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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

Constitutional Review, Volume 10, Number 2, December 2024

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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
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Note From the Editors

The editorial team is pleased to present the December 2024 edition of *Constitutional Review* (Volume 10, Number 2). Published semiannually in May and December, the journal remains committed to fostering scholarly dialogue on constitutional law, judicial independence, and the critical role of constitutional courts in promoting democratic principles. This edition features a carefully curated selection of eight articles, each addressing pressing issues in constitutional governance and the complex relationship between law and politics across diverse jurisdictions.

The first article, *"**The Rejection of the Voice for Aboriginal People in Australia: A Postmortem of Causes of Failure**"* by Bertus de Villiers, provides a detailed analysis of the 2023 Australian referendum that proposed a constitutionally enshrined advisory body for Aboriginal peoples. The author explores the roots of public skepticism, including ambiguities surrounding the body's structure and functions, and examines the referendum's implications for indigenous rights and reconciliation efforts in Australia.

The second article, *"**Threat to Indonesia's Constitutional Court Independence Posed by Religious Populist Movements and Its Implication towards Human Rights**"* by Cekli Setya Pratiwi, investigates the challenges posed by the rise of religious populism in Indonesia. Drawing on empirical research, the article highlights how conservative hardliner groups advocating specific religious interpretations pressure the Constitutional Court, thereby threatening judicial independence, democracy, and the rule of law.

In *"**Weak-Form Review and Judicial Independence: A Comparative Perspective**,"* Mirza Satria Buana examines shifting paradigms in judicial review within Indonesia, contrasting strong-form and weak-form review models. The article argues for a return to strong-form review to bolster judicial independence and reinforce legal constitutionalism in the context of Indonesia's political dynamics.

The fourth article, *"**The Relationship between the Constitutional Judges' Selection by the House of Representatives and the Position of Judges in Judicial Review Decisions**"* by Muchamad Ali Safa'at et al., explores the connection between judicial selection processes and judicial independence. The authors emphasize the importance of transparent and participatory mechanisms in fostering impartiality and integrity in constitutional decision-making.

Manuel Adrián Merino Menjívar, in *"**The Removal of the Constitutional Chamber Justices in El Salvador: A Story about the Fragility of Judicial Independence**,"* critiques the unconstitutional removal of constitutional justices in El Salvador in 2021. The article frames this development as a manifestation of authoritarian populism, shedding light on the vulnerabilities of judicial independence in emerging democracies.

In *"**Constitutional Court Regression in Post-Democratic Transition: A Comparison of Court Packing in Hungary, Poland, and Indonesia**,"* Idul Rishan examines how regimes utilize court-packing strategies to undermine judicial independence. Through a comparative analysis, the article highlights the political motivations behind such manipulations and their impact on democratic backsliding in these jurisdictions.

The seventh article, *"**Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court**"* by Titon Slamet Kurnia and Ninon Melatyugra, advocates for the adoption of universality as a guiding principle in human rights adjudication. The authors propose interpretive frameworks that prioritize unenumerated rights, protect minority rights, and minimize rights limitations.

The final contribution, *"**Initiating Constitutional Morality: Political Intervention, Ethical Reinforcement, and Constitutional Court Decisions in Indonesia**"* by Annisa Salsabila et al., examines ethical challenges faced by Indonesia's Constitutional Court. The article underscores the importance of constitutional morality in mitigating political interventions and promoting ethical judicial practices to uphold constitutional supremacy.

Together, these articles provide a comprehensive exploration of contemporary constitutional challenges, combining theoretical insights with practical considerations. The editorial team extends its gratitude to the authors, reviewers, and contributors whose efforts have made this edition possible.

It is hoped that this issue will provoke thoughtful discourse among scholars, practitioners, and policymakers worldwide. The editorial team appreciates the continued support for *Constitutional Review* and looks forward to future engagements with its readership.

Warm regards,
The Editorial Team
Constitutional Review
December 2024

The Rejection of the Voice for Aboriginal People in Australia – A Postmortem of Causes of Failure

Bertus de Villiers

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 266-306

On 14 October 2023, the Australian electorate rejected by an overwhelming majority a proposal for a constitutionally guaranteed advisory body, to be called the Aboriginal and Torres Strait Islander Voice. This was the fourth attempt in Australia to create an advisory voice for Aboriginal people, but the first time it was attempted via a constitutional amendment involving a public vote. The rejection is continuing to reverberate through Australian society. To many Aboriginal people this was not only a rejection of a technical proposal, but a rejection of their aspirations of self-determination. This article reflects on some of the root causes why in the view of the author, the referendum failed. The article is critical of the lack of information about the composition and functions of the proposed Voice as well as the inconsistencies between various reports and public documents. These contributed to public scepticism and rejection of the proposal.

Keywords : Advisory Body; Australia; Indigenous Rights; Referendum; Self-Determination; The Voice

Threat to Indonesia's Constitutional Court Independence Posed by Religious Populist Movements and Its Implication towards Human Rights

Cekli Setya Pratiwi

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 307-339

One of the biggest challenges to a democratic state under the rule of law today is rising populist movements that endanger the independence of the judiciary. In Indonesia, the religious populist movement led by hardliner Islamic groups continues to try to enter courtrooms to advocate for religious interpretations of court decisions, such as when the Indonesian Constitutional Court reviews the 1965 anti-blasphemy law. This socio-legal research examines empirical data from key resource interviews and secondary data from related Constitutional Court judgements, pertinent legislation, and public policies to determine the socio-political backdrop of the Court decision. This technique enables the author to evaluate religious populism and how it affects Constitutional Court rulings. Political pressure may weaken the court, according to this research, encourage the religious populism of the former of Islamic Defenders Front to impose its will by stating that the repeal of the Anti-Blasphemy Law shows strong indications of corruption within the Court. Religious populism in the justice system raises concerns about political or religious decision-making, thereby undermining the rule of law. This research shows that the pattern or tendency of religious populism shows the Court's compromise of the legal system towards democratic government in Indonesia, eroding the independence of the judiciary, endangering the right to religious freedom, and weakening public confidence in the justice system and democracy.

Keywords: Independence of Constitutional Court; Indonesia; Religious Populist Movements; Right to Freedom of Religion; Rule of Law

Weak-Form Review and Judicial Independence: A Comparative Perspective

Mirza Satria Buana

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 340-366

This article examines the Court's judicial review power that has gradually shifted from a strong-Weak-Form Review into a weak-form review. The shifting into weak-form review may affect judicial independence, both *de facto* or *de jure*, because Justices have considered the Legislature's responds on the Court's decisions. This approach diminishes the Court's supremacy toward lawmakers. This article explores comparative insights from various countries that utilize those reviews, notably the United States of America (strong review), and commonwealth countries (weak review). It also elaborates on some 'anomalies' from both reviews. It raises two important questions: what insights can be learned from other countries' judicial practices, particularly on the use of weak-form review? And, does weak-form review suitable to be enforced in Indonesia's context? The weak review that is manifested in conditional decisions claims to be more politically palatable. Despite that strategic reason, the practice of conditional decision is prone to misuse as it could decrease constitutionalism and judicial independence. This paper argues that the weak-form review is not suitable for Indonesia's constitutional law context, because the country lacks prerequisites and preconditions of strong control through parliament. The Indonesian Constitutional Court must return to its genuine authority as a strong-form review to strengthen legal constitutionalism.

Keywords: Judicial Review; Strong-Form Review; The Indonesian Constitutional Court; Weak-Form Review

The Relationship between the Constitutional Judges' Selection by the House of Representatives and the Position of Judges in Judicial Review Decisions

Muchamad Ali Safa'at, Aan Eko Widiarto, Haru Permadi and Muhammad Dahlan

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 367-412

The two issues raised in this study are the selection mechanism for constitutional judges nominated by the House of Representative (DPR) and the correlation between the selection of constitutional judges nominated by the DPR and the position of the judge in the decision to review the law. This research analizes the position of the constitutional judges on 8 judicial review decision which correlated to the authority and interests of the DPR. Judges who are nominated through a highly transparent and participatory selection process or a transparent and participatory process may rule in favor of or against the interests of the DPR. However, judges who are nominated through a selection process that is not transparent and participatory will all make decisions in favor of the interests of the DPR. That finding show that the judge nominated through a highly transparent and participatory selection process tends to be more independent than the judge nominated through less transparent and participatory selection process.

Keywords: Constitutional Court; Independency of the Judiciary; Judges' election, Participatory Transparency

The Removal of the Constitutional Chamber Justices in El Salvador: A Story about the Fragility of Judicial Independence

Manuel Adrián Merino Menjívar

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 413-450

The work discusses a significant event that occurred on May 1, 2021, when the Legislative Assembly of El Salvador removed the Justices of the Constitutional Chamber of the Supreme Court of Justice before their term expiration, violating legal procedures. This action was facilitated by a combination of populist rhetoric from the President and abuse of power by the Legislative Assembly. Referred to as Constitutional Authoritarian-Populism, this trend undermines the rule of law. The text outlines the Salvadoran constitutional framework and discusses concepts like judicial independence, populism, abusive constitutionalism, and authoritarianism in the Latin American context. It then examines instances of Constitutional Authoritarian-Populism in El Salvador from 2019 to 2023, demonstrating that the removal of the Justices wasn't spontaneous. Finally, it analyzes the process of removal, the response from the removed Justices, and the subsequent decision by newly appointed Justices to authorize presidential re-election in El Salvador.

Keywords: Constitutional Authoritarian-Populism; Constitutional Chamber; Judicial Independence; Presidential Re-election; Removal

Constitutional Court Regression in Post-Democratic Transition: A Comparison of Court Packing in Hungary, Poland, and Indonesia

Idul Rishan

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 451-473

Over the past two decades, the constitutional court established in the post-democratic transition has begun to face regression. The Constitutional Courts in Hungary, Poland, and Indonesia have evidence, carried out intensively through court packing. This article investigates the regime's undermining of the constitutional court against constitutional judges in selected countries. In addition, this article will also describe the regime's motives and objectives in undermining the independence of the constitutional court. This study argues that regression of the constitutional court occurs through several patterns, such as increasing and decreasing the number of constitutional judges, politicizing the appointment and dismissal of constitutional judges, and rearranging the requirements and selection procedures of constitutional judges. The regime uses court packing to place judges who are loyal or have the same political preferences as the regime to provide control over their independence.

Keywords: Constitutional Court; Court Packing; Judicial Independence

Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court

Titon Slamet Kurnia and Ninon Melatyugra

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 474-504

This article discusses issues regarding constitutional interpretation in general, and the interpretation of human rights provisions in the constitution in particular. The setting of the discussion is the role of the Constitutional Court of Indonesia in reviewing the constitutionality of laws based on Chapter XA of the 1945 Constitution. Constitutional interpretation is pivotal in deciding the constitutionality of laws. Therefore, this article aims to propose an interpretive principle to the Constitutional Court when interpreting human rights provisions in deciding the constitutionality of laws. The interpretive principle is the universality of rights. In other words, this article suggests the Constitutional Court adopt the universality of rights principle in interpreting Chapter XA of the 1945 Constitution. The principle of universality of rights departs from the understanding that human rights are natural rights. The interpretive principles that can be derived from the principle of universality of rights are as follows. First, recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting constitutional human rights norms. These interpretive principles are discovered through a comparative approach, in this case referring to judicial practices in other countries as well as regional and international judicial bodies that are considered relevant. The rationale behind this proposal is that human rights interpretation using the universality of rights principle can enhance the protection of human rights. Suppose judicial review of the constitutionality of laws is dedicated to enhancing human rights. In that case, constitutional interpretation should be dictated by the universality of rights principle as the interpretive principle.

Keywords: Constitutional Interpretation; Human Rights; Universality

Initiating Constitutional Morality: Political Intervention, Ethical Reinforcement, and Constitutional Court Decisions in Indonesia

Annisa Salsabila, Tria Noviantika, and Ahmad Yani

Constitutional Review, Vol. 10 No. 2, December 2024, pp. 505-537

Constitutional morality is essential for the branches of power (Parliament and Government) to ensure impartiality, political insularity, and institutional stability for the judicial power, especially the Constitutional Court and constitutional morality as a guide and benchmark for constitutional judges to form ethics and decisions that reflect the Constitution. This article seeks to answer crucial questions about how forms of intervention and ethical problems in the Constitutional Court do not reflect constitutional morality and how the idea of limiting intervention and strengthening the ethics and decisions of the Constitutional Court through constitutional morality. The author uses normative legal research methods with statutory, conceptual, comparative, and case approaches. The results of this study are in line with the hypothesis of the argumentation that the author builds, showing that the lack of application of constitutional morality by Parliament, Government, and Constitutional Court Judges has threatened the independence of the Constitutional Court, has damaged the judicial dignity of the Constitutional Court, and making the Constitutional Court a means of political insurance. Several cases have shown that parliamentary and government intervention in the Constitutional Court is inevitable. Likewise, ethical violations and decisions of the Constitutional Court that do not reflect the Constitution add to the complexity of the current problems of the Constitutional Court. For this reason, the author recommends that the elaboration of the concept of limiting intervention and strengthening the ethics and decisions of the Constitutional Court can be accomplished in several ways, including statutory provisions regarding the prohibition of conflicts of interest and the ethics of state administrators, the construction of ethical institutions/courts as external institutions in enforcing and supervising ethics, reconstructing the process of selecting and dismissing constitutional judges fairly and transparently by involving public oversight, and guaranteeing and legitimizing the Constitutional Court in exercising administrative and financial autonomy independently.

Keywords: Constitutional Court Decisions; Constitutional Morality; Ethics; Independence; Political Intervention

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The Rejection of the Voice for Aboriginal People in Australia – A Postmortem of Causes of Failure

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Abstract

On 14 October 2023, the Australian electorate rejected by an overwhelming majority a proposal for a constitutionally guaranteed advisory body, to be called the Aboriginal and Torres Strait Islander Voice. This was the fourth attempt in Australia to create an advisory voice for Aboriginal people, but the first time it was attempted via a constitutional amendment involving a public vote. The rejection is continuing to reverberate through Australian society. To many Aboriginal people this was not only a rejection of a technical proposal, but a rejection of their aspirations of self-determination. This article reflects on some of the root causes why in the view of the author, the referendum failed. The article is critical of the lack of information about the composition and functions of the proposed Voice as well as the inconsistencies between various reports and public documents. These contributed to public scepticism and rejection of the proposal.

Keywords : Advisory Body; Australia; Indigenous Rights; Referendum; Self-Determination; The Voice

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I. INTRODUCTION

On 14 October 2023, the Australian electorate rejected by an overwhelming majority a proposal for a constitutionally guaranteed advisory body, to be called the Aboriginal and Torres Strait Islander Voice (the Voice).[1] The proposed amendment would have obligated Parliament to enact legislation to create the Voice and to legislate about its composition, powers, functions, and related aspects. A two-stage process was proposed: first, an amendment to the Constitution for the Voice to be mandated; and second, legislation to be enacted in which the detail of the Voice was contained. From the outset this process presented a challenge since it meant that the public had to vote on a constitutional proposal and amendment of which the detail was not known.

The current process leading to the referendum started in 2017 and culminated in an extensive and deeply divisive public campaign at the end of 2023.[2] The proposed amendment to the Constitution rested on three principles, namely *recognition* of Aboriginal people[3] as the first people of Australia; mandating the creating an *advisory body* by which Aboriginal people could make 'representations' to the national parliament and executive government; and *enshrining* the principle of an advisory Voice into the Constitution.

The proposed amendment read as follows:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> **129 Aboriginal and Torres Strait Islander Voice**
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

[1] For an analysis of voting, see Stephan Baum, "Unravelling the Referendum: An Analysis of the 2023 Australian Voice to Parliament Referendum Outcomes across Capital Cities," *Research Square* (preprint), 2024, https://doi.org/10.21203/rs.3.rs-4069107/v1.

[2] Selecting a date when the process by which Aboriginal people sought greater self-determination started is a challenge because Aboriginal demands to be heard and consulted go back to the settlement of the country. For purposes of this article, 2017 is chosen simply because that is the year when the Aboriginal delegates started their deliberations at Uluru, where the *Uluru Statement from the Heart* was adopted.

[3] It must be noted that the reference to "Aboriginal people" does not imply that they are a single Indigenous group with one cultural and language identity. Aboriginal and Torres Strait Islander peoples comprise around 150 language groups, with many communities having a close connection to areas where their ancestors resided and called "country." Around 4% of the total population (984,000) identify as Aboriginal. Australian Bureau of Statistics, "Census 2021" (Canberra, 2021), https://www.abs.gov.au/census.

i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
ii. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
iii. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

The question put to the electorate by way of the referendum was whether they supported the amendment to the Constitution. For the Constitution to be amended a double majority, being a majority of the states (4 out of 6 states) as well as a majority of the total popular vote, is required.[4] The final vote was 60% No against 40% Yes.[5] The amendment was defeated in each of the 6 states. The result was 'shocking but not a surprise.'[6]

The process leading to the referendum commenced in 2017 when a group of Aboriginal leaders met at the spiritual centre of Australia, Uluru, to discuss their demands for constitutional recognition. The statement adopted by them, referred to as the Uluru Statement from the Heart, envisaged an amendment to the Constitution in the format that was put to the referendum.

The rejection of the constitutional amendment raises many questions for Australia as far as reconciliation, indigenous rights, self-determination, consultation, and the closing of the socio-economic gap between Aboriginal and non-aboriginal persons are concerned.[7] The scale of the rejection of the proposal sent reverberations through Australian society since there is no alternative plan for national consultation with Aboriginal people. One must note, however, the consultation with Aboriginal people at a *local level* in Australia through native

[4] It is noted that since the enactment of the Constitution in 1901, there had been 46 proposals at 18 occasions to amend the Constitution, of which only 8 had been successful.
[5] Australian Electoral Commission, "National Results," 2023, https://tallyroom.aec.gov.au/ReferendumNationalResults-29581.htm.
[6] Mike Berry, "The Voice Referendum," *Journal of Australian Political Economy* 92 (2024): 247.
[7] Charles and Hamilton view the outcome as a crisis in democracy and the referendum having been "hijacked" by lies and mining interests. Katharine C. Charles and Laura Hamilton, "The Voice and Australia's Democracy Crisis," *Meanjin* 83 (2024): 200–209.

title processes, is advanced, extensive, and sophisticated.[8] I have suggested in the aftermath of the referendum that for future self-determination initiatives, native title should be used as a springboard for broader consultation and cooperation.[9] More than half of the Australian landmass is covered by native title and the empowerment this brings could be harnessed for regional and national consultation. As far as *national* consultation is concerned all leaders have however now been sent back to the drawing board. The state of South Australia has become the first federal state to enact by legislation a First Nations Voice to state parliament with the objective to 'give First Nations people a voice that will be heard by the Parliament of South Australia, the Government of South Australia and other persons and bodies.'[10] The first election for the state-voice took place on 16 March 2024, with a low voter turnout of around 10 percent.[11] The South Australia state-voice is an advisory, consultation, and advocating body.[12] Other states are also considering various forms of advisory, and truth and reconciliation processes.

The experiences of Australia with the design of a national consultative body for indigenous people are not unique to that country. Internationally advisory bodies for indigenous people have had a challenging pathway. For example, in South Africa the Khoisan Act has been declared as unconstitutional;[13] in the Nordic countries the Sámi Declaration remains in draft; in Finland there are ongoing attempt to clarify the powers and functions of the Sámi Parliament vis-

[8] Richard Bartlett, *Native Title in Australia*, 4th ed. (Chatswood, NSW: LexisNexis Butterworths, 2020); Bertus de Villiers, "Using Control over Access to Land to Achieve Self-Government (of Some Sort): Reflecting on the Experiences of Aboriginal People with the Right to Negotiate in Australia," in *Navigating the Unknown: Essays on Selected Case Studies about the Rights of Minorities*, edited by Bertus de Villiers, 104–37 (Leiden: Brill, 2022).

[9] Bertus de Villiers, "Life after the Failed Voice: Options for Aboriginal Self-Determination and Consultation in Australia," *International Journal on Minority and Group Rights* (2024): 1–32.

[10] *First Nations Voice Act 2023* (No. 9 of 2023) (South Australia Voice).

[11] The low voter turnout is likely to cause other states that had considered similar advisory state bodies to reflect on the merit and timing of any new advisory institutional arrangements. "SA First Nations Voice Election Results Show Low Turnout, but Candidate Urges 'Give Us a Chance,'" *ABC News*, March 29, 2024, https://www.abc.net.au/news/2024-03-29/sa-voice-to-parliament-voter-turnout/103649148.

[12] Attorney-General's Department (South Australia), "Local First Nations Voices," 2023, https://www.agd.sa.gov.au/first-nations-voice/local-first-nations-voices.

[13] *Mogale and Others v. Speaker of the National Assembly and Others* [2023] ZACC 14; Bertus de Villiers, "Speaking, but Does Anyone Listen? The Path of Progress and Frustration with Indigenous Advisory Bodies of the Sámi, Aboriginal People, and the Khoisan," in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*, edited by Bertus de Villiers, 131–200 (Leiden: Brill, 2023).

à-vis national policies that affect the Sámi; in the Americas there are ongoing experimenting with advice-giving indigenous bodies; and in Chile constitutional referenda in 2022 and in 2023 to recognise the rights of indigenous people were defeated.

The decision to put the Voice to a referendum was inherently risky since constitutional amendment requirements in Australia are not often met. Placing such a potentially divisive question before the population without bipartisan support opened the risk of a zero-sum outcome with an unpredictable electorate.[14] The detail (or lack thereof) of the proposed Voice was inevitable going to be the focus of the campaign, for example: is the Voice to be elected or appointed; what would be its purposes and objectives; what would be the term of office; how would urban versus rural Aboriginal interests be accommodated; would it make decisions by consensus or by majority; how would minority interests within the Voice be accommodated; what procedures would be followed before a representation is made; what would be the legal status of representations; on what subject matters could representations be made; could legislation or executive actions be challenged in court on the basis that representations had not been invited, or a representation had not been given adequate weight, or inadequate time had been given for representatives in the Voice to consult with their communities?[15] Although efforts were made to politically respond to these questions, the fact remained that the actual detail would in due course be provided only *after* the referendum, and this uncertainty left the electorate perturbed.[16]

Ultimately government decided *against* providing statutory detail prior to the referendum in answer to the questions put above.[17] Prime Minster Albanese

[14] Bertus de Villiers, "Seven Questions before the Voice Can Be Heard: Learning from the Past," *Brief*, August 2022, 8–11.

[15] Bertus de Villiers, "An Advisory Body for Aboriginal Peoples in Australia: The Detail May Be Fatal to the Deal," *Brief*, March 2018, 7–11.

[16] The most comprehensive advice given to Parliament in answer to some of these questions was authored by the Solicitor-General.^1 But, as argued below, this advice did not address all the questions raised above and was also open to disagreement. The advice was what it says—*advice*—and open to disputation. One could hardly expect a doubting public to be enthused about an opinion given by a senior lawyer. See Stephen Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," advice to Parliament, April 19, 2023.

