furthermore, the LGA has yet to regulate the electoral/political accountability of LCEs, which should be a consequence of adopting the LCE direct election. We recommend precise arrangements on the accountability principle in the Constitution to avoid the politicization of laws by legislators according to their political interests and improve the role of Citizens through a recall petition to strengthen the enforcement mechanisms.

Keywords: Constitution; Decentralization; Local Accountability; Political Configuration

I. INTRODUCTION

Decentralization in Indonesia is intended to strengthen public accountability as a means of protecting the interests of local communities.[1] Accountability broadly defined as an obligation to account for the success or failure implementation of the organization's mission through a media of accountability. It is a crucial factor in a representative democracy system to avoid abuse of the people's mandate by representatives,[2] to prevent corruption,[3] to optimize the performance of the government.[4] Accountability is an indispensable part of decentralization and serves as a balancing force.[5]

LGAs regulate the LCEs' accountability system. In contrast to the local chief executive administrative and fiscal accountability to DPRD and the Central Government, which are clearly and consistently regulated in the Local Government Act Number 1 of 1945 to Law Number 9 of 2015, these laws stipulate the political accountability system differently.

In the old order administration, the local chief executive was accountable for Central Indonesian National Committee at local level (KNIP Daerah) who served

[1] Ryaas Rasyid, "Regional Autonomy and Local Politics in Indonesia," in *Local Power and Politics in Indonesia*, ed. Edward Aspinall and Greg Feal (Canberra: Research School of Southeast Asian Studies - The Australian National University, 2003).

[2] W. T Stanbury, *Accountability to Citizens in the Westminster Model of Government: More Myth than Reality* (Vancouver: Fraser Institute Digital Publication, 2003).

[3] Laurence Ferry, Peter Eckersley, and Zamzulaila Zakaria, "Accountability and Transparency in English Local Government: Moving from 'Matching Parts' to 'Awkward Couple'?," *Financial Accountability and Management* 31, no. 3 (2015): 345–361, https://doi.org/10.1111/faam.12060.

[4] Mark Bovens, "The Concept of Public Accountability," in *The Oxford Handbook of Public Management*, ed. E. Ferlie, L. E. Lynn Jnr., and C. Pollitt (Oxford: Oxford University Press, 2005), 182-208.

[5] Jesse Ribot and Arun Agrawal, "Accountability in Decentralization : A Framework with South Asian and West African Cases," *The Journal of Developing Areas* 33, no. 4 (1999): 473-502, http://dx.doi.org/10.2307/4192885.

as local council as regulated in LGA 1 of 1945. KNIP Daerah had the power to question, assess and sanction LCEs as part of horizontal accountability. In the New Order government, the LGA 5 of 1974 stipulated the LCEs' accountability to the central government. Hence DPRD lost its role in evaluating LCEs' performance, and only the central government had the authority to assess and impose sanctions on them. Meanwhile, in the reformation era's first five years (1999-2003), the LGA 22 of 1999 reinstated the political accountability of LCEs to the DPRD.

However, when the people directly elected the local chief executive in 2004, the LCEs' political accountability system, as regulated in the LGA 32 of 2004 and the LGA 23 of 2014, showed an unclear direction. Instead of being accountable to their constituents, local chief executives only submit reports on local government administration to the central government, DPRD and the public. As a result, as holders of sovereignty that shall be involved in achieving an accountability system,[6] the resident do not have the power to judge and impose sanctions on the poor-performing local chief executives.

Despite these changes, the LCE political accountability needs to be fixed. The LCEs' accountability to the central government in the era of Guided Democracy and the New Order caused LCE to pay less attention to local aspirations. When the LCEs were responsible to the DPRD at the beginning of the reformation era, the DPRD tended to use its authority to impose its interests on the LCEs, thus triggering political turmoil in the region. Meanwhile, the absence of LCEs' political accountability system in the current era has even led to the uncontrolled performance of LCEs. The central authority commonly emphasizes administrative accountability, while DPRD tend to use horizontal accountability instruments as a political weapon. Suppose power is decentralized to actors who are responsible only to higher authorities in the government structure or to the local council; decentralization is unlikely to achieve its stated goals.

[6] Richard Mulgan, "Accountability: An Ever-Expanding Concept?," *Public Administration* 78, no. 3 (2000): 555-573, https://doi.org/10.1111/1467-9299.00218.

Here we argue that the LCEs' political accountability system needs to be regulated clearly and consistently by referring to the principles of accountability, the local administration system, and the LCEs' appointment system. Accountability at the local level must entail four principles, including setting accountability standards, obtaining information on policies and actions to be assessed, making judgments about the conformity of policies and actions with standards, and imposing sanctions on unsatisfactory performances.[7] The head of an autonomous region in the unitary state system must be administratively responsible to the central government. The elected LCE shall be accountable to voters.[8]

This research will answer three questions: how did the different historical junctures shape local chief executives' accountability systems? How is the conformity of the LCE accountability norms in the LGAs with the enforcement principles as one of the four accountability principles introduced by The International Institute for Democracy and Electoral Assistance (IDEA)?[9]

II. METHOD

This research adopts a qualitative method to obtain a deeper understanding of Indonesia's local chief political accountability system to explore and critically analyze various phenomena surrounding the study's object.[10] This study uses a legal-historical approach to examine the different historical junctures on the characteristics of legal products. According to Pathak,[11] legal-historical research presents a fascinating picture of the working of the law. It reveals facts crucial to unravelling many a legal problem that requires often looking back to the past.

---

7 Anuradha Joshi, "Do They Work? Assessing the Impact of Transparency and Accountability Initiatives in Service Delivery," *Development Policy Review* 31, no. 1 (2013): 29-48, https://doi.org/10.1111/dpr.12018.

8 Abraham Rugo Muriu, "Decentralization, Citizen Participation and Local Public Service Delivery: A Study on the Nature and Influence of Citizen Participation on Decentralized Service Delivery in Kenya" (Thesis (published) submitted for the submission at Universitätsverlag Potsdam, 2013).

9 Andrés Mejía Acosta, Anuradha Joshi, and Graeme Ramshaw, *International Institute for Democracy and Electoral Assistance IDEA Democratic Accountability and Service Delivery-A Desk Review* (Sweden: International IDEA, 2013), https://www.idea.int/.

10 John W. Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*, 4th ed. (California: SAGE Publications Inc., 2014).

11 Rabindra Kr. Pathak, "Historical Approach to Legal Research," in *Legal Research and Methodology Perspectives, Process and Practice*, ed. B.C. Nirmal, Rajnish Kumar Singh, and Arti Nirmal (India: Satyam Law International, 2019), 1295.

The reason behind the choice of the legal-historical approach is sustained by the fact that the law formation process is inextricably linked to the conception and the structure of political power.[12] At the same time, the legislative and government institutions are parts of political institutions.[13] Hence, in the rule of law system, the constitution should provide normative boundaries to prevent the politicization of law in the law-making process.

In addition, this study also utilizes a theory-driven approach, using several theories on political accountability to analyze the proposed topic. It allows researchers to build a corpus of robust scientific knowledge through theory testing.[14] The theories are primarily used to develop a suitable conceptual framework as the basis for conducting data analysis.

Primary data are collected by interviewing experts, while secondary data are collected from relevant books, journals, and articles on the statutory regulations of local government and political history literature in Indonesia. The collected data are analyzed and interpreted using qualitative analysis and then placed within a conceptual framework.[15] The final step is presenting interpretation by explicating a compact story from the interconnections of the categories.

III. ANALYSIS & DISCUSSION

3.1. Understanding Political Accountability in Decentralized Government

Decentralization aims to improve efficiency, equity, greater participation, and responsiveness of the government to citizens[16] by giving authority to local governments.[17] However, the effectiveness of decentralization hinges on

[12] Daniel S. Lev, *Hukum dan Politik di Indonesia [Law and Politics in Indonesia]* (Jakarta: LP3ES, 1990).

[13] Miro Cerar, "The Relationship between Law and Politics," *Sword and Scales : An Examination of the Relationship between Law and Politics* 15, no. 1 (2009), https://digitalcommons.law.ggu.edu/annlsurvey/vol15/iss1/3.

[14] Philip J. Cash, "Developing Theory-Driven Design Research," *Design Studies* 56 (2018): 84-119, https://doi.org/10.1016/j.destud.2018.03.002.

[15] Creswell, *Research Design: Qualitative*.

[16] Michael Mbate, "Decentralisation, Governance and Accountability: Theory and Evidence," *Journal of African Democracy and Development* 1, no. 2 (2017): 1-16, www.kas.de/Uganda/en/.

[17] Markus Böckenförde, "A Practical Guide to Decentralized Forms of Government" (Paper (published) presented as part of the Constitution Building Programme implemented by International IDEA with funding from the Royal Norwegian Ministry of Foreign Affairs, 2011).

accountability. The absence of an accountability system will eliminate control over local government administrators or distance their range of control so that local governments can act arbitrarily or only serve their interests.[18]

Lindberg[19] emphasized the importance of looking at sources in the accountability relationship, the level of control, and the spatial direction of the accountability relationship. The source of authority that comes from superiors, as in the government structure, will produce a form of administrative/bureaucratic accountability that is vertical, the source of authority from the council in the context of representative democracy produces a form of horizontal accountability,[20] while the source of authority from the voters will produce political/electoral accountability.[21]

In the last few decades, local autonomy has incorporated features of political decentralization. Political decentralization aims to enable local people to elect (directly or indirectly) public officials, thereby strengthening their political accountability to their constituents.[22] Political decentralization opens political competition at the local level, tightens the circle of accountability between public and public officials,[23] and increases the political accountability of local government officials to their constituencies. It allows constituent as principals to evaluate and sanction poor-performing agents (LCE).[24] Only if constituents use accountability as a balancing force that decentralization is most likely to be effective.[25]

---

[18] Bovens, "The Concept of Public."

[19] Staffan I Lindberg, "Accountability: The Core Concept and Its Subtypes" (Paper (published) presented for the Africa Power and Politics Programme (APPP) by the Overseas Development Institute, 2009).

[20] Guillermo O'Donnell, "Horizontal Accountability in New Democracies," *Journal of Democracy* 9, no. 3 (1998): 112-26, https://doi.org/10.1515/9781685854133-004.

[21] Edward Brenya et al., "Democratic Institutions and Political Accountability : A Case Study of Ghana's Fourth Republican Parliament," *The International Journal of Humanities & Social Studies* 2, no. 12 (2014): 52-67, http://www.theijhss.com/.

[22] Sujit Choudry, Michael Heyman, and Richard Stacey, *Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa* (Center for Constitutional Transitions, International IDEA and the United Nations Development Programme, 2014).

[23] Jean-Paul Faguet, "Decentralization and Local Government Performance" (Paper (published) is taken from a study at Centre for Economic Performance and Development Studies Institute, London School of Economics and financed by a grant from the World Bank Research Committee, 1997).

[24] Andreas Schedler, "Conceptualizing Accountability," in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Diamond, and F. Marc Plattner (London: Lynn Rienner Publisher, Inc., 1999).

[25] Ribot and Agrawal, "Accountability in Decentralization."

3.2. Local Chief Political Accountability System in Indonesia: Problems and Its Consequences

Regulatory provisions regarding the political accountability system of LCEs that have been continuously changing in the seven decades of the Indonesian nation's journey indicate that this nation is still searching for the right design. It is inseparable from the decisions of different ruling regimes regarding the political decentralization model and the pattern of relations between the central government and local governments within the framework of a unitary state system. The following chapters show these relationships with its various consequences.

3.2.1. Political Configuration and It's Effects

Referring to Sato,[26] an analysis of Indonesia's political configuration can be divided into five sections, namely liberal democracy era, guided democracy era, the first and second phases of the new order era, and the current reformasi era.

From the outset, government system in the liberal democracy era (1945-1958) adopted a presidential system.[27] However, at the suggestion of the Central Indonesian National Committee (KNIP), the government issued a government decree on 14 November 1945, marking the dawn of the parliamentary system.[28] The government also issued a declaration on 3 November 1945 as a transition to a parliamentary system that provided the people with ample opportunities to establish political parties, thereby giving rise to a multi-party system. The parliament showed high productivity in producing hundreds of laws, dozens of motions and interpellations, the right of inquiry, and the right to budget.

In this liberal configuration, three laws on local government were enacted, reflecting the supremacy of local councils. Law Number 1 of 1945 regulates the Local Indonesian National Committee (KNID) as a local council.[29] The Local

[26] Yuri Sato, "Democratizing Indonesia: Reformasi Period in Historical Perspective," *IDE JETRO* 1 (2003): 1-31, https://www.ide.go.jp.

[27] Despite it being categorized as a quasi-presidential system by a number of constitutional law experts. See Moh. Kusnardi and Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia [Introduction to the Indonesian Constitutional Law]* (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum UI, 1983).

[28] Juniarto, *Sejarah Ketatanegaraan Republik Indonesia [Constitutional History of the Republic of Indonesia]* (Jakarta: Bumi Aksara, 1990).

[29] Law No. 1 of 1945 on Regulations Regarding the Position of Regional National Committees.

Government Agency, led by the regional head, is responsible to the KNID (Article 3 of Law Number 1 of 1945), leading to a horizontal accountability system for LCEs.

Under the Law Number 22 of 1948,[30] DPRD plays a role in the nomination of LCEs to be appointed by authorized officials (Article 18), thereby indicating the increasingly stronger position and role of the DPRD in determining LCE candidates. The LCE is responsible to and obliged to provide the requested information to the DPRD (Article 34). This system accommodates the enforcement principle in which the DPRD reserves the right to propose the dismissal of the local chief executive to the Central Government.

On 18 January 1957, the first law on the Principles of Local Government, as indicated in the 1950 Constitution, was passed.[31] The law adheres to the principle of real autonomy as an implication of the ultra-democratic principle in the 1950 Constitution and also strengthens the parliamentary system in the local government system more than the previous laws do. According to Article 6 of the law, members of the DPD (Regional Representative Board) make decisions and hold the executive power of the local government (Article 44).

The design of the LCE accountability system in this law also shows a parliamentary-style in which they are accountable to the DPRD. The general explanation of this law also explains that the LCE functions as a chairperson and concurrently as a member of the DPD; hence, they are collegially responsible to the DPRD in performing their duties. Therefore, when the DPRD overthrows the DPD through a vote of no confidence or other instruments, the status as the LCE is also terminated, meaning that the position of the LCE is no longer a central government apparatus.

Political instability during the liberal democracy era was used as a pretext by President Soekarno to issue a presidential decree on 5 July 1959, reinstating

[30] Law Number 22 of 1948 Concerning Stipulation of Basic Rules Regarding Self-Government in Regions with the Right to Regulate and Manage Their Own Households.

[31] Law Number 1 of 1957 on the Principles of Regional Government.

the 1945 Constitution and returning the central authority to the President, which also marked the start of the Guided Democracy era (1959-1966). According to Bakti,[32] it was the ground for the return of the 1945 Constitution and paved the way to the guided democracy era through which Sukarno pushed for several main agendas.

The first is the centralization of power to the President by establishing a national council consisting of representatives of functional groups. This extra-constitutional position of the council, higher than the Cabinet, was led by President Soekarno himself. According to Lubis M.,[33] the council membership and the cabinet reflects the whole nation and the parliament. The second is the creation of the Soekarno-Military-PKI (Indonesian Communist Party) axis to strengthen the centralism of power.[34]

The third is the disbandment of political parties that did not support Sukarno, including Masyumi and the PSI. The guided democracy regime also weakened the people's legislature due to the frequent issues of several laws and regulations in the forms of PERPRES, PENPRES, and PERPPU by the President, in addition to the establishment of DPR-GR (People's Representative Council of Gotong Royong) disbanding of the DPR (House of Representatives) through Presidential Decree Number 4 of 1960.[35] The fourth is control over the press that did not support government policies and threatened to revoke the issuance license, assuming it does not support the implementation of the USDEK.

The political configuration in this guided democracy is centralized, authoritarian, and repressive with an executive characteristic, in contrast to the liberal democracy era. In this political configuration, the Government stipulates

[32] Ikrar Nusa Bakti, "The Transition to Democracy in Indonesia: Some Outstanding Problems," *The Asia-Pacific: A Region in Transition* (2004): 195–206, https://apcss.org.

[33] Mochtar Lubis, *Hati Nurani Melawan Kezaliman, Surat Surat Bung Hatta Kepada Presiden Soekarno 1957-1960 [Conscience Against Violence, Bung Hatta's Letters to President Soekarno 1957-1960]* (Jakarta: Sinar Harapan, 1986).

[34] Shils, Edward, "Angkatan Bersenjata dalam Pembangunan Politik Negara-Negara Baru [Armed Forces in Political Development of New Counries]," in *Elit dalam Perspektif Sejarah [Elites in Historical Perspective]*, ed. Sartono Kartodirdjo (Jakarta: LP3ES, 1983).

[35] Zentralarchiv Yamguchi and Gigi Quetelet, "Comparative Study of Post-Marriage Nationality of Women in Legal Systems of Different Countries," *International Journal of Social Science Research and Review* 3, no. 3 (2020): 1-8, https://doi.org/10.47814/ijssrr.v3i3.41.

two regulations related to regional government, namely Presidential Decree Number 6 of 1959[36] and Law Number 18 of 1965.[37] Presidential Decree Number 6 of 1959 offers a political policy that restores and strengthens the position of the local chief executive as an apparatus of the Central Government (Article 14). According to Article 14 of the decree, Paragraph 2, the local chief executive supervises the running of local governments and may suspend the DPRD's decision assuming the LCE considers the decision to be in contradictory with public interest and higher laws and regulations (Article 15). In determining the local chief executive, the Central Government may appoint candidates other than those proposed by the local council (Article 14). The role of the DPRD was compromised since it was led by a local chief executive (Article 1). The local chief executive responds to the DPRD, which no longer can dismiss him/her so it has weakened the principle of DPRD enforcement in this horizontal accountability (Article 14).

Meanwhile, Law Number 18 of 1965 strengthened the Central Government's control over the regions. Liang Gie called it "the colonial law" due to the dominance of the Central Government's role over regional governments. According to Article 17 Paragraph 2, the local chief executive could not be overthrown by the DPRD because they are civil servants and a Central Government apparatus (Article 19).

Suharto took the helm of the new order regime with the army built from a coalition of groups opposing President Soekarno and the Indonesian Communist Party (PKI), intellectuals, students, and businesspeople.[38] From 1965 to 1969, Suharto and the army adopted a liberal-inclined political system of governance to determine a new democratic regime and became the antithesis of the authoritarian guided democracy government. During this period, press freedom allowed mass media to broadcast news and openly criticize the Government's abject failure of guided democracy.

[36] Stipulation of the President Number 6 of 1959 on Regional Government.
[37] Law Number 18 of 1965 on the Principles of Regional Government.
[38] Edward Aspinall and Greg Fealy, *Soeharto's New Order and Its Legacy* (Australia: ANU Press, 2010), 0-14.

Suharto and the army began political consolidation for the 1971 general election after Suharto took office in 1968. Several indicators marked the political configuration of the new order. The first is the authoritarianism of military-based regimes or dictatorships.[39] The second is the simplification of political parties through the fusion policy, which led to the creation of three political parties, namely the Indonesian Democratic Party (Partai Demokrat Indonesia/PDI) as a merger of nationalist-oriented political parties, the United Development Party (Partai Persatuan Pembangunan/PPP) as a merger of Islamic political parties, and the Golkar Party.[40] The third is the suppression of the press and the exercise of concentrated administrative, fiscal and political power.[41]

From 1966 to 1969, the three periods with varying political configurations in the new order era influenced the characteristics of legal products following the implementation of a liberal-democratic Decree of the People's Consultative Assembly (TAP MPRS) Number XXI/MPRS/1966.[42] The decree provided broad autonomy to the regions and tended to be liberal with the libertarian style of the early new order.

During the 1969-1971 consolidation period, the new format of Indonesian politics, which emphasizes growth-based economic development on the support of foreign capital borne by national stability and national integration, influenced the concept of autonomy. It was also replaced with the concept of 'real and responsible' autonomy as indicated by Law Number 6 of 1969.[43]

---

39 R. W. Baker, "Indonesia in Crisis," *Asia Pacific Issues* 36 (1998), https://scholarspace.manoa.hawaii.edu/.Indonesia is facing a grave crisis which is, in the most fundamental sense, political. A loss of confidence in the Soeharto government and a wave of violence sparked by deteriorating economic conditions have raised the specter of a general collapse. As the world's fourth-largest nation by population, possessing vast natural resources, and located at a key crossroads between the Pacific and Indian Oceans, Indonesia is strategically critical to the future of the Asia-Pacific region. Since 1965 it has played a responsible and active international role, and was a leader in establishing the Association of Southeast Asian Nations (ASEAN

40 Stefan Eklöf, *Indonesian Politics in Crisis: The Long Fall of Suharto, 1996-1998* (Copenhagen: NIAS Publishing, 1999).

41 Francis E. Hutchinson, "(De)Centralization and the Missing Middle in Indonesia and Malaysia," *Sojourn: Journal of Social Issues in Southeast Asia* 32, no. 2 (2017): 291-335, http://www.jstor.org/stable/44668418.

42 Ketetapan Majelis Permusyawaratan Rakyat Sementara Republik Indonesia Nomor XXI/MPRS/1966 Tahun 1966 Tentang Pemberian Otonomi Seluas-Luasnya Kepada Daerah [Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia Number XXI/MPRS/1966 of 1966 on the Granting of the Widest Autonomy to Regions].

43 Law Number 6 of 1969 on Statements of the Non-Applicability of Various Laws and Government Regulations in Lieu of Laws.

Meanwhile, in the third period of 1971-1999, the political configuration showed an anti-democratic and authoritarian characteristic that further influenced the pattern of local government legal products. Decree of the People's Consultative Assembly Number IV/MPR/1973[44] on the GBHN (Outlines of the State Policy) was enacted immediately after the 1971 general election, which also adopted the concept of real and responsible autonomy. After the GBHN, the new order regime also passed Law Number 5 of 1974,[45] which strengthened the role of the Central Government in regional administration. The Central Government exercises three types of supervision to the regions, including preventive, repressive, and general supervisions (Articles 68-71). The DPRD is authorized to nominate at least two local chief executive candidates to the Central Government. However, neither President nor Ministry of Home Affairs is bound by the proposal. The candidate with the highest number of votes in the DPRD is not automatically appointed to be the local chief executive for the final determination is the prerogative of the President (Articles 15-16).

This law adopts a vertical accountability system (Article 22, Paragraph 2), which was built based on the concept of the President as the highest authority to administer the government in all regions across the country. According to Article 22, Paragraph 3, the LCE is only obliged to provide "information" of accountability to the DPRD for regional administration. Therefore, the DPRD, as an element of the local government, can exercise supervision without sanctions. For example, the DPRD of Central Aceh Regency once found irregularities committed by the local chief executive but was only able to act to reject the local chief executive's accountability report.[46]

Since the end of the new order era (1999), Indonesia has elected five presidents, with Habibie, Abdurrahman Wahid, and Megawati Soekarno Putri

[44] Decree of the People's Consultative Assembly of the Republic of Indonesia Number: IV/MPR/1973 on The Outlines of State Policy.

[45] Law of the Republic of Indonesia Number 5 of 1974 on the Principles of Government in the Regions.

[46] Nikmatul Huda, "Undang-Undang Nomor 5 Tahun 1974 dan Reformasi Sistem Pemerintahan di Daerah [Law Number 5 of 1974 and Reform of the Regional Government System]," *Jurnal Hukum IUS QUIA IUSTUM* 5, no. 10 (1998): 48-59, https://journal.uii.ac.id/IUSTUM/article/view/6956.

elected by the MPR and Susilo Bambang Yudhoyono (SBY) and Joko "Jokowi" Widodo democratically elected through a direct general election.

In general, political configuration in the reformasi era is democratic with different levels and characteristics.[47] Relationship between the executive and the legislature is dynamic. At the beginning of the reformasi era, the DPR enjoys a stronger political position than the executive such as the case with the leadership of Habibie, Abdurrahman Wahid, and the first period of SBY's administration. Liddle[48] argued that the President had to face a more fragmented and rootless party system. Meanwhile, in the Megawati administration, the second period of SBY's administration, and the Jokowi administration, the executive balanced the DPR and is even more dominant over the parliament. Therefore, to secure the DPR support, the President prioritizes developing inclusive alliances with all political parties, offers cabinet seats, and provides other loyalty rewards. The internal affairs of at least two opposition parties eventually forced the DPR to declare their support for the government.[49]

The dynamics of these relationships are strongly influenced by the President's capacity to build a governing coalition. However, there is no guarantee that the coalition can effectively diminish political power in the DPR because, according to Sherlock,[50] of consensus instead of voting in parliamentary decision-making. Therefore, for this reason, it is crucial to win majority support from DPR members as representatives of political parties by gaining control and making decisions regarding legislation, budgets, and other government policies. In addition, cabinet solidarity is low across parties regardless of the number of parties represented in the Cabinet.

The multi-party system was back in place in the reformasi era, enabling dozens of political parties to participate in the 1999 and 2004 elections. According

[47] Gerry van Klinken, "Indonesian Politics in 2008: The Ambiguities of Democratic Change," *Bulletin of Indonesian Economic Studies* 44, no. 3 (2008): 365-81, https://doi.org/10.1080/00074910802395328.

[48] R. Liddle, "Year One of the Yudhoyono-Kalla Duumvirate," *Bulletin of Indonesian Economic Studies* 41, no. 3 (2005): 325-40, https://doi.org/10.1080/00074910500306593.

[49] Marcus Mietzner, "Coercing Loyalty: Coalitional Presidentialism and Party Politics in Jokowi's Indonesia," *Contemporary Southeast Asia* 38, no. 2 (2016): 209-32, http://dx.doi.org/10.1355/cs38-2b.

[50] Stephen Sherlock, "SBY's Consensus Cabinet - Lanjutkan? [SBY's Consensus Cabinet - Continue?]," *Bulletin of Indonesian Economic Studies* 45, no. 3 (2009): 341-43, https://doi.org/10.1080/00074910903424043.

to Johnson Tan,[51] political parties are weak, personalistic, and dominated by the elite, leading to the liquidation of the information department previously used to control the press by President Abdurrahman Wahid and led to the rapid development of online mass media. Political elites' domination of some mainstream mass media also emerged.

In recent years, political configuration in the reformasi era has been growing dynamic by shifting from the liberal-democratic one and the quasi-parliamentary one to the centralized one. Power[52] argued that during the Jokowi's administration, the quality of Indonesian democracy has deteriorated, affecting the characteristics of legal products regarding local government and the accountability system. At the onset of the reformation era, an ambitious program of decentralization was rolled out to restore the political rights of the citizens and shift broad government responsibilities to the sub-national level. Nonetheless, this program disrupted the country's widespread patronage network. Amendments to the 1945 Constitution have emboldened local governments with a more robust policy of decentralization.

Law Number 22 of 1999 adheres to broad, real, and responsible autonomy. However, the law is different from Law Number 5 of 1974, which restored the regional head election system to the DPRD and determined the characteristics of legislative supremacy.[53] The LCE accountability system in Article 31 Paragraph (2) stipulates that the Governor is responsible to the DPRD in performing duties and authority as a local chief executive. Article 32 Paragraph (3) stipulates that regents and mayors are accountable to the DPRD.

The LCE accountability system design based on Law Number 22 of 1999 gives the DPRD the authority to question, to assess, and to impose sanctions on the local chief executive, including dismissal. In practice, the implementation

[51] Paige Johnson Tan, "Reining in the Reign of the Parties: Political Parties in Contemporary Indonesia," *Asian Journal of Political Science* 20, no. 2 (2012): 154-79, https://doi.org/10.1080/02185377.2012.714132.

[52] Thomas P. Power, "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline," *Bulletin of Indonesian Economic Studies* 54, no. 3 (2018): 307-38, https://doi.org/10.1080/00074918.2018.1549918.

[53] Nuraida Mokhsen, "Decentralization in the Post New Order Era of Indonesia" (Thesis (published) submitted for the submission of PhD program at The Australian National University, 2003).

of this accountability system presents many problems due to the accountability mechanism of LCE used as a political instrument by the DPRD rather than for evaluating the performance of regional heads. DPRD used it to "blackmail" head of local government,[54] the accountability forum became an arena of "collusive" relationship between head of local government and DPRD, so it created political turmoil and instability have been rampant in local government administration.[55]

Law Number 32 of 2004 enacted at the end of Megawati's administration, provided a strong executive position. The concept of local autonomy adopted is similar to the concept adopted by Law Number 5 of 1974, which is in accordance with the significant changes in the LCE election system. The enactment of this law marks the commencement of full recognition of the people's sovereignty in electing regional heads through a direct election system for candidates proposed by political parties, a coalition of political parties, and individuals.

The direct LCE election system is implemented with adjustments to the development planning system as stipulated in Law Number 25 of 2004. The vision, mission, program, and campaign promise of the elected regional head are used as a reference in the preparation of the Local Mid-term Development Plan (Rencana Pembangunan Jangka Menengah Daerah/RPJMD) in accordance with Article 5 Paragraph 2 of the RPJMD, leading to the creation of symmetry between the people's sovereignty in local elections and the development planning system.

The design of the LCE accountability system no longer needs the regional head to be accountable to the DPRD as they only submit the Accountability Report (Laporan Keterangan Pertanggungjawaban/LKPJ) directly to the DPRD. In addition, the LCE also submits a Report on the Implementation of Regional Government to the Central Government (Laporan Penyelenggaraan Pemerintah Daerah kepada Pemerintah Pusat/LPPD) and a Summary of Accountability Report

[54] Djohermansyah Djohan, "Menyoal Revisi UU Otonomi Daerah [Questioning the Revision of the Regional Autonomy Law]," in *Otonomi Daerah: Evaluasi & Proyeksi [Regional Autonomy: Evaluation & Projection]*, ed. Indra J. Piliang, Dendi Ramdani, and Agung Pribadi (Jakarta: CV. Tri Rimba Persada, 2003), 151-59.

[55] Alan Bayu Aji, "Implikasi Politik Hukum Pengaturan Pertanggungjawaban Kinerja Kepala Daerah Pasca Reformasi [Political Implications of the Regulation of Regional Heads' Performance Accountability Post-Reformation]," *Jurnal Lex Renaissance* 2, no. 2 (2017): 231-58, https://doi.org/10.20885/JLR.vol2.iss2.art1.

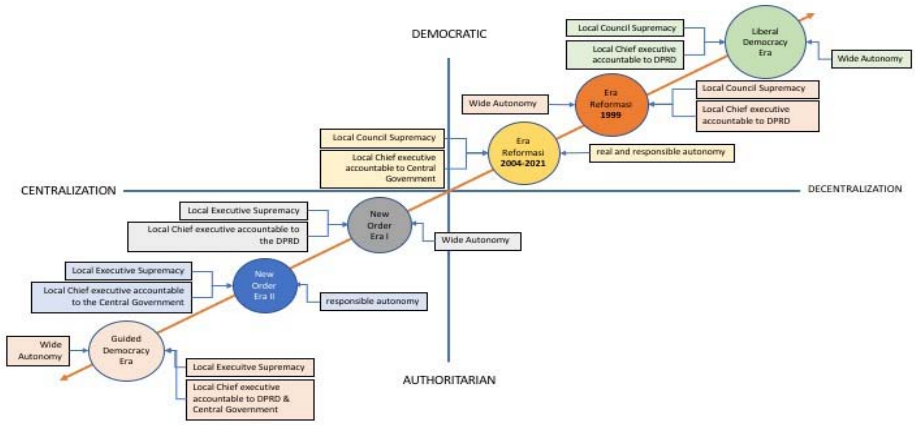
to the community in accordance with Article 27 Paragraph 2. The change in this accountability system is also regulated in Law Number 23 of 2014 instead of Law Number 32 of 2004.

The above provisions explain that the LPPD as a form of a vertical report from the LCE to the Central Government is a consequence of the unitary state. The LKPJ is submitted by the LCE to the DPRD annually. Meanwhile, the DPRD only has the ability to provide recommendations for improving the running of local government. Therefore, the LCE is no longer responsible to the DPRD. Conversely, the DPRD is not authorized to impose sanctions on the dismissal of LCE for their unsatisfactory performance. Instead, they can only exercise the right of interpellation, assuming the LCE does not carry out the obligation to submit an accountability report.

The provincial DPRD is able to report the Governor to the Minister and the Regency/City DPRD is able to report the Regent to the Governor, assuming the explanation of the regional leadership regarding the use of rights is not accepted. Based on the report, the Minister and the Governor issue is able to issue written warnings to the Governor and the regent/mayor, respectively. Furthermore, the local chief executive is obliged to take part in a special coaching program in the field of government carried out by the Ministry, assuming the written warning delivered twice in a row fails to be implemented. Moreover, the submission of the local chief executive's Summary of annual LKPJ to the community is also not followed by a clear mechanism for providing feedback and sanctions regarding lackluster performance and inability to fulfill campaign promises.

The sift of the accountability systems during those periods can be shortly described as follows:

Figure 1. Political Configuration and Its Effect to the Decentralization Legal Framework



Source: Authors, 2021

The figure indicates that the political configuration in Indonesia remains a determinant factor against the law, as Dahrendorf[56] stated that the law is controlled by those with power. The political configuration at the central government determines legal direction related to the local government and accountability systems of LCEs. Irrespective of the rising popularity associated with the decentralization process, it is still in the middle of a tug-of-war between the aspiration of local communities and the interests of the Central Government.[57]

3.2.2. Tracing the Root of the Problem

The changes to the provisions of the LCEs' political accountability system raise at least two fundamental questions. Why can the regime in power easily change the design of the political decentralization system and the LCEs' accountability system in the local government act? Has the design of the LCEs' political accountability system fulfilled the enforcement principle as one of the

[56] Ralf Dahrendorf, *Class and Conflict in an Industrial Society* (London: Routledge, 2022), 354.

[57] Andres Pose-Rodriguez and Roberto Ezcurra, "Does Decentralization Matter for Regional Disparities? A Cross-Country Analysis," *Journal of Economic Geography* 10, no. 5 (September 2010): 619-44, https://doi.org/10.1093/jeg/lbp049.

pillars of the accountability system? The following sections will examine both of these issues.

3.2.2.1. The Lack of Norms on Accountability in the Constitution

Indonesia places the Constitution in the highest position in the legal system. With this position, legislators are bound by constitutional norms in making legal regulations; thus, it can prevent the potential failure of representative democracy, majority dictatorship, and neglect of human rights. Therefore, the Constitution must contain fundamental norms regarding the principal aspects of the administration of the state.[58]

Article 18 of the 1945 Constitution, which is the constitutional basis for forming regions, does not clearly and unequivocally stipulate the principles of regional government administration. It fully submits the arrangements to legislators through laws. The elucidation of article 18 states local autonomy without further explanation regarding its' model and type. While the second amendment to the 1945 Constitution adds norms regarding the administration of regional government by affirming the broadest possible implementation of autonomy, including clarifying the political autonomy. However, the political autonomy in LCE selection stipulated in Article 18, paragraph 4, is still ambiguous by only requiring "democratic selection". It has triggered support and rejection of the direct election system to date.

This ambiguity of norms allows the regimes in power to tinker with the decentralization model, especially in the political decentralization. The nuances of Dutch colonialism still influence the spirit of local government administration.[59] This issue often triggers tensions between the central government and the regions due to the attraction of interests.

---

[58] The Constitution must contain the background and objectives of the country; basic rules regarding sovereignty, state form, government system, state ideology, citizenship; rules on the fundamental rights of citizens; power structure and state institutions (main and auxiliary organs); local government; power change mechanism; referendum mechanism; constitutional amendment mechanism; as well as other matters deemed necessary. See Elliot Bulmer, *Local Democracy* (Sweden: International IDEA, 2017), https://www.idea.int/.

[59] W. Jati, "Inkonsistensi Paradigma Otonomi Daerah di Indonesia: Dilema Sentralisasi atau Desentralisasi [The Inconsistency of the Paradigm of Regional Autonomy in Indonesia: The Dilemma of Centralization or Decentralization]," *Jurnal Konstitusi* 9, no. 4 (May, 2012): 743-70, https://doi.org/10.31078/jk947.

While the norms governing accountability in the Indonesian Constitution are minimal, except for the Federation of the Republic of Indonesia (Republik Indonesia Serikat/RIS) Constitution and the 1950 Constitution. The 1945 Constitution does not explicitly regulate the norms regarding the system of accountability/responsibility in government. Only the Elucidation of the 1945 Constitution states that the President who holds power and responsibility in administering the government is the mandate of the MPR, is elected and appointed by the MPR, and is responsible to the MPR. The President is not responsible for the DPR. Therefore, on November 11, 1945, the Working Committee of KNIP proposed to the President a system of accountability of ministers to Parliament. Unfortunately, although President accepted the proposal, it was not followed by an amendment to the 1945 Constitution.

The amendments to the 1945 Constitution in the reformation era did not include regulatory norms regarding the government accountability system, both the accountability of the elected president (replacing the electoral system by the MPR) and the accountability of local government. Proposals to include norms regarding the accountability system in the 1945 amendment process in this reformation era have appeared, including a proposal from a team of academics from Gadjah Mada University who advocated the implementation of political decentralization that would allow local chief executives (governors, regents, sub-districts, and village heads) are elected by the people and are accountable to the people. However, this proposal failed to be adopted in the constitutional amendments.

There were proposals from several Members of Parliament (MP) to include norms for regulating the accountability system during the Constitution's amendment process. The National Awakening Faction (F-KB), through its spokesperson Khofifah Indar Parawansa proposed that all state institutions, including the president, be responsible for the MPR as the supreme state institution. Several other MPs from the F-KB, Military & Police (F-TNI/POLRI), Reformation Faction, PPP-Faction, and Golkar Party Faction (F-PG) proposed that the elected president be accountable to the people through the MPR.

However, this proposal failed. Therefore, scholars assume the elected president's and local chief's accountability to the people based on voters' assessment in the next election, which is considered weak due to several factors.[60]

The absence of regulatory norms regarding accountability in the Constitution poses a severe problem. It allows legislators to freely regulate this accountability system in LGAs following their political mission. The local chief accountability norms that have frequently changed in the LGAs from the old-order era to the reformation era prove how the government and legislators' political interests can control the accountability system's direction and design. As the supreme law in Indonesia, the constitution has lost its role in guarding the accountability of elected officials.

Without clear arrangements on the local chief accountability system (and accountability of public officials in general) in the Constitution, the local chief executive accountability system will not be effective. It will only become a formal procedure in local democracy.

3.2.2.2. Vertical, Horizontal or Electoral Accountability?

The LCE accountability system before the enactment of LGA 32 of 2004 only involves two main actors, namely the DPRD and the Central Government. The LCE accountability system model is also manifested in two forms, namely the vertical and horizontal accountability to the Central Government and the DPRD respectively. This process took place in a liberal-democratic manner, in line with the characteristics of legislative supremacy as in the liberal democracy era and the beginning of the reformation era. The horizontal accountability system is still simultaneous with the vertical ones as a consequence of the form of a unitary state. This shift in the accountability system from horizontal to vertical and vice versa shows the tug-of-war between the central and regional governments in the context of political decentralization.

[60] Secretariat General of the People's Consultative Assembly of the Republic of Indonesia, *Minutes of Amendment to the 1945 Constitution of the Republic of Indonesia, 1999-2002, Session Year 1999* (Secretariat General of the People's Consultative Assembly of the Republic of Indonesia: Jakarta, 2008).

Since the implementation of the local chief executive direct election system back in 2004, political parties that nominate candidates and local communities as voters in the local election emerged as new actors in the local accountability system. The presence of this new actor at the local level was followed by the adjustment to the LCE accountability model into electoral accountability. Law Number 32 of 2004 and Law Number 23 of 2014 stipulated that LCE must submit a summary of the LCE's Local Government Implementation Report (RLPD) to the public through mass media without any arrangement regarding the mechanism for providing feedback. However, even this mechanism is still weak in the implementation.[61]

Unfortunately, the addition of this new actor (community) does not include the provision of a significant level of control by the community to LCEs. As voters in the local election who are the source of the accountability relationship of LCE, the community is only half-heartedly involved in this accountability system without being given the power of control and imposing sanction. It leads to a weak electoral accountability system.

Some scholars, such as Strom,[62] argue that the people in the next election can evaluate the performance of the elected LCE as part of the political accountability system. Elections serve as an instrument to elect new representatives and assess the performance of incumbents. The people, as voters, can punish the incumbents by not re-electing them (punishment vote) or rewarding them in the next election.[63] However, this approach has some weaknesses; First, voter preferences are easy

[61] "Personal Interview with Prof. Ramlan Surbakti," 2021.

[62] Kaare Strom, "Democracy, Accountability, and Coalition Bargaining, Center for the Study of Democracy," *European Journal of Political Research* 31, no. 1 (February 1997): 47-62, http://dx.doi.org/10.1023/A:1006856818727.and even the granting of that right did not secure women's equal access to or exercise of social, political, and civil power. Today, all Western industrialized democracies guarantee women and men's formal equality as citizens, but some research suggests women are less likely to take advantage of that equality. Some findings indicate women may be less engaged citizens than men, and participate in politics less frequently, along with being less knowledgeable about and interested in the political sphere (Verba, Burns and Schlozman 1997

[63] Emmanuel Skoufias et al., "Electoral Accountability and Local Government Spending in Indonesia" (Policy Research Working Paper (published) submitted for the publication of World Bank Group, 2014).

to manipulate, especially if the elected officials who are running again prioritize new programs and cover up their track records.[64] Second, It is unclear whether voters are making their choice in the election based on reward and punishment votes, based on the new program offered, or voting based on political loyalty or similar political identities.[65]

Decentralization not only means delegating resources and authority to lower levels of government but also requires the transformation and change of key accountability actors between government institutions and the community.[66] In their study in Jambi, Tony Djogo and Rudi Syaf found that the decentralization of forest resource management authority to local governments has resulted in a situation where district governments are not accountable to the central government or downward to local communities.[67]

In the context of the relationship between the actors of accountability, the local chief executive accountability system in local government law still tends to use horizontal accountability by positioning the DPRD as the principal even though the government system applied is presidential.[68] The law also fails to regulate the role of political parties in this accountability system, allowing political parties to duck their responsibilities and play their role more as a "ticket provider" for local chief executive nominations.[69]

---

[64] Edward Rubin, "The Myth of Accountability and the Anti-Administrative Impulse," *Michigan Law Review* 103, no. 8 (2005): 2073-2136, https://repository.law.umich.edu/mlr/vol103/iss8/3.

[65] Bernard Manin, Adam Przeworski, and Susan C. Stokes, "Elections and Representation," in *Democracy, Accountability, and Representation*, ed. Adam Przeworski , Susan C. Stokes and Bernard Manin (Cambridge: Cambridge University Press, 2012), 29–54.

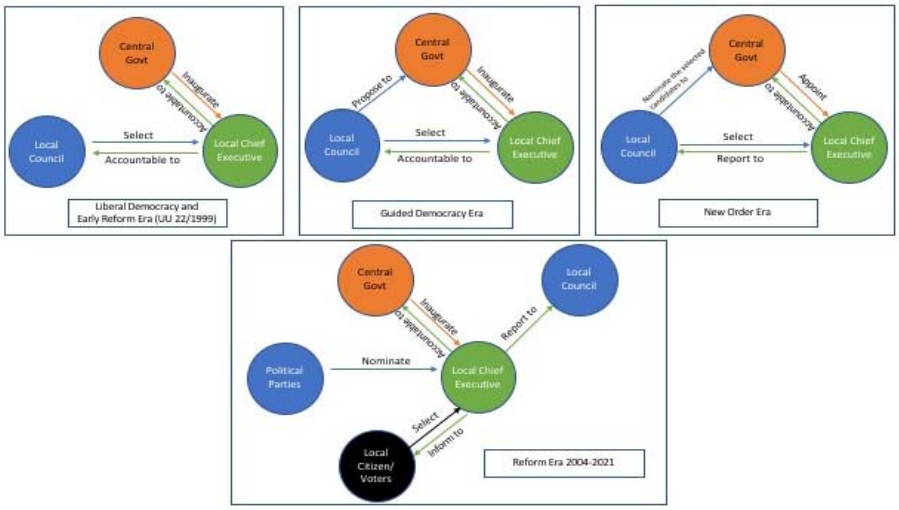
[66] Sebastian Eckardt, "Political Accountability, Fiscal Conditions and Local Government Performance—Cross-Sectional Evidence from Indonesia," *Public Administration and Development* 28, no. 1 (2008), http://dx.doi.org/10.1002/pad.475.

[67] Tony Djogo and Rudi Syaf, "Decentralization without Accountability: Power and Authority over Local Forest Governance in Indonesia" (Paper (published) submitted for Indiana University, Digital Library of the Commons (DLC), 2004) .

[68] "Personal Interview with Dr. Ghafar Karim."

[69] "Personal Interview with Prof. Ramlan Surbakti."

Figure 2. Map of Actors in the Local Chief Executive Accountability System



Source: Author, 2021

3.2.3. The Conformity of Accountability Principles

A number of LGAs show that the LCE accountability degree meet the parameters of standard, answerability, and enforceability in the liberal democracy era. However, the enforceability parameter is consistently owned by the Central Government through vertical and administrative accountability instruments because it is the condition where the Central Government has the authority to assess accountability and impose sanctions on LCE.

Meanwhile, the enforceability parameter in the horizontal accountability system was applied during the liberal democracy era and the early reformation era through Law Number 22 of 1999. The DPRD has the enforceability authority to assess and impose sanctions on local chief executive instead of the horizontal accountability system in the eras of guided democracy, the new order, and post-2004 reformation.

The enforceability parameter in the electoral accountability system of LCE is not enforced despite the implementation of direct elections since 2004. As constituents in the elections, local communities are not authorized to control

and impose sanctions on elected LCE when they fail to fulfill their campaign promises.[70] The absence of an accountability system that puts citizens as the main actors causes the absence of responsibilities for the elected officials to fulfill their campaign promises.[71]

3.2.4. Role of Constituent

The LCE accountability system, since the era of liberal democracy to date, has not provided sufficient space for the people to assess LCEs' performance. Law Number 32 of 2004 and Law Number 23 of 2014 stipulated that LCE must submit a summary of the LCE's Local Government Implementation Report (RLPD) to the public through mass media; however, it needs to arrange the mechanism for providing feedback. It causes the public's response to the RLPD to be very low, as found in the Rahmatunnisa study,[72] and gives rise to alternative legal efforts through time-consuming class actions, such as collective legal action against local chiefs in Jakarta[73] and Bogor.[74]

In a system of political decentralization where the people are involved in electing LCEs, apart from the Central Government and the DPRD, the authority needs to be granted to the community to assess and impose sanctions on regional heads as part of the accountability system. More is needed for the people to access the LCEs' RLPD. Experiences and systems developed in a number of countries such as the Philippines,[75] South Korea,[76] and Peru[77] as unitary state that

[70] "Personal Interview with Dr. Ghafar Karim."

[71] Muhtar Said, Ahsanul Minan, and Muhammad Nurul Huda, "The Problems of Horizontal and Vertical Accountability of Elected Officials in Indonesia," *Journal of Indonesian Legal Studies* 6, no. 1 (2021): 83-124, https://doi.org/10.15294/jils.v6i1.43403.

[72] Mudiyati Rahmatunnisa, "Questioning the Effectiveness of Indonesia's Local Government Accountability System," *Jurnal Bina Praja* 10, no. 1 (2018): 135-45, https://doi.org/10.21787/jbp.10.2018.135-145.

[73] Ihsanuddin, "Anies Berkali-Kali Digugat ke Pengadilan: Dari Urusan Banjir, Polusi, Hingga Upah Minimum Halama [Anies Has Been Sued Again and Again to the Court: From Floods, Pollution, to Minimum Wages]," Kompas.com, published March 10, 2022.

[74] Ahmad Sudarno, "Bupati Digugat Warga Bogor karena Jalan Rusak [The Regent Sued by Bogor Residents For Damaged Roads]," Liputan6.com, published June 7, 2016.

[75] Raul C Pangalangan, "Law and Newly Restored Democracies: The Philippines Experience in Restoring Political Participation and Accountability," *IDE Asian Law Series* 13 (2002), https://www.ide.go.jp/.

[76] Jin-Wook Choi, Chang Soo Choe, and Jaehoon Kim, *Local Government and Public Administration in Korea* (Seoul: Local Government Officials Development Institute, 2013).

[77] Michael Haman, "Recall Elections: A Tool of Accountability? Evidence from Peru," *Desarrollo y Sociedad* 87 (2021): 73–111, https://doi.org/10.13043/dys.87.3.and the margin of victory was low in previous municipal elections. The key vari-ables for the successful removal of a mayor include the political experience of the organizer of a recall procedure, the number of null votes, and votes for the winner in previous municipal elections. Future research

implement decentralization and direct local election systems, also implement electoral accountability system along with vertical and horizontal systems. This electoral accountability system is realized through a direct democracy mechanism by granting the right to the community to submit a petition to request a recall-election.

Recall-election is an election that will allow the resident to vote and decide whether to remove LCE from office or keep them in power if they are satisfied with the LCEs' performance.[78] The initiative of filing petitions causes public officials to propose political compromises with their voters, hence politicians cannot move freely from the control of their voters.[79] Some scholars found that the recall election may be used as a political weapon by the losers.[80] However, the constitutional court can play a role in reviewing the validity of the recall petition to prevent the politicization of the petition as adopted in the impeachment system.

The direct democracy mechanism in the LCE accountability system needs to be considered for adoption in Indonesia. Through this model, the people as principals can effectively control LCEs, so that LCE can pay more attention to and make people's preferences a reference in public services. It will also be able to build consistency in the LCEs' political accountability system with the political decentralization system.

The constitution and the LGA law need to regulate the right of the people to submit petitions to request the dismissal of the LCE as part of the LCE's political accountability system. Meanwhile, the DPRD play a checks and balances role.

should build on these findings and further examine recall elections.",",author":[{"dropping-particle":"","family":"Haman","given":"Michael","non-dropping-particle":"","parse-names":false,"suffix":""}],"container-title":"Desarrollo y Sociedad","id":"ITEM-1","issue":"87","issued":{"date-parts":[["2021"]]},"page":"73-111","title":"Recall elections: A tool of accountability? evidence from Peru","type":"article-journal","volume":"2021"},"uris":["http://www.mendeley.com/documents/?uuid=136f0f7b-c731-4c60-baab-04befd931059"]}],"mendeley":{"formattedCitation":"Michael Haman, "Recall Elections: A Tool of Accountability? Evidence from Peru," Desarrollo y Sociedad 2021, no. 87 (2021

78 Andrew Ellis, "The Use and Design of Referendums" (Paper (published) presented for Seminar on the Referendum in Costa Rica co-sponsored by International IDEA and the Supreme Election Tribunal of Costa Rica, 2007).

79 Katharina Eva Hofer-jaronicki, "Voting and Participating in Direct Democracies" (Thesis (published) submitted for the Schweizerisches Institut für Empirische Wirtschaftsforschung (SEW-HSG) Universität St. Gallen, Switzerland, 2015).

80 Yanina Welp and Juan Pablo Milanese, "Playing by the Rules of the Game: Partisan Use of Recall Referendums in Colombia," *Democratization* 25, no. 8 (2018): 1379-96, https://doi.org/10.1080/13510347.2017.1421176.

This petition proposal can be submitted to the local election commission (KPUD) for an administrative review and then submitted to the Constitutional Court (MK) to evaluate its legal validity. Suppose the Constitutional Court approves this petition proposal. In that case, the KPUD can hold a recall election to ask the people's opinion on the proposed dismissal of the LCE and, at the same time, choose a replacement candidate.

IV. CONCLUSION

Historical-legal analysis shows that the ruling regime's political interests shaped the characteristics of legal products on the LCE accountability, leading to an ineffective LCE political accountability system. The LCE accountability system remains tarnished by a number of problems, including the absence of enforceability and limited public participation.[81] The absence of norms regulating the principles of accountability in the Constitution contributes to this problematic situation. The authors suggest amending the Constitution to insert provisions on the principle of accountability to prevent law-making as a mere political instrument by the ruling regime. The authors also recommend strengthening the enforcement system of the LCE accountability by granting control power and sanction to the people as the principal in the LCE accountability. The LGA should include the recall election as a robust instrument for the people to hold the LCE accountable.

BIBLIOGRAPHY

Acosta, Andrés Mejía, Anuradha Joshi, and Graeme Ramshaw. *International Institute for Democracy and Electoral Assistance IDEA Democratic Accountability and Service Delivery-A Desk Review*. Sweden: International IDEA, 2013. eBooks.

Aji, Alan Bayu. "Implikasi Politik Hukum Pengaturan Pertanggungjawaban Kinerja Kepala Daerah Pasca Reformasi [Political Implications of the Regulation of

[81] Rahmatunnisa, "Questioning the Effectiveness."

Regional Heads' Performance Accountability Post-Reformation]." *Jurnal Lex Renaissance* 2, no. 2 (2017): 231-58, https://doi.org/10.20885/JLR.vol2.iss2.art1

Aspinall, Edward and Greg Fealy. *Soeharto's New Order and Its Legacy*. Australia: ANU Press, 2010.

Bakti, Ikrar Nusa. "The Transition to Democracy in Indonesia: Some Outstanding Problems." *The Asia-Pacific: A Region in Transition* (2004): 195–206. https://apcss.org.

Böckenförde, Markus. "A Practical Guide to Decentralized Forms of Government." Paper, International IDEA, 2011.

Bovens, Mark. "The Concept of Public Accountability." In *The Oxford Handbook of Public Management*, edited by E. Ferlie, L. E. Lynn Jnr., and C. Pollitt, 182-208. Oxford: Oxford University Press, 2005.

Brenya, Edward, Owura Kwabena Kuffuor, Jennifer Aboagyewaah Asamoah, Yaa Yeboah Adu- Gyimah, and Abena Dugan. "Democratic Institutions and Political Accountability : A Case Study of Ghana's Fourth Republican Parliament." *The International Journal of Humanities & Social Studies* 2, no. 12 (2014): 52–67, http://www.theijhss.com/.

Bulmer, Elliot. *Local Democracy*. Sweden: International IDEA, 2017. eBooks.

Cash, Philip J. "Developing Theory-Driven Design Research." *Design Studies* 56 (2018): 84–119, https://doi.org/10.1016/j.destud.2018.03.002.

Cerar, Miro. "The Relationship between Law and Politics." *Sword and Scales : An Examination of the Relationship between Law and Politics* 15, no. 1 (2009), https://digitalcommons.law.ggu.edu/annlsurvey/vol15/iss1/3.

Choi, Jin-Wook, Chang Soo Choe, and Jaehoon Kim. *Local Government and Public Administration in Korea*. Seoul: Local Government Officials Development Institute, 2013.

Choudry, Sujit, Michael Heyman, and Richard Stacey. *Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa*. Center for Constitutional Transitions, International IDEA and the United Nations Development Programme, 2014.

Creswell, John W. *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*, 4th ed. California: SAGE Publications Inc., 2014.

Dahrendorf, Ralf. *Class and Conflict in an Industrial Society*. London: Routledge, 2022.

Decree of the People's Consultative Assembly of the Republic of Indonesia Number: IV/MPR/1973 on The Outlines of State Policy.

Djogo, Tony and Rudi Syaf. "Decentralization without Accountability: Power and Authority over Local Forest Governance in Indonesia." Paper, Indiana University, Digital Library of the Commons (DLC), 2004.

Djohan, Djohermansyah. "Menyoal Revisi UU Otonomi Daerah [Questioning the Revision of the Regional Autonomy Law]." In *Otonomi Daerah: Evaluasi & Proyeksi [Regional Autonomy: Evaluation & Projection]*, edited by Indra J. Piliang, Dendi Ramdani, and Agung Pribadi, 151-59. Jakarta: CV. Tri Rimba Persada, 2003.

Eckardt, Sebastian. "Political Accountability, Fiscal Conditions and Local Government Performance—Cross-Sectional Evidence from Indonesia." *Public Administration and Development* 28, no. 1 (2008), http://dx.doi.org/10.1002/pad.475.

Eklöf, Stefan. *Indonesian Politics in Crisis: The Long Fall of Suharto, 1996-1998*. Copenhagen: NIAS Publishing, 1999.