[17] As explained below, the references during the referendum campaign to the Calma Langton report and the subsequent Design Principles for the Voice carried little weight since those materials were not contained in legislation and would not, when the Constitution were interpreted in future, bear any weight.

was often quoted during the referendum campaign when asked about the detail of the Voice, that the 'answer is out there'.[18] The debate will continue about the merit of that answer of the Prime Minister and the decision not to give greater legal clarity about the design of the Voice prior to the referendum.[19] Previous Prime Minister Keating, a strong supporter of the Voice during the campaign, acknowledged after the referendum that it was the 'wrong fight' and it had perhaps 'ruined' the atmosphere for a national treaty.[20]

The run-up to the referendum highlighted two major risks identified by the opposing sides to the Voice-debate: on the one side, the concern was that the proposed power to make representations of the Voice would be so weak that the Voice would become another 'toy telephone' which would have little practical effect since sovereign powers will remain in favour of government and the executive.[21] On the other side, the concern was that the consultation obligations arising from the Voice would give rise to increased litigation, delay the legislative and executive processes, and racialize socio-economic policies.

There is plethora of reasons on offer to explain why the Voice-amendment had failed. I seek to contribute to the discussion by engaging in 3 potential reasons for the failure, namely: (a) the absence of detail prior to the referendum about the composition, powers, and functions of the Voice; (b) the concern about possible involvement of the Voice in general policies and legislation rather than for it to be directed to those matters that solely or principally affect Aboriginal

[18] On 23 September 2023, shortly before the referendum, the Prime Minister defended the lack of detail about the Voice by saying: 'The *detail* is *there* and of course, the Parliament will determine the composition and procedures of the Voice. See A. Albanese, "Albo Hits Back on Claim That Voice to Parliament," *News.com.au*, September 18, 2023.

[19] I acknowledge that there had been many attempts by academics, activists, and influencers to answer questions about the Voice in the leadup to the referendum, but it is the contention of this article that those responses would not have carried much weight in future parliaments and courts, and hence they were simply personal opinions. My proposition is that the lack of statutory detail was fatal to the initiative, regardless of efforts by experts such as Davis and Williams to remedy the information vacuum. See Megan Davis and George Williams, *Everything You Need to Know about the Voice* (Sydney: UNSW Press, 2023). Highly respected barrister McCusker QC described the lack of detail about the Voice and the potential abuse that may arise from litigation arising from representations made by the Voice as a 'power grab disguised in sheep's clothing'. See Malcolm McCusker, "'A Bad Idea for Australia': McCusker Blasts the Voice at Its Core," *6PR*, October 6, 2023.

[20] Lenore Taylor, "Paul Keating Says Voice Referendum Was 'Wrong Fight' and Has 'Ruined the Game' for a Treaty," *The Guardian*, October 27, 2023, https://www.theguardian.com/australia-news/2023/oct/27/paul-keating-says-voice-referendum-was-wrong-fight-and-has-ruined-the-game-for-a-treaty.

[21] Bertus de Villiers, "The Recognition Conundrum: Is an Advisory Body for Aboriginal People Progress to Rectify Past Injustices or Just Another 'Toy Telephone'?" *Journal on Ethnopolitics and Minority Issues in Europe* 17 (2018): 24–28.

communities, their land, culture and traditions; and (c) the risk of increased litigation if parliament or the executive fail to seek or to heed to representations made by the Voice.

Before progressing to the substance of my arguments, a brief background is provided about the path travelled by the Voice-amendment; the Australian experience with previous Aboriginal advisory bodies; and a brief overview of indicia that have crystallised from international law about consultation with indigenous people.

II. PATH OF THE VOICE – FROM ULURU TO REFERENDUM (2017-2023)

The discussion in Australia about the recognition of Aboriginal people in an appropriate way has been ongoing for a long time.[22] A previous proposal by then Prime Minister John Howard[23] to 'recognise' Aboriginal people in the preamble of the Constitution was rejected by Aboriginal people as being merely symbolic, with too little practical and legal effect.[24]

The debate about recognition took a major leap forward when on 26 May 2017 delegates from Aboriginal communities across Australia met under the auspices of the Referendum Council at Uluru in the centre of Australia to issue a statement entitled *Uluru Statement from the Heart.*[25] The Referendum Council made its recommendations after consultation with Aboriginal people.[26] The

[22] The Referendum Council was appointed on 7 December 2015 by then Prime Minster Turnbull and then Leader of the Opposition Shorten. At the time of the referendum the Labour Party had been elected to government and the Prime Minister, Anthony Albanese, committed to a referendum within his first term of office. The leader of the main opposition Liberal Party, Peter Dutton, opposed the constitutional amendment. Dutton was in favour of an amendment to recognise Aboriginal people, but he was against an amendment of the Constitution to create the Voice.

[23] John Howard, "The Right Time: Constitutional Recognition for Indigenous Australians," speech delivered at the Sydney Institute, Sydney, October 11, 2007, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1.

[24] Some state parliaments in Australia have taken steps to acknowledge Aboriginal people; for example, in 2015, the Constitution of the State of Western Australia was amended to recognize Aboriginal people in the preamble.^1 Some states and territories, such as South Australia and the ACT, have also commenced discussions to enact a state-based Voice for Aboriginal people. See *Constitution Act 1889* (Western Australia), preamble.

[25] "Uluru Statement from the Heart," Uluru: Referendum Council, 2017, https://ulurustatement.org/the-statement/view-the-statement/.

[26] Referendum Council, "Final Report of the Referendum Council," Commonwealth of Australia, June 30, 2017, 44–138, https://www.referendumcouncil.org.au/final-report.

Referendum Council opted for a constitutionally entrenched Voice to be given to Aboriginal people as a practical result of recognition of them being the original owners of Australia. The Referendum Council recommended that the creation of the Voice be mandated by the Constitution (hence requiring a referendum), with the detail to be legislated by Parliament. The basic outline proposed by the Referendum Council for the Voice was as follows: The Voice would be elected and not appointed; the detail of the Voice, its powers and its functioning would be set out in legislation to be enacted by the federal Parliament; the Voice would have advisory powers, not a veto or any legislative powers; and the exact scope of advices to be given were to be finalised in legislation.

The National Indigenous Australians Agency (NIAA), was subsequently tasked by the federal government to investigate, consult, report, and make recommendations on a Voice to give effect to the Uluru Statement of the Heart. The NIAA undertook further public consultation and released its final report for a proposed Voice in July 2021 (also referred to as the Calma Langton report).[27] The report recommended that the Voice would comprise national, regional and local bodies across 35 regions that represent Aboriginal people; that in the design of the Voice the local needs of Aboriginal communities to determine how they would elect or nominate representatives would be considered rather than a single model of election or nomination imposed for all Aboriginal communities; the Voice would provide non-binding advices and recommendations to state and federal governments on matters that directly impact on Aboriginal people in regard to their social, spiritual and economic wellbeing; delegates from the regional bodies were to form a national Voice that would comprise 24 persons; and the Voice would not have legislative, executive or administrative functions.

These recommendations by the Calma Langton report were noted and welcomed by government. Notably however is that government did not formally accept or endorse the recommendations; the recommendations were not reduced

[27] Marcia Langton and Tom Calma, "Indigenous Voice Co-Design Process Final Report to the Australian Government," Canberra: Indigenous Voice, July 2021, https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf.

to a government White Paper for public comment; the recommendations were not submitted to a constitutional convention for deliberation; and the recommendations were not reflected in a bill or legislation. The detailed recommendations of the Calma Langton Report therefore remained non-binding options and recommendations with the status of a discussion paper rather than a legal or policy instrument.

As the referendum approached and criticism for the lack of detail about the Voice became intense, the First Nations Working Group adopted 'Design Principles' for the Voice. Those Design Principles also fell far short of the detail contained in the Calma Langton Report. The Design Principles did not satisfy critics of the lack of detail and did not do justice to the voluminous Calma Langton report and detail developed by the Co-Design process.[28]

On 19 June 2023, Parliament passed the Constitution Alteration Bill, which contained the proposed amendment and the referendum question.[29]

III. EXPERIENCES WITH PREVIOUS ABORIGINAL ADVISORY BODIES

The debates leading to the referendum took place against the background that Australia has since the 1970s had 3 legislated federal Aboriginal advisory bodies. Although each of those had been abolished, the reasons for their failure and ways to mitigate those risk being repeated by the Voice, were arguably not given adequate attention during the referendum debates.[30] The principal lesson sought to be drawn by the government from the previous experiences was that the Voice had to be constitutionally enshrined to prevent it from being abolished.[31] This was a poor reflection on, and an inadequate response to the

[28] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice," 2023, https://voice.gov.au/sites/default/files/2023-06/design-principles-aboriginal-torres-strait-islander-voice.pdf.

[29] *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth), https://www.legislation.gov.au/Details/C2023B00060/Html/Text.

[30] Taflaga suggests that the previous advisory bodies were abolished "at the whims of government," but the reality is more nuanced since, as is shown below, those bodies also became dysfunctional and ineffective due to internal disagreements. See Maria Taflaga, "Australia: Political Developments and Data in 2023: Unfinished Business: Failed Referendums and Ongoing Inflation," *European Journal of Political Research* (2024): 2.

[31] Reconciliation Australia, "Voice to Parliament," 2023, https://www.reconciliation.org.au/reconciliation/support-a-voice-to-parliament/.

reasons for failure of the previous advisory experiences. One would have expected that a detailed analysis would take place of those previous experiences with the view to identify pitfalls to be averted. The principal lesson the yes-campaign sought to draw was that entrenchment should occur, but the argument failed to acknowledge that constitutional entrenchment by itself would not address the reasons for previous failures. A constitutionally entrenched advisory body that malfunctions, or that becomes unyielding, or that loses credibility, or that gives rise to extensive litigation, or that may suffer low participation as happened with ATSIC, may become a substantial hurdle to indigenous consultation and reconciliation – even the more if it is entrenched in the Constitution and can only be removed by way of another referendum.

Following is a brief overview of those previous advisory bodies:[32]

1.1 National Aboriginal Consultative Committee

The National Aboriginal Consultative Committee (NACC) (1973-1977) was an advisory body comprised of 41 elected Aboriginal people. The NACC's principal function was to advise government on policies that affected Aboriginal people. There was no list of topics that had to be referred to the NACC for advice, and there was no legal obligation on government to seek advice or to consult.[33] Several issues contributed to the failure of the NACC, for example: the demand of the NACC to be at law an effective self-government for Aboriginal people and the rejection by government thereof; disagreement about the weight to be attached to advice of the NACC – be it advisory or binding; reluctance on the part of government to explain why NACC advice had not been accepted; internal disagreement between Aboriginal representatives of the NACC about priorities to be pursued; and confusing objectives of the NACC. The NACC was abolished after 4 years.[34]

[32] Bertus de Villiers, "Dithering between Consultation and Consensus: Whereto with Advisory Bodies for Indigenous Peoples?" *Journal on Ethnopolitics and Minority Issues in Europe* 22 (2023): 32–63, https://doi.org/10.53779/HBKA3992.

[33] NACC, "The 1970s: The National Aboriginal Consultative Committee (NACC) 1973–1977," Koori History Website, accessed April 23, 2021, http://www.kooriweb.org/foley/images/history/1970s/nacc74/naccdx.html.

[34] De Villiers, "Speaking, but Does Anyone Listen?"

1.2 National Aboriginal Conference

The second advisory body for Aboriginal people commenced in 1977 (and ended in 1985) with the National Aboriginal Conference (NAC). The NAC was an indirectly elected, national body. The NAC comprised 36 members with regional branches. The NAC had no other self-governing, supervisory, or administrative powers.[35] Similar to the NACC, there was no legal obligation on parliament, the government, or government departments to refer policies or bills to the NAC for comment, or for advice of the NAC to be considered in good faith, or for government officials to meet with the NAC. There was also ongoing disagreement *within* the NAC where its focus should lie – on local issues affecting traditional land and culture of Aboriginal people, or should it also focus on national issues such as a treaty and advocacy on wider socio-economic policy issues.[36] The NAC-government relationship soon ended in stalemate, with some saying the NACC had exceeded its mandate; others saying NAC had become a talk shop with no effective powers; and others complaining the NACC had the wrong focus. Amid these disputes, to rural Aboriginal people the importance of local land rights (also known as native title) in their traditional lands became more important than city-based agendas. The NAC was abolished after 8 years.

1.3 Aboriginal and Torres Strait Islander Commission

The third attempt to create an advisory body for Aboriginal people commenced in 1990 (and ended in 2005) with the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC).[37] ATSIC had an advisory function, but added thereto were also administrative functions to identify spending priorities, to manage some Aboriginal community programmes, and to allocate funds to Aboriginal communities.[38] ATSIC was elected with a regional and a national profile,

[35] AIATSIS, "NAC—Establishment, Role and Functions," Canberra: AIATSIS, 1983, https://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/national-aboriginal-conference.

[36] Bertus de Villiers, "An Ancient People Struggling to Find a Modern Voice: Experiences of Australia's Indigenous People with Advisory Bodies," *International Journal on Minority and Group Rights* 26 (2019): 1–21.

[37] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[38] Kingsley Palmer, *ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials* (Canberra: AIATSIS, 2004).

and it had an autonomous budget with substantial staff.[39] A failure or refusal of government to consult with ATSIC, or a rejection of an advice received from ATSIC was not reviewable or otherwise justiciable.[40] The reasons for the demise of ATSIC were varied, but essentially it experienced resistance from government; it struggled to generate legitimacy amongst Aboriginal people which is evident in low voter turnout in elections; there was confusion of powers and functions *within* ATSIC and *between* ATSIC and the government; and there were concerns about corruption and maladministration within ATSIC.[41] ATSIC was abolished after 15 years in 2005. [42]

These previous experiences of Aboriginal advisory bodies raised many questions about the lack of detail that accompanied the proposed Voice. The failure of government to identify the reasons for previous failures of advisory bodies and address those shortcomings by way of the design-elements of the Voice, fuelled concerns by sceptics that the Voice may become an unworkable entrenched body.

In light of the topic of this article, five concerns arose from the previous Aboriginal advisory bodies in general, and ATSIC in particular, namely: (a) the elected nature of ATSIC gave rise to expectations of effective power-sharing and self-government, but those hopes could not be met by its mere advisory and limited administrative powers; (b) the self-administration powers of ATSIC were complicated by overlapping functions with government departments and blurred responsibilities; (c) ATSIC had no reasonable expectation that its advices to government would be sought or accepted, or at least be considered in good

[39] Will Sanders, "ATSIC's Achievements and Strengths: Implications for Institutional Reform," Sydney: Centre for Aboriginal Economic Policy Research, 2004, http://caepr.anu.edu.au/sites/default/files/Publications/topical/SandersATSICAchievement.pdf.

[40] Sanders, "ATSIC's Achievements and Strengths."

[41] Palmer, *ATSIC: Origins and Issues for the Future*.

[42] Angela Pratt and Scott Bennett, "The End of ATSIC and the Future Administration of Indigenous Affairs," Canberra: Parliament of Australia, 2004, https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/FXED6/upload_binary/fxed68.pdf;fileType=application%2Fpdf.

faith;[43] (d) Aboriginal representatives in ATSIC could not agree on a shared vision for Aboriginal self-determination; and (e) the credibility of ATSIC in Aboriginal communities was low, which in turn impacted on its legitimacy and credibility – internally and externally.

IV. OBSERVATIONS FROM INTERNATIONAL LAW ABOUT INDIGENOUS CONSULTATION

It is only recently that international law has being giving specific attention to the collective rights of indigenous people. The notion of collective rights of indigenous people, has since the 1970s been increasingly acknowledged in international law and in regional instruments.[44] The essential concept that has become associated with collective rights of indigenous people is the right to 'self-determination' based on their pre-settlement sovereignty.[45] Whilst it is accepted that self-determination also applies to the rights of individuals, the term is often used in international and public law in the context of indigenous peoples collectively exercising their cultural and customary rights.[46] However, self-determination is not a term of art, and hence its content and application may vary from state to state.[47] As a general proposition the right to self-determination is often associated with arrangements for self-government, self-administration,

[43] Ironically, as pointed out below, the Solicitor-General in his legal advice to Parliament stressed that there would not be an obligation on Parliament to consider representations made by the Voice.^1 This left unanswered the question of why the same frustration that caused the demise of ATSIC would not also cause the demise of the Voice. One of the principal concerns of those on the left of the campaign was precisely that representations could be ignored and hence rendered the Voice ineffectual. It seemed as if the government tried to steer away from giving a definitive answer, but this eroded trust rather than giving comfort. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b).

[44] James Anaya, "The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples," *Canadian Yearbook of International Law* 49 (2011): 117–76; United Nations, "Indigenous Peoples and the United Nations Human Rights System" (New York: United Nations, 2013); UN Special Rapporteur on the Rights of Indigenous Peoples, "Special Rapporteur on the Rights of Indigenous Peoples," 2007, https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx.

[45] Ranjan Shrinkhal, "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal," *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (2021): 71–82, https://doi.org/10.1177/1177180121994681.

[46] Gudmundur Alfredsson, "The Rights to Self-Determination in International Law," in *Minority Self-Government in Europe and the Middle East*, edited by Olgun Akbulut and Elçin Aktoprak, 3–31 (Leiden: Brill, 2019).

[47] Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020).

autonomy, land rights, consultation rights over policies that impact the indigenous community, and advisory bodies, albeit not limited to those.[48]

The two most relevant instruments in international law that share as primary objective the protection of indigenous rights, are the International Labour Organisation Convention 169 Concerning Indigenous and Tribal Peoples (ILO 169),[49] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[50] ILO 169 is the only legally binding international treaty on indigenous peoples, whilst UNDRIP is a non-legally binding declaration of the UN General Assembly. ILO 169 has only been ratified by a few nations (23 – of which Australia is not one), whilst UNDRIP has principally political and policy impact, but has much wider endorsement (including by Australia). UNDRIP has been described as a 'guiding instrument' to assist signatory parties in better recognising indigenous people's rights.[51] There are ongoing efforts in Australia to ensure its laws and policies are consistent with UNDRIP.[52]

ILO 169 does not use the phrase self-determination, but it recognises the rights of indigenous people to exercise control over their traditional lands and cultural institutions, which, in effect, is a form of self-determination. Article 4(1) of ILO 169 relates to the collective right of indigenous people to institutions that are designed specifically to accommodate their unique identities. The Preamble of UNDRIP and article 19 of UNDRIP encapsulate the objective that is sought to be achieved:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

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48 Alexandra Tomaselli, "The Right to Political Participation of Indigenous Peoples: A Holistic Approach," *International Journal on Minority and Group Rights* 24 (2017): 390–427.

49 International Labour Organization, *Indigenous and Tribal Peoples Convention*, C169, 1989, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

50 United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," 2007, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

51 United Nations, *Indigenous Peoples and the United Nations Human Rights System* (New York: United Nations, 2013), 4.

52 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Canberra: Parliament of Australia, 2023).

The way how states design institutions for indigenous people to comply with UNDRIP, falls within the discretion of states.[53] Indigenous people have the right to be consulted and to be involved in decisions and policies about the use of their traditional lands and natural resources on those lands, as well as the protection of those resources, and their general development.[54]

In practical terms, one of the most important procedural rights accorded to indigenous people in UNDRIP is the right to free, prior and informed consent (FPIC) about matters that impact on their unique identity, culture, traditions, language, customs, and traditional lands.[55] It is particularly when their traditional lands are affected, that informed consent of indigenous people ought to be sought, albeit that seeking consensus does not imply a veto is granted to an indigenous community.[56] Practical effect and useful guidance was given in the South American Kichwa-case about the meaning of FPIC.[57] In another South American case, the Poma Poma-case, it was declared that 'effective' participation in decision-making is an essential element to consultation.[58] In both of these cases consultation related to specific projects on indigenous lands and not to a general advisory role about socio-economic policies. In the South African Baleni case the right of a veto of an indigenous community over a project was upheld, but that was pursuant to the terms of the applicable statute and not because of standards imposed by UNDRIP.[59] The right to self-determination is difficult, if not impossible, to enforce in domestic settings unless additional legislative or policy interventions occur within states.[60]

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53 Victoria Tauli-Corpuz, *Autonomy Report of the Special Rapporteur on the Rights of Indigenous Peoples* (New York: United Nations, 2019), paras. 36–66, https://www.undocs.org/A/74/149.

54 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), art. 15.

55 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), art. 6; United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art. 19.

56 International Labour Organization, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), arts. 15.2, 17.2.

57 *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). In this case, the court ruled that the following consultation standards must be met: prior to the decision being made; in good faith with the objective of reaching an agreement; with information provided about the proposed project being adequate and accessible; that the project and consultation are based on social and environmental impact assessments; and that the advice expressed by the community must be informed.

58 *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (March 24, 2009).

59 *Baleni v. Minister of Mineral Resources*, 2019 (2) SA 453 (GP).

60 Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009).

As a basic principle, consultation with indigenous people is not mandated for general socio-economic, public policies or legislation that also affect the rest of the population.[61] The obligation to consult related to issues that specifically effect the traditional lands of indigenous people particularly in the event of large-scale projects[62] and policy areas that primarily relate to indigenous people. Furthermore, the justiciability of the right to FPIC is, unless otherwise stated in domestic law, directed at the adequacy of *processes* of consultation rather than as a substantive veto or a review about the merit of the policy or legislative measure.[63]

V. THREE CONTRIBUTORY REASONS FOR THE FAILURE OF THE VOICE-REFERENDUM

The reasons why the Voice referendum failed remain the subject of ongoing discourse in Australia.[64] In this part the focus is on 3 contributing reasons for the failure of the Voice-referendum, namely: (a) the absence of statutory detail about the composition, powers, and functions of the Voice; (b) the concern that the Voice would make representations about general policies and legislation that affect Aboriginal people as part of the general population (for example social areas such as poverty, youth crime, housing, employment, health), rather in respect of those matters that solely or principally affect Aboriginal communities; and (c) the concern of increased litigation if parliament or the executive fail to seek or to heed to representations made by the Voice.

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[61] Bertus de Villiers, "Right to Be Consulted, but the Frustration of Being Ignored: The Ongoing Efforts in International Law to Give Practical Meaning to Free, Prior, and Informed Consent," in *Indigenous Rights in the Modern Era: Regaining What Has Been Lost*, edited by Bertus de Villiers (Leiden: Brill, 2023) , 68–130.

[62] *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (November 28, 2007).

[63] See, for example, in Australia, the *Tipakalippa* case, *Santos NA Barossa Pty Ltd v. Tipakalippa* [2022] FCAFC 193, and the *Cooper* case, *Cooper v. National Offshore Petroleum Safety and Environmental Management Authority (No. 2)* [2023] FCA 1158. In the *Tipakalippa* case, the Federal Court of Australia commented as follows about the purpose of consultation: "Consultation … gives the titleholder an opportunity to receive information that it might not otherwise have received from others affected by its proposed activity." *Santos NA Barossa Pty Ltd v. Tipakalippa* [2022] FCAFC 193, para. 89.

[64] Simon Cowan, "Things to Learn from the Voice to Parliament Referendum," *Canberra Times*, October 21, 2023; Katie Wellauer, Claire Williams, and Bridget Brennan, "Why the Voice Failed," *ABC News*, October 16, 2023, https://www.abc.net.au/news/2023-10-16/why-the-voice-failed/102978962; Naaman Zhou, "The Failure of Australia's Attempt to Create an Indigenous Voice to Parliament," *The New Yorker*, October 19, 2023; Adam Wesselinoff, "Review: How the Voice Referendum's Defeat 'Unsettled' Australia," *The Catholic Weekly*, July 1, 2024, https://catholicweekly.com.au/voice-referendum-failure/.

In the process from 2017-2023 leading to the referendum there were principally five steps by which the details about the possible institutional design, functions and powers of the Voice were ventilated, namely the Uluru Statement of the Heart (26 May 2017); the Joint Select Committee Report (2018); the Final Report of the Indigenous Voice Co-Design Process (September 2022); the Design Principles of the First Nations Working Group (23 March 2023); and finally the text of the proposed Constitutional Amendment (2023). In this part I reflect on each of those steps to explain the 3 design reasons for failure as identified above.

5.1 Design Features of the Voice

The debate leading to the Voice was characterised by demands for more information about the design and powers of the Voice, and counterarguments that Parliament would provide in due course the detail once the constitutional amendment that mandated the creation of the Voice by Parliament, had been approved.[65] Added thereto, the Voice constitutional amendment was not preceded by the legislative processes of a White Paper; a draft bill; or a constitutional convention. The explanations by those who supported the Voice that detail would be forthcoming *after* the referendum, could not cure public scepticism and concern at the lack of constitutional and statutory detail *prior* to the vote.[66] In the run-up to the referendum the following materials sought to provide clarity about the composition, powers, and functions of the Voice, but none of those were legally enshrined:

The *Uluru Statement* (2017) laid claim to ongoing sovereignty of Aboriginal people that was never ceded at the time of settlement and called for a constitutional amendment that would provide for an advisory Voice to be included into the Constitution. Added thereto a 'Makarrata Commission', which

[65] A leading Voice campaigner, Marcus Stewart, commented in the aftermath: "The general Australian community couldn't comprehend what exactly it was." Wellauer, Williams, and Brennan, "Why the Voice Failed."

[66] Olivia Hogan comments that the media should also carry some responsibility for having "created a minefield of information" that made it very difficult to gauge public opinion. Added thereto, the campaign centred too much on symbolism rather than "practical change." See Olivia Hogan, "Why the Voice Failed: The Australian Establishment Has Been Too Focused on Symbolic Gestures Rather than Practical Change," *The Critic*, February 2, 2024.

is perhaps comparable to the South African truth and reconciliation commission, was proposed.[67] The Makarrata Commission were to have a dual function – that of truth-telling about the history of Australia as well as negotiation a form of treaty between Aboriginal people and the government.[68] The Uluru Statement was welcomed by government but referred for further deliberations, including to a Joint Select Committee of Parliament.

The *Joint Select Committee of Parliament on Constitutional Recognition* (2018) invited public inputs and proposals to give effect to the Uluru Statement.[69] The Joint Select Committee in 2018 made several general recommendations about the design, powers and functions of the Voice, for example: the members should be chosen by Aboriginal people rather than being appointed by government; the different practices of local and regional Aboriginal communities should be accommodated in the design of the Voice; the Voice should be organised at local, state and national levels; it should make representations but not have administrative powers; and advices of the Voice should be sought and given at the earliest opportunity. The Joint Committee recommended further consultation to work out greater detail about the design of the Voice as part of a publicly 'co-design' process.

The *Final Report of the Indigenous Voice Co-Design Process* (2021) went to great length to consider the different options for the Voice.[70] The Report (also referred to by the name of the chairpersons of the process as the Calma Langton report) endorsed the idea of local and state voices in addition to the national Voice.[71] The Calma Langton report recommended a national body of 24

[67] "Uluru Statement from the Heart," Uluru: Referendum Council, 2017, https://ulurustatement.org/the-statement/view-the-statement/.

[68] Jill J. Fleay and Barry Judd, "The Uluru Statement: A First Nations Perspective of the Implications for Social Reconstructive Race Relations in Australia," *International Journal of Critical Indigenous Studies* 12, no. 1 (2019): 6.

[69] Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra: Parliament of Australia, 2018), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report.

[70] Marcia Langton and Tom Calma, *Indigenous Voice Co-Design Process: Final Report to the Australian Government* (Canberra: Indigenous Voice, July 2021), https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf.

[71] Langton and Calma, *Indigenous Voice Co-Design Process*, 10. The referendum proposal only dealt with the national Voice, leaving it unclear how the states would be expected to legislate for local voices.

members; to be 'chosen' to represent Aboriginal people in the respective states,[72] regions and territories; with powers to give 'advice' (note the Voice proposal used the word 'representation' rather than advice) to government and parliament; in regard to matters that affect Aboriginal people. Emphasis was placed that advice would be given to both the executive government and parliament to ensure Aboriginal interests were addressed at all stages of the legislative and policy process. Importantly, the scope of powers would be limited to 'advise on matters of *national significance* to Aboriginal and Torres Strait Islander peoples relating to their social, spiritual and economic wellbeing.' (emphasis added since the qualification 'national significance' was not included in the proposed constitutional amendment for the Voice)[73] Guidance was also given about when advice could be made or should be sought (these thresholds when advice would be given or sought were excluded from the proposed Voice amendment). The Calma Langton report summarised the consultation obligation on the federal government as follows:

> The Australian Parliament and Government would be 'obliged' to ask the National Voice for advice on a defined and limited number of proposed laws and policies that *overwhelmingly* affect Aboriginal and Torres Strait Islander peoples. There would also be an 'expectation' to consult the National Voice, based on a set of principles, on a wider group of policies and laws that *significantly* affect Aboriginal and Torres Strait Islander peoples.[74]

The Calma Langton report envisaged that 'consultation standards' would be set out in legislation so it is clear when there is an 'obligation' to consult; when there is an 'expectation' to consult; and when consultation 'may' be sought regarding any other policy or legislative measure. The standard of consultation should

[72] Langton and Calma, *Indigenous Voice Co-Design Process*, 111. It was envisaged that a "gender balance must be structurally guaranteed" within the Voice, but with no clarity how the objective would be achieved or whether gender balance was reflective of Aboriginal law and custom.

[73] Langton and Calma, *Indigenous Voice Co-Design Process*, 11.

[74] Langton and Calma, *Indigenous Voice Co-Design Process*, 11, 160. The Final Report referred to the following examples to which an obligation to consult would apply: amendments to the *Native Title Act* (1993); "major amendments affecting Indigenous Business Australia"; changes affecting the "Community Development Program"; amendments to the national Aboriginal heritage protection legislation; and amendments to the *Aboriginal Corporations Act*. These thresholds were not formally accepted by the government and hence carried no status or assurance during the referendum campaign.

be of 'good faith' and partnership.[75] Importantly, the Calma Langton report recommended that 'compliance of the Australian Parliament and Government with these elements *could not be challenged* in a court.' (emphasis added since this recommended qualification was not included into the proposed constitutional amendment for the Voice)[76] Thereby the risk of legal challenges to legislation or policies was sought to be removed.

It was furthermore emphasised that a recommendation of the Voice did not constitute a veto over any legislation or policy measure. The Final Report emphasised that the Voice was not intended to be a 'third chamber' of Parliament.[77] The term of office of members of the Voice would be 4 years.[78] It was envisaged that there would be some form of interaction between the national Voice and regional voices to ensure inputs and feedback in both directions.[79]

The *Design Principles of the First Nations Working Group* (2023) sought to identify general principles for the design, functions and powers of the Voice, but without providing the same level as detail as recommended by the Calma Langton report.[80] The following design principles are of relevance to this article: the Voice is to make 'representations' on 'matters relating to' Aboriginal people; Parliament and the executive should seek representations 'early in the development of proposed laws and policies'; members of the Voice will be 'selected' by Aboriginal communities; the way in which representatives are 'chosen' will

[75] Langton and Calma, *Indigenous Voice Co-Design Process*, 158. The Final Report stated as follows: "Consultation standards and transparency mechanisms must be flexible enough to address the full range of possible circumstances, particularly concerning timing. In some cases, consultation with the National Voice may be built in from the early stages. In other cases, legislative changes may be time-sensitive, and a smaller amount of time might be provided for consultation with the National Voice."

[76] Langton and Calma, *Indigenous Voice Co-Design Process*, 109, 160. This was an important point of principle that did not find its way into the proposed constitutional amendment. Had the proposed constitutional amendment contained a clause to the effect that legislation or policies could not be legally challenged on the basis that they did not comply with consultation standards, the outcome of the referendum may have been different.

[77] Langton and Calma, *Indigenous Voice Co-Design Process*, 166. The Final Report observed that concerns about the Voice constituting an additional chamber to Parliament were "unjustified" and "mistaken."

[78] Langton and Calma, *Indigenous Voice Co-Design Process*, 132.

[79] Langton and Calma, *Indigenous Voice Co-Design Process*, 145.

[80] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice," 2023, https://voice.gov.au/sites/default/files/2023-06/design-principles-aboriginal-torres-strait-islander-voice.pdf.

depend on the 'wishes of local communities'; members would be 'chosen' from each of the states and territories; there would be 'gender balance' at national level; and the Voice would not have a veto power.

Finally, the following draft *constitutional amendment* (2023) was put to the public in the referendum:

> **129 Aboriginal and Torres Strait Islander Voice**
>
> *In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:*
>
> i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
>
> ii. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
>
> iii. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

5.2 Concerns about the Design Features of the Voice

The design of the Voice, as put to the referendum, had suffered several critical design deficiencies, gaps, vagueness, and inconsistencies. These ultimately contributed to the rejection of the proposal since the 'no' campaign focused on the weaknesses of design, whilst the 'yes' campaign could not satisfactorily answer questions of substance about the design and relied on a positive 'vibe'[81] to get the question approved.[82] It was, on reflection, not unreasonable for the public to

[81] Michelle Evans and Michelle Grattan, "The Voice to Parliament and the Silent Majority," *Australian Quarterly* 95, no. 1 (2024): 4–11.

[82] Note, for example, the response of Wood to criticism of the Voice: "To the apathetic electors in the 'no' camp, do not let your self-centred leaders use you, then blame you as red-necks or racists and generally treat you as fools; fight their mantra: if you don't know, don't just vote no, but find out! It is pretty straightforward! These are some of the issues we wish non-Indigenous people would raise." The name-calling and labelling of persons who raised concerns about the Voice as racists did not contribute to an atmosphere of support and reasoned debate for the proposal. Contrast the 2023 referendum culture with the 1967 referendum culture and the unity it had engendered towards the status of Aboriginal people. Also note Berry, who comments that "racism [for rejecting the Voice] is not the full story. There was also genuine confusion about why the Voice was needed, a situation readily reinforced by those opposed to the amendment on a rag-tag range of grounds, reflecting material and ideological commitments. See Andrew Wood, "Critique of 'Voice versus Rights,'" *UNSW Law Journal Forum* 5 (2023): 17. Murray Goot and Tim Rowse, "The Debate over the Constitutional Recognition of Indigenous Australians: National Unity and Memories of the 1967 Referendum," *Australian Journal of Politics and History* 70 (2024): 97–119. Berry, "The Voice Referendum," 243.

have asked critical questions about the composition, powers, and functions of a body that would in future become an integral part of the legislative and policy processes at all levels of Australia. The risk of calling a referendum whereby ordinary people had to be convinced of the merit of the proposal, was exacerbated by the lack of detail to respond to reasonable questions about design.

A critical feature of the referendum campaign was that in the absence of detailed information in the text of the amendment about the design, powers and functions of the Voice, proponents of the Voice cited supplementary reports, scientific works, opinions of retired judges and academics, and policy statements, to purportedly supplement the lack of detail in the legal text. For example, although the Solicitor General sought to give the assurance that a representation provided to Parliament would be non-binding,[83] critics disagreed and pointed out that non-parliamentary advices, materials and opinions would carry little, if any, weight when in future, representations of the Voice become the subject of litigation.[84] There were concerns that the Voice might become a forum whereby *any* government policy or legislation in future could be challenged on basis that it affects Aboriginal people generally or some Aboriginal community specifically, and that consultation with them had not been adequate, timely, or proper. Ironically, the assurance sought to be given by, for example the Solicitor-General that failure by parliament of the executive 'to consider representations' by the Voice '*would not have justiciable consequences*'[85] raised the concern within the Yes campaign and the left of the No campaign that the Voice was set up to become another toy telephone.[86] The lack of detail and the assurance sought

[83] Stephen Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," advice to Parliament, April 19, 2023, para. 38. Some experts cautioned that regardless of legal advice, there may be "unintended legal consequences" from the wording. See Evans and Grattan, "The Voice to Parliament and the Silent Majority," 7.

[84] This refusal by the designers of the Voice was ironic because the Calma Langton report specifically recommended as follows: "The standards set out above would be non-justiciable, meaning alignment with the standards could not be challenged in court and could not affect the legal validity of laws or policies." It remained unexplained during the referendum why the assurances and detail contained in the Calma Langton Report were not particularised by way of legislation. Langton and Calma, *Indigenous Voice Co-Design Process*, 160 (emphasis added).

[85] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 39.

[86] The ambiguity was also reflected in public statements by Prime Minister Albanese, where on the one hand he made the Voice out to be "simply an opportunity to be heard," whilst on the other hand he suggested it would be a "very powerful instrument. See Evans and Grattan, "The Voice to Parliament and the Silent Majority," 7.

to be given by the Solicitor-General thus became a double-edged sword where the no vote on the right and left side felt their concerns had been vindicated.

Due to the limitation in space, I restrict my analysis to three design aspects of the Voice where these shortcomings were present, namely its composition; its powers and functions; and the justiciability of its representations.

But before attending to those design-issues, I briefly refer to the principles of statutory interpretation in Australia since those rules determine the relevance and weight, if any, that could have been placed by future courts on materials, opinions, and publications released as part of the referendum that were not part of the legal text of the amendment. It is my proposition that the details of the Voice ought to have been enacted in legislation *prior* to the referendum to enable the electorate to make an informed decision about the text of the amendment.[87]

When analysing the Voice amendment, it is essential to distinguish between the *text* of the proposed constitutional amendment – which would be the highest legally enforceable text - and other *non-legal* material such as scientific reports, policies, public statements – that do not have the force of law. If the Voice-proposal had been approved, the text of the amendment would have been the supreme text given force by courts, with possible limited reference to parliamentary statements and debates, but with no or little weight to voluminous extra-legal materials and scientific opinions expressed during the referendum campaign in support of the Voice.[88] Australian courts rely in interpretation on 'common

[87] If the Voice had been enacted by legislation prior to the referendum, the vote would only have affected its constitutional status, not its existence. With the rejection of the constitutional amendment by such an overwhelming majority, the probability of a national statutory Voice has for all practical purposes disappeared and is likely to be removed from the political agenda for a substantial time.

[88] The Solicitor-General gave the following assurance about the material to be considered if in future a question arises about the obligation on Parliament and the executive to consider representations of the Voice: "The High Court has given weight to equivalent explanatory materials when interpreting previous constitutional amendments. Accordingly, the Court can be expected to have regard to the statements just quoted from the Explanatory Memorandum and Second Reading Speech if it is ever called upon to decide whether proposed s 129(ii) impliedly prevents the Parliament from making laws specifying the legal effect of representations made by the Voice to the Executive Government. It would be a distinctly unsound approach to the interpretation of the constitutional text to attribute to the proposed amendment an implied meaning that is not only unsupported by its text, but that is irreconcilable with the evident intention of the drafters as reflected in explanatory materials brought into existence before the Australian people voted on the proposed constitutional amendment." Whilst this is correct, it must also be noted that firstly, if the text of the legal instrument is clear, then there is no need to cite parliamentary debates, and secondly, the ultimate judgment about consideration to be given to representations of the Voice belongs to a future High Court, and its discretion would not be bound by opinions expressed in 2023. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 38.

sense' by referring to the *text* of the statute, the *context* of the statute, and the *purpose* of the statute.[89] Whilst courts may, when the meaning of words in the legal instrument are not clear, rely on other parliamentary materials such as the second reading speech, to assist with interpretation, it is unlikely that a court would venture to non-parliamentary materials such as scientific papers, reports, and public statements to assist with a particular statutory interpretation.[90] In essence, the proper approach to statutory construction begins with a consideration of the text itself;[91] secondary materials cannot be substituted for the text of legislation;[92] and a statutory provision is to be construed consistently with the language and purpose of all of provisions of the statute.[93]

In the case of the Voice, references by Prime Minister Albanese that the answer to questions about the composition, powers and functions of the Voice 'is out there', often referred to the Calma Langton report and the Design Principles as purportedly containing the answers sought by the public, but it must be noted that the Calma Langton report had not been formally accepted by government; the report had no policy status as a government or Labour Party policy; the report was not definitive on a number of issues and offered a range of options rather than firm recommendations; the report was subject to further public deliberation in order to finalise the detail; and the report had not been reduced to a government White Paper or a legislative bill. Similarly, the Design Principles had no legal status.

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[89] John Middleton, "Statutory Interpretation: Mostly Common Sense?" *Melbourne University Law Review* 40, no. 2 (2017): 626–656. In Australia, the basic principle to identify legislative intent is to consider "the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose." If the ordinary meaning of text is clear, there is no need to cite parliamentary readings, much less materials produced in the course of a referendum campaign. See *Australian Education Union v. Department of Education and Children's Services* (2012) 248 CLR 1.

[90] Note, for example, the federal *Acts Interpretation Act 1901*, which provides that extrinsic material may be used when the ordinary meaning of a word in the statutes gives rise to a meaning that is "ambiguous or obscure" or an interpretation that is "absurd or is unreasonable." Extrinsic material in this context refers to parliamentary debates such as the second reading speech, not to scientific papers, political speeches, or expert reports and opinions produced in the course of the referendum campaign. 1 *Acts Interpretation Act 1901* (Cth), s. 15AB(1)(b).

[91] *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27.

[92] *K-Generation Pty Ltd v. Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501.

[93] *Project Blue Sky Inc v. Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355.

5.3 Concerns about the Composition of the Voice

The composition of the Voice was left in its entirety for legislation yet to be enacted by Parliament *after* the referendum. Although the Calma Langton Report made recommendations about the composition of the Voice, those recommendations were not formally accepted by government nor reduced to any legislative instrument. The assumption of the Calma Langton Report was furthermore that state based voices would also be established, but no detail existed about the constitutional requirements, implications, or functions of such regional bodies. Whilst on the one hand the lack of detail allowed for post-referendum flexibility, on the other hand those opposing the proposal exploited the lack of detail about composition for being vague and uncertain.

In the explanatory booklet that accompanied the proposed Voice amendment, more was said about the possible composition of the Voice, for example, that it would represent Aboriginal people from across the country; that 'members of the Voice *will be chosen* by Aboriginal and Torres Strait Islander people in their local area and serve for a fixed period';[94] and the Voice 'will include young people and a *balance* of men and women.'[95] The Referendum Booklet did not provide any information about the size of the Voice; the manner in which representatives would be 'chosen'; how members were to be held accountable by their constituencies; or the way in which 'parity' between men and women or election by young people would be achieved in the Voice; or how minority opinions within the Voice would be accommodated. Most importantly, the Referendum Booklet had no legal status and read like a wish list rather than a constitutional design instrument.

In other supplementary material, such as the Calma Langton report, mention was made that the Voice would comprise 24 members, but with no clarity how those persons would come to office. Although mention was made that the members of the Voice would not be appointed by government, in all other respects there was no certainty about how members would be nominated, elected, or appointed

[94] Australian Electoral Commission, *Your Official Referendum Booklet* (Canberra: Australian Electoral Commission, 2023), 12, https://www.aec.gov.au/referendums/files/pamphlet/referendum-booklet.pdf.
[95] Australian Electoral Commission, *Your Official Referendum Booklet*, 14.

other than to say it would be in accordance with the local Aboriginal laws and customs. Most importantly, it was not clear how those elected to serve in the Voice would overlap with elected Aboriginal members of parliament or with native title holders. It is not unreasonable to conclude that if the Amendment had been approved, it would likely have taken years to work out the detail.

The imbedded deficiency of this approach for the election of representatives of the Voice was that it assumed that amongst Aboriginal groups at regional and local levels there were agreement about how leaders or elders would be appointed to represent multiple Aboriginal communities collectively. But there was and is no such intra-Aboriginal agreement.[96] Furthermore, the assurance sought to be given of 'gender parity' in the composition of the Voice at the national level raised the question how such an objective would be attained, and whether such parity is reflective of Aboriginal law and customs.

Whilst a case was made by the yes-campaign that the legislative detail about the composition of the Voice would follow on the referendum, the absence of detail during the referendum created an atmosphere of scepticism in the public mind.[97] The failure by the proponents of the Voice to address reasonable questions, added to an atmosphere of negativity.

5.4 Concerns about the Powers and Functions of the Voice

The powers and functions of the Voice were not defined by the proposed constitutional amendment. Those details were also left to the settled in due course by Parliament. The amendment merely provided that the Voice shall have the power to make 'make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres

[96] Gabrielle Stonehouse, "The Differing Views from Indigenous Australians across NSW on the Voice to Parliament Referendum," *ABC News*, October 6, 2023, https://www.abc.net.au/news/2023-10-06/nsw-voice-to-parliament-different-indigenous-australian-views/102927776.

[97] These are typical questions that could have been discussed at a constitutional convention, but since the Voice proposal was not referred to a convention, the opportunity was lost. Note, for example, the constitutional convention convened in 1998 to consider the question of a constitutional amendment for Australia to become a republic and the extensive debates that took place in an effort to expand consensus.^1 There was no satisfactory reason given by the government why the proposed Voice amendment had not also been referred to a constitutional convention. George Winterton, "Australia's Constitutional Convention 1998," *Agenda: A Journal of Policy Analysis and Reform* 5, no. 1 (1998): 97–109.

Strait Islander peoples'. Although the Solicitor-General expressed the opinion that the Voice was compatible with the Australian system of representative and responsible government,[98] it was not clear on what subject matters the Voice could make representations. Although the amendment did not seek to confer any legislative, executive or judicial powers to the Voice, the amendment was silent as to the range of topics that would fall within or outside the scope of the Voice.

Two critical issues arise for purposes of this article from this power, namely what is the meaning of 'representations'; and what matters would fall within the scope of policy areas on which representations could be made?

It is notable that the amendment did not define what is meant by 'representation'. It is furthermore noteworthy that the Calma Langton report did not refer to 'representation' but rather to 'advice', whilst the Solicitor-General in its opinion observed there would be no obligation to 'consult' with the Voice.[99] The obvious question arose why the word representation was preferred to previously used words of advice or consult? No clarity or satisfactory explanation was given why the term representation was preferred in the proposed amendment to the term advice in the Uluru Statement and the Calma Langton report. During the referendum debate, including in the Referendum Booklet, the concepts recommendation, representation, and advice were often used interchangeably as if they carry the same meaning.[100] The Design Principles principally used the word 'representation'.[101] This raised the questions: why were different concepts – advice, recommendation, consult, representation - used to describe the outcomes of the Voice deliberations, and did those terms signify different meanings? Or, was it just a case of sloppy drafting?