Ellis, Andrew. "The Use and Design of Referendums." Paper, International IDEA and the Supreme Election Tribunal of Costa Rica, 2007.

Faguet, Jean-paul. "Decentralization and Local Government Performance." Paper, London School of Economics, 1997.

Ferry, Laurence, Peter Eckersley, and Zamzulaila Zakaria. "Accountability and Transparency in English Local Government: Moving from 'Matching Parts' to 'Awkward Couple'?" *Financial Accountability and Management* 31, no. 3 (2015): 345–361, https://doi.org/10.1111/faam.12060.

Haman, Michael. "Recall Elections: A Tool of Accountability? Evidence from Peru." *Desarrollo y Sociedad* 87 (2021): 73–111, https://doi.org/10.13043/dys.87.3.

Hofer-jaronicki, Katharina Eva. "Voting and Participating in Direct Democracies." Thesis, Schweizerisches Institut für Empirische Wirtschaftsforschung (SEW-HSG) Universität St. Gallen, Switzerland, 2015.

Huda, Nikmatul. "Undang-Undang Nomor 5 Tahun 1974 dan Reformasi Sistem Pemerintahan di Daerah [Law Number 5 of 1974 and Reform of the Regional Government System]." *Jurnal Hukum IUS QUIA IUSTUM* 5, no. 10 (1998): 48-59, https://journal.uii.ac.id/IUSTUM/article/view/6956.

Hutchinson, Francis E. "(De)Centralization and the Missing Middle in Indonesia and Malaysia." *Sojourn: Journal of Social Issues in Southeast Asia* 32, no. 2 (2017): 291-335, http://www.jstor.org/stable/44668418.

Ihsanuddin. "Anies Berkali-Kali Digugat ke Pengadilan: Dari Urusan Banjir, Polusi, Hingga Upah Minimum Halama [Anies Has Been Sued Again and Again to the Court: From Floods, Pollution, to Minimum Wages]." Kompas.com, published March 10, 2022. https://megapolitan.kompas.com/read/2022/03/10/11081131/anies-berkali-kali-digugat-ke-pengadilan-dari-urusan-banjir-polusi-hingga?page=all.

Jati, W. "Inkonsistensi Paradigma Otonomi Daerah di Indonesia: Dilema Sentralisasi atau Desentralisasi [The Inconsistency of the Paradigm of Regional Autonomy in Indonesia: The Dilemma of Centralization or Decentralization]." *Jurnal Konstitusi* 9, no. 4 (May, 2012): 743-70, https://doi.org/10.31078/jk947.

Joshi, Anuradha. "Do They Work? Assessing the Impact of Transparency and Accountability Initiatives in Service Delivery." *Development Policy Review* 31, no. 1 (2013) : 29-48, https://doi.org/10.1111/dpr.12018.

Juniarto. *Sejarah Ketatanegaraan Republik Indonesia [Constitutional History of the Republic of Indonesia]*. Jakarta: Bumi Aksara, 1990.

Ketetapan Majelis Permusyawaratan Rakyat Sementara Republik Indonesia Nomor XXI/MPRS/1966 Tahun 1966 Tentang Pemberian Otonomi Seluas-Luasnya Kepada Daerah [Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia Number XXI/MPRS/1966 of 1966 on the Granting of the Widest Autonomy to Regions].

Kusnardi, Moh. and Harmaily Ibrahim. *Pengantar Hukum Tata Negara Indonesia [Introduction to the Indonesian Constitutional Law]*. Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum UI, 1983.

Law No. 1 of 1945 on Regulations Regarding the Position of Regional National Committees. Indonesia.

Law Number 22 of 1948 Concerning Stipulation of Basic Rules Regarding Self-Government in Regions With the Right to Regulate and Manage Their Own Households.

Law Number 1 of 1957 on the Principles of Regional Government.

Law Number 18 of 1965 on the Principles of Regional Government.

Law Number 6 of 1969 on Statements of the Non-Applicability of Various Laws and Government Regulations in Lieu of Laws.

Law of the Republic of Indonesia Number 5 of 1974 on the Principles of Government in the Regions.

Lev, Daniel S. *Hukum dan Politik di Indonesia [Law and Politics in Indonesia]*. Jakarta: LP3ES, 1990.

Liddle, R. William. "Year One of the Yudhoyono-Kalla Duumvirate." *Bulletin of Indonesian Economic Studies* 41, no. 3 (2005): 325-40, https://doi.org/10.1080/00074910500306593.

Lindberg, Staffan I. "Accountability: The Core Concept and Its Subtypes." Paper, The Africa Power and Politics Programme (APPP), 2009.

Lubis, Mochtar. *Hati Nurani Melawan Kezaliman, Surat Surat Bung Hatta Kepada Presiden Soekarno 1957-1960* [*Conscience Against Violence, Bung Hatta's Letters to President Soekarno 1957-1960]*. Jakarta: Sinar Harapan, 1986.

Manin, Bernard, Adam Przeworski, and Susan C. Stokes. "Elections and Representation." In *Democracy, Accountability, and Representation*, edited by Adam Przeworski , Susan C. Stokes and Bernard Manin, 29-54. Cambridge: Cambridge University Press, 2012.

Mbate, Michael. "Decentralisation, Governance and Accountability: Theory and Evidence." *Journal of African Democracy and Development* 1, no. 2 (2017): 1-16, www.kas.de/Uganda/en/.

Mietzner, Marcus. "Coercing Loyalty: Coalitional Presidentialism and Party Politics in Jokowi's Indonesia." *Contemporary Southeast Asia* 38, no. 2 (2016): 209-32, http://dx.doi.org/10.1355/cs38-2b.

Mokhsen, Nuraida. "Decentralization in the Post New Order Era of Indonesia." Thesis, The Australian National University, 2003.

Mulgan, Richard. "Accountability: An Ever-Expanding Concept?" *Public Administration* 78, no. 3 (2000): 555–573, https://doi.org/10.1111/1467-9299.00218.

Muriu, Abraham Rugo. "Decentralization, Citizen Participation and Local Public Service Delivery: A Study on the Nature and Influence of Citizen Participation on Decentralized Service Delivery in Kenya." Thesis, Universitätsverlag Potsdam, 2013.

O'Donnell, Guillermo. "Horizontal Accountability in New Democracies." *Journal of Democracy* 9, no. 3 (1998): 112-26, https://doi.org/10.1515/9781685854133-004.

Pangalangan, Raul C. "Law and Newly Restored Democracies: The Philippines Experience in Restoring Political Participation and Accountability." *IDE Asian Law Series* 13 (2002), https://www.ide.go.jp/.

Pathak, Rabindra Kr. "Historical Approach to Legal Research." In *Legal Research and Methodology Perspectives, Process and Practice*, edited by B.C. Nirmal, Rajnish Kumar Singh, and Arti Nirmal, 1295. India: Satyam Law International, 2019.

"Personal Interview with Dr. Ghafar Karim."

"Personal Interview with Prof. Ramlan Surbakti." 2021.

Pose-Rodriguez, Andres and Roberto Ezcurra. "Does Decentralization Matter for Regional Disparities? A Cross-Country Analysis." *Journal of Economic Geography* 10, no. 5 (September 2010): 619-44, https://doi.org/10.1093/jeg/lbp049.

Power, Thomas P. "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline." *Bulletin of Indonesian Economic Studies* 54, no. 3 (2018): 307-38, https://doi.org/10.1080/00074918.2018.1549918.

Rahmatunnisa, Mudiyati. "Questioning the Effectiveness of Indonesia's Local Government Accountability System." *Jurnal Bina Praja* 10, no. 1 (2018): 135-45, https://doi.org/10.21787/jbp.10.2018.135-145.

Rasyid, Ryaas. "Regional Autonomy and Local Politics in Indonesia." In *Local Power and Politics in Indonesia*, edited by Edward Aspinall and Greg Feal. Canberra: Research School of Southeast Asian Studies - The Australian National University, 2003.

Ribot, Jesse, and Arun Agrawal. "Accountability in Decentralization : A Framework with South Asian and West African Cases." *The Journal of Developing Areas* 33, no. 4 (1999): 473–502, http://dx.doi.org/10.2307/4192885.

Rubin, Edward. "The Myth of Accountability and the Anti-Administrative Impulse." *Michigan Law Review* 103, no. 8 (2005): 2073–2136, https://repository.law.umich.edu/mlr/vol103/iss8/3.

Said, Muhtar, Ahsanul Minan, and Muhammad Nurul Huda. "The Problems of Horizontal and Vertical Accountability of Elected Officials in Indonesia." *Journal of Indonesian Legal Studies* 6, no. 1 (2021): 83-124, https://doi.org/10.15294/jils.v6i1.43403.

Sato, Yuri. "Democratizing Indonesia : Reformasi Period in Historical Perspective." *IDE JETRO* 1 (2003): 1-31, https://www.ide.go.jp.

Schedler, Andreas. "Conceptualizing Accountability." In *The Self-Restraining State: Power and Accountability in New Democracies*, edited by Andreas Schedler, Larry Diamond, and F. Marc Plattner. London: Lynn Rienner Publisher, Inc., 1999.

Secretariat General of the People's Consultative Assembly of the Republic of Indonesia. *Minutes of Amendment to the 1945 Constitution of the Republic of Indonesia, 1999-2002, Session Year 1999*. Secretariat General of the People's Consultative Assembly of the Republic of Indonesia: Jakarta, 2008.

Sherlock, Stephen. "SBY's Consensus Cabinet - Lanjutkan? [SBY's Consensus Cabinet - Continue?]." *Bulletin of Indonesian Economic Studies* 45, no. 3 (2009): 341-43, https://doi.org/10.1080/00074910903424043.

Skoufias, Emmanuel et al. "Electoral Accountability and Local Government Spending in Indonesia." Policy Research Working Paper, World Bank Group, 2014.

Stanbury, W. T. *Accountability to Citizens in the Westminster Model of Government: More Myth than Reality*. Vancouver: Fraser Institute Digital Publication, 2003.

Stipulation of the President Number 6 of 1959 on Regional Government.

Strom, Kaare. "Democracy, Accountability, and Coalition Bargaining, Center for the Study of Democracy." *European Journal of Political Research* 31, no. 1 (February 1997): 47-62, http://dx.doi.org/10.1023/A:1006856818727.

Sudarno, Ahmad. "Bupati Digugat Warga Bogor karena Jalan Rusak [The Regent Sued by Bogor Residents For Damaged Roads]." Liputan6.com, published June 7, 2016. https://www.liputan6.com/news/read/2525768/bupati-digugat-warga-bogor-kerena-jalan-rusak.

Tan, Paige Johnson. "Reining in the Reign of the Parties: Political Parties in Contemporary Indonesia." *Asian Journal of Political Science* 20, no. 2 (2012): 154-79, https://doi.org/10.1080/02185377.2012.714132.

Van Klinken, Gerry. "Indonesian Politics in 2008: The Ambiguities of Democratic Change." *Bulletin of Indonesian Economic Studies* 44, no. 3 (2008): 365-81, https://doi.org/10.1080/00074910802395328.

Welp, Yanina, and Juan Pablo Milanese. "Playing by the Rules of the Game: Partisan Use of Recall Referendums in Colombia." *Democratization* 25, no. 8 (2018): 1379-96, https://doi.org/10.1080/13510347.2017.1421176.

Yamguchi, Zentralarchiv and Gigi Quetelet. "Comparative Study of Post-Marriage Nationality of Women in Legal Systems of Different Countries." *International Journal of Social Science Research and Review* 3, no. 3 (2020): 1-8, https://doi.org/10.47814/ijssrr.v3i3.41.

Zain, Fadlan Mukhtar. "Digugat Warga Gara-Gara Ubah Nama Jalan, Bupati Kebumen Ngaku Tak Takut, Hadir Langsung di Persidangan Halaman [Residents Sued Over Changing Street Name, Kebumen Regent Says He's Not Afraid, Appears Directly at Page Trial]." Kompas.Com, published March 9, 2022. https://regional.kompas.com/read/2022/03/09/094407978/digugat-warga-gara-gara-ubah-nama-jalan-bupati-kebumen-ngaku-tak-takut?page=all.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1013

Comparative Analysis of Jurisprudence on Interventions to the Rights to Property Through Taxation: The Constitutional Court of Türkiye and European Court of Human Rights

Betül Hayrullahoğlu[*]
Usak University, Faculty of Economics and Administrative Sciences, Türkiye
betul.hayrullahoglu@usak.edu.tr

Received: 5 February 2023| Last Revised: 28 November 2023 | Accepted: 19 December 2023

Abstract

Fundamental rights and freedoms of individuals are guaranteed in both constitutions and international treaties. One of the most important treaties protecting fundamental rights and freedoms is the European Convention on Human Rights (ECHR). Türkiye, which adopts a monist understanding, is one of the countries that are party to the ECHR. Since it was founded in 1959, Türkiye has been one of the three countries that are subject to the most judgments by the European Court of Human Rights (ECtHR). In order to make this bad record better and to protect fundamental rights and freedoms more effectively, the individual application mechanism to the Constitutional Court has been entered into force in Türkiye since 2012. This paper argues whether the case law of the Constitutional Court of the Republic of Türkiye, which is necessary to reduce the applications made to the ECtHR against Türkiye and the violation decisions given by the ECtHR, is compatible with the case law of the ECtHR. The paper analyses the right to property, which is one of the most related rights to taxes, and focuses only on tax interventions to this right. The right to property is important not only because it is directly related to taxes, but

[*] Associate Professor at the Public Finance Department, Faculty of Economics and Administrative Sciences, Usak University. This paper is derived from the research project titled *Turkey's Individual Application Experience in terms of Taxation Policies: Suggestions for Italy* written as a visiting fellow at the University of Milan-Bicocca- School of Law in 2021.

also because it is the second most violated right among the violation decisions made by the ECtHR against Türkiye between 1959-2022, after the right to a fair trial. The methodology employed is based on a comparative jurisprudential analysis of the Constitutional Court of the Republic of Türkiye and ECtHR. In this way, the similarities and differences between the way the two courts dealt with the cases in the interventions to the right to property through taxes can be analyzed. As a result, it is understood that both Courts treat the right to property in the same way, but the Turkish Constitutional Court adopts a stricter and more protective interpretation than the European Court of Human Rights in terms of legality criteria.

Keywords: Taxes; Right to Property; Individual Application; Constitutional Court; EctHR

I. INTRODUCTION

As a result of the social contract, individuals who were initially without a state voluntarily relinquished a portion of their independence to a government or authority, embracing the concept of the rule of law. The financing of functions assumed by the more advanced organizational form of societies, the state, has necessitated the use of taxes. In this regard, taxes, whether in kind or in cash, have been employed in both primitive and modern communities to meet the common needs of society.

Taxes inevitably require intervention in some fundamental rights and freedoms of individuals. One of the most tax-sensitive rights is the right to property. Countries protect fundamental rights and freedoms through both constitutions and treaties. In this context, the right to property is protected both in the Constitution of the Republic of Türkiye and in the European Convention on Human Rights to which Türkiye is a party.

In Türkiye, the protection of fundamental rights and freedoms in national law are carried out through the individual application mechanism. Individual application to the Constitutional Court, applied in more than forty countries today; came into force with the Constitutional amendment as a consequence of the Referendum on 12.09.2010 in Türkiye. The jurisdiction ratione temporis of the Turkish Constitutional Court began on 23.09.2012.

The individual application mechanism has mainly two objectives; to protect fundamental rights and freedoms more effectively and to reduce the applications to the European Court of Human Rights (ECtHR) against the country.

As expected, the case law of the Turkish Constitutional Court is in line with the European Court of Human Rights in order to reduce the applications made against Türkiye to the European Court of Human Rights and to reduce Türkiye's conviction. On the other hand, in some cases, the Turkish Constitutional Court to adopts a more strict interpretation than the European Court of Human Rights in order to protect the rights of individuals more effectively.

The methodology employed is based on document and jurisprudential analysis. The scope of the study covers the jurisprudence of the Constitutional Court of the Republic of Türkiye and the European Court of Human Rights regarding interventions in the right to property through taxation. The focus on both the jurisprudence of the Constitutional Court of the Republic of Türkiye and the ECtHR in this study is justified by the fact that one of the objectives behind the brought into force of the individual application mechanism in Türkiye is to reduce the number of convictions by the ECtHR. Consequently, the alignment of the Turkish Constitutional Court with the ECtHR jurisprudence becomes important.

Furthermore, in Türkiye, the scope of individual applications includes the rights falling under the joint protection of the Turkish Constitution and the ECHR. As a result, the Constitutional Court of the Republic of Türkiye has undertaken projects in collaboration with the Council of Europe to support and enhance the individual application.

Additionally, Türkiye is a member of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). Within this association, Azerbaijan, South Korea, and Thailand also implement individual application mechanisms. However, it is noteworthy that the concept of individual application originated in Europe, with Germany and Spain being among the pioneers in this regard,

boasting the most developed practices.[1] The success of the continental European model of constitutional review has also had an impact on the dynamics and outcomes of the alteration of constitutional review institutions in Middle East/North Africa (MENA) countries.[2]

For all these reasons explained, although the individual application applied in Türkiye has its own characteristics, the ECtHR case law is taken as reference in the study.

Within the scope of the paper, not all the decisions of the Constitutional Court of the Republic of Türkiye, only the basic decisions that determine the main approach of the Court are included. Examining the decisions of the ECtHR published only in English is another limitation of the study.

The importance of individual application and its contribution to the protection of fundamental rights and freedoms in domestic law has been discussed in the literature. Zühtü Arslan, President of the Constitutional Court of the Republic of Türkiye, draws attention to the fact that with the entry into force of the individual application mechanism, the Constitutional Court of the Republic of Türkiye has started to make decisions with a "rights-oriented" paradigm based on the protection of individuals' fundamental rights and freedoms.[3] On the other hand, it is emphasized that the existence of individual application in domestic law will reduce the number of applications to the ECtHR against that country. The Venice Commission, in its report published in 2011, emphasizes the importance of resolving disputes at the national level before they reach the ECtHR, considering the caseload of the ECtHR. In this regard, the report draws attention to the importance of an individual application mechanism.[4] Zupančič also concluded that the constitutional complaint (individual application) is the

[1] M. Lutfi Chakim, "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions," *Constitutional Review* 5, no. 1 (May 2019): 96.

[2] Anja Schoeller-Schletter, "Mapping Constitutional Review in the Middle East and North Africa: Historic Developments and Comparative Remarks," in *Constitutional Review in the Middle East and North Africa*, ed. Anja Schoeller-Schletter (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2021), 21.

[3] Zühtü Arslan, "The Role of Individual Application in the Protection of Human Rights in Turkey," Constitutional Court of The Republic of Türkiye, published May 03, 2021.

[4] European Commission for Democracy Through Law (Venice Commission), "*Study on Individual Access to Constitutional Justice adopted by the Venice Commission at its 85th Plenary Session Venice, 17-18.10.2010*, Gagik Harutyunyan, Angelika Nussberger, Peter Paczolay. Study No: 538/2009, 2011.

most ideal way to ensure harmony between national constitutional law and the Law of the EctHR.[5] Another legist Palguna also draws attention to the importance of the constitutional complaint.[6] Faiz, argues that constitutional complaint might be adopted as a new remedy in Indonesia to strengthen the protective role of the Indonesian Constitutional Court regarding the fundamental rights and freedoms.[7]

Individual application in Türkiye has a history of eleven years. So, there is not a very developed literature on it. The interest of law researchers and academics in case law that makes references to foreign and international law is immense.[8] However, since the development of the case law requires a certain period of time, studies that analyze the case law of the of the Constitutional Court of Türkiye are limited. In her study, which examines the individual application in terms of tax law, Akdemir did not analyze the case law, but focused on the functioning of the individual application in terms of not only the right to property but also other rights.[9]

Some of the studies that analyze the case law on tax interventions to the right to property, which is the subject of this study, focus only on the case law of the Constitutional Court of the Republic of Türkiye. For example, the study of Uygun and Gerçek aims at systematically classifying the judicial tax decisions of the Constitutional Court.[10] Hayrullahoğlu, on the other hand, examined the case law of the Constitutional Court of the Republic of Türkiye on tax interventions to the right to property within the scope of the proportionality criterion, out

5 Boštjan M. Zupančič, "Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis," *Revus,* no. 1 (2003).

6 I Dewa Gede Palguna, "Constitutional Complaint and The Protection of Citizens The Constitutional Rights," *Constitutional Review 3,* no. 1 (May 2017): 1.

7 Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review 2,* no. 1 (May 2016): 103, http://dx.doi.org/10.31078/consrev215.

8 Bisariyadi Bisariyadi, "Referencing International Human Rights Law in Indonesian Constitutional Adjudication," *Constitutional Review 4,* no. 2 (December 2018): 250.

9 Tuğçe Akdemir, "Vergi Hukuku Açısından Türk Anayasa Mahkemesi'ne Bireysel Başvuru Yolu [Individual Appeals to The Turkish Constitutional Court With Regard to Tax Law]," *Türkiye Barolar Birliği Dergisi* [Journal of the Union of Turkish Bar Associations], no. 111 (March-April 2014): 255.

10 Esra Uygun and Adnan Gerçek, "Anayasa Mahkemesinin Vergilendirme Alanındaki Bireysel Başvuru Kararlarının Değerlendirilmesi [Evaluation of Individual Applications Decisions in the Field of Taxation of Constitutional Court]," *Türkiye Adalet Akademisi Dergisi* [Journal of the Turkish Justice Academy], no. 29 (January 2017): 167.

of three criteria consisting of legality, public interest, and proportionality.[11] Hayrullahoğlu's other paper, prepared with Gök, focuses on the decision of the Constitutional Court, which examines only the right to property in terms of non-discrimination.[12] The studies of Sağır and Türkay, who analyze both the case law of the Constitutional Court of the Republic of Türkiye and the ECtHR, examine the subject only in terms of legality, out of three criteria.[13]

This paper seeks an answer to the question of "to what extent does the approach of the Constitutional Court of the Republic of Türkiye overlap with the approach of the ECtHR in the interventions to the right to property through taxation?" Apart from this paper, which aims to find an answer to this question, only one study has been found that examines the tax interventions to the right to property by comprehensively considering the case law of both the Constitutional Court of the Republic of Türkiye and the ECtHR. Yılmazoğlu focused on the subject comprehensively in his doctoral thesis. Although this paper has the same purpose as Yılmazoğlu's thesis, it is important because it deals with the subject by focusing on important basic decisions in accordance with the limitations of an article, and because of its widespread impact due to its language.

This paper aims to reveal the compliance of the Turkish Constitutional Court's case law on interventions to the right to property through taxes with the European Court of Human Right case law. Thus, the similarities and differences between the approaches of both courts on the protection of fundamental rights and freedoms can be analyzed.

---

11 Betül Hayrullahoğlu, "Mülkiyet Hakkına Vergi Yoluyla Müdahalelerde Anayasa Mahkemesinin Ölçülülük Denetimi [Proportionality Control of the Constitutional Court in Interventions to Property by Tax]," in *Küreselleşen Dünyada Mali ve* İktisadi *Meseleler* [Financial and Economic Issues in a Globalizing World], ed. Serap Ürüt Saygın and Orçun Avcı, (Bursa: Ekin Press, 2021), 59.

12 Betül Hayrullahoğlu and Onur Gök, "Vergi İncelemelerinde Mükellef Hakkı Bağlamında Ayrımcılık Yasağı: Bir Anayasa Mahkemesi Kararı Çerçevesinde İnceleme [In the Context of Taxpayer's Right in Tax Auditing the Prohibition of Discrimination: A Review of the Constitutional Court Judgment]," in *Maliye Araştırmaları-2* [Public Finance Studies-2], ed. Selçuk İpek (Bursa: Ekin Press, 2018), 151.

13 Harun Sağır, "Anayasa Mahkemesi'nin Bireysel Başvuru Kararları Çerçevesinde Vergisel Müdahalelerde Mülkiyet Hakkı İhlali Bakımından Hukuka Uygunluk Ölçütü [Legal Compliance Criterion for Violation of Right to Property in Tax Interventions within the Framework of Individual Application Decisions of the Constitutional Court]," *Vergi Dünyası Dergisi* [Tax World Journal] no. 492 (August 2022); İmdat Türkay, "Anayasa Mahkemesi Kararında Mülkiyet Hakkı ve Vergi İlişkisi [The Relation between Right to Property and Taxes in the Decision of the Constitutional Court]," Mondaq, published November 14, 2022.

The study proceeds as follows: Part 2 focuses on how fundamental rights and freedoms are limited by taxation policies. Part 3 examines what ECtHR wants for the protection right to property. This section explains some important decisions of the ECtHR. To make a comparison between the Turkish Constitutional Court and the European Court of Human Rights Part 4 focuses on the Constitutional Court of Türkiye case law. Part 5 concludes.

II. RESTRICTION OF FUNDAMENTAL RIGHTS AND FREEDOMS THROUGH TAXATION POLICIES

It is possible to restrict individuals' fundamental rights and freedoms for various reasons. One of these reasons is taxation. The use of taxation authority, which is one of the most important powers of the government, requires a close and continuous relationship with human rights, and in this process, the state may interfere with the fundamental rights and freedoms of individuals.[14]

Since every tax or financial obligation results in interference with property,[15] the right to property is one of the most sensitive rights against taxation.[16] However, it is possible to restrict many other human rights, which are guaranteed by the constitution and contracts, apart from the right to property, through taxation. At this point, the important thing is that the limitation is legal, in other words, compliance with the boundaries of the restriction.

The conditions under which fundamental rights and freedoms will be restricted are stated in the constitutions.

In Article 13 of the Constitution of the Turkish Republic, as a condition of the restriction, in addition to legality,

---

[14] Gamze Gümüşkaya, *Mülkiyet Hakkına Vergisel Müdahaleler Bakımından İnsan Hakları Avrupa Mahkemesi'ne Kişisel Başvuru* [Personal Application to the European Court of Human Rights in Terms of Tax Interventions to the Right to Property] (Istanbul: On Iki Levha Publishing House, 2010), 269.

[15] Funda Töralp, "Temel Hak ve Özgürlüklerin Vergilendirme Yetkisinin Kullanımına Etkisi [The Effect of Fundamental Rights and Freedoms on the Use of Taxation Power]," in *Anayasadan Mali ve Vergisel Beklentiler [Fiscal and Tax Expectations from the Constitution]*, ed. Feridun Yenisey, Gülsen Güneş and Z. Ertunç Şirin, (Istanbul: On İki Levha Publishing House, 2012), 175.

[16] Mine Nur Bozdoğan, "Mülkiyet Hakkına Haksız Bir Müdahale, İptali ve Yeni Hukuki Zemin: Fazla veya Yersiz Tahsil Edilen Vergilerin İadesinde Süre Sorunu [An Unjust Intervention with the Right to Property, Its Cancellation and New Legal Ground: The Problem of Time in Refunding the Over or Undue Collected Taxes]", *Maliye Dergisi* [Public Finance Journal], no. 162 (January- June 2012): 224.

> "...in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence" requirements also emphasized. Moreover, "these restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality".

Apart from constitutions, countries also protect fundamental rights and freedoms through international conventions.

A state also breaches its international obligation whenever its *"actions"* or *"omissions"* are not suitable with specifically determined rules in treaties.[17] One of the most important international conventions implemented for this purpose is the European Convention on Human Rights. With the Convention signed in Rome on 04.11.1950 by the member states of the Council of Europe, it is aimed to protect and develop human rights and fundamental freedoms.[18]

The Convention, whose full name is *"The Convention for the Protection of Human Rights and Fundamental Freedoms"* and known as the European Convention on Human Rights, is founded on the belief that fundamental freedoms, which constitute the main source of peace and justice in the world are based on a truly democratic political regime and a common understanding and respect for human rights.[19]

The Convention is an important milestone in the development of international human rights law. Sovereign states, for the first time, accepted the legal obligation to guarantee the classical human rights of all persons within their jurisdiction and allowed all persons, including their own nationals, to apply to an international court that could issue a legally binding violation decision.[20]

Actually, human rights obligations do not recommend exact taxation policies because states have the discretion to formulate the policies most proper to their

---

[17] United Nations General Assembly, "Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona." (Report by United Nations, Human Rights Council Twenty-Sixth Session Agenda Item 3 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 2014).

[18] "European Convention on Human Rights," opened for signature November 04, 1950, *European Treaty Series* no. 5.

[19] M. Refik Korkusuz, *Uluslararası Belgelerde ve Türk Anayasası'nda Temel Hak ve Özgürlükler* [Fundamental Rights and Freedoms in International Documents and the Turkish Constitution] (Istanbul: Özrenk Press, 1998), 82.

[20] David Harris, et. al., *Avrupa* İnsan *Hakları Sözleşmesi Hukuku* [Law of the European Convention on Human Rights], trans. Mehveş Bingöllü Kılcı, Ulaş Karan (Ankara: Sen Press, 2013), 31.

circumstances. However, a wide range of human right treaties impose limits on the discretion of states in the formulation of fiscal policies. It is a necessity because, in order to ensure that states respect, protect and fulfill rights, fiscal policies must be guided by the obligations imposed by these treaties. International human rights law sets obligations for states to respect, protect and fulfill human rights in all the ways that they exercise their functions.[21] For example, in the second paragraph of Article 1 of the Additional Protocol 1, which regulates the Right to Property of the European Convention on Human Rights, it is stated that this right can be restricted only for the purpose of public interest and in accordance with the conditions stipulated in the law and the general principles of international law.[22]

III. IN THE CONTEXT OF THE RIGHT TO PROPERTY, EXPECTATIONS OF THE ECTHR FROM TAX ADMINISTRATION AND JUDICIARY

In this section, first the right to property is defined, and then before the jurisprudence of the Constitutional Court of the Republic of Türkiye, the ECtHR case law in the context of right to property and taxation is explained.

3.1. Right to Property

The right to property is always an important issue in law[23] and it constitutes one of the most fundamental and ancient rights in a liberal democratic state of law.[24] First and foremost it is a constitutional matter. In modern constitutional countries, with the right of life, and the right of liberty the right to property is also the most fundamental right of citizens.[25]

This right is also very important to the economic development necessary to ensure that human beings can supply themselves with everything to support

[21] United Nations General Assembly, "Report of the Special Rapporteur."
[22] "European Convention on Human Rights," opened for signature November 04, 1950, *European Treaty Series* no. 5.
[23] Pu Hong. "On Protection and Restriction of Private Property Right," *Journal of Politics and Law* 1, no. 4, (December 2008): 62.
[24] Muhammet Özekes, İcra *Hukukunda Temel Haklar ve* İlkeler [Fundamental Rights and Principles in Enforcement Law] (Ankara: Adalet Publishing House, 2009), 165.
[25] Hong, "Property Right," 62.

themselves such as foods or housing. As such, right to property is a strategic human right that protects other human rights.[26]

So what is right to property? Wilson says that *"property rights are an effect of property"* and defines property as a tradition that is learned and socially taught in each generation.[27] Alchian defines the right to property as "the rights of individuals to the use of resources."[28] International law has long sought to protect the right to property as a *"human right."* [29] So are domestic laws.

The right to property regulated in the 35th Article of the Constitution of the Republic of Türkiye is guaranteed by saying *"Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to property shall not contravene public interest"*.

The right to property is also protected in the European Convention on Human Rights. According to Article 1 of the Additional Protocol 1 of the Convention titled *"Protection of Property"*:[30]

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The article contains 3 rules. The first rule, contained in the first sentence of the first paragraph, recognizes the right to respect for the right to property. The second rule in the second sentence of the first paragraph is about the abolition of the property, and it binds it to certain conditions. The third and last rule regulated in the second paragraph gives the state the right to control the use

[26] Rhoda E. Howard-Hassmann, "Reconsidering the Right to Own Property," *Journal of Human Rights* 12, no. 2 (May 2013): 180.
[27] Bart J. Wilson, "The Primacy of Property; or, the Subordination of Property Rights," *Journal of Institutional Economics* 19, no. 2 (August 2022): 251.
[28] Armen A. Alchian, "Some Economics of Property Rights," *Il Politico* [The politician] 30, no. 4 (December 1965): 817.
[29] José Enrique Alvarez, "The Human Right of Property," *University of Miami Law Review* 72, no. 3. (Spring 2018): 580.
[30] "European Convention on Human Rights," opened for signature November 04, 1950, *European Treaty Series* no. 5.

of the right to property by enacting the laws it deems necessary in accordance with the general interest and for this purpose.[31]

Article 1 of Protocol No. 1 both recognizes the right of individuals to peacefully enjoyment their property, and clearly grants the state a broad mandate to intervene in this right for the public interest.[32] In other words, with this article, on the one hand, the state is given the right to take all the measures it deems necessary regarding taxes, on the other hand, the individual is protected against these measures and is made the subject of the right to property, which is one of the most basic human rights.[33]

It took a while to bring the claims of violation of right to property to the agenda in the field of tax law. The Commission was rather hesitant to decide on a right to property violation claim in the tax law field. Due to the recognition of the wide discretion of the state in the field of taxation and the acceptance of the tax within the absolute sovereignty of the states, the Commission has made many inadmissibility decisions. For this reason, it is very difficult to find a tax case brought before the Court between the years 1959-1995, which we can describe as the first period. However, after 1995, the Court decided violation of right to property related to taxation.[34]

According to the statistics of the ECtHR covering the years 1959-2021, the right to property is among the most violated rights for Türkiye.[35]

The individual application mechanism is limited to secure fundamental rights and freedoms regulated in the European Convention on Human Rights (ECHR) rather than all rights ensured in the Turkish Constitution.[36] Since the right to property is guaranteed in both the Constitution of the Republic of Türkiye and the ECHR, it is within the scope of individual application.

---

31 Durmuş Tezcan et al., İnsan *Hakları El Kitabı* [Human Rights Handbook] (Ankara: Seckin Publishing House, 2011), 408.

32 Harris, *European Convention*, 718.

33 Suat Simşek, "Vergi Politikaları, Mülkiyet Hakkı ve Avrupa İnsan Hakları Mahkemesi [Tax Policies, Right to Property and the European Court of Human Rights]," *Maliye Dergisi* [Public Finance Journal], no. 159 (July- December, 2010): 324.

34 Begüm Dilemre Oden, "Avrupa İnsan Hakları Mahkemesi Kararlarının Türk Vergi Hukukuna Etkisi [The Effect of European Court of Human Rights Decisions on Turkish Tax Law]" (PhD diss., Cankaya University, 2017), 104.

35 European Court of Human Rights, (2022a). "ECHR Overview 1959-2021," European Court of Human Rights, published February, 2022.

36 Engin Yıldırım, "Social Rights and The Turkish Constitutional Court," *Constitutional Review* 7, no. 2 (December 2021): 195.

3.2. ECtHR Case Law in the Context of Right to Property and Taxation

According to Article 35 of the ECHR, individuals can apply to the ECtHR following the exhaustion of domestic remedies. The requirement to exhaust domestic remedies before making an application to the ECtHR is a form of respect for states.[37]

The ECtHR gives a wide margin of appreciation to the states in the field of taxation.[38] However, in cases where the increase in taxes imposes an exorbitant burden on the persons concerned or undermines the financial situation of the concerned, the Convention bodies may consider the application.[39]

The first expectation of the ECtHR regarding the right to property is that the tax regulations should be public. However, the Court is not involved in how this requirement is to be fulfilled. The ECtHR, on the other hand, stated that the Convention did not make any provision about the degree of publicity of the rules; that no opinion could be expressed on the choice of the contracting states on this matter; that only the conformity of the method with the Convention could be evaluated.[40]

The second expectation of the ECtHR is predictability. Regarding the predictability of tax rules, the ECtHR states that there may be some convincing reasons for changes in the case law over time and differences in interpretation; that previous interpretations can be changed in order to keep the Convention up-to-date, as long as the reasons for the change are stated.[41] The Court also expects the administration to accept the approach in favor of the taxpayer if

[37] Kamil A. Strzepek, "The Relationship Between The European Convention on Human Rights and Domestic Law: A Case Study," *Constitutional Review* 6, no. 2 (December 2020): 354.

[38] Judical Review of European Court of Human Rights, No. 15375/89, Gasus Dosier- Und Fördertechnik GmbH, v. The Netherlands (European Court of Human Rights February 23, 1995).

[39] Aida Grgic et al., *Avrupa* İnsan *Hakları Sözleşmesi Kapsamında Mülkiyet Hakkı* [The Right to Property under the European Convention on Human Rights], trans. Özgür Heval Çinar, Abdulcelil Kaya (Belgium: Council of Europe, 2007), 46.

[40] Judical Review of European Court of Human Rights, No. 26449/95, Spacek, s.r.o.v. The Czech Republic (European Court of Human Rights November 09, 1999).

[41] Judical Review of European Court of Human Rights, No. 39766/05, Serkov, v. Ukraine (European Court of Human Rights October 07, 2011).

the domestic law is unclear or there is a rule that can be interpreted more than once on the taxpayer's rights and obligations.[42]

The third expectation of the ECtHR is proportionality. The proportionality indicates that any action against any rights limitation should be proportional.[43] At this point, the ECtHR emphasizes that taxes should not impose an excessive burden on taxpayers.[44] Tax increases that are based on valid grounds and do not impose an intolerable burden on taxpayers do not violate the right to property.

In the Azienda Case,[45] the applicants were agricultural firms. In the relevant period, fiscalizzazione [concession] and sgravi contributivi [exemptions] were established to support agricultural activities. Companies only benefited from the exemption (sgravi contributivi). Since they could not benefit from both privileges, they applied to the ECtHR claiming that their right to property was violated.

In its adjudication, the ECtHR stated that the state aims to reduce public expenditures by limiting aid. In addition, as regards the effects of the interference on the applicant companies' financial condition, the Court found that the companies had consistently paid the relevant contributions without applying the concession. That is, companies are not in a position where they cannot run their business due to the associated financial burdens. The Court further noted that the applicant companies had even willingly chosen to withhold such assistance for a certain period of time, waiting for more than ten years before bringing their claims before the domestic courts. Moreover, companies were not completely deprived of benefits. They also benefited from an exemption, that is, another benefit.

In conclusion, the ECtHR held that the interference was in a fair balance.

---

42 Judical Review of European Court of Human Rights, No. 39766/05, Serkov, v. Ukraine (European Court of Human Rights October 07, 2011); Judical Review of European Court of Human Rights, No. 23759/03, Shchokin, v. Ukraine (European Court of Human Rights January 14, 2011).

43 Giri Ahmad Taufik, "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly," *Constitutional Review* 4, no. 1 (May 2018): 71.

44 Judical Review of European Court of Human Rights, No. 66529/11, N.K.M., v. Hungary (European Court of Human Rights May 14, 2013); Judical Review of European Court of Human Rights, No. 41838/11, R.Sz., v. Hungary (European Court of Human Rights November 04, 2013).

45 Judical Review of European Court of Human Rights, No. 48357/07, 52677/07, 52687/07 and 52701/07, Azienda Agricola Silverfunghi S.A.S. and Others v. Italy (European Court of Human Rights September 24, 2014).

Besides taxes, tax penalties also should not create an excessive burden on the fiscal status of taxpayers.[46]

According to the court, the disproportionately of the tax security measures also violate the right to property. To avoid this, powers should not be used arbitrarily. As an example, the ECtHR has stated that the administration can use its pre-emption authority, which is an intervention for the purpose of public interest, such as the prevention of tax evasion, in a *"fair"* and not *"arbitrary"*. However, the failure of those concerned to effectively discuss the pre-emption measure against them gave the State a very wide margin of discretionary power as to the limits of the measure. This makes this authority unpredictable and unjustified. The application of the pre-emption power against the applicant, who has no evidence of malicious behavior, places an excessive burden on the applicant and this situation violates his right to property by making the intervention disproportionate.[47]

In another case, the Court emphasized that states can take certain measures to prevent, stop or penalize when they receive information about the declaration and payment of Value Added Tax (VAT); however, despite the absence of such a finding, the punishment of the buyer, who fulfills his obligations and does not have the opportunity to control whether the seller complies with his obligations, cannot be considered reasonable because the seller does not comply with his obligations, and this violates the fair balance between the requirements of the general interest of the society and the protection of the fundamental rights of the individual.[48]

In another case, the Court stated that, while it was acceptable to be detained by the authorities for short periods of time on the plane on suspicion of tax

[46] Judical Review of European Court of Human Rights, No. 35533/04, Mamidakis, v. Greece (European Court of Human Rights January 11, 2007); Judical Review of European Court of Human Rights, No. 14902/04, OAO Neftyanaya Kompaniya Yukos v. Russia (European Court of Human Rights September 20, 2011).

[47] Judical Review of European Court of Human Rights, No. 13616/88, Hentrich., v. France (European Court of Human Rights September 22, 1994).

[48] Judical Review of European Court of Human Rights, No. 3991/03, Bulves AD., v. Bulgaria (European Court of Human Rights January 22, 2009).

evasion, the accompanying abusive and arbitrary actions of the authorities had rendered these safeguards ineffective in practice.[49]

In the Travers Case,[50] the applicants are partners of companies operating in the iron industry and trade sector. As per the law, they are obliged to pay taxes in advance. However, the applicants complain that although this tax withholding system is highly effective in terms of tax evasion, it has adversely affected not only tax evaders but also, and disproportionately, the entire industry. The reason is that the amount cut is very high (about 60%). In addition, tax refunds are paid to them after an average of 5 years. Moreover, the interest paid to them on their tax return is lower than the rate paid to holders of government bonds.

For all these reasons explained, the ECtHR emphasizes that although this system has been adopted to combat tax evasion effectively, it poses a significant burden for taxpayers. Moreover, this burden is exacerbated by the delay in receiving tax refunds from tax authorities. Therefore, the ECtHR held that the applicants' right to property had been violated by a disproportionate or unjustified interference with their property.

The ECtHR attaches so much importance to the principle of proportionality that it finds that in certain circumstances it should be possible to make procedural exceptions. This means that the national courts of Member States should not dismiss cases that appear inadmissible too easily. In one Case,[51] enforcement proceedings were initiated against the applicant to collect the company's tax liability because he was the so-called chairman of a company, a position that he had systematically rejected from the beginning. In this process, the appeal of the applicant was late.

---

[49] Judical Review of European Court of Human Rights, No. 19336/04, West/Alliance Limited, v. Ukraine (European Court of Human Rights January 23, 2014).

[50] Judical Review of European Court of Human Rights, No. 15117/89, Riccardo Travers and 27 Others v. Italy (European Court of Human Rights January 16, 1995).

[51] Judical Review of European Court of Human Rights, No. 27785/10, Melo Tadeu., v. Portugal (European Court of Human Rights October 23, 2014).

Precisely this case shows that the sole fact of a disproportionate interference caused a violation of right to property, regardless whether the appeal was too late.[52]

The ECtHR states that it is also against the principle of proportionality that people have to pay more taxes for reasons such as a delay in the implementation of judicial decisions by the administration[53] or problems experienced by local authorities in implementing international norms such as EU directives.[54]

In the Di Belmonte Case,[55] the applicant, Pietro Bruno di Belmonte, an Italian national, owns a plot of land in Ispika. The applicant's land was expropriated. In accordance with the legislation in force at the time of the expropriation, the expropriation value payments are not subject to tax. In 1992, 20% withholding tax was introduced on expropriation revenues. The expropriation cost, which should be paid to the land owner in the year the expropriation was made, was delayed due to some disputes with the administration. Therefore, the administration paid the expropriation cost by deducting the 20% tax.

According to the ECtHR, if there had been no disruption in the implementation of the judicial decisions of the administration within the conditions of the concrete case, the applicant would have reached the expropriation compensation tax-free before the enactment of the Law that brought new provisions. In these circumstances, the application of the new Law to the applicant's expropriation compensation constitutes an excessive burden for the applicant. The local administration's failure to comply with the judicial decisions and to pay the compensation due to the applicant on time and in full left the applicant face to face with new taxes. Therefore, the applicant's right to property had been violated. The ECtHR also notes that the delay in reimbursement of the unduly

52 Eric Poelmann, "ECHR Melo Tadeu: A Tax Case Which Should Bring on More Carefully Selected Criminal Procedures", *Intertax* 44, no. 5 (2016): 434-435, https://doi.org/10.54648/taxi2016035.

53 Judical Review of European Court of Human Rights, No. 72638/01, Di Belmonte., v. Italy (European Court of Human Rights March 16, 2010).

54 Judical Review of European Court of Human Rights, No. 36677/97, S.A. Dangeville, v. France (European Court of Human Rights April 16, 2002).

55 Judical Review of European Court of Human Rights, No. 72638/01, Di Belmonte., v. Italy (European Court of Human Rights March 16, 2010).

collected tax[56] and the non-interest levying on such refunds[57] in cases where it is determined by the national authorities that the tax has been overpaid, is also contrary to the principle of proportionality.

In the Buffalo Sri Case,[58] the applicant was a limited liability company headquartered in Italy until 2001 and entered into a voluntary liquidation process. Between 1985-1992, the company paid taxes over the amount accrued to the government. As a result, the right to receive a tax refund has arisen. The state began reimbursement payments in 1997. However, the full refund amounts were not paid at that time. During that period the applicant company had to seek financing from banks and private individuals. For this reason, it was exposed to an extra cost burden and had to pay high interest rates from the tax refunds paid by the State.

Noting that the applicant company had suffered disproportionate delays in paying its tax refunds, the Court held that there had been a violation of Article 1 of Protocol No. 1 to the Convention.

As stated before, the ECtHR gives a wide margin of appreciation to the states in the field of taxation.[59] According to the ECtHR, national authorities, because of their direct knowledge of their society and their needs, are in principle in a better position than an international judge to decide what is in the *"public interest"*. For this reason, the ECtHR gives member states a wide margin of appreciation in taxation policies.[60] For example; Cacciato v. Italy and Guiso and Consiglio v. Italy Cases concerned the expropriation of land by municipal authorities and in particular the tax of 20% that the applicants had to pay on

[56] Judical Review of European Court of Human Rights, No. 38746/97, Buffalo S.r.l. in Liquidation, v. Italy (European Court of Human Rights July 03, 2003); Judical Review of European Court of Human Rights, No. 803/02, Intersplav, v. Ukraine (European Court of Human Rights January 09, 2007).

[57] Judical Review of European Court of Human Rights, No. 10162/02, Eko- Elda Avee, v. Greece (European Court of Human Rights June 09, 2006).

[58] Judical Review of European Court of Human Rights, No. 38746/97, Buffalo S.R.L., in Liquidation, v. Italy (European Court of Human Rights July 03, 2003).

[59] Judical Review of European Court of Human Rights, No. 15375/89, Gasus Dosier- Und Fördertechnik GmbH, v. The Netherlands (European Court of Human Rights February 23, 1995).

[60] Judical Review of European Court of Human Rights, No. 15117/89, Riccardo Travers and 27 Others v. Italy (European Court of Human Rights January 16, 1995).

the compensation they received. They complained about the right to property. However, applications were declared inadmissible.[61]

In the Scordino Case,[62] where the expropriation price was contested, the applicants claimed that their right to property was violated also due to the 20% tax deduction on this price. The ECtHR did not find the 20% tax deduction from the expropriation price unfair. However, the power of the state is not unlimited. According to the ECtHR, the right to property may be violated when the tax system imposes an excessive burden on taxpayers or interferes in a substantial way with their fiscal situation.[63]

In summary, considering the case law of the ECtHR on the right to property for tax interventions, it can be understood that, if taxes and tax penalties create an excessive burden on the fiscal status of taxpayers, if the tax security measures are disproportionately, if taxpayers have to pay more taxes for reasons such as a delay in the implementation of judicial decisions and problems experienced by local authorities in implementing international norms, if the refunds to the taxpayers are not made on time, if non-interest levying on such refunds in cases where it is determined by the national authorities that the tax has been overpaid, the ECtHR decides that the fair balance is disturbed against the taxpayers and the right to property is violated.

IV. THE CONSTITUTIONAL COURT OF TÜRKİYE CASE LAW IN THE CONTEXT OF THE RIGHT TO PROPERTY AND TAXATION

Increased awareness of human rights questions resulting from the misappropriation of State power has led to the coming into force or expansion of existing legal mechanisms to protect constitutional rights and freedoms.[64] One of these mechanisms is constitutional complaint. Constitutional complaint is one of the important constitutional court jurisdictions that can be qualified as

[61] European Court of Human Rights, (2022b). "Italy," European Court of Human Rights, published November 2022.
[62] Judical Review of European Court of Human Rights, No. 36813/97, Scordino v. Italy (European Court of Human Rights March 29, 2006).
[63] Harris, *European Convention*, 716.
[64] Gerhard Dannemann, "Constitutional Complaints: The European Perspective," *The International and Comparative Law Quarterly 43,* no. 1 (January 1994): 142.

a complaint or lawsuit filed by any person who thinks that his/her rights have been violated by an act or omission of public authority.[65] Following the come into force of the individual application in Lithuania in 2019, only three Council of Europe member states remain, although having a constitutional court, not allowing direct individual access.[66] Currently, constitutional complaint has been adopted in various models in many countries.[67] It is shaped as the individual application in Türkiye.

In the individual application examinations of the Turkish Constitutional Court, such as the ECtHR, the regulations for determining, changing and paying taxes and similar obligations and social security premiums and contributions are handled within the scope of the state's authority to regulate the use of property or control the use of property for the public benefit.[68]

Again, like ECtHR, the Constitutional Court in its judicial review of right to property through taxation, determines whether the intervention constitutes a violation of the right to property by examining three criteria. These are; legality, public interest, and proportionality.[69]

In its decisions, the ECtHR considers the stable case law formed by domestic judicial decisions on interference with rights and freedoms sufficient to meet the requirement of legality and does not seek a law enacted by the legislature.[70] In other words, while the ECtHR accepts that the conditions envisaged in the law, that is, the principles developed through jurisprudence based on judicial decisions that have gained stability by interpreting the legality broadly can also meet the legality requirement, the Constitutional Court emphasizes that the limitations

[65] Chakim, "A Comparative Perspective," 96.

[66] Ingrida Daneliene, "Individual Access to Constitutional Justice in Lithuania: the Potential within the Newly Established Model of the Individual Constitutional Complaint," *Revista de Derecho Político*, no. 111 (May- August 2021): 307.

[67] Chakim, "A Comparative Perspective," 96.

[68] Individual Application to Constitutional Court, Arif Sarıgül, Application No. 2013/8324 (The Constitutional Court of the Republic of Türkiye, February 23, 2016).

[69] Individual Application to Constitutional Court, Türkiye İş Bankası A.Ş., [Turkey Is Bank Joint Stock Company], Application No. 2014/6192 (The Constitutional Court of the Republic of Türkiye, November 12, 2014).

[70] Sibel İnceoğlu, "Hak ve Özgürlükleri Sınırlama ve Güvence Rejimi," [Limitation of Rights and Freedoms and the Assurance Regime] in İnsan Hakları Avrupa Sözleşmesi ve Anayasa Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme, *[An Analysis within the Scope of the European Convention on Human Rights and the Individual Application to the Constitutional Court],* ed. Sibel İnceoğlu (Ankara: Sen Press, 2013): 30.

to the right to property must be made by law. In this respect, the Constitution provides broader protection than the European Convention on Human Rights.[71]

According to the case law of the Constitutional Court, in order for an interference with the right to property to be legal, it is not sufficient for the interference to be based on a legal regulation existing in national law, but it must also be accessible and foreseeable for the owner of the right to property.[72]

The Court accepts that in cases where certainty is provided for the individual by clarifying the content and scope of laws with judicial jurisprudence, the condition of foreseeability is met and therefore the legitimacy of the interference with the right to property.[73]

The resolution of the Constitutional Court to violate the right to property, on the grounds that predictability could not be achieved, is the Case of Türkiye İş Bankası A.Ş [Türkiye Is Bank Joint Stock Company].[74]

Türkiye İş Bankası A.Ş [Türkiye Is Bank Joint Stock Company] is a bank operating in Türkiye since the foundation of the Republic. For many years, the Bank has made contribution payments to the foundation, which was established to provide various benefits to its employees. As a result of the tax inspection, these payments should be considered as wages and income tax should be paid, but a penalty tax was imposed on the bank because the tax was not withheld and paid.

---

71 Individual Application to Constitutional Court, Celalettin Aşçıoğlu, Application No. 2013/1436 (The Constitutional Court of the Republic of Türkiye, March 06, 2014).

72 Gamze Gümüşkaya, "İnsan Hakları ve Vergilendirme: Mülkiyet Hakkı Yönünden İnsan Hakları Avrupa Mahkemesi'ne Kişisel Başvuru" [Human Rights and Taxation: Personal Application to the European Court of Human Rights in Terms of Right to Property] (Master diss., Istanbul University, 2009), 80.

73 Individual Application to Constitutional Court, Türkiye İş Bankası A.Ş., [Turkey Is Bank Joint Stock Company], Application No. 2014/6192 (The Constitutional Court of the Republic of Türkiye, November 12, 2014).

74 For similar Cases see Individual Application to Constitutional Court, Türkiye İş Bankası A.Ş. Şubeleri, [Turkey Is Bank Joint Stock Company Branches] Application No. 2014/6193 (The Constitutional Court of the Republic of Türkiye, October 15, 2015); Individual Application to Constitutional Court, Türkiye İş Bankası A.Ş. Şubeleri (2) [Turkey Is Bank Joint Stock Company Branches (2)], Application No. 2015/356 (The Constitutional Court of the Republic of Türkiye, September 22, 2016); Individual Application to Constitutional Court, Anadolu Anonim Türk Sigorta Şirketi Şubeleri [Anadolu Anonim Turkish Insurance Company Branches], Application No. 2014/17286 (The Constitutional Court of the Republic of Türkiye, November 16, 2016); Individual Application to Constitutional Court Türkiye İş Bankası A.Ş. Şubeleri (4) [Turkey Is Bank Joint Stock Company Branches (4)], Application No. 2015/6691, (The Constitutional Court of the Republic of Türkiye, March 08, 2018); Individual Application to Constitutional Court Narsan Plastik San. Tic. Ltd. Şti., Application No. 2013/6842, (The Constitutional Court of the Republic of Türkiye, April 20, 2016).

In its evaluation, the Constitutional Court stated that absolute clarity cannot always be expected from the laws, therefore, it should be accepted that the uncertainty in the legal regulations can be eliminated with the interpretations in practice. It is stated that the content and scope of the legal regulation is clarified by sub-law regulations or judicial case law, that is, in cases where certainty is provided for the individual, it can be said that the condition of predictability is met.

The Court drew attention to the fact that from 1974 when the Foundation was established until 2012 when the tax inspection was conducted, the tax administration did not have any initiative or precedent regarding the taxation of the contributions paid by the Bank to the Foundation. In other words, contribution payments made by the Bank for many years have not been taxed. The practice regarding the evaluation of contribution payments as wages and subjecting them to tax was initiated in line with the tax technique report prepared as a result of the tax inspection conducted in 2012. The jurisprudence in this direction, on the other hand, was formed by the 2013 decisions of the Council of State due to the lawsuits filed against the taxes levied upon this examination. Therefore, predictability could only come into question with the decisions of the Council of State in 2013. As a result, the Constitutional Court stated that in the taxation period of 2007, which is the subject of the application, since the provision of law regarding the time the benefit is obtained is not clear, it cannot be considered that the said contribution payments will be taxed within the scope of wages.

Individual applications[75] made by the same applicant to the Constitutional Court are related to the contradiction of the judicial decision with the general case law. There is no clarity in the legislation about whether a person who has a school canteen in Türkiye is exempt from VAT or not. However, the Council of State, which is the administrative high court, has decisions that these services are

[75] Individual Application to Constitutional Court, Murat Çevik, Application No. 2013/3245 (The Constitutional Court of the Republic of Türkiye, December 12, 2014); Individual Application to Constitutional Court Murat Çevik (2), Application No. 2013/3244 (The Constitutional Court of the Republic of Türkiye, July 07, 2015); Individual Application to Constitutional Court Murat Çevik (4), Application No. 2013/3241 (The Constitutional Court of the Republic of Türkiye, December 16, 2015); Individual Application to Constitutional Court Murat Çevik (5), Application No. 2013/3246 (The Constitutional Court of the Republic of Türkiye, December 16, 2015).

exempt from VAT. However, the tax court decided that the school canteen service is subject to VAT. Thereupon, the Constitutional Court decided that the right to property was violated due to the *"unpredictable"* nature of the interpretation and application of legal rules.