An issue that caused the extensive debate during the referendum was the scope of the powers of the Voice in general, and more particularly on which topics could the Voice make representations and when would its representation have to be sought by government or parliament. The Calma Langton report recommended

[98] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 8.
[99] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(a).
[100] Australian Electoral Commission, *Your Official Referendum Booklet.*
[101] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice."

two principal categories of consultation, namely when advice *must* be sought and when advice *may* be sought. Those recommendations were for inexplicable reasons not carried into the amendment. The Voice proposal adopted had a much wider scope by stating that the Voice could make a representation 'on matters relating to Aboriginal and Torres Strait Islander peoples'. This could, potentially, involve *any* policy or legislation since no mention was made of Aboriginal people being affected 'directly, disproportionally, or predominantly'. In fact, the Referendum Booklet stressed that the Voice would be a 'vehicle' that would address broader socio-economic issues such as Aboriginal life expectancy, infant mortality, and education.[102] Although the Solicitor-General gave the assurance there would be *no obligation* on parliament or the executive to consult or to consider representations of the Voice,[103] this opinion fuelled concern within the Yes camp as well as on the left side of the No campaign that the Voice would have no effective powers. This broad scope of potential powers seemed to repeat the lack of clarity about functions was displayed in the previous Aboriginal advisory bodies.

There was also concern that the status of popularly elected Aboriginal representatives in the federal Parliament (11 at the time of the referendum) would be undermined by the Voice process, whereby a parallel process to the parliamentary processes may be embarked upon. Added thereto was the concern that some of the issues raised by the yes campaign regarding socio-economic indicia, were not necessarily race based but also had an element of class and social status. For example, high juvenile incarceration, poor health conditions, and backlogs in educational performance have elements of race, but also elements of class, income, education, locality, and socio-economic status.[104] Concerns were therefore expressed that the Voice would cause an administrative *apartheid*-

[102] Australian Electoral Commission, *Your Official Referendum Booklet*, 16.

[103] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b).

[104] A leading Aboriginal no-campaigner, Jacinta Price, expressed her views about the importance of addressing socio-economic challenges on the basis of root cause rather than race as follows: "My hope is that after October 14, after defeating this voice of division, we can bring accountability to existing structures, and we can get away from assuming city activists speak for all Aboriginals and back to focusing on the real issues—education, employment, economic participation, and safety from violence and sexual assault." See Jarrad Cross, "Jacinta Nampijinpa Price Tells Press Club the Voice Is 'Built on Lies' amid Furore in Canberra," *National Indigenous Times*, September 14, 2023, https://nit.com.au/14-09-2023/7687/jacinta-nampijinpa-price-tells-press-club-the-voice-is-built-on-lies-amid-furore-in-canberra.

approach whereby different policies were developed for different communities based on race, rather than special protection and consultation based on indigenous culture and traditional lands.[105]

The Design Principles sought to place an obligation on Parliament and Executive Government to seek representations from the Voice 'early in the development of proposed laws and policies.'[106] This type of broad and unqualified statement would likely have opened the door for extensive litigation about disputes such as timing to invite a representation; time given to Voice representatives to consult with indigenous communities; the weight given to representations; re-consultation as the policy process evolve; and the position of minority views within the Voice.[107] The Design Principles also did not consider that detail that evolves during the policy or legislative process may give rise to demands for another round of consultation being sought.

In short, the proposed powers and functions of the Voice relied on concepts such as consultation, advice, and representation interchangeably as if to convey the same meaning; it failed to specify when and how representations had to be sought or given; and it failed to address concerns that the policy and legislative processes would become drawn-out and circular due to ongoing representations about the detail of policies and legislation.

5.5 Concerns about the Justiciability of Representations of the Voice

The topic that perhaps gave rise to most debate during the referendum campaign, was the possibility of litigation that may arise from Voice

[105] Warren Mundine, a leading Aboriginal no-campaigner, criticised the race-based premise of the Voice as follows: "This is based on a false premise that Indigenous Australians are one homogenous group, and will constitutionally enshrine us as a single race of people, ignoring our unique first nations. It's a step backwards." See Nyunggai Warren Mundine, "The Voice, as Proposed, Is Flawed and Insulting to First Nations," *Sydney Morning Herald*, April 19, 2023, https://www.smh.com.au/national/the-voice-as-proposed-is-flawed-and-insulting-to-first-nations-20230418-p5d193.html.

[106] First Nations Referendum Working Group, "Design Principles of the Aboriginal and Torres Strait Islander Voice."

[107] Note, however, the opinion expressed by the Solicitor-General that there was no obligation on Parliament or the executive to consult with the Voice. While I respect this opinion, it is ultimately the High Court that would determine the law, and other dissenting opinions would then become theoretical. I would suggest that in light of international jurisprudence where greater attention is given to consultation with Indigenous people and the obligations arising from UNDRIP, it is not untenable to suggest that a future High Court could have placed obligations on government and Parliament to seek representation from the Voice. In my view, the assurance sought to be given by the Solicitor-General is open to dispute. See Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(a).

representations, or due to the failure to seek or to invite a representation. The Solicitor-General expressed the opinion that there was no obligation on the executive or parliament to 'consider' or 'follow' representations made by the Voice since 'courts are adverse to enforcing procedural requirements relating to the internal deliberations of Parliament…'[108] This opinion did not and cannot be construed to have ruled out any possible future decision by the High Court to require from parliament or the executive a different standard of conduct than had been anticipated by the Solicitor-General.[109]

On the one hand, the yes-campaign sought to give assurance that the representations would not be non-binding; would not constitute a veto; would respect the sovereignty of parliament; and would not constitute a third chamber of parliament. On the other hand, the no-campaign empathized that whatever weight is given to representations of the Voice would depend on the discretion of a future High Court; that the potential justiciability of representations of the Voice might politicise the appointment of judges; that no assurances given by any expert during the referendum campaign would bind a future High Court; and that under the veil of continued Aboriginal sovereignty the High Court could over time expand the scope of powers of the Voice.[110] To address this concern, the Liberal Party proposed an inclusion into the text of the amendment to the effect that parliament would control the applicability of judicial review and thus parliament would be able by way of legislation to restrict the justiciability of

[108] Donaghue, "Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum," para. 18(b). Solicitor-General Donaghue, para. 18(b).

[109] Note, for example, how the Constitutional Court in South Africa has ordered Parliament to re-negotiate and re-write legislation aimed at granting consultation rights to the Khoisan Indigenous people since the original public consultation had not been adequate.^1 While I accept that the judgment in South Africa was pursuant to a different constitutional regime, there is an increasing trend internationally for courts to require good faith or free, prior, and informed consent from governments in their dealings with Indigenous people.^2 Although I am not critical of this trend, it does undermine the assurance sought to be given by the Solicitor-General that the relationship between the Voice and the executive and Parliament would not in future give rise to potential litigation. See *Mogale and Others v. Speaker of the National Assembly and Others* [2023] ZACC 14. G.N. Barrie, "The 'Right' to Free, Prior and Informed Consent: Evolving Customary International Law," in *Courts and Diversity: Twenty Years of the Constitutional Court of Indonesia*, edited by Bertus de Villiers, Syarifuddin Isra, and Paulus Budi Faiz, 195–227 (Leiden: Brill, 2024).

[110] Note, for example, the proposition that the Voice would lead to the "structural political empowerment" of Aboriginal people, whose "sovereignty was never ceded or extinguished." Gabrielle Appleby, Scott Brennman, and Megan Davis, "A First Nations Voice and the Exercise of Constitutional Drafting," *Public Law Review* 34, no. 1 (2023): 4.

Voice representations. This proposal was not inconsistent with the Calma Langton recommendations, but it was rejected by government during the parliamentary process leading to the referendum.[111]

There was an obvious contradiction between the text of the proposed amendment and the public assurances sought to be given that the Voice representations would not give rise to litigation.[112] Whilst the materials leading up to the referendum made repeated statements that the representations, consultation and advice of the Voice would not be a veto and would not lead to challenges of the validity of legislation and policies, the proposed amendment to the Constitution contained no such guarantee or limitation. This fuelled concerns that the Voice could become an instrument by which practically any legislation or policy measure that remotely affects Aboriginal people, could be subject to challenge for lack of timely invitation for a representation; lack of giving proper weight to a representation; and lack of adequate time or resources to enable representatives of the Voice to consult with their respective communities prior to making a representation.

VI. CONCLUSION: WHERE DOES THE REJECTION OF THE VOICE LEAVE ABORIGINAL CONSULTATION IN AUSTRALIA?

The Australian referendum campaign concerning the Voice is arguably a good example of what should *not* be done to enact an advisory body for indigenous people. Public surveys indicated overwhelming support for the principle of an Aboriginal advisory body, but the specifics of the proposal and the failure of government to engage the public about reasonable questions left the electorate negative and the proposal was rejected by an overwhelming majority.

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[111] Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Canberra: Parliament of Australia, May 2023), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report.

[112] Note, for example, the statement that the litigation arising from representations made by the Voice should provide a basis for "intergenerational generosity" by the courts. This type of vagueness increased public scepticism, rather than addressing concerns about increased litigation. See Appleby, Brennman, and Davis, "A First Nations Voice and the Exercise of Constitutional Drafting," 6.

The following propositions drawn from the Voice-process can be made regarding the three topics the subject of this article, namely design; powers and functions; and justiciability:

The rejection of the Voice was a rejection of a particular model of consultation, not a rejection of consultation as such with Aboriginal people, nor a negation of the importance of listening to Aboriginal people, or a refusal to address Aboriginal socio-economic disadvantage.

The case made for the inclusion of a mandate to create the Voice into the Constitution by way of a referendum rather than to create a statutory Voice, was not convincing. The principal argument in favour of a constitutional amendment was that entrenchment would prevent abolishment of the Voice, but that exacerbated concerns because of a lack of detail about the Voice and the difficulty to amend the Constitution again should the Voice have to be removed for whatever reason.

The calling of a referendum to approve a constitutional amendment that mandated the creation of an indigenous advisory body by Parliament was a high-stake risk based on a zero-sum approach whereby there is either total success or total failure. Recent international experiences with referenda such as those of Chile and Brexit highlight the risk of putting such complex issues to a popular vote. As Evans and Grattan observe: 'Zero-sum ultimatums don't tend to go well in times of economic uncertainty as the case of Brexit in the United Kingdom shows.'[113]

A statutory Voice would have been easier to establish; there seemed to have been bipartisan support in Parliament for such an advisory body; it would have been flexible and easy to amend; and it could in due course have given advice about some form of constitutional recognition.

Indigenous advisory bodies are inevitably dependent on public goodwill and bipartisan support. The greater the risk of adversarial relationships and litigation, the more likely an advisory body would fail, or would lose public goodwill.

[113] Evans and Grattan, "The Voice to Parliament and the Silent Majority," 9.

The design of the Voice left too many questions unanswered. The reference to supplementary material and opinions of experts as if those carried legal weight to address concerns with the design, did not address the weakness of the legal text that was put to the vote.

The ostensible wide powers of the Voice created the risk that it could become a forum whereby *any* government policy or legislation could be challenged by specialist interest groups under the veil that it affects Aboriginal people in general, or a specific Aboriginal community.

The potential justiciability of representations of the Voice read with its wide powers and functions, was in many respects the death knell for the initiative. Notably, a future High Court would be guided principally by the text of the Constitution as supreme law, and not by legal, political, or scientific assurances given at the time of the referendum campaign.

The outcome of the referendum reflects, at least in part, concern about the judiciary using and perhaps abusing its powers to direct social policies in a manner of its suiting rather than for Parliament and the executive to determine the course of social-economic reform and reconciliation.

Finally, do indigenous advisory bodies have a place in Australia? The answer to the question is an unequivocal yes, but much depends on its purpose, objectives, design, powers and functions, and justiciability of advice of such an indigenous advisory body.

My concern with a referendum was made known well before the calling of it. I have consistently supported an advisory body for Aboriginal people but argued for it to be put in a legislative rather than a constitutional framework. My concerns expressed in August 2022 were as follows:

> There is a risk, as in the case of the republican-debate, that something that seems obvious and ready for public approval, fails because the detail put people off. The problem is that, since the mechanism for recognition is proposed to be the Constitution, including the Voice in the Constitution would require every Aussie voter to be convinced not only of the merit of the Voice in general, but also the detail of it. That does not bode well, because

> so many people can develop a gripe about so many issues. Strange bedfellows can find themselves voting 'no', but for different reasons....Australia cannot afford a 4th failed experiment with Aboriginal consultation.[114]

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[114] De Villiers, "Seven Questions before the Voice Can Be Heard," 9–11.

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Threat to Indonesia's Constitutional Court Independence Posed by Religious Populist Movements and its Implication Towards Human Rights

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Abstract

One of the biggest challenges to a democratic state under the rule of law today is rising populist movements that endanger the independence of the judiciary. In Indonesia, the religious populist movement led by hardliner Islamic groups continues to try to enter courtrooms to advocate for religious interpretations of court decisions, such as when the Indonesian Constitutional Court reviews the 1965 anti-blasphemy law. This socio-legal research examines empirical data from key resource interviews and secondary data from related Constitutional Court judgements, pertinent legislation, and public policies to determine the socio-political backdrop of the Court decision. This technique enables the author to evaluate religious populism and how it affects Constitutional Court rulings. Political pressure may weaken the court, according to this research, encourage the religious populism of the former of Islamic Defenders Front to impose its will by stating that the repeal of the Anti-Blasphemy Law shows strong indications of corruption within the Court. Religious populism in the justice system raises concerns about political or religious decision-making, thereby undermining

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the rule of law. This research shows that the pattern or tendency of religious populism shows the Court's compromise of the legal system towards democratic government in Indonesia, eroding the independence of the judiciary, endangering the right to religious freedom, and weakening public confidence in the justice system and democracy.

Keywords: Independence of Constitutional Court; Indonesia; Religious Populist Movements; Right to Freedom of Religion; Rule of Law

I. INTRODUCTION

The independence of the Constitutional Court Republic of Indonesia is facing a significant challenge posed by religious populist movements. These movements, which advocate for a conservative interpretation of Islam and seek to implement Islamic law, have gained considerable influence and pose a threat to democracy and the rule of law in the country.

Studying judicial independence has mostly focused on general court judiciary independence and its link with legislative capacity to remove judges. Other studies on Constitutional Court independence employ the Judicial Reform Index (JRI) framework devised by the Central European and Eurasian Law Initiative (CEELI), which focuses on judicial system issues. Included among these concerns are the quality, education, and diversity of judges, (iii) the source of funds or the budget; (iv) the assurance that the organisation will endure; (v) accountability and transparency; and (vi) efficiency.[1] Meanwhile, the existing literature on the role of religious populist movements[2] in Indonesia concentrates on their influence on the country's political and social institutions.[3] Adding to studies concerning the influence of religious populist movement compromising the independence of the Constitutional Court that have been done in various countries, including

[1] Ahmad Fadlil Sumadi, "The Independence of the Constitutional Court," *Jurnal Konstitusi* 8, no. 5 (2011): 631–648. See also Luthfi W. Eddyono, "Independence of the Indonesian Constitutional Court in Norms and Practices," *Constitutional Review* 3, no. 1 (2017): 71–97.

[2] The use of the term "religious populist movement" in the title was chosen rather than the term "Islamic populist movement" because the author avoids generalizations about existing Islamic populist movements. Specifically, what is meant by "religious populist movement" in the title has been explained by the author in this paper.

[3] Marcus Mietzner and Burhanuddin Muhtadi, "Explaining the 2016 Islamist Mobilisation in Indonesia: Religious Intolerance, Militant Groups and the Politics of Accommodation," *Asian Studies Review* 42, no. 3 (2018): 479–497. See Ihsan Yilmaz, Nicholas Morieson, and Hasnan Bachtiar, "Civilizational Populism in Indonesia: The Case of Front Pembela Islam (FPI)," *Religions* 13, no. 12 (2022): 1208.

in Turkey,[4] the United States,[5] and Israel,[6] this study conducted in Indonesia aims to assess the potential consequences of the rise of religious populist movements in Indonesia towards the independency of the Constitutional Court of the Republic of Indonesia (hereinafter the CCRI). This study argues that the radical religious movements advocate for a conservative interpretation of Islam and seek to implement Islamic law, have gained considerable influence to undermines the impartiality and integrity of the judiciary and poses a significant threat to democracy and the rule of law in the country.

The paper begins by providing an overview of the current political and social landscape in Indonesia, highlighting the emergence and growth of religious populist movements. It then delves into the concept of judicial independence and its crucial role in upholding the principles of democracy and the rule of law. The paper explores the various ways in which religious populist movements challenge the independence of the Constitutional Court including attempts to influence judicial appointments, exert pressure on court decisions, and employ intimidation tactics against critics. Furthermore, the paper examines the potential consequences of compromising the independence of the Constitutional Court, such as the erosion of democratic values, the violation of human rights, and the weakening of the rule of law. It also analyzes the implications for minority rights and religious freedom in a society where religious populist movements hold significant sway.

In concluding section, the paper proposes recommendations and strategies to address the challenge posed by religious populist movements and safeguard the independence of the Constitutional Court. These recommendations aim to strengthen the judiciary's autonomy, enhance transparency and accountability, and promote a culture of respect for the rule of law and democratic principles. By undertaking this assessment, the paper seeks to contribute to the understanding

[4] James Corl and Mushin Yunus Sozen, "The Effect of Populism on American and Turkish Judiciaries," *Journal of Student Research* 11, no. 1 (2022).

[5] Corl and Sozen, "The Effect of Populism."

[6] Guy Ben-Porat and Dani Filc, "Remember to Be Jewish: Religious Populism in Israel," *Politics and Religion* 15, no. 1 (2022): 61–84.

of the threats faced by the Constitutional Court's independence in Indonesia and the urgent need to protect democracy and the rule of law.

II. METHOD

This study applies socio-legal[7] approach through investigating the influence of political pressure from religious populist movements on the Constitutional Court's decisions and require a comprehensive analysis of the court's decisions, the political context surrounding the cases, and the legal arguments presented by the parties involved. This socio-legal analysis is used to examine the gap between what the Court believes in its legal considerations and rulings, and the reality on the ground. Is the Court's belief in maintaining the Anti-Blasphemy Law on the grounds of preventing horizontal conflict between religions based solely on the fact that the enactment of this Law reduces the occurrence of such conflicts, or is it actually the opposite? Where the judge's confidence in maintaining the Anti-Blasphemy Law is merely an indication of the judge's lack of independence in facing the pressures of religious populism.

This study gathered data through in-depth interviews with 32 peoples, including judges, human rights activists and experts, members of religious minorities groups, non-governmental organizations and other stakeholders. This study also employed secondary resources in the form of legal arguments for the Constitutional Court's judgements of the judicial review of the Anti-Blasphemy Law No. 140/PUU-VII/2009, No. 84/PUU X/2012, and No. 76/PUU XVI/2018, related laws and regulations, as well as various other sources to understand the socio-political context when the decision was made. This approach allows the author to analyse the phenomenon of religious populism and how its movement influences the decisions of the Constitutional Court, which the doctrinal approach is unable to reach.

The formulation of the problem to be studied is first, whether the Constitutional Court's decision regarding the Blasphemy Law in Indonesia was influenced by political pressure from populist religious movements. Second,

[7] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005).

the extent to which the decision endangers democracy and the rule of law. To answer this problem formulation, first by identifying the pattern of involvement of religious populist movements in influencing the Constitutional Court's decision in the judicial review case of the Anti-Blasphemy Law. In this case, evidence of pressure or lobbying from religious populist movements during the trial process, as well as the judge's consistency in formulating arguments and deciding cases related to religion, will be the focus of the study. Second, to assess the extent of the Constitutional Court's decision in the judicial review case regarding the blasphemy law, its impact on the protection of human rights and the principle of the rule of law will be further studied. This means that the investigation is focused on whether there is political pressure that pushed the court to follow the wishes of religious populist groups, assessing the Court's consistency in deciding on the constitutional religious rights of citizens, and examining the impact of the Court's decision on the rights of religious minority groups.

Utilizing a socio-legal approach allows the author to understand and analyse the gap between the legal provisions of the 1965 Anti-Blasphemy Law, along with various derivative regulations and what happens in reality. After obtaining an overview of the pattern of the religious populism movement in influencing the Court in deciding on judicial review cases regarding the Anti-Blasphemy Law, as well as examining matters related to the impact of the ambiguity of the Court's decisions on the rights of minority groups that are violated, as well as the principles of the rule of law that best, then the author can draw conclusions. In this way, the challenges and implications of the influence of the religious populism movement on the independence of the Indonesian Constitutional Court can be formulated.

III. ANALYSIS AND DISCUSSION

3.1. Overview of Religious Populist Movements in Indonesia

The global rise of religious populism has impacted the political situation in Indonesia and has become an integral part of populist discourses in numerous Asia-Pacific countries, including Indonesia. Religious populist movements in Indonesia

can be defined by their characteristics, which include: first, instrumentalization of religious discourse. Religious populist movements in Indonesia often instrumentalize religious discourse to gain support and mobilize their followers.[8] They use religious rhetoric and symbols to appeal to the religious sentiments of the population. Second, it cause division of society. These religious movements tend to divide society into distinct groups. They often portray themselves as the virtuous ummah (Muslim community) and label others as corrupt elites or immoral non-Muslim enemies. This division is based on religious and civilizational lines, creating an "us versus them" mentality.[9] Third, they influence on politics and society. Religious populist movements in Indonesia have gained influence in politics and society. They have been able to strengthen their political power and negotiate with mainstream political parties. Their growing influence has shaped public discourse and policies in the country.[10] Fourth, they appeal to religious identity. These movements emphasize religious identity as a central component of their populist discourse. They present themselves as defenders of religious values and use religious symbols and narratives to rally support.[11] Fifth, they take benefits of the growth of social media. Religious populist movements in Indonesia have utilized social media platforms to disseminate their messages and mobilize their followers.[12] The religious populist movements have created communities of support and have contributed to the development of religious populism in the online sphere.

It is important to note that these characteristics may vary among different religious populist movements in Indonesia. The specific ideologies, strategies, and goals of each movement may differ, but they share a common tendency to use religion as a tool for political mobilization and influence.

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8 Rizky Widian, Putu Agung Nara Indra Prima Satya, and Sylvia Yazid, "Religion in Indonesia's Elections: An Implementation of a Populist Strategy?," *Politics and Religion* 16, no. 2 (June 2023): 351–373, https://doi.org/10.1017/S1755048321000195.

9 Greg Barton, Ihsan Yilmaz, and Nicholas Morieson, "Religious and Pro-Violence Populism in Indonesia: The Rise and Fall of a Far-Right Islamist Civilisationist Movement," *Religions* 12, no. 6 (2021): 397, https://doi.org/10.3390/rel12060397.

10 Corl and Sozen, "The Effect of Populism."

11 Ihsan Yilmaz and Nicholas Morieson, "A Systematic Literature Review of Populism, Religion and Emotions," *Religions* 12, no. 4 (2021): 272, https://doi.org/10.3390/rel12040272.

12 Robertus Wijanarko, "Religious Populism and Public Sphere in Indonesia," *Jurnal Sosial Humaniora* 14, no. 1 (2021): 1–9.

The growth of new religious movements in various parts of the world, although not labelled as formal religion, is a socio-psychological symptom of loneliness and alienation.[13] The influence of these movements on Indonesian society has been significant, with some movements gaining political power and negotiating with mainstream political parties. The most prominent religious movements in Indonesia are Islamic Defenders Front (FPI),[14] Prosperous Justice Party (PKS), and National Movement to Safeguard the Indonesian Ulema Council's Fatwa (GNPF-MUI), which includes the 411, 212 movement and the grand reunion of 212 alumni. The FPI is a radical Islamist group that has been known for its violent and aggressive tactics against those who oppose its views. The civilizational turn in Indonesian populism has been demonstrated by the FPI's actions and discourse during the Ahok affair, in which a Christian Chinese politician was accused of blasphemy by Indonesian Islamists.[15] The FPI divides Indonesian society into three groups: the virtuous ummah, corrupt elites, and immoral internal and external non-Muslim enemies, particularly the West. Second, Prosperous Justice Party (PKS): The PKS is an Islamist political party that has gained significant influence in Indonesian politics. It has been known for its conservative views on Islam and its opposition to secularism. National Movement to Safeguard the Indonesian Ulema Council's Fatwa (GNPF-MUI): The GNPF-MUI is a coalition of Islamist groups that was formed in response to the 2016 Jakarta gubernatorial election. It has been involved in various protests and demonstrations, including the 2017 mass rally against the then-governor of Jakarta, Basuki Tjahaja Purnama. These movements have been instrumental in shaping public discourse and policies in Indonesia, with some gaining political power and negotiating with mainstream political parties. They have also been known to use religious rhetoric and symbols to appeal to the religious sentiments of the population and divide society into distinct groups based on religious

[13] Johannes Haryatmoko, "The Pathology of Tribal Nationalism According to Hannah Arendt: Uncovering Religious Populism Mechanisms Which Jeopardize Cultural Diversity," *Jurnal Kawistara* 9, no. 1 (2019): 60–77.

[14] Muhamad Luthfi, Rusydan Fathy, and Mohammad Faisal Asadi, "GNPF MUI: Strategi Pembingkaian dan Keberhasilan Gerakan Populis Islam di Indonesia" [GNPF MUI: Framing Strategy and Success of the Islamic Populist Movement in Indonesia], *Asketik: Jurnal Agama dan Perubahan Sosial* 3, no. 1 (2019).

[15] Yilmaz, Morieson, and Bachtiar, "Civilizational Populism in Indonesia."

and civilizational lines. Overall, the emergence and growth of religious populist movements in Indonesia have had a significant impact on politics and society, shaping public discourse and policies in the country.[16]

This study concentrates on the religious populist movement that continues to employ religious symbols in its battle for the applicable anti-blasphemy law. This study examines to what extent the threat these populist religious movements pose to the independence of the Constitutional Court's judicial review decision on the anti-blasphemy law. This study found that the religious populism movement mentioned above was not only actively involved as a party supporting the Government to maintain the Anti-Blasphemy Law in the judicial review of the law at the Constitutional Court, but also in pressing the Constitutional Court building by imposing a large number of people to urge the court to maintain the law.

How does the Constitutional Court see these demands? The Constitutional Court's assessment of the Anti-Blasphemy Law: does it prioritise the rule of law or Islamic populism? The Constitutional Court hesitated to face pressure from the Islamic populist movement, so it maintained the Anti-Blasphemy Law even though it recognised articles with multiple interpretations that endanger religious minority believers.

3.2. Constitutional Court's Ruling Repeatedly Uphold the Constitutionality of the Flawed Anti's Blasphemy Law

The Constitutional Court was established and assigned the responsibility to protect and defend human rights.[17] This role has been effectively fulfilled by the Court, which has, through its judicial review authority, invalidated numerous laws deemed unconstitutional and in violation of human rights. As reflected in Decision No. 011-017/PUU-VIII/2003, Decision No. 6-13-20/PUU-VIII/2010, Decision No 55/PUU-VIII/2010 and Decision No. 27/PUU-IX/2011, where the Court has succeeded in giving a strong decision by cancelling ambiguous articles that conflict

[16] Sunardi, "Islamic Populism: Asymmetrical, Multi-Class Coalition-Based Social Mobilization," *Jurnal Politik* 4, no. 2 (2019): 18.

[17] Saldi Isra, "The Role of the Constitutional Court in Strengthening Human Rights in Indonesia," *Jurnal Konstitusi* 11, no. 3 (2014): 409–427.

with legal certainty. In this decision, the Court was also firm in upholding the principle of discrimination as an absolute right and cannot be limited.[18]

However, when it comes to judicial review cases related to religion, the Court still faces challenges. The judge's decision prevented them from making a strong decision. The Court no longer views violations of the right to be treated without discrimination as an absolute right that can make an article of a law unconstitutional. Court independence ultimately becomes an important study.

To redress the constitutional rights that have been breached as a result of the implementation of the Indonesia's anti-blasphemy law, various adherents of minority religions have lodged claims for judicial review of the provisions within the law that are deemed to impinge on their constitutional rights guaranteed under the 1945 Constitution. Various minority religious groups in Indonesia who continue to be criminalized and intimidated because their religion or religious sect is deemed deviant by the state submitted this judicial review. However, the government and legislators backed by radical Islamic groups have persuaded the courts that the state can restrict religious sects because religious sects are

[18] At least this is reflected in several decisions. *First,* In Decision no. 011-017/PUU-VIII/2003, the Court stated that Article 60 letter g of the Law No. 12 of 2003, which contains a prohibition on those who are "former members banned organizations of the Indonesian Communist Party, including its mass organizations, or not a person directly or indirectly involved in G.30.S/ PKI or other prohibited organizations", become members of the DPR, DPD, DPRD Provincial, Regency or City DPRD has been declared to have no binding legal force. The Court considered that this article violated the people's constitutional right not to be discriminated against in participating in government. *Second,* in Decision Number 6-13-20/PUU-VIII/2010 the Constitutional Court annulled article 30 of Law No. 16 of 2004 concerning the Indonesian Prosecutor's Office stating "In the field of maintaining public order, the prosecutor's office participates in organizing activity through supervise the circulation of printed materials". The Court considers that the article relates to the prohibition on the distribution of books as a source of information, inclusion without trial. This is an action that is inconsistent and even contrary to Article 28F of the 1945 Constitution and is an excessive form of regulation of the right to freedom of expression and violates Article 28J of the 1945 Constitution. *Third,* In Decision Number. 55/PUU-VIII/2010. (4) Decision Number 27/PUU-IX/2011. Third, In Decision No. 55/PUU-VIII/2010 The Court stated that Article 21 and its explanation and Article 47 Paragraph (1) do not have binding force and (2) Law No. 18 of 2004 concerning Plantations because the Constitutional Court considered that these articles had unclear (ambiguous) formulations that could disrupt legal certainty. The Court also considers that this article violates the right to recognition and guarantees of legal certainty, rights develop oneself in order to meet the needs of life, guaranteed and protected with the instrument Article 28D Paragraph (1) and Article 28G Paragraph (1) of the 1945 Constitution. Fourth, In Decision The Court considers that Article 29 Paragraphs (1), (2), (3), (4), (5), (6), (7), and (8); Article 64; Article 65 Paragraph (1), (2), (3), (4), (5), (6), (7), (8), and (9); Article 66 Paragraphs (1), (2), (3) and (4) in Law Number 13 of 2003 concerning Employment which regulates the outsourcing system or Certain Time Work Agreements, are provisions that do not guarantee job security and therefore violate the rights of guaranteed in the 1945 Constitution, including Article 28D Paragraph (2) of the 1945 Constitution. That is, Article 27 Paragraph (2) of the 1945 Constitution, namely the right of every person to work and receive imbalance and fair and appropriate treatment in relationships Work. This is reflected in several Constitutional Court decisions. For detailed analysis, see Isra, "The Role of the Constitutional Court in Strengthening Human Rights in Indonesia," 421–426.

a form of religious expression and not an absolute right. The state may restrict religious sects that deviate from the religions practiced in Indonesia.

During the trial, hardline Islamic groups, such as Hizb ut-Tahrir Indonesia, the Board of Trustees of the Indonesian Kyai-Islamic Boarding School Friendship Council, Aisyiyah Central Leadership, IAIN Sunan Ampel, rejected the annulment of the Anti-Blasphemy Law by submitting themselves as petitioners for intervention, in addition to their supporters. Outside the court, they staged a demonstration outside the court. Based on the interviews with representatives of groups that support the law against blasphemy being maintained and not repealed, it is that deviations from religious teachings disrupt religious harmony because they provoke conflict, whereas Article 28J of the 1945 Constitution grants the state the authority to protect religious expression. This argument was also considered by the Constitutional Court, which believed that maintaining the Anti-Blasphemy Law was necessary to prevent the law's abolition in the event of a conflict between religions in which no law could be used to resolve it. On the other hand, the Court opined that the Articles of the Anti-blasphemy Law contained ambiguous provisions that could lead to discriminatory conduct.

The CCRI has delivered at least three judgments on judicial reviews of the 1965 Anti-Blasphemy Law, namely Decision Number 140/PUU-VII/2009, Decision Number 84/PUU-X/2012, and Decision Number 76/PUU-XVI/2018 and repeatedly uphold the validity of the law. This study reveals that various scholars have concluded that the Anti-blasphemy law is a flawed law,[19] due to weaknesses in substance and is no longer relevant to continue to be implemented in countries that have guaranteed the right to freedom of religion. This study at least confirms that first, the problematic substance of the articles in the Anti-Blasphemy Law is unclear or has multiple interpretations, thereby disrupting legal certainty. Second, the lack of clarity regarding what is meant by "defaming religion" can cause

[19] Meghan Fischer, "Hate Speech Laws and Blasphemy Laws: Parallels Show Problems with the UN Strategy and Plan of Action on Hate Speech," *Emory International Law Review* 35 (2021): 177. See also Cekli S. Pratiwi, "Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law," *Constitutional Review* 7, no. 2 (2021): 273–299, https://doi.org/10.31078/consrev724. Andreas Harsono, "Indonesia to Expand Abusive Blasphemy Law: Revoke New Provisions Violating Basic Rights," *Human Rights Watch*, October 31, 2019, https://www.hrw.org/news/2019/10/31/indonesia-expand-abusive-blasphemy-law.

groups that have religious interpretations that are different from the religions practiced in Indonesia to become targets of discrimination under this law.

According to interviews with parties who support the Anti-Blasphemy Law, any expression or interpretation that does not match Indonesia's interpretation of Islam is blasphemy and intolerance that can divide the people. The sources don't understand the Anti-Blasphemy Law's key shortcomings. While the Anti-blasphemy Law protects official faiths, it also affects religious minorities whose beliefs vary and may be criminalised. Minorities that suffer threats of violence want their religious teachings safeguarded by the state, not to undermine official faiths (Islam). Therefore, the religious minority organisations have submitted a request for a judicial review of the Anti-Blasphemy Law to the Constitutional Court in response to the ongoing discriminatory treatment and prosecution they face.

In contrast to its prior rulings, the Court rendered confusing judgements in many judicial reviews of the Anti-Blasphemy Law. One perspective argues that articles lacking clarity have the potential to result in discriminatory treatment. However, conversely, the court ruled that the statute is constitutional. In brief, the arguments of the petitioner, the responses of the respondents in this case the DPR and the Government, and the verdicts of the CCRI are as describe in Table.1.

Table 1.
The Main Point of the Constitutional Court Rulings of the ABL's Review

Decision Number	Petitioner's Arguments	Respondent's Arguments	The Main Point of the Court Rulings
Decision Number 140/PUU-VII/2009	The ABL contradict the principle of the rule of law and the Indonesia Constitution, enacted during state emergency, violated the right of religious freedom, not in line with the principle of legal certainty and justice	The enactment of the ABL happened when the government in the normal condition, the religious expression is not an absolute rights and can be limited under Article 28J of the Constitution.	(1) The CCRI declared that the State need to limits the religious expression to eliminate conflicts among religions.

Decision Number	Petitioner's Arguments	Respondent's Arguments	The Main Point of the Court Rulings
84/PUU-	Shia's follower claimed that the element of crime, such as "insult the feeling of others, in public space, hostility" under Article 156a has not been defined clearly	The respondents followed the arguments stated in the Decision number 140/PUU-VII/2009.	(2) The CCRI concluded that the limitation is only apply to religious expression or in form of speech or behaviors in public space. (3) The CCRI declared that the substance of the Law on the Prevention of Blasphemy against Religion has to be X/2012 modified in terms of the form of regulation, formulation, and legal principles. (4) The CCRI argues that "the need for a revision of the Law on the Prevention of Blasphemy Against Religion, both within the formal framework of law and in content, in order to have more clear material aspects that will of not lead to ambiguity in reality" (Crouch, 2011). (5) However, the CCRI concluded that the 1965 ABL is constitutional because it does not restrict the freedom to believe, but rather restricts public religious speech that is antagonistic, abusive, or desecrates the religion practiced in Indonesia.
Decision Number 76/PUU-XVI/2018	Ahmadiyya's follower claimed that Article 1 and 2 of the ABL	Every religion has its own teachings that contradictive with other religions,Article 4 the ABL violated the right to religious freedom, the defamation of religion could not be criminalized, Article 4 does not necessary limit religious freedom of the people.	

Sources: Cited from the CCRI verdicts and the interview of the Judges.

The ambiguity of the Constitutional Court's decision demonstrates that, on the one hand, the Court wishes to base its decision on the principle of the rule of law, according to which laws must contain clear elements and not be open to multiple interpretations, but, on the other hand, the Court continues to assert that the law is valid, the Court's considerations lending more weight to the experts of the defendants than those of the petitioners. It cannot be denied that the Court's decision to consider the opinions of experts reflects the influence of populist religious groups on its case decisions.

In decisions number 140/PUU-VII/2009, 84/PUU X/2012, and 76/PUU XVI/2018, the CCRI has opined that the Indonesia Anti-Blasphemy Law does not prohibit individuals from holding beliefs that differ from other religions or beliefs. However, the law does limit the methods through which such beliefs may be expressed or disseminated to others in public. The Court has held that, in accordance with Article 28J and the IHRL, religious speech can be regulated by law. It is worth noting that limits on the freedom of religion and the freedom of expression guaranteed by Article 18(3) and Article 19(3) of the ICCPR.

It is no doubt that the Court considers arguments related to the protection of religious sentiments and the right to express opinions or critique religious beliefs and shape the boundaries of acceptable speech and actions under the law. Nevertheless, this precedent's decision has been criticized by some NGOs and leaders of democracy, who argue that the law is contrary to the guarantee of freedom of religion that cannot be reduced under any circumstances. This criticism suggests that the court's interpretation of the law may have become more restrictive over time. As the results, it provided legal backing for the enforcement of the law and has influenced subsequent cases related to blasphemy. Thus, the weaknesses of the Anti-blasphemy law were never corrected, instead the existence of the ambiguous and discriminatory law was actually made worse by the ratification of various new laws that still maintained the goal of providing guarantees for protection of the six religions adhered to in Indonesia.

What factors cause the Court to be so hesitant when reviewing laws relating to religion? Has the current political situation and pressure from radical Islamic

groups shaken the independence of the Court? Before answering the core question of this study, in the next section the author will explain the theoretical framework regarding judicial independence. In the subsequent part, the author will elucidate the theoretical framework pertaining to judicial independence, emphasising the imperative nature of upholding the rule of law and ensuring the safeguarding of human rights, prior to addressing the central research topic.

3.3. The Importance of Judicial Independence in a Democratic Society

Judicial independence is a concept that refers to the freedom of the judiciary from interference by other institutions and individuals. It connotes a constitutional arrangement of a separation of the judicial power from the executive and legislative powers.[20] Judicial independence is a means to the ends of impartiality and legitimacy; therefore, links between diversity, legitimacy, and impartiality may not explicitly mention judicial independence, despite the existence of an obvious connection. Legal independence is when judges issue commands based on their own scales and directives, without internal or external influence. The independence of judges is violated if their decisions are influenced by factors other than the law, conscience, and a recognized judge, and as a result, justice and human security are not realised. The concept of judicial independence has been cited as a key causal variable in comparative political science for outcomes ranging from regime stability to economic development to the protection of human rights. Each year, the international community expends considerable resources to promote judicial reform and autonomy.

The independence of the judiciary is essential to the maintenance of democracy and the rule of law.[21] It ensures the separation of the judiciary from the executive and legislative branches, which is necessary to prevent any branch from becoming too powerful and to maintain a system of checks and balances.

[20] Vyacheslav Harkusha, "The Principle of Independence of the Judiciary as the Basis of a Democratic Society," *Naukovyy Visnyk Dnipropetrovs'kogo Derzhavnogo Universytetu Vnutrishnikh Sprav* 1, no. 1 (2021): 72–76, https://doi.org/10.31733/2078-3566-2021-1-72-76.

[21] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Southern California Law Review* 74 (2000): 1307.

The independence of the judiciary permits judges to make decisions based on the law and the circumstances of a case without fear of retaliation or influence from other branches of government or external actors. This impartiality is crucial for ensuring that justice is served and the rule of law is maintained. Moreover, judicial independence is essential to the protection of human rights because it enables judges to make decisions based solely on the law and not political or social pressures. This protection is necessary to ensure that everyone is treated equally and equitably under the law. In conclusion, judicial independence strengthens the legitimacy of the judiciary and the entire legal system. It ensures that the public has faith in the judicial system and that decisions are made impartially and equitably.

The connection between judicial independence and human rights is indispensable for ensuring a fair and just legal system. International human rights instruments mandate a fair prosecution by an independent and impartial tribunal, which is an absolute right to which no exceptions may be made. The principle of a judge's impartiality is one of the most important principles of judicial evidence and one of the most important guarantees of litigation, limiting the judge's powers of proof in favour of the litigants. Empirical analyses of domestic legal traditions demonstrate that common law states have, on average, better human rights practises than civil law, Islamic law, and mixed law states. This is because the procedural characteristics of common law result in greater judicial independence and protection of individual rights. Judicial independence is not an objective in and of itself, but rather a means to impartiality and legitimacy; therefore, links between diversity, legitimacy, and impartiality may not explicitly mention judicial independence, despite the obvious connection.

Overall, judicial independence is a fundamental component of a democratic society and the rule of law, and it is essential to ensure that justice is served, human rights are protected, and the legal system is legitimate and trustworthy.

3.4. Challenges to the Independence of the Constitutional Court Posed by Religious Populist Movements

Drawing from the previously outlined theoretical framework, it can be inferred that the Constitutional Court's judicial independence may face disruptions stemming not only from internal factors, such as the suspension or removal of judges and the financial autonomy of the judiciary, but also from external factors like the prevailing political climate and the presence of other disturbances, such as populist movements.

There are some potential ways in which religious populist movements may exert pressure on courts to align with their beliefs. First is public protests and demonstrations. Religious populist movements may organize large-scale protests and demonstrations outside court buildings to pressure judges and influence their decisions. These public displays of support or opposition can create an atmosphere of intimidation and sway the court's judgment. Second is political influence. Religious populist movements may have political connections or alliances that enable them to exert influence over the appointment of judges or other key judicial processes. This influence can be used to ensure that judges sympathetic to their beliefs are appointed or that decisions align with their religious and political agenda. Third, is social media campaigns. Religious populist movements often utilize social media platforms to mobilize their followers and shape public opinion. They may launch targeted campaigns to rally support for their cause and put pressure on the court to rule in their favor. Fourth is public discourse and rhetoric. Religious populist movements may engage in public discourse and rhetoric that portrays the court as biased or corrupt if its decisions do not align with their beliefs. This can create a narrative that puts pressure on the court to conform to their agenda or face public backlash.

Moreover, according to Mietzer and Muhtadi, courts typically respond to pressure from religious populist movements. It is important to note that the

specific strategies employed by religious populist movements to pressure courts may vary depending on the context and the particular movement in question.

a) Upholding judicial independence: "Courts may resist pressure from religious populist movements and uphold their independence by making decisions based on the law and facts of the case, rather than political or religious considerations.[22]"
b) Compromising independence: "In some cases, courts may succumb to pressure from religious populist movements and compromise their independence by making decisions that align with their beliefs. This compromise can undermine the integrity of the judiciary and erode the rule of law.[23]"
c) Delaying decisions: "Courts may delay decisions in response to pressure from religious populist movements. This delay can be used to avoid making a controversial decision or to wait for the political climate to change before making a decision." [24]
d) Seeking international support: "In some cases, courts may seek international support to resist pressure from religious populist movements. This support can come in the form of international human rights organizations or other international judicial bodies."[25]

Following Mietzer and Muhtadi, this study found that in reviewing the Anti-Blasphemy Law, the Court gave in to pressure from religious populist movements and compromised their independence by making decisions in line with their beliefs. This compromise could undermine the integrity of the judiciary and erode the rule of law. The Court faced intimidation tactics against critics and opponents. Religious populist movements in Indonesia have employed various tactics to pressure courts to align with their beliefs. While the literature does

[22] Marcus Mietzner and Burhanuddin Muhtadi, "The Myth of Pluralism: Nahdlatul Ulama and the Politics of Religious Tolerance in Indonesia," *Contemporary Southeast Asia* 42, no. 1 (2020): 58–84, https://doi.org/10.1355/cs42-1c.
[23] Mietzner and Muhtadi, "The Myth of Pluralism."
[24] Mietzner and Muhtadi, "The Myth of Pluralism."
[25] Mietzner and Muhtadi, "The Myth of Pluralism."

not provide a comprehensive list of these tactics, some potential ways in which religious populist movements may exert pressure on courts.

One of the challenges to the independence of the Constitutional Court posed by religious populist movements is their attempts to influence judicial appointments. This challenge is significant because it could compromise the impartiality and independence of the court. The court's independence may be compromised by external influences in cases when the court's judgement is characterised by ambiguity, fails to establish legal clarity, and has ramifications for the violation of human rights.

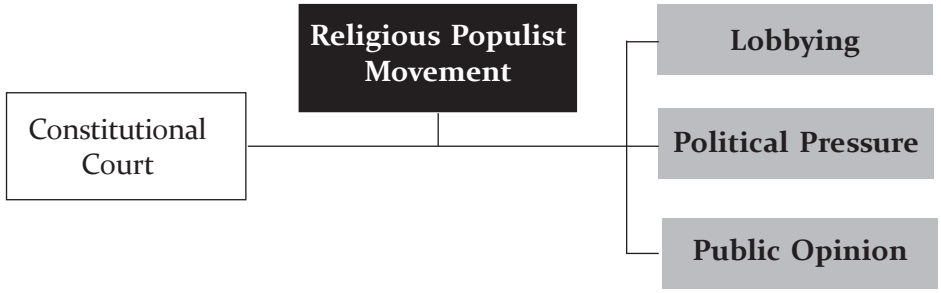
This research has identified three distinct manners in which the religious populist movement exerted influence on the Constitutional Court's verdict during the judicial review of the anti-blasphemy legislation. These influences are described in the diagram 1.