The Constitutional Court states that there is no interference with the discretion of public administrations regarding public interest unless it is clearly found to be baseless or arbitrary in the individual application review, and the burden of proof that the intervention is contrary to the public interest is on the claimant.

According to the criteria of the Constitutional Court, like the ECtHR, it is not sufficient for an interference with the right to property to be legal and has a legitimate aim based on the public interest, but also the interference must be proportionate.

In order for the action that interferes with the right to property to be considered legitimate by the Constitutional Court within the scope of proportionality, it is required that the intervention is convenient and necessary and that the new situation and the deteriorated balance of benefits as a result of the intervention do not reach an intolerable dimension for individuals, in other words, they must be proportional.[76]

In an application made to the Constitutional Court,[77] the applicant complained that the vehicle, which was confiscated for the purpose of collecting the public debt, was de facto sequestered instead of placing a lien on its registry. The applicant also argues that his current receivable from the tax administration is greater than his debt and that these receivables should be accepted as collateral for the debt. Despite all this, he claimed that he was a victim because the vehicle was not put up for sale within three months even if it was considered possible to make a lien, and although the vehicle was put up for sale for the second time, it could not be sold and was not returned to him after a reasonable period of time.

[76] Individual Application to Constitutional Court, Zekiye Şanlı, Application No. 2012/931 (The Constitutional Court of the Republic of Türkiye, June 26, 2014).

[77] Individual Application to Constitutional Court, EM Export Dış Ticaret A.Ş. [EM Export Foreign Trade Inc.], Application No. 2014/10283 (The Constitutional Court of the Republic of Türkiye, April 05, 2017).

The Constitutional Court in its review stated that the actual seizure of the vehicle, which was confiscated due to non-payment of the tax debt, in order to be able to sell it, was a reasonable and ordinary measure. It is also emphasized in the decision that being a public creditor may not mean that these receivables are accepted as direct collateral. Moreover, although it was stated that the vehicle seized by the applicant was not put up for sale within the time specified in the law and it was not returned to him after a reasonable period of time after it could not be sold, as a result of the examinations, the Court realized that the tax administration told the applicant that the vehicle could be returned as it was received, but the applicant did not receive it. Moreover, in addition to all these, it is also possible for the applicant to pay the tax debt and take delivery of the vehicle. Therefore, the seizure period was considered reasonable.

Finally, stating that the actual seizure of the applicant's vehicle was due to the nature of the seizure process, the Court decided that the intervention did not upset the fair balance between the public interest and the individual interest and was proportionate, since the applicant could not concretely demonstrate that he had suffered an extraordinary loss.

In another application[78] to the Constitutional Court, the applicant sued the tax authority for the cancellation of the payment orders sent to him for the collection of the public receivables, which could not be collected from the company. However, they were rejected. In his application, he claimed that he could not be held responsible for the public receivables because he was not authorized to represent the company and his right to property has been violated due to the payment order.

Since the applicant did not claim that he had been under a heavy and intolerable burden due to a payment order notified for the purpose of collecting the unpaid tax debt during the period when he was a member of the board of directors, the Constitutional Court decided that the burden imposed on the applicant with the purpose of the intervention is proportionate.

[78] Individual Application to Constitutional Court, Hüsamettin Kemal Esiner, Application No. 2013/1949, (The Constitutional Court of the Republic of Türkiye, June 24, 2015).

There are also many decisions that the Constitutional Court reviews in terms of proportionality criteria and decides on violations. The first of these violations is the non-payment of interest for the unduly collected taxes, as in the case law of the ECtHR.

In an application[79] with the demand for the refund of the unduly collected taxes with the interest, the interest request of the applicant was rejected despite the decision to refund the unduly collected taxes. Considering the current inflationary conditions, the Constitutional Court drew attention to the depreciation that occurred during the time elapsed between the date when the overpayments from the applicant were made and the lawsuits filed with the request for restitution were concluded in favor of the applicant. Consequently, the Court held that the applicant had to endure a non-proportional and excessive burden.

An application[80] subject to proportionality control by the Constitutional Court is for declarations submitted with reservations. Accordingly, the Court emphasizes that taxpayers have the right to put reservations about their declarations in order to file a lawsuit against their declarations in matters of legal disagreement. Thus, it is stated that it will otherwise deprive people of a mechanism where they can claim the arbitrariness or illegality of the interference with their right to property as well as leading to an excessive burden on the right holder. In the case, upon the detection that the company from which the applicant company purchased goods and services used false invoices, the tax administration submitted a correction statement from the applicant company and requested compensation for the value-added taxes incurred on these purchases, and stated that otherwise they would be included in the negative taxpayer list. Thereupon, the applicant company submitted its correction declarations with reservations, and the tax administration accrued value-added tax, stamp duty, and delay interest on the

[79] Individual Application to Constitutional Court, Akün *Gıda* Maddeleri Sanayi ve Ticaret A.Ş [Akün Foodstuff Industry and Trade Inc.], Application No. 2013/1993 (The Constitutional Court of the Republic of Türkiye, May 06, 2015).

[80] Individual Application to Constitutional Court, Arbay Petrol Gıda Turizm Taşımacılık Sanayi Ticaret Ltd. *Şti.* ve Arbay Turizm Taşımacılık *İthalat İhracat İnşaat* ve Organizasyon Sanayi ve Ticaret Ltd. *Şti.* [GK], [Arbay Petrol Food Tourism Transportation Industry Trade Ltd. Sti. and Arbay Tourism Transportation Import Export Construction and Organization Industry and Trade Ltd. Sti. [GA]], Application No. 2015/15100, (The Constitutional Court of the Republic of Türkiye, February 27, 2019).

submitted declarations and imposed a penalty for loss of tax. As a result of the refusal of the cases he brought against the assessments without examining the merits, the applicant filed an individual application.

The Court evaluated that the interpretation made that the lawsuit could not be filed despite the reservation made in the correction statement caused the applicants to be unable to make claims regarding illegality. Therefore, the Court decided that as a result of this interpretation made by the judicial organs, an excessive burden was placed on the applicant and the fair balance was disturbed against the applicant.

With this decision, the Constitutional Court protected the right of taxpayers to file a lawsuit against their own statements by making reservations. However, the situation is different for the tax returns submitted if the taxpayers admit their mistakes and apply to the tax administration with repentance.

In the application,[81] the lawsuits filed against the accrual transactions and penalties based on the declaration of regret given by the tax administration with reservations were rejected by the tax court without examining the merits. In its examination, the Constitutional Court drew attention to the difference between the two declarations and emphasized that the inability to file a lawsuit on the repentance declarations filed with reservation creates a natural limit stemming from the nature of the repentance system. The Court therefore concluded that no undue burden was placed on the applicant personally.

It is seen that most individual applications to the Constitutional Court are made as a result of compulsory enforcement practices in the interventions to the right to property through tax interventions. As in other taxation processes, there is usually not much problem in the eligibility and necessity criteria in forced enforcement proceedings, but from time to time there can be some problems with proportionality.[82]

[81] Individual Application to Constitutional Court, Millî Reasürans Türk A.Ş, Application No. 2016/70, (The Constitutional Court of the Republic of Türkiye, July 01, 2010).

[82] Özekes, *Fundamental Rights*, 209.

It should be taken into account in terms of proportionality in the enforcement practices that the debtor's damage as a result of the proceedings is an inevitable result due to the nature of the enforcement law. However, it is not possible to argue that the principle of proportionality is damaged if this damage is within reasonable limits legally accepted because, at this point, there is a reasonable proportion between the purpose and the means.[83] So, in its decisions on compulsory enforcement practices, the Constitutional Court seeks the allegation that *"a heavy and intolerable burden has been incurred"* as a result of the practice. Otherwise, the Court finds that the interference was proportionate,[84] on the grounds that no allegation was made by the applicant that he was under a heavy and intolerable burden.

V. CONCLUSION

Both Turkish Constitutional Court and ECtHR, the regulations for determining, changing and paying taxes and similar obligations and social security premiums and contributions are handled within the scope of the state's authority to regulate the use of property or control the use of property for the public benefit.

The ECtHR emphasizes that the tax regulations should be public, the case law should be predictible and taxes, tax penalties and tax measures should be proportionally and should not create intolerable burden on taxpayers. Like ECtHR, the Constitutional Court in its judicial review of right to property through taxation, determines whether the intervention constitutes a violation of the right to property by examining three criteria; legality, public interest and proportionality.

The difference in interpretation between the Constitutional Court and the ECtHR emerges in the criterion of legality. While the ECtHR accepts that besides law the principles developed through jurisprudence based on judicial decisions that have gained stability can also meet the legality requirement by interpreting the legality broadly, the Constitutional Court of Türkiye emphasizes that the

[83] Özekes, *Fundamental Rights*, 210.

[84] Individual Application to Constitutional Court, Hüsamettin Kemal Esiner, Application No. 2013/1949, (The Constitutional Court of the Republic of Türkiye, June 24, 2015).

limitations to the right to property can be made only by law. According to the Turkish Constitutional Court, the existence of the law is not sufficient to ensure the legality condition, it must also be accessible and foreseeable for the owner of the right to property.

For the public interest criterion, both courts make similar interpretations. The ECtHR gives member states a wide margin of appreciation in taxation policies. However, the power of the state is not unlimited. According to the ECtHR, the right to property may be violated when the tax system imposes an excessive burden on taxpayers or interferes in a substantial way with their fiscal situation. The Turkish Constitutional Court also emphasizes that there is no interference with the discretion of public administrations regarding the public interest unless it is clearly determined to be groundless or arbitrary.

In terms of both courts, the examinations are mostly made on the basis of proportionality criteria. According to both courts, it is not sufficient for an interference to be legal and it has a legitimate aim based on the public interest, but the interference must also be proportionate. On the proportionality examination, most of the applications are made as a result of compulsory enforcement practices in the interventions to the right to property through tax interventions. In these applications, the Constitutional Court of Türkiye seeks the claim that the applicant has been under a heavy and intolerable burden due to interference from the tax authority. Otherwise, it decides that the property right is not violated.

Türkiye is one of the countries against which the most violations are ruled by the ECtHR every year. A significant part of the ECtHR's case file consists of applications from Türkiye. The individual application that Türkiye has put into effect to improve its poor record against the ECtHR has only been in force for 11 years. In this respect, the ECtHR record of Türkiye has not yet improved. However, positive results are inevitable in the long run. For this reason, it is important that Türkiye does not deviate from both the ECtHR jurisprudence and its own principles. On the other hand, Türkiye has made significant progress in terms of more effective protection of fundamental rights and freedoms,

which is another main purpose of individual application. Both the number of individual applications to the court and the reflection of the Constitutional Court's jurisprudence on the practices of institutions prove this.

Individual application also has a major role in the paradigm transformation of the Constitutional Court of the Republic of Türkiye, from an ideology-based approach to a rights-based approach. Today, many countries implement constitutional complaints in different models in accordance with their internal dynamics. In this regard, it is thought that this legal remedy will contribute to the more effective protection of human rights in countries such as Italy and Indonesia, which have not yet implemented the individual application mechanism.

BIBLIOGRAPHY

Akdemir, Tuğçe. "Vergi Hukuku Açısından Türk Anayasa Mahkemesi'ne Bireysel Başvuru Yolu [Individual Appeals to The Turkish Constitutional Court With Regard to Tax Law]." *Türkiye Barolar Birliği Dergisi* [Journal of the Union of Turkish Bar Associations], no. 111 (March-April 2014): 255-278, https://search.trdizin.gov.tr/yayin/detay/221644/.

Alchian, Armen A. "Some Economics of Property Rights." *Il Politico* [The politician] 30, no. 4 (December 1965): 816-829.

Alvarez, Enrique, José. "The Human Right of Property." *University of Miami Law Review* 72, no. 3 (Spring 2018): 580-705, https://repository.law.miami.edu/umlr/vol72/iss3/3.

Arslan, Zühtü. "The Role of Individual Application in the Protection of Human Rights in Turkey" Constitutional court of The Republic of Türkiye, published May 03, 2021, https://www.anayasa.gov.tr/en/president/presidents-speeches/the-role-of-individual-application-in-the-protection-of-human-rights-in-turkeystar.

Bisariyadi, Bisariyadi. "Referencing International Human Rights Law in Indonesian Constitutional Adjudication." *Constitutional Review 4,* no. 2 (December 2018): 249-270, http://dx.doi.org/10.31078/consrev424.

Bozdoğan, Mine Nur. "Mülkiyet Hakkına Haksız Bir Müdahale, İptali ve Yeni Hukuki Zemin: Fazla veya Yersiz Tahsil Edilen Vergilerin İadesinde Süre Sorunu, [An Unjust Intervention with the Right to Property, Its Cancellation and New Legal Ground: The Problem of Time in Refunding the Over or Undue Collected Taxes]." *Maliye Dergisi [Public Finance Journal]*, no. 162 (January-June 2012): 219-237.

Chakim, M. Lutfi "A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions." *Constitutional Review* 5, no. 1 (May 2019): 96-133 https://doi.org/10.31078/consrev514.

Daneliene, Ingrida. "Individual Access to Constitutional Justice in Lithuania: the Potential within the Newly Established Model of the Individual Constitutional Complaint." *Revista de Derecho Político*, no. 111 (May-August 2021): 281-312, https://doi.org/10.5944/rdp.111.2021.

Dannemann, Gerhard. "Constitutional Complaints: The European Perspective." *The International and Comparative Law Quarterly 43,* no. 1 (January 1994): 142-153.

Dilemre Öden, Begüm. "Avrupa İnsan Hakları Mahkemesi Kararlarının Türk Vergi Hukukuna Etkisi. [The Effect of European Court of Human Rights Decisions on Turkish Tax Law]." PhD diss., Cankaya University, 2017.

European Commission for Democracy Through Law (Venice Commission), Study on Individual Access to Constitutional Justice adopted by the Venice Commission at its 85th Plenary Session, Venice, 17-18.10.2010, Gagik Harutyunyan, Angelika Nussberger and Peter Paczolay, Study No: 538/2009, Strasbourg: 2011, https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e, (30.11.2021).

"European Convention on Human Rights." Opened for signature November 04, 1950. *European Treaty Series* no. 5. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005.

European Court of Human Rights. (2022a). "ECHR Overview 1959-2021." European Court of Human Rights, published February, 2022. https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf.

European Court of Human Rights (2022b). "Italy." European Court of Human Rights, published November 2022. https://www.echr.coe.int/documents/cp_italy_eng.pdf.

European Court of Human Rights (2022c). Accessed October 19, 2022. https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

European Court of Human Rights. Case of Hentrich., v. France, App. No: 13616/88, 22.09.1994.

European Court of Human Rights. Case of Riccardo Travers and 27 Others v. Italy, App. No: 15117/89, 16.01.19.

European Court of Human Rights. Case of Gasus Dosier- Und Fördertechnik GmbH, v. The Netherlands, App. No: 15375/89, 23.02.1995.

European Court of Human Rights. Case of Spacek, s.r.o.v. The Czech Republic, App. No: 26449/95, 09.11.1999.

European Court of Human Rights. Case of S.A. Dangeville, v. France, App. No: 36677/97, 16.04.2002.

European Court of Human Rights. Case of Buffalo S.r.I. in Liquidation, v. Italy, App. No: 38746/97, 03.07.2003.

European Court of Human Rights. Case of Scordino v. Italy, App. No: 36813/97, 29.03.2006.

European Court of Human Rights. Case of Eko- Elda Avee, v. Greece, App. No: 10162/02, 09.06.2006.

European Court of Human Rights. Case of Intersplav, v. Ukraine, App. No: 803/02, 09.01.2007.

European Court of Human Rights. Case of Mamidakis, v. Greece, App. No: 35533/04, 11.01.2007.

European Court of Human Rights. Case of Bulves AD., v. Bulgaria, App. No: 3991/03, 22.01.2009.

European Court of Human Rights. Case of Di Belmonte., v. Italy, App. No: 72638/01, 16.03.2010.

European Court of Human Rights. Case of Serkov, v. Ukraine, App. No: 39766/05, 07.10.2011.

European Court of Human Rights. Case of Shchokin, v. Ukraine, App. No: 23759/03 and 37943/06, 14.01.2011.

European Court of Human Rights. Case of OAO Neftyanaya Kompaniya Yukos v. Russia, App. No: 14902/04, 20.09.2011.

European Court of Human Rights. Case of N.K.M., v. Hungary, App. No: 66529/11, 14.05.2013.

European Court of Human Rights. Case of R.Sz., v. Hungary, App. No: 41838/11, 04.11.2013.

European Court of Human Rights. Case of West/Alliance Limited, v. Ukraine, App. No: 19336/04, 23.01.2014.

European Court of Human Rights. Case of Azienda Agricola Silverfunghi S.A.S. and Others v. Italy, App. No: 48357/07, 52677/07, 52687/07 and 52701/07, 24.09.2014.

Faiz, Pan Mohamad. "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court." *Constitutional Review 2,* no. 1 (May 2016): 103-128, http://dx.doi.org/10.31078/consrev215.

Grgic, Aida, Zvonimir Mataga, Matija Longar and Ana Vilfan. Avrupa İnsan Hakları Sözleşmesi Kapsamında Mülkiyet Hakkı [The Right to Property under the European Convention on Human Rights]. Translated by Özgür Heval Çinar and Abdulcelil Kaya). Belgium: Council of Europe, 2007.

Gümüşkaya, Gamze. "İnsan Hakları ve Vergilendirme: Mülkiyet Hakkı Yönünden İnsan Hakları Avrupa Mahkemesi'ne Kişisel Başvuru. [Human Rights and

Taxation: Personal Application to the European Court of Human Rights in Terms of Right to Property]." Master diss., Istanbul University, 2009.

Gümüşkaya, Gamze. Mülkiyet Hakkına Vergisel Müdahaleler Bakımından İnsan Hakları Avrupa Mahkemesi'ne Kişisel Başvuru [Personal Application to the European Court of Human Rights in Terms of Tax Interventions to the Right to Property]. Istanbul: On Iki Levha Publishing House, 2010.

Harris David. et al. *Avrupa İnsan Hakları Sözleşmesi Hukuku [European Convention on Human Rights Law]*. Translated by Mehveş Bingöllü Kılcı, Ulaş Karan. Ankara: Sen Press, 2013.

Hayrullahoğlu, Betül and Onur Gök. "Vergi İncelemelerinde Mükellef Hakkı Bağlamında Ayrımcılık Yasağı: Bir Anayasa Mahkemesi Kararı Çerçevesinde İnceleme [In the Context of Taxpayer's Right in Tax Auditing the Prohibition of Discrimination: A Review of the Constitutional Court Judgment]." In *Maliye Araştırmaları-2 [Public Finance Studies-2]* ed. Selçuk İpek, 151-166. Bursa: 2018.

Hayrullahoğlu, Betül. "Mülkiyet Hakkına Vergi Yoluyla Müdahalelerde Anayasa Mahkemesinin Ölçülülük Denetimi," [Proportionality Control of the Constitutional Court in Interventions to Property by Tax] in *Küreselleşen Dünyada Mali ve İktisadi Meseleler [Financial and Economic Issues in a Globalizing World],* ed. Serap Ürüt Saygın and Orçun Avcı, 59-80. Bursa: Ekin Press, 2021.

Howard-Hassmann, Rhoda E. "Reconsidering the Right to Own Property." *Journal of Human Rights* 12, no. 2 (May 2013): 180-197. https://doi.org/10.1080/14754835.2013.784667.

Inceoğlu, Sibel. "Hak ve Özgürlükleri Sınırlama ve Güvence Rejimi [Limitation of Rights and Freedoms and the Assurance Regime]." In İnsan Hakları Avrupa Sözleşmesi ve Anayasa Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme [An Analysis within the Scope of the European Convention on Human Rights and the Individual Application to the Constitutional Court], edited by Sibel İnceoğlu, 23-52. Ankara: Sen Press, 2013.

Korkusuz, M. Refik. Uluslararası Belgelerde ve Türk Anayasası'nda Temel Hak ve Özgürlükler [Fundamental Rights and Freedoms in International Documents and the Turkish Constitution]. Istanbul: Özrenk Press. 1998.

Ozekes, Muhammet. İcra Hukukunda Temel Haklar ve İlkeler [Fundamental Rights and Principles in Enforcement Law]. Ankara: Adalet Publishing House, 2009.

Palguna, I Dewa Gede. "Constitutional Complaint and The Protection of Citizens The Constitutional Rights." *Constitutional Review 3,* no. 1 (May 2017): 1-23, http://dx.doi.org/10.31078/consrev311.

Poelmann, Eric. "ECHR Melo Tadeu: A Tax Case Which Should Bring on More Carefully Selected Criminal Procedures." *Intertax* 44, no. 5 (2016): 434-437, https://doi.org/10.54648/taxi2016035.

Pu, Hong. "On Protection and Restriction of Private Property Right." *Journal of Politics and Law* 1, no. 4 (December 2008): 62-66. 10.5539/jpl.v1n4p62.

Sağır, Harun. "Anayasa Mahkemesi'nin Bireysel Başvuru Kararları Çerçevesinde Vergisel Müdahalelerde Mülkiyet Hakkı İhlali Bakımından Hukuka Uygunluk Ölçütü [Legal Compliance Criterion for Violation of Right to Property in Tax Interventions within the Framework of Individual Application Decisions of the Constitutional Court]." *Vergi Dünyası Dergisi [Tax World Journal],* no. 492 (August 2022).

Schoeller-Schletter, Anja. "Mapping Constitutional Review in the Middle East and North Africa: Historic Developments and Comparative Remarks." In *Constitutional Review in the Middle East and North Africa*, edited by Anja Schoeller-Schletter, 13-32. Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2021.

Strzepek, Kamil A. "The Relationship Between The European Convention on Human Rights and Domestic Law: A Case Study." *Constitutional Review* 6, no. 2 (December 2020): 338-365, https://doi.org/10.31078/consrev626.

Şimşek, Suat. "Vergi Politikaları, Mülkiyet Hakkı ve Avrupa İnsan Hakları Mahkemesi [Tax Policies, Right to Property and the European Court of Human Rights]." *Maliye Dergisi* [Public Finance Journal], no. 159

(July-December 2010): 323-345. https://ms.hmb.gov.tr/uploads/2019/09/Suat%C5%9E%C4%BoM%C5%9EEK.pdf.

Taufik, Giri Ahmad. "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly." *Constitutional Review 4,* no. 1 (May 2018): 45-79, https://doi.org/10.31078/consrev413.

Tezcan, Durmuş, Mustafa Ruhan Erdem. Oğuz Sancakdar and Rıfat Murat Önok. *İnsan Hakları El Kitabı [Human Rights Handbook].* Ankara: Seckin Publishing House, 2011.

The Constitutional Court of the Republic of Türkiye. Case of Celalettin Aşçıoğlu, App. No: 2013/1436, 06.03.2014.

The Constitutional Court of the Republic of Türkiye. Case of Zekiye Şanlı, App. No: 2012/931, 26.06.2014.

The Constitutional Court of the Republic of Türkiye. Case of Türkiye İş Bankası A.Ş., [Türkiye Is Bank Joint Stock Company], App. No: 2014/6192, 12.11.2014.

The Constitutional Court of the Republic of Türkiye. Case of Murat Çevik, App. No: 2013/3245, 11.12.2014.

The Constitutional Court of the Republic of Türkiye. Case of Akün Gıda Maddeleri Sanayi ve Ticaret A.Ş., [Akün Foodstuff Industry and Trade Inc.], App. No: 2013/1993, 06.05.2015.

The Constitutional Court of the Republic of Türkiye. Case of Hüsamettin Kemal Esiner, App. No: 2013/1949, 24.06.2015.

The Constitutional Court of the Republic of Türkiye. Case of Murat Çevik (2), App. No: 201/3244, 07.07.2015.

The Constitutional Court of the Republic of Türkiye. Case of Türkiye İş Bankası A.Ş. Şubeleri, [Türkiye Is Bank Joint Stock Company Branches], App. No: 2014/6193, 15.10.2015.

The Constitutional Court of the Republic of Türkiye. Case of Murat Çevik (4), App. No: 2013/3241, 16.12.2015.

The Constitutional Court of the Republic of Türkiye. Case of Murat Çevik (5), App. No: 2013/3246, 16.12.2015.

The Constitutional Court of the Republic of Türkiye. Case of Arif Sarıgül, App. No: 2013/8324, 23.02.2016.

The Constitutional Court of the Republic of Türkiye. Case of Narsan Plastik San. Tic. Ltd. Şti., [Narsan Plastik San. Trade Co. Ltd.], App. No: 2013/6842, 20.04.2016.

The Constitutional Court of the Republic of Türkiye. Case of Türkiye İş Bankası A.Ş. Şubeleri (2), [Türkiye Is Bank Joint Stock Company Branches (2)], App. No: 2015/356, 22.09.2016.

The Constitutional Court of the Republic of Türkiye. Case of Anadolu Anonim Türk Sigorta Şirketi Şubeleri, [Anadolu Anonim Turkish Insurance Company Branches], App. No: 2014/17286, 16.11.2016.

The Constitutional Court of the Republic of Türkiye. Case of EM Export Dış Ticaret A.Ş., [EM Export Foreign Trade Inc.], App. No: 2014/10283, 05.04.2017.

The Constitutional Court of the Republic of Türkiye. Case of Türkiye İş Bankası A.Ş. Şubeleri (4), [Türkiye Is Bank Joint Stock Company Branches (4)], App. No: 2015/6691, 08.03.2018.

The Constitutional Court of the Republic of Türkiye. Case of Arbay Petrol Gıda Turizm Taşımacılık Sanayi Ticaret Ltd. Şti. ve Arbay Turizm Taşımacılık İthalat İhracat İnşaat ve Organizasyon Sanayi ve Ticaret Ltd. Şti. [GK], [Arbay Petrol Food Tourism Transportation Industry Trade Ltd. Sti. and Arbay Tourism Transportation Import Export Construction and Organization Industry and Trade Ltd. Sti. [GA]], App. No: 2015/15100, 27.02.2019.

The Constitutional Court of the Republic of Türkiye. Case of Millî Reasürans Türk A.Ş., App. No: 2016/70, 01.07.2020.

The Constitutional Court of the Republic of Türkiye, "Kararlar Bilgi Bankası [Decisions/Judgments Database.]." Accessed October 19, 2022. https://kararlarbilgibankasi.anayasa.gov.tr/.

Töralp, Funda. "Temel Hak ve Özgürlüklerin Vergilendirme Yetkisinin Kullanımına Etkisi [The Effect of Fundamental Rights and Freedoms on the Use of Taxation Power]." In *Anayasadan Mali ve Vergisel Beklentiler [Fiscal and Tax Expectations from the Constitution]*, edited by Feridun Yenisey, Gülsen Güneş, Z. Ertunç Şirin, 163-182. Istanbul: On Iki Levha Publishing House, 2012.

Türkay, İmdat. "Anayasa Mahkemesi Kararında Mülkiyet Hakkı ve Vergi İlişkisi [The Relation between Right to Property and Taxes in the Decision of the Constitutional Court]." Mondaq, published November 14, 2022, https://www.mondaq.com/turkey/tax-authorities/1250532/anayasa-mahkemesi-kararinda-m%C3%BClkiyet-hakki-ve-vergi-ili%C5%9Fkisi.

United Nations General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona. Human Rights Council Twenty-Sixth Session Agenda Item 3 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, New York: United Nations, 2014. https://undocs.org/A/HRC/26/28 (16.11.2021).

Uygun, Esra and Adnan Gerçek. "Anayasa Mahkemesinin Vergilendirme Alanındaki Bireysel Başvuru Kararlarının Değerlendirilmesi [Evaluation of Individual Applications Decisions in the Field of Taxation of Constitutional Court]." *Türkiye Adalet Akademisi Dergisi* [Journal of the Turkish Justice Academy], no. 29 (2017): 167-191.

Wilson, Bart J. "The Primacy of Property; or, the Subordination of Property Rights." *Journal of Institutional Economics* 19, no. 2, (August 2022): 251-267, doi:10.1017/S1744137422000212.

Yıldırım, Engin. "Social Rights and The Turkish Constitutional Court." *Constitutional Review* 7, no. 2 (December 2021): 188-202, https://doi.org/10.31078/consrev721.

Zupančič, Boštjan M. "Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis." *Revus,* no. 1 (2003), https://doi.org/10.4000/revus.1441.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1014

The Constitutional Court and Forest Tenure Conflicts in Indonesia

Yance Arizona[*]
Department of Constitutional Law, Universitas Gadjah Mada
yancearizona@ugm.ac.id

Umi Illiyina[**]
Advocate and Independent Researcher
umi.illiyina@pillar-lawfirm.com

Received: 14 August 2022 | Last Revised: 5 November 2023 | Accepted: 19 February 2024

Abstract

With regard to access to land and forest resources, forestry legislation maintains an imbalance between the state, corporations, and local communities. Since the colonial era, forestry regulation has facilitated restrictions on the ability of local communities to benefit from land and forest resources, while also concentrating power in the hands of the state. To uphold state ownership, forestry law criminalizes customary practices, putting local communities at risk. In this sense, conflicts between local communities, corporations, and government agencies arise because of structural issues in the legal framework of laws and regulations that undermine the land rights of local communities. The establishment of the Constitutional Court in Indonesia in 2003 has enabled local communities and NGOs to challenge the Forestry Law. They use the Constitutional Court to support the resolution of forestry tenure conflicts. This article examines the extent to which the Constitutional Court can contribute to the resolution of forest tenure conflicts through judicial review of forest laws. This article discusses twelve Constitutional Court decisions regarding judicial review of the Forestry Law and the Law on Forest Destruction Prevention and Eradication. We found that the Constitutional Court has made a positive contribution to addressing the deficiency of forest legislation regarding local and customary land rights. The implementation of Constitutional Court's ruling is not, however, a matter

[*] Lecturer at the Department of Constitutional Law, Faculty of Law, Universitas Gadjah Mada.
[**] Managing Partner at Pillaw Law Firm.

of self-implementation. The ruling of the Constitutional Court will only have significance if it is continuously promoted by various stakeholders in support of forest tenure reform to facilitate the resolution of forest tenure conflicts.

Keywords: Constitutional Court; Customary Land Rights; Forestry Law; Forest Tenure Conflicts; Indonesia

I. INTRODUCTION

1.1. Background

1.1.1. State Territorialization and Diminishment of Customary Land Tenure

In Indonesia, forest areas cover approximately 120 million hectares, or 67% of the land surface.[1] Forest areas not only contain substantial natural resources in the form of timber and mineral deposits but also deviate from a number of complex social issues. The vast potential of land and forest resources has made it a battleground for the competing interests of local residents, governments, and business companies. This conflict has existed since colonial times and is now known as the forest tenure conflict.[2] In the midst of the ongoing conflicts, the law played a significant role because the ruler used legal measures to strengthen state control and weaken people's access to land and forest resources.

Exclusive state control over forest areas has transformed forests into state property that must be free of local residents' individual and collective rights.[3] This restriction is not instantaneous but is gradually constructed through a territorialization process. The territorialization of forest areas by the state occurs in three stages.[4] In the beginning, colonial rulers declared and asserted that all lands for which ownership could not be proven by individuals and communities were state land property. During the Dutch colonial period, this unilateral claim was

1 SOIFO, *The State of Indonesia's Forest 2020* (Jakarta: The Ministry of Environment and Forestry, 2020).

2 Myrna Asfinawati Safitri, "Forest Tenure in Indonesia: The Socio-Legal Challenges of Securing Communities' Rights" (PhD diss., Van Vollenhoven Institute, Leiden University, 2010).

3 Nancy Lee Peluso, "The History of State Forest Management in Colonial Java," *Forest & Conservation History* 35, no. 2 (1991): 65-75; Nancy Lee Peluso, *Rich Forests, Poor People: Forest Access Control and Resistance in Java* (Berkeley/Los Angeles/Oxford: University of California Press, 1992).

4 Peter Vandergeest and Nancy Lee Peluso, "Territorialization and State Power in Thailand," *Theory and Society* 24, no. 3 (1995): 385-426.

made through the doctrine of declaration (*domein verklaring*).[5] The government intends to monopolize all forest land and resources with this claim.

The second step involves establishing boundaries. The colonial authorities established the boundaries of forest areas to differentiate between forest and non-forest areas and to divide forest functions into various purposes, including extraction, protection, and conservation. During colonial times, the forestry service categorized the forests into forestry registers. Some regions of Indonesia continue to use this colonial forestry register system. In addition, the Indonesian government implemented a similar strategy to expand its control over forested lands beyond the islands of Java and Madura. In the 1970s and 1980s, the government conducted this process through "the forest agreement system" (*Tata Guna Hutan Kesepakatan*/TGHK).[6] The government has meticulously mapped and organized the forests. Individuals and groups of citizens were prohibited from accessing land and forest resources without government permission. Former forest dwellers are considered illegal residents who are subject to expulsion from the forest.

In the third stage, colonial rulers and national governments establish policies and initiatives to maintain their control over forest areas. The government allocates land and forest resources for self-exploitation or for granting forest concessions to business corporations. This stage is not always tied to extractive operations, but also to environmental protection, including the establishment of conservation forests, the creation of national parks that sustain conservation forests, and even reforestation to reinforce long-term government control of forest areas.

In conducting the three stages of territorialisation, colonial rulers and national governments not only use legal instruments and physical violence to legitimise the deprivation of people's living space, but also use forestry knowledge. A study by Mia Siscawati explores how forestry knowledge was

[5] Cees Fasseur, "Purse or Principle: Dutch Colonial Policy in the 1860s and the Decline of the Cultivation System," *Modern Asian Studies* 25, no. 1 (1991): 33-52.

[6] Mia Siscawati, "Social Movements and Scientific Forestry: Examining the Community Forestry in Indonesia" (PhD diss., University of Washington, 2012); Myrna Asfinawati Safitri et al., *Menuju Kepastian dan Keadilan Tenurial [Towards Tenure Certainty and Justice]* (Jakarta: Kelompok Masyarakat Sipil untuk Reformasi Tenurial [Civil Society Group for Tenurial Reform], 2011).

constructed by colonial rulers to legitimize their control over forest areas.[7] The Dutch colonial foresters in the colonies learned from the forestry knowledge of German forestry, known as scientific forestry.[8] Through this scientific forestry approach, forests are categorized and managed using a mathematical approach.[9] Local knowledge about how communities manage and depend on forests is not considered. Scientific forestry builds the myth that the government is the greatest and most sustainable in managing land and forest resources. On that basis, local communities are considered a threat to forest sustainability and will reduce substantial benefits for the state in extracting forest resources. This authoritarian practice in the field of forestry continued and became the root of forestry tenure conflicts to present times.[10]

1.1.2. Forest Tenure Conflicts

Forest tenure conflict is defined as a conflict of claims to obtain access and benefits from land and forest resources. These conflicts can occur between fellow communities or what is called horizontal conflicts, but they can also occur between communities, corporations, and government agencies in the forestry sector. The last forest tenure conflict is referred to as a vertical or structural conflict because it involves an unbalanced power relationship among local communities, forestry companies, and government agencies. This article discusses forest tenure conflict in the latter sense.

The root of the tenure forestry conflict in Indonesia is state territorialization, as mentioned in the beginning of this article. The expansion of government control over forest areas is carried out without community consent, criminalizing forest management practices by communities and expelling communities living within forest areas because communities are considered a threat to forest sustainability.[11] In fact, many indigenous and local communities already live and depend on

7 Siscawati, *Social Movements and Scientific Forestry*.
8 Peter Vandergeest and Nancy Lee Peluso, "Empires of Forestry: Professional Forestry and State Power in Southeast Asia, Part 1," *Environment and History* 12, no. 1 (2006): 31–64.
9 Siscawati, *Social Movements and Scientific Forestry*.
10 Peluso, *Rich Forests, Poor People*; Yance Arizona, "Rethinking Adat Strategies: Politics of State Recognition of Customary Land Rights in Indonesia" (PhD diss., Leiden University, 2022).
11 Peluso, *Rich Forests, Poor People*.

their livelihoods from land and forest resources.[12] The Indonesian Central Bureau of Statistics *(Badan Pusat Statistik/BPS)* released a census, stating that 31,957 or 71.06% of villages in Indonesia are located within and at the edge of forest areas.[13] Similarly, in 2014, the MoEF conducted a forestry survey and found that 32,447,851 people depend on forest resources for their livelihoods. Most of them live in poverty. They have cultivate land and gather forest products, according to their local customs.

Forest tenure conflict between local and indigenous communities and government agencies and forestry companies seems inevitable. Forest tenure conflicts can be latent or manifest. Conflicts are latent because there are conflicts over legal claims and legitimacy to land ownership and control of land and land assets, while conflicts become manifest when government agencies and companies expand control and physically exclude indigenous and local communities from their territories. This situation has caused many forestry tenure conflicts in Indonesia. The NGO Agrarian Reform Consortium (*Consortium for Agrarian Reform/KPA*) recorded 2,047 cases of land conflict occurring between 2015 and 2019. In 2019 alone, 279 land conflicts appeared to be located within 734,239 hectares. Approximately 109,042 of the households resided in 420 villages across Indonesia.[14] In 2021, the Ministry of Environment and Forestry (MoEF) has already received 500 reports on land conflicts in the forestry sector, and only 54 of these have reached a solution between the parties in conflict.

For many years, the government allowed the conflict to occur, and there was no effective and efficient mechanism to resolve forest tenure conflicts. Since the 1990s, the government began to develop social forestry schemes to involve communities in forest management, but this has not fully resolved the conflict.[15] One of the obstacles to resolving the conflict lies in forestry legislation itself, which does not fully provide human rights guarantees for indigenous and local

[12] Safitri et al., *Menuju Kepastian dan Keadilan Tenurial [Towards Tenure Certainty and Justice]*.
[13] Ibid., 6-7.
[14] Totok Dwi Diantoro, "Dinamika Kebijakan Resolusi Konflik Tenurial Kawasan Hutan Era Joko Widodo [Dynamics of Forest Area Tenurial Conflict Resolution Policy in the Joko Widodo Era]," *Media of Law and Sharia* 1, no. 4 (2020): 245-46.
[15] Safitri, "Forest Tenure in Indonesia"; Siscawati, *Social Movements and Scientific Forestry*.

communities as rights-bearing-ubjects and land owners.[16] Understanding that the cause of forest tenure conflict is embedded in forestry legislation, indigenous communities and NGOs in the forestry sector challenged forestry law to the Constitutional Court as a strategy to resolve forest tenure conflicts.

1.1.3. Constitutional Court and Judicial Review

The constitutional reforms in Indonesia from 1999 to 2002 opened the opportunity to uphold democratic principles and the rule of law. In line with the spirit of underpinning constitutional democracy and promoting human rights, the result of constitutional reform established a Constitutional Court. In Indonesia, the Constitutional Court was created with the main task of conducting judicial review.

Through the authority of judicial review, the Constitutional Court can evaluate laws, collaboratively created by the government and the House of Representatives (*Dewan Perwakilan Rakyat*/DPR), to ensure that these laws do not violate the constitution. Ginsburg and Versteeg showed that 83% of constitutions now explicitly authorize constitutional review by courts.[17] Judicial review is a forum for the Constitutional Court to be involved in supervising the democratization process, ensuring the fulfilment of human rights, and enforcing the rule of law. However, there have not been many studies that discuss the relevance of judicial review related to the issue of resolving conflicts over natural resources. In fact, indirectly, the judicial review conducted by the Constitutional Court can contribute to the resolution of conflicts related to natural resources, especially since the roots of the conflict are embedded in the legislation.

---

[16] Yance Arizona, Siti Rakhma Mary, and Grahat Nagara, *Anotasi Putusan MK No. 45/PUU-IX/2011 Mengenai Pengujian Konstitusionalitas Kawasan Hutan dalam Pasal 1 Angka 3 UU No. 41 Tahun 1999 tentang Kehutanan [Annotation of Constitutional Court Decision No. 45/PUU-IX/2011 Regarding Testing of the Constitutionality of Forest Areas in Article 1 Number 3 of Law no. 41 of 1999 concerning Forestry]* (Jakarta: Perkumpulan HuMa [HuMa Association], 2012); Noer Fauzi Rachman and Mia Siscawati, "Forestry Law, Masyarakat Adat [Indigenous Community] and Struggles for Inclusive Citizenship in Indonesia," in *Routledge Handbook in Asian Law*, ed. Christopher Antons (London and New York: Routledge, 2016); Yance Arizona, Siti Rakhma Mary Herwati, and Erasmus Cahyadi, *Kembalikan Hutan Adat kepada Masyarakat Hukum Adat: Anotasi Putusan MK No. 35/PUU-X/2012 Mengenai Pengujian UU No. 41 Tahun 1999 tentang Kehutanan [Return Customary Forests to Customary Law Communities: Annotation of Constitutional Court Decision No. 35/PUU-X/2012 Regarding Review of Law No. 41 of 1999 concerning Forestry]* (Jakarta: Perkumpulan HuMa, Epistema Institute, and Aliansi Masyarakat Adat Nusantara [HuMa Association, Epistema Institute, and Alliance of Indigenous Peoples of the Archipelago], 2014).

[17] Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics and Organization* 30, no. 3 (2014): 587.

In the context of forestry in Indonesia, this is interesting because the latest Forestry Law was created in 1999 before the constitutional amendments were completed (1999-2002) and the Constitutional Court was established in 2003. Thus, the Constitutional Court became an important institution for adjusting provisions in the Forestry Law, which are still weighted with the legacy of colonial forestry law in the context of the new democratic era. Indigenous communities and NGOs who assist the forest communities in facing forestry conflicts with companies and government agencies then take advantage of the Constitutional Court to challenge forestry legislation that facilitates forestry tenure conflicts. This article further examines how the Constitutional Court plays a role in resolving forestry tenure conflicts through judicial review of laws in the field of forestry.

1.2. Research Questions

This study discusses the role of the Constitutional Court in conducting judicial review of laws in the field of forestry in relation to the resolution of forestry tenure conflicts encountered by local communities against forest companies and government agencies. More specifically, the research questions are divided as follows:

1. What is the character of the Constitutional Court's ruling in reviewing laws relating to forestry tenure conflicts?
2. Does the Constitutional Court contribute to resolving forest tenure conflicts and improving good forest governance and protecting local and indigenous communities' rights over forest land and resources?
3. What are the limitations of Constitutional Court's ruling related to efforts to protect the rights of local communities in forest tenure conflicts?

1.3. Method

This research is not a completely new study conducted by the author. Previously, the first author published a book chapter on *the Constitutional Court and Forest Tenure Reform* (2014), as well as several annotations to the Constitutional Court's rulings.[18] This article partly uses data from previous research

[18] Arizona et al., *Anotasi Putusan MK [Annotation of Constitutional Court Decision].*

by updating data and analytical tools on constitutional court rulings related to law in the field of forestry. The update of this article was conducted by the second author. In addition, data updates were also carried out by conducting literature studies and observing how the implementation of the Constitutional Court's rulings facilitated forest tenure conflict resolutions.

Specifically for this article, the stages of research activities is described as follows. First, the author, with the help of a research assistant, conducted an inventory of the Constitutional Court's rulings related to the judicial review of the Forestry Law (Number 41/1999) and the Law on Prevention and Eradication of Forest Destruction (Number 18/2013). Second, the author performs a classification. Of the 16 cases handled by the Constitutional Court, the author set aside four cases because these cases were withdrawn by the petitioners before they were decided by the Constitutional Court. The author analyzed twelve Constitutional Court rulings in which 6 of them were rejected by the Constitutional Court, 2 judgments were declared inadmissible, and four decisions were granted either in full or partially. Third, the author conducted a content analysis of four granted rulings to understand the changes, the substance of the Constitutional Court's considerations, and the juridical implications of the Constitutional Court's decisions. The fourth stage concerns the implementation of the court rulings. The author collects data and analyzes the implementation of the decision. The data collected are secondary data obtained from government regulations and policies to respond to the Constitutional Court's decision, as well as data from the NGOs reportingthe implementation of the Constitutional Court's ruling to encourage forest tenure reform and conflict resolution in concrete cases. Finally, the author analyzes the contribution and limitations of the Constitutional Court rulings in facilitating the implementation of resolving forest tenure conflicts.

From the aforementioned stages of research, it can be understood that this research is basically court studies, in particular the study of the decisions of the Constitutional Court. However, this research does not stop at text analysis, which is generally carried out in normative legal studies, but also examines how the Constitutional Court's decision is located in the context of forest tenure

conflicts that have occurred for a long period in Indonesia. In that context, this study captures how the government responds and how the community and NGOs advocate so that the Constitutional Court's decision gives real meaning to forest tenure conflict resolution for concrete cases on the ground.

II. DISCUSSION

This section begins with a description and analysis of forestry laws through a historical approach. The author would like to point out that the current Forestry Law, characterized by its strong colonial influences, centralizes forest area ownership under government control while neglecting the rights of local and indigenous communities dependent on forest resources.. Such a law is the root of current forest tenure conflicts. Next, this section will discuss several judicial review cases of the Forestry Law and the Law on the Prevention and Eradication of Forest Destruction submitted to the Constitutional Court. The author will highlight some fundamental changes in Constitutional Court's ruling that corrected the Forestry Law. Furthermore, this section also discusses how the Constitutional Court's rulings are implemented by the government, local communities, and NGOs. The final section discusses the contribution and limitations of the Constitutional Court rulings in resolving forestry tenure conflicts in Indonesia.

2.1. Forestry Laws: From Colonial to Contemporary

The development of forestry regulations in Indonesia strengthens state control while weakening people's rights to land and forest resources. The development of forestry policy can be distinguished in five periods, starting from the Dutch colonial period (1865-1942), the Japanese period (1942-1945), the early independence period (1945-1967), the New Order period (1967-1999), and the reform era (1999-present).

The first colonial forestry regulation was created in 1865.[19] In 1865, the Dutch colonial government strengthened forestry control through a regulation

[19] Peluso, "The History of State Forest," 65-75.

specifically applied to Java and Madura. The 1865 Forest Regulation defined forests as state-owned forests by removing a provision on the recognition of native communities managing their village forests.[20] At that time, the general policies of European expansion and imperialism supported the creation of regulations to protect and control colonies against other colonial powers, whilst increasing profits from colonial exploitation. The 1865 forestry regulation was revised several times, including in 1874, 1875, 1897, 1913, 1927, 1932, 1937, and 1939. Such revision was conducted to expand government control over forest areas, including by implementing the 'domain declaration' principle, according to the *Agrarische Besluit* of 1870.[21] For example, in 1874, the colonial government enacted a regulation on forest management and exploitation in Java and Madura, which divided forest management into teak and non-teak forest areas.[22] This regulation strengthened the colonial government's control, and provided a legal basis for issuing concessions to private corporations to exploit teak forests. In the beginning, the colonial government was only interested in controlling teak forests in Java, because of their commercial value. The latter forest regulation was the *Boschordonantie voor Java en Madura* 1927, which was later revised in 1932. Article 2 of this forestry regulation states that forests are state-owned and free from indigenous rights. According to this regulation, state forests comprise uncultivated trees and bamboo plants, timber gardens planted by the Forestry Service or other government agencies, and gardens containing plants that do not produce trees but are planted by the Forestry Service. The colonial government only made regulations on forest control for Java and Madura.[23]

---

[20] Soenarjo Hardjodarsono, *Sejarah Kehutanan Indonesia I: Periode Reasejarah - Tahun 1942* [History of Indonesian Forestry I: The Historical Period – 1942] (Jakarta: Departemen Kehutanan [Forestry Department], 1986), 76.

[21] Rachman, *Land Reform dari Masa ke Masa* [Land Reform from Time to Time] (Yogyakarta: STPN Press and SAINS, 2012).

[22] Hardjodarsono, *Sejarah Kehutanan Indonesia* [History of Indonesian Forestry], 80; Siti Rakhma Mary, Dhani Armanto, and Lukito, *Dominasi dan Resistensi Pengelolaan Hutan di Jawa Tengah: Studi Kasus di 4 Kabupaten [Dominance and Resistance in Forest Management in Central Java: Case Studies in 4 Districts]* (Jakarta: Perkumpulan HuMa [HuMa Association], 2007), 10.

[23] Marjanne Termorshuzen-Arts, "Rakyat Indonesia dan Tanahnya: Perkembangan Doktrin Domein di Masa Kolonial dan Pengaruhnya dalam Hukum Agraria Indonesia [The Indonesian People and Their Land: The Development of the Domain Doctrine in the Colonial Period and its Influence on Indonesian Agrarian Law]," in *Hukum Agraria dan Masyarakat di Indonesia* [Agrarian Law and Society in Indonesia], ed. Myrna Safitri and Tristam Moeliono (Jakarta: HuMa, Van Vollenhoven Institute-Leiden University, KITLV-Jakarta, 2010), 65.

During the early period of Indonesian independence, Indonesia's postcolonial government replaced Dutch colonial land laws with national laws that were compatible with Indonesian peoples' interests. During the preparation of the Basic Agrarian Law (BAL) 1960, forestry issues were not much debated. Although the BAL intended to reform forest regulation by replacing the concepts of state domain and domain declaration in the *Agrarische Wet 1870*, it did not impact the core forestry regulations. The BAL removed several agrarian regulations from the colonial period, but it did not revoke the *Boschordonantie 1932*. The first forestry law in the post-colonial period was created in 1967. President Suharto enacted Basic Forestry Law Number 5 of 1967 (BFL) to increase economic activity in forest areas that would create state income. In contrast to the BAL, which specifically revoked agrarian regulations during the colonial period,the BFL did not revoke the *Boschordonantie*. Forestry Service officials translated *Boschordonantie* into Bahasa Indonesia, and used it as the main source for the BFL.[24] By not removing the *Boschordonantie*, the government can preserve the implementation of regulations in the forestry sector, including maps of forest areas based on the *Boschordonantie*. The BFL continued the forestry management policy of the *Boschordonantie* by stating that the state is the forest landowner. The Minister of Forestry has the authority to determine which areas are designated as 'forest area' (Article 1, point 4 of the BFL), and to grant logging concessions to foreign and domestic companies (Article 14 of the BFL, and Government Regulation No. 21/1970). The BFL does not recognise customary territories at all, and thus no customary forests.[25] Through the Forestry Law, the Suharto Administration expanded state control over forest areas outside Java, especially on the islands of Kalimantan, Sulawesi, and Sumatra. The government created an Agreement Forest Use Program (TGHK) to make claims and determine the boundaries of forest areas unilaterally without the consent of the community. This makes forestry conflicts increasingly widespread in areas outside Java.

[24] Peluso, *Rich Forests, Poor,* 131.
[25] Rachman and Siscawati, "Forestry Law, Masyarakat Adat [Indigenous Community]."

After Suharto stepped down as President in 1998, in the spirit of reform, the government and the new House of Representatives passed a new Forestry Law (Number 41/1999). The new Forestry Law explicitly mentions repealing colonial forestry regulations. Nevertheless, the principle that the government is the sole owner of the forest area, which is at the core of the forestry ideology still persists. NGOs tried to influence the substance of the new Forestry Law to strengthen the communities' rights, but this was not fully successful. As a result, the Forestry Law is very limited in accommodating community rights. For instance, the Forestry Law regulates customary forests in an ambiguous way because customary forests are defined as forests located in state forest areas.

During the reform period, the government also implemented a decentralization policy that gave local governments the flexibility to grant business licenses in the forestry sector. As a result, the exploitation of timber in the forest is increasing. This not only happens legally, but also illegally. There is rampant illegal logging in various places in Indonesia. To overcome illegal logging and other forestry crimes, the government and the House of Representatives enacted Law No. 18 of 2013 concerning the Prevention and Eradication of Forest Destruction. This law takes over all the criminal provisions contained in the Forestry Law (Number 41/1999). The repressive approach taken by the government also targets people who have been living in forest areas and depend on forest resources for their livelihood. Thus, various parties often challenge both the Forestry Law and the Law on the Prevention and Eradication of Forest Destruction in the Constitutional Court. The petitioners argue that the provisions in both laws have caused human rights violations, thereby inflicting constitutional rights on the petitioners.

2.2. Constitutional Court's Rulings

The Forestry Law has not changed much, especially with regard to forestry practices. Although there are some provisions in the Forestry Law that provide access to communities to manage forests, the ideology of foresters in the forestry sector has not changed much. For them, the reduction of state forest areas is considered a failure to manage forests, while giving access to communities to

manage forests is considered a weakness of the state in maintaining and managing forest land and resources.

Nevertheless, this conservative view of foresters has gradually changed. Local communities, NGOs, and regional heads perceived the central government's monopoly of forest areasas a violation of constitutional provisions. This awareness relies on the assumption that the 1945 Constitution has the spirit of democracy, decentralization, and the protection of human rights.[26] Consequently, the Forestry Law should be interpreted as a means to implement the main principles of the constitution in natural resource management.

Table 1.
Judicial Review of Forestry Laws to The Constitutional Court (2005-2022)

No	Case number	Constitutional issues	Court decision
1	003/PUU-III/2005	Mining operations in forest areas	Rejected
2	013/PUU-III/2005	Illegal transport of wood from forest areas	Inadmissible
3	021/PUU-III/2005	Deprivation of forest harvesting equipment in the Forestry Law	Rejected
4	72/PUU-VIII/2010	Permits for using forest areas for mining operations, and mining permits in forest areas issued by district heads	Rejected
5	34/PUU-IX/2011	The forest establishment process	Partially granted
6	45/PUU-IX/2011	Definition of (state) forest areas	Granted
7	35/PUU-X/2012	Definition of customary forest and legal recognition of adat communities by district regulation	Partially granted
8	95/PUU-XII/2014	Criminalization of adat and local communities living in forest areas	Partially granted

[26] Yance Arizona, *Konstitusionalisme Agraria* [Agrarian Constitutionalism] (Yogyakarta: STPN Press, 2014).

No	Case number	Constitutional issues	Court decision
9	70/PUU-XII/2014	Authority of local governments in the establishment of forest areas and authority of local governments in granting mining concessions within forest areas	Inadmissible
10	98/PUU-XIII/2015	Forestry corporation crimes	Rejected
11	139/PUU-XIII/2015	Criminal act of creating a plantation in a forest area	Rejected
12	69/PUU-XIV/2016	Evidence of timber in forestry crimes	Rejected

Of the 12 judicial review cases of the Forestry Law and the Forest Prevention and Eradication Law, six were rejected by the Constitutional Court, 2 were inadmissible, and four were partially or completely engulfed. The applicants in the case of testing the law in the field of forestry also vary from indigenous and local communities, community organizations, NGOs, and local governments, to entrepreneurs. From some of these rulings, there are several that have relevance to forestry tenure reform and forestry conflicts. There are four rulings that will be discussed, including:

1. Case Decision No. 45/PUU-IX/2011 relates to the constitutionality of the definition of forest areas (MK45 Ruling),
2. Case Decision No. 34/PUU—IX/2011 concerning the limitation of forest tenure by the state on the rights to land used as forest areas (MK34 Decision),
3. Case Decision No. 35/PUU-X/2012 concerning the constitutionality of customary forests and the conditional recognition of the existence of indigenous peoples (MK35 Decision).
4. Case Decision No. 95/PUU-XII/2014 concerning the provisions of forestry crimes that ensnare people who live and depend on forest areas and resources.

Table 2.

Changing Provision in the Forestry Law through Constitutional Court Rulings

Case Number	Before the Court rulings	After the Court rulings
No. 45/PUU-IX/2011	Article 1 (3) of the Forestry Law "A forest area is a certain area that is appointed and/or determined by the government to maintain its existence as a permanent forest."	Article 1 (3) of the Forestry Law "A forest area is a certain area that is ~~appointed and/or~~ determined by the government to maintain its existence as a permanent forest."
No. 34/PUU-IX/2011	Article 4, paragraph (3) of the Forestry Law "The control of forests by the State continues to pay attention to the rights of indigenous communities, as long as the reality is still there and recognized for their existence, and does not conflict with national interests."	Article 4, paragraph (3) of the Forestry Law "The control of forests by the canyon still pays attention to the rights of indigenous communities, as long as the reality is still there and recognized for its existence, **community rights are given based on the provisions of laws and regulations**, and do not conflict with national interests".
No. 35/PUU-X/2012	Article 1 (6) of the Forestry Law "Customary forests are state forests located within the territory of indigenous peoples."	Article 1 number 6 of the Forestry Law "Customary forests are ~~**state**~~ forests located within the territory of indigenous peoples."

Case Number	Before the Court rulings	After the Court rulings
No. 95/PUU-XII/2014	Article 50 paragraph (3) letter e and letter i of the Forestry Law Article 50 paragraph (3) Everyone is prohibited: e. cutting down trees or harvesting or collecting forest products in the forest without having the rights or permission of an authorized official; i. herding livestock within forest areas not specifically designated for such purposes by authorized officials;	Article 50 paragraph (3) letter e and letter i of the Forestry Law Article 50 paragraph (3) Everyone is prohibited: e. cutting down trees or harvesting or collecting forest products in the forest without having the rights or permission of the authorized officials, **except for people who live in the forest for generations and are not intended for commercial purposes;** i. herding livestock within forest areas not specifically designated for such purposes by authorized officials**, except for people who live in the forest for generations and are not intended for commercial purposes;**

The above section shows the changes in the Forestry Law before and after the Constitutional Court rulings. Although the changes are textual,, the substance of these changes plays a crucial role in giving new meaning to the context of forestry governance and the resolution of forestry tenure conflicts encountered by indigenous and local communities. The following sections briefly review these four rulings.

2.2.1. The Definition of Forest Area Has Been Revisited (Case Number 45/PUU-IX/2011)

Five district heads from Central Kalimantan Province: (1) Muhammad Mawardi (Head of Kapuas District); (2) Duwel Rawing (Head of Katingan District); and

(3) H. Zain Alkim (Head of East Barito District); (4) H. Ahmad Dirman (Head of Sukamara District); (5) Hambit Bintih (Head of Gunung Mas District); and a businessman named Akhmad Taufik filed a judicial review case against Article 1 number 3 of the Forestry Law, which stated that: "*A forest area is a certain area appointed and/or determined by the Government to maintain its existence as a permanent forest*." The petitioners questioned the phrase "appointed and or" in Article 1 number 3 of the Forestry Law. They questioned whether the provision caused legal uncertainty regarding the status of forest areas and allowed the Ministry of Forestry to arbitrarily determine forest areas because unilateral action through appointment was considered to have full legal consequences as the basis for determining forest areas.

Seven months after the application filled case number 45/PUU-IX/2011, the Constitutional Court issued a judgment on February 21, 2012. The Constitutional Court granted the petitioner's application. Consequently, Article 1 number 3 is changed to: "*A forest area is a certain area designated by the Government to maintain its existence as a permanent forest*." The phrase "appointed and/or" no longer exists in Article 1 number 3 of the Forestry Law.

This ruling gives a new meaning to the forest area. For many years, there has been legal uncertainty about the process to determine an area as a forest area because there is a conflict between Article 1 number 3 of the Forestry Law which determines that the appointment decree by the Ministry of Forestry is the basis for determining forest areas and Article 15 of the Forestry Law which places the appointment of forest areas as the first step in establishing legal forest areas. The Constitutional Court made corrections by determining that the correct process in determining forest areas was to follow the stages in Article 15 consisting of (1) appointment, (2) delineation of (3) mapping, and (4) determination. Thus, all forest area designations that have been carried out by the Ministry of Forestry cannot be considered valid as forest areas until the determination of forest areas by the government is carried out.

This court ruling prevents the Ministry of Forestry from arbitrarily establishing forest areas. For years, the Ministry of Forestry used an appointment decree to establish forest areas by neglecting local communities who had lived in particular areas before forest areas were established. The Judgment of the Constitutional Court stated:

> "Whereas in a rule of law, a state administrative officer shall not do as he pleases, but shall act in accordance with the laws and regulations, as well as acts under freies Ermessen (discretionary powers). The mere appointment of an area to be used as a forest area without going through a process or stages involving various stakeholders in the forest area in accordance with laws and regulations, is the implementation of authoritarian government. The designation of forest areas is predictable, not incidental, and even has to be planned, and therefore does not require the action of freies Ermessen (discretionary powers). It should not be a forest area that will be maintained as a permanent forest, controlling the lives of many people, only done through an appointment".[27]

The citation of the Constitutional Court's legal consideration means that the presumption by the Ministry of Forestry that the appointment procedure is the basis for defining forest areas is no longer viable. Maintaining the appointment decree as the legal basis for determining forest areas as definitive forest areas is a form of forestry authoritarianism that should be ended. This decision corrects the arbitrariness that has existed since colonial times in determining forest areas in Indonesia.

---

[27] This is a loose translation of the following citation: "*Bahwa dalam suatu negara hukum, pejabat administrasi negara tidak boleh berbuat sekehendak hatinya, akan tetapi harus bertindak sesuai dengan hukum dan peraturan perundang-undangan, serta tindakan berdasarkan freies Ermessen* (discretionary powers). *Penunjukan belaka atas suatu kawasan untuk dijadikan kawasan hutan tanpa melalui proses atau tahap-tahap yang melibatkan berbagai pemangku kepentingan di kawasan hutan sesuai dengan hukum dan peraturan perundang-undangan, merupakan pelaksanaan pemerintahan otoriter. Penunjukan kawasan hutan merupakan sesuatu yang dapat diprediksi, tidak tiba-tiba, bahkan harus direncanakan, dan karenanya tidak memerlukan tindakan freies Ermessen* (discretionary powers). *Tidak seharusnya suatu kawasan hutan yang akan dipertahankan keberadaannya sebagai hutan tetap, menguasai hajat hidup orang banyak, hanya dilakukan melalui penunjukan* [In a legal state, state administrative officials are not allowed to act arbitrarily; instead, they must act in accordance with the law and regulations, as well as actions based on freies Ermessen (discretionary powers). The mere designation of an area to be classified as a forest area without going through processes or stages involving various stakeholders in the forest area in accordance with the laws and regulations constitutes an implementation of authoritarian governance. The designation of a forest area is something that can be predicted, not sudden, and must even be planned, and therefore does not require discretionary powers. A forest area that is to be maintained as a permanent forest should not dominate the livelihoods of many people, and its designation should not be done solely through appointment]".

2.2.2. Local Communities' Land Rights Must Be Considered in the Establishment of Forest Areas (Case Number No. 34/PUU-IX/2011)

In the Constitutional Court ruling on Case Number 34/PUU-IX/2011, the Constitutional Court strengthened its view that the confirmation of forest areas must pay attention to the existence and rights of indigenous communities, including the rights of individuals and legal entities. The petitioner in case No. 34/PUU-IX/2011 is Maskur Anang bin Kemas Anang Muhamad, a businessman in Jambi, who submitted the judicial review case against Article 4 paragraph (3) of the Forestry Law, which stated: *"The control of forests by the State continues to pay attention to the rights of indigenous peoples, as long as the reality is still there and recognized for its existence, and does not conflict with the national interest."*

The applicant expected that what is considered in the establishment of forest areas by the Ministry of Forestry is not only indigenous communities rights, but also other land rights recognized by laws and regulations. In this case, the petitioner suffered a constitutional loss due to the establishment of a forest area that deprived him of land use rights for developing plantation activities. The Constitutional Court granted the application. Consequently, the Constitutional Court gave a new meaning to Article 4, paragraph (3) of the Forestry Law: "*The control of forests by the state still pays attention to the rights of indigenous ommunities, as long as the reality is still there and recognized for its existence,* ***the rights of communities are given based on the provisions of laws and regulations****, and do not conflict with the national interest".* Therefore, in establishing forest areas, the government must first include local communities' consent as a form of control with respect to the exercise of government authority in the forest establishment process. The government must ensure the fulfillment of the constitutional rights of citizens in the form of property rights, customary rights, and other land rights according to the provisions of laws and regulations such as Land Use Rights (*Hak Guna Usaha*), Building Use Rights (*Hak Guna Bangunan*), and Right to Use (*Hak Pakai*).

What does the Constitutional Court mean by the word "pay attention" in Article 4, paragraph (3) of the Forestry Law? The Constitutional Court in this ruling refers to the Constitutional Court Decision No. 32/PUUVIII/2010, on June 4, 2012, stating that the following:

> "... The wo"d *"pay attent"on"* in Article 4, paragraph (3) of the Forestry Law must also be interpreted imperatively in the form of an affirmation that the Government, when determining forest areas, is obliged to include community consent first as a form of control function over the Government to ensure the fulfilment of the constitutional rights of citizens to live a prosperous life mentally and physically, reside, and get a good and healthy living environment, and have private property rights and such property rights may not be arbitrarily taken over by anyone [vide Article 28H paragraphs (1) and (4) of the 1945 Constitution]. "[28]

Therefore, in the process of determining forest areas, when the government determines the existence and rights of indigenous communities or individual rights based on laws and regulations, it is obliged to make a fair land conflict settlement with the rights holders in advance. Consequently, the criminal approach of imprisoning people who live and depend on forests is not the best way to solve land tenure conflicts. This decision strengthens the rights of communities in the process of establishing forest areas that have been ignored for centuries and have led to pervasive forest tenure conflicts.

2.2.3. Separation of Customary Forest and State Forest (Case Number No. 35/PUU-X/2012)

The petitioners in Case No. 35/PUU-X/2012 comprise AMAN, the Kuntu community, and the Cisitu Kasepuhan community. The main point of application

[28] This is a loose translation to the following citation: "*... kata "memperhatikan" dalam Pasal 4 ayat (3) UU Kehutanan haruslah pula dimaknai secara imperatif berupa penegasan bahwa Pemerintah, saat menetapkan wilayah kawasan hutan, berkewajiban menyertakan pendapat masyarakat terlebih dahulu sebagai bentuk fungsi kontrol terhadap Pemerintah untuk memastikan dipenuhinya hak-hak konstitusional warga negara untuk hidup sejahtera lahir dan batin, bertempat tinggal, dan mendapatkan lingkungan hidup yang baik dan sehat, mempunyai hak milik pribadi dan hak milik tersebut tidak boleh diambil alih secara sewenang-wenang oleh siapa pun (lihat Pasal 28H ayat (1) dan ayat (4) UUD 1945)* [...the word "considering" in Article 4 paragraph (3) of the Forestry Law must also be interpreted imperatively, signifying that the Government, when determining forest area boundaries, is obligated to involve the opinions of the community first as a form of control function against the Government to ensure the fulfillment of citizens' constitutional rights to live a prosperous life physically and spiritually, to reside, and to have a good and healthy environment. They have personal ownership rights, and these rights cannot be arbitrarily taken over by anyone (see Article 28H paragraph (1) and paragraph (4) of the 1945 Constitution)]."

in Case No. 35/PUU-X/2012 is the constitutionality of the existence of customary forests as part of state forests. Article 1 number 6 of the Forestry Law states: "*Customary forests are* ***state*** forests located *within the territory of indigenous peoples.*" Furthermore, Article 5 paragraph (2) of the Forestry Law states that: "*State forests as referred to in paragraph (1) letter a, can be in the form of customary forests.*" The provision stating that customary forests are part of the state's forests has created a denial of the existence of customary forests. Coupled with the government's lack of seriousness in creating operational policies that allow indigenous communities to enjoy their rights to customary forests.

The petitioners argued that the existence of customary forests should be made into a special category in contrast to state and right forests. However, the Constitutional Court has another opinion that differs from the construction of the Forestry Law and from that pleaded by the petitioner. The Constitutional Court, through its ruling, separated customary forests from state forests, but did not make customary forests a special category, but instead included the existence of customary forests as one of the types in rights forests. Therefore, the right forest consists of forests that are on the land of individuals/legal entities, and customary forest.[29]

2.2.4. Diminishing Criminalization Toward Local Communities (Case Number 95/PUU-XII/2014)

This case is related to the judicial review of the Forestry Law and the Law on the Prevention and Eradication of Forest Destruction. The applicants in this case were 10 parties consisting of indigenous communities, individuals, and NGOs. The applicants argue that the enactment of some provisions in the Forestry Law and the Law on Prevention and Eradication of Forest Destruction has had an impact on the criminalization of communities who live within and around forest areas. This also creates legal uncertainty regarding the status of forest areas that sustain forest tenure conflicts, and the deteriorating condition of forests.

[29] Arizona et al., *Kembalikan Hutan Adat* [Return Customary Forests].

The Constitutional Court, in its legal considerations, stated that the provisions of the forestry crime in Article 50 paragraph (3) letter e and letter i of the Forestry Law do not apply to people who live for generations in the forest areas, as long as they cut down trees, harvest, collect forest products, and raise livestock in forest areas are carried out not for commercial purposes. The Constitutional Court argues that people who have lived for generations in the forest need clothing, food, and shelter for their daily needs that must be protected by the state, not even threatened with criminal penalties. To provide further explanation on this matter, it is necessary to explain the following categories:

People who have lived in the forest areas for generations, known as heredity communities, are not subject to the criminal provision in the Forestry Law. Hereditary community is a general term that can be applied to indigenous communities and local communities that have lived in the forest for generations. The term hereditary can also be proved by investigating grandchildren within the community to show that the community has lived in the forest for more than two generations. Therefore, to measure whether a community has lived for generations, it is proven that the community has lived in the forest for more than two generations.

People who live in forest areas does not mean that they reside in forest areas. the Constitutional Court stated that the exemption criminal provisions are only aimed at people living in the forest, not for communities located "around the forest area". The Constitutional Court did not specify the difference between people who "live in the forest" and people who are "around the forest area." However, to provide a clear understanding, people living in the forest must be linked to their livelihood, especially with regard to basic needs such as clothing, food, and shelter from the forest, as considered by the Constitutional Court. Therefore, people who live in the forest do not have to be a community whose houses are built in the forest, but local community members who depend on their livelihood from forest land and resources. In short, only people who have a strong life relationship with the forest, beyond economic relations, are excluded from the criminal provisions.

Local communities use forest land and resources, not for commercial purposes. Another criterion for exemption is that local communities only use forest land and resources for non-commercial activities. This condition is important to avoid over-exploitation of forest resources by local community members, which can lead to forest degradation. However, many local community members had planted trees and other crops for commercial activities in forest areas by themselves. In many cases, this practice has occurred even before the government designated their land as forest areas. Another issue is related to raising livestock in forest areas. People often raise animals such as chickens, goats, and cows in the forest for commercial purposes to increase their income. Therefore, the Constitutional Court's restrictions on non-commercial purposes should be viewed as an effort to protect forests from excessive destruction.

2.3. Implementation of Constitutional Court Rulings

The four Constitutional Court rulings discussed above have contributed to facilitating forest tenure conflict resolution. The Constitutional Court has made corrections and encouraged forestry tenure reform in line with the principles of the rule of law and human rights. In the process of establishing forest areas, the Constitutional Court stated that the process of determining definitive forest areas must follow all stages, including paying attention to and seeking approval from communities that will be affected by the determination of forest areas. The Constitutional Court also emphasized the position of customary forests as part of customary territories and not as part of state forests. Thus, customary forest areas that have been used by the government as state forest areas must be returned to indigenous communities. Finally, the Constitutional Court developed exceptions for the application of criminal provisions for people who live, use forest products not for commercial purposes, and herd livestock in forest areas.

The Constitutional Court's ruling contributes indirectly to the resolution of forest tenure conflicts. To understand the effect of the Constitutional Court's rulings, it is necessary to investigate the implementation of the court rulings by the government, local communities, and NGOs to determine the impact of the Constitutional Court's rulings. This section discusses some of the government's

responses, both institutional and programmatic, and examines what changes have been made to implement the Constitutional Court's decision in relation to improving forestry governance and resolving forest tenure conflicts.

2.3.1. Joint Agreement of Twelve Ministries and State Agencies Under the Supervision of KPK

Good Constitutional Court rulings will not work without institutional change and government response to implement Constitutional Court's rulings. At an earlier stage, the Ministry of Forestry was not responsive to Constitutional Court's ruling. Another institution, the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*/KPK), which promotes better forestry governance, encourages the establishment of a joint understanding involving twelve ministries and state agencies to advance the establishment of forest areas. This program aims to resolve forestry tenure conflicts through reformulation of procedures for establishing forest areas.

In 2013, the KPK built a commitment with 12 Ministries and Institutions to prevent corruption in the establishment of forest areas, known as *Nota Kesepahaman Bersama* (NKB) 12. Although the entrance to this issue is from the prevention of corruption, this joint agreement can enable the Ministry of Forestry and other ministries to work together to improve forestry governance as a prerequisite for the resolution of forest tenure conflicts. The data below show that the establishment of forest areas has increased dramatically since the NKB was agreed. Each agency is actively involved in the establishment of forest areas.

In addition to its success in encouraging the acceleration of the establishment of forest areas, NKB 12 has also succeeded in encouraging some ministries to create basic regulations for the recognition of customary forests. To implement NKB 12, the Ministry of Home Affairs issued a Regulation on Guidelines for the Recognition of Indigenous Communities, the Ministry of Agrarian Affairs issued a Ministerial Regulation on Communal Lands, and the Ministry of Forestry issued a Ministerial Regulation containing procedures for the establishment of customary forests. Details on this will be discussed further in the section below.

Although NKB 12 is quite effective in encouraging forest governance reform and the implementation of Constitutional Court's decision, the commitment of this cooperation does not last long. In 2014, a general election led to the establishment of a new regime. The commitment of the ministers of the previous government was different from that of the new government. In addition, the form of cooperation through NKB 12 is naturally *ad hoc*, not in the form of a permanent institution. Therefore, the improvement of forest tenure reform to resolve forestry tenure conflicts requires permanent institutions.

2.3.2. The Reorganization of the Ministry of Forestry and New Policies

The Constitutional Court's ruling provides an argument for indigenous community organizations and NGOs to push for structural changes. For this group, the recognition of customary forests is a strategic step toward the resolution of forestry tenure conflicts. This group is aware that the implementation of Constitutional Court's decision is not entirely an administrative process, but a political process. Therefore, they take advantage of the political opportunities available. During the 2014 presidential election, AMAN, as the applicant in the Court ruling in Case Number 35 and as the largest indigenous organization in Indonesia, supported presidential candidate Joko Widodo-Jusuf Kalla. The pair of presidential candidates incorporated the AMAN agenda into their political programs, to encourage the government to implement the Constitutional Court's decision on customary forest recognition.

After Joko Widodo-Jusuf Kalla won the 2014 elections, the group felt that it had a great opportunity to oversee the implementation of the Constitutional Court ruling. However, it requires an institutional change in the government. President Joko Widodo merged the Ministry of Forestry with the Ministry of Environment. This merger is expected to provide a stronger social and environmental dimension to forest management. Within the Ministry of Environment and Forestry, the Directorate General of Social Forestry and Environmental Partnerships (*Perhutanan Sosial dan Kemitraan Lingkungan*/PSKL) was established. This Directorate is at the forefront of the process of resolving forestry conflicts and recognizing communities' rights in the field of forestry.

2.3.3. Enhancing Social Forestry Programs and Legal Recognition of Customary Forests

The notable contribution of the Constitutional Court is to strengthen communities' rights in forestry management. Currently, the demands of communities to resolve conflicts are not only based on the real needs they face for the fulfillment of daily needs, but are also based on constitutional rights. The Constitutional Court's ruling has prompted many community groups to use constitutional rights as an argument to deal with government agencies and forestry companies on the ground. One example relates to the decision of Constitutional Court Case Number 35, which recognised the existence of customary forests. Indigenous groups in various places made signposts and erected them at conflict sites. The signpost stated: Based on the Decision of the Constitutional Court No. 35/PUU-X/2012, Customary Forests are No Longer State Forests. These events concretely show that Constitutional Court's ruling impacts on the ground as an argument for local communities encountering forest tenure conflicts.

The rise of awareness that the resolution of forest tenure conflicts and the constitutional rights of forest dwellers has led to many important changes. A notable example is the increase in access and rights of communities through various social forestry schemes and customary forests.[30] The government is rapidly expanding the scheme and simplifying procedures for communities to gain access to or recognition of customary forests.[31] Data until July 2022 show that the area of forest areas managed by the community has reached more than 5 million hectares. This number has increased greatly compared to the condition of approximately 10 years ago, before there was a single Constitutional Court ruling that strengthened community rights and encouraged improvements in forestry governance.

[30] Mia Siscawati, et al., "Overview of Forest Tenure Reforms in Indonesia" (Working Paper 223 (published) presented for Center for International Forestry Research at Bogor, Indonesia, 2017).

[31] Yance Arizona, Malik, and Lucy Ishimora, "*Pengakuan Hukum Terhadap Masyarakat Adat: Trend Produk Hukum Daerah dan Nasional Paska Putusan MK 35/PUU-X/2012* [The Legal Recognition of Adat Communities: The Trend of Local and National Regulation after Constitutional Court Decision Number 35/PUU-X/2012]," *Outlook Epistema* 2017.

2.4. Contribution and Limitations of Court Rulings

The Constitutional Court has played an important role in facilitating forest tenure reform by making corrections to several provisions of the Forestry Law. There are substantially at least two main contributions of the Constitutional Court. First, the Constitutional Court restricts arbitrary action by the government, which is the most important element in realizing the rule of law principles. The Constitutional Court tends to end authoritarian practices in determining definitive forest areas. In the ruling, the Constitutional Court restored the position of appointment as the initial stage in the process of establishing forest areas as desired by Article 15 of the Forestry Law. The Constitutional Court wants to ensure a participatory process in the establishment of forest areas to reduce forestry tenure conflicts.

Second, the Constitutional Court plays an important role as the protector of constitutional rights by prioritizing the existence and indigenous peoples' rights as well as individual rights in the process of establishing forest areas. The priority of citizens' rights is used as a principle by the Constitutional Court so that the government must consider the designation of forest areas. Similarly, in the establishment of forest areas, the government must pay attention to seeking the consent of the community. The Constitutional Court not only recognizes the existence of community rights in forest management but also affirms a special category of customary forests that must be separated from state forests to ensure that indigenous communities can enjoy their constitutional rights guaranteed by the constitution.

However, it is also undeniable that there are many of limitations to the use of the Constitutional Court in supporting forestry tenure reforms. The first is the Constitutional Court's decisions that apply to the future (*prospective*). Consequently, it is less effective to endure fundamental corrections from past decisions by the government that have been the main cause of the present forest tenure conflicts. Second, the Constitutional Court ruling is general and public. It only resolves problems at the level of legal norms, not at the level of legal practice in the field. Thus, the presence of a Constitutional Court ruling does

not necessarily solve the concrete problems faced by the people on the ground. At the very least, the Constitutional Court's ruling can open a new debate and policy that is more in favour of the interests of citizens whose living space has been deprived of due to the enactment of a law. Thus, the implementation of Constitutional Court's ruling requires institutional changes and the involvement of the political process to give meaning to Constitutional Court's decision.

III. CONCLUSION

The Constitutional Court has played an important role in supporting forestry tenure reform. The Constitutional Court's most important contribution is to limit the arbitrary power of the government in the process of establishing forest areas while providing a solid foundation for the priority of individuals' and indigenous communities' rights in forest governance in Indonesia. However, the Constitutional Court's decision has a significant impact only if its implementation is supported by community organizations and NGOs who consistently encourage institutional changes, policy reforms, and innovative programs to implement the Constitutional Court's rulings.

Thoroughly, the implementation of Constitutional Court's ruling followed the changing demands and pressure from local communities. The government made incremental changes to gradually accommodate the local and indigenous communities' rights to reach forestry tenure conflict resolution. However, there is something unimaginable in advance by proponents of indigenous communities' rights regarding the procedural consequences of realizing customary forest recognition. Regulatory reform requires improved access to legal procedures for realizing the recognition of rights and the resolution of conflicts. Government agencies strictly control the process and outcomes of conflict resolution and the legalization of indigenous communities' rights. The indirect consequences of such a mechanism reinforce the imbalance of power between the government and the people. In other words, complicated procedures for the recognition of rights and conflict resolution generate greater discretionary space for state agencies to slow down, divert, and reject claims submitted by communities.

BIBLIOGRAPHY

Afiff, Suraya, and Noer Fauzi Rachman. "Institutional Activism: Seeking Customary Forest Rights Recognition from Within the Indonesian State." *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 453-70, https://doi.org/10.1080/14442213.2019.1670245.

Arizona, Yance. "Rethinking Adat Strategies: Politics of State Recognition of Customary Land Rights in Indonesia." PhD diss., Leiden University, 2022.

Arizona, Yance, Malik, and Lucy Ishimora. "Pengakuan Hukum Terhadap Masyarakat Adat: Trend Produk Hukum Daerah dan Nasional Paska Putusan MK 35/PUU-X/2012 [The Legal Recognition of Adat Communities: The Trend of Local and National Regulation after Constitutional Court Decision Number 35/PUU-X/2012]." *Outlook Epistema* 2017, http://dx.doi.org/10.13140/RG.2.2.31961.67689.

Arizona, Yance, Siti Rakhma Mary, and Grahat Nagara. *Anotasi Putusan MK No. 45/PUU-IX/2011 Mengenai Pengujian Konstitusionalitas Kawasan Hutan dalam Pasal 1 Angka 3 UU No. 41 Tahun 1999 tentang Kehutanan [Annotation of Constitutional Court Decision No. 45/PUU-IX/2011 Regarding Testing of the Constitutionality of Forest Areas in Article 1 Number 3 of Law no. 41 of 1999 concerning Forestry]*. Jakarta: Perkumpulan HuMa [HuMa Association], 2012.

Arizona, Yance, Siti Rakhma Mary Herwati, and Erasmus Cahyadi. *Kembalikan Hutan Adat kepada Masyarakat Hukum Adat: Anotasi Putusan MK No. 35/PUU-X/2012 Mengenai Pengujian UU No. 41 Tahun 1999 tentang Kehutanan [Return Customary Forests to Customary Law Communities: Annotation of Constitutional Court Decision No. 35/PUU-X/2012 Regarding Review of Law No. 41 of 1999 concerning Forestry]*. Jakarta: Perkumpulan HuMa, Epistema Institute, and Aliansi Masyarakat Adat Nusantara [HuMa Association, Epistema Institute, and Alliance of Indigenous Peoples of the Archipelago], 2014.

Arizona, Yance, Erasmus Cahyadi, and Malik. *Mengakhiri Rezim Kriminalisasi Kehutanan: Anotasi Putusan Mahkamah Konstitusi Nomor 95/PUU-XII/2014 Mengenai Pengujian UU No. 18 Tahun 2013 tentang Pencegahan dan Pemberantasan Perusakan Hutan, serta UU No. 41 Tahun 1999 tentang Kehutanan [Ending the Criminalization Regime of Forestry: Annotation of Constitutional Court Decision No. 95/PUU-XII/2014 Regarding the Judicial Review of Law No. 18 of 2013 on the Prevention and Eradication of Forest Destruction, and Law No. 41 of 1999 concerning Forestry]*. Jakarta: Epistema Institute and AMAN, 2015.

Arizona, Yance. *Konstitusionalisme Agraria [Agrarian Constitutionalism]*. Yogyakarta: STPN Press, 2014.

Arizona, Yance. Erasmus Cahyadi and Malik. *Banyak Perubahan Tetapi Tidak Banyak yang Berubah: Refleksi 2 Tahun Putusan MK 35 [Many Changes, But Not Much Has Changed: Reflection on 2 Years of Constitutional Court Decision 35]*. Jakarta: AMAN and Epistema Institute, 2015.

Arizona, Yance, Muki Trenggono Wicaksono, and Jacqueline Vel. "The Role of Indigeneity NGOs in the Legal Recognition of Adat Communities and Customary Forests in Indonesia." *The Asia Pacific Journal of Anthropology* 20, no. 5 (2019): 487-506, https://doi.org/10.1080/14442213.2019.1670241.

Boomgaard, Peter. "Forest Management and Exploitation in Colonial Java, 1677-1897." *Forest & Conservation History* 36, no. 1 (1992): 4–14, https://doi.org/10.2307/3983978.

Burns, Peter. *The Leiden Legacy: Concepts of Law in Indonesia*. Leiden: KITLV, 2004.

Cahyono, Eko. et, al. *Evaluasi Konflik Agraria Masyarakat Hukum Adat dalam Kawasan Hutan [Evaluation of Agrarian Conflicts of Indigenous Communities in Forest Areas]*. Jakarta: National Commission on Human Rights, 2016.

Colchester, Marcus. "Sustaining the Forests: The Community-Based Approach in South and South-East Asia." *Development and Change* 25, no. 1 (1994): 69-100, https://doi.org/10.1111/j.1467-7660.1994.tb00510.x.

Colchester, Marcus. "Indigenous Peoples and Communal Tenures in Asia." *Environmental Science & Policy* 7, no. 3 (June 2004): 145-53, https://doi.org/10.1016/j.envsci.2004.02.004.

Diantoro, Totok Dwi. "Dinamika Kebijakan Resolusi Konflik Tenurial Kawasan Hutan Era Joko Widodo [Dynamics of Forest Area Tenurial Conflict Resolution Policy in the Joko Widodo Era]." *Media of Law and Sharia* 1, no. 4 (2020): 245-46, https://doi.org/10.18196/mls.v1i4.10272.

Fasseur, Cees. "Purse or Principle: Dutch Colonial Policy in the 1860s and the Decline of the Cultivation System." *Modern Asian Studies* 25, no. 1 (1991): 33-52, https://doi.org/10.1017/S0026749X00015833.

Fay, Chip, and Ho-Ming So Denduangrudee. "Emerging Options for the Recognition and Protection of Indigenous Community Rights in Indonesia." In *Land and Development in Indonesia: Searching for the People's Sovereignty*, edited by John McCharty and Kathryn Robinson. Singapore: ISEAS, 2016.

Furnivall, John Sydenham. *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India*. Cambridge: New York, 1948.

Forest Watch Indonesia. *The State of the Forest: Indonesia*. Bogor: Forest Watch Indonesia and Washington DC: Global Forest Watch, 2002.

Ginsburg, Tom, and Mila Versteeg. "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics and Organization* 30, no. 3 (2014): 587-622. https://doi.org/10.1093/jleo/ewt008.

Hardjodarsono, Soenarjo. *Sejarah Kehutanan Indonesia I: Periode Reasejarah - Tahun 1942 [History of Indonesian Forestry I: The Historical Period – 1942]*. Jakarta: Departemen Kehutanan [Forestry Department], 1986.

Lund, Christian. "Of What Is This a Case?: Analytical Movements in Qualitative Social Science Research." *Human Organization* 73, no. 3 (2014): 224–34, http://www.jstor.org/stable/44148783.

Mary, Siti Rakhma, Dhani Armanto, and Lukito. *Dominasi dan Resistensi Pengelolaan Hutan di Jawa Tengah: Studi Kasus di 4 Kabupaten [Dominance*

and Resistance in Forest Management in Central Java: Case Studies in 4 Districts]. Jakarta: Perkumpulan HuMa [HuMa Association], 2007.

Peluso, Nancy Lee, and Peter Vandergeest. "Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand." *The Journal of Asian Studies* 60, no. 3 (2001): 761–812, https://doi.org/10.2307/2700109.

Peluso, Nancy Lee. "The History of State Forest Management in Colonial Java." *Forest & Conservation History* 35, no. 2 (1991): 65-75, https://doi.org/10.2307/3983940

Peluso, Nancy Lee. *Rich Forests, Poor People: Forest Access Control and Resistance in Java*. Berkeley/Los Angeles/Oxford: University of California Press, 1992.

Rachman, Noer Fauzi and Hasriady Masalam. "The Trajectory of Indigeneity Politics Against Land Dispossession in Indonesia." *Sriwijaya Law Review* 1, no. 1 (2017): 122-42, https://doi.org/10.28946/SLREV.VOL1.ISS1.13.PP122-142.

Rachman, Noer Fauzi, and Mia Siscawati. "Forestry Law, Masyarakat Adat [Indigenous Community] and Struggles for Inclusive Citizenship in Indonesia." In *Routledge Handbook in Asian Law*, edited by Christopher Antons. London and New York: Routledge, 2016.

Safitri, Myrna Asfinawati. "Forest Tenure in Indonesia: The Socio-Legal Challenges of Securing Communities' Rights." PhD diss., Van Vollenhoven Institute, Leiden University, 2010.

Safitri, Myrna Asfinawati, et al. *Menuju Kepastian dan Keadilan Tenurial [Towards Tenure Certainty and Justice]*. Jakarta: Kelompok Masyarakat Sipil untuk Reformasi Tenurial [Civil Society Group for Tenurial Reform], 2011.

Safitri, Myrna Asfinawati. ""Dividing the Land: Legal Gaps in the Recognition of Customary Land in Indonesian Forest Areas." *Kasarinlan: Philippine Journal of World Studies* 30, no. (2)-31(1) (2015): 31-48, https://www.journals.upd.edu.ph/index.php/kasarinlan/article/view/5705.

Siscawati, Mia, et al. "Overview of Forest Tenure Reforms in Indonesia." Working Paper 223, Center for International Forestry Research, 2017.

Siscawati, Mia. "Social Movements and Scientific Forestry: Examining the Community Forestry in Indonesia." PhD diss., University of Washington, 2012.

SOIFO. *The State of Indonesia's Forest 2020*. Jakarta: The Ministry of Environment and Forestry, 2020.

Termorshuzen-Arts, Marjanne. "Rakyat Indonesia dan Tanahnya: Perkembangan Doktrin Domein di Masa Kolonial dan Pengaruhnya dalam Hukum Agraria Indonesia [The Indonesian People and Their Land: The Development of the Domain Doctrine in the Colonial Period and its Influence on Indonesian Agrarian Law]." In *Hukum Agraria dan Masyarakat di Indonesia [Agrarian Law and Society in Indonesia]*, edited by Myrna Safitri and Tristam Moeliono, 65. Jakarta: HuMa, Van Vollenhoven Institute-Leiden University, KITLV-Jakarta, 2010.

Vandergeest, Peter and Nancy Lee Peluso. "Empires of Forestry: Professional Forestry and State Power in Southeast Asia, Part 1." *Environment and History* 12, no. 1 (2006): 31–64, http://dx.doi.org/10.3197/096734006776026809.

Vandergeest, Peter and Nancy Lee Peluso. "Territorialization and State Power in Thailand." *Theory and Society* 24, no. 3 (1995): 385-426, http://dx.doi.org/10.1007/BF00993352.

Wignjosoebroto, Soetandyo. *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia [From Colonial Law to National Law: Socio-Political Dynamics in the Development of Law in Indonesia]*. Jakarta: Asosiasi HuMa [HuMa Association], 2014.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1015

Comity or Confrontation: Budgeting Independence of the American Judiciary

Justin Apperson*
William & Mary Law School
jbapperson@wm.edu

Received: 5 October 2023 | Last Revised: 6 February 2024 | Accepted: 1 April 2024

Abstract

While many American court systems have constitutional funding protections judicial salaries, the judiciary in the position of bargaining for funding for staff, services, technology, facilities, supplies, and other goods to adequately fund the constitutional mission of adjudication. Courts have looked to two principal strategies in securing funding. First, courts have tried to improve the relationship with the other branches through long-term connections and demonstrations of sound judicial governance. Courts have sought to improve their strategic planning, incorporating novel uses of data including performance measures, with the collateral hope of enhancing budget justifications. Courts have also tested political strategies for self-advocacy, including elevating judicial officers as spokespersons for the judicial branch, mobilizing stakeholders, and lobbying key officials. Second, courts have invoked the inherent powers of the judiciary as a separate and co-equal branch to compel funding that is reasonably necessary to administration of justice. Judicial leaders have typically disfavored this technique, which presents its own risks of trespassing on legislative power and impairing longer-term strategies for building bridges and understanding between the branches, except in patterns of legislative neglect or hostility towards judicial independence.

Keywords: Judicial Independence; Budgeting; Communications Strategies; Inherent Powers

* Juris doctor candidate at William & Mary Law School in Williamsburg, Virginia. He received his bachelor's degree in history and Spanish from Transylvania University in Lexington, Kentucky in 2014.

I. INTRODUCTION

Following the 2008 financial collapse, and in other moments of austerity, legislatures feeling the fallout expected all state agencies to make sacrifices, swinging a "meat ax" into the fiscal planning of government administrators.[1] The courts were not spared. In 2013, the American federal courts were faced with an automatic 5% spending reduction through statutory budget sequestration, amounting to $350 million dollars, halfway through the fiscal year.[2] Some district courts were forced to schedule their criminal dockets around dates when federal public defenders were furloughed.[3] The New Hampshire judiciary first furloughed and then laid off 13% of its staff in 2011 due to budget cuts from the state legislature.[4]

If the "meat ax" is frightening, sometimes the "scalpel" offers questionable relief, with legislatures or executive officials singling out the judicial organ for special attention.[5] Several years ago, the Kansas legislature responded to an opinion by the state Supreme Court, interpreting the state constitution to obligate adequate funding of the education system, by removing the court's power to supervise lower court judges[6]. The legislature followed up with a measure threatening the budget of the judiciary if the Kansas Supreme Court found this administrative reform unconstitutional. The showdown ended only when legislature reversed course after the Supreme Court held as anticipated.[7]

These budget fights suggest an intractable tension between an independent judiciary and elected legislatures shepherding resources on behalf of the taxpayers. Where the executive branch is responsible for overseeing judicial budgets and submitting funding requests to the legislature, there is an additional layer

1 For the metaphor, see Catie Edmondson, "How to Enforce a Debt Deal: Through 'Meat-Ax' Cuts Nobody Wants," *New York Times*, June 1, 2023.

2 "Facing Fiscal Crises, Judicial Conference Charted Steady Courts," United States Courts, published November 17, 2022.

3 Ibid.

4 *Crisis in Court Funding: Second Hearing before the ABA Task Force on Preservation of the Justice System*, Concord, N.H. (May 26, 2011) (Testimony of New Hampshire Supreme Court Chief Justice Linda Dalianis).

5 For the scalpel metaphor, see Jim Puzzanghera, "Bipartisan Agreement on Budget Cuts: Scalpel is Better than Ax," *Los Angeles Times*, February 28, 2013.

6 Lincoln Caplan, "The Political War Against the Kansas Supreme Court," *The New Yorker*, February 5, 2016.

7 Ibid.

of scrutiny implicating separation of powers. The courts derive their power from constitutions, which create obligatory judicial functions that operate independently from the other branches. Other constitutional language, such as "open courts" provisions, may suggest an entitlement of the public to a fair and impartial public adjudication of their rights.[8]

Overzealous, or punitive, interventions in judicial budgets threaten these functions of an independent judicial branch. The legislature is assigned the power of the purse and keeps funding recipients accountable to the taxpayers, screening programs for wasteful spending, as well as fraud and abuse. The judiciary demands independence while also promising to remain accountable. The two must negotiate, in good faith and with respect for the constitutional role of the courts, to determine what funding is adequate to ensure the continuity of core judicial functions.

In the wake of recession budget cuts, and in austerity battles preceding it, the American courts put their heads together to compile persuasive strategies for dealing with legislatures in appropriations processes.[9] They understood that making good on promised accountability by demonstrating a commitment by the courts to efficient governance and stewardship of court resources was key to earning continuing legislative support.[10] Courts also focused on improving communications with the other branches, seeking to develop more enduring channels and discover what messages and methods of delivery are most effective.[11] However, courts occasionally took a more muscular approach, insisting on their inherent powers and framing their budget requests as constitutional demands attached to the doctrine of separation of powers.[12]

This Article will share the experience and lessons learned from American court systems in securing adequate budgets to carry out their functions as the

[8] Judith Resnik, "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture," Saint Louis University Law Journal 56, no. 4 (Summer 2012): 923.

[9] See, e.g., Conference of Chief Justices, Resolution 22: State Judicial Branch Budgets in Times of Fiscal Crisis, Adopted at 27th Midyear Meeting, January 21, 2004.

[10] "Principles for Judicial Administration," National Center for State Courts Williamsburg: NCSC, 2012.

[11] "Funding Justice: Strategies and Messages for Restoring Court Funding," Williamsburg: NCSC, 2012. Web, https://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/Funding%20Justice.pdf.

[12] Matter of Maron v Silver, 925 N.E.2d 899 (N.Y. 2010).

Third Branch. First, this Article will summarize strategies adopted in dealing with legislative and executive officials in the annual appropriations process. Both legislatures and courts have the goal of enhancing judicial accountability, and these strategies seek to build firm partnerships on that basis with a coordinate branch. Second, this Article will review examples of courts invoking inherent powers to break impasse and explore the significant risks for the courts in applying these strategies.

1.1. Background

1.1.1. Source of Judicial Power

In the United States, judicial power is distributed between the federal courts and the state courts. Article III, section 1 of the U.S. Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[13] Tenure of judges both on the Supreme Court and the lower courts is for life during good behavior, and compensation cannot be reduced during a judge's term in office.[14]

Article III, section 2 limits the subject matter jurisdiction of the federal courts to "cases and controversies" arising under the Constitution, federal law and treaties, suits involving the federal government, cases involving diversity of state citizenship or a US citizen and foreign parties, suits between states, cases involving ambassadors and consuls, and admiralty cases.[15] The Supreme Court has original jurisdiction only over cases involving state parties and ambassadors or other public ministers.[16] The Supreme Court has appellate jurisdiction over other cases brought in the lower courts.[17]

The US Constitution does not expressly grant judicial review of congressional acts to the federal courts. However, in the early republic the Supreme Court held that the judiciary has an inherent power, derived from the principle of limited

[13] U.S. Constitution, art. III, § 1.
[14] U.S. Constitution, art. III, § 1.
[15] U.S. Constitution, art. III, § 2.
[16] Ibid.
[17] Ibid.

government powers implied in the Constitution, to declare laws passed by Congress unconstitutional. In the words of Justice John Marshall, "It is emphatically the province and duty of the Judicial Department to say what the law is."[18]

The state enjoys concurrent jurisdiction with the federal courts, except where the federal courts have exclusive jurisdiction. The U.S. Supreme Court noted in *Gulf Offshore Co. v. Mobil Oil Co.*, "The general principle of state court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state."[19] Meanwhile, the federal courts, based on their powers in Article III, can decide state law causes of action where there is diversity jurisdiction.[20] The vast majority of cases are heard in the state courts.[21]

The powers of the state courts are articulated in each of 50 state constitutions. For instance, the Virginia Constitution declares, "The judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish."[22] The Virginia Constitution then defines, among other things, the original and appellate jurisdiction of the Supreme Court, manner of selection and qualification of judges, removal and disqualification of judges, the authority of the Chief Justice as administrative head of the judiciary, and the power of the Supreme Court to establish court rules.[23]

Constitutional commitments outside the articles defining judicial power create additional responsibilities for courts. The Sixth Amendment guarantee to a speedy and public trial by jury specifies a form and theoretical time limit for adjudication.[24] The right to counsel guarantee requires the provision of legal

[18] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
[19] Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477 (1981).
[20] 28 U.S.C. § 1332.
[21] "Federal and State Caseload Trends: 2012-2021," Court Statistics Project, National Center for State Courts, accessed September 25, 2023.
[22] Virginia Constitution, art. VI, § 1.
[23] Virginia Constitution, art. VI, § 2-12.
[24] U.S. Constitution, Amendment VI.

services to indigent defendants.[25] Although not found in the US Constitution, forty-one state constitutions contain an "open courts" or "right to remedy" provision that has variously been read to require physical access to courts, to restrict certain types of court fees, and to restrict the legislature from re-defining common law causes of action.[26]

The Supreme Court's doctrines defining Fourteenth Amendment due process, right to counsel, speedy and public trial, and other fundamental procedural rights inevitably affect the workload and funding needs not only of the federal courts but also the state courts.[27] Statutes defining jurisdiction, the scope of substantive law, and rules of civil and criminal procedure also have major downstream effects on the docket.[28]

1.1.2. Administration of the Federal Courts

Prior to 1939, administrative control of the federal judiciary was within the Department of Justice.[29] Following several Depression-era budget conflicts, Chief Justice Charles Evan Hughes worked with stakeholders from the judiciary, the American Bar Association, and the Department of Justice to draft legislation transferring administrative functions to a new Administrative Office of the United States Courts (AOUSC) under the supervision of the Judicial Conference of the United States.[30] 28 U.S.C § 601 provides that the Director is appointed by the Chief Justice of the United States with consultation from the Judicial Conference.[31] The Director is responsible for administrative matters applying to all federal courts, collecting and reporting data, disbursing appropriations, overseeing management of facilities, and generally stewarding court resources.[32]

---

[25] Gideon v. Wainwright, 372 U.S. 335 (1963).

[26] Judith Resnik, "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture," St. Louis University Law Journal, 56, no. 4 (Summer 2012): 978.

[27] For an illustration of how right to counsel intersects with judicial administration, see Conrad Wilson, "Head of Oregon Supreme Court calls for immediate fix to ongoing lack of public defenders," Oregon Public Broadcasting, July 7, 2022.

[28] The struggle between branches over the procedural rulemaking in the courts invites still more separation of powers controversy. For discussion, see Charles Gardner Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," *New York University Law Review* 71, no. 5 (November 1996): 1165.

[29] "The Executive Role in Judicial Administration," Federal Judicial Center, accessed September 25, 2023.

[30] Ibid.

[31] 28 U.S.C § 601.

[32] 28 U.S.C § 604.

The Judicial Conference of the United States supervises the USAOC as the policymaking arm of the federal judiciary.[33]

The AOUSC prepares a budget estimate for the federal judiciary, which is approved by the Judicial Conference of the United States and accompanied by budget justifications.[34] The Judicial Conference then presents the budget to the executive Office of Management and the Budget.[35] The President may comment on the judiciary's proposed budget but is prohibited by statute from changing any items in the proposal before submitting it to Congress.[36] Congressional appropriations committees will consider the budget, and the Director of the AOUSC, as well as often judicial officers including Supreme Court justices, will generally explain budget justifications and the constitutional role of the judiciary in committee hearings.[37]

Although the federal judiciary suffered a 5% reduction in 2013 as part of an across-the-board spending cut, Congress has generally appreciated the funding needs and constitutional obligations of the federal courts and increased appropriations between 1.2% and 5.9% in all fiscal years between 2014 and 2023.[38] In fiscal year 2023, the federal courts requested $8.6 billion, approximately 0.2% of the total federal budget.[39] Approximately two thirds of the increase in the fiscal year 2024 budget request beyond the previous year is dedicated to inflation adjusted salary increases.[40]

1.1.3. Administration of the State Courts

State constitutions and statutes assign responsibilities for judicial administration and budgeting. Historically, trial courts have been funded substantially from local revenue. However, the trend since the latter half of the twentieth century has been to place budget authority at the state level, under

33 28 U.S.C § 331.
34 "Introduction to the Federal Budget Process," Congressional Research Service, updated January 10, 2023.
35 "The Judiciary Fiscal Year 2024 Congressional Budget Summary," Administrative Office of the United States Courts, 2023.
36 ,"Understanding the Federal Courts," Administrative Office of the United States Courts, Washington, AOUSC: 25.
37 Ibid.
38 "Federal Court Funding," American Bar Association, Last Modified June 1, 2023.
39 "Judiciary Budget Request FY 2023," Congressional Research Service, updated April 25, 2022.
40 Administrative Office of the United States Courts, *The Judiciary Fiscal Year 2024 Congressional Budget Summary*.

a state Administrative Office of the Courts, appropriating funds from general government revenue for the courts via the state legislature. For instance, in California, one of the country's largest court systems, the majority of trial court budgets are sourced from state taxpayers using a Workload-based Allocation and Funding Methodology, which analyzes a court's workload based on volume, type, and complexity of cases.[41] The goal of transferring funding authority to the state was to better equalize funding across the trial courts, as some counties were better positioned to fund the trial courts than others.[42] Funding for some programs comes from separate funding sources.

Numerous judicial advocacy and bar organizations have recommended that judicial budgets be submitted directly to the legislature without alteration by the Governor. In 2004, the American Bar Association Commission (ABA) Commission on State Court Funding urged states to permit to the judiciary to submit its budget request directly to the legislature.[43] At the time, the Commission observed that in 18 states the Governor had authority to alter the judicial budget, and in only 14 was the judicial budget required to be considered separately from the budget for executive agencies.[44] The National Center for State Courts (NCSC) in *Principles for Judicial Administration* similarly suggested, "State and local legislative bodies should require that the judiciary's budget be presented directly to them by judicial leadership without prior approval of the executive."[45] Both commented on the judicial appropriations process, and ultimately the independence of the branch, being hampered by executive officials lacking appreciation for the specific funding justifications or separate constitutional role of the judiciary.[46]

The budget for the California judiciary is mediated by the executive branch and governed under the state's constitutional balanced budget amendment.[47] The California Judicial Council begins the process by compiling budget information

41 Merril Balassone, "The Trial Court Funding Formula, Explained," Judicial Branch of California, published July 27, 2017.
42 Ibid.
43 Joseph Nadeau, "Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding," *Judges' Journal* (Summer 2004): 16-17.
44 Ibid.
45 National Center for State Courts, Principles for Judicial Administration: 13-14.
46 Ibid. Nadeau, "Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding."
47 "The Branch Budget Process," Judicial Branch of California, accessed September 25, 2023.

for the state Department of Finance, based on data collected from the court system, which forwards a budget recommendation to the Governor.[48] The state constitution requires the governor to submit a balanced budget by January 10, negotiation and revision occurs until May, and the legislature must adopt a balanced budget by June 15.[49] Meanwhile, in New York, Article VII, section 1 of the state constitution provides that the financial requests of the legislature and the judiciary are submitted to the Governor, and the Governor must include these requests in the budget submitted to the legislature without revision.[50] However, like in the budget for the federal courts, the governor may offer recommendations.[51]

II. DISCUSSION

2.1. Strategies for Collaborating with Coordinate Branches in Budgeting

The judiciary has twin goals of independence and accountability.[52] Independence requires that the coordinate branches of government respect the constitutional role of the judiciary to interpret and apply the law to cases and controversies. The courts have a constitutional mission to provide a fair, speedy, and impartial adjudication of legal rights and some adequate level of funding is surely incidental to this mission.

Meanwhile, accountability insists that the judiciary must self-govern in a way that reflects its public purpose. The legislature has its own constitutional role to generate revenue, authorize spending in accordance with public purposes, and achieve fiscal sustainability.[53] If the courts were able to demand a blank check

[48] Ibid.

[49] Ibid.

[50] New York Constitution, art. VII, § 1.

[51] Ibid

[52] The Strategic Plan for California's Judicial Branch provides that both "protecting the independence of the branch is crucial in a democracy" and "accountability is a duty of public service." See: "The Strategic Plan for California's Judicial Branch," Judicial Council of California, July 19, 2019. The Strategic Plan for the Federal Judiciary names independence and transparency among the core values of the judicial branch. Judicial Conference of the United States, *Strategic Plan for the Federal Judiciary* (Washington: Judicial Conference of the United States, 2020), 2.

[53] U.S. Constitution, art. I, § 8. See also, e.g., Virginia Constitution, art. IV, § 11 ("No bill which . . . makes, continues, or revives any appropriation of public or trust money or property . . . shall be passed except by the affirmative vote of a majority of all the members elected to each house . . . "); Jeffrey Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," Maryland Law Review 52, no. 1 (1993): 224 ("Courts concede that the power over the purse has been granted to state legislatures by state constitutions. Therefore, when courts claim such power as inherent, they intrude into a fundamental responsibility of another branch of government.").

from the legislature for any spending, no matter how questionably connected to their constitutional mission, the limiting principle of government would be compromised.[54] The World Bank has noted, "excessive financial independence of the judiciary could be used by some judiciary to shield themselves against legitimate reform efforts and reasonable expectation regarding performance."[55]

The question is then whether to fund the courts but how much is adequate and how to prioritize funding.[56] Answering that question requires negotiation at least between the legislature and the judiciary. Where the executive lacks authority to mediate the judicial budget, executive agencies are still involved in judicial accountability in setting financial reporting requirements that apply universally to public entities, as well as in prosecuting criminal misuse of funds.[57]

Courts and bar associations have urged in times of fiscal crisis that independence requires the legislature adequately fund the judiciary. The American Bar Association adopted a resolution in 2011 pleading for "state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately, provide that funding as a governmental priority, and develop principles that would provide for stable and predictable levels of funding of those justice systems."[58] But the resolution also calls on courts to remember their public service role and "identify and engage in best practices to insure the protection of the citizens within their jurisdictions, efficient use of court resources, and financial accountability."[59]

While American courts seek to distance themselves from the political branches, a posture that stems from their guarded independence, the budgeting process requires the courts to enter the political arena and advocate for

[54] "National Center for State Courts and Justice at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding": 2.

[55] Federica Viapiana, "Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy," *Laws* 7, no. 4 (2018): 3.

[56] Judith Resnik, "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture," *St. Louis U. L.J.* 56, no. 4 (2012): 977.

[57] Bill Chappell, "W.Va Supreme Court Justice Allen Loughry is Charged with 22 Counts, Including Fraud," NPR, June 20, 2018.

[58] American Bar Association, "Report to the House of Delegates: Task Force on Preservation of the Justice System," (Report, 2011), 1.

[59] Ibid.

themselves.[60] Courts have also sought to boost their signal by identifying and building relationships with key budget actors, educating them early on the work of the judiciary, broadcasting unified messaging from a strong spokesperson, documenting the broader public impact of budget needs, and finding allies who will speak to the important role of the courts.[61] Recent research has tended to suggest that emphasizing the independence and special qualities of the judiciary in dealing with the legislature, although constitutionally relevant, is less persuasive than discussing the business justifications of court resources.[62]

2.2. Performance Measures

Three of the 20 *Principles for Judicial Administration* developed by the National Center for State Courts involve workload assessments and performance measures.[63] Principle 15 suggests, "The court system should be transparent and accountable through the use of performance measures and evaluation at all levels of the organization."[64] The Commentary notes, "The right to institutional independence and self-governance necessarily entails the obligation to be open and accountable for the use of public resources. This includes not just finances but also the effectiveness with which resources are used."[65]

Notably, the purpose of workload measures, performance measures, and budgeting is not principally as a tool for requesting funding from the legislature.[66] Before a budget becomes a request for funding from executive budget officers or the legislature, it is an internal planning document that commits court resources to specific programs and activities. The judiciary must be able to explain its budget to itself before it can justify it to a legislative committee. However, a

[60] James Douglas and Roger Hartley, "Making the Case for Court Funding: The Important Role of Lobbying," *Judges' Journal* (Summer 2004): 35.

[61] Conference of State Court Administrators, "Position Paper on State Judicial Budgets in Times of Fiscal Crisis," 2003.

[62] "National Center for State Courts and Justice at Stake, Funding Justice: Strategies and Messages for Restoring Court Funding,"17-19.

[63] "Principles for Judicial Administration," National Center for State Courts..

[64] Ibid.

[65] Ibid, 15.

[66] Ibid, 17 ("The legal concept of procedural due process and the administrative aspect of efficiency are components of the manner in which courts process cases and interact with litigants. Caseflow management is central to the integration of these components into effective judicial administration. Defining quality outcomes is a difficult task, but with the emergence of the Trial Court Performance Standards (1990), the International Framework for Court Excellence (2008) and the High Performance Court Framework (2010), concepts and values have been developed by which all courts can measure their efficiency and quality via instruments such as CourTools (2005).").

budget developed with consideration for objective support criteria, and targeted at indicators of improved performance, can be instrumental in budget discussions with the other branches.[67]

Legislative and executive officials are not the only people to whom the courts must justify themselves, and indeed budgeting decisions by state judicial administrators and councils are frequently controversial with the trial courts that they supervise.[68] Federica Vapiana argues that while performance-based budgeting schemes "increase transparency and reduce the risk of arbitrary resources allocation and influence from the executive, on the other hand, they restrict the judicial autonomy by strengthening the control by court managers on judges' activities and self-organization."[69] Vapiana adds that these budgeting models, which originate from New Public Management concepts of administration that gained popularity in the American state courts before migrating to European judicial administration, work towards the professionalization of the judicial branch.[70]

In the American state courts, Richard Schauffler identifies four factors that led court systems to appreciate performance measures: the increase in criminal caseloads passed downstream by the legislature in anti-drug criminal reforms; public focus on litigation costs; budget constraints as a result of the recession of the 1990s, during which courts often failed to objectively justify their budgets; and underwhelming results in public surveys of public trust and confidence.[71] Judicial leaders in the Conference of Chief Justices, Conference of State Court Administrators, the American Judges Association, and National Association of Court Management, seeking to improve public perception, manage trial court caseloads, and improve their funding justifications, endorsed Trial Court Performance Standards developed in 1990 by the National Center for State Courts.[72]

---

[67] Ibid, 12.
[68] Viapiana, "Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy," 5.
[69] Ibid, 3.
[70] Ibid, 2.
[71] Richard Y. Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance," *Utrecht Law Review* 3, no. 1 (June 2007): 118.
[72] Ibid, 119.