- **Lobbying:** Religious populist movements may lobby government officials to appoint judges who share their religious and political beliefs. This lobbying has been done through various means, such as public statements, protests, and petitions. Religious populist movements organized large-scale protests and demonstrations outside court buildings to pressure judges and influence their decisions.[26] During the process, the Minister of Religion, MUI, FPI made statements in various media that they supported the Anti-Blasphemy Law not being repealed and calling for the repeal of the law to be rejected by the Constitutional Court.[27]

[26] Sana Jaffrey, "Right-Wing Populism and Vigilante Violence in Asia," *Studies in Comparative International Development* 56, no. 2 (2021): 223–249.

[27] " Jelang Demo 212, Ormas Islam Jawa Timur Gelar Tabligh Akbar [Ahead of the 212 Demonstration, East Java Islamic Organizations Hold Grand Tabligh]," *Tempo.co*, accessed 20 August 2023, https://nasional.tempo.co/read/823279/jelang-demo-212-ormas-islam-jawa-timur-gelar-tabligh-akbar. See also "Ketua Fraksi PKS: UU Larangan Penodaan Agama Jangan Dihapus [Chairman of PKS Faction: Blasphemy Law Should Not Be Abolished]," *PKS.id*, accessed 20 August 2023, https://pks.id/content/ketua-fraksi-pks-uu-larangan-penodaan-agama-jangan-dihapus. "MUI East Java Asks Constitutional Court Not to Abolish PNPS Law 1965," *Kominfo Jawa Timur*, accessed 20 August 2024, https://kominfo.jatimprov.go.id/read/umum/20702. " PBNU Minta MK Tolak Judicial Review UU Penodaan Agama [PBNU Requests Constitutional Court to Reject Judicial Review of Blasphemy Law]," *Wahdah Islamiyah*, https://wahdah.or.id/pbnu-minta-mk-tolak-judicial-review-uu-penodaan-agama. See "PKS Tidak Setuju UU Larangan Penodaan Agama Dihapus [PKS Disagrees with Abolition of Blasphemy Law]," *BeritaSatu*, accessed 20 August 2023, https://www.beritasatu.com/nasional/431375/pks-tidak-setuju-uu-larangan-penodaan-agama-dihapus.

Diagram 1. The impact of the religious populist movement on the independency of the Constitutional Court may be seen via three distinct avenues.



Sources: developed by the Author based on several interviews and secondary data sources.

- **Political pressure:** Religious populist movements may exert political pressure on government officials to appoint judges who align with their views. This pressure was happened in the form of threats, intimidation, or other coercive tactics. During the judicial review process, extremist Islamic groups continued to file reports on religious minority organisations, which law enforcement continued to investigate.[28] Simultaneous with the ongoing legal examination of the Anti-Blasphemy Law, there exists a political scenario in a state of turbulence involving Ahok, who was a gubernatorial candidate in Jakarta and was also needed to engage in blasphemous acts. The persistence of extremist Islamic organisations in advocating against the repeal of the Anti-Blasphemy Law, which serves as a legal foundation for the conviction of Ahok, might be attributed to the circumstances.
- **Public opinion:** Religious populist movements may try to sway public opinion in favor of their preferred candidates for judicial appointments. They may use social media, public rallies, or other means to influence public opinion and pressure government officials to appoint judges who share their views. Religious populist movements often utilized social media platforms to mobilize their followers and shape public opinion. They launch

[28] Simultaneously with the judicial review process, the Ahok and Meiliana cases continue to be processed.

targeted campaigns to rally support for their cause and put pressure on the court to rule in their favor.[29] Religious populist movements engaged in public discourse and rhetoric that portrays the court as biased or corrupt if its decisions do not align with their beliefs.[30] These attempts to influence judicial appointments can compromise the independence of the judiciary and undermine the rule of law. It is essential to safeguard the independence of the judiciary and ensure that judicial appointments are made based on merit and impartiality, rather than political or religious considerations.

The extent to which these tactics have influenced the independence of the Constitutional Court in Indonesia is a complex issue that depends on various factors, including the strength of the judiciary's independence and the specific movement in question. However, it is essential to protect the independence of the judiciary by ensuring that court decisions are made based on merit and impartiality, rather than succumbing to external pressures.[31]

In addition to external pressures exerted by religious populist movements, it is noteworthy that these organisations also have influence inside the court and align themselves with parties advocating for the preservation of the anti-blasphemy law. In the judicial review, the group requesting the repeal of the anti-blasphemy law and the group defending the anti-blasphemy law did not reach an agreement. Each group presents an expert for informational purposes. Moeslim Abdurrahman, Djohan Effendi, Garin Nugroho, Thamrin Amal Tamagola, and Luthfie Assyaukanie, for instance, were among the experts who demanded the repeal of the law. A number of authorities, including Komaruddin Hidayat, Siti Zuhro, Taufik Ismail, and Azyumardi Azra, believe that this law is problematic and have called for its revision. On the other hand, the group requesting that the law not be annulled comprise of Chairperson of the Islamic Defenders Front (FPI) Rizieq Syihab, Minister of Religion Suryadharma Ali, Minister of Law

[29] Andrew Chadwick and Jennifer Stromer-Galley, "Digital Media, Power, and Democracy in Parties and Election Campaigns: Party Decline or Party Renewal?," *The International Journal of Press/Politics* 21, no. 3 (2016): 283–293.
[30] M. Iqbal Ahnaf and Danielle N. Lussier, "Religious Leaders and Elections in the Polarizing Context of Indonesia," *Humaniora* 31, no. 3 (2019): 227.
[31] Mietzner and Muhtadi, "The Myth of Pluralism."

and Human Rights Patrialias Akbar, Chairman of Indonesia Ulema Assembly Amidhan, Nahdhatul Ulama figure Hasyim Muzadi, expert on constitutional law Yuzril Ihza Mahendra, expert on criminal law Gajah Mada University in Yogyakarta, Eddy OS Hiariej, and Islamic feminist Khofifah Indar Parawansa. In its considerations, the Constitutional Court adopted the expert opinion presented by the respondent rather than the expert from the plaintiff. The Constitutional Court did not consider the fact that the petitioners' constitutional rights were violated when defending their religious beliefs, nor did it take into account the numerous incidents they endured. In the meantime, the Constitutional Court acknowledged the ambiguity of the law's interpretations. Nonetheless, the Constitutional Court ruled that this law was constitutional, arguing that it would prevent legal idiocy that could spark conflict. The court did not consider the fact that the implementation of this law led to vigilante actions and targeted minority groups. It is difficult to assert that the religious populist movement has compromised the judicial independence.

Second, the sole female justice and Christian, justice Maria Farida, expressed a dissenting opinion. According to her, the application of the Blasphemy Law has resulted in numerous violations of the right to religious freedom. Additionally, Judge Maria stated that the six religions recognized and mentioned in the Blasphemy Law, with the exception of mysticism, were forms of treatment. In practice, only these six adherents of this religion can, for instance, list their religion on a driver's license, marriage license, or death certificate. Thus, the anti-blasphemy law has no justification for limiting the existence of non-established religions and belief groups, as it has discriminated against their status from the outset, denying them the same protection as the six established religions.[32] When Maria Farida, in other judicial review's decisions, concurred that the blasphemy law would not be repealed, the independence of the Court was called into question.

The challenges to the independence of the Constitutional Court posed by religious populist movements leads to pressure on court decisions to align with

[32] Simon Butt, "The Function of Judicial Dissent in Indonesia's Constitutional Court," *Constitutional Review* 4 (2018): 1.

religious and political beliefs. Religious populist movements pressure courts to align with their beliefs through various means. While the search results provided do not directly address this specific question, we can draw insights from the broader literature on religious populism and its influence on the judiciary.

3.5. Consequences of Compromising the Independence of the Constitutional Court

3.5.1. Erosion of Democratic Values and The Rule of Law

Within this particular section, the author posits that the compromise decision pertaining to the judicial review of the Anti-Blasphemy Law carries significant implications, particularly in terms of establishing the primacy of legal principles and facilitating transgressions against human rights, specifically the freedom of religion. These outcomes, in turn, are argued to pose a threat to the democratic fabric of Indonesia.

First, when the independence of the Constitutional Court is compromised due to pressure from religious populist movements, it can have significant consequences, including: erosion of democratic values: The interference and influence of religious populist movements on the court can undermine the democratic principles of separation of powers and checks and balances. This erosion of democratic values can weaken the overall democratic system and lead to an imbalance of power. According to Crouch, the Constitutional Court's decision upholding the Anti-Blasphemy Law further confirmed that there is no separation of church and state in Indonesia and bolstered a theocratic Islamic state. Even though the Constitutional Court examined the anti-blasphemy law against the constitution, the court should consider how this Anti-Blasphemy Law is implemented in practise to determine to what extent the law undermines the rule of law. This study found that maintaining theAnti-Blasphemy Law signifies that the state permits Islamic law to influence government policy, for instance by using the MUI fatwa as justification for removing restrictions on the religious activities of people of other faiths or beliefs.[33]

[33] Melissa A. Crouch, "Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law," *Asian Journal of Comparative Law* 7 (2012), https://doi.org/10.1515/1932-0205.1391.

Table 2. List of New Religious Sects Accused of Deviance based on MUI Fatwas from 1975 to 2010

No.	Name of Sect	Stigmatzed as deflant Sect by MUI
1	Kerajaan Ubur-ubur	MUI Fatwa of Serang, Banten Province
2	Hakekok Blakatsu	MUI Fatwa, in Banten Province
3	Ahmadiyah Qadhiyan	MUI Fatwan 26 May 1980 claimed that
4	Lia Edem or Salamullah	MUI Fatwa Number 768/MUI/XII/1977 December 22th 1997
5	Al-Qiyadah Al-Islamiyah	MUI Fatwa Yogyakarta Province Number B-149/MUI-DIY/FATWA/IX/2007
6	*Gerakan Fajar Nusantara (*Gafatar)	MUI Fatwa Number 04 Year 2007
7	Tarekat Tajul Khalwatiyah Syekh Yusuf Gowa	MUI Fatwa Number 01/MUI-Gowa/XI/2016 November 9th Year 201

Sourcce: Various secondary resources

Another consequences of compromising the independence of the Constitutional Court is undermining the rule of law. When the court's decisions are influenced by religious and political beliefs rather than being based on the law and legal principles, it undermines the rule of law. This can result in inconsistent and arbitrary rulings, eroding public trust in the judiciary and the legal system. In its arguments, the Constitutional Court favoured political interests, namely avoiding paying off the law in order to prevent a larger horizontal conflict.

> ".....the Court considered whether the anti-blasphemy law was repealed or not, the conditions feared would not necessarily occur [...] Because of that, it is in the public interest and in anticipation of conflicts, both horizontal and vertical, that the existence of an anti-blasphemy law is very important"

The claim that there would be a legal vacuum if the anti-blasphemy law is repealed was unfounded because the Criminal Code already contains an article that regulates the actions of judges, namely article 173 of the Criminal Code. The fact that the anti-blasphemy law has multiple interpretations, is discriminatory, and has been used by vigilante groups to justify violence against religious minorities was rejected by the Constitutional Court.

Furthermore, compromising the independence of the Constitutional Court threat to human rights since it can have severe implications for the protection of human rights. When decisions are influenced by religious and political pressures, the rights of individuals and minority groups may be disregarded or violated, leading to a decline in human rights protections. Various studies conducted by NGOs show that religious minority groups in Indonesia cannot optimally enjoy the right to freedom of religion and continue to experience criminalization, violence and other forms of human rights violations.

3.5.2. Weakening Judicial Legitimacy

The independence of the judiciary is crucial for its legitimacy. When the court is perceived as being influenced by external forces, such as religious populist movements, its credibility and legitimacy may be undermined. This can lead to a loss of public confidence in the court's ability to deliver impartial and fair judgments.

According to the Constitutional Court Law, the decision of the Constitutional Court is *erga omnes*,[34] must be carried out by all parties, not just the litigants. However, the legitimacy of the judicial review decision on the anti-blasphemy law is diminished because the Indonesia Parliament (the DPR) has not yet revised the norm of multiple interpretations in the law. The enactment of the New Criminal Code in 2023, which is anticipated to correct the flaws of the Law Against Blasphemy of Religion, does not appear to satisfy the public's sense of justice and is still viewed as a half-hearted improvement. Even though Article 4 of the Law Against Blasphemy of Religion was nullified by the ratification of Article 302 of the (new) Criminal Code, which was against the prohibition of hate speech, the Criminal Code did not nullify the enactment of Articles 1, 2, and 3 of the Law Against Blasphemy of Religion. This means that until the (New) Criminal Code goes into effect in 2025, the law against religious blasphemy poses a threat to the freedom of religion, particularly for religious minorities. In addition, the provisions of Article 302 continue to influence the protection

[34] Dian Ayu Widya Ningrum, Al Khanif, and Antikowati, "The Ideal Format for Implementing Constitutional Court Decisions to Effectuate the Erga Omnes Principle," *Jurnal Konstitusi* 19, no. 2 (2022): 314, https://doi.org/10.31078/jk1924.

of religion or belief in Indonesia rather than the protection of individual rights, so that the interpretation of enmity is heavily influenced by the interpretation of the majority religions.

Moreover, law enforcement officials and other criminal tribunals continue to punish religious minorities based on the law. Despite the fact that this law is defended in order to prevent horizontal conflict, vigilante groups continue to target religious minorities with violence and vigilante acts. In the case of vigilante justice against Gafatar, there were 21 defendants in the destruction of the Miftahul Huda Mosque in Bale Harapan Village, Sintang Regency, West Kalimantan. In the verdict read on January 6, 2022, they were only sentenced to 4 months and 15 days by the Pontianak District Court Judge. The Islamic Defenders Front, or FPI, is the hard-line Islamic community organization most frequently involved in the actions of vigilante actions. At least in this study, FPI was recorded as being involved in the attack on Ahmadiyah residents, Gafatar, destroying Meiliana's house, and mobilizing large numbers of people in theAhok case as described in table

Table 3. The incidents of vigilante justice carried out by the Islamic Defenders Front (FPI)

No	Date	The Form of Vigilante Actions
1	February 10, 2011	FPI's attack on the Abmadiyya Congregation in Çikeusik, Banten.
2	January 28, 2011	FPI raided the Ahmadiyya An-Nushrat Mosque in Makassar, South Sulawesi, to attack and destroy the mosque's nameplate and furniture.
3	January 29, 2011	FPI held a demonstration to force the Ahmadiyya congregation to leave Makassar.
4	March 4, 2011	The FPI mob caused trouble and set fire to the Ahmadiyya headquarters in Lubuk Pinang District, Muko-Muka Regency, Bengkulu.
5	March 4, 2011	FPI mobs burn down a food stall belonging to members of the Ahmadiyya Congregation in Polewali City, Polewali Mandar Regency, West Sulawesi.

No	Date	The Form of Vigilante Actions
6	March 11, 2011	Dozens of mobs from the FPI occupy the Al Gbofur Mosque belonging to the Indonesian Ahmadiyya Muslim Community (JAI) in Cianjur.
7	March 13, 2011	The Ahmadiyya Mosque in Cisaar Village, Cipeuyeum Village, Hauwangi, District, Cianjur Regency, was attacked by hundreds of FPI mobs. As a result, several parts of the building were damaged. The mob also burned Ahmadiyab books and books. A house belonging to an Abmadiyab figure in Tolenjeng Village, Sukagalib Village, Sukatatu. District, Tasikmalaya Regency, was damaged.
8	May 2, 2011	FPI Jakarta demands the termination of the film Pocong Mandi Goyang Hip, starring Hollywood porn actress, Sasha Grey.
9	July 26, 2011	FPI mobs vandalize a transgender meeting place in Purwokerto, Central Java.
10	August 8, 2011	FPI members ransacked the Coto, Makassar shop on JI. AP Pettavani. Makassar for remaining open during the day during the fasting month.
11	August 12, 2011	FPI mobs destroy a food stall owned by Topaz Makassar Restaurant.
12	August 13, 2011	FPI mobs create trouble and burn the Ahmadiyya headquarters in Makassar.
13	August 14, 2011	FPI mob destroys a mom's food stall in Ciamis.
14	August 20, 2011	FPI mobs sweep a food stall selling their wares during the day in the Puncak Bogor area, West Java.
15	January 22, 2015	FPI demonstrates pressure on court when Ahok is in the Appeal court of Supreme Court .

3.5.3. Violation of Human Rights and Minority Rights

Compromising the independence of the Constitutional Court due to pressure from religious populist movements can have severe consequences, including the violation of human rights and minority rights. When the court's decisions are influenced by religious and political beliefs rather than being based on the law and legal principles, it can lead to inconsistent and arbitrary rulings, eroding public trust in the judiciary and the legal system . The interference and influence

of religious populist movements on the court can undermine the democratic principles of separation of powers and checks and balances, leading to the erosion of democratic values.

It is no doubt that the anti-blasphemy law around the world tends to discriminate minority groups inside and,[35] or outside of the court. Inside of the court, Judges have applied the law to punish blasphemous with disproportionate penalties.[36] The judge decision on blasphemy cases is usually using heavy sentencing such as 5 years jail time which should not be the same as criminal charge. Outside of the court, the law has been used more frequently by the local government as legal basis to issuing other relevant policies against the adherents of the heretical sect in Indonesia (see table 2 section 3.5.1. in previous section).

Additionally, compromising the independence of the Constitutional Court can have severe implications for the protection of human rights. When decisions are influenced by religious and political pressures, the rights of individuals and minority groups may be disregarded or violated, leading to a decline in human rights protections. Empirical analyses of domestic legal traditions demonstrate that common law states have better human rights practices on average than civil law, Islamic law, or mixed law states because the procedural features of common law result in greater judicial independence and protection of individual rights in these legal systems. At least 130 individuals were convicted under the Indonesia's anti-blasphemy law between 1988 and 2012, with an additional 66 cases being resolved by the courts between 2012 and 2018. [37] In addition, in 2021 the case of Gafatar then appeared.

3.6. Implications for Religious Freedom and Tolerance

Compromising the independence of the Constitutional Court due to pressure from religious populist movements can have severe consequences for religious freedom and tolerance. When the court's decisions are influenced by religious and political beliefs rather than being based on the law and legal principles,

[35] David F. Forte, "Apostasy and Blasphemy in Pakistan," *Connecticut Journal of International Law* 10, no. 1 (1994): 27–70, https://engagedscholarship.csuohio.edu/fac_articles/79.

[36] Fischer, "Hate Speech Laws and Blasphemy Laws," 177.

[37] Crouch, "Law and Religion in Indonesia," https://doi.org/10.1515/1932-0205.1391.

it can lead to inconsistent and arbitrary rulings, eroding public trust in the judiciary and the legal system. The interference and influence of religious populist movements on the court can undermine the democratic principles of separation of powers and checks and balances, leading to the erosion of democratic values

Additionally, compromising the independence of the Constitutional Court can have severe implications for religious freedom and tolerance. When decisions are influenced by religious and political pressures, the rights of individuals and minority groups may be disregarded or violated, leading to a decline in religious freedom and tolerance . The erosion of religious freedom and tolerance can have severe consequences for social cohesion and stability, leading to increased social tensions and conflicts.

The current legal politics under the Anti-Blasphemy Law regime has continued to place minority religions in a marginalized position. With various court decisions declaring minority religious groups as misguided, they no longer receive equal protection in society. Meiliana can no longer live comfortably, and she was evicted from her home. Gafatar group was forced to leave their place of residence and return to their respective homes, but their families did not recognize them as members. Ahmadiyya has experienced various forms of intimidation and violence. Under the Anti-Blasphemy Law regime, the court's decision to prosecute minority religious groups for their beliefs has caused a strain on interreligious relationships, characterized by suspicion and distrust. In cases such as Ahmadiyya or Gafatar, the communities that used to coexist peacefully and regarded the presence of these groups as a religious social dynamic now view them as a "common enemy" following the Fatwa MUI and various public policies in the regions.

Thus, when hardline Islamist groups call for resistance, public anger is easily stirred up. As a result, the fear of expressing their religious beliefs has become stronger among minority groups (PB House, 2014). For instance, after the issuance of the 3/2008 Joint Ministerial Decree, which prohibits the Ahmadiyya from promoting their activities and spreading their religious teachings and warns that Ahmadiyya followers could be prosecuted for blasphemy if they violate it, and

followed by the court's decision that the Ahmadiyya leaders are guilty of defiling Islamic teachings, the Ahmadiyya group has been secretive in practicing their religious rituals and beliefs. Various difficulties faced by Ahmadiyya followers, such as the lack of government recognition of their residency status, access to public services, property ownership status, and security concerns, have caused Ahmadiyya followers to fear expressing their freedom of worship according to their beliefs.

Therefore, it is essential to protect the independence of the judiciary by ensuring that court decisions are made based on merit and impartiality, rather than succumbing to external pressures.

Overall, compromising the independence of the Constitutional Court due to pressure from religious populist movements can have far-reaching consequences, including the erosion of democratic values, undermining the rule of law, threats to human rights, and weakening judicial legitimacy. It is essential to safeguard the independence of the judiciary to ensure the integrity and effectiveness of the court in upholding democracy and the rule of law.

IV. CONCLUSION

The study demonstrates that several variables have the potential to impede the effectiveness of the judiciary. The Anti-Blasphemy Law judicial review has witnessed the emergence of a religious populist movement in Indonesia, spearheaded by a former member of the Front Islamic Defender. This movement has has garnered support due to the escalating political landscape, with efforts aimed at exerting influence on the justice system and urging the Constitutional Court to adopt policies aligned with their religious convictions. This movement attempts to use several strategies, including lobbying, exerting political pressure, and moulding public opinion, in order to advance its political objectives.

The aforementioned scenario presents a significant obstacle to the Constitutional Court's independence in its role of impartially preserving the Constitution and upholding human rights. The potential impact of religious populism on the Constitutional Court's judicial system gives rise to apprehensions

about the decision-making process, emphasising the need of adhering to the ideals of the rule of law rather than being influenced by political or religious considerations. This also raises concerns about the court's dedication to safeguarding the rights of minority groups, since these movements often endorse measures that might potentially infringe upon such rights.

The present study examines the impact of religious populism on cases of religious blasphemy in Indonesia, with a particular emphasis on its negative consequences for the country's legal system and democratic government. The possible loss of the Court's independence has the potential to undermine the basic concept of the separation of powers, so presenting a danger to the preservation of individual rights. Moreover, this phenomenon has the capacity to erode public confidence in not just the judiciary but also the democratic structure. The aforementioned findings contribute to a deeper understanding of the obstacles faced by the judicial system in Indonesia and the threat posed by religious populist organizations.

The erosion of judicial independence can have far-reaching consequences for democracy, the rule of law, and the protection of human rights. In anticipation of future developments, it is imperative to persist in pushing for the preservation of judicial independence and opposing any endeavours that may undermine its integrity. Advocating for the independence of the Constitutional Court is crucial, as it entails the production of robust judgements, the prioritisation of legal certainty, the adherence to human rights law standards, and the steadfast upholding of the principle of non-discrimination. The Constitutional Court must continue to serve as a stronghold of impartiality, diligently safeguarding the fundamental tenets of justice.

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Weak-Form Review and Judicial Independence: A Comparative Perspective

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Abstract

This article examines the Court's judicial review power that has gradually shifted from a strong-form review into a weak-form review. The shifting into weak-form review may affect judicial independence, both *de facto* or *de jure*, because Justices have considered the Legislature's responds on the Court's decisions. This approach diminishes the Court's supremacy toward lawmakers. This article explores comparative insights from various countries that utilize those reviews, notably the United States of America (strong review), and commonwealth countries (weak review). It also elaborates on some 'anomalies' from both reviews. It raises two important questions: what insights can be learned from other countries' judicial practices, particularly on the use of weak-form review? And, does weak-form review suitable to be enforced in Indonesia's context? The weak review that is manifested in conditional decisions claims to be more politically palatable. Despite that strategic reason, the practice of conditional decision is prone to misuse as it could decrease constitutionalism and judicial independence. This paper argues that the weak-form review is not suitable for Indonesia's constitutional law context, because the country lacks prerequisites and preconditions of strong control through parliament. The Indonesian Constitutional Court must return to its genuine authority as a strong-form review to strengthen legal constitutionalism.

Keywords: Judicial Review; Strong-Form Review; The Indonesian Constitutional Court; Weak-Form Review

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I. INTRODUCTION

This paper examines the shifting of the Indonesian Constitutional Court's judicial review power from a strong-form review into a weak-form review. On paper, the Court's decision is final and binding which is characterized as a 'strong-form review'.[1] In practice, the Court has often practiced conditional decisions which closely relate to 'weak-form review.' The weak review stands for the decision to review the law that can still be brought to the parliamentary institution for further consideration and scrutinized by the parliament.[2] The conditional decisions in Indonesia's context is close to the weak review because the decision provides compromised conditions for lawmakers. By having this kind of compromised approach to the Legislature, this article argues that the Court has inclined toward 'political constitutionalism', rather than 'legal constitutionalism.'[3] The shifting may jeopardize judicial independence, because Justices have considered the Legislature's responds on the Court's decisions. This approach diminishes the Court's supremacy toward lawmakers. To scrutinize the shifting and sustain the thesis statement, this article explores comparative insights from various countries that utilize those reviews, notably the United States of America (strong review), and commonwealth countries (weak review). It also elaborates on some 'anomalies' from both reviews. It raises two important questions: (1) what insights can be learned from other countries' judicial practices, particularly on the use of weak-form review? And, (2) does weak-form review suitable to be enforced in Indonesia's context?

These questions need both theoretical and legal-political explanation, thus this article employs a socio-legal/inter-disciplinary approach.[4] Also, this article employs a comparative constitutional law to compare and contrast Indonesia's experiences with other countries. The article analyses some constitutional

[1] Constitutional Court Law No. 24 of 2003, art. 10(1) (Indonesia). See also Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (London: Routledge, 2018), 78.

[2] Steven G. Calabresi, *The History and Growth of Judicial Review, Volume 2: The Courts of the United States, Switzerland, and the European Union* (Oxford: Oxford University Press, 2021), 52–53.

[3] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008), 12–34. See Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review," *Texas Law Review* 82, no. 7 (June 2004): 1895–1926.

[4] Reza Banakar and Max Travers, eds., *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005), 5.

practices from other courts with the same factual problems and purpose.[5] The article believes that the distinctive political context is pivotal as a basis of comparative law.[6] It provides a thesis statement that weak-form review is not compatible in the current Indonesia's legal-political context, because Indonesia lacks many foundational pre-requirements of democracy and Rule of Law. The practice of weak-form review through conditional decisions would be misused and may erode fragile Indonesia's Rule of Law.

This article flows as follows. First, it starts with the comparative description between weak-form review which is embedded in the common law-parliamentarian system, and strong-form review which is strongly influenced by the American legal system. The two models are dynamically merged in some countries' judicial practice. The second part deals with the Indonesian context. The analysis will focus on the constitutional court in general and its conditional decisions in particular. The third section contemplates some foundational pre-requirements of democracy and the Rule of Law that are lacking in Indonesia's context. The last part is a short conclusion.

II. FEATURES OF WEAK-FORM REVIEW AND STRONG-FORM REVIEW

Judicial body in general has two pivotal functions. *First*, a technical function, as it has duties to sustain and deduce legal propositions. It must apply, define or reinforce rules or doctrines, which eventually contribute to strengthening the structures of the social order. *Second*, the court's ideological function, involves the maintenance of currents of ideology which legal doctrine maintains, implements, and serves to legalise government and empower the social order.[7] Both adversarial and inquisitorial systems have the same functions. These functions are inseparable from each other because they contribute to the

[5] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (Oxford: Oxford University Press, 1998), 34. See Mary Ann Glendon, Paolo G. Carozza, and Colin B. Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law*, 3rd ed. (St. Paul, MN: Thomson/West, 2007).

[6] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *Modern Law Review* 37, no. 1 (January 1974): 1–27, https://doi.org/10.1111/j.1468-2230.1974.tb02376.x.

[7] Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 7.

empowerment of the state's sovereignty. The state governs and transmits its ideology to the people through the court decisions by applying law to the cases.[8]

In exercising its functions, judicial (constitutional) review is the most crucial and public-needed authority of judiciary.[9] The authority of judicial review can protect citizens' constitutional rights from the government's conducts and abuse of powers through legislation, because citizens' rights can only be limited through the provision of legislation.[10] Human rights violation by commission of the government is often masked as limitation of rights in the form of legislation. The Court's judicial review authority to scrutinize the legislation under review becomes so pivotal for democracy and constitutionalism. In a realist perspective, legislative and executive are 'drunk', in that kind of situation, the court should be 'sober'.[11] Through judicial review, many courts in democratic countries have undergone progressive conduct by considering exogenous aspects: economic and political conditions, leaving behind the legalism paradigm.[12] The U.S. Supreme Court in the Lochner case had been influenced by legal realism.[13] The German Constitutional Court has strongly embraced right-based judicial review.[14] The High Court of Australia has exercised political value judgment.[15] And, the South Africa Constitutional Court upholds the principle of transformative constitutionalism.[16]

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8 Shapiro and Sweet, *On Law*.

9 Aharon Barak, *The Judge in a Democracy* (Princeton, New Jersey: Princeton University Press, 2006), 67.

10 David M. Trubek, "Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs," in *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press; New York: Oxford University Press, 1984), 205–17.

11 Keith E. Whittington, "Sober Second Thoughts: Evaluating the History of Horizontal Judicial Review by the U.S. Supreme Court," *University of Illinois Law Review* 2015, no. 1 (2015): 57–101, https://ssrn.com/abstract=2807259.

12 Theunis Roux, "Losing Faith in Law's Authority," in *Comparative Judicial Review*, ed. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK, and Northampton, MA: Edward Elgar Publishing, 2018), 57.

13 David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011); Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97, no. 3 (June 2009): 751–805, https://www.jstor.org/stable/20677894; See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993).

14 Lilly Weidemann, "Administrative Procedure and Judicial Review in Germany," in *Judicial Review of Administration in Europe*, eds. Giacinto della Cananea and Mads Andenas (Oxford: Oxford University Press, 2021). See Georg Nolte and Peter Radler, "Judicial Review in Germany," *European Public Law* 1, no. 1 (1995): 55–69, https://doi.org/10.54648/EURO1995007.

15 Michael Kirby, "Value Judgments: The Ethics of Law," *Reform* (Australian Law Reform Commission) 72 (1998), https://www.austlii.edu.au/au/journals/ALRCRefJl/1998/37.pdf.

16 Eric Kibet and Charles Fombad, "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa," *African Human Rights Law Journal* 17, no. 2 (2017): 340–66, https://doi.org/10.17159/1996-2096/2017/v17n2a1.

Despite the progressive and activism paradigm exercised by the courts, they are still prone to political influences that can erode judicial independence.

The essence of judicial power's legitimacy lies in its independence, meaning the institution must be independent from the government, particularly in the narrow sense of executive power. In a broader sense, there are influential bodies including political groups within the state system and interest and pressure groups outside it. According to Shetreet, there are four pre-requirements for the independence of the judiciary. *First*, substantive independence manifests itself when deciding cases. *Second*, personal independence is legally guaranteed for the term of office and tenure. *Third*, internal independence is essential to bring freedom from colleagues' influences. *Lastly*, collective independence allows independence to participate and regulate the court's budgeting.[17]

Judicial independence manifests in both its individual and institutional aspects. In a sense that a judge/Justice shall exercise the judicial function on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference.[18] Scope of 'independence' is so broad, encompassing from societal relationship to parties involving in a particular dispute, free from inappropriate connections with, and influence by, both the executive and legislative branches of government, and free from judicial colleagues.[19] There are several reasons why the independence of the judiciary is so crucial. *First*, it limits executive power. To limit power, it must be separated from and distributed to other branches of government. *Second*, it is a requirement of the rule of law. There will be no legal supremacy without the independence of the judiciary. *Third*, it is a guarantee of the judiciary's fairness and impartiality. *Fourth*, it promotes equality before the law as there will be no privileges within the courtroom.

[17] Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in *Judicial Independence: The Contemporary Debate*, eds. Shimon Shetreet and Jules Deschênes (Dordrecht: Martinus Nijhoff Publishers, 1985), 590–95.

[18] *The Bangalore Principles of Judicial Conduct* (2002), adopted by the Judicial Group on Strengthening Judicial Integrity, revised at the Round Table Meeting of Chief Justices, The Hague, November 25–26, 2002.

[19] *The Bangalore Principles of Judicial Conduct*.

This section explores two types of reviews: weak and strong-form reviews, by highlighting their historical and contemporary significances on the rule of law.

2.1. Weak-Form Review: A Consequences of Parliamentary Sovereignty

The model and nature of weak-form review constitutional court decisions are mostly practiced by British Commonwealth countries. In the context of British constitutionalism, the decision to review the law can still be brought to the parliamentary institution for further evaluation (further scrutinized by the parliament). It can be observed, both in the British Human Rights Act of 1998,[20] and in The New Zealand Bill of Rights Act,[21] both laws explain that the court can interpret the law, but the court cannot declare the constitutionality status of a law ("Court can construe and interpret legislation, but cannot declare its constitutionality").[22] The above description can be interpreted that the decision to review the law from the constitutional court is not final and binding because the final result of testing or evaluating the law is determined by another institution, namely the legislature or parliament.[23] Moreover, the practice of weak-form review also occurs in Canada, the Canadian Charter explains that the Canadian Parliament has the authority to give a final decision on the decision of the Supreme Court of Canada on the unconstitutionality of a law ("... Parliament has the power to decide that a statute should be operational notwithstanding its incompatibility with certain individual rights").[24] In this context, court plays the role as 'mediator agent', it mediates interests in parliament. If political parties disagree with some norms of the Act, the court will be invited to settle the constitutional question. The court can evaluate legislation, but the final review is in the legislature/parliament's hand. Nevertheless, the legislature/parliament can invite the court to perform a strong-review.[25]

[20] Human Rights Act 1998, UK Public General Acts 1998 (UK).
[21] New Zealand Bill of Rights Act 1990 (NZ).
[22] Calabresi, *The History and Growth of Judicial Review,* 52.
[23] Mark Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention," *Legal Studies* 22, no. 3 (November 2002): 340–76. Parliamentary sovereignty has two distinctive features: first, the absolute aspect where Parliament has legal authority to enact any law without limitation; second, the liberal aspect where Parliament's legal power is unlimited but subject to moral constraints.
[24] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), c. 11.
[25] Tushnet, *Weak Courts, Strong Rights*, 412.

The nature of the weak-form review decision is actually an embodiment of the doctrine of parliamentary sovereignty in the Westminster Parliament which is the antithesis of the doctrine of judge-made law. From the perspective of parliamentary sovereignty, only parliament or the legislative body can understand the true meaning of the law (legislative intent) and therefore is authorized to be the last institution to interpret the law. [26] In a constitutional system where constitutional judicial decisions are weak-form review, the constitutional court only plays the role of a 'middle man' who stands in the middle between the idealism of constitutional texts and the authority of parliament in the formation and final interpretation of legislation. Constitutional courts in constitutional disputes are required to invite all stakeholders, including members of parliament, to seek clarification or further explanation regarding the norms contained in a law submitted to the court. In the Westminster Parliamentary system, the parliament is even authorized to grant a clearance of substantive review to the judiciary to conduct a material review of legislation ("The Court only invalidates legislation, when it manifestly inconsistencies with the Constitution").[27] This system is known as the 'new Commonwealth model of constitutionalism'.[28] In this system, constitutionalism is not 'judicial constitutionalism', but 'political constitutionalism'.[29]

In the context of 'political constitutionalism', the decision of the constitutional court in a judicial review of legislation can be reviewed by a special session of parliament. The result of the review by the constitutional court can be accepted (for a strong review), or can be rejected by parliament. Tushnet states: "*The judicially created meaning may then be rejected by the political branches of government through more-or-less ordinary legislation, rather than through the substantially more burdensome method of constitutional amandement.*"[30]

[26] John Austin, *The Province of Jurisprudence Determined*, Lecture V (London: Weidenfeld and Nicolson, 1954), 95.
[27] Calabresi, *The History and Growth of Judicial Review*, 52.
[28] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism," *American Journal of Comparative Law* 49, no. 4 (Autumn 2001): 707–60, https://dx.doi.org/10.2139/ssrn.302401.
[29] Mark Tushnet, "The Relationship between Political Constitutionalism and Weak-Form Judicial Review," *German Law Journal* 14, no. 12 (2013): 2249–61, https://doi.org/10.1017/S2071832200002753.
[30] Tushnet, "The Relationship between," 2250.

Furthermore, in the paradigm of 'political constitutionalism', the perspective is more realist-political than legal. The constitutional court is considered not to be the only state institution with a constitutional mandate to interpret laws, but rather it is the parliament that truly understands the constitutional meaning of the legislation.[31] The constitutional court system is also often referred to as the Thayerian model, where the role of the court is personified as a 'wise parent'. It is also often referred to as the dialog model, where the court opens up opportunities for parliament to correct mistakes in the legislative process ("acting as a 'wise parent' to allow the Parliament to fix the error").[32]

As a consequence, the constitutional court is also required to be able to refrain and be careful not to enter into the authority of the law-forming body: the legislature.[33] Due to the presence of the prudential principle in the judicial review of laws, the meaning of constitutionality in judicial review decisions often has different 'levels', 'gradations' and 'requirements' of constitutionality ("unconstitutional, but not too unconstitutional; an error, but not a clear error").[34] This judicial method and approach have been transplanted by the Indonesian Constitutional Court through the form of conditional decisions.

The pragmatic-political objective of the dialogue model between the constitutional court and parliament in weak-form review is to avoid unnecessary confrontation and conflict between the two institutions. In its decision, the constitutional court only explains in a declarative sense that legislation under review is inconsistent with constitutional norms. In response to the decision of the constitutional court, parliament can then respond and provide clarification in a parliamentary hearing. The decision of the parliament has two possibilities, either to accept the interpretation of the constitutional court or to ignore it. The answer and clarification from parliament can be in the form of a mechanism for

[31] Martin H. Redish, *Judicial Independence and the American Constitution: A Democratic Paradox* (Stanford, CA: Stanford Law Books, 2017), 16.

[32] Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries," *Wake Forest Law Review* 38, no. 2 (2003): 813–38.

[33] Mark Tushnet, "Alternative Forms of Judicial Review," *Michigan Law Review* 101, no. 8 (2003): 2781–802, https://repository.law.umich.edu/mlr/vol101/iss8/9.

[34] Tushnet, "Alternative Forms of Judicial Review."

re-enacting a law that has been tested, or by providing revisions/improvements based on the results of the assessment of the constitutional court.[35]

Constitutional law scholars supporting 'political constitutionalism' make the claim that the model and nature of weak-form review constitutional court decisions have an impact on increasing parliamentary accountability to the objective-legal input of the constitutional court. One of the positive values is that members of parliament from both the government coalition and the opposition have many opportunities to deliberate.[36] In the context of the legislative process in the Westminster Parliament, parliament forms laws from a generalist perspective, and parliamentarians recognize that there will always be loopholes in the law. Therefore, judicial review by the constitutional court is a constitutional necessity, where the constitutional court provides input on the procedural and material aspects of the law and consideration of the constitutional rights of citizens that could be affected by the generalist regulation. In this context, 'dialogue' within the parliamentary institution regarding the decision of the constitutional court is needed.

The model and characteristics of the English weak-form review constitutional judicial decision are not without criticism and evaluation. The founding fathers of the United States and constitutional law experts from Western Europe who migrated to the United States in the period of World War II, especially Hans Kelsen, provided a lot of theoretical justification for the model and nature of strong-form review decisions which are the anti-thesis of weak-form review.

2.2. Strong-Form Review: A Legal Constitutionalism

Contrast with the constitutional court in the commonwealth countries which are only placed as an institution of constitutional interpretation, so that the decision is only declarative (weak-form review).[37] In the Kelsenian model, the authority of the constitutional court also includes constitutive

[35] Tushnet, 2251.

[36] Yuval Eylon and Alon Harel, "The Right to Judicial Review," *Virginia Law Review* 92, no. 5 (2006): 991–1022, https://ssrn.com/abstract=906460. See Alon Harel and Tsvi Kahana, "The Easy Core Case for Judicial Review," *Journal of Legal Analysis* 2, no. 1 (2010): 227–56, https://doi.org/10.1093/jla/2.1.227.

[37] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), 204.

law-making functions,[38] which are able to 'reshape' constitutional norms, by making comprehensive corrections to legal products and public policies made by the legislature.[39]

The idea of a constitutional court with a strong-form review decision was actually developed by Kelsen when he lived and taught at Columbia University in the United States of America. The source of inspiration is the practice of judicial review in the United States Supreme Court, which was a pioneer of strong decision power. The founding fathers of the United States deliberately reconstructed the judicial system in the United States as an antithesis to the paradigm and practice of the British judiciary which still adheres to the doctrine of parliamentary sovereignty. In reading the texts of the United States Constitution, it can be understood that the founding fathers of the United States firmly rejected all elements of parliamentary sovereignty. The founders and authors of the text of the United States Constitution believed that the power and sovereignty of parliament should be fenced by the norms of constitutional law run by an independent constitutional judiciary, namely the Supreme Court of the United States. This doctrine of judicial power became known as 'constrained parliamentarism'.[40] The Supreme Court of the United States in several of its landmark decisions has repeatedly stated that the position of its decisions is higher and superior to the legislative products of the legislature or representatives. This assertion can be observed in several decisions such as Cooper v. Aaron and Bush v. Gore.[41]

It is important to note that both Kelsenian model and the U.S model have distinctive characteristics. The U.S. applies the decentralized (or diffuse) model of constitutional review while the Kelsenian model is centralized. The U.S judicial review starts from litigation processes in a strict 'cases and controversies' or 'concrete review' doctrine, and all judicial branches under the

[38] Calabresi, *The History and Growth of Judicial Review,* 51.
[39] Niels Petersen, "The German Constitutional Court and Legislative Capture," *International Journal of Constitutional Law* 12, no. 3 (2014): 695–713, https://doi.org/10.1093/icon/mou040.
[40] Redish, *Judicial Independence and the American Constitution*, 320.
[41] Erin F. Delaney and Rosalind Dixon, eds., *Comparative Judicial Review* (Cheltenham, UK: Edward Elgar Publishing, 2018), 445.

U.S Supreme Court can exercise judicial review.[42] On the other hand, in the Kelsenian European model (in which the Indonesian system adopted), there are two branches of judicial institution, namely the Supreme Court and the Constitutional Court. In this system, the Constitutional Court has an absolute authority for constitutional review (centralized), and citizens can be more flexible to file judicial review cases as the claim of constitutional damages can be 'abstract'.[43] Despite the distinctive aspects, both the U.S. Supreme Court and Kelsenian models share similar perspective of strong-form review aiming to uphold constitutional sovereignty or 'legal constitutionalism'.

The nature of constitutional sovereignty embodied in the U.S. Supreme Court's strong decision power is prescriptive and directive, this is because it stabilizes constitutional norms through the interpretation of constitutional judges ("judge to say what the law is").[44] This means two things: the Court has general authority to determine what the Constitution means, and the Court's constitutional interpretations are authoritative. Through the Supreme Court as the constitutional court in the United States, the balancing function is carried out in three conditions. *First*, through limiting government power, while strengthening the constitutional rights of citizens. *Second*, through strengthening the awareness of citizens' rights by providing litigation space to make corrections to government public policies. Constitutional awareness is important in an effort to avoid democratic decline ("encouraging citizens to counter democracy transgression"). *Third*, helping citizens to adapt to evolving socio-economic changes ("helping citizens to adapt to new socio-political circumstances").[45]

However, in practice, the United States Supreme Court also often uses judicial-political strategies in judicial review disputes. Sometimes the Supreme Court implements judicial restraint, where the Supreme Court is cautious and

[42] Charles G. Haines, *The American Doctrine of Judicial Supremacy* (Berkeley: University of California Press, 1914), 17; see also Redish, *Judicial Independence and the American Constitution*, 320.

[43] Petersen, "The German Constitutional Court and Legislative Capture," 716.

[44] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), 250.

[45] Tonja Jacobi et al., "Judicial Review as a Self-Stabilizing Constitutional Mechanism," in *Comparative Judicial Review*, eds. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK: Edward Elgar Publishing, 2018), 203.

tends to refrain from making progressive interpretations that can be interpreted as Supreme Court intervention in the legislature. The Supreme Court often also gives the legislature (Congress) the opportunity to make substantive revisions to the law. The caution of the United States Supreme Court in conducting a strong review of the law is a reflection of President Franklin D. Roosevelt's policy that intends to weaken the authority of the Supreme Court through the Judicial Procedures Reform Bill in 1937. The executive policy is known as *Pack the Court*, which was the result of President Franklin D. Roosevelt's anger at the Supreme Court for repressively cancelling laws in the New Deal project.[46] However, in the dynamics of constitutional practice and judicial independence, the Supreme Court also often engages in judicial activism, when Supreme Court justices feel uncertain of the goodwill of the legislature to accept and implement their decisions.[47]

Furthermore, in the context of the dynamics of political-constitutional practices in the United States, Supreme Court judges often carry out strategies that are often referred to as constitutional politics, in order to ensure that their decisions have legality as well as strong socio-political justification, but on the other hand still respect the authority and dignity of law-making institutions, with the aim of avoiding horizontal conflicts between state institutions.

The strong-form review of the U.S Supreme Court has several modifications. It implies strong legal rights protection for citizens, that require strong remedies as well. Brown v. Board of Education provides an example of how the Court supervised the desegregation processes. However, it took a decade to change, and the Court got severe political confrontation.[48] Another example is the landmark decision of Marbury v. Madison. The Supreme Court issued a decision that clearly seemed to have the character of activism and had strong decision power (strong-form review) because the Court rejected the legislature's interpretation in enacting the Judiciary Act.[49] It became a reference for many

[46] Jacobi et al., "Judicial Review as a Self-Stabilizing."
[47] Haines, *The American Doctrine of Judicial Supremacy*, 17.
[48] Strong remedy is a detailed order from the Court to the implementation of social welfare policy. The U.S Supreme Court said "weak remedies are not remedies."
[49] Redish, *Judicial Independence and the American Constitution*, 320.

legal experts in several countries (including Indonesia) regarding judicial review. However, the Supreme Court actually remained cautious by refusing to issue a writ of mandamus because such action could be considered intervening in the authority and authority of the executive branch, namely President Jefferson.[50] This was actually the application of 'strong right, but weak remedy' as the court assertively defended the rights, but provide some requirements and an unspecified timeline for the legislature.