Originally, implementation of the cumbersome 68 performance standards sputtered, largely due to issues with data collection capabilities, but interest re-emerged after another wave of financial crises. NCSC developed a new and simplified suite of 10 measures called CourTools.[73] The new approach incorporated a "balanced scorecard" allowing administrators to compare competing measures, such as time to disposition and "court user" satisfaction, and ten performance measures.[74] The measures for trial courts include access and fairness, clearance rates, time to disposition, age of pending caseload, trial date certainty, reliability and integrity of case files, fairness and management of legal financial obligations, effective use of jurors, court employee satisfaction, and cost per case.[75] An additional set of six measures for appellate courts look at a quality of services survey, time to disposition, clearance rates, age of active pending caseload, court employee satisfaction, and reliability and integrity of case files.[76]

Standard definitions for data measures comparable across courts in and between states are an important feature of the suite.[77] For example, the time to disposition measure explains how to count time for reopened and reactivated cases.[78] The time between when a defendant absconds in a simple assault case and the time when the case is reactivated should not be counted in the time to disposition.[79] The access and fairness survey provides a standard form for data collected from court users about their subjective interactions with court staff, adequacy of technology, feeling they were given a fair hearing, and disability and language accommodations that may have gone unaddressed in the proceeding.[80] As a condition to usefully implementing performance measures, courts must have robust data collection and quality standards in place.[81]

---

73 Ibid,119-20.
74 Ibid.
75 "Trial Court Performance Measures," CourTools, National Center for State Courts, accessed September 25, 2023,.
76 "Appellate Court Performance Measures," CourTools, National Center for State Courts, accessed September 25, 2023.
77 Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance,"123.
78 "Measure 3: Time to Disposition," Trial Court Performance Measures, CourTools, National Center for State Courts, accessed September 25, 2023.
79 Ibid.
80 "Measure 1: Access and Fairness," Trial Court Performance Measures, CourTools, National Center for State Courts, accessed September 25, 2023.
81 Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance," 123-24.

NCSC offers five reasons for court administrators at the local and state level to embrace performance measures, mostly focusing on internal strategic planning.[82] First, performance measures allow court administrators and judges to test their assumptions about what is happening in court, correcting anecdotal accounts and biases. Second, they allow courts to collect information valued by the broadest range of constituents. Third, they support flexible management by allowing courts to work towards target measures rather than strict methods.[83]

The last two reasons do focus on budgeting and demonstrating public accountability. In explaining why performance measures are useful for "preparing, justifying, and presenting budget requests," NCSC argues:

> Performance assessment's focus on multiple goals and corresponding measures makes clear that courts use resources to achieve multiple ends. Information on how well the court is doing in different work areas provides essential indicators of whether goals are reasonably being achieved, which ones are being met more fully than others, and which ones are marked by poor or unacceptable performance. As a result, courts can articulate why some activities need tighter management oversight, improved administrative practices, more resources to support promising uses of new technology, or different configurations of personnel.[84]

Most philosophically for separation of powers, NCSC observes, "Formal performance assessment signals a court's recognition, willingness, and ability to meet its critical institutional responsibilities as part of the third branch of government . . . Since courts use public resources, taxpayers and their elected representatives are legitimately entitled to raise questions about efficiency and effectiveness in the expenditure of court funds."[85]

Opinion surveys suggest that the public does not instinctively appreciate the need for court funding and are as likely to attribute court backlogs to delay, inefficiencies, frivolous litigation, and arbitrary judicial preference as they are to conclude that there is inadequate funding of the judicial branch.[86] The courts are

[82] "Why Measure Performance?" National Center for State Courts, Williamsburg: NCSC, 2005.
[83] Ibid., 2.
[84] Ibid.
[85] Ibid., 3.
[86] National Center for State Courts and Justice at Stake, *Funding Justice: Strategies and Messages for Restoring Court Funding*: 3-4.

of course not ignorant of these criticisms. When the US Supreme Court modified the notice pleading standard for civil cases in federal court in *Iqbal*, some of its key considerations were cost and speed of litigation and judicial management of discovery.[87] Whether requiring plaintiffs to state sufficient facts to support a plausible claim to relief achieves efficiencies for litigants or the court system is a question that demands data, some generated by the courts as grant and filing rates for motions to dismiss, as well as things captured in performance measures like time to disposition.[88] This presents heavily contested questions about the tradeoffs between access to justice and judicial economy, which are focused on varyingly data-informed decisions within the control of the judicial branch.[89]

Performance measures can be useful in demonstrating to legislators what impact an investment in technology, training, facilities, or staff is likely to have on improving access to justice, reducing backlogs, or achieving other public goals of the judiciary. For instance, Dan Becker, as Court Administrator for the Utah court system, suggested that CourTools helped him to communicate to legislators the impact of staff cuts due to budget reductions, observing, "As we've been losing staff, we've been seeing some degradation of the measures from the access survey. It is a very concrete way of illustrating for the appropriations committee what the impact has been."[90] The promise of standard measures across states and trial courts is that that court administrators can track trends and identify what strategies worked to improve performance in a sample of courts or a peer court system, allowing them to build that into their strategic plans and budgets, which are then communicated with supporting information to the legislature.[91]

[87] Ashcroft v. Iqbal, 556 U.S. 662, 685-86 (2009).

[88] Benjamin Spencer, "Pleading and Access to Civil Justice: A Response to Twiqbal Apologists," *UCLA Law Review* 60, no. 6 (August 2013): 1713-1714. For more on the challenges of empirical analysis of the effects of procedural rule changes, and specifically the standard for notice pleading, see David Engstrom, "The Twiqbal Puzzle and Empirical Study of Civil Procedure," *Stanford Law Review* 65, no. 6 (July 2013): 1203.

[89] See Spencer, "Pleading and Access to Civil Justice: A Response to Twiqbal Apologists,": 1737. As I have written previously, Twombly and Iqbal are part of a series of cases moving civil procedure in a restrictive direction. From summary judgment to pleading, to personal jurisdiction, to class action doctrine, the Court has reinterpreted procedural rules in ways that protect corporate or government defendants against suits by individual plaintiffs.

[90] Caroline Cournoyer, "Measuring the Efficiency of Courts," *Governing*, published July 26, 2011.

[91] See Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance," 123. Developing standard definitions, counting rules, and calculations provided the basis for creating a new perception that measurement could be done fairly, accurately, and consistently within and across courts within a given state, and among states. The obvious additional benefit, in the context of diverse state court systems, is that standardizing the precise way the measures are to be taken is the only hope for creating results that can be interpreted and compared in a meaningful way.

Arming court administrators with data both for strategic planning and subsequent communications with legislatures and the public can help the courts accomplish goals of accountability and transparency. This is likely to improve the working relationship with legislatures, address their doubts about cost-effectiveness, and smoothen wrinkles in the appropriations process. Still there are risks to performance-based budgeting and evaluation. When talking about judicial independence, a person can be talking about the independence of the judicial *branch* as co-equal and self-governing, or she can be talking about the insulation of individual judges from external pressure, which can come from their own court hierarchy.[92] The conventional concern is that judges working towards cost-effectiveness measures of productivity adopted by judicial councils and court administrators can reduce the quality of decisions or impact the behavior of judges in alternative dispute resolution.[93]

Indeed, making sense of alternative dispute resolution (ADR), which in effect competes with the courts, has been a thorny issue in state courts' attempts to address budget issues. On the one hand, the American Bar Association Commission on the 21st Century Judiciary report *Justice in Jeopardy* highlighted the concern that the courts were experiencing "brain drain" as judges exited the judiciary to become arbitrators or work in private practice on account of low comparative salaries.[94] On the other, some state court systems and the American Bar Association Task Force on Preservation of the Justice System recommended, as a cost-saving solution, that courts foster ADR, such as through court ordered mediation, as a tool for "enhancing access to conflict resolution," notwithstanding the risks of ADR in cases of unequal bargaining power or which

[92] Roger Hartley, "State Budget Politics and Judicial Independence: An Emerging Crisis for the Courts as a Political Branch," The Court Manager 18 (Winter 2003): 19.

[93] See Viapiana, "Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy," 12. Pressures on productivity and efficiency are strongly perceived by Dutch judges, who are complaining a higher caseload caused by the budgetary constraints, a strict schedule of hearings that reduce the time allocated to cases definition and, therefore, reduce attention to the quality of judgment. Judith Resnik voiced early concerns, predating Trial Court Performance Measures. "Managerial Judges," Harvard Law Review 96, no. 2 (December 1982): 444. Notably, given that federal judges are protected by life tenure, Resnik identifies peer pressure as an important mechanism weighing on judges, but this pressure revolves around how judges use tools, especially settlement conferences, created by procedural rules promoting case management techniques. Ibid, 386.

[94] American Bar Association, "Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary," 2003: 47.

touch "fundamental social and constitutional conflicts."[95] The NCSC *Principles for Judicial Administration* argue, "Increasingly courts, the bar, and the public have recognized that alternative means of dispute resolution could be more timely, more resource efficient, and produce more satisfactory results."[96]

Arbitration has been controversial in the United States, especially where a feature of lopsided consumer and employer contracts that waive the right to sue or join a class action, raising concerns about the right to "open courts" and access to justice.[97] Judith Resnik observes, "Because courts have-by law and practice-let go of their monopoly over services and opened entry to other institutions, courts have become competitors for high-end investors with private providers."[98] Resnik emphasizes her concerns about eroding concept of a universal right to access open court processes and removal of adjudication from the public sphere to forums that "rely on practices that do not admit of a need to show their processes in order to justify the exercise of authority."[99]

Performance measures are intended to capture in data the core values of the judiciary, which the federal courts define in their strategic plan as rule of law, equal justice, judicial independence, diversity and respect, accountability, excellence, and service.[100] The Judicial Council of California states in its strategic plan that its guiding principles are public service, independence, quality, and accountability. Performance measures can be indicative of how courts are achieving their values, but they are ultimately statistics that require interpretation, evaluation, and judgment about allocation of resources.[101] The "balanced scorecard" approach, reflected in the CourTools framework, is compared by Robert S. Kaplan to "the dials and indicators in an airplane cockpit," noting that "the complexity

[95] American Bar Association, "Report to the House of Delegates: Task Force on Preservation of the Justice System": 14.
[96] National Center for State Courts, *Principles for Judicial Administration*: 8.
[97] Judith Resnik, "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture," 997.
[98] Ibid, 976.
[99] Ibid, 997.
[100] Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance," 120-21; Judicial Conference of the United States, "Strategic Plan for the Federal Judiciary," 2.
[101] Judicial Conference of California, "Strategic Plan for California's Judicial Branch," 2.

of managing an organization today requires that managers be able to view performance in several areas simultaneously."[102]

2.3. Communications Strategies for Support of Budgets

While there is significant scholarship on short-term and long-term strategies for executive agencies to preserve their budgets, study is more limited on how courts, which serve with a different constitutional mandate than executive bodies, can secure consistent funding.[103] Judicial messaging must consider that the courts have independent constitutional functions separate and distinct from those of the executive. A 2011 Policy Paper from the Conference of State Court Administrators, the authors point out that 75% or more of judicial budgets go towards salaries for judicial officers and staff, which the report describes as mandated spending.[104] In the federal courts, Article III of the US Constitution prohibits the legislature from reducing salaries while judges are in office.[105]

Still, legislators may resist representatives of the judiciary's attempts to describe their budget requests as entitlements, especially if there has been little interim communication, which either sets up a confrontation or re-positioning to other rhetorical strategies.[106] The courts are caught flat-footed if they cannot shift to more granular public service justifications. In a 2001 survey, respondents from the legislature, executive, and legislature ranked providing justification of need and submitting realistic budget requests as the most useful short-term strategies for securing funding.[107] Although the authors note that other research paradoxically suggests that legislators sometimes reward acquisitiveness and that the courts sometimes make overly conservative budget requests.[108] The authors

[102] Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance," 124. Robert S. Kaplan and David P. Norton, "The Balanced Scorecard – Measures that Drives Performance," *Harvard Business Review* (February 1992).

[103] James Douglas and Roger Hartley, "Budgeting for State Courts: The Perceptions of Key Officials regarding Determinants of Budget Success." *The Justice System Journal* 24, no. 3 (2003): 252-53.

[104] Conference of State Court Administrators, "Position Paper on State Judicial Budgets in Times of Fiscal Crisis," 15.

[105] U.S. Constitution, art. III, § 1.

[106] "Funding Justice: Strategies and Messages for Restoring Court Funding," National Center for State Courts and Justice at Stake, 12.

[107] James Douglas and Roger Hartley. "Budgeting for State Courts: The Perceptions of Key Officials regarding Determinants of Budget Success," 256.

[108] Ibid, 256-257.

point out that the judiciary is more likely to receive a higher percentage of its initial budget request than executive agencies.[109]

The difficult factors for courts to control in the short-term perceived as most significant to budget success were respect by the other branches for an independent judiciary and support of the legislative leadership.[110] If there are damaged relationships with the other branches, then there is not much opportunity to fix that during the appropriations process. Courts have attempted to become politically sophisticated in building stronger stakeholder alliances and self-advocacy tools to build longer-term support for their budgets.[111]

One lobbying strategy has involved improving the visibility of the Chief Justice as a spokesperson for the judiciary, such as through personal letter writing, paying visits to state budget officials, or prudently appearing in person at legislative hearings.[112] The code of conduct for federal judges permits judges to engage with executive and legislative officials by providing expertise on "matters concerning the law, the legal system, and the administrative justice," notwithstanding their obligation to refrain from commenting on pending actions.[113] The creation of the Judicial Conference of the United States was itself in part the result of lobbying by Chief Justice William Howard Taft.[114]

Another 2001 survey of legislators, court administrators, and executive officials suggested that talks between the Chief Justice and/or key legislative members are "moderately or highly useful," perceived as somewhat more useful than the Chief Justice appearing at legislative hearings.[115] The 2011 COSCA Policy Paper suggested that the Administrative Director of the State Courts is likely to be better armed with detailed budget justifications and likely to be more responsive

[109] Ibid.
[110] Ibid, 258-259.
[111] James Douglas and Roger Hartley, "Making the Case for Court Funding: The Important Role of Lobbying," *Judges' Journal* (Summer 2004): 35.
[112] "Position Paper on State Judicial Budgets in Times of Fiscal Crisis," Conference of State Court Administrators, 5-9.
[113] See Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," 1198.
[114] Jonas Anderson, "Judicial Lobbying," *Washington Law Review* 91, no. 2 (June 2016): 422.
[115] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," *Public Budgeting and Finance* 21 (Spring 2001) 42-43.

to hearing inquiries, but also spoke highly of the role of the Chief Justice in advocating for the needs of the judiciary.[116]

The same 2001 survey suggested that making up for the lack of a strong native constituency for the courts by mobilizing community allies is perceived by budget actors as at least a moderately successful strategy. [117]Although the most cited groups paying visits were not far from the judiciary, namely bar associations and judicial or court employee associations.[118] A strategy guide produced by the National Center for State Courts suggested that the most credible community members for messaging on behalf of the courts include supreme court justices, members of the legislature with a legal background, judges and lawyers from key lawmakers' districts, business leaders, and informed court administrators.[119]

After the 2008 financial crisis, the American Bar Association issued a resolution asking bar associations to "to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems."[120] Impacts that might be persuasive to budget policymakers include the direct costs of litigation and damaged investment potential for businesses and other litigants resulting from lengthy times to disposition.[121] Although, as noted earlier in this article, legislators and the public may hesitate to attribute those impacts to inadequate court funding, blaming instead court procedures and preferences.[122] Other impacts include the direct costs of pre-trial detention, both for the detainee in custody and the detention system housing him, and constitutional rights issues resulting from any delays in the criminal docket.[123] Notably, the federal courts are prohibited by

[116] "Position Paper on State Judicial Budgets in Times of Fiscal Crisis," Conference of State Court Administrators, 7.
[117] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," 44-46.
[118] Ibid.
[119] National Center for State Courts and Justice at Stake, *Funding Justice: Strategies and Messages for Restoring Court Funding*: 11.
[120] American Bar Association, *Report to the House of Delegates: Task Force on Preservation of the Justice System*: 1.
[121] "Funding Justice: Strategies and Messages for Restoring Court Funding," National Center for State Courts and Justice at Stake, 5-6.
[122] Ibid.
[123] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," 43-44. See also "Position Paper on State Judicial Budgets in Times of Fiscal Crisis," Conference of State Court Administrators, 17-18.

statute from using appropriated funds on grassroots funding coalitions, including expenditures on direct appeals to the public to contract representatives.[124]

Some lessons relating to lobbying for appropriations while preserving judicial credibility might be applied from the experience of lobbying for procedural rules. Charles Gardner Geyh suggests that the courts tend to enjoy a superior competence and credibility that enhances the lobbying efforts of the judiciary, as compared other subjects of legislation, these being qualities that lobbyists strive to establish.[125] Geyh describes a recurring problem, which he calls the "competence-credibility paradox" where courts "put their credibility at risk to the extent that their efforts coincide with personal or institutional self-interest," which is resolved by the judiciary "channeling its interactions with Congress in ways that enable it to share its expertise on matters of institutional or personal self-interest without appearing so self-interested as to compromise its credibility."[126] He suggests buffering devices for recommendations to Congress, such as through the use of independent commissions, which some states rely on for proposing upward adjustments to judicial compensation.[127]

2.4. Inherent Judicial Power

Both the courts and the other branches are aware that the judiciary has an additional "weapon" in the power to interpret the state or federal constitution, that the constitution provides for the judiciary as a separate and independent branch of government responsible for adjudication, and that the courts can therefore compel funding reasonably necessary for courts to carry out that assigned role.[128] The other branches cannot seek to destroy or impede the functioning of the judiciary by neglecting its justified funding needs or holding the budget for its constitutional purpose hostage to impermissible demands.

For varying reasons, the judiciary tends to be hesitant to threaten or use litigation to break a budget impasse. First, as the previous sections have attempted

[124] Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," 1198.
[125] Ibid, 1222-23.
[126] Ibid.
[127] Ibid, 1227-29. See West Virginia Judicial Compensation Commission, "Report of the West Virginia Judicial Compensation Commission," (Charleston: West Virginia Judicial Compensation Commission, 2022).
[128] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," 43-44.

to show, positive ongoing relations with the other branches promote the security of judicial funding, and a confrontational approach is perceived as likely to poison longer term budget negotiations.[129] In a 2001 survey, court administrators ranked the usefulness of threatening inherent powers as lower than any other strategy for securing funding, slightly lower even than how useful this option is perceived by legislators and executive officials.[130]

Second, courts might perceive the risk that the other branches will resort to their own retaliatory powers.[131] For instance, legislatures often have the power of defining the jurisdiction of the courts through statutes, and "court-stripping" has been used to prevent the courts from hearing certain types of cases in response to controversial rulings.[132] If the legislature is sour at being compelled to a honor the judiciary's budget request, the legislature could shift to exercising what authority it has over jurisdiction and procedural rules.[133] Courts might seek to avoid an escalating arms race with embittered coordinate branches, at least when other avenues are available, suggesting using inherent powers only as a last resort for the most egregious or intractable budget hurdles.[134]

There is a long history of local courts invoking inherent powers in funding conflicts with their local executive and legislative bodies, historically responsible for the greatest burden of court funding, seeking the intervention of higher courts.[135] In *Hosford v. State*, a trial court complained about street noise obstructing proceedings, a result of inadequate facilities for holding trial.[136] The Mississippi

[129] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," 44.
[130] Ibid.
[131] Ibid.
[132] Schauffler, "Judicial Accountability in the US State Courts: Measuring Court Performance." Constitutional commentators frustrated with the jurisprudence of the US Supreme Court have lately been very creative in coming up with jurisdiction-stripping solutions to blocking review in the federal courts of Congressional prerogatives. See, e.g., Jon Sprigman, "Stripping the Courts' Jurisdiction," *The American Prospect*, May 5, 2021.
[133] Ibid.
[134] James Douglas and Roger Hartley, "State Court Strategies and Politics during the Appropriations Process," 44.
[135] G. Gregg Webb and Keith E. Whittington, "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers," *Judicature* 88 (July 2004): 14-15. While the federal courts frequently interpret the Compensation Clause to prevent diminution of judicial compensation, they have not generally extended separation of powers to compel operating expenses. *See* Jeffrey Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," *Maryland Law Review* 52, no. 1 (1993): 226-27. However, the Ninth Circuit has held that lack of funding implicates the Seventh Amendment right to civil jury trials. *Armster v. United States Dist. Court*, 792 F.2d 1423, 1430-31 (9th Cir. 1986) (holding that a three-and-a-half-month suspension pursuant to an Administrative Office memorandum violates the Seventh Amendment).
[136] *Hosford v. State*, 525 So.2d 789, 794-95 (Miss. 1988).

Supreme Court noted that the record suggested the noise was potentially distracting enough in the Green County Circuit Court to justify mistrials in criminal cases.[137] The court, adjudicating a dispute between two local actors, overcame reservations about comity between the branches and authorized the trial court judge to preserve the integrity of the judiciary by proceeding against the board of supervisors to acquire needed facility upgrades.[138] Meanwhile, in *Lavelle v. Koch*, the Supreme Court of Pennsylvania dismissed a complaint in mandamus by the Presiding Judge of the Carbon County Court of Common Pleas seeking to compel the local board of supervisors to fund compensation increases for court employees.[139] The court resisted finding that recruitment and retention of court employees was impaired by the lack of salary increases, and therefore the court failed in its burden of demonstrating that its funding request was "reasonably necessary" to the administration of justice.[140] The standard appears popular among sister state judiciaries, having been used to compel funding for expenses ranging from an $86 tape recorder to millions of dollars spread across various spending areas.[141]

Lavelle suggests the judiciary carries the burden of proving that expenses are "reasonably necessary," which sister jurisdictions tend to follow through various allocations.[142] There is some risk for embarrassment in these cases, at least when ruling on discretionary salary increases, as judges have an apparent pecuniary that may ordinarily require recusal, only falling under the exception of the rule of necessity.[143] The judiciary further risks trespassing in the province of legislative authorities by overextending its power to compel funding.[144] The North Carolina Supreme Court has cautioned, "[D]oing what is 'reasonably necessary for the proper administration of justice' means doing no more than is reasonably

[137] Ibid., 797.
[138] Ibid., 798.
[139] *Lavelle v. Koch*, 617 A.2d 319, 320-21 (Pa. 1992).
[140] Ibid., 322.
[141] Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers": 233-235.
[142] Ibid., 237.
[143] See, e.g., Jorgensen v. Blagojevich, 811 N.E.2d 652, 660 (Ill. 2004).
[144] See Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," 224-25.

necessary. The court's exercise of its inherent power must be responsible—even cautious—and in the 'spirit of mutual cooperation' among the three branches."[145]

From the perspective of state level courts and officials, the amounts in controversy in these cases were modest, but persistent conflicts helped motivate the movement towards unified budgeting.[146] With court funding becoming centralized under state administrators, and subject to appropriations from state legislatures, the battleground shifted displacing the role of state high courts from mediators in local disputes to parties advocating for the independence of the branch under their own budget supervision.[147]The judicial branch in this position must bargain with co-equal branches at the highest level. Where there is a breakdown, the state judiciary is put in the somewhat more awkward position of adjudicating its own budget requests.[148]

The New York Unified Court System, apparently experiencing repeated cycles of strained relations with the other branches, provides two recent useful cases studies. In *Wachtler v. Cuomo*, the Chief Judge of the New York Court of Appeals sued Governor Mario Cuomo after the governor reduced the judicial budget presented to him by 10%, leading to a later legislative appropriation significantly less than the original request by the judiciary, even though the New York constitution calls for the governor to pass on the judiciary's budget request unrevised to the legislature.[149] The parties traded barbs before the press and public but ultimately settled for a modest increase in the judiciary's budget before the case went to trial.[150]

---

[145] *Matter of Alamance Cnty. Court Facilities*, 405 S.E.2d 125, 132 (N.C. 1991). For more on limitations to the standard of reasonable necessity, and common defenses by legislatures to compelled funding for the judiciary. Regarding public support for the judiciary, as an alternative to compelled funding, Jackson remarks, "It is unclear why users of state courts have not been more effective in mobilizing support for those courts," and notes early efforts of courts to study models for building public support. "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers," 252-53. The author, quoting George Hazard, notes that "No important function of government can be maintained over the long run without public debate, political commitment, and the exercise of community responsibility as expressed by bodies dependent on popular assent.

[146] G. Gregg Webb and Keith E. Whittington, "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers," 15-16.

[147] Ibid.

[148] Ibid.

[149] Ibid., 16. New York Constitution, art. VII, § 1.

[150] G. Gregg Webb and Keith E. Whittington, "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers": 16.

Several years later, another Chief Judge of the New Court of Appeals once again sued on behalf of judges by invoking the inherent powers of the judicial branch. In *Matter of Maron v. Silver*, the legislature had not provided a cost-of-living adjustment for judicial salaries for 10 years.[151] Although both the legislature and executive agreed in principle that there should be judicial salary increases, the legislature repeatedly refused to pass a spending proposal that did not also increases salaries for themselves, and the Governor shot down proposals that did include legislative salary increases.[152] The judiciary was caught in the middle as a bargaining chip for the salary increases of another branch.

The New York Court of Appeals held,

> All parties agree that a salary increase is justified and, yet, those who have the constitutional duty to act have done nothing to further that objective due to disputes unrelated to the merits of any proposed increase. This inaction not only impairs the structural independence of the Judiciary, but also deleteriously affects the public at large, which is entitled to a well-qualified, functioning Judiciary.[153]

Notably, in offering a remedy, the court offered only declarative relief, putting the legislature on notice that judicial salary increases must not be conditioned on legislative salary increases.[154] The court stated, "Of course, whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature. It should keep in mind, however, that whether the Legislature has met its constitutional obligations in that regard is within the province of this Court."

This is significant because the New York Court of Appeals certifies the budget request of the New York Unified Court System at issue, and the court issuing the decision presumably believed that budget had sound justifications[155]. But

[151] *Matter of Maron v. Silver*, 925 N.E.2d 899, 904 (N.Y. 2010). While the Compensation Clause of the US Constitution and analogous provisions of state constitutions provide that judicial salaries may not be decreased during their term in office, legislatures are involved in determining whether salary *increases* are justified in the normal appropriations process. For a study on the effects of judicial pay on judicial retention, see James M. Anderson and Eric Helland, "How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench," *Stanford Law Review* 64, no. 5 (May 2012): 1277-1342.

[152] *Matter of Maron v. Silver*, 925 N.E.2d 899, 904-05 (N.Y. 2010).

[153] Ibid., 915.

[154] Ibid.

[155] "New York Unified Court System Budget Fiscal Year 2024," New York Unified Court System, 2023.

the court offered the legislature the opportunity to re-consider judicial salaries at least as it relates to the needs of the judiciary, in the spirit of inter-branch co-operation. This did not necessarily foreclose on whether the legislature could reasonably disagree about what salary increases are justified.[156]

Another approach could be advantageous for the judiciary in those situations where legislative and executive officials, seeking to advance their partisan political goals, exceed their role by interfering overtly in the judicial province by attaching funding conditions to the outcome of judicial decisions. While not exactly common, the Kansas judiciary provides a useful example of such a bold legislative attempt to curtail case-specific judicial discretion by tying the judiciary's funding to the Supreme Court's decision on the constitutionality of measure reforming judicial administration. In 2014, the Kansas Supreme Court held in *Gannon* that the legislature had failed to equitably fund public education, which provoked strong opposition from Republican Governor Sam Brownback and the Republican-majority legislature.[157] Following *Gannon*, in a manner some observed as punitive, the Kansas legislature passed bills related to judicial administration, removing the authority of the Supreme Court to designate the chief justices of the trial courts and imposing a deadline for courts to reach decisions.[158] The Governor also proposed in his State of the State speech in 2015 to change the method of selection for the Kansas Supreme Court from the merit-based selection system to a system of popular election.[159]

Most troublingly, later in 2015 the Kansas legislature in House Bill 2005 included a non-severability provision, which tied the $278 million judicial budget to the 2014 measure transferring authority of the Supreme Court to designate trial court chief justices, HB 2338, providing "if any provision of this act . . . is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of this act without such stayed, invalid, or unconstitutional provision and the provisions of this act

[156] *Matter of Maron v. Silver*, 925 N.E.2d 899, 917 (N.Y. 2010).
[157] *Gannon v. State*, 319 P.3d 1196, 1204 (Kan. 2014).
[158] Erik Eckholm, "Outrages by Kansas Justices' Rulings, Republicans Seek to Reshape the Court," *New York Times*, April 2, 2016.
[159] Stephen Koranda, "2015 KS State of the State Speech Touches on Taxes, School Funding," NPR, January 16, 2015.

are hereby declared to be null and void and shall have no force and effect."[160] The Kansas Supreme Court risked triggering this provision with its decision in *Solomon v. State*, which held that the legislature violated separation of powers in HB 2338 by stripping the Supreme Court of its authority to designate trial court judges, observing that "the means of assigning positions responsible to the Supreme Court and charged with effectuating Supreme Court policy must be in the hands of the Supreme Court, not the legislature."[161] The court noted in its opinion that "our holding appears to have practical adverse consequences to the judiciary budget, which the legislature may wish to address, even though those concerns played no part in our analysis."[162]

A lawsuit seeking to prevent the effect of the non-severability provision was filed by four district court judges.[163] The plaintiffs argued that the non-severability provision violated the Compensation Clause of the Kansas Constitution, the judiciary's exclusive power to hear cases, and the constitutional obligation to allocate judicial funding.[164] The issue ultimately became moot, and the parties motioned to dismiss voluntarily, because the Kansas legislature reversed course and repealed the non-severability provision in HB 2005.[165]

After retiring, former Chief Justice Lawton Nuss remarked on the interest of peer court systems across the United States in the Kansas judiciary's conflict with the legislature and Governor Brownback, noting the possibility that sister state legislatures will be eager to adopt strategies to attack the judiciary when they prove successful in neighboring jurisdictions.[166] Since the Kansas standoff, there have been a couple of tit-for-tat retaliatory threats to judicial budgets pressuring decisions. In Alaska, Republican Governor Mike Dunleavy exercised line-item veto authority to reduce the appellate court budget by $334,700, stating in his objections, "The Legislative and Executive Branch are opposed to State

[160] H.B. 2005 (2015).
[161] *Solomon v. State*, 364 P.3d 536, 549 (Kan. 2015).
[162] Ibid., 550.
[163] "Fairchild v. Kansas," Brennan Center for Justice, published December 18, 2015.
[164] Ibid.
[165] Ibid.
[166] Lawton Nuss, "Interview of Lawton Nuss by Richard Ross," Kansas Oral History Project, July 2022.

funded elective abortions; the only branch of the government that insists on State funded elective abortions is the Supreme Court."[167] The issue arose following the Alaska Supreme Court's 2019 decision in *State v. Planned Parenthood of the Great Northwest*, which interpreted the equal protection clause of the Alaska Constitution to require Medicaid reimbursement for certain medically necessary abortions.[168] A state superior court judge in 2020 held that this use of line-item veto authority violated separation of powers, declaring that "the separation of powers doctrine simply cannot tolerate a construct in which the funding of the judiciary is based on the popularity of its opinions."[169] The state did not appeal.[170]

Still, in a climate of hostility to judicial independence, the other branches will not always reveal their motivations as so clearly retaliatory, perhaps stating superficially fiscal rationales or altogether neglecting to provide justifications for funding reductions. In these situations, courts may need to satisfy the burden of proving that withheld funding is "reasonably necessary" for courts to fulfill their role. While the judiciary can also further negotiation by providing buttoned-up funding justifications to the legislature using techniques discussed in this Article, these are perhaps unlikely to succeed where the legislature is not acting in good faith, enhancing the argument for a litigation-based approach.

III. CONCLUSION

The judiciary is in a vulnerable position to the other branches in advocating for their own financial security and must be on guard against demands by executive officers or the legislature that offend the separation of powers. One forward-thinking and preventive strategy in addressing this problem is for the judiciary to insulate itself by building trust and confidence with the other branches, educating them on the work of the courts, and showing it that takes seriously goals of public service and accountability. Courts in the United States have attempted to carry out this strategy in part through communicating the

[167] *American Civil Liberties Union v. Dunleavy*, No. 3AN-19-08349CI (3d D. Alaska 2021) at 2.
[168] *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1004-05 (Alaska 2019).
[169] Ibid., 16.
[170] Andrew Kitchenman, "Dunleavy's Court System Vetoes because of Abortion Funding were Illegal, Judge Says," Alaska Public Media, October 16, 2020.

court's use objective budget criteria, strategic planning, and performance measures, which carries implications on the decisional autonomy of lower court judges.

Courts have also sometimes invoked their inherent powers to compel the funding of legislative and executive officials. This tends to be disfavored by court leaders and managers, as it may damage the long-term strategy of comity and cooperative partnerships and invite retaliatory measures by the coordinate branches and defeating larger goals that extend beyond appropriations for any individual fiscal year. However, in instances where co-ordinate branches have consistently failed to consider budget requests, or attached conditions that are irrelevant (if not hostile) to determining funding that is reasonably necessary for judicial administration, then courts have sometimes invoked these powers as a trump card.

BIBLIOGRAPHY

Administrative Office of the United States Courts. "The Judiciary Fiscal Year 2024 Congressional Budget Summary." 2023. https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/congressional-budget-request.

Administrative Office of the United States Courts. "Understanding the Federal Courts." Washington, AOUSC. https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf.

American Bar Association. "Federal Court Funding." Last Modified June 1, 2023. https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding/.

American Bar Association. "Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary." 2003. Web, https://www.opensocietyfoundations.org/publications/justice-jeopardy-report-american-bar-assocation-commission-21st-century-judiciary.

American Bar Association. "Report to the House of Delegates: Task Force on Preservation of the Justice System." 2011.

American Civil Liberties Union v. Dunleavy, No. 3AN-19-08349CI (3d D. Alaska 2021) https://drive.google.com/file/d/11G2bt-Rm795Tc7nQAEUCemttEZ23fjiJ/view.

Anderson, James M and Eric Helland. "How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench." *Stanford Law Review* 64, no. 5 (May 2012).

Anderson, Jonas. "Judicial Lobbying." Washington Law Review 91, no. 2 (June 2016).

Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Balassone, Merrill. "The Trial Court Funding Formula, Explained." Judicial Branch of California. Published July 27, 2017. https://newsroom.courts.ca.gov/news/trial-court-funding-formula-explained.

Brennan Center for Justice. "Fairchild v. Kansas." Published December 18, 2015. https://www.brennancenter.org/our-work/court-cases/fairchild-v-kansas.

Caplan, Lincoln. "The Political War Against the Kansas Supreme Court." The New Yorker, February 5, 2016. https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court.

Chappell, Bill. "W.Va Supreme Court Justice Allen Loughry is Charged with 22 Counts, Including Fraud." NPR. June 20, 2018. https://www.npr.org/2018/06/20/621836487/w-va-supreme-court-justice-allen-loughry-is-charged-with-22-counts-including-fraud.

Congressional Research Service. "Introduction to the Federal Budget Process." Updated January 10, 2023. https://crsreports.congress.gov/product/pdf/R/R46240.

Congressional Research Service. "Judiciary Budget Request FY 2023." Updated April 25, 2022, https://crsreports.congress.gov/product/pdf/IF/IF11842.

Cournoyer, Caroline. "Measuring the Efficiency of Courts." *Governing*. Published July 26, 2011. https://www.governing.com/archive/measuring-the-efficiency-of-courts.html#:~:text=CourTools%20are%20largely%20efficiency%20and,been%20pending%20before%20the%20court.

Court Statistics Project. "Federal and State Caseload Trends: 2012-2021." National Center for State Courts, accessed September 25, 2023, https://www.courtstatistics.org/court-statistics/state-versus-federal-caseloads.

Douglas, James and Roger Hartley. "Budgeting for State Courts: The Perceptions of Key Officials regarding Determinants of Budget Success." *The Justice System Journal* 24, no. 3 (2003).

Douglas, James and Roger Hartley. "Making the Case for Court Funding: The Important Role of Lobbying," *Judges' Journal* (Summer 2004): 35.

Douglas, James and Roger Hartley. "State Court Strategies and Politics during the Appropriations Process." *Public Budgeting and Finance* 21 (Spring 2001): 42-43.

Eckholm. Erik. "Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape the Court." New York Times. April 2, 2016.

Edmondson, Catie. "How to Enforce a Debt Deal: Through 'Meat-Ax' Cuts Nobody Wants." *New York Times*, June 1, 2023.

David Engstrom. "The Twiqbal Puzzle and Empirical Study of Civil Procedure." *Stanford Law Review* 65, no. 6 (July 2013).

Federal Judicial Center. "The Executive Role in Judicial Administration." Accessed September 25, 2023, https://www.fjc.gov/history/administration/executive-role-judicial-administration.

Gannon v. State, 319 P.3d 1196 (Kan. 2014).

Geyh, Charles Gardner. "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress." *New York University Law Review* 71, no. 5 (November 1996).

Hartley, Roger. "State Budget Politics and Judicial Independence: An Emerging Crisis for the Courts as a Political Branch." *The Court Manager* 18 (Winter 2003).

Hazard, Geoffrey C., Jr. et al."Court Finance and Unitary Budgeting." *Yale Law Journal* 81, no. 7 (1972).

Hosford v. State, 525 So.2d 789 (Miss. 1988).

Jackson, Jeffrey. "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers." *Maryland Law Review* 52, no. 1 (1993).

Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004).

Judicial Branch of California. "The Branch Budget Process." Accessed September 25, 2023. https://www.courts.ca.gov/24153.htm.

Judicial Conference of the United States. "Strategic Plan for the Federal Judiciary." Washington: Judicial Conference of the United States, 2020.

Judicial Council of California. "The Strategic Plan for California's Judicial Branch." July 19, 2019.

Kaplan, Robert S. and David P. Norton. "The Balanced Scorecard – Measures that Drives Performance." *Harvard Business Review* (February 1992). https://hbr.org/1992/01/the-balanced-scorecard-measures-that-drive-performance-2.

Koranda, Stephen. "2015 KS State of the State Speech Touches on Taxes, School Funding." NPR. January 16, 2015. https://kansaspublicradio.org/statehouse-news/2015-01-16/2015-ks-state-of-the-state-speech-touches-on-taxes-school-funding.

Kitchenman, Andrew. "Dunleavy's Court System Vetoes because of Abortion Funding were Illegal, Judge Says." Alaska Public Media. October 16, 2020. https://alaskapublic.org/2020/10/16/dunleavys-court-system-vetoes-because-of-abortion-funding-were-illegal-judge-says/.

Lavelle v. Koch, 617 A.2d 319 (Pa. 1992).

Matter of Alamance Cnty. Court Facilities, 405 S.E.2d 125 (N.C. 1991).

Matter of Maron v. Silver, 925 N.E.2d 899 (N.Y. 2010).

Nadeau, Joseph. "Ensuring Adequate Long-Term Funding for Courts: Recommendations from the ABA Commission on State Court Funding." *Judges' Journal* (Summer 2004).

National Center for State Courts. "Appellate Court Performance Measures." CourTools. Accessed September 25, 2023. https://www.ncsc.org/courtools/appellate-court-performance-measures.

National Center for State Courts. "Measure 1: Access and Fairness." Trial Court Performance Measures, CourTools. Accessed September 25, 2023, https://www.ncsc.org/__data/assets/pdf_file/0033/88737/M1Access-and-Fairness.pdf

National Center for State Courts. "Measure 3: Time to Disposition." Trial Court Performance Measures, CourTools. Accessed September 25, 2023. https://www.ncsc.org/__data/assets/pdf_file/0014/61403/courtools_trial_measure3_time_to_disposition_revised.pdf.

National Center for State Courts. "Principles for Judicial Administration." Williamsburg: NCSC, 2012. https://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/Principles%20for%20Judicial%20Administration.pdf.

National Center for State Courts. "Trial Court Performance Measures." CourTools. Accessed September 25, 2023. https://www.ncsc.org/courtools/trial-court-performance-measures.

National Center for State Courts. "Why Measure Performance?" Williamsburg: NCSC, 2005. Web, https://www.ncsc.org/__data/assets/pdf_file/0012/6501/courtools-why-we-measure.pdf

National Center for State Courts and Justice at Stake. "Funding Justice: Strategies and Messages for Restoring Court Funding." Williamsburg: NCSC, 2012. https://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/Funding%20Justice.pdf.

New York Unified Court System. "New York Unified Court System Budget Fiscal Year 2024." https://ww2.nycourts.gov/sites/default/files/document/files/2022-11/FY2024_FINAL_JudiciaryBudget.pdf.

Nuss, Lawton. "Interview of Lawton Nuss by Richard Ross." By Richard Ross, Kansas Oral History Project (July 2022). https://ksoralhistory.org/wp-content/uploads/Interview-of-Lawton-Nuss-by-Richard-Ross-downloaded-final-copy.pdf.

Puzzanghera, Jim. "Bipartisan Agreement on Budget Cuts: Scalpel is Better than Ax." *Los Angeles Times* (February 28): 2013. https://www.latimes.com/business/la-xpm-2013-feb-28-la-fi-smart-budget-cuts-20130301-story.html.

Resnik, Judith. "Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture." *St. Louis University Law Journal* 56, no. 4 (Summer 2012).

Resnik, Judith. "Managerial Judges." *Harvard Law Review* 96, no. 2 (December 1982).

Spencer, Benjamin. "Pleading and Access to Civil Justice: A Response to Twiqbal Apologists." *UCLA Law Review* 60, no. 6 (August 2013).

Schauffler, Richard Y. "Judicial Accountability in the US State Courts: Measuring Court Performance." *Utrecht Law Review* 3, no. 1 (June 2007).

Sprigman, Jon. "Stripping the Courts' Jurisdiction." The American Prospect. May 5, 2021. https://prospect.org/justice/stripping-the-courts-jurisdiction/.

Solomon v. State, 364 P.3d 536 (Kan. 2015).

State v. Planned Parenthood of the Great Nw., 436 P.3d 984 (Alaska 2019).

United States Courts. "Facing Fiscal Crises, Judicial Conference Charted Steady Courts." Published November 17, 2022. https://www.uscourts.gov/news/2022/11/17/facing-fiscal-crises-judicial-conference-charted-steady-course

Viapiana, Federica. "Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy." *Laws* 7, no. 4 (2018): 38.

Webb, G. Gregg and Keith E. Whittington. "Judicial Independence, the Power of the Purse, and Inherent Judicial Powers." 88 (July 2004). *Judicature*

West Virginia Judicial Compensation Commission. "Report of the West Virginia Judicial Compensation Commission." Charleston: West Virginia Judicial Compensation Commission, 2022. https://www.wvlegislature.gov/interims/JCC_2022_Report.pdf

Wilson, Conrad. "Head of Oregon Supreme Court calls for immediate fix to ongoing lack of public defenders." Oregon Public Broadcasting. July 7, 2022. https://www.opb.org/article/2022/07/07/oregon-chief-justice-walters-calls-for-immediate-fix-to-public-defender-crisis/.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1016

Between the People and the Populists: Safeguarding Judicial Independence in a Changing World

Fritz Edward Siregar*
Indonesia Jentera School of Law
fritz.siregar@jentera.ac.id

Received: 2 August 2023 | Last Revised: 20 September 2023 | Accepted: 10 February 2024

Abstract

This article examines the impact of social media on the dissemination and influence of populist ideology, as well as the strategies populist movements have employed to erode the independence of the judiciary, including public resistance, constitutional amendments, and the expansion of the judiciary. This article analyzes strategies and solutions designed to preserve and safeguard judicial independence. The in question strategy includes strengthening the legal and institutional framework, cultivating a culture that upholds the supremacy of law, increasing judicial accountability, and encouraging collaborative dialogue between judicial institutions. This paper employs a case study methodology to examine the resistance of the judiciary to populist pressures in South Africa, Colombia, and Indonesia. This article's conclusion demonstrates that the court faces a dilemma between the importance of maintaining judicial independence from populist interests over legal requirements and the necessity of popular opinion for public legitimacy. In the context of populism, this is a challenge for judicial independence. Therefore, this paper encourages collaboration between academics, practitioners, and policymakers to safeguard judicial independence in an increasingly interconnected and rapidly developing world.

Keywords: Constitutional Court; Judicial Independence; Populist Movement; Public Support

* Fritz Edward Siregar is a constitutional law lecturer who teaches and writes about Constitutional Law, Constitutional Court Law, Election Law, and Election Legal Dispute Mechanism.

I. INTRODUCTION

1.1. Populist and the Threat to Judicial Independence

Populism is a political phenomenon characterized by the appeal to the "common people" against a perceived elite or establishment. Populist movements often claim to represent the will of the majority and seek to mobilize the masses against established institutions, including the judiciary.[1] Populism has grown in popularity in recent years, with populist politicians and parties attaining power in countries such as the United States, Brazil, Hungary, and Poland.[2]

Judicial independence is a key premise of the rule of law, which holds that all individuals and institutions, including the government, are subject to and accountable to the law. An independent judiciary assures that judges may make decisions free of other influences like as political intervention or public opinion, and that they can safeguard the rights and liberties of all citizens, not just those who support the ruling party or popular movements.[3]

The rise of populism poses serious challenges to judicial independence. In pursuit of their political goals, populist movements frequently attack existing institutions, including the judiciary, and may strive to undermine the rule of law. This can show itself in a variety of ways, including public criticism of judges, attempts to modify the composition of the courts, and efforts to rewrite the constitution to diminish judicial independence.[4]

Populist leaders' public criticism of judges can weaken public trust in the court and create a climate in which judges may feel pushed to submit to populist demands. In the United States, for example, President Trump often criticised judges and court judgements with which he disagreed, potentially weakening public trust in the impartiality of the judiciary.[5] Attempts to alter the composition of the courts, such as court-packing, can potentially jeopardise

1 Anya Bernstein and Glen Staszewski, "Judicial Populism," *Minnesota Law Review* 106 (2021): 283.
2 Vasileios Adamidis, "Democracy, Populism, and the Rule of Law: A Reconsideration of Their Interconnectedness," *Politics* (2021).
3 Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* 18, no. 2 (2020): 407–22.
4 William A. Galston, "The Populist Challenge to Liberal Democracy," *Journal of Democracy* 29, no. 2 (2018): 5–19.
5 Charles Gardner Geyh, "Judicial Independefnce at Twilight," *Case Western Reserve Law Review* 71 (2020): 1045.

judicial independence. In Poland, the ruling Law and Justice party has moved to fill the country's Constitutional Tribunal with party loyalists, raising concerns about the judiciary's independence.[6] Constitutional amendments are another tool that populist movements might use to undermine judicial independence. In Hungary, the ruling Fidesz party has made significant modifications to the country's constitution, including clauses affecting the independence of the judiciary.[7] These changes have raised concerns about the erosion of the rule of law in Hungary.

In addition to these strategies, populist movements may use social media to influence public opinion and exert pressure on judges.[8] Populist leaders can create an environment in which judges feels obliged to make rulings that agree with the populist agenda rather than sticking to the principle of the rule of law by using social media platforms to promote their ideas and rally their supporters.

As a result, the growth of populism poses serious dangers to judicial independence. These dangers can show themselves in a variety of ways, including public criticism of judges, attempts to change the composition of the courts, and moves to rewrite the constitution to diminish judicial independence. It is critical for judiciaries to stay attentive and robust in the face of populist demands, as judicial independence is fundamental for sustaining the rule of law and protecting all individuals' rights and liberties.

This article will discuss populism, its impact on judicial independence, and measures that can be taken to defend judicial independence against populist assaults. This article consists of seven chapters, the first of which aims to provide an overview of populism. I will attempt to define populism, judicial independence, and populist actors in this chapter. The second chapter will then examine populist strategies that can erode judicial independence. The third chapter will then discuss techniques and remedies for safeguarding the independence of the judiciary. The fifth chapter will then investigate case studies of the Constitutional Court's

6 Bernstein and Staszewski, "Judicial Populism."

7 James Corl and Mushin Yunus Sozen, "The Effect of Populism on American and Turkish Judiciaries," *Journal of Student Research* 11, no. 1 (2022).

8 Nick Friedman, "The Impact of Populism on Courts: Institutional Legitimacy and the Popular Will," *The Foundation for Law, Justice and Society* (2019).

efforts to maintain judicial resilience and resilience in the face of populism. The sixth chapter will address how the court can maintain judicial independence while gaining public support. The seventh and final chapter is the concluding chapter and will summarize the discussion.

1.2. Understanding Populism

Populism is a political ideology that highlights the gap between "the people" and "the elite." Populist movements frequently present ordinary people as morally decent while portraying the elite as corrupt and self-serving.[9] Populism can be associated with broader ideologies such as nationalism or socialism, which implies that different populists can disagree on a variety of subjects with the exception of the separation of society into the people and the elite.[10]

Several causes have contributed to the growth and spread of populism in various nations, including economic disparity, unhappiness with the political elite, and the growing impact of social media. Populist movements have evolved in several political systems, with leaders including Donald Trump in the United States, Rodrigo Duterte in the Philippines, and Jair Bolsonaro in Brazil, to name a few.

Cas Mudde defines populism as a "thin-centered ideology" that believes society is eventually divided into two homogeneous and antagonistic groups: "the pure people" and "the corrupt elite".[11] Populist movements frequently rely on public opinion and the media to exert pressure on the judiciary and other institutions. Populist leaders can create an environment in which judges feel obliged to make rulings that agree with the populist agenda rather than sticking to the principles of the rule of law by using media channels to propagate their views and rally their supporters.

Populism has presented itself in many ways in various political systems. Populist movements have eroded democratic institutions and the rule of law

[9] David Molloy, "What Is Populism, and What Does the Term Actually Mean?" BBC News, published March 6, 2018,
[10] Chris Drew, "15 Famous Examples of Populism," Helpful Professor.com, published July 2, 2023.
[11] Cas Mudde, "Populism in the Twenty-First Century: An Illiberal Democratic Response to Undemocratic Liberalism" (Paper (published) presented at the conference "Democracy in Trouble?" at the University of Pennsylvania's Andrea Mitchell Center for the Study of Democracy, 2018).

in some circumstances, while in others, they have resulted in the introduction of policies that address the concerns of marginalised people.[12] Depending on the specific circumstances and acts of populist leaders, populism's impact on political systems can be both favourable and detrimental.

In Latin America, for example, populism has been associated with charismatic leaders such as Argentina's Juan Perón, who pursued measures aimed at resolving social and economic disparities.[13] However, some populist leaders in the area have been chastised for eroding democratic institutions and concentrating power in the executive, raising concerns about the long-term consequences of populist influence on democracy.[14] The growth of right-wing populist parties in Europe has resulted in rising anti-immigrant sentiment and nationalist agendas, calling into question the principles of liberal democracy and the European Union. These parties have achieved significant electoral support in some cases, raising questions about the future of democratic governance in the region.[15]

Populism can also exist in a range of socioeconomic areas and be used to achieve the aims of many people. Populist politicians, such as Hungary's Victor Orban and the Philippines' Rodrigo Duterte, frequently present themselves as the voice of "the people," promising to challenge the system. In order to consolidate power, they may attempt to weaken checks and balances, including judicial independence. Political leaders can use their ideas to excite entire political parties that base their programmes on populist rhetoric. These parties may use their legislative power to challenge or overturn judicial judgements, putting judicial independence at risk. Non-governmental organisations (NGOs) can also utilise populist narratives to rally public support and exert influence over the judiciary by filing lawsuits to force policy changes. Having their own goal, non-governmental organisations (NGOs) have frequently used the courts for political advocacy, which has the potential to pervert the judiciary's role.

[12] Ann Lian, "Populism and Political Systems," Democratic Erosion, published May 20, 2022.
[13] Jordan Kyle, Limor Gultchin, "Populists in Power Around the World," Tony Blair Institute for Global Change, published November 7, 2018.
[14] Ibid.
[15] Ibid.

We may also mention interest groups, freedom fighters or liberation movements, religious organisations, social movements, or internet communities that have evolved into populist actors. These groups can use social media to disseminate populist messages and unify against perceived elites. Their capacity to shape public opinion may put the judiciary under pressure. A wide range of players can exploit populist beliefs to advance their own goals. While not all pose a direct threat to judicial independence, their influence on the court can apply pressure in a variety of ways, potentially undermining its impartiality and independence.

1.3. Understanding Judicial Independence

Judicial independence refers to the idea that the judiciary should be separate from the other departments of government, which means that courts should not be influenced improperly by the administrative or legislative branches, or by private or party interests. This independence is critical for upholding the rule of law and assuring the protection of all people' rights and liberties. Judicial independence protects the rights and privileges guaranteed by a restricted constitution by preventing executive and legislative infringement on such rights. It also serves as a foundation for democracy and the rule of law by requiring all authority and power to be derived from an ultimate source of law.

As populist movements often aim to challenge established institutions and norms, including the court, the emergence of populism in numerous countries has posed substantial challenges to judicial independence. Populist leaders may apply pressure on the court through media outlets and public opinion, creating a climate in which judges may feel obligated to make rulings that agree with the populist agenda rather than sticking to the ideals of the rule of law.[16] Populist movements can develop in a variety of political systems, resulting in both positive and negative outcomes depending on the setting and actions of populist leaders. Understanding the connection between populism and judicial independence is

[16] "The Importance of Judicial Independence: - Judge Robert C. Leuba," State of Connecticut Judicial Branch, published October 10, 2000.

critical for establishing strategies to protect democratic institutions and promote inclusive governance.

The Court is not a "insulate" institution. In order to attain "true political power," the Court must first gain public support. Public support for the judiciary is vital in every democratic society. This is because the judiciary holds a unique position of trust in society because it is tasked with interpreting and applying the law. Its decisions, whether popular or unpopular, have a significant impact on people's lives. When citizens have faith in the court, they are more likely to accept verdicts, even if they disagree with them, since they believe the decisions were made fairly and in accordance with the law. The relationship between the judiciary and the public, on the other hand, can be convoluted and occasionally conflicting. On the one hand, courts must maintain their independence and resist populist pressures to prioritise popular sentiment above legal requirements. On the other hand, they cannot completely disregard popular opinion because doing so would jeopardise their legitimacy and public support. As a result, in this delicate balance, courts must walk carefully.

II. POPULIST TACTICS: UNDERMINING JUDICIAL INDEPENDENCE

Populist groups are known to use a variety of strategies to weaken judicial independence. These strategies can vary from public shaming of judges to more drastic steps like constitutional amendments, administrative measures and court-packing. In this part, we will look more closely at these strategies and present examples of populist politicians using them to undermine the independence of their judiciaries.[17]

2.1. Public Criticism of Judges

Public criticism of judges is a common approach employed by populist leaders to weaken judicial independence. Populist leaders can weaken public trust in the judiciary and create a climate in which judges may feel pushed to submit to populist demands by publicly criticising judges and their decisions.

[17] Bernstein and Staszewski, "Judicial Populism."

In the United States, for example, President Trump often criticised judges and court judgements with which he disagreed, potentially weakening public trust in the impartiality of the judiciary.[18] Public criticism can also chill judges, who may become more careful in their decision-making in order to avoid being attacked by populist politicians. As a result, judges may prioritise the will of the majority over the ideals of the rule of law, thus weakening the judiciary's independence.[19]

2.2. Constitutional Amendments

Constitutional amendments are another tool that populist movements might use to undermine judicial independence. Populist leaders can gain greater control over the courts and their judgements by changing the constitution to modify the structure and operation of the judiciary. In Hungary, for example, the ruling Fidesz party has proposed significant amendments to the country's constitution, including clauses affecting the independence of the court.[20] These reforms have sparked concerns in Hungary about the deterioration of the rule of law. Similarly, the ruling AK Party in Turkey has adopted constitutional revisions that have enhanced administrative authority over the judiciary, creating worries about the independence of Turkish courts.[21]

2.3. Court-Packing

Another method employed by populist movements to influence the composition of courts and, thus, their judgements is court-packing. Populist leaders can ensure that the courts make judgements that fit with their political agenda by nominating judges who are loyal to the ruling party or the populist movement. In Poland, the ruling Law and Justice party has moved to fill the country's Constitutional Tribunal with party loyalists, raising concerns about the judiciary's independence.[22] Court-packing can also result in justices who are

[18] Voeten, "Populism and Backlashes."
[19] Ibid.
[20] Zoltán Szente, "Constitutional Changes in Populist Times," *Review of Central and East European Law* 47, no. 1 (March 8, 2022): 12–36.
[21] Corl and Sozen, "The Effect of Populism."
[22] Bernstein and Staszewski, "Judicial Populism."

more concerned with pleasing the ruling party or populist movement than with maintaining the principles of the rule of law. This has the potential to erode judicial independence and the rule of law.

2.4. Legislative and Administrative Measures

Populist movements may utilise legislative and administrative measures to weaken judicial independence in addition to the strategies listed above. Populist politicians, for example, may pass legislation that limits the judiciary's power to examine government acts or limits the courts' authority in specific areas. Indonesia Constitutional Court has these experience through the amendment of constitutional court law, even though the Court able to turn back.[23] These actions have the potential to erode the judiciary's ability to operate as a check on the executive and legislative arms of government, eroding the rule of law even more. Budget cuts or changes to the judicial nomination process can also be used to weaken the court and make it more susceptible to populist influence. Populist leaders can exert greater control over the judiciary and its decisions by decreasing the resources available to the courts or changing the nomination process to favour judges loyal to the ruling party or populist movement.

Populist movements often rely on media and public opinion to exert pressure on the judiciary. By using media outlets to disseminate their messages and rally their supporters, populist leaders can create an environment where judges may feel compelled to make decisions that align with the populist agenda, rather than adhering to the principles of the rule of law. In some circumstances, populist leaders may publicly criticize judges and court rulings on social media, weakening public trust in the judiciary and creating a climate in which judges may feel pressured to submit to populist demands.[24] This has the potential to erode judicial independence and the rule of law. The following chapter will look at how populists utilize social media to erode judicial independence.

[23] Fritz Siregar, "Indonesian Constitutional Politics 2003-2013" (PhD Thesis, University of New South Wales, Sydney, 2016).
[24] Geyh, "Judicial Independence at Twilight."

III. THE ROLE OF SOCIAL MEDIA IN POPULIST MOVEMENTS

Social media has evolved into a potent weapon for populist mobilisation, allowing individuals to connect directly with their voice. Populist movements and leaders have used social media platforms to amplify their messages, bypass traditional media gatekeepers, and communicate with a larger audience.[25] One of the reasons populists thrive on social media is that these platforms alter the public sphere's communication structure, making it more difficult for citizens to access facts that refutes populist views.[26] Populist themes frequently resonate with people's emotions and frustrations, and social media platforms enable these messages to spread quickly and gain support.[27]

3.1. Social Media as a Tool for Populist Mobilization

Populist movements have successfully used social media to mobilize people and spread their beliefs. Populist leaders may swiftly establish a big and engaged following by creating and sharing material that resonates with their target demographic. This allows them to influence public opinion and impose pressure on political institutions such as the judiciary. Populist movements can also use social media platforms to avoid traditional media gatekeepers, allowing them to distribute their messages without being subjected to the same amount of scrutiny as mainstream media outlets. This can result in the spread of disinformation and the construction of echo chambers, in which people are exposed primarily to content that validates their existing opinions.

Populist posts on platforms like Facebook tend to elicit more replies, shares, and comments than mainstream political leaders' posts, showing the ability of social media enabling populist actors to affect public opinion without the assistance of professional media outlets. Furthermore, social media platforms exacerbate political polarization, fuel populism, and erode trust in governments,

[25] Paolo Gerbaudo et al., "Angry Posts Mobilize: Emotional Communication and Online Mobilization in the Facebook Pages of Western European Right-Wing Populist Leaders," Social Media + Society 9, no. 1 (January 2023): 20563051231163330.

[26] Kai Spiekermann, "Why Populists Do Well on Social Networks," *Global Justice: Theory Practice Rhetoric* 12, no. 2 (November 2020): 50–7.

[27] Gerbaudo et al., "Angry Posts Mobilize."

news media, and institutions.[28] Populism has spread deeper into the political realm in the age of social media, with platforms like Twitter providing new insights into an old phenomena. With the introduction of social media came the emergence of digital populism, and populist parties have become proficient at exploiting new technologies to amplify their message, recruit, and organize.[29]

3.2. Method in Utilizing Social Media

The populists have a thorough understanding of how to use algorithms in social media and maximize with three methods: (1) creating echo chambers and filter bubbles; (2) disseminating misinformation and disinformation; and (3) engaging with the people.

Social media can frequently produce echo chambers and filter bubbles in which users are only exposed to content that validates their pre-existing ideas. This is known as the *echo chambers and filter bubbles method***.** This has the potential to intensify polarisation and make populist sentiments appear more popular or generally accepted than they are. Courts must be aware of this and remain committed to impartiality and legal standards, rather than succumbing to heightened public sentiment. Algorithms on social media platforms are frequently used to present users content based on their previous behaviours and interests. This can result in "echo chambers" and "filter bubbles," in which individuals are primarily exposed to viewpoints that are similar to their own. This can put pressure on courts to make judgements that appear to support these points of view. Courts, on the other hand, must keep in mind that these digital phenomena may not always reflect the whole diversity of public opinion and must seek to make judgements based on constitutional principles and comprehensive legal research.[30] Cass Sunstein, a legal scholar, discusses similar concepts in his work "Republic.com 2.0" (2007), in which he expresses concern about the polarizing effect of online echo chambers on democracy.[31]

[28] Piergiuseppe Fortunato and Marco Pecoraro, "Social Media, Education, and the Rise of Populist Euroscepticism," *Humanities and Social Sciences Communications* 9, no. 1 (August 2022).
[29] "Digital Populism," ECPS, accessed July 12, 2023.
[30] Eli Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (Penguin Press: UK, 2011).
[31] Cass R. Sunstein, *Republic. Com* (Princeton: University Press, 2001).

In the digital age, the propagation of incorrect or misleading information is a big issue. This strategy is known as *disinformation and misinformation dissemination*. Courts must maintain their function as a source of authoritative and accurate legal interpretations while resisting populist demands based on disinformation. The purposeful or unintentional transmission of incorrect or misleading information has become a significant concern in the digital age. Populist narratives frequently rely on simplistic explanations and scapegoating, which might be based on or promote misinformation. As a result, courts must make decisions in an atmosphere where public opinion may be swayed by inaccurate or misleading information. It is vital that courts maintain their commitment to making decisions based on trustworthy information and legal principles. Furthermore, by properly expressing their conclusions and the legal basis behind them, they could help to prevent misinformation.[32]

While social media can offer difficulties, it can also be an effective tool for courts to communicate with the public. This is the final method, which we referred to as *the interaction with the public method*. The Court can utilise these forums to clarify their judgements and legal concepts, promoting a better awareness of the law and the role of the courts among the general public. This can serve to improve public understanding of the legal system and potentially counteract disinformation. Such participation, however, must be properly regulated in order to preserve the court's dignity and impartiality. Richard Posner lays the groundwork for understanding why public interaction is important.[33] Scholars such as David Kaye have lately written about the potential of social media as a tool for public institutions.[34]

The power of populist movements to sway public opinion via social media has serious consequences for judicial independence. When making decisions, judges may be more prone to heed public opinion, especially in high-profile cases that garner extensive media coverage. This can result in a situation in

[32] Robert Chesney and Danielle Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security," *California Law Review* 107 (2019): 1753.
[33] Richard A. Posner, *How Judges Think* (London: Harvard University Press, 2010).
[34] David Kaye, "Speech Police: The Global Struggle to Govern the Internet," *Columbia Global Reports* (2019): 144.

which judges priorities the will of the majority over the principles of the rule of law, potentially weakening the judiciary's independence. What should the Court do to protect its judicial independence? We shall make an attempt to answer that query.

IV. SAFEGUARDING JUDICIAL INDEPENDENCE: STRATEGIES AND SOLUTIONS

In the face of populist threats, it is critical to establish methods and measures that increase the resilience of the court while maintaining judicial independence. However, distinguishing between popular and justified decisions frequently necessitates further context research. This section will provide numerous techniques and explore the relevance of legal and institutional structures in maintaining judicial independence, aside from the influence that the populist movement attempted to impose, drawing on the writings of scholars such as Theunis Roux, David Landau, and Rosalind Dixon.

4.1. The Theoretical Foundations of Judicial Independence

Before delving into specific strategies, it is important to understand the theoretical foundations of judicial independence as discussed by scholars like Roux, Landau, and Dixon. These scholars emphasize the importance of maintaining a balance between judicial independence and judicial accountability, arguing that a strong and independent judiciary is essential for upholding the rule of law and protecting the rights of all citizens.

Theunis Roux, for example, has written extensively on the concept of "transformative constitutionalism," which emphasizes the role of the judiciary in promoting social and political change. In this context, judicial independence is crucial for ensuring that judges can make decisions that advance the goals of transformative constitutionalism without being influenced by political pressures or populist movements.[35] David Landau, on the other hand, has focused on the concept of "abusive constitutionalism," which refers to the use of constitutional

[35] Theunis Roux, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" *Stellenbosch Law Review* 20, no. 2 (2009): 258–85.

amendments and other legal mechanisms by populist leaders to undermine democratic institutions, including the judiciary. Landau argues that judicial independence is essential for preventing the erosion of the rule of law and protecting democratic institutions from abusive constitutional practices.[36] Rosalind Dixon has explored the relationship between judicial independence and constitutional resilience, arguing that a strong and independent judiciary is crucial for maintaining the stability and adaptability of constitutional systems. Dixon emphasizes the importance of institutional arrangements, such as judicial review and constitutional interpretation, in safeguarding judicial independence and promoting constitutional resilience.[37]

To finish the theoretical foundation, the collective wisdom of academics such as Roux, Landau, and Dixon shows the critical importance of judicial independence in upholding the rule of law, mitigating the hazards of abusive constitutionalism, and creating constitutional resilience. Recognising the theoretical grounds of judicial independence, however, is only the first step. These theories must be translated into effective methods in practise in order to effectively protect our judiciary from the destabilising impacts of populism.

In the following sections, we will look at various options for bolstering judicial independence. These are intended not merely to survive current populist pressures, but also to provide our judiciary with the resilience required to face future difficulties. The ultimate goal is to establish a strong and independent judiciary that can protect the rule of law and serve as a beacon of justice in our democratic society. Let us now dissect these methods and discuss their relevance in today's political atmosphere.

4.2. Specific Strategies

Understanding that the court has significant judicial independence is one thing; understanding how to apply that understanding in specific ways to resist populist movements is quite another. We proposed a fourth option for the Court

[36] David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 189, no. 646 (2013).

[37] Rosalind Dixon and Tim Ginsburg, *Comparative Constitutional Law in Asia* (Edward Elgar Publishing, 2014), Rosalind Dixon and Tom Ginsburg, eds., Comparative Constitutional Law in Asia (Cheltenham, UK: Edward Elgar Publishing, 2014), accessed July 12, 2023.

to examine. The first stage is to establish legal and institutional frameworks. The second phase is to instill a culture of legal observance. The third phase is to increase judicial transparency and accountability. The fourth and final proposed strategy is to encourage judicial conversation and cooperation.

Our first suggestion is to make legal and institutional structures.[38] Institutional arrangements are critical to ensuring judicial independence. Clear constitutional measures protecting the independence of the judiciary, such as laws governing the nomination and dismissal of judges, can help protect the courts from political intervention. Furthermore, strong judicial councils or similar groups can provide oversight and assistance to the judiciary, ensuring that judges can do their duties without being unduly influenced by populist movements.[39]

The second strategy is that it promotes a culture of respect for the rule of law. It is critical for preserving judicial independence.[40] This can be accomplished by public education campaigns emphasizing the importance of the judiciary's responsibility in protecting all citizens' rights and liberties, not only those who support the ruling party or popular movements. Populist narratives that seek to undermine judicial independence can be resisted by promoting a greater awareness of the judiciary's role in society.

The third strategy is to improve judicial accountability and transparency. It can also aid in the preservation of judicial independence.[41] Public faith in the judiciary can be preserved by holding judges accountable for their acts and rulings, decreasing the possibility for populist movements to exploit public unhappiness with the courts. Making court rulings and processes more accessible to the public, for example, can assist counter populist narratives that depict the judiciary as secretive or elitist.

---

[38] Christopher M. Larkins, "Judicial Independence and Democratiziation: A Theoritical and Conceptual Analysis," *American Journal of Comparative Law* 44 (1996): 605.

[39] Markus B. Zimmer, "Judicial Systems Institutional Frameworks: An Overview of the Interplay Between Self-Governance and Independence," *SSRN Scholarly Paper* (December 2010).

[40] Tom Ginsburg and Aziz Z Huq, "How to Save a Constitutional Democracy," *International Journal of Constitutional Law* 16, no. 4 (October 2018): 1352-57.

[41] James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2, no. 2 (October 2014): 187–217.

Judicial accountability measures, in my opinion, are the most critical things a constitutional court justice should apply. The Court's priority should be to demonstrate that each decision is based on a meticulous, impartial assessment of the law and the constitution, rather than popular mood or political factors. The Court could employ those tactics in a variety of ways. The Court should emphasize that each decision is based on a careful examination of legal principles, statute law, and precedent. Highlight the importance of adhering to legal principles and precedents in the decision-making process.[42] The Court must also demonstrate that its approach to constitutional interpretation has been consistent throughout decisions, regardless of its political or popular repercussions.[43] Provide detailed and precise legal reasons, and each decision will be strengthened. This rationale should be based on the law and the constitution, rather than on popular feeling or political concerns. Finally, the Court should highlight judgements in which the Court defended the rights of minorities or vulnerable groups against popular opposition. This indicates a dedication to safeguarding the rights of all citizens, not just the majority.[44]

Finally, judicial discourse and cooperation strategies, both within and beyond countries, can serve to strengthen judicial independence in the face of populist threats.[45] Judges can share experiences and best practices for retaining their independence and supporting the rule of law by engaging in discourse with their colleagues. International collaboration, such as that provided by regional judicial networks or organizations, can also provide assistance and resources to judiciaries facing populist challenges.

To protect judicial independence in the face of populist threats, a multifaceted approach is required, including strong legal and institutional arrangements, cultivating a culture of respect for the rule of law, increasing judicial accountability and transparency, and encouraging judicial dialogue and cooperation. Judiciaries

[42] Shena Solanki, "Stare Decisis: Definition, Examples and Critical Analysis," Legal.thomsonreuters.com, accessed July 13, 2023.

[43] Fritz Edward Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1 (2015): 1.

[44] "Why Are Minority Rights Important?" Political Youth Network, accessed July 13, 2023.

[45] Ruth Mackenzie, et al.,"Manual on International Courts and Tribunals," Google Books, accessed July 14, 2023.

can better protect their independence and maintain the rule of law in an increasingly interconnected and rapidly changing world by understanding the theoretical foundations of judicial independence as discussed by scholars such as Roux, Landau, and Dixon and implementing the strategies they propose.

V. CASE STUDIES: JUDICIAL RESISTANCE AND RESILIENCE

Several courts have successfully resisted populist pressures, providing significant lessons to other countries. Populist movements have challenged the Langa Court in South Africa, Poland's Constitutional Tribunal, the Colombian Constitutional Court, and the Indonesian Constitutonal Court. These courts have used a variety of measures to protect their independence, emphasising the need of strong legal and institutional frameworks in preserving judicial independence.

5.1. The Langa Court in South Africa

South Africa's Langa Court, named for Chief Justice Pius Langa, is an example of a judiciary that has successfully defied populist demands. The court encountered severe problems during Langa's tenure as Chief Justice, from 2005 to 2009, including political interference and attempts to undermine its independence. Despite these obstacles, the Langa Court was able to keep its independence and protect the rule of law. A variety of circumstances contributed to the court's tenacity. First, the Langa Court adhered to the concepts of transformative constitutionalism, which emphasises the judiciary's role in effecting social and political transformation.[46] This dedication enabled the court to defy populist influences and stay focused on its mission.

Second, the Langa Court benefited from widespread public support, which helped to shield it from political pressure. The court was able to maintain its legitimacy and credibility in the eyes of the public by developing a culture of respect for the rule of law and engaging with the public through outreach program and other activities. Finally, the Langa Court benefited from solid institutional

[46] Innocent Batsani-Ncube, "Governing from the Opposition?': Tracing the Impact of EFF's 'Niche Populist Politics' on ANC Policy Shifts," *Africa Review* 13, no. 2 (November 2021): 199–216.

arrangements, such as a well-functioning Judicial Service Commission and a strong judicial review mechanism.[47] These agreements provided the court with the necessary resources and assistance to maintain its independence in the face of populist threats. The Langa Court's experience can help other judiciaries dealing with populist pressures. Judiciaries can maintain their independence and uphold the rule of law by adhering to the principles of transformational constitutionalism, garnering popular support, and depending on robust institutional arrangements.

5.2. The Colombian Constitutional Court

Colombia's Constitutional Court has been critical in safeguarding judicial independence against populist demands. Since its inception in 1991, the court has encountered several difficulties, including populist leaders' attempts to undermine its authority and impair its independence.[48] In 2010, then-President lvaro Uribe attempted to change the constitution to allow him to run for a third term. The court ruled that the proposed amendment was illegal, citing its authority to defend the constitution's democratic ideals.[49]

The Colombian Constitutional Court has used a variety of measures to maintain its independence. First, the court has relied on strong constitutional safeguards that safeguard its power and independence, such as those governing the nomination and removal of judges. Second, the court has participated in communication and collaboration with other regional judiciaries, sharing experiences and best practises for preserving judicial independence.[50] The Colombian Constitutional Court's example can help other courts dealing with populist pressures. The court has been able to maintain its independence and uphold the rule of law by relying on strong constitutional provisions and participating in communication and cooperation with other judiciaries.[51]

---

47 Ibid.

48 Rodrigo Uprimny, "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges," *Texas Law Review* 89, no. 7 (September 2014):1587-1609.

49 Manuel José Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court," *Washington University Global Studies Law Review* 3, no. 4 (2004): 524.

50 Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship* (Cambridge: University Press, 2010).

51 Dixon and Ginsburg, "Comparative Constitutional Law."

5.3. The Indonesian Constitutional Court

The Indonesian Constitutional Court has encountered populist influence concerns, particularly in issues involving Ulayat rights and educational rights.[52] In these examples, the independence of the court may have been influenced by the issue of judicial populism, which happens when judicial branches are more influenced by the interests of the majority of the people.[53]

In Indonesia, the Constitutional Court has been viewed as more populist and concerned with public opinion.[54] The court's popularity has helped to shield it from political pressure, with public opinion playing an important part in maintaining the court's independence.[55] In Indonesia, one example of judicial populism is the matter of Ulayat rights and educational rights, where the independence of the Indonesian Constitutional Court may have been influenced by the issue of judicial populism. The majority's will may have influenced the court's rulings on these issues, thereby weakening the judiciary's independence.[56]

The Indonesian Constitutional Court's experience demonstrates the possible risks to judicial independence posed by populist movements. By becoming more concerned with public opinion and majority will, the court may unintentionally weaken its own independence and the rule of law.[57] This highlights the importance

[52] Rosa Ristawati and Radian Salman, "Judicial Independence Vis-à-Vis Judicial Populism: The Case of Ulayat Rights and Educational Rights," *Constitutional Review* 6, no. 1 (2020): 110–32.

[53] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar Publishing, 2018).

[54] Simon Butt, "Anti-Corruption Reform in Indonesia: An Obituary?" *Bulletin of Indonesian Economic Studies* 47 (2011): 381–94.

[55] Marcus Mietzner, "Indonesia's Democratic Stagnation: Anti-Reformist Elites and Resilient Civil Society," *Democratization iFirst* (May 2011).

[56] Tim Lindsey, "Indonesian Constitutional Reform: Muddling Towards Democracy," *Singapore Journal of International and Comparative Law* 6, no. 1 (2002): 244–301.

[57] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge, 2018).it illustrates how Indonesia's recent experience offers a stark contrast between the different models. First, a prudential-minimalist heroic chief justice who knows how to enhance the Court's authority while fortifying the Court's status by playing a minimalist role in policy areas. Second, a bold and aggressive heroic chief justice, employing an ambitious constitutional interpretation. The third model is a soldier-type chief justice, who portrays himself as a subordinate of the Executive and Legislature. Contrary perhaps to expectations, the book's findings show a more cautious initial approach to be the most effective. The experience of Indonesia clearly illustrates the importance of heroic judicial leadership and how the approach chosen by a court can have serious consequences for its success. This book will be a valuable resource for those interested in the law and politics of Indonesia, comparative constitutional law, and comparative judicial politics.","ISBN":"978-1-351-58491-3","language":"en","note":"Google-Books-ID: 5yFWDwAAQBAJ","number-of-pages":"370","publisher":"Routledge","source":"Google Books","title":"Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes","title-short":"Law and Politics of Constitutional Courts","author":[{"family":"Hendrianto","given":"Stefanus"}],"issued":{"date-parts":[["2018",4,17]]}},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

of judiciaries remaining alert and resilient in the face of populist influences, ensuring that their decisions are anchored in the principles of the rule of law and the protection of all people' rights and liberties.[58]

Several techniques can be used by each country to maintain judicial independence against the influence of social media and populist movements. According to the above-mentioned court experience, there is no single rule that can be used by every court. Apart of judicial decision that the Court rendered, the Court need to response strategically. We may offer many approaches that the court could use. First, judges and judicial institutions should actively connect with the public via social media and other avenues of communication, increasing transparency and fostering a greater awareness of the judiciary's role in society. Second, judicial institutions should invest in media literacy and public education programmed to assist citizens in critically evaluating the information they come across on social media. This can serve to fight misinformation and decrease the impact of populist narratives on public opinion. Finally, judges should be aware of the possible influence of social media on their decision-making and work hard to maintain their independence in the face of public pressure. This may entail gathering information from a variety of sources and engaging in continual professional development to ensure that their choices are founded on the principles of the rule of law.

The rise of social media has had a huge impact on the propagation and popularity of populist movements, with serious consequences for judicial independence. Understanding how social media can be used to manipulate public opinion and put pressure on judges allows judicial institutions to devise methods to protect their independence and uphold the rule of law in an increasingly linked and fast changing world.

[58] Nicole Curato, *Democracy in a Time of Misery: From Spectacular Tragedies to Deliberative Action* (Oxford University Press, 2019).

VI. PARADOX OF PUBLIC SUPPORT, POPULIST MOVEMENT AND RULE OF LAW

This chapter investigates the complex interplay of public support, populist movements, and rule of law - a trinity that creates an intriguing conundrum in the area of constitutional law. While public engagement is the foundation of a healthy democracy, it becomes a complicated problem when populist movements enter the picture, especially when these movements enjoy widespread public support. Finally, we ask, "Why not take sides with the Populist Movement?" We face difficult issues regarding the appeal and risks of uniting with populism. This part encourages us to consider the function and obligations of judicial institutions in populist times. Each part aims to shed light on a different aspect of this perplexing dilemma. We urge readers to accompany us on this intellectual trip as we explore unexplored territory of public involvement, populist movements, and the rule of law.

6.1. Defining the Paradox: The Populist Regime and the Rule of Law

The contradictory relationship between populist regimes and the rule of law is based on a basic tension: while populist leaders claim to represent the people, they frequently undercut the same legal principles that support democratic governance. This tension forms the backdrop for this chapter's exploration of the populist regime and their respect to the rule of law.[59] Populist regimes frequently defend their acts by claiming to be acting in accordance with the will of the people. They cast their government as a struggle against a corrupt or disengaged elite. In this environment, the populist leader is portrayed as the actual protector of the people's interests, and all actions performed, even those that undermine constitutional standards or the rule of law, are justified as necessary to protect the people's rights. It is critical to comprehend the peculiar role of courts in populist political settings.[60]

Courts frequently walk a tightrope, attempting to uphold their role of preserving the rule of law while facing populist regimes that seek to undermine

[59] Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, 2017).
[60] Jan-Werner Müller, *What Is Populism?* (Penguin UK, 2017).

their independence.[61] Using the conceptual framework of the "Politico-Legal Character of the Courts," it is possible to recognize that courts do not function in a political vacuum. They are frequently trapped in a power struggle, with populist politicians attempting to undermine their authority and independence.[62]

Another critical aspect of this issue is populist regimes' use of constitutional amendment as instruments. While campaigning for the will of the people, populist leaders frequently change or distort the constitution in order to consolidate their authority. These constitutional tamperings may have long-term consequences for a democracy's health, undermining institutional checks and balances that keep power in check.[63] However, while populist regimes may strive to manipulate the constitution, they frequently do it within the bounds of law, using constitutional amendment procedures. This poses a unique issue for the rule of law, as the legal structure of these modifications can make them difficult to resist, despite their potential to undermine democratic norms.[64]

As a result, recognising the populist regime's dilemma with the rule of law necessitates a thorough examination of the political dynamics between populist leaders and judicial institutions, as well as the role of constitutional modifications in creating these dynamics.[65] This investigation gives important insights into the intricate mechanisms by which populist regimes can undermine the rule of law, assisting in the identification of potential measures for sustaining judicial independence and democratic government.[66]

6.2. Public Support

The Court requires public support and is a critical component of democratic administration. Despite their seeming independence from popular opinion politics, judicial institutions are no exception to this rule. The need for public

[61] Lord Neuburger et al.,"The Need for Independent Judges and a Free Press in a Democracy," *UNODC*, accessed July 13, 2023.
[62] Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018).
[63] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* 19 (December 2017): 3–47.
[64] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge: Cambridge University Press, 2013).
[65] David Landau, "Populist Constitutions," *University of Chicago Law Review* 85 (2018): 521.
[66] "Civic Education: The Key to Preserving Judicial Independence," Judicature, accessed July 13, 2023.

support stems from a variety of circumstances and can play an important role in preserving the courts' independence and effectiveness.[67]

The court serves as an important check and balance on the other arms of government in a democracy. The judiciary ensures that all citizens, regardless of political power or influence, are held accountable to the law through rendering unbiased judgements. The judiciary can only play this duty successfully if the public trusts and believes in it. When the judiciary is regarded to be biassed or corrupt, public trust in the justice system suffers, resulting in a weakening of the rule of law.[68]

The public's backing can also be a valuable safeguard for judicial independence. When other branches of government threaten the judiciary, public support can act as a check, ensuring that the judiciary can carry out its tasks without undue influence or interference. Tom Ginsburg and Aziz Huq highlight the necessity of public support in protecting judicial independence. The argument behind this is that if you're going to have a good time, you should be able to find a way to use it.[69]

So, what's the harm in siding with public opinion? Is the Court in need of popular support? Indeed, public support can be important to the legitimacy and efficiency of a court. The primary role of a court, particularly a constitutional court, is to uphold the rule of law and constitutional values. These values frequently include the defence of fundamental rights, even when doing so contradicts popular opinion. The danger of a court that is too closely aligned with public opinion is that it may undermine the rule of law and minority rights. The notion of majority rule and the protection of minority rights are both vital to democratic institutions. Democracy is more than just majority rule; it also entails respecting and protecting the rights of minority groups. If a court bases its decisions solely on public opinion, it risks failing to respect the rights of minorities.

[67] "Issue 2: Preserving Public Trust, Confidence, and Understanding | United States Courts," United State Courts, accessed July 13, 2023.
[68] Ibid.
[69] Ginsburg and Huq, "How to Save a Constitutional Democracy."

Furthermore, public opinion can be fickle and influenced by a variety of factors, including current events, popular emotion, and charismatic leaders. Based on these varying perspectives, judicial rulings may result in contradictions in the application of the law. Furthermore, a court that is too closely aligned with popular feeling risks being used for political purposes. This may jeopardise the independence of the court, which is a critical foundation of any democracy. As a result, while courts require public support to function properly, their main allegiance should be to the law and the constitution. Balancing the need for public support while upholding the law is a difficult issue for any court.

Finally, public support can help the judiciary gain legitimacy. The power of the social media as discussed above is a powerful tool, but it's also a dangerous one. As a result, a judiciary that has the public's backing is more likely to be recognized as genuine and authoritative. Barry Friedman argues that popular support can boost the judiciary's perceived legitimacy, making it more effective in its position as a check on power. As previously said, cultivating public support should not jeopardise the judiciary's dedication to the rule of law.[70] Rosalind Dixon and Tom Ginsburg also stated that judicial independence should not be surrendered for popularity. Public support should not be sought at the risk of making politically expedient but legally illegitimate judgements. Yes, in a democracy, public support for the court is critical. It can protect judicial independence, promote the effective implementation of judicial decisions, and boost the judiciary's legitimacy.[71] However, it is critical that this assistance be sought in a manner that respects the rule of law and preserves the independence of the court.

6.3. Why Not Taking Side with the Populist?

As we enter the third portion of this sub-chapter, "Why Not Taking Side with the Populist Movement?" we are confronted with a very contentious question: to what extent, if any, should judges identify with populist movements? Many

[70] Barry Friedman, "The Will of the People and the Process of Constitutional Change," *George Washington Law Review* 78, no. 6 (July 2010): 10-41.

[71] Dixon and Ginsburg, "Comparative Constittutional Law in Asia."

constitutional academics are concerned about the potential impact of populism on the judicial system and the overall rule of law. However, a small but notable group of these researchers recognizes the potential benefits of a populist approach. These benefits can include increasing democratic participation or implying that courts, while keeping their primary purpose and independence, should not ignore popular feeling entirely.

Mark Tushnet is one of these scholars. He postulates about the possible benefits of a populist strategy in enhancing democratic engagement. His concept of "populist constitutional law" advocates for a more democratic approach to constitutional interpretation, in which the voices of ordinary persons are prioritised and given fair weight.[72] Tushnet's viewpoint does not argue for the abolition of judicial review; rather, he emphasises the significance of balancing judicial review with democratic norms and popular opinion. In addition to Tushnet's viewpoint, Barry Friedman dives into the concept of "dialogic judicial review".[73] This concept is based on the idea that during the decision-making process, courts should engage in an active dialogue with not just the general public, but also with other parts of government. Friedman stops short of pushing for courts to support populism. He does, however, imply that judges cannot ignore the pulse of public opinion and must take it into account throughout their deliberations. Jeremy Waldron champions a similar stance in his key essay, "The Core of the Case Against Judicial Review".[74] His thoughts could be considered as more populist in their approach to constitutional law. He contends that constitutional rights determinations should be the result of democratic processes rather than being put completely in the hands of the judges.

It is important to note, however, that these scholars advocate for a careful and nuanced balance when it comes to populist beliefs. They advocate for a level of engagement with public opinion or populist notions that benefits democracy and the rule of law. They, however, sternly caution against going so far as to jeopardies constitutional norms or judicial independence. They recognize the

[72] Mark Tushnet, *Taking the Constitution Atakway from the Courts* (Princeton University Press, 2000).
[73] Friedman, "The Will of the People."
[74] Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (April 2006): 1346.

importance of public participation and democratic legitimacy, but warn against pursuing these objectives at the price of constitutional safeguards.

As a result, these academics demonstrate that the relationship between the courts, populism, and the public is laden with ambiguities and nuances. Courts must tread carefully in this delicate balance, ensuring that, while considering popular feelings, they do not jeopardise their independence or constitutional values. These arguments serve as a powerful reminder that courts are critical in protecting democracy and the rule of law from populist challenges. The courts' responsibility is not only to reflect popular emotion, but to analyse and scrutinise it against a framework of constitutional norms and democratic values. Given the complicated and often unforeseen ways populism can interact with judicial systems and constitutional law, it is critical that we keep these factors in mind as we move forward.

VII. CONCLUSION

This article has examined the numerous threats to judicial independence and the rule of law faced by the development of populism. To weaken judicial independence, populist movements use strategies such as public criticism, constitutional modifications, and court-packing. Social media has also played an important part in the propagation and influence of populist movements, with the ability to manipulate public opinion and exert pressure on judges.

Several tactics and solutions have been proposed to solve these difficulties, building on the work of researchers such as Theunis Roux, David Landau, and Rosalind Dixon. Strengthening legal and institutional structures, promoting a culture of respect for the rule of law, increasing judicial accountability and openness, and encouraging judicial discourse and collaboration are among the ways. Case studies from South Africa, Colombia, and Indonesia have proved the durability of judiciaries in the face of populist forces. These case studies provide significant insights into the issues that judiciaries face, as well as measures for maintaining judicial independence.

In sum, maintaining judicial independence in the face of populist threats is essential to upholding the rule of law and safeguarding the rights and freedoms of all people. The Indonesian Constitutional Court is a clear example of populist assaults that have weakened the independence of the judiciary. Remember that the Indonesian Constitutional Court has a reputation for being more populist and sensitive to public opinion. By becoming more concerned with public opinion and the majority's will, the Indonesian Constitutional Court inadvertently undermines its independence and legal pre-eminence. In order to defend the justice system at the Indonesian Constitutional Court from populist attacks, the strategies and solutions outlined in this article are relevant to consider. However, additional research is required to investigate the relationship between populism and judicial independence, particularly in developing democracies and diverse legal systems.

This article can catalyze academics, practitioners, and policymakers to develop innovative methods for preserving judicial independence in an increasingly interconnected and swiftly changing world. Collaboration between these parties is required to ensure that the judiciary remains a solid and independent institution, upholding the supremacy of law and safeguarding all citizens regardless of the political climate.

BIBLIOGRAPHY

Adamidis, Vasileios. "Democracy, Populism, and the Rule of Law: A Reconsideration of Their Interconnectedness." *Politics* (2021), https://doi.org/10.1177/02633957211041444.

Batsani-Ncube, Innocent. "Governing from the Opposition?': Tracing the Impact of EFF's 'Niche Populist Politics' on ANC Policy Shifts." *Africa Review* 13, no. 2 (November 2021): 199–216, https://doi.org/10.1080/09744053.2021.1943145.

Bernstein, Anya, and Glen Staszewski. "Judicial Populism." *Minnesota Law Review* 106 (2021): 283, https://dx.doi.org/10.2139/ssrn.3694132.

Butt, Simon. "Anti-Corruption Reform in Indonesia: An Obituary?" *Bulletin of Indonesian Economic Studies* 47 (2011): 381–94, https://doi.org/10.1080/00074918.2011.619051.

Cepeda-Espinosa, Manuel José. "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court." *Washington University Global Studies Law Review* 3, no. 4 (2004): 524, https://openscholarship.wustl.edu/law_globalstudies/vol3/iss4/2/.

Chesney, Bobby, and Danielle Citron. "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security." *California Law Review* 107 (2019): 1753, https://dx.doi.org/10.2139/ssrn.3213954.

"Civic Education: The Key to Preserving Judicial Independence." Judicature, accessed July 13, 2023. https://judicature.duke.edu/articles/civic-education-the-key-to-preserving-judicial-independence/.

Corl, James, and Mushin Yunus Sozen. "The Effect of Populism on American and Turkish Judiciaries." *Journal of Student Research* 11, no. 1 (2022), https://doi.org/10.47611/jsr.v11i1.1574.

Curato, Nicole. *Democracy in a Time of Misery: From Spectacular Tragedies to Deliberative Action*. Oxford University Press, 2019.

"Digital Populism." ECPS, accessed July 12, 2023. https://www.populismstudies.org/Vocabulary/digital-populism/.

Dixon, Rosalind, and Tom Ginsburg, eds. *Comparative Constitutional Law in Asia*. Cheltenham, UK: Edward Elgar Publishing, 2014. https://doi.org/10.4337/9781781002704.

Drew, Cris. "15 Famous Examples of Populism (2023)." Helpful Professor, published July 12, 2023. https://helpfulprofessor.com/examples-of-populism/.

Fortunato, Piergiuseppe, and Marco Pecoraro. "Social Media, Education, and the Rise of Populist Euroscepticism." *Humanities and Social Sciences Communications* 9, no. 1 (August 2022), https://doi.org/10.1057/s41599-022-01317-y.

Friedman, Barry. "The Will of the People and the Process of Constitutional Change." *George Washington Law Review* 78, no. 6 (July 2010): 10-41, https://ssrn.com/abstract=1647728.

Friedman, Nick. "The Impact of Populism on Courts: Institutional Legitimacy and the Popular Will." *The Foundation for Law, Justice and Society* (2019), https://www.fljs.org/sites/www.fljs.org.

Galston, William A. "The Populist Challenge to Liberal Democracy." *Journal of Democracy* 29, no. 2 (2018): 5–19, https://doi.org/10.1353/jod.2018.0020.

Gerbaudo, Paolo. "Angry Posts Mobilize: Emotional Communication and Online Mobilization in the Facebook Pages of Western European Right-Wing Populist Leaders." *Social Media + Society* 9, no. 1 (January 2023): 20563051231163330, https://doi.org/10.1177/20563051231163327.

Geyh, Charles Gardner. "Judicial Independence at Twilight." *Case Western Reserve Law Review* 71 (2020): 1045, https://scholarlycommons.law.case.edu/caselrev/vol71/iss3/5.

Ginsburg, Tom, and Aziz Z Huq. *How to Save a Constitutional Democracy*. University of Chicago Press, 2018.

Hendrianto, Stefanus. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. Routledge, 2018.

Hilbink, Lisa. Judges beyond Politics in Democracy and Dictatorship. Cambridge University Press, 2010.

"Issue 2: Preserving Public Trust, Confidence, and Understanding | United States Courts." Accessed July 13, 2023. https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust-confidence-and-understanding.

Kaye, David. "Speech Police: The Global Struggle to Govern the Internet." *Columbia Global Reports* (2019): 144, https://doi.org/10.2307/j.ctv1fx4h8v.

Kyle, Jordan and Gultchin, Limor. "Populists in Power Around the World." Tony Blair Institute for Global Change, published November 7, 2018. https://www.institute.global/insights/geopolitics-and-security/populists-power-around-world.

Landau, David. "Abusive Constitutionalism." *UC Davis Law Review* 189, no. 646 (2013), https://ssrn.com/abstract=2244629.

Landau, David. "Populist Constitutions." *University of Chicago Law Review* 85 (2018): 521, https://chicagounbound.uchicago.edu/uclrev/vol85/iss2/3.

Larkins, Christopher M. "Judicial Independence and Democratiziation: A Theoritical and Conceptual Analysis." *American Journal of Comparative Law* 44 (1996): 605, https://doi.org/10.2307/840623.

Lian, Ann. "Populism and Political Systems." Democratic Erosion, published May 20, 2022. https://www.democratic-erosion.com/2022/05/20/populism-and-political-systems/.

Lindsey, Tim. "Indonesian Constitutional Reform: Muddling Towards Democracy." *Singapore Journal of International and Comparative Law* 6, no. 1 (2002): 244–301, http://138.25.65.110/au/journals/ELECD/2008/24.pdf.

Mackenzie, Ruth. "Manual on International Courts and Tribunals." Google Books, accessed July 14, 2023.

Melton, James, and Tom Ginsburg. Tom Ginsburg and Aziz Z Huq. "How to Save a Constitutional Democracy." *International Journal of Constitutional Law* 16, no. 4 (October 2018): 1352-57, https://doi.org/10.1093/icon/moy107.

Mietzner, Marcus. "Indonesia's Democratic Stagnation: Anti-Reformist Elites and Resilient Civil Society." *Democratization* iFirst (May 2011), http://dx.doi.org/10.1080/13510347.2011.572620.

Molloy, David. "What Is Populism, and What Does the Term Actually Mean?" BBC News, published March 6, 2018. https://www.bbc.com/news/world-43301423.

Mudde, Cas. "Populism in the Twenty-First Century: An Illiberal Democratic Response to Undemocratic Liberalism." Paper, presented at the conference "Democracy in Trouble?" at the University of Pennsylvania's Andrea Mitchell Center for the Study of Democracy, 2018.

Mudde, Cas and Rovira Kaltwasser, Cristobal. "Populism: A Very Short Introduction." Oxford Academic, accessed July 14, 2023. https://academic.oup.com/book/866.

Müller, Jan-Werner. *What Is Populism?*. Penguin UK, 2017.

Neuburger, Lord. "The Need for Independent Judges and a Free Press in a Democracy." UNODC, accessed July 13, 2023. https://www.unodc.org/dohadeclaration/en/news/2021/05/the-need-for-independent-judges-and-a-free-press-in-a-democracy.html.

Pech, Laurent, and Kim Lane Scheppele. "Illiberalism Within: Rule of Law Backsliding in the EU." *Cambridge Yearbook of European Legal Studies* 19 (December 2017): 3–47, https://doi.org/10.1017/cel.2017.9

Posner, Richard A. *How Judges Think*. London: Harvard University Press, 2010.

Ristawati, Rosa and Radian Salman. "Judicial Independence Vis-à-Vis Judicial Populism: The Case of Ulayat Rights and Educational Rights." *Constitutional Review* 6, no. 1 (2020): 110–32. https://doi.org/10.31078/consrev614.

Roux, Theunis. *The Politics of Principle: The First South African Constitutional Court, 1995–2005*. Cambridge: Cambridge University Press, 2013.

Roux, Theunis. "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" *Stellenbosch Law Review* 20, no. 2 (2009): 258–85, https://journals.co.za/doi/abs/10.10520/EJC54704.

Siregar, Fritz. "Indonesian Constitutional Politics 2003-2013." PhD Thesis, UNSW Sydney, 2016.

Siregar, Fritz Edward. "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)." *Constitutional Review* 1 (2015): 1, https://doi.org/10.31078/consrev111.

Spiekermann, Kai. "Why Populists Do Well on Social Networks." *Global Justice : Theory Practice Rhetoric* 12, no. 02 (November 2020): 50–71, https://doi.org/10.21248/gjn.12.02.203.

Solanki, Shena. "Stare Decisis: Definition, Examples and Critical Analysis." Legal.thomsonreuters.com, accessed July 13, 2023. https://legal.thomsonreuters.com/blog/the-doctrine-of-stare-decisis/.

Sunstein, Cass R. *Republic. Com*. Princeton: University Press, 2001.

Szente, Zoltán. "Constitutional Changes in Populist Times." *Review of Central and East European Law* 47, no. 1 (2022): 12–36. https://doi.org/10.1163/15730352-47010001.

"The Importance of Judicial Independence: - Judge Robert C. Leuba." State of Connecticut Judicial Branch, published October 10, 2000. https://www.jud.ct.gov/external/news/press036.html.

Tushnet, Mark. *Advanced Introduction to Comparative Constitutional Law*. Edward Elgar Publishing, 2018.

Uprimny, Rodrigo. "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges." *Texas Law Review* 89, no. 7 (September 2014): 1587-1609, https://doi.org/10.4324/9780203797655-13.

Voeten, Erik. "Populism and Backlashes against International Courts." *Perspectives on Politics* 18, no. 2 (2020): 407–22, https://doi.org/10.1017/S1537592719000975.

Waldron, Jeremy. "*The Core of the Case against Judicial Review*." The Yale Law Journal 115, no. 6 (April 1, 2006): 1346, https://doi.org/10.2307/20455656.

"Why Are Minority Rights Important?" Political Youth Network, accessed July 13, 2023. https://politicalyouthnetwork.org/why-are-minority-rights-important-2/.

Zimmer, Markus B. "Judicial Systems Institutional Frameworks: An Overview of the Interplay Between Self-Governance and Independence." *SSRN Scholarly Paper* (December 2010), https://papers.ssrn.com/abstract=2284465

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1017

Assessment of De Jure Judicial Independence of Constitutional Courts According to International Guidelines

Osayd Awawda*
Faculty of Law and Political Science, Hebron University
Hebron, Palestine
osayda@hebron.edu

Received: 24 April 2023 | Last Revised: 10 December 2023 | Accepted: 19 March 2024

Abstract

Judicial independence of constitutional courts is of paramount importance because it upholds the rule of law, protects individual rights, and maintains checks and balances in a democracy. Moreover, it ensures impartiality, prevents the abuse of power, and fosters public trust in the legal system. By interpreting and applying the law without external influence, an independent judiciary safeguards the principles of justice and democratic governance. This Article provides criteria for assessing *de jure* judicial independence of constitutional courts according to four renowned international documents that set normative standards for protecting judicial independence. These four documents are synthesises the literature about the definition of judicial independence, particularly in the context of constitutional courts, and analyses four international guidelines that set essential standards for protecting the independence of the judiciary. These four guidelines are: Basic Principles on the Independence of the Judiciary by the UN,[1] Report of the Special Rapporteur on the Independence of Judges and

* Osayd Awawda is a certified legal translator, a practising lawyer and an Assistant Professor of Constitutional Law at Hebron University, Palestine. He teaches Public International Law, International Humanitarian Law, International Criminal Law, and Research Methods. He holds an LLB from Birzeit University, an LLM, and a PhD, both from Melbourne Law School, Australia. His PhD thesis, now published as a book by Cambridge Scholars Publishing, was titled: "The Palestinian Supreme Constitutional Court: A Critical Assessment of its Independence under the Emergency Regime of the West Bank". Some parts of this Article were originally published in that book, and due permission has been granted from the publisher to use them in this Article.

1 Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1.

Lawyers,[2] the Universal Charter of the Judges,[3] and International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.[4] Using conceptual and doctrinal analysis, this Article identifies three key elements of de jure judicial independence: personal, institutional, and procedural. It also establishes practical criteria to evaluate whether the laws governing a specific constitutional court uphold or undermine its *de jure* judicial independence. Importantly, it is crucial to distinguish between *de jure* and *de facto* judicial independence because merely enacting constitutional provisions and laws to safeguard the judiciary does not automatically guarantee an independent judiciary in practice. The discussion of these principles highlights how personal, institutional, and procedural independence can be established and preserved within the courts. This Article concludes that the common purpose of these principles is to protect judges from unwarranted interference, especially from the executive branch. Among the various principles, the most crucial ones were found to be independent judicial appointment procedures and ensuring judges' tenure is protected against retaliatory actions by the governing regime.

Keywords: De Jure and De Facto Judicial Independence; Personal Independence; Institutional Independence; Procedural Independence

I. INTRODUCTION

Christopher Larkins stipulates that '[d]espite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law'.[5] However, a clear characteristic of judicial independence as a concept is that it is relational, i.e. it describes the relationship between the judiciary vis-à-vis other institutionso.[6] Dordrecht and Shetreet claimed persuasively that '[t]he increasing role which the judiciary has assumed warrants some re-examination of the conceptual framework and the theoretical rationales which define its position vis-à-vis the other branches of the government'.[7]

---

2 Leandro Despouy, "Special Rapporteur," (Report of the Special Rapporteur on the Independence of Judges and Lawyers, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41, 24 March 2009).

3 *The Universal Charter of the Judge*, approved by the International Association of Judges on 17 November 1999 art 1.

4 "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors" (International Commission of Jurists, 2007).

5 Christopher Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis* (The American Society of Comparative Law, 1996), 607.

6 Owen Fiss, *The Law as it Could Be* (NewYork University Press, 2003), 55.

7 Ibid., 590.

Judicial independence finds its roots in the principle of the separation of powers, which aims to establish a set of checks and balances between the three powers of the state: the legislative, the executive, and the judicial.[8] The role of judges, as holders of public posts, is to decide disputes between litigants in adjudicative procedures.[9] These procedures are affected by three actors: the decision-maker (the judge), the institution (the court rules), and the subject-matter of litigation (the case).[10]

Since judges in both lower and higher courts are obliged to decide on cases with strict adherence to the law, judges' independence from the undue interference of the other two powers is a prerequisite for a fair judgment.[11] A fair judgment is one which is based on discounting all that is irrelevant to applying the law on the facts presented to the court, which includes particular considerations to the parties, judges' self-interest, and the interests of those who appointed them to their judicial offices.[12] Therefore, judicial independence is a fundamental element of the judges' role, an element that enables the judiciary to exercise its functions by reviewing the action s of civilians and, more importantly, actions of the executive and the legislature, to ensure the protection of rights and the punishment of transgressors through fair trials.[13]

It is thus possible to define judicial independence as the ability of judges to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for

[8] Bernd Hayo and Stefan Voigt, "Explaining De Facto Judicial Independence," *International Review of Law and Economics* 27, no. 3 (2007): 267, 271–2.

[9] Roderick A. Macdonald and Hoi Kong, "Judicial Independence as a Constitutional Virtue," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 832.

[10] Steven B. Burbank and Barry Friedman, "Reconsidering Judicial Independence," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman (Los Angeles: Sage Publications Inc., 2002), 12.

[11] Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 345, 349.

[12] Drew A. Linzer and Jeffrey K. Staton, "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence" *(*Paper presented at The Annual Meeting of the American Political Science Association*,* Seattle, September 2011), 5.

[13] Julio Ríos–Figueroa and Jeffrey K. Staton, "An Evaluation of Cross–National Measures of Judicial Independence," *Journal of Law, Economics, and Organization* 30, no. 1 (2012): 104, 104.

any reason'.[14] Without judicial independence, undue interference would impinge on judges' application of law, causing the courts to become unable to exercise their functions.[15]

Owen Fiss provides a practical explanation of judicial independence by arguing that is achieved when three conditions are fulfilled: 'party detachment', 'individual autonomy', and 'political insularity'.[16] Notably, these conditions are different from the elements of judicial independence, which as will be explained later, are the elements that regimes themselves should provide to the judicial power in order to fulfil these conditions.

Party detachment is the independence that judges have vis-à-vis the litigants who stand before the bench. This is the core of the judicial role, which is also referred to as the impartiality of judges. It requires judges to not unduly favour the interest of any party. This concept is also known as behavioural independence, which requires that judges be shielded from subordination to political pressure. To achieve it, judges must have security of occupation, by guaranteeing a fixed tenure,[17] transparent procedures of judicial inspection against 'retaliatory removal',[18] and financial security, through generous salaries and pensions.[19]

Next, individual autonomy is the independence of a judge vis-à-vis other judges in the same bench. This allows judges to make their own decisions and pronounce dissenting opinions.[20] To achieve it, the grounding of judicial recruitment on merit is necessary, by selecting judges according to their educational qualifications and expertise.[21] Equally important is a social culture

[14] Richard Stacey and Sujit Choudhry, "International Standards for the Independence of the Judiciary" (The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers, International IDEA, 2013), 2.

[15] Brad Epperly, "Political Competition and De Facto Judicial Independence in Non-Democracies," *European Journal of Political Research* 56, no. 2 (2017): 279, 279; See generally Lewis A. Kornhauser, "Is Judicial Independence a Useful Concept?" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman (Los Angeles: Sage Publications Inc., 2002), 48.

[16] Ibid., 55.

[17] Gerard Brennan, "Judicial Independence," High Court of Australia.

[18] Donald Jackson, "Judicial Independence in Cross–National Perspective," in American Bar Association, *Judicial Independence: Essays, Bibliography, and Discussion Guide* (1999), 27.

[19] Martin L Friedland, Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council* (1995).

[20] Thomas E Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre–Soviet Russia," *William & Mary Bill Rights Journal 5, no. 1* (1996).

[21] Jackson, "Judicial Independence."

that obliges the regime to show genuine commitment to the rule of law instead of disdain of courts' rulings and political meddling.[22]

Last, political insularity is the independence of the judiciary vis-à-vis other institutions in the state, particularly the executive. Courts, especially constitutional, administrative, and anti-corruption courts, are often targets of undue interference in authoritarian regimes, through procedures that enable the sidelining of 'disloyal' judges. The last concept is also referred to as institutional independence, which requires clear rules of judicial function.[23] What is required to achieve this are reasonable methods for reprimanding personal or professional misdeeds and dismissal for official misbehaviour.[24]

II. ELEMENTS OF JUDICIAL INDEPENDENCE

Protecting judges as individuals and courts as institutions from undue interference requires a set of principles that can help in establishing the elements of judicial independence. These elements are: independent judges, also known as personal or professional independence; independent courts, also named operational or institutional independence; and independent procedures, also called procedural or decisional independence, which means that other state powers do not unduly interfere in the litigation process.[25]

There are preeminent international law texts that uphold judicial independence, and provide guidelines for establishing independent judiciaries. The International Covenant on Civil and Political Rights ('ICCPR'), which is 'hard' international law that is legally binding on its signatories, asserts the critical importance of a fair trial, because it is the duty of the judiciary to act as the ultimate guarantor of human rights in the state.[26] Domestically, the judiciary acts as such by securing the rule of law to ensure that all legislative actions are consistent with the constitution, and that all executive actions are in

[22] Friedland, Canadian Judicial Council.
[23] Peter Russell and David O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World, Constitutionalism and Democracy* (Charlottesville: University Press of Virginia, 2001), 6.
[24] Friedland, Canadian Judicial Council.
[25] Bernd Hayo and Stefan Voigt, "Explaining Constitutional Change: The Case of Judicial Independence," *International Review of Law and Economics* 48, no. 1 (2016): 1, 5.
[26] Ibid.

conformity with enacted statutes.[27] This duty would not be adequately fulfilled without insulating the judiciary from undue interference. Article 14 of the ICCPR provides that:

> All persons are equal before courts and tribunals, and all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law.[28]

The United Nations Human Rights Committee produced an influential document that provides an authoritative interpretation of this binding Article, known as General Comment No. 32.[29] It is a valuable explanation of the right of fair trial and how even non-signatories to the ICCPR must fulfil it, since it is part of customary international law.[30] The General Comment provides a working definition for an independent judiciary in light of that Article: courts must be impartial, display no bias or favour, not pre-judge cases, be politically independent, and not be subject to or beholden to influence from the legislative or executive branches of government, in order to fulfil their functions without fear.[31]

Leading international organisations and judicial support networks held numerous discussions to define a set of ideal provisions of judicial independence to which states around the world should strive to adhere.[32] These organisations and networks described them as 'ideal' because, in reality, it is not possible to adhere to all of them.[33] Thus, judicial independence is a principle that requires substantial protection of the judiciary as a first step, then continues demanding constant improvement of states' adherence to those provisions. Accordingly, it is not expected of states that they fulfil all the obligations described in this set.[34]

---

[27] See generally Lisa Hilbink, "The Origins of Positive Judicial Independence," *World Politics* 64, no. 4 (2012): 587.

[28] UN Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [3].

[29] Ibid.

[30] Katherine Glenn Bass and Sujit Choudhry, "Constitutional Review in New Democracies," (International IDEA, 2013), 4.

[31] Ibid, 15-29.

[32] James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* , no. 2 (2014): 187, 187–8.

[33] Charles M. Cameron, "Judicial Independence: How Can You Tell It When You See It? And, Who Cares," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Steven B. Burbank and Barry Friedman (Sage Publications Inc., 2002), 134.

[34] Lydia Brashear Tiede, "Judicial Independence: Often Cited, Rarely Understood," *Journal Contemporary Legal Issues* 15 (2006): 129, 136.

Rather, a progressive endeavour to provide the judiciary with essential protection from undue interference is what this set demands.[35] Considering the varying degrees of progressing in that endeavour, states around the world have shown various degrees of commitment to the provisions of this set, which means they fall on different points along the spectrum of judicial independence. Thus, it is incorrect to classify judiciaries around the world according to a simple dichotomy of 'independent' and 'not independent'.[36]

The global standards of judicial independence can be synthesised from four primary documents that were produced by international organisations to support judges worldwide: the Basic Principles on the Independence of the Judiciary by the UN ('Basic Principles');[37] the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers ('Special Rapporteur');[38] the Universal Charter of the Judges ('Universal Charter');[39] and the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors ('International Principles').[40]

The organisations that arranged conferences and discussions to prepare those documents are among the leading and most influential organisations in the field of judicial independence and the rule of law around the world.[41] These documents therefore offer an authoritative, comprehensive source for a set of principles that assists in assessing the independence of judicial institutions, bearing in mind that comparative differences do appear when the assessment is conducted.

---

35 Ibid.

36 Mathew D. Mc Cubbins, Roger Noll and Barry R. Weingast, "Conditions for Judicial Independence," *Journal of Contemporary Legal Issues* 15 (2006): 105, 123.

37 Basic Principles on the Independence of the Judiciary, UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1 (*Basic Principles of Judicial Independence*).

38 Leandro Despouy, Special Rapporteur, *Report of the Special Rapporteur on the independence of judges and lawyers*, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009) (*Special Rapporteur on the independence of judges*).

39 The Universal Charter of the Judge approved by the International Association of Judges on 17 November 1999 art 1.

40 José Zeitune, "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors" (Paper, International Commission of Jurists, 2004).

41 See International Association of Judges's website at http://www.iaj–uim.org/home/ and International Commission of Jurists' website at https://www.icj.org/

These four international documents can be employed to pragmatically evaluate the degree of independence in both higher and lower courts.[42] In what follows, the elements of judicial independence — personal, institutional, and procedural — will be explained in turn, to show how the principles related to each element protect the independence of judges. These principles are set to eliminate, or at least reduce as much as possible, undue political interference of the non-judicial officials in judges' profession.[43]

2.1. Personal Independence

The rules of judicial tenure are the major focus of most materials on judicial independence. Judicial tenure includes all aspects of judges' profession: appointment and selection, term of office, remuneration and salaries promotion, resignation, discipline, and removal. For the aspect of selection, the Basic Principles declare that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'.[44] Also, the Universal Charter asserts that '[w]here this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, which includes substantial judicial representation'.[45] One purpose of requiring this limited involvement is to avoid to judicial self-restraint, which might occur if the judiciary is the sole controller of judicial selection, leading to avoiding judicial review of critical matters that might trigger a response of irrepressible political incursion into courts' independence.[46] Both provisions avow the need to have a selection process that is transparent and objective, with limited involvement of non-judicial institutions that are unlikely to have common improper motives, to avoid the dominance of the executive power.

Regarding judicial appointments to constitutional courts, Choudhry and Bass convincingly argue, in a way similar to Kelsen's original vision, that

[42] Robert M. Howard and Henry F. Carey, "Is an Independent Judiciary Necessary for Democracy?" *Judicature* 87, no. 6 (2004): 284.
[43] Bass and Choudhry, "Constitutional Review," 4.
[44] *Basic Principles of Judicial Independence*, art 10.
[45] *The Universal Charter of the Judge*, art 9.
[46] G. Alan Tarr, *Without Fear or Favour: Judicial Independence and Judicial Accountability in the States* (Stanford University Press, 2012).

different political actors have to participate in appointing constitutional judges, because that promotes the judges' accountability and 'creates a sense of political investment', urging those who might lose in litigation before a court to abide by its judgments rather than challenging its independence.[47] Both scholars support this argument by proposing a set of principles that 'must' guide the appointment procedures of constitutional judges: 'widespread participation from different political constituencies; division of the powers to appoint and remove justices; and establishing qualifications to ensure the selection of judges of high legal expertise'.[48] The critical impact of constitutional court's rulings makes it necessary to shield them from potential attempts to undermine their legitimacy, especially by losing parties.[49]

It is principally for this requirement that independently exercised constitutional review is vital for maintaining constitutional courts' image as umpires with integrity, because if such review seems to be lacking independence, then their judgments might be considered politically biased, which undermines their legitimacy.

There are five models of appointing constitutional judges that are relatively consistent with the principles mentioned above. The first is the legislative supermajority model, in which the parliament dominates the appointment procedure. The essence of this model requires a supermajority for candidates to be appointed, which might be two-thirds or three-fifths of the parliament, to prevent the ruling party from achieving a simple majority to appoint its nominees.[50] In states that have two chambers system, both chambers may participate in electing candidates. Because of the supermajority requirement, this model promotes a process of compromise and negotiation between opposition and government party in the parliament. In Germany, this model was a factor in fostering a collective

[47] Sujit Choudhry and Katherine Glenn Bass, "Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence" (Center for Constitutional Transitions at UNY Law and International Institute for Democracy and Electoral Assistance, 2014), 10.

[48] Ibid.

[49] John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77, no. 4 (2002): 962, 1002–3, 1007.

[50] Andrew Harding, Peter Leyland and Tania Groppi, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," in *Constitutional Courts: A Comparative Study*, ed. Andrew Harding and Peter Leyland (Londong: Wildy, Simmonds & Hill, 2009), 15.

sense of political investment among parties when appointing judges to the Federal Constitutional Court.[51] Nevertheless, a compromise on a candidate may be difficult in states that have intense partisan conflicts. Another challenge to this model in states with highly-fragmented parties is that a deadlock could be encountered during the appointment if the parties come to reach the specified supermajority.[52]

The second model is the judiciary-executive model, in which both judicial and executive powers share the authority to appoint constitutional judges. Generally, senior judges from higher courts propose a list of candidates to the executive power, which must, in turn, formally appoint the candidates it selects from that list.[53] Other versions of this model have both roles exchanged between the executive and the senior judges, in which the latter appoint the selected candidates from a list that the executive power proposes. The reason behind excluding the parliament in this model is to shield the court from short-term political concerns.[54] Nonetheless, this sort of shielding might exclude the opposition in the parliament, which undermines the sense of political investment in the constitutional court, and might trigger accusations of political bias. The Egyptian Supreme Constitutional Court and the Iraqi Federal Supreme Court are appointed according to variations on this model.[55]

The third is the legislative-executive model, in which the task of appointing judges is divided between the executive power and the parliament. Commonly, the president, as the head of the executive authority, nominates a list of candidates to the parliament which in turn selects the judges. Similar to the previous model, the roles might be exchanged in a variation of this model, i.e. nomination comes from the parliament, while the president makes final selections. In the first variation, members of the parliament usually hold confirmation hearings and scrutinise the candidates by examining their ideological stances and personal suitability. Importantly, such hearings might become exceedingly politicised,

51 Choudhry and Bass, 9.
52 Ibid, 11–12.
53 Harding, Leyland and Groppi, 14.
54 Bass and Choudhry, "Constitutional Review," 12.
55 Ibid.

especially in states where the president is not from the majority party in the parliament, which could divert the hearings from their original goal of assessing the judicial qualifications of those candidates.[56]

The fourth model is the judicial council model, in which political parties participate in creating a council to insulate the appointment procedures from undue interference. Often, non-political actors take a role in this council, such as law scholars, bar associations, and human rights activists. The council supervises the appointment process by inviting eligible candidates to submit their applications, interviewing them, and either sending a short list of the most suitable candidates to the executive and legislative powers to appoint who they both agree on, or directly selecting the candidates in a determinative manner. South Africa is a prominent example of a state that applies in this model. Its Judicial Service Commission is composed of executive officials, members of both chambers of parliament, judges, lawyers, and law scholars, and this helped to establish a sense of political investment, with its judgments being widely respected.[57] Another iteration of this model is to require recommendations of candidates from the judicial council at the first formation of the court (i.e selecting the candidates for the first bench ever), while in following appointments, filling vacant chairs in the bench, the constitutional court itself, not the judicial council, nominates candidates to the president. A problem with this model is the ability to compose the council of qualified members, and how to reach an agreement about the criteria for membership, particularly in developing and transitional states.[58]

Last is the multi-constituency model. Mainly to avoid controversy over designing a selection committee, the three powers (with the participation of civic organisations in some variations of this model) engage in the appointment process by having a specified quota of the court's posts.[59] In contrast with the judicial council model, the participants have either direct or indirect authority to

[56] Harding, Leyland and Groppi, 14.
[57] Choudhry and Bass, 'Constitutional Courts," 11.
[58] Harding, Leyland and Groppi, 14.
[59] Ibid 14.

appoint their nominees to the court. If it is direct, participants can appoint their candidates without having to consult or gain the approval of other participants, which allows them to act independently. If it is indirect, participants can either nominate candidates or approve already-nominated ones. Notably, if parliament members do not reach an agreement on candidates, then appointments by them might be delayed. This model could theoretically create a divided panel, since judges might tend to show 'gratefulness' for the institutions that selected them by unjustifiably serving their interests. In Italy, this model has been applied since 1953 and it endorsed a positive sense of political investment in the court's composition.[60] The Turkish Constitutional Court also adopted this model in the constitutional amendments of 2010.[61]

In all these models, judicial appointments must be based on objective criteria. The Special Rapporteur emphasises 'the importance of the establishment and application of objective criteria in the selection of judges, [which] should relate particularly to qualifications, integrity, ability and efficiency'.[62] The International Principles declare that 'selection criteria must not be discriminatory and must embody safeguards against appointments based on partiality or prejudice'.[63] Thus, a merit-based, and not partiality-based, selection process is a prerequisite for appointing qualified judges.

Furthermore, judges must have secure terms of office, which might take the form of long-fixed terms, retirement-age terms, or life-long terms. Most states prefer a long fixed-term of appointment for constitutional judges to ensure more frequent replacements compared to the other two forms, seeking a bench that represents prevailing moral values of the wider public.[64] Allowing renewable terms, especially when such renewals are dependent on legislative or executive approvals, might impinge on the personal independence of the judges. The reason is the possibility of judges' being under pressure to make decisions that unduly

[60] Choudhry and Bass, 12.
[61] Ibid.
[62] *Special Rapporteur on the independence of judges*, [30].
[63] *International Principles on Judicial Independence*, 72.
[64] Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Massachusett: Edward Elgar Publishing, Inc., 2011), 270.

please those from whom they need renewal.[65] Germany, for instance, changed its Federal Constitutional Court's law in 1970, from allowing for renewal of terms by parliament members to non-renewable terms, to eliminate politically-driven approved or refused renewals.[66]

Additionally, promoting judges must be according to non-arbitrary processes, and accepting a judge's resignation must require the involvement of both judicial and executive (or legislative) officials to prevent any forced resignation.[67] Courts must not be abolished or restructured to terminate judicial tenures; and removal procedures, including those of disciplining judges, must be conditional upon the investigation of grave incapacity or misbehaviour under the supervision of judicial institutions. The Universal Charter affirms that '[a] judge must be appointed for life or such other period and conditions, that the judicial independence is not endangered' and '[a] judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure'.[68] Also, the International Principles proclaim that '[t]he determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing'.[69]

2.2. Institutional Independence

Because courts are institutions that serve the public in upholding the rule of law, their administration, operational processes, and managerial procedures must not allow the executive or legislative power to unduly interfere with them. Administering judicial affairs must be shielded from manipulation from the regime.

Additionally, judges must not be rewarded or punished for performing their judicial tasks. Thus, they must avoid any reward from the executive or

[65] Bass and Choudhry, 4.

[66] Donald Kommers, *Autonomy Versus Accountability: The German Judiciary, in Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Virginia: University Press of Virginia, 2001), 148–9.

[67] Ubaid ul–Haq, "Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who Has the Right Idea?" (2010).

[68] *The Universal Charter of the Judge*, art 8.

[69] *International Principles on Judicial Independence,* 56.

legislative powers for a judgment they have made. Most importantly, they must enjoy immunity from punishment or revenge by litigants whose interests have been adversely affected by a judgment. This immunity must also take the form of physical security, through ensuring the safety of judges and their families, especially when threats have been made against them. The Universal Charter states that '[c]ivil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under specific circumstances ensuring that his or her independence cannot be influenced.'[70] Moreover, the International Principles assert that '[a]ll necessary measures should be taken to ensure the safety of judges, such as ensuring the presence of security guards on court premises or providing police protection for judges who may become or are victims of serious threats.'[71]

Furthermore, judges as public officials must refuse to fill roles that are likely to intrude into their performance of judicial duties, such as roles of policy advising for the government or statutory counselling for the Parliament. This issue entwines with judges' personal independence, as accepting such role might cause conflict of interest and lead to biased judgments. Nevertheless, in cases where there is no probability of contradiction between judges duties and a particular role, being appointed to that role is acceptable, such as acting as a member of investigation commission after retirement, or holding an administrative position in the judiciary under the supervision of the judicial power. The Basic Principles confirm that 'judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.'[72] Moreover, the Special Rapporteur asserts 'the importance of the participation of judges in debates concerning their functions and status as well as general legal debates.'[73] Both provisions support that judges be involved in what might strengthen the rule of law and uphold justice in their states, as long as such involvement does not impinge on their independence.

[70] *The Universal Charter of the Judge*, art 7.

[71] *Special Rapporteur on the independence of judges*, [160], citing *Specific standards on the independence of judges, lawyers and prosecutors*, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, Council of Europe.

[72] *Basic Principles of Judicial Independence*, art 8.

[73] *Special Rapporteur on the independence of judges*, [45].

Also, assigning cases to judges must not be in a way that allows the legislative or executive power to choose who should sit on the bench for a certain case. Thus, the docket control must be managed by courts alone to prevent capricious allocation of critical cases to specific judges.[74] Furthermore, transferring judges between courts, and forming judicial benches must be rigid and immune to discretionary control by the executive power. Such immunity might assist in preventing retaliation against judges who pronounce judgments unfavourable to the executive.[75] The Universal Charter declares that the administration of the judiciary 'must be organised in such a way, that it does not compromise the judges' genuine independence'.[76]

Importantly, it is not possible for courts to be completely independent from the legislature, because the latter's approval of the court's budget is required.[77] Thus, it is critical for the judiciary to participate in preparing its budget with the parliament. This participation helps to prevent any coercive financial restrictions against the judiciary and shield the judiciary from any external pressure. Moreover, funding and resourcing of courts must be adequate to facilitate the courts' work, without leaving the executive power to control the allocation of funds to the judiciary. The Special Rapporteur endorses that 'entrusting the administration of funds directly to the judiciary or an independent body responsible for the judiciary is much more likely to reinforce the independence of the judiciary'.[78]

2.3. Procedural Independence

Judges, as umpires, must be authorised to oversee all matters related to the case before them and be free from influence that impinges on the decision-making processes that they conduct on a daily basis. This authorisation may afford them the acceptable amount of discretionary power they need to apply their understanding of the law to the facts.

---

74 Jonathan P Kastellec and Jeffrey R Lax, "Case Selection and the Study of Judicial Politics," *Journal of Empirical Legal Studies* 5, no. 3 (2008), 407.

75 Lydia Brashear Tiede, "Judicial Independence: Often Cited, Rarely Understood," *Journal Contemporary Legal 15* (2006): 129, 136, 79.

76 *The Universal Charter of the Judge*, art 11.

77 Daniel M Klerman, and Paul G Mahoney, "The Value of Judicial Independence: Evidence from Eighteenth Century England," *American Law and Economics Review* 7, no. 1 (2005): 1, 2–3.

78 *Special Rapporteur on the independence of judges*, [43].

Hence, courts must have autonomy to decide whether matters fall within their jurisdiction, in a manner that prevents executive or legislative impingement on the courts' role. By having such comprehensive jurisdiction, courts can obstruct legislative diminution of courts' jurisdiction that Ubaid ul-Haq correctly describes as 'the most effective means through which [executive and legislative] branches could invade the judiciary'.[79] Moreover, Lydia Tiede refers to expanding court's jurisdiction as a purpose of judicial reform:

> [J]udicial reform efforts have focused on providing judges with specific powers to decide certain types of cases which were previously out of the purview of the courts. For example, judicial reform in some former dictatorships, has focused on providing power to civil courts to hear cases once primarily reserved for military courts. Comparatively, the institutionalisation of power and authority of non-elected officials also may enhance independence.[80]

Additionally, the executive power must execute courts' judgments without any changes. Individuals, corporations, commissions, executive agencies, and local governments must comply with courts' judgments, because, in many legal systems, 'the judiciary … has neither the capacity to enforce its will nor the ability to oversee compliance with its instructions'.[81] The Basic Principles and the International Principles uphold that '[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.[82]

For constitutional courts, procedural independence means that the executive power executes the courts' judgments. This element of independence is related to the critical issue of these courts being effective. Admittedly, it is hard to provide a robust definition of an 'effective' constitutional court. As Harding rightly explains:

> Effectiveness has to be judged against original intentions [of establishing the constitutional court], and even here we are unsure whether to take ostensible raison d'être or [pragmatic] reasons: if a constitutional court was set up to

[79] Ul–Haq, "Judicial Independence in Light," 12, 41.
[80] Jodi Finkel, "Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court," *Journal of Latin American Studies* 35, no. 4 (2003): 777.
[81] McCubbins, Noll and Weingast, "Conditions for Judicial Independence."
[82] *Basic Principles of Judicial Independence*, art 3; *International Principles on Judicial Independence,* 22.

> protect a party or policy that might or did lose political power and in fact did so, this might logically be counted an effective court.[83]

He argues against what might be considered a promising approach to solve this difficulty, which is 'to assume that the ostensible purpose is to deter constitutional actors from abusing their position or abusing individual human rights; if we find that in fact they were so deterred because of the prospect of a robust response from the court, we could perhaps conclude there is success'.[84] His counter-argument is that 'even here, how are we to judge the motivation or not of the actors and what standards are we to apply if not those laid down by the court itself?'[85]

This explanation demonstrates how difficult it is to build criteria for assessing a court's degree of effectiveness, as original intentions are hard to identify, and genuine motivations behind the political elites' complicity with a constitutional judgment are even harder to detect.[86] Both challenges impede determining the true impact of constitutional courts. Another incorrect approach is the statistical analysis of judgments, because significant cases for a certain regime could make only a small number of cases compared to the entire caseload of the court.[87] Additionally, significant cases may relate to separate subjects of the court's jurisdiction, and not all courts make their judgments available to the public.[88] Thus, it is incorrect to assess a court's effectiveness according to statistics, as Comella concurs:

> [S]ome laws are more important than others. A court would not be [effective] if it never deviated from the parliament with respect to the key issues, even if it overturned lots of legal provisions of marginal importance … [and] it may very well happen that a parliamentary majority abstains from enacting a particular law out of fear that the court will invalidate it. A strong judiciary may cause this sort of 'chilling effect' on the legislature.[89]

---

[83] Harding, Leyland and Groppi, 23.
[84] Ibid.
[85] Ibid.
[86] Ibid., 9.
[87] Ibid., 8–9.
[88] Alec Stone Sweet, "Constitutional Courts," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 828.
[89] Comella, 272.

Nevertheless, in the normative sense, constitutional courts are established primarily to ensure adherence to the constitution, by holding the state powers accountable and upholding the constitution's supremacy over legislation, leading to 'effective implementation of constitutional rules'.[90] This is the normative purpose of establishing a constitutional court, and a court is considered effective to the extent it correctly performs that fundamental function and pronounces judgments that are 'consistent with the norms set out in the constitution'.[91] Therefore, for a constitutional court to be effective, it should make use of available opportunities to fulfil 'the specific purpose of protecting the constitution', which may be facilitated by adopting a purposive rather than a literalist approach in adjudication.[92]

A suitable approach to assess a certain constitutional court's effectiveness might be that proposed by Sweet, because, as the following benchmarks suggest, effectiveness should be assessed on a case-by-case basis, taking into consideration the differences between cases' subjects and the political tensions present at submission time:[93]

First, critical constitutional objections should be regularly submitted to the constitutional court. This issue is mainly dependent on available avenues to access the court, which will be explained shortly.

Second, and the most important, constitutional judgments should be strongly-reasoned and logically-justified. A court that makes decisions that are criticised by constitutional jurists as being rationally absurd or lacking cogency would give rise to questions about its competence or motivation.[94] Assessing a court's arguments is subject to many factors such as: the record of the judgments it has issued, the constitutional heritage of its predecessor (if any), the purposes that the court was established to fulfil, the sort of the review conducted by the court (whether abstract or concrete), and more importantly the nature of

[90] Chen and Maduro, 97.
[91] See especially Harding, Leyland and Groppi, 4–5, 24.
[92] Victor Ferreres, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism," *Texas Law Review* 82 (2003), 1705, 1711.
[93] Sweet, 825.
[94] Harding, Leyland and Groppi, 22.

the state's constitution itself, since the constitution is the core reference in the review process.[95]

Third, the court's decisions should be perceived as having binding effect on those subject to its jurisdiction. If a regime acts contrary to a court's decisions when its interests are at risk, then the binding effect of the court's judgments is undermined. For some regimes, maintaining control, punishing political enemies, and rewarding allies are far more important than showing obedience to the constitutional court's judgments.[96]

To elaborate on the first benchmark, and since most constitutional courts have filtering competence to choose what cases to be heard, i.e. who can submit a request to the court, the rules of access to such courts becomes a factor in assessing courts' effectiveness. Generally, there are four avenues to access constitutional courts.

First, direct, original action (or petition). This action is submitted by a person (whether legal or natural) who might be aggrieved — or was in fact aggrieved as some legal systems require — by the application of a certain law, seeking direct challenge of its constitutionality. This action is distinguished for its independent feature, since the fact of being aggrieved by the application of the law suffices as an acceptable reason to submit this sort of action.[97] The constitutional court starts by examining whether the grievance, claimed by the submitter, is possible, or actual, and caused by the challenged law. If that is found true, then the submitter is considered as having an 'interest' in this action, and the constitutional court proceeds to assess the consistency between the constitution and the challenged law.

This avenue is different from that of limiting direct, original access to certain executive or legislative officials, who have standing without aggravation, such as the president, the prime minister, a specified number of parliament members,

[95] Juliane Kokott, and Martin Kaspar, "Ensuring Constitutional Efficacy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 805–11.
[96] Sweet, 825.
[97] Harding, Leyland and Groppi, 9.

or a human rights agency.[98] This action is considered the most efficient avenue of constitutional review, since it has minimal procedures compared to the other three avenues, which assists the constitutional court to achieve prompt constitutional stability in the legal system.

This avenue of constitutional review is consistent with the positive constitutional right that some systems provide for every citizen, namely the right to have access to the specialised court and enjoy equality before the judiciary.[99] Nevertheless, some states do not allow for this action, for example, the Constitutional Council in France.[100] Additionally, many other constitutional courts confine this action only to individual rights violations, for example, the German and Spanish Constitutional Courts.[101]

The second avenue is subsidiary referral conducted by ordinary courts when judges perceive a serious possibility of unconstitutionality concerning a certain legislative provision.[102] Here, judges *sua sponte* (i.e. without the request of the parties) suspend the litigation and refer the issue of unconstitutionality to the constitutional court.[103] The importance of this avenue lies in enabling the judges themselves to refer legislative provisions that are potentially unconstitutional to the constitutional court without a request from a disputing party, allowing ordinary judges to participate in maintaining the constitutional consistency of the legal system.[104]

The third avenue is the adversary's rebuttal. The rebuttal is conducted upon a request from a disputing party to the ordinary court, in which that party challenges the constitutionality of a certain legislative provision that the court expresses its intention to apply in the dispute. In contrast to the previous avenue, the rebuttal cannot be *sua sponte* initiated by the judge.[105] If the ordinary court found this rebuttal serious and worthy of constitutional assessment, then it is

98 Andrew Harding, "The Fundamentals of Constitutional Courts" (International IDEA, April 2017), 5.
99 Comella, 267.
100 Ibid.
101 Comella, 267; Sweet, "Constitutional Courts," 828.
102 Harding, "The Fundamentals of Constitutional Courts."
103 Harding, Leyland and Groppi, 9.
104 Comella, 267.
105 Andrew Harding, "The Fundamentals of Constitutional Courts," 5.

obliged to suspend the litigation, as it is the duty of the judge not to apply legislative provisions that appear to be unconstitutional.[106] Then, the judge allows the adversary to request, within a defined period, the constitutional court's assessment of the challenged law. If the period expires without the adversary submitting the request, then the ordinary court continues with the procedures of the original dispute and disregards any further objections from the same adversary regarding that legislative provision.[107]

The fourth avenue is confrontation by the constitutional court itself, which takes place while the constitutional court is adjudicating on a constitutional dispute presented to it through one of the three avenues mentioned above, or while answering a request to interpret a constitutional or a legislative text. If the court realises that another legislative provision, relevant to the original dispute is unconstitutional, then it has the right to *sua sponte* review it.[108] The confrontation is a matter that asserts the comprehensive jurisdiction of the constitutional court on all laws even if they are not directly challenged by a certain person or entity.[109]

In conclusion, these four avenues provide constitutional courts with regular review of laws, but the vital benchmark of those explained above is to have strongly-reasoned and well-argued judgments.

III. DE JURE AND DE FACTO INDEPENDENCE

The importance of differentiating between *de jure* and *de facto* judicial independence arises from the fact that writing constitutional provisions and enacting laws to protect the judiciary do not necessarily result in a *de facto* independent judiciary.[110]

I begin with the definition of de *jure* independence. Rios-Figueroa and Staton define it as 'formal rules designed to insulate judges from undue pressure, either

[106] Harding, Leyland and Groppi, 9.
[107] Comella, 267.
[108] Ibid., 268.
[109] Ibid.
[110] Hayo and Voigt, "Explaining De Facto Judicial Independence."

from outside the judiciary or from within'.[111] Examples of such rules are those related to judicial appointment and removal procedures, tenure, inspection, and budget. These rules may be contained in the constitution itself or in statutes (enacted under the authority of the constitution) that establish and regulate the courts. Similarly, Linzer and Staton define *de jure* independence as 'a set of formal institutions [reflected in law] —such as fixed budgets or cumbersome removal procedures— that are thought to provide incentives for independent judging'.[112]

The principles explained above about the elements of judicial independence (personal, institutional, and procedural) seek to achieve *de jure* independence, in order to reach *de facto* independence, since the former is a necessary but not sufficient condition for the latter. These principles include the notions that judicial appointments must be based on qualification and merits; that judges must refuse to fill roles that may impinge on their judicial duties; and that courts must have autonomy to decide whether matters fall within their jurisdiction.[113]

De facto independence can be measured by two distinct, yet related, criteria: autonomy and influence.[114] Autonomy means that 'judges be the authors of their own opinions',[115] and that they do 'not respond to undue pressures to resolve cases in particular ways'.[116] Stated otherwise, judges are independent in the sense of autonomy when their decisions reflect their own application of the law, and when what they think sincerely about the dispute before them determines their judgment.[117]

In comparison, influence means that a court's decisions are 'enforced in practice even when political actors would rather not comply', instead of being

[111] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 2008).

[112] Drew A. Linzer and Jeffrey K. Staton, "A Global Measure of Judicial Independence," *Journal of Law and Courts* 3, no. 2 (2015), 223, 225.

[113] Charles D Crabtree and Christopher J Fariss, "Uncovering Patterns among Latent Variables: Human Rights and Judicial Independence" *Research & Politics* 2 (2015): 1, 2.

[114] Clifford J. Carrubba and Christopher Zorn, "*Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*," *Journal of Politics* 72, no. 3 (2010): 812, 822–3.

[115] Kornhauser, "Is Judicial Independence a Useful Concept?"

[116] Ibid., 45–55. See Epperly, "Political Competition," 279; Rosenn S. Keith, "The Protection of Judicial Independence in Latin America," *The University of Miami Inter–American Law Review* 19, no. 1 (1987): 1, 3–35.

[117] Frans Van Dijk, Frank van Tulder and Ymkje Lugten, "Independence of Judges: Judicial Perceptions and Formal Safeguards," *Netherlands Council for the Judiciary* 4 (2016); Charles Crabtree and Michael J. Nelson, "New Evidence for a Positive Relationship between De Facto Judicial Independence and State Respect for Empowerment Rights," *International Studies Quarterly* 61, no. 1 (2017): 210.

routinely ignored or poorly implemented.[118] Hamilton et al argue that courts depend on the assistance of other political authorities to enforce their decisions because they lack financial or physical means of coercion.[119] According to Cameron, judicial independence in this sense reflects a causal relationship between how judges 'think the underlying conflict they are adjudicating should be resolved and how it is resolved in practice'.[120]

The criterion that is most relevant to this thesis is autonomy, because in order to assess the court's *de facto* independence through the criterion of influence, a degree of discontent by the regime with what the court decides is required, in order to see whether the regime prioritises obeying the court over maintaining its authoritarian interests or not. This is not present in the case of the West Bank regime. As highlighted in the introduction, 27 out of 36 judgments were in favour of the regime, and the rest were irrelevant to its interests.

Rios-Figueroa, Linzer, and Staton affirm that assessing *de facto* independence is a challenging task because of the difficulty of isolating lack of autonomy as the principal reason why a judge has acted in a particular way.[121] Other reasons for issuing judgments that are in favour of the regime include, but are not limited to, the relevant legal texts being unclear or not supporting decisions against the regime, poor quality argument before the Court due to the incompetence of counsel, or incompetence on the part of judges themselves.[122]

However, this thesis, through the methodology it adopts (which is explained in its introduction), provides compelling evidence that the problem with the Court's judgments lies in poor argumentation and ill justification of decisions.

[118] Ibid., See Daniel M Brinks, and Abby Blass, "Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice," *International Journal of Constitutional Law* 15, no. 2 (2017): 296, 304.

[119] Ibid.; see Jeff Yates, Andrew B. Whitford and David Brown, "Perceptions of the Rule of Law: Evidence on the Impact of Judicial Insulation," *Social Science Quarterly* 100, no. 1 (2019):198.

[120] Cameron, "Judicial Independence," 134–43.

[121] Kirk A Randazzo, Douglas M Gibler and Rebecca Reid, "Examining the Development of Judicial Independence," *Political Research Quarterly* 63, no. 3 (2016): 583, 587; Frans Van Dijk and Geoffrey Vos, "A Method for Assessment of the Independence and Accountability of the Judiciary," *International Journal for Court Administration* 9, no. 1 (2017): 1, 6.

[122] See Van Dijk and Philip, "Reaction on the Comments."; Bernd Hayo and Stefan Voigt, "The Long–Term Relationship between *De Jure* and *De Facto* Judicial Independence," *Economics Letters* 183, no. 1 (2019); Clifford J Carrubba et al, *The Comparative Law Project* (Emory University, 2015); Helmke, Gretchen, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2012).

This is hard to accept from the judges of a constitutional court, particularly considering the high level of expertise and long years of experience that those judges supposedly have. The criticism of the 36 judgments of the Court is not targeted to what counsel argued, or how clear the relevant legal texts were. Rather, it is against the Court's arguments and justifications used to reach the conclusion in each judgment.

States are obliged to guarantee a *de facto* independent judiciary because 'compliance [with judicial independence rules] is the normal organisational presumption'.[123] Also, Martha Finnemore and Kathryn Sikkink argue that the reason for that obligation is the basic rule *pacta sunt servanda,* i.e. the social contract between the people and their rulers. Therefore, they consider guaranteeing *de facto* independence as an integral element of the state's legitimacy.[124]

The emphasis on *de facto* independence comes from the observation that global norms are becoming more influential, and that it is only a matter of time before more states ostensibly adopt constitutional methods to protect the judiciary, even if not in the practical realm. In other words, because of the influence of these methods in distinguishing between democratic and authoritarian regimes; the latter are more likely to adopt these methods without having the capacity or readiness to truly implement them. As a result, such incapacity will cause 'decoupling between promise and practice.[125]

Tsutsui and Hafner-Burton emphasise that the adoption of those methods might regularly take the form of 'a symbolic gesture to signal that the government is not a deviant actor'.[126] Both authors contend that, in some international treaties of human rights, if 'the legitimacy of a treaty grows to the extent that non-ratifying states look like deviants, governments are more likely to ratify

[123] Beth A Simmons and Richard H Steinberg, *International Law and International Relations: An International Organization Reader* (Cambridge University Press, 2007).

[124] Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, (Massachusetts Institute of Technology Press, 1998), 903–4.

[125] Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* (London: Sage Publications, 1999), 145.

[126] Emilie M Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises* (Chicago: University of Chicago Press, 2005).

without willingness or capacity to comply with the provisions, thus increasing the likelihood of decoupling'.[127]

De facto independence of constitutional courts relates primarily to their legitimacy. Because constitutional review could result in nullifying legislation based on unconstitutionality, such nullification might be objected to as an undemocratic decision, because constitutional courts consist of unelected judges, as opposed to the legislator who is an elected representative of the people.[128]

To face this objection, constitutional courts need to establish and maintain their own legitimacy. This can be achieved through demonstrating robust reasoning in their judgments and paying special attention to the interpretative method applied when dealing with constitutional texts. Most importantly, these decisions must be available to the public for reasons such as criticism, transparency, and legal education. Amongst the most used methods of interpretation are: contextual, textual, historical, intention-related, and purpose-related interpretations. Through these methods, constitutional courts substantiate arguments to justify their judgments.

To elaborate, if a court is demonstrating an illogical, unpersuasive interpretation of the constitution, then it is highly expected to be politically biased and even arbitrary.[129] There is no 'perfect' interpretive mode that a constitutional court can consider; rather, the judicial review style and judicial tradition play a role in shaping a suitable interpretive model.[130] For example, constitutional courts in the common law system issue precedents that are binding upon all courts, with prospective (and sometimes retroactive) effects that make their legal impact at the same level as a law.

In civil law systems, courts sometimes provide basic, sparse reasoning in their judgments. Harding and Leyland affirm that judgments of civil law courts

[127] Oona A Hathaway, "Do Human Rights Treaties Make a Difference?" (Faculty Scholarship Series Paper No. 839, Yale Law School, January 2002); Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington, D.C: Georgetown University Press, 2005).

[128] Chen, Albert H Y and Miguel Pioares Maduro, "The Judiciary and Constitutional Review," in *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner and Cheryl Saunders (Abingdon: Taylor and Francis, 2013), 103.

[129] Harding, Leyland and Groppi, 22.

[130] Chen and Maduro, 103.

generally 'do not engage with the arguments presented or those referred to by other judges or in other cases dealing with similar issues, especially those with which the judge presumably disagrees; they fail in general terms to justify the decisions taken; holdings are binding but not the reasoning'.[131] Thus, a more explained reasoning of the conclusion they reach is required in every judgment to demonstrate a robust adjudication process.

IV. CONCLUSION

In conclusion, this Article has delved into the establishment of a comprehensive set of criteria for assessing the de jure independence of constitutional courts. Recognizing the significance of judicial independence in upholding the rule of law, protecting individual rights, and ensuring democratic governance, this study has aimed to provide a framework that enables an objective evaluation of the independence of constitutional courts worldwide.

By employing methods of conceptual and doctrinal analysis, this Article has identified three key elements of de jure judicial independence: personal, institutional, and procedural. These elements serve as the foundation for the developed criteria, which encompass various dimensions of a constitutional court's functioning.

The criteria presented in this Article offer a multidimensional approach to assessing the independence of constitutional courts. They encompass the composition of the court, including the appointment and removal processes, the tenure of judges, the court's jurisdiction and access to justice, as well as its overall effectiveness and administrative matters. By examining these aspects in detail, it becomes possible to ascertain the extent to which a constitutional court operates independently from external interference.

Moreover, this Article has emphasized the importance of distinguishing between de jure and de facto judicial independence. While constitutional provisions and laws are necessary for establishing de jure independence, they

[131] Harding and Leyland, "Constitutional Courts of Thailand and Indonesia," 333.

do not automatically guarantee its practical realization. Therefore, the developed criteria not only take into account the formal legal framework but also consider the actual functioning and effectiveness of the court in practice.

By providing a comprehensive and structured framework for assessing de jure independence, this Article aims to contribute to the promotion of an impartial and effective judiciary worldwide. It is hoped that the criteria outlined herein will facilitate discussions, research, and reforms in the field of judicial independence, ultimately strengthening the rule of law and upholding democratic principles in diverse constitutional contexts.

BIBLIOGRAPHY

Bass, Katherine Glenn and Sujit Choudhry. "Constitutional Review in New Democracies." International IDEA, 2013.

Brennan, Gerard. "Judicial Independence," High Court of Australia. <http://www.hcourt.gov.au/assets/publications/speeches/former–justices/brennanj/brennanj_ajc.htm>.

Brinks, Daniel M and Abby Blass. "Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice." *International Journal of Constitutional Law* 15, no. 2 (2017).

Burbank, Steven B. and Barry Friedman. "Reconsidering Judicial Independence." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman. Los Angeles: Sage Publications Inc., 2002.

Carrubba, Clifford J. and Christopher Zorn. "*Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*." *Journal of Politics* 72, no. 3 (2010): 812, 822–3.

Crabtree, Charles D and Christopher J Fariss. "Uncovering Patterns among Latent Variables: Human Rights and Judicial Independence." *Research & Politics* 2 (2015): 1, 2.

Cameron, Charles M. "Judicial Independence: How Can You Tell It When You See It? And, Who Cares." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Steven B. Burbank and Barry Friedman (Sage Publications Inc., 2002), 134.

Chen, Albert H Y and Miguel Pioares Maduro. "The Judiciary and Constitutional Review." In *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner and Cheryl Saunders. Abingdon: Taylor and Francis, 2013.

Choudhry, Sujit and Katherine Glenn Bass. "Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence." Center for Constitutional Transitions at UNY Law and International Institute for Democracy and Electoral Assistance, 2014, 10.

Comella, Victor Ferreres. "The Rise of Specialized Constitutional Courts." In *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon. Massachusett: Edward Elgar Publishing, Inc., 2011.

Despouy, Leandro. "Special Rapporteur." Report of the Special Rapporteur on the Independence of Judges and Lawyers, GA 11th sess, Agenda Item 3, UN Doc A/HRC/11/41 (24 March 2009).

Epperly, Brad. "Political Competition and De Facto Judicial Independence in Non-Democracies." *European Journal of Political Research* 56, no. 2 (2017).

Ferreres, Victor. "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism." *Texas Law Review* 82 (2003), 1705, 1711.

Finkel, Jodi. "Supreme Court Decsisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court." *Journal of Latin American Studies* 35, no. 4 (2003).

Finnemore, Martha and Kathryn Sikkink. *International Norm Dynamics and Political Change*. Massachusetts Institute of Technology Press, 1998.

Fiss, Owen. *The Law as it Could Be*. NewYork University Press, 2003.

Friedland, Martin L.Canadian Judicial Council. *A Place Apart: Judicial Independence and Accountability in Canada: A Report Prepared for the Canadian Judicial Council*. 1995.

Harding, Andrew. "The Fundamentals of Constitutional Courts" (International IDEA, April 2017), 5**.**

Harding, Andrew, Peter Leyland and Tania Groppi. "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective." In *Constitutional Courts: A Comparative Study*, ed. Andrew Harding and Peter Leyland. Londong: Wildy, Simmonds & Hill, 2009.

Hayo, Bernd and Stefan Voigt. "Explaining De Facto Judicial Independence." *International Review of Law and Economics* 27, no. 3 (2007).

Hayo, Bernd and Stefan Voigt. "Explaining Constitutional Change: The Case of Judicial Independence." *International Review of Law and Economics* 48, no. 1 (2016): 1, 5.

Hayo, Bernd and Stefan Voigt. "The Long–Term Relationship between *De Jure* and *De Facto* Judicial Independence." *Economics Letters* 183, no. 1 (2019).

Hilbink, Lisa. "The Origins of Positive Judicial Independence." *World Politics* 64, no. 4 (2012): 587.

Helmke, Gretchen and Frances Rosenbluth. "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review of Political Science* 12 (2009).

Howard, Robert M. and Henry F. Carey. "Is an Independent Judiciary Necessary for Democracy?" *Judicature* 87, no. 6 (2004): 284.

"International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors" (International Commission of Jurists, 2007).

Hafner-Burton, Emilie M and Kiyoteru Tsutsui. *Human Rights in a Globalizing World: The Paradox of Empty Promises*. Chicago: University of Chicago Press, 2005.

Hathaway, Oona A. "Do Human Rights Treaties Make a Difference?" Faculty Scholarship Series Paper No. 839. Yale Law School, January 2002.

Jackson, Donald. "Judicial Independence in Cross–National Perspective." In American Bar Association, *Judicial Independence: Essays, Bibliography, and Discussion Guide*. 1999, 27.

Kastellec, Jonathan P and Jeffrey R Lax. "Case Selection and the Study of Judicial Politics." *Journal of Empirical Legal Studies* 5, no. 3 (2008).

Keith, Linda Camp. *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* (London: Sage Publications, 1999).

Kokott, Juliane and Martin Kaspar. "Ensuring Constitutional Efficacy." In *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012).fh

Kommers, Donald. *Autonomy Versus Accountability: The German Judiciary, in Judicial Independence in the Age of Democracy: Critical Perspectives from around the World.* Virginia: University Press of Virginia, 2001.

Kornhauser, Lewis A. "Is Judicial Independence a Useful Concept?" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Steven B. Burbank and Barry Friedman. Los Angeles: Sage Publications Inc., 2002).

Larkins, Christopher. *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis.* The American Society of Comparative Law, 1996.

Linzer, Drew A. and Jeffrey K. Staton. "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence." Paper presented at The Annual Meeting of the American Political Science Association, Seattle, September 2011.

Linzer, Drew A. and Jeffrey K. Staton. "A Global Measure of Judicial Independence." *Journal of Law and Courts* 3, no. 2 (2015).

Macdonald, Roderick A. and Hoi Kong. "Judicial Independence as a Constitutional Virtue." In *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó. Oxford: Oxford University Press, 2012.

McCubbins, Mathew D., Roger Noll and Barry R. Weingast. "Conditions for Judicial Independence." *Journal of Contemporary Legal Issues* 15 (2006).

Melton, James and Tom Ginsburg. "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence." *Journal of Law and Courts* , no. 2 (2014): 187, 187–8.

Plank, Thomas E. "The Essential Elements of Judicial Independence and the Experience of Pre–Soviet Russia." *William & Mary Bill Rights Journal 5, no. 1* (1996).

Randazzo, Kirk A, Douglas M Gibler and Rebecca Reid. "Examining the Development of Judicial Independence." *Political Research Quarterly* 63, no. 3 (2016).

Ríos–Figueroa, Julio and Jeffrey K. Staton. "An Evaluation of Cross–National Measures of Judicial Independence." *Journal of Law, Economics, and Organization* 30, no. 1 (2012).

Russell, Peter and David O'Brien. *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World, Constitutionalism and Democracy*. Charlottesville: University Press of Virginia, 2001.

Simmons, Beth A and Richard H Steinberg. *International Law and International Relations: An International Organization Reader*. Cambridge University Press, 2007.

Sweet, Alec Stone. "Constitutional Courts." In *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012).

Tarr, G. Alan. *Without Fear or Favour: Judicial Independence and Judicial Accountability in the States*. Stanford University Press, 2012.

Tiede, Lydia Brashear. "Judicial Independence: Often Cited, Rarely Understood." *Journal Contemporary Legal Issues* 15 (2006): 129, 136.

The Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999 art 1.

Ul–Haq, Ubaid. "Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who Has the Right Idea?" 2010. http://works.bepress.com/ubaid_ul_haq/3/.

UN Doc A/CONF.121/22/Rev.1 (26 August–6 September 1985) art 1 (*Basic Principles of Judicial Independence*).

UN Human Rights Committee, General Comment No. 32: *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [3].

Van Dijk, Frans and Geoffrey Vos. "A Method for Assessment of the Independence and Accountability of the Judiciary." *International Journal for Court Administration* 9, no. 1 (2017).

Yates, Jeff, Andrew B. Whitford and David Brown. "Perceptions of the Rule of Law: Evidence on the Impact of Judicial Insulation." *Social Science Quarterly* 100, no. 1 (2019):198.

Zeitune, José. "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors." Paper, International Commission of Jurists, 2004. https://www.icj.org/wp-content/uploads/2012/04/icj_independence_of_judiciary_guide_2004.pdf.

Constitutional Review, Volume 10, Number 1, May 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1018

The Vocabulary of Right Under the Indonesian Constitution: A Hohfeldian Analysis

Adis Nur Hayati[*]
The National Research and Innovation Agency of the Republic of Indonesia (BRIN)
adis011@brin.go.id

Dewi Analis Indriyani[**]
The National Research and Innovation Agency of the Republic of Indonesia (BRIN)
dewi043@brin.go.id

Nurangga Firmanditya[***]
Universitas Indonesia, Faculty of Law
nurangga.firmanditya@ui.ac.id

Harison Citrawan[****]
The Pennsylvania State University, Dickinson Law
hmc5713@psu.edu

Received: 28 October 2022 | Last Revised: 3 October 2023 | Accepted: 16 January 2024

Abstract

This article demonstrates how the Indonesian Constitutional Court interprets the term 'right' when deciding issue-level questions involving constitutional doctrine. In doing so, we employ the Hohfeldian scheme that configures right into four different meanings of claim right, privilege, power, and immunity. By looking at the molecular configuration of rights in the context of freedom of religion, natural resource control, educational policies, and fair trial, this we contend that the right under the constitution is interpreted by the Court in a dynamic-yet-configured fashion. In this sense, 'dynamic' implies that the Court's interpretation does not adhere to a fixed or consistent vocabulary, while 'configured' suggests that the vocabulary of right is fundamentally configured

[*] Researcher at the National Research and Innovation Agency of the Republic of Indonesia.
[**] Researcher at the National Research and Innovation Agency of the Republic of Indonesia.
[***] Master of Laws Program of 2022. Researcher at the National Research and Innovation Agency of the Republic of Indonesia.
[****] SJD Class of 2023. Researcher at the National Research and Innovation Agency of the Republic of Indonesia.

by both (1) non-relational liberty and (2) power that provides intervention, limitations, or even change over the nature of liberty into liability (i.e., duty to refrain from acting in a certain way). It is manifest that right is hardly expounded by the Court when the term is juxtaposed with any relevant governmental duties and powers. This demonstrates a judicial fabrication of a flexible legal concept used by the judicial authority to justify certain normative objectives.

Keywords: Constitution; Hohfeld; Interpretation; Legal Concept; Right

I. INTRODUCTION

The word 'right' (*hak*) has been one of the major discourses in constitutional review adjudication in Indonesia. Say, for instance, what are the limits of right to religious practices, does *adat* or traditional people have the right to communal resources,[1] does the President has a prerogative right to elect a vice minister,[2] and so on. In practice, constitutional review cases have been much dealing with the ways the Constitutional Court interprets the legal concept of (human) rights (*hak asasi manusia*) enshrined under Article 28 of the 1945 Constitution. Moreover, the use of right, seen as a fundamental legal concept, is at some point intertwined with other ideas such as need (*kebutuhan*) and interest (*kepentingan*)—e.g., acknowledged by the Court as a condition to prove legal standing of a constitutional claim.[3] While the interpretation of right seems prevalent in the Court's constitutional reasoning, an analytic examination on the rather pliable use of the vocabulary is important.

This article is interested in understanding the use and interpretation of the word *right* by the Constitutional Court in several constitutional review decisions in Indonesia.[4] Our focus is to zoom in the ways the Court interprets right and the extent to which the right is being protected under the constitution—e.g., should we understand one's *right* to exercise her religion and belief equivalent

[1] Constitutional Court, Decision no. 35/PUU-X/2012 (2013).
[2] Constitutional Court, Decision no. 80/PUU-XVII/2019 (2019).
[3] Constitutional Court, Decision no. 006/PUU-III/2005 (2005); Constitutional Court, Decision no. 11/PUU-V/2007 (2007).
[4] Malika Rajan Vasandani, Dwi Putra Nugraha, and Susi Susantijo, "Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution," *Constitutional Review* 8, no. 1 (May 2022): 62, http://dx.doi.org/10.31078/consrev813; Stefanus Hendrianto, "Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia," *Constitutional Review* 6, no. 2 (December 2020): 241, http://dx.doi.org/10.31078/consrev623; Andy Omara, "Enforcing Nonjusticiable Rights in Indonesia," *Constitutional Review* 6, no. 2 (December 2020): 311.

to her *liberty* to proselytize?[5] In answering this inquiry, we borrow from Wesley Hohfeld's scheme of right as an approach that denounces the equivocal use of right.[6] Based on this scheme, we can identify four kinds of entitlement that lawyers somewhat obfuscate one from another. These are including claim-rights (or rights 'in the strictest sense'), privileges (or liberties), powers, and immunities.[7]

Suggested by the Hohfeldian framework of right, this study examines the molecular configuration of constitutional rights in the context of freedom of religion, natural resources, education policies, and fair trial.[8] We contend that the judges' interpretation of right is dynamic-yet-configured in a way that they tried to balance the communitarian and the liberal interpretation of rights.[9] Specifically, it is suggested that *right* as a legal concept under the constitution is hardly expounded by the Court when it is juxtaposed with any relevant governmental duties and powers. This phenomenon tends to demonstrate a judicial fabrication of a flexible legal concept used by the judicial authority to justify certain normative objectives.[10]

This study particularly focuses on three issues related to the scheme: (1) right deriving from primary rights or non-directed duties, (2) right as a form of non-relational liberty, and (3) right as a form of relation. Admittedly, there are certain problems with Hohfeld's scheme in its own right insofar as it is read all-inclusive and capable of encompassing all jural relations. Our investigation suggests that the scheme is inadequate in explaining the configuration of right to interpret and exercise religious teachings, right to free education, duty to respect right to fair trial, and the state's right to resource control (*hak menguasai negara*). As

5 Muchamad Ali Safa'at, "The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations," *Constitutional Review* 8, no. 1 (May 2022): 113.

6 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays* (New Haven: Yale University Press, 1923).

7 Ibid.

8 Important to note that these contexts should not be seen as units of analysis. Rather, we tend to view those cases as exemplars of reasoning, based on which we attempt to understand the configurations of right in the Court's practices.

9 On balancing theory, see Robert Alexy, "Discourse Theory and Fundamental Rights," in *Arguing Fundamental Rights*, ed. Agustín José Menéndez and Erik Oddvar Eriksen (Dordrecht: Springer, 2006), 15–30.

10 Lee Epstein and Keren Weinshall, *The Strategic Analysis of Judicial Behavior: A Comparative Perspective* (Cambridge: Cambridge University Press, 2021); Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 2018).

we will observe, the scheme requires adjustments in order to adequately explain some jural relations under the Constitution.

Working under the legal hermeneutic tradition, this article aims to contribute to the discourse of rights meaning-making process in the context of constitutional law practice in Indonesia.[11] By understanding the constitutional reasoning of right, we can apprehend a clear and distinctive set of vocabularies that can better explain legal relations, particularly amidst the popular instrumentalization of the vocabulary of right in the many constitutional inquiries in the country. At a conceptual level, we also aim to contribute to the current conversation pertaining to the instrumentality of the Hohfeldian scheme in the public law context. We, nonetheless, limit the descriptive analysis to the hermeneutical aspect of the Court's decision without necessarily attaching a particular normative judgment to the description. Furthermore, our analysis is not intended to illustrate the so-called 'strategic behavior' of the judges in interpreting rights in a sense that our latter claim—about the proper balance between the communitarian and the liberal interpretation of rights—should be read restrictively not as a normative claim.[12]

This article is organized into three parts. *First*, it outlines the underlying approach regarding *right* as both a practice of semantic and a legal concept. By sketching the issue from the Hohfeldian framework of rights, and supplemented by several contemporary discussions and modifications, this article situates the talks about right not only as a matter of semantic question but also conceptual one. *Second*, this article examines four areas of case exemplars based on which we will draw the configuration of right as reasoned by the Court. Here, we focus on examining the molecular configuration of right as discussed in each of the thematic constitutional review cases. *Third*, from the cases examination, we later argue that the judges' interpretation of right is rather dynamic-yet-configured in a way that they tried to balance the communitarian and the liberal interpretation of rights.

[11] Carel Smith, "The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor," *Erasmus Law Review* 4 (2011): 21; Brian Bix, "HLA Hart and the Hermeneutic Turn in Legal Theory," *Southern Methodist University Law Review* 52 (1999): 167.

[12] On strategic judgment, see Epstein and Weinshall, *The Strategic Analysis*.

II. RIGHT AS A LEGAL CONCEPT

It is a common discourse in Indonesian legal practice that the word right (*hak*) is intertwined with duty or obligation (*kewajiban*).[13] The typical reading of right is that it is *something that we ought to get, receive or accept*, while duty or obligation is simply *something that we ought to do or act.* This kind of reading is underpinned by the idea of correlative fairness, meaning that in justifying fairness legal actors must navigate and put right and obligation in balance, to the extent that in finding such a balance they usually enact the principles of proportionality (*proporsionalitas*) and reasonableness (*kepantasan*).[14]

In this section, we situate the vocabulary of right into the inseparable nature of the semantic and the conceptual.[15] To wit, right as a semantic practice simply means that it posits certain semantic significance when used in legal statements, for instance rights as stated by courts or written under the law. Meanwhile, right as a legal concept can be seen as a set of categories composed of theoretical constructs which have legal, moral, and ethical posture.[16] That being the case, the structure of our theoretical underpinning is grounded on Hohfeld's concern regarding right as a legal concept. According to Hohfeld, the word *right* used in legal practice is ambiguous and it tends to be injudiciously applied as a reference to entitlement of any kind. He then pointed out that *right* actually has four different meanings (and uses) as in: (1) right in the strictest sense (or claim right), (2) privilege (or liberty), (3) power, and (4) immunity. Hohfeld did not squarely describe the definitions of these concepts. Instead, he explained

[13] Majda El-Muhtaj, *Hak Asasi Manusia dalam Konstitusi Indonesia [Human Rights in the Indonesian Constitution]* (Jakarta: Kencana, 2015); Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia [Indonesian Constitution and Constitutionalism]* (Jakarta: Sinar Grafika, 2021).

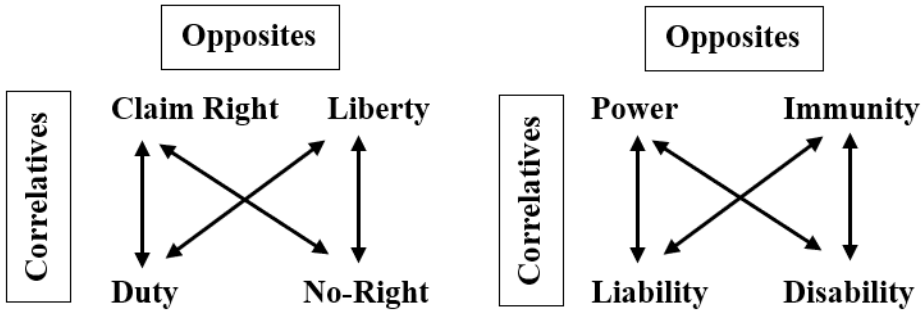
[14] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015); David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (London & New York: Routledge, 2014); Alexy, "Discourse Theory and Fundamental Rights."

[15] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); Roy Andrew Partain, "Creating Rights, Terminating Rights, Overcoming Legal Conflicts," *Constitutional Review* 8, no. 2 (December 2022): 215.

[16] George Andreopoulos and Zehra F Kabasakal Arat, "On the Uses and Misuses of Human Rights: A Critical Approach to Advocacy," in *The Uses and Misuses of Human Rights* (New York: Springer, 2014), 1–27; Ronald Holzhacker, "Gay Rights Are Human Rights: The Framing of New Interpretations of International Human Rights Norms"," in *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy*, ed. George Andreopoulos and Zehra F. Kabasakal Arat (New York: Palgrave Macmillan, 2014), 29–64.

the definitions by showing the ways each of these concepts can be analyzed through a diametrical scheme of 'opposites' and 'correlatives' jural relations.[17] The following diagram shows the jural relations between those concepts.

Figure 1. Hohfeldian's Scheme



A brief description of each concept should be helpful at the moment. *First*, a claim right is a right correlated with the duties of others.[18] As for duty, Hohfeld mentioned that it is "that which one ought or ought not to do."[19] Current understanding of duty, however, is certainly more sophisticated than this. Relevant to this, we can borrow from Curran who aptly writes that "[t]hese duties consist in either refraining from actions that would impede the right holder in her exercise of the right or, sometimes, of performing actions that will give the right holder the thing she has a right to or help her to have or do the thing she has a right to."[20] That is, we may state that if A promises B to pay ten thousands rupiahs, therefore, A has a duty to give B ten thousands rupiahs. In turn, B has a claim right against A to get ten thousands rupiahs. B's claim and A's duty correlates and B's claim right entails A's duty. The reason why claim-right and duty are

[17] Luís Duarte D'Almeida, "Fundamental Legal Concepts: The Hohfeldian Framework," *Philosophy Compass* 11, no. 10 (2016): 555.
[18] Eleanor Curran, "Hobbes's Theory of Rights – A Modern Interest Theory," *The Journal of Ethics* 6 (2002): 63–86.
[19] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 23, no. 1 (1913): 16–59.
[20] Curran, "Hobbes's Theory of Rights."

correlated is because they describe two sides of one relationship.[21] It should be noted that claim rights concern actions or omissions by someone else.[22] However, while claim right and duty is in a correlative relation, claim right is in opposite relation with no-right. In this case, the term no-right can be simply understood as a position of not having a claim-right towards someone to perform or refrain from performing a certain action.[23]

Second, liberty is a freedom from a duty to abstain from doing something. Liberty (or privilege) is a right that is not correlated with duty—they are instead in opposite relation.[24] Liberty is correlated with a no-right so that in this position another party against whom the liberty is held has a no-right concerning the activity that it relates to.[25] Important to note that a privilege to μ doesn't entail duties on others not to interfere with the liberty-holder's μ-ing.[26] In that sense, two or more people may also have the same privilege to the same thing or action, and they can be in unconstrained competition with one another to exercise their rights.[27] For example, A has a liberty right to not give B ten thousands rupiahs, then B has a correlative no-right for the action that A not give her ten thousands rupiahs. In this case A does not have a duty towards B to give her ten thousands rupiahs, and B also has no duty to refrain from interfering with A's action.

Third, a power-right is one's ability to change legal positions.[28] More specifically, a legal power can be understood as a normative ability to change existing legal positions or to have affirmative control over a given legal relation.[29] For example, if A promises to B to pay ten thousands rupiahs in exchange of B gives A a pair of shoes. In this situation, B has the power to change his legal position by giving his shoes. That is, if B gives A his shoes, it will change B's

[21] Allen Thomas O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law," *South Carolina Law Review* 61, no. 1 (2009): 141–70, https://scholarcommons.sc.edu/sclr/vol61/iss1/5.
[22] D'Almeida, "Fundamental Legal Concepts."
[23] Ibid.
[24] Hohfeld, "Some Fundamental Legal."
[25] Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights," *Murdoch University Electronic Journal of Law* 12, no. 1 (2005).
[26] D'Almeida, "Fundamental Legal Concepts."
[27] Curran, "Hobbes's Theory of Rights."
[28] R´eka Markovich, "Understanding Hohfeld and Formalizing Legal Rights: The Hohfeldian Conceptions and Their Conditional Consequences," *Studia Logica* 108 (2020): 131.
[29] D'Almeida, "Fundamental Legal Concepts."

claim-rights, privileges, and powers connected to it. In that sense, as Hohfeld claimed, "a legal power (as distinguished, of course, from mental or physical power) is the opposite of legal disability, and correlative of legal liability."[30] Thus, if B gives A his shoes, A has a legal liability to have a duty to pay ten thousands rupiahs to B. B's legal power correlates with A's legal liability.

Fourth, the last form of rights in Hohfeld's scheme is immunity. Hohfeld explained that "immunity is one's freedom from the legal power or "control" of another as regards some legal relation."[31] Furthermore, he also described that "immunity is the correlative of disability ('no-power'), and the opposite or negation of liability."[32] For instance, if the state has no power to place B to give his shoes to C, thus B has immunity in that situation, while the state has a disability ('no-power'). Importantly, B's immunity is correlative with the state's disability.

Hohfeld's scheme was originally concerned about the practice of right in private law.[33] To date, there have been some contentions saying that the theory only focuses on bilateral relationship. This is largely because the scheme conceptualizes entitlements (i.e., claim-rights, privilege, power) as a concept that consists of directed relations among specified individuals/entities.[34] The assumption is that every legal position must correlate with the legal position of someone else's as one side of a legal relation.[35] This, however, does not imply that the Hohfeldian entitlements are limited only to individuals. It can also be *multital* in nature, meaning that it can adjust between an individual and persons on the one hand, and another individual or persons on the other. The point is that, suggested by Westen, "an entitlement remains unconceptualized for Hohfeld unless it specifies the person or persons toward whom it is directed".[36] This conception is considered problematic by several theorists,[37] and it raises

30 Hohfeld, "Some Fundamental Legal."
31 Ibid.
32 Ibid.
33 Francois A. Fontaneau, "The Right to Religious Freedom & the Hohfeldian Analysis of Rights," *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 3, no. 1 (2013): 92–99.
34 Peter Westen, "Poor Wesley Hohfeld," *San Diego Law Review* 55 (2018): 449–68.
35 D'Almeida, "Fundamental Legal Concepts."
36 Westen, "Poor Wesley Hohfeld."
37 Duarte d'Almeida, "Fundamental Legal Concepts."

debates over whether the Hohfeld's scheme can only be applied in the realm of civil law with a model of mutual relationships between agents.[38]

In fact, some argue that the scheme can also be used to analyze public law and many other areas of law. O'Rourke, for example, applies the Hohfeldian scheme in constitutional law context, showing how the constitution creates legal relations between an individual and the government.[39] Analogous to the Hohfeldian approach to the concept of property, it is claimed that "*constitutional right* in the broader sense may also be called a *bundle of relations*, meaning a bundle of relations between an individual and the government that arise from a particular clause or value of the Constitution."[40] Read in that way, examining the constitutional reasoning toward right from a Hohfeldian analysis can arguably help us understand the intertwinement between semantic and conceptual practice of right, particularly in the context of the highly abstract notion of right under the constitution.[41]

III. THE INTERPRETATION OF RIGHT

This section describes the practice of interpretation of rights in several judicial review decisions at the Constitutional Court. Our focus is to zoom in on the ways the Court reasons about rights and the extent to which such rights being protected under the constitution. Upon examining the issue-level questions involving constitutional doctrine of rights *in* religious life, natural resources control, education, and fair trial, we contend that right as a legal concept under the constitution is rather *dynamic* in the sense that the Court's interpretation

[38] Vivienne Brown, "Rights, Liberties and Duties: Reformulating Hohfeld's Scheme of Legal Relations?," *Current Legal Problems* 58, no. 1 (2005): 344. In fact, the views of theorists are divided into two sides. "Some critics of Hohfeld's scheme argue that the notion of correlative duties does not apply to criminal or public law where this element of correlativity is either absent or can be accommodated only by strained attempts to identify putative correlative agents within the state's legal apparatus. They conclude that Hohfeld's scheme is of limited applicability and not appropriate to all areas of law. Defenders of Hohfeld's scheme have argued in response that, logically, duties are correlative to claim-rights, so that such correlative relations must be held to exist in practice. So, for example, they would argue that the duties of the criminal law are correlated with claim rights held by state officials."

[39] O'Rourke, "Refuge from a Jurisprudence of Doubt."

[40] Ibid.

[41] Ibid.

does not hinge upon a fixed or consistent vocabulary. As a result, right as a legal concept has various meanings and a vast array of legal implications.

3.1. The Dynamics of Interpretation

This subsection describes the dynamics of interpretation in four propositions, including: right is interpreted as: (1) a mixture of liberty and duty, (2) an assemblage of duty and responsibility, (3) duty, and (4) power.

First, the term 'right' is associated with a mixture of liberty and duty. Here, our examination focuses on the right to embrace religion in on the 1965 Anti-Blasphemy Law constitutional review case (140/PUU-VII/2009).[42] In this case, the Court seems to construe the right of freedom to embrace religion as a duty instead of liberty. Utilizing the Hohfeld's scheme of rights, the right of freedom to embrace religion can be categorized as liberty.[43] Recall that, According to Hohfeld, liberty is in a correlative position with no-right, and in a contradictive position with duty. In this case, the liberty to embrace religion is interpreted as duty—which should have been posited in a contradictory position. Although Indonesia does not have any statutory regulations obliging a person to have a religion, the Court interpreted the right to religious freedom as if it is a necessity or an obligation for the people to have a religion. This can be seen from the Court's reasoning that says "... every citizen, even as an individual or as a nation collectively must be able to accept God Almighty who animates other precepts ..."[44]. From the Court's perspective, all citizens must identify themselves with a religion because religion (the notion of belief in God) is one of the country's ideological principles. According to the Court,

[42] Constitutional Court, Decision no. 140/PUU-VII/2009 (2010). In this 2009 case, the applicants submitted a judicial review request about the provisions related to the prohibition of religious blasphemy. Under this Law, blasphemy is understood as deliberately publicly telling, encouraging, or seeking general support, and to do an interpretation of religion professed in Indonesia or religious activities that resemble those religious activities, which interpretations and activities deviate from the main teachings of that religion. One of the applicant's arguments is that this article generates religious discrimination which is contrary to human rights and freedom of religion in the 1945 Constitution.

[43] It is not classified as claim rights because exercising the right to embrace religion doesn't correlate with other people's or party's duty. On the other hand, it also doesn't fit into other forms of rights such as power or immunity.

[44] Constitutional Court, Decision no. 140/PUU-VII/2009, 271–72, 3.34.1.

> [t]he rule of law principle in Indonesia must be seen in the following way: the 1945 Constitution, namely a state of law that places the principle of God The Almighty as the main principle, as well as the underlying religious values that underpins the life of the nation and the state, not the state that separates relations between religion and the state, and not only adhering to the principle of individualism and the principle of communalism.[45]

Furthermore, the Court explains that "[t]he Indonesian Constitution does not promote any campaign for freedom in having no religion, promoting anti-religion, and does not allow any insult or defilement of religious teachings or books that are the sources of religious beliefs or defamation of God's name."[46] According to the Court,

> [o]n the basis of such a philosophical view of religious freedom in Indonesia, as a *Pancasila* state, any activities or practices should not be allowed to alienate citizens from *Pancasila*. In the name of freedom, a person or group cannot erode the religiosity of society which has been inherited as values that animate various statutory provisions in Indonesia.[47]

We can see that the term *right* in religious freedom is viewed by the Court as duty. However, at another point, the interpretation switches from duty to liberty. According to the Court, people possess the freedom to embrace any beliefs or religions they believe in, and that the state has an obligation to guarantee this liberty. The Court propounds that,

> [f]reedom of religion [*kebebasan beragama*] is one of the most basic and fundamental human rights for every human being. The right to freedom of religion has been agreed upon by the world community as an individual right that is directly attached, which must be respected, upheld, and protected by the state, government, and everyone for the sake of honor and protection of human dignity.[48]

Second, right is framed as an assemblage of duty and responsibility. This proposition can be found in constitutional review cases related to the right in education.[49] In these cases, our observation focuses on the right to the

[45] Constitutional Court, Decision no. 140/PUU-VII/2009, 3.34.10.
[46] Constitutional Court, Decision no. 140/PUU-VII/2009, 3.34.11.
[47] Ibid.
[48] Ibid.
[49] Constitutional Court, Decision no. 85/PUU-XI/2013 (2014).

administration of education. Similar with the previous case, we believe that the judges seem to construe right to the administration of education as a duty rather than liberty. As mentioned before, according to Hohfeld, liberty is in a correlative position with no-right, and in a contradictive position with duty. However, the Court's considerations seem to be treating the right to the administration as responsibility or duty. In explaining the right to the administration of education, the Court compares the right to education *vis-a-vis* the right to life. They illustrate that despite the state protects its citizens' rights to life, the citizens must also bear the responsibility to live healthily and to prioritize their lives or those under their care, so that they will not be robbed of their right to live either by others or by the absence of such responsibility. To put it in the educational context, the argument revolves around Article 6 of the 20/2003 National Education System Law which rules that "[e]very citizen is responsible for the preservation of education administration."[50] According to the Court, it is true that the government is responsible for its citizens' education, but, for the sake of their own self quality, all citizens must "participate" (*ikut*) in bearing the responsibility *toward themselves* to reach their desired level of education. Furthermore, the Court claims that such a statement does not diminish the role of the government altogether: Since the quality of a state depends on citizen participation, the government must not leave the development of the citizens to themselves—otherwise they might exercise such *freedom* by not taking any education at all. The Court thus declares that this Article is constitutional in so far as the term *duty* is to be interpreted as to *participate*. That is, the responsibility rests mainly on the state but the citizens must "participate in bearing the responsibility" (*ikut bertanggung jawab*).[51]

Third, we can also find that *right* is sometimes identical to *duty*. This proposition can be found in a constitutional review case regarding the right to

[50] Law No. 20 of 2003 on National Education System.
[51] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009 (2010).

fair trial (65/PUU-VIII/2010).[52] In this case, our analysis focuses on right to call witnesses. The Court interprets the *right* to propose (i.e., to call and examine) witnesses and/or experts who benefit the suspect during the investigation stage as *duty*. The Court initially regards the right to fair trial from the lens of claim-right, but then their perspective switches to the lens of duty or obligation. Fundamentally, the Court construed right in fair criminal trial processes as a resultant of tension between interests. That is, according to the Court, "criminal procedural law contains norms that balance the legal interests of individuals and the legal interests of society and the state, because basically in criminal law, individuals and/or communities deal directly with the state."[53] Such a tension, or in the Court's term *relationship*, of interests "places the individual and/or society in a weaker position. In this case, the criminal procedure law serves to limit the state power, exercised by investigators, public prosecutors, and judges, in criminal justice processes against individuals and/or the public, especially suspects and defendants involved in the process."[54] Rather than parsing the relational nature of the right to fair trial structure, the Court perceived that such a right is something naturally attached, while later disconcerting the matter of right and duty or obligation. The Court claims that "[c]onsidering a person's human rights remain inherent [*melekat*] to him even though he has been identified as a suspect or defendant. Therefore, under the rule of law, criminal procedural law is positioned as a tool so that the implementation of legal process is carried out fairly (due process of law) for the sake of respect for human rights."[55]

Fourth, right is also framed as power. In this sense, it is important to highlight the Court's interpretation of right in cases involving the state's *right* over resource control (*hak menguasai negara*) encapsulated under Article 33 paragraph (3) of

[52] Constitutional Court, Decision no. 65/PUU-VIII/2010 (2010). In this case, the Court decided that all provisions pertaining to the definition and use of witness has violated the Constitution insofar as the concept of witness "is not interpreted as including 'a person who can provide information in the context of investigation, prosecution and trial of a criminal act which he does not always hear for himself, he sees for himself, and he experiences for himself.'

[53] Constitutional Court, Decision no. 65/PUU-VIII/2010 at 87, 3.11.

[54] Constitutional Court, Decision no. 65/PUU-VIII/2010.

[55] Ibid.

the 1945 Constitution. In some of the Court's opinions, we found that the term *right* in natural resource control was actually interpreted as *power*. Particularly, the constitutional right of the state to control the natural resources is a right that derives from certain primary right. The term *derivative right* in this instance refers to a method of governmental management over natural resources.[56] This indicates that the purpose of such provision is to demonstrate the degree to which the state has direct management of natural resources.[57] In the 2012 Oil and Gas Law review case, the Court indicates the form of state's right to control in three different levels, that is, "the first and most important level is that the state runs a direct management of natural resources [...] so that the people will benefit more from natural resource management. State control in the second rank is the state's ability to make policies and management, and the state function in the third rank is the function of regulation and supervision."[58] However, direct management by the state can also be done "as long as the state has the capability in terms of capital, technology, and management to manage natural resources."[59] One of the dissenting opinions was expressed by Justice Harjono who opines that the private sector could manage natural resources only if "the state is unable to provide financing, especially in exploration where the risk is anything but low, because the cost of exploration is not small, while the possibility in finding the source of oil or gas is uncertain."[60] From this point of view, the hierarchy of state's right seems to build upon the effectiveness principle, in the sense that the constitutional criteria of state control—through the phrase 'state power'—must be read in conjunction with "for the greatest prosperity of the people."[61]

The above explanation suggests that the Court's interpretation of right under the Constitution is rather dynamic, which bears different meaning and legal

[56] Constitutional Court, Decision no. 001-021-022/PUU-I/2003 (2003).
[57] Constitutional Court, Decision no. 058-059-060-063/PUU-II/2004 (2005); Constitutional Court, Decision no. 008/PUU-III/2005 (2005).
[58] Constitutional Court, Decision no. 36/PUU-X/2012 (2012).
[59] Ibid.
[60] Ibid.
[61] Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945 [Legal Politics of Natural Resources Management According to Article 33 of the 1945 Constitution," Constitutional Journal]," *Jurnal Konstitusi* 13, no. 1 (2016): 191–212, https://doi.org/10.31078/jk1319; Mohamad Mova AlAfghani, "Strengths and Limitations of The Indonesian Constitutional Court's '6 Basic Principles' in Resolving Water Conflicts," *Constitutional Review* 9, no. 1 (2023): 179–220.

implications. In some instances, we can observe that right is not necessarily understood as claim-right but perceived as duty and responsibility instead, while in other instance, the interpretation shifts between the concept of right and duty. Moreover, there is also the case where right is understood as power. In the next section we argue that this mode of interpretation can also be seen as a set or constant form of configuration of rights.

3.2. The Configuration of Right: Between Non-relational Liberty and Power

In this sub-section, we argue that right in the *configured* sense is to be understood as a set of arrangement of (1) right in the form of non-relational liberty and (2) power that provides intervention, limitations, or even change over the nature of liberty into, ultimately, liability. Our examination in this subsection focuses on instances where right is understood by the Court as non-relational liberties—i.e., in which there is no jural relation that prevails as their correlative counterparts. From there, we will then examine how non-relational liberty is configured when encountered with governmental policy consideration. In these instances, liberty is virtually altered or transformed to a certain kind of liability, that is, a duty to refrain from acting in a certain way.

First, we find that the term *right* in religious freedom is an arrangement of non-relational (religious) *liberty* and power that alters it into *liability* to a certain religious activity. In the 1965 Anti-Blasphemy Law review case the Court construes the right to individually interpret religious teachings or to exercise religious activities as individual freedom in the form of non-relational liberty.[62] In general, the right to individually interpret religious teachings or to exercise religious activities is categorized as liberty. It does not fit into the classification of claim-right because one's religious interpretation or activity does not correlate with other's duty, nor with any other form of rights (e.g., power, immunity). That said, it cannot be simply understood as liberty in the Hohfeldian sense since the kind of liberty in the Court's opinion is fundamentally non-relational.

[62] Constitutional Court, Decision no. 140/PUU-VII/2009.

The Court argues that the right to individually interpret religious teachings or to exercise religious activities as *liberty* that has no relations with other people or parties. This is because the liberty only exists individually for the person itself and not against other people. It is asserted that "freedom of beliefs according to the Court is a freedom that cannot be limited by coercion and cannot even be tried because such freedom is a freedom that exists in the mind and heart of someone who believes in that belief." [63] Due to this internal nature of the right, other people or parties do not have any correlative or jural relations regarding one's right to individually interpret religious teachings or to exercise religious activities. This situation, however, could change if that person exercises her rights in public or against other people. In that case, this right can no longer be considered as *liberty* but instead, it is altered into a different category, since there is a duty that prohibits that person from doing so. In this sense, we find that the Court tends to construe the *right* to publicly interpret religious teachings or carry out religious activities as a kind of *liability* that bears correlative relation with the state *power*. From the Court's perspective, people have individual liberty to interpret any religious teachings or carry out any religious activities that resemble a religion professed in Indonesia, but they are not allowed to deliberately interpret religious teachings or carry out religious activities in which such interpretations and activities deviate from the accepted teachings of the religion. The Court asserted that,

> ... even if a deviant interpretation is considered as freedom of religion because it is related to the freedom to believe in beliefs, express thoughts and attitudes according to one's conscience [vide Article 28E paragraph (2) of the 1945 Constitution], this must be seen from two sides, namely the freedom to believe in one religion on the one side, and freedom to express thoughts and attitudes according to his conscience on the other side ... However, if the freedom to express thoughts and attitudes according to one's conscience (*forum externum*) already involves relations with other parties in a society, then such freedom can be limited.[64]

[63] Constitutional Court, Decision no. 287–88, 3.51.
[64] Constitutional Court, Decision no. 140/PUU-VII/2009 at 287–88, 3.51.

In that sense, the Court furthermore claims that "... [t]he Law on the Prevention of Abuse and/or Blasphemy of Religion does not limit a person's beliefs (*forum internum*), but only limits the expression of thoughts and attitudes according to his conscience in public (*forum externum*) that deviates from the main religious teachings adopted in Indonesia; expresses feelings, or commit acts that are essentially hostile, abuse or desecrate a religion in Indonesia."[65] The Court explains that if these limitations are not regulated, these sorts of deviant act may spark horizontal conflicts, as well as create unrest, division, and hostility in society.[66]

The Court's reasoning showcases that the *liberty-right* to deliberately and publicly interpret religious teachings or carry out religious activities has turned into *liability* if it deviates from the common-accepted teachings. The reason is that, according to Article 2 and Article 3 of the Anti-Blasphemy Law, violation against the limitations set by the state—that is, to deliberately and publicly interpret and exercise deviant religious teachings—will result in criminal sanction. The Court also explains that such a law essentially regulates two aspects of restrictions on religious freedom, namely restrictions on administrative and criminal restrictions:

> Administrative restrictions, namely a public prohibition to intentionally commit interpretation of religion or carrying out activities, which deviate from the main teachings of a religion in Indonesia whose sanctions are administrative activities starting from warnings to prohibitions as well as dissolution of the organization, while a criminal prohibition is a prohibition against any person who intentionally expresses feelings or commits acts which are essentially hostile, abuse, or blasphemy against a religion professed in Indonesia.[67]

The Court furthermore assesses that "religion in the sense of believing in a certain religion is the domain of the internal forum, [it] is freedom, a human right whose protection, promotion, enforcement, and fulfillment are the responsibility of the state, especially the government."[68] However, the Court claims that this right or freedom can be limited for the sole purpose of securing recognition and respect for the rights and freedoms of others and to fulfill fair

[65] Constitutional Court, Decision no. 140/PUU-VII/2009.
[66] Ibid.
[67] Ibid.
[68] Ibid.

demands in accordance with society values. In this sense, "along with being granted the right to freedom of religion, the state also has the right to provide regulations and limitations on the implementation of religious freedom."[69] The limitation is explicitly ruled under Article 28J paragraph (2) of the 1945 Constitution, stipulating that "[i]n exercising the rights and freedom, everyone must be subject to the restrictions set by law for the sole purpose of securing recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, *religious values*, security and public order in a democratic society."[70] The Court then proceeds to explain that in the case of limitations, "the state has a role as the balancer between human rights and basic obligations to realize just human rights. The state has a role to ensure that the exercise of one's freedom does not injure the freedom of others. This is where the state realizes its goal, namely, to achieve the best life possible."[71]

Second, we highlight that *right* in education is configured by non-relational (educational) *liberty* and *power* that alter it into *liability* to participate in education. Here, our particular interest is the case 11-14-21-126-136/PUU/VII/2009. As a general notion in this 2009 case, the Court claims that "the Constitution posits education as one of human rights, and as a right it is the duty of the state—especially the government—to protect, develop, uphold, and fulfill (this right)."[72] But on the other hand, the Court also recognizes several rights that constitute the right to education itself, including: the duty in the administration of education, the right for free education, the right for assembly and association, and the freedom to choose education. In that sense, the Court frames the citizen's right to choose educational forum (i.e., where she receives her education) as a non-relational liberty—at least to the extent of early childhood education programs that target children under the age of seven. The Court refers to Article 28 (2) of the National Education System Law and argues that this provision provides the opportunity for this sort of education to be administered either formally, non-formally, or

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009 (2009).

informally.[73] For the purpose of administering an early childhood education program, the three types of education are basically open choices. Evidently, this is where the particular *liberty* is not *claim*-right, since it does not require the existence of another person's duty towards its fulfillment, in which Hohfeldian scheme of rights necessitates—i.e., the existence of duty as the correlation of a claim-rights due to among others the existence of an interest or measure of control at the hand of the claim holder.[74]

Nonetheless, power alters such non-relational liberty in education specifically when the Court makes the case of two different kinds of right to free education, namely (1) the right to be exempted from the cost of education and (2) the right to be treated non-discriminately in relation to educational cost. The duty related to the former finds its relevance in Article 31 paragraph 3 of the Constitution, stipulating that at least twenty percent of the state's revenue and budget is to be allocated for the administration of national education. This means that the budget for education sits at the top of the state's priority list and the fulfillment of that cost solely rests at the hand of the government insofar as it does not exceed beyond the limit of twenty percent. Hence, whether the state would bear all education costs or not depends on its financial capability.[75] Another point of argument is that the fourth paragraph of the preamble to the Indonesian constitution which mentions that the government shall, among others, educate the life of the nation. As such, the Court argues that educating the life of the nation does not mean that the whole education cost will be left to the state—while refusing any involvement of the society—because otherwise, it will place the state in such a manner that it becomes the sole institution capable of regulating and deciding every aspect of state and nation life (*kehidupan berbangsa dan bernegara*) thus eliminating any potential and resources in the society.

---

[73] Ibid., [3.33]. The use of these three terms is limited in the context on how education is institutionalized as prescribed in Indonesian Law No. 20 Year 2003. Formal education is structured and conducted in tiers within formal institutions such as elementary or high school. Non-formal education is also structured and conducted in tiers but not within a formal institution. While informal education is experienced within the boundary of its subject's family and environment.

[74] Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120, no. 3 (April 2010): 465–494.

[75] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2019 (2019).

With regard to the latter kind of right—i.e., to be treated indiscriminately in relation to cost-burden—the argument revolves around the provision of Article 12 (2.b.) of the 2003 National Education System Law which regulates that, "every learner [in this context referring to any members of society undertaking self-development through the process of learning available in certain branch, level, or types of education] participates in bearing the cost of education administration, except for those who are exempted from such obligation by the virtue of existing statutory regulation."[76] It seems, at the first sight, that the rule incites discrimination, since it provides the basis for free education whilst the phrase 'except for' (*kecuali bagi*) implies that it does not treat all students equally. On this matter, the Court argued that the word participates (in bearing the cost of education administration) does not necessarily diminish the state's obligation and placing the burden on students' hands. Instead, to participate should be understood as the manifestation of the state's willingness to be open to any contribution from the society to fund the administration of education that is yet covered by the state. Furthermore, the phrase "with the exception of those who are exempted from such obligation by the virtue of the existing statutory regulation" acts as a balancing principle that there is duty to participate in cost-burden for the wealthy, while there is an exemption for the poor. This is arguably aimed at making sure that everyone has the same opportunity to access education.[77]

Third, the term *right* is essentially configured by non-relational *liberty* in fair trial and *power* that alters it into *liability* in the face of fairness and the legal interests of the community. Specifically, the constitutional right to fair trial comprises the so-called liberty for a case review (*peninjauan k*embali) that is fundamentally non-relational. As it is written under the Criminal Procedure Code, a convict or her heir has the right to submit a petition for review to the Supreme Court except against acquittal or dismissal from all legal charges. These parties can only submit a petition for review once. This limitation, according to the

[76] Law No. 20 of 2003 on National Education System.
[77] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009, 3.26.

Court, has violated individual's rights and fundamental freedom enshrined under the Constitution. These rights and freedoms, argued the Court, are intertwined with the objective of criminal law, that is, to satisfy legal certainty (*kepastian hukum*) and justice (*keadilan*). The limitation for a case review petition, while admittedly may achieve the former, fails to pursue the latter as justice requires the law to seek for material truths—something that could be done if case review petition is not limited to only once. By referring to the idea of justice, the Court claims that "justice is a very basic human need, more fundamental than the human need for legal certainty; Material truth contains the spirit of justice, while procedural law norms contain the nature of legal certainty which sometimes ignores the principle of justice."[78] We can however identify the intervention of *power* to *liberty* when the Court frames the right to fair trial as a resultant of tension between interests. At this point, the Court took a conspicuous shift of argument, that is, seeing fair trial from the lens of liberty (i.e., to call witness) to the lens of duty or obligation. The Court argues that such an obligation to respect right to fair trial shall comprise (1) any efforts to protect [an individual] against arbitrary actions *from* state officials, (2) granting various guarantees for suspects and defendants to *fully defend* themselves, (3) the application of the *presumption* of innocence principle, and (4) the application of the *equality* before the law principle.[79]

Relatedly, let us examine the Court's assessment on the constitutionality of the meaning of witness in criminal trial. According to the Court,

> the arrangement or definition of witnesses in the Criminal Procedure Code, as regulated in the articles requested for review, creates multiple interpretations, and violates the *lex certa* principle—while the *lex stricta* principle is a general principle in the formation of criminal legislation. Provisions that imply multiple interpretations in criminal procedural law may result in legal uncertainty for citizens, because in criminal procedural law, investigators, public prosecutors, and judges have the authority to examine suspects or defendants who are entitled to legal protection.[80]

[78] Constitutional Court, Decision no. 34/PUU-XI/2013 (2013).
[79] Constitutional Court, Decision no. 65/PUU-VIII/2010.
[80] Ibid.

Thus, the Court argues, "the provisions for summoning and examining witnesses and/or experts that are favorable to the suspect or defendant, as ruled under Article 65 in conjunction with Article 116 paragraph (3) and paragraph (4) of the Criminal Procedure Code, must be interpreted to be carried out not only in the trial stage in court, but also under investigation."[81] It follows then that the rules on witness submission have violated the constitutional right to fair trial since they "neglecting *the right of a suspect or defendant* to submit (summon and examine) witnesses and/or experts who are beneficial to them at the investigation [by the police] level and only allowing to summon these witnesses and/or experts at the level of court examination."[82] The Court furthermore draws a kind of line of reasonableness and fairness that limits the right at hand. Even if we call fair trial is (inherent or attached) right, the Court suggests that, in fact, "it must be kept in mind that the submission of witnesses or experts who are beneficial for the suspect or defendant in the criminal justice process is not to hinder the enforcement of the criminal law. Although the rights of the suspect or defendant are protected by criminal procedural law, the limits of fairness and the legal interests of the community represented by the state must be taken into account."[83]

Fourth, we can assert that the state's *right* to resource control is an arrangement of its non-relational liberty and power that alters it into *liability* to control limitations. In this context, according to the Court, limitation on the right to resource control can be understood on two grounds, namely it is grounded on people's rights and the environment, and on the purpose of the control. In a 2013 judicial review case related to water resources control, the Court claims that "the right of control by the state over water is the "spirit" (*roh*) or "heart" (*jantung*) of [the law] *a quo*."[84] In this regard, the Court draws a very strict limitation of water control, that since "water is one of the most important and fundamental elements in human life and it controls the livelihood of many people. [...] [I]n

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Constitutional Court, Decision no. 85/PUU-XI/2013.

water exploitation there must be very strict restrictions as an effort to preserve and sustain the availability of water for the life of the nation."[85] Furthermore, there are six principles applicable to resource control limitations according to the Court, including (1) water exploitation must not interfere with, rule out, let alone negate people's right to water;[86] (2) the state's obligation to fulfill the people's right to water;[87] (3) the right to a clean environment;[88] (4) the right of supervision and control by the state;[89] (5) the priority of water exploitation by the State/Regional Owned Affairs Agency;[90] and (6) the authority of the government in granting permits to private companies, which is in water exploitation.[91] At this point, suffice it to say the constitutional principles have become *power* that alters the state's *liberty* into *liability* against certain forms of limitation.[92]

IV. CONSTITUTIONAL RIGHT: WHAT KIND OF VOCABULARY?

In the previous section, we have argued that the vocabulary of right, as a legal concept under the constitution, has been interpreted by the Court in a rather 'dynamic-yet-configured' fashion. Right in the *dynamic* sense implies that the ways the Court interprets the term under the constitution do not hinge upon a fixed or consistent vocabulary. As a result, right as a legal concept has various meanings and a vast array of legal implications. Right in the *configured* sense is to be understood as a set of configurations of (1) individual freedom in the form of non-relational liberty, and (2) power that provides intervention, limitations, or even change over the nature of the individual's liberty into liability.

To elaborate these propositions, let us consider the following statements.

(1) A has nonrelational liberty to μ;
(2) B has power to Ø toward A to μ;
(3) A has liability toward B to μ.

[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] AlAfghani, "Strengths and Limitations."

From these statements, we may assume that constitutional right (1) is intervened by power (2) thus results (3) 'a new form' of right. For the Hohfeldian internal symmetry to hold, we sketch such configurations into the following figures.

Table 1. Non-Relational liberty under the Constitution

	A has nonrelational liberty to μ
Jural opposite	A has duty to μ
Jural correlative	-

Therefore,

Table 2. Jural relation under the Constitution

	B has power to Ø toward A to μ	A has liability to Ø toward B to μ
Jural opposite	B has disability to Ø toward A to μ	A has an immunity to Ø toward B to μ
Jural correlative	A has liability to Ø toward B to μ	B has power to Ø toward A to μ

Based on Table 1 and Table 2, we can see that the Hohfeldian scheme is inadequate to explain the characteristics or the forms of rights arising from non-directed duties.[93] That is, in the Hohfeldian perspective, claim rights are correlative with duties.[94] Duties in this frame are those that owed to someone[95] or also known as "directed" duties. In that regard, Hohfeld explained that "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place".[96] From this example, we can see that duty is owed *directly* to a specific individual who holds a correlative claim right. In fact, we also use the term duty to refer to what we are required to do regardless of whether we owe it to anyone (i.e., non-directed

[93] "A duty is a directed duty if there is someone to whom it is owed; and that it is a nondirected duty if there is no one to whom it is owed." Sreenivasan, "Duties and Their Direction."

[94] "The duty that correlates with a claim right is a duty that is owed to the claim right holder; and a claim right is always something held against the bearer of the correlative duty." Ibid., 466.

[95] Siegfried Van Duffel, "The Nature of Rights Debate Rests on a Mistake," *Pacific Philosophical Quarterly* 93 (2012): 104–23.

[96] Hohfeld, "Some Fundamental Legal."

duties)—for example any duties imposed by criminal law, public law, and several standalone private law duties that imply no claim rights. These, according to d'Almeida, "[u]nlike directed duties, then, undirected duties do not correlate with claim-rights (or any other sort of entitlement) on anyone else. They are not relational positions."[97] As such, these non-directed duties are not covered by the Hohfeldian scheme.[98]

In a rather similar vein, our analysis showcases that the scheme needs a slight adjustment to explain jural relations arising from non-directed duties under the Constitution. From the Hohfeldian perspective, duties are the *correlative* of claim-rights and the *opposite* of privileges. In the right of freedom to exercise religion, for instance, the Court initially interprets such a right as if it is a necessity or duty for the Indonesians even if there is no statutory regulation that obliges the people to do so. The implication is twofold: on the one hand, we see that the *duty* to practice one's own religion does not have any correlative relation with other's *claim right*. On the other hand, the *duty* to exercise religion is not on the opposite side of the *liberty* to religious practices because the Court stipulates that believing a certain religion is itself *liberty*—"it is a human right that the protection, promotion, enforcement, and fulfillment of which are the responsibility of the state, especially the government."[99] These conditions show that the right of freedom to religion seems unfit in any legal entitlements or jural relations that Hohfeld has offered.

That being the case, there are two alternative adjustments to the Court's interpretation assessment through a Hohfeldian analysis. *First*, even though the non-directed duties are not in relational positions with any other sorts of entitlement of other parties, these duties still manifest *consistently*—not in correlative nor opposite sense—with other entitlements. Furthermore, there is even a possibility that a privilege arises from duty or an obligation. In line with this proposition, Hohfeld himself seems aware of the possibility of such relation

97 D'Almeida, "Fundamental Legal Concepts."
98 Ibid.
99 Constitutional Court, Decision no. 140/PUU-VII/2009.

by assuming that "if for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort, for the latter is of the same content or tenor."[100] Read in that way, the liberty to embrace religion, to access free education, and to provide witness in a criminal trial, all have been seen as a duty or obligation of the citizens. In line with this sort of obligation, the state is presumptively under the duty to provide freedom or privilege for the people to believe a certain religion according to their faith, to choose what kind of educational services for their kids, and to call witness during trial and investigation processes. These conditions show that duty and liberty are not correlated, nor opposite, but rather *consistent* with one another. Understood in that way, even if the Court declares some non-directed duties under the Constitution, they are, however, not necessarily not *consistent* with the other entitlement provided under the same provision.

Second, another adjustment we may indicate in the Hohfeldian scheme is that it cannot explain the characteristics or forms of rights of non-relational liberty, that is, liberty-no right relation.[101] Importantly, it is somehow relevant to the so-called 'derivate right' configuration under the state's right to control over (natural) resources. We might ask, at the moment, are we dealing with right as a relation (the state having privilege) or a concept (the privilege that the state has)? The distinction between right as a concept and a relation is crucial since the scheme appears to conflate the two: In a Hohfeldian analysis, privilege or liberty is a right that correlates with 'no-right' and has an opposite relation with 'no-duty'.[102] However, as Brown rightly suggests, this opposite of a relation involving duty implies two senses of permissible action, that is, 'Y does not have a duty not to Ø' which is a negation of the legal relation, and 'Y has a no-duty not to Ø' which is a negation of the legal concept.[103] The former asserts that the act is 'not prohibited' and the latter 'expressly permitted.'[104]

[100] Hohfeld, "Some Fundamental Legal."
[101] J.E Penner, *Hohfeldian Liberties, Property Rights: A Re-Examination*, Online edn (Oxford: Oxford Academic, 2020).
[102] Ibid.
[103] Brown, "Rights, Liberties and Duties."
[104] Ibid.

Relevant to this proposition the Hohfeldian scheme of privilege or liberty needs to be differentiated into three different kinds of liberty rights, which is called, borrowing from Brown, simple liberty, liberty right, and general liberty right.[105] A simple liberty is a liberty that arises because there is no prohibition against doing something and its actions stand outside the remit of the law,[106] for example, if 'Y does not have a duty or prohibition to eat breakfast, then Y has a simple liberty to eat breakfast.' In this case we can see that simple liberty is a form of liberties that does not have correlative relation and has an opposite relation with a general duty not to Ø.[107] On the one hand, liberty right is a liberty that lays within the authority of the law—of being expressly permitted and therefore made it lawful.[108] Liberty rights may be correlative or non-correlative. For example, "if X grants Y a license to enter X's land, then Y has a no-duty to X not to enter X's land. Here Y has a 'correlative liberty-right' against X to enter and there is a legal relationship between X and Y." On the other hand, if Y has a liberty against self-incrimination or liberty to embrace a religion, then these types of liberty-rights do not seem to be correlative. This can be understood as "Y has no duty to self-criminate' (or Y has express permission not to self-criminate)." A similar assertion goes with simple liberty, this type of liberty right does not have a correlative relation with others. Brown calls this type of liberty "general liberty-right."[109]

Arguably, the three kinds of *liberty-right* can be seen as a better reflection of what kind of right it is when the Court reasons about right to interpret religious teachings or carry out religious activities, right to free from educational cost, duty to respect right to fair trial, and state's right to resource control. Since there is no clear explanation regarding the permissible actions based on these kinds of right, it is fair to say that the Court has been fabricating *prima facie* a flexible legal concept to justify certain normative objectives (i.e., efficiency in providing public welfare, the limits of fairness and the legal interests of the community

[105] Ibid.
[106] D'Almeida, "Fundamental Legal Concepts."
[107] Brown, "Rights, Liberties and Duties."
[108] D'Almeida, "Fundamental Legal Concepts."
[109] Brown, "Rights, Liberties and Duties"

in criminal trials, public financial contribution to free education, and peaceful religious activities). But the thing is that the Hohfeldian liberty-no right relation eventually forms exceptions to such normative positions, providing rooms for the Court to configure jural relations and the permissible actions under the constitution.

V. CONCLUSION

Ultimately, what do we talk about when talking about rights in the constitution? In this article, we contend that the nature of constitutional rights has been hardly expounded by the Court particularly when it is juxtaposed with the discourse of governmental duties and powers. We have also claimed that the term right under the constitution is interpreted by the Court in a rather dynamic-yet-configured fashion. The interpretation of right in the former sense implies that it does not hinge upon a firm or constant vocabulary as the Court has been equating right with other terms such as liberty, duty, and power. In the latter sense, right is understood by the Court as a set of configurations of (1) non-relational liberty and (2) power that provides intervention or limitations, and alters the nature of such liberty into, ultimately, liability.

BIBLIOGRAPHY

AlAfghani, Mohamad Mova. "Strengths and Limitations of The Indonesian Constitutional Court's '6 Basic Principles' in Resolving Water Conflicts." *Constitutional Review* 9, no. 1 (2023): 179–220, http://dx.doi.org/10.31078/consrev916.

Alexy, Robert. "Discourse Theory and Fundamental Rights." In *Arguing Fundamental Rights*, edited by Agustín José Menéndez and Erik Oddvar Eriksen, 15–30. Dordrecht: Springer, 2006.

Andreopoulos, George, and Zehra F Kabasakal Arat. "On the Uses and Misuses of Human Rights: A Critical Approach to Advocacy." In *The Uses and Misuses of Human Rights*, 1–27. New York: Springer, 2014.

Asshiddiqie, Jimly. *Konstitusi dan Konstitusionalisme Indonesia [Indonesian Constitution and Constitutionalism]*. Jakarta: Sinar Grafika, 2021.

Bix, Brian. "HLA Hart and the Hermeneutic Turn in Legal Theory." *Southern Methodist University Law Review* 52 (1999): 167, https://ssrn.com/abstract=163810.

Bourchier, David. *Illiberal Democracy in Indonesia: The Ideology of the Family State*. London & New York: Routledge, 2014.

Brown, Vivienne. "Rights, Liberties and Duties: Reformulating Hohfeld's Scheme of Legal Relations?" *Current Legal Problems* 58, no. 1 (2005): 343–67, https://doi.org/10.1093/clp/58.1.343.

Butt, Simon. *The Constitutional Court and Democracy in Indonesia*. Leiden: Brill, 2015.

Constitutional Court, Decision no. 001-021-022/PUU-I/2003 (2003).

Constitutional Court, Decision no. 058-059-060-063/PUU-II/2004 (2005).

Constitutional Court, Decision no. 006/PUU-III/2005 (2005).

Constitutional Court, Decision no. 008/PUU-III/2005 (2005).

Constitutional Court, Decision no. 11/PUU-V/2007 (2007).

Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009 (2010).

Constitutional Court, Decision no. 140/PUU-VII/2009 (2010).

Constitutional Court, Decision no. 65/PUU-VIII/2010 (2010).

Constitutional Court, Decision no. 36/PUU-X/2012 (2012).

Constitutional Court, Decision no. 35/PUU-X/2012 (2013).

Constitutional Court, Decision no. 34/PUU-XI/2013 (2013).

Constitutional Court, Decision no. 85/PUU-XI/2013 (2014).

Constitutional Court, Decision no. 80/PUU-XVII/2019 (2019).

Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2019 (2019).

Curran, Eleanor. "Hobbes's Theory of Rights – A Modern Interest Theory." *The Journal of Ethics* 6 (2002): 63–86, https://doi.org/10.1023/A:1015875902334.

D'Almeida, Luís Duarte. "Fundamental Legal Concepts: The Hohfeldian Framework." *Philosophy Compass* 11, no. 10 (2016): 554–69, https://doi.org/10.1111/phc3.12342.

Duffel, Siegfried Van. "The Nature of Rights Debate Rests on a Mistake." *Pacific Philosophical Quarterly* 93 (2012): 104–23, https://doi.org/10.1111/j.1468-0114.2011.01418.x.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1978.

El-Muhtaj, Majda. *Hak Asasi Manusia dalam Konstitusi Indonesia [Human Rights in the Indonesian Constitution]*. Jakarta: Kencana, 2015.

Epstein, Lee, and Keren Weinshall. *The Strategic Analysis of Judicial Behavior: A Comparative Perspective*. Cambridge: Cambridge University Press, 2021.

Fontaneau, Francois A. "The Right to Religious Freedom & the Hohfeldian Analysis of Rights." *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 3, no. 1 (2013): 92–99, https://researchonline.nd.edu.au/solidarity/vol3/iss1/7.

Hendrianto, Stefanus. "Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia." *Constitutional Review* 6, no. 2 (December 2020): 241, http://dx.doi.org/10.31078/consrev623.

Hohfeld, Wesley Newcomb. *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays*. New Haven: Yale University Press, 1923.

Hohfeld, Wesley Newcomb. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *The Yale Law Journal* 23, no. 1 (1913): 16–59, https://doi.org/10.2307/785533.

Holzhacker, Ronald. "Gay Rights Are Human Rights': The Framing of New Interpretations of International Human Rights Norms". In *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy*, edited by George Andreopoulos and Zehra F. Kabasakal Arat, 29–64. New York: Palgrave Macmillan, 2014.

Law No. 20 of 2003 on National Education System (2003).

Lazarev, Nikolai. "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights." *Murdoch University Electronic Journal of Law* 12, no. 1 (2005), https://dx.doi.org/10.25236/AJHSS.2023.060308.

Markovich, R´eka. "Understanding Hohfeld and Formalizing Legal Rights: The Hohfeldian Conceptions and Their Conditional Consequences." *Studia Logica* 108 (2020): 131, https://doi.org/10.1007/s11225-019-09870-5.

O'Rourke, Allen Thomas. "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law." *South Carolina Law Review* 61, no. 1 (2009): 141–70, https://scholarcommons.sc.edu/sclr/vol61/iss1/5.

Omara, Andy. "Enforcing Nonjusticiable Rights in Indonesia." *Constitutional Review* 6, no. 2 (December 2020): 311, http://dx.doi.org/10.31078/consrev625.

Partain, Roy Andrew. "Creating Rights, Terminating Rights, Overcoming Legal Conflicts." *Constitutional Review* 8, no. 2 (December 2022): 215, http://dx.doi.org/10.31078/consrev822.

Penner, J.E. *Hohfeldian Liberties, Property Rights: A Re-Examination*. Online edn. Oxford: Oxford Academic, 2020.

Rachman, Irfan Nur. "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945 [Legal Politics of Natural Resources Management According to Article 33 of the 1945 Constitution," Constitutional Journal]," *Jurnal Konstitusi* 13, no. 1 (2016): 191–212, https://doi.org/10.31078/jk1319.

Safa'at, Muchamad Ali. "The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations." *Constitutional Review* 8, no. 1 (May 2022): 113-50, http://dx.doi.org/10.31078/consrev815.

Smith, Carel. "The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor." *Erasmus Law Review* 4 (2011): 21, https://ssrn.com/abstract=1924860.

Sreenivasan, Gopal. "Duties and Their Direction." *Ethics* 120, no. 3 (April 2010): 465–494, https://doi.org/10.1086/652303.

Sunstein, Cass R. *Legal Reasoning and Political Conflict*. Oxford University Press, 2018.

Vasandani, Malika Rajan, Dwi Putra Nugraha, and Susi Susantijo. "Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution." *Consttitutional Review* 8, no. 1 (May 2022): 62, http://dx.doi.org/10.31078/consrev813.

Westen, Peter. "Poor Wesley Hohfeld." *San Diego Law Review* 55 (2018): 449–68, https://digital.sandiego.edu/sdlr/vol55/iss2/11.

Biographies

Professor Sang-Hyeon Jeon is a faculty member at the Seoul National University School of Law (SNU Law). He graduated from Seoul National University (SNU) Social Science College (B.A.) and earned his Ph.D. from SNU Law. He holds a Master of Laws (LL.M.) from Fordham Law School in the United States. He has been teaching constitutional law, with his areas of expertise including theories of constitutional interpretation, the judicial system, and the Constitutional Court of Korea. Before joining SNU Law, Professor Jeon served as a constitutional rapporteur (research officer) at the Constitutional Court of Korea and taught constitutional law as an associate professor at Hanyang University School of Law.

Dr. Ahsanul Minan is a Constitutional Law lecturer at Nahdlatul Ulama University, Jakarta, Indonesia. He obtained his Doctorate degree from Faculty of Law, Universitas Indonesia in 2024.

Prof. Dr. Satya Arinanto, S.H., M.H. is a faculty member at Faculty of Law, Universitas Indonesia. He graduated from Faculty of Law, Universitas Indonesia (Bachelor degree in 1990, Master Degree in 1997 and Doctorate degree in 2003). His expertise includes Constitutional Law and Human Rights Law.

Prof. Dr. Djohermansyah Djohan, M.A. is a faculty member at the Faculty of Political Government, Internal Affairs Governance Institute (IPDN). He obtained his Bachelor Degree in Political Science in 1984 from Institut Ilmu Pemerintahan (IIP), then his master degree in 1991 from University of Hawaii, Honolulu, the United States of America, and Doctorate degree in 1999 from Universitas Padjajaran.

Betül Hayrullahoğlu, Ph.D. graduated from the Faculty of Economics and Administrative Sciences, Department of Public Finance, at Celal Bayar University. She completed her master's degree in fiscal law at Dokuz Eylül University with her thesis titled "The Principle of Prohibition of Analogy in Turkish Tax Jurisprudence". She completed her Ph.D. at the same university in the Public Finance Department with her thesis titled "Tax Collecting Power of Tax Administration and Its Boundaries in Turkey". For her post-doctoral studies, she worked as a fully funded guest researcher at the Faculty of Law at the University of Milano-Bicocca in Italy during the Fall Semester of the 2021-2022 academic year on the project titled "Turkey's Individual Application Experience in Terms of Taxation Policies: Suggestions for Italy". Between 2017-2018, she worked as an expert on temporary assignment at the Constitutional Court of Turkey. Her special areas of study include the relationship between taxation and human rights and the individual application to the Constitutional Court. She is proficient in English and has a good command of Italian. She became an associate professor in the field of fiscal law in September 2022. She is currently serving in the Department of Public Finance, at the Faculty of Economics and Administrative Sciences at Uşak University.

Dr. Yance Arizona, S.H., M.H., M.A. is a lecturer and assistant professor at the Department of Constitutional Law, Universitas Gadjah Mada, Yogyakarta, Indonesia. He has accomplished his Ph.D. studies at the Van Vollenhoven Institute for Law, Governance and Society, Leiden University, the Netherlands (2022). Prior to his Ph.D., Yance obtained a master's in constitutional law from the University of Indonesia (2012) and a Master of Arts from Onati International Institute for the Sociology of Law, Spain (2016). He has published numerous international articles and book chapters regarding the constitution, constitutional court, agrarian and natural resources, forest governance and indigenous communities' rights in Indonesia. Currently, he is the Chairman of the Research Center for Democracy, Constitution, and Human Rights at Faculty of Law, Universitas Gadjah Mada.

Umi Illiyina, S.H., M.H. is a distinguished lawyer and public official with a strong academic background in law. She earned her Bachelor of Law degree from the Faculty of Law at Riau University and, furthering her education, a Master's degree in Constitutional Law from the Faculty of Law at the University of Indonesia. In her professional career, Umi Illiyina has established herself as a proficient lawyer, demonstrating a deep understanding of constitutional law and election disputes. Her expertise and dedication to legal development led to her appointment in 2023 as a member of the Election Supervisory Body for the Special Region of Yogyakarta. In this role, she is responsible for overseeing the integrity and fairness of the electoral process, ensuring that elections are conducted in compliance with legal and regulatory frameworks.

Justin Apperson is a third-year juris doctor candidate at William & Mary Law School in Williamsburg, Virginia. Originally from Louisville, Kentucky, he received his bachelor's degree in history and Spanish from Transylvania University in Lexington, Kentucky in 2014. Until 2021, he worked at the National Center for State Courts, a non-profit organization dedicated to promoting rule of law and improving judicial administration in the United States and around the world, as Senior Administrative Specialist under Access to Justice Initiatives and the Language Access Services Section. At William & Mary, he is the President of the Labor & Employment Law Society and a staff member of the William & Mary Law Review.

Fritz Edward Siregar, LL.M. On April 11, 2017, the President of the Republic of Indonesia appointed Fritz Edward Siregar to the Indonesia Election Supervisory Board for the term 2017-2022. Fritz finished his doctoral studies at the University of New South Wales in Australia in June 2016. Fritz's dissertation research focuses on the Indonesia Constitutional Court's judicial behavior and judicialization. Fritz earned his Bachelor of Laws (LL.B.) from the Faculty of Law at the University of Indonesia. He earned a Master of Laws (LL.M.) from Erasmus University Rotterdam. Fritz worked as a Justice Assistant to Justice Maruarar Siahaan of the Indonesia Constitutional Court from 2004 to 2009. During his tenure as Election Supervisory Board's head of legal, Fritz is responsible for all Bawaslu's national regulations. He is also in charge of and coordinates the Social Media Campaign Regulation and the Campaign Fund. Fritz has also been appointed to the Global Network on Electoral Justice's Scientific Committee for the period 2022-2027. Fritz is a constitutional law lecturer who teaches and writes about Constitutional Law, Constitutional Court Law, Election Law, and Election Legal Dispute Mechanism.

Osayd Awawda, LL.M., Ph.D. He is a certified legal translator, a practicing lawyer, and an Assistant Professor of Public Law at Qatar University College of Law in Doha, Qatar. He holds an LL.B. from Birzeit University with distinction, an LL.M. with second-degree honor, and a Ph.D. with distinction from Melbourne Law School, Australia. His Ph.D. thesis, which is now available as a book, was entitled: "The Palestinian Supreme Constitutional Court: A Critical Assessment of its Independence under the Emergency Regime of the West Bank". He participated in multiple conferences and published several papers about legal challenges present in Palestine in various fields such as Constitutional Law, Administrative Law, Tax Law, Labour Law, International Humanitarian Law, and International Trade Law. He regularly trains the teams of the Faculty of Law and Political Science at Hebron University in moot court competitions. He often appears in media programs to discuss and analyse imminent legal issues in Palestine.

Adis Nur Hayati is an assistant researcher at the National Research and Innovation Agency of the Republic of Indonesia (BRIN). She has written some articles in business law areas such as consumer law, cooperation law, etc. However, besides having an interest in business law, she also has an interest and eagerness to do research in technology law, feminist legal theory, and human rights areas. Adis finished her bachelor's degree with a concentration on business law at Universitas Indonesia in 2018. After that, she received her master of law degree (cum laude) from the same university and concentration in 2022.

Dewi Analis Indriyani is an Assistant Researcher, she is member of the legal theory and doctrine research group at the Research Center for Law National Research and Innovation Agency of Republic of Indonesia. She is interested in research in the fields of IPR, Human Rights, and Vulnerable Groups. She completed her undergraduate at the Faculty of Law in Muhammadiyah University of Malang, Master of Law with a major in Business Law, Airlangga University, and Master of Law with a major in Intellectual Property Law, Universitas Indonesia.

Nurangga Firmanditya is currently working as an assistant researcher at Research Center for Law, National Research and Innovation Agency of Republic of Indonesia with field of research in law, technology, and human rights. Earlier in his career, he worked at Ministry of Law and Human Right from 2019 before being reassigned to the current position in 2022. As an assistant researcher, he had the opportunity to get involved in various academic activities including research, discussion forum, academic writing, and policy papermaking. He studied jurisprudence from the faculty of law of Universitas Islam Indonesia and obtained his bachelor's degree in 2013. At this moment he is pursuing a master's degree in Universitas Indonesia with concentration in socio-legal study.

Harison Citrawan is is a Fulbright scholar at Penn State Dickinson Law and junior researcher at Research Center for Law under the Indonesian Research and Innovation Agency. His research interests include legal theory, legal epistemology and human rights. He received law degrees from Universitas Gadjah Mada, Rijksuniversiteit Groningen and Penn State University.

Subject Index

Name Index

AUTHOR GUIDELINES

Constitutional Review Journal is a medium intended to disseminate research or conceptual analysis on constitutional court decisions all over the world. The journal is published twice a year in May and December. Articles published focus on constitutions, constitutional court decisions, and topics on constitutional law that have not been published elsewhere. The journal is aimed for experts, academicians, researchers, practitioners, state officials, non-governmental organizations, and observers of constitutional law.

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.

1. Manuscripts have to be written in English.
2. The translation of any foreign language in body text, footnotes, and bibliography need to be added (in a bracket) after the sentence/word in foreign language.

   Example:

   Foreign language in bibliography

   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.
4. Manuscripts submitted must be original scientific writings and do not contain elements of plagiarism.
5. Submitted manuscripts have not been published elsewhere. The manuscripts are also not under consideration in any publishers.
6. The length of the manuscripts including footnotes are around 8000-10.000 words.
7. Manuscripts are written in A4 paper, 12 point Times New Roman, 1.5 space and written in standard and correct grammatical language.
8. The references of the manuscript should use at least 15 international journal article. The author could refer to the Constitutional Review (ConsRev) Journal as the additional international references to : https://consrev.mkri.id/index.php/const-rev/issue/archive
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
        1.1. Sub-heading
            1.1.1. Sub-sub-heading

    II. Main Heading

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

Theunis Roux*
The University of New South Wales (UNSW), Sydney, Australia
t.roux@unsw.edu.au

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.

Constitutional Review indexed by:

Constitutional Review can also be found on the following library database:


ISSN 2460-0016
9 772460 001002