It is also important to note that the Supreme Court in Marbury v. Madison actually only confirmed or interpreted the texts of the United States Constitution, especially in Article III related to "One Supreme Court", "the power to adjudicate all cases" and "arising under this Constitution". Therefore, Supreme Court judges, especially Chief Justice Marshall, did not merely consider social and political needs as is often claimed by proponents of the judicial-political approach to judicial activism. In a purposive textualism reading, Article III of the United States Constitution, which is often referred to as the Supreme Clause, is actually the main textual-normative basis for the granting of judicial review authority in the Marbury v. Madison decision. The decision actually only emphasizes the doctrine of constitutional supremacy.[51]

But apart from some of the strategic practices and judicial-political approaches above, the Supreme Court both in theory and practice still has strong-form review power, this is because in the construction of the United States Constitution only the Supreme Court has the exclusive authority to determine the constitutional meaning of statutory norms and the constitution itself ("... the exclusive power to determine the meaning of the Constitution").[52] In other words, when the Supreme Court has 'spoken' through its decisions, the other (institutions) must be silent ("when the Supreme Court has spoken, the conversation must end").[53]

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[50] Delaney and Dixon, *Comparative Judicial Review*, 783.

[51] Redish, *Judicial Independence and the American Constitution*, 320.

[52] Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," *Columbia Law Review* 102, no. 2 (2002): 237–336, https://ssrn.com/abstract=307601.

[53] Richard Hofstadter, ed., "Preface to Virginia and Kentucky Resolutions," in *Great Issues in American History: From the Revolution to the Civil War, 1765–1865* (New York: Vintage Books, 1958), 72.

III. AN INDONESIA CONTEXT: CONDITIONAL DECISIONS

Looking at the context of Indonesian state administration in general, and the dynamics of the decisions of the Indonesian Constitutional Court in particular, it can be seen that on paper, the power of the Constitutional Court's decision is final and binding. Law Number 24 of 2003 concerning the Constitutional Court, Article 10 Paragraph (1) states: "The Constitutional Court has the authority to hear cases at the first and last instance and its decision is final to: (a) to test laws against the Constitution of the Republic of Indonesia Year 1945." However in practice, it is often the opposite. The existence of the constitutional politics of the Constitutional Court and the binding force (final and binding) of the decisions of the Constitutional Court, especially in the early period of Asshiddiqie's leadership, received a lot of neglect and resistance, both from the executive and the legislature. The nullification of constitutional norms through unconstitutional decisions by the 9 (nine) Constitutional Judges was considered to violate the principle of 'parliamentary sovereignty' and the original authority of representative institutions in the process of forming legislation.[54]

With the purpose to avoid these counter-productive conflicts, the Constitutional Court in the first period modified the type and power of judicial review decisions, by adding a 'requirement' clause or conditionalities, especially in decisions that are 'sensitive' to the interests of the lawmaking body. Whereas it is well known in Law Number 24 of 2003, Article 56, it is stated that the ruling of the Constitutional Court is limited to: the application cannot be accepted, the application is granted, and the application is rejected. The modifications of these conditional decisions are as follows: (1) The first is a conditionally constitutional decision, contained for the first time in a judicial review of Law Number 7/2004 on Water Resources. The interpretation or political-strategic meaning of the 'conditionally constitutional' decision is that the law under review is decided to be constitutional, but the degree of constitutionality depends on the requirements that have been given by the Constitutional Court. In other words,

[54] Hendrianto, *Law and Politics of Constitutional Courts*, 724.

if the implementation of the law deviates from the constitutional requirements set by the Constitutional Court, the law can be reviewed.[55]

The second modification is a conditionally unconstitutional decision, which means that the articles or laws being tested are declared unconstitutional, however, the status of unconstitutionality can be changed if the requirements by the Constitutional Court are carried out by the lawmaker, in this case the government and the legislature. The model and power of the decision can be seen in the examination of Law Number 18/2003 on Advocates. [56] The duration of the unconstitutionality status of the tested law can also be determined by the court's decision. In other words, through a conditional unconstitutional decision, the binding force of a law is suspended (suspended declaration) until the time determined by the Constitutional Court. In addition, the nature of the two conditional decisions above can also only have a prospective ruling, for example in the judicial review of Law Number 16 of 2003 concerning the Enactment of the Anti-Terrorism Law.[57]

Based on the analysis from the first period of the Constitutional Justices leaded by Asshiddiqie, in which the 'conditional' decision firstly implemented. There is one finding can be considered. The leadership of the Chief Justice is pivotal to drive opinions and discourses among Justices. From this experience, it can be concluded that the 'conditional' decision aimed as a strategic mechanism to ease tension with the Legislature. However, as the judicial approach/ interpretation depends on the quality and integrity of Justices (mostly the Chief Justice), the 'conditional' decisions are being misused by the next Justices to please the Legislature. Consequently, it diminishes the supremacy of the court as the sole interpreter of the Constitution. One example can be described. In the context of the formal judicial review of the Law on Job Creation, the norms of the law *a quo* are still considered to have legality during the two year period for comprehensive revision.[58] For this reason, the government asserts that the

[55] Hendrianto, *Law and Politics of Constitutional Courts*.
[56] *Judicial Review of Advocate Law*, Decision No. 101/PUU-VII/2009, Constitutional Court of Indonesia.
[57] *Judicial Review of Criminal Code*, Decision No. 013/PUU-I/2003, Constitutional Court of Indonesia.
[58] *Judicial Review of Job Creation Omnibus Law*, Decision No. 91/PUU-XVIII/2020, Constitutional Court of Indonesia.

derivative regulations from the Job Creation Law are still valid and can serve as legality for government technical policies in the field. In this context, the interpretation of 'conditional unconstitutional' becomes wild.

It is interesting to see the analysis of previous research by Rahman (2020), which states that "there is no substantial difference between decisions with 'conditional constitutional' clauses and decisions with 'conditional unconstitutional' clauses".[59] In addition, the argument was based on the examination of seven conditional decisions that in their legal considerations stated that the norm being tested was 'conditionally constitutional', but in the verdict, it was declared 'conditionally unconstitutional'.[60] This clearly creates inconsistency and legal ambiguity in the Constitutional Court's decision.

Furthermore, in analyzing the *ratio legis* of conditional decisions, especially the conditionally constitutional, the conditional was anchored in the opinion of the Constitutional Court itself through Decision Number 19/PUU-VII/2010 which stated that a conditional constitutional decision is issued if: "... a norm petitioned for review can be interpreted differently, where the difference in interpretation can cause legal uncertainty which causes violation of the constitutional rights of citizens, so that a conditional constitutional decision is imposed to provide a certain interpretation so as not to cause legal uncertainty or violation of the rights of citizens."[61] However, the Constitutional Court later recognized the weakness of conditional constitutional decisions, because often the law-making body (*addresaat*) understands that it does not need to follow the Court's requirements because the norm being tested is declared constitutional. In other words, the parties' lawsuit is rejected. Therefore, the *addresaat* does not feel obliged to make substantive changes to the law.[62]

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[59] Faiz Rahman, "Anomali Penerapan Klausula Bersyarat dalam Putusan Pengujian Perundang-undangan terhadap Undang-Undang Dasar [Anomaly of Conditional Decisions of Judicial Review]," *Jurnal Konstitusi* 17, no. 1 (2020): 57–79, https://doi.org/10.31078/jk1712.

[60] Rahman, "Anomali Penerapan Klausula," 31-39.

[61] *Judicial Review of Health Law*, Decision No. 19/PUU-VII/2010, Constitutional Court of Indonesia; see Rahman, "Anomaly of Conditional Decisions," 36.

[62] *Judicial Review of Excise Law*, Decision No. 54/PUU-VI/2008, Constitutional Court of Indonesia; see Rahman, "Anomaly of Conditional Decisions," 37.

The paper argues that the opinion of the Constitutional Court regarding the conditional decision above is very problematic because the Constitutional Court should be the sole interpreter of the Constitution, which gives meaning and single-authoritative interpretation to statutory norms, instead of opening a debate on the constitutional interpretation of a tested law. The inconsistency of conditional decisions has the potential to violate the principle of legality, which is one of the important foundations of the principle of the rule of law. The principle of legality is a moral requirement. Where a legal product, both legislation and judicial decisions, must not have a contradictory meaning (the principle of non-contradictory), but must be clear and not vague or ambiguous (the principle of clarity).[63] In addition, conditional decisions also undermine the principle of real legal certainty,[64] where it is emphasized that judges' decisions must contain clarity of meaning and solve problems, instead of opening up room for wild interpretation (clear and precise rules, so that everyone knows where they stand).[65]

Furthermore, the former Constitutional Court Judge, Harjono provided justification regarding conditional decisions as follows:

> "Therefore, we (Justices) create the conditional decisions by proposing a requirement: if a provision whose formulation is general is later implemented in the form of A, then the implementation of A is not contrary to the Constitution. However, if the general formulation is later implemented in the form of B, then B will be contrary to the Constitution. Thus, it can be tested again."[66]

The above argument seems very sociological by considering the implementation actions of the laws being tested, but keep in mind, *first*, the Constitutional Court is a constitutional court with a Kelsenian model which aims to carry out the process of validating statutory norms against the highest law or the Constitution. The Constitutional Court with the Kelsenian model is

[63] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958): 630–72, https://www.jstor.org/stable/1338226.

[64] Adriaan Bedner and Barbara Oomen, eds., *Real Legal Certainty and Its Relevance: Essays in Honour of Jan Michiel Otto* (Leiden: Leiden University Press, 2018), 11.

[65] Bedner and Oomen eds., "*Real Legal Certainty*."

[66] Rahman, "Anomaly of Conditional Decisions," 36.

not theoretically oriented towards supervising the implementation of the norms of the laws being tested.[67] *Second*, the Constitutional Court is not authorized and has no control mechanism over the implementation of the laws being tested. The Indonesian Constitutional Court is centralized, in contrast to the United States Supreme Court which is decentralized so that it can supervise the implementation or execution of its judges' decisions.[68] Therefore, the reason based on the implementation of the law for conditional decisions can be debunked. *Lastly*, the judicial approach of weak review is also considered as part of Justice's judicial interpretation which should be protected by the principle of judicial independence. However, this article argues that Justices should refrain to interpret the validity of the decision which is implicitly stated on the Constitutional Court Law. The power of strong-form review of the Court's decision is crystal clear on legislation, thus should be applied consistently by the Justices.

The two models of strong-strategic decision power in conditional decisions are clearly the result of constitutional politics from the judges of the Constitutional Court, the purpose of which is to give time to lawmaking institutions to make substantive and formal revisions to the laws being tested. In addition, the main objective is of course to avoid conflict and institutional tension between the Constitutional Court and the government and representative institutions as lawmaking institutions. Conditional decisions with weak-form review aim to flex political tension (making decisions politically palatable). This practice occurs in almost all constitutional courts in post-authoritarian contexts and democratic transitions. In other words, this paper argues that the true reason for the modification of conditional decisions is more political-pragmatic, rather than merely the effectiveness or implementation of the tested law and substantive justice.

[67] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1945), 401. See Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Clark, NJ: The Lawbook Exchange, 2005), 314.
[68] *Brown v. Board of Education*, 347 U.S. 483 (1954).

IV. PRECONDITIONS OF WEAK-FORM REVIEW

Tushnet argues that both models of the power of constitutional judicial decisions, both strong-form review and weak-form review, can actually be chosen according to the needs and social urgency in society.[69] In other words, a normative-constitutional constitutional court whose decision is final and binding can also adopt a weak-form review model, and vice versa. But of course with some legal-political consequences of its own. This paper argues that both models: weak-form review and strong-form review have their own historical-philosophical context. Therefore, both have their own truth claims. However, this paper argues that the constitutional court model with the nature and power of weak-form review is more suitable in the context of countries with a parliamentary political culture, which is mostly adopted by common law countries and/or former British colonies (the Commonwealth countries).

Although transplanting the approach and strategy of weak-form review can also be used in constitutional courts with the Kelsenian model, the author argues that the system and practice of weak-form review can only be implemented by fulfilling various democratic preconditions, as follows. First, a country must have a representative system or parliament with a strong control function, as well as a high degree of public accountability. In weak-form review, the revision of legislation suggested by the constitutional court through its 'conditional' decision ultimately depends on the political willingness of the representative body or parliament. Without a strong parliamentary control system, submitting revisions to legislation through the 'conditional' route is futile.

The second prerequisite is intertwined with the parliamentary control system. It is recognized that the 'political machines' of parliament are political parties. Therefore, one way of parliamentary reform is through strengthening the political-legal system and culture of political parties in parliament, which must be idealistically oriented towards 'public accountability'. The adherence of members of parliament to always be accountable to their voters or constituents

[69] Tushnet, *Weak Courts, Strong Rights*.

aims to realize responsible governance for all actions, implementation and strategic policies carried out by the government (responsible government). In contrast, the British parliamentary system of government has long embraced a culture of responsible government and upholds public accountability. Realistically, it will take a long time to transplant this political-legal constitutional culture to post-authoritarian countries such as Indonesia.

The third prerequisite is still related to political parties in the dynamics of constitutional politics in representative institutions or parliament. Weak-form review which authorizes parliament to make the final revision of a constitutional court decision requires a strong, accountable and competitive parliament. Therefore, political parties in representative institutions must be in a competitive as well as ideological party system (vigorous party competition), so that the deliberation process for the formation of legislation can run more critically and dynamically as well as constitutionally meaningful. According to Landau, there is a link between the process of judicial review and the constellation of government coalitions, "the stronger and more dominant the coalition of government parties, the less competitive the debate in parliament, and this leads to the weak objective-legal aspirations of the constitutional court in the debate in parliament." [70] This anomaly can be further exacerbated by the choice of proportional representation, which requires a large coalition to govern (government by majority). The tendency to form large or 'fat' coalitions correlates with the 'politics of harmony' which is actually a manifestation of the ruling party's pragmatic political consolidation. These pragmatically formed coalitions are allegedly not friendly to judicial review of legislation, because the political interests of the majority in parliament have been consolidated and the opposition/minority in parliament is weak. In the worst case scenario, the pragmatic grand coalition can become State Capture, where the coalition of government political parties can do anything and violate constitutional norms, including ignoring court decisions.[71]

[70] David Landau, "Courts and Support Structures: Beyond the Classic Narrative," in *Comparative Judicial Review*, eds. Erin F. Delaney and Rosalind Dixon (Cheltenham, UK: Edward Elgar Publishing, 2018), 226–43.

[71] Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, "The Coming Demise of Liberal Constitutionalism," *University of Chicago Law Review* 85, no. 2 (2018): 239–55, https://chicagounbound.uchicago.edu/uclrev/vol85/iss2/12.

The last fourth prerequisite is related to citizens' rights who must have an established awareness and culture of constitutionalism as well as being critical of the government's actions. Every citizen must be aware of their constitutional rights enshrined in the constitution as citizens. With a strong awareness and culture of constitutionalism, citizens can more often file material and formal challenges to legislation that has the potential to harm their constitutional rights. Therefore, civic education becomes very important to be given to citizens, so that they can understand their constitutional rights, as well as understand their obligations, and more importantly can understand the obligations of the government as a duty bearer in the institution of human rights. Ultimately, it is the citizens themselves who are able to 'punish' or 'reward' (reward and punishment) the performance of political parties and governments through elections and constitutional justice mechanisms.

V. CONCLUSION

The power of constitutional judicial decisions is a reflection of constitutional relations between state institutions. In a parliamentary system of government that is more widely known in the tradition and practice of constitutional courts in common law countries, the system is oriented towards the control function of parliament over the government, the weak-form review model of constitutional judicial decision power can be relied upon to create a political balance between the three branches of power, namely: executive, legislative and judicial (classic Trias Politica). However, the system and model of constitutional justice must be supported by several prerequisites and preconditions of a strong rule of law and democracy. In the context of the Indonesian Constitutional Court with its conditional decision practice, this paper argues that the construction of the conditional decision has a political rather than legal background. With a conditional decision, the Constitutional Court provides an 'opportunity' for lawmaking institutions to make revisions/improvements in accordance with the direction and advice of the Constitutional Court, the power of weak decisions (weak-form review) is believed to reduce conflict or friction between the

constitutional judicial body and lawmaking institutions. With this strategy, the decision of the Constitutional Court can be more politically accepted by the lawmaking body (politically palatable).

Reflecting on the current political reality in the Indonesian parliament, this paper argues that Indonesia does not have the prerequisites and preconditions for democracy and a strong rule of law to support the model and nature of weak-form review decisions. Therefore, a conditional Constitutional Court's decision has the potential to be misused to maintain political-economic interests in the law, while degrading the dignity of the constitutional court and constitutionalism. This paper provides constructive suggestions to the Constitutional Court to apply the model and power of strong-form review decisions, as it has been implicitly stated on the Constitutional Court Law. The choice of strong-form review indeed has the consequence that some decisions of the Constitutional Court may be ignored by the legislative body, as well as can complicate the relationship between the constitutional court and other high state institutions. Although it seems not strategic, strong-form decisions are needed to provide real legal certainty and effective remedies to citizens who are directly or indirectly affected by laws and regulations.

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The Relationship Between the Constitutional Judges' Selection by the House of Representatives and The Position of Judges in Judicial Review Decisions

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Abstract

The two issues raised in this study are the selection mechanism for constitutional judges nominated by the House of Representative (DPR) and the correlation between the selection of constitutional judges nominated by the DPR and the position of the judge in the decision to review the law. This research analizes the position of the constitutional judges on 8 judicial review decision which correlated to the authority and interests of the DPR. Judges who are nominated through a highly transparent and participatory selection process or a transparent and participatory process may rule in favor of or against the interests of the DPR. However, judges who are nominated through a selection process that is not transparent and participatory will all make decisions in

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favor of the interests of the DPR. That finding show that the judge nominated through a highly transparent and participatory selection process tends to be more independent than the judge nominated through less transparent and participatory selection process.
Keywords: Constitutional Court; Independency of the Judiciary; Judges' election, Participatory Transparency

I. INTRODUCTION

1.1. Background

Free and impartial judiciary is one of the rules of law elements. Article 24 paragraph (1) of the 1945 Constitution states that judicial power is an independent power to uphold law and justice. Independent means not affected and cannot be influenced by other branches of power or by other forces. Impartial means neutral and objective to uphold law and justice in exercising authority.

The independence of the Constitutional Court as a judicial institution is an absolute requirement to fulfill the nature of its presence based on the principles of the rule of law. Without independence, the Constitutional Court will only become an extension of political power. Article 24 C paragraphs (1) and (2) of the 1945 Constitution provides 5 authorities to the Constitutional Court, namely to hear at the first and final level whose decisions are final and binding for (1) review laws against the Constitution, (2) disputes over the authority of state institutions whose authority is granted by the Constitution (3) the dissolution of political parties, (4) disputes over general election results, and (5) deciding on the House of Representatives's (DPR) opinion regarding alleged violations of law by the President and/or Vice President.

One aspect that is argued to affect the independence of the Constitutional Court is the mechanism for appointment of Constitutional Court judges.[1] Article 19 of the Constitutional Court Act[2] only states that the nomination of constitutional judges is carried out in a transparent and participatory manner. Meanwhile, Article 20 paragraph (2) of the Constitutional Court Act states that the election of constitutional judges is carried out objectively and accountably.

[1] Andrew Harding, *The Fundamentals of Constitutional Courts* (London: International IDEA, 2017), 3.
[2] Indonesia, *Act Number 24 of 2003 on the Constitutional Court, as Amended by Act Number 7 of 2020*.

There are no detailed provisions on how the mechanism and by whom the selection is carried out.

There are differences in the recruitment practices of constitutional judges by the three institutions, even by the same institution at different times. Some conduct open selection with registration and a series of examinations. Some simply announce the candidates to be nominated but the decision is made by the institution itself. Some suddenly determine a person to be proposed as a constitutional judge.

These differences often lead to polemics and criticism. Closed mechanisms are suspected by the public, especially if the proposed judges have questioned track records about their integrity and statesmanship. Various studies and scientific articles have argued that the selection mechanism of Constitutional Court judges affects the independence of constitutional judges.[3] If the mechanism for filling positions is carried out in a transparent and accountable manner, it is assumed that it will better guarantee the election of independent judges. Conversely, if the filling of judicial positions is done through appointment or closed doors, it will produce judges who are not independent, i.e. judges who can be influenced by the proposing institution, or at least will favor the interests of the proposing institution.

This study limits the selection mechanism of constitutional judges proposed by the DPR because as a political institution, the DPR has the most dominant political interests compared to the other two proposing institutions (the President and the Supreme Court). In addition, several phenomena show members of the DPR openly criticizing the Constitutional Court's decisions and expressing disappointment with the Constitutional Court judges who have been nominated.[4] Of course the President also has political interest on constitutional judges, but never publicly critize the court decisions. However, the position of the

[3] Kristy Richardson, "A Definition of Judicial Independence," *The UNE Law Journal* 2, no. 1 (2005): 78, http://www.austlii.edu.au/au/journals/UNELawJl/2005/3.pdf.

[4] Erik Purnama Putra, "Anggota DPR Tuding MK Batalkan UU Seenaknya [House Member Accuses Constitutional Court of Arbitrarily Nullifying Laws]," *Republika*, accessed September 9, 2024, https://news.republika.co.id/berita/lt9923/anggota-dpr-tuding-mk-batalkan-uu-seenaknya#google_vignette.

constitutional judges proposed by the President also need to be analized in the next reasearch. The two issues raised in this study are the selection mechanism for constitutional judges nominated by the DPR and the correlation between the selection of constitutional judges nominated by the DPR and the position of the judge in the decision to review the law.

1.2. Research Questions

a. What is the mechanism for appointing constitutional judges? And how is it implemented?
b. What is the legal opinion and position of constitutional judges appointed by the DPR in the decision on judicial review of laws related to the authority and interests of the DPR?
c. What is the correlation between the mechanism for filling the position of constitutional judges by the DPR and the decision in judicial review of laws related to the authority and interests of the DPR?

1.3. Method

To the focus and issues raised, this research uses empirical juridical methods. Law is seen as the reality of actions and decisions formed by the DPR and the Constitutional Court.[5] There are two variables to be found and described, namely the variable of the constitutional judge selection mechanism that has been carried out by the DPR and the variable of the opinion or legal position of the judge proposed by the DPR. Furthermore, the two variables are analyzed to determine whether or not there is a correlation.

II. RESULT AND DISCUSSION

2.1. Independence and Impartiality of Judicial Power

Courts were originally established to resolve disputes and restore social harmony, addressing conflicts over ownership, property, and offenses based on laws and social norms. Their duty includes ensuring fair treatment for both

[5] Johny Ibrahim, *Teori & Metode Penelitian Hukum Normatif* [*Theory and Method of Normative Legal Research*] (Malang: Bayumedia Publishing, 2005), 33–41.

winners and losers. Over time, their role has expanded to include shaping public policy through dispute resolution.[6]

The independence of the judiciary is a central principle of the modern rule of law.[7] This principle was born out of the doctrine of separation of powers, which aims to limit power.[8] The judiciary's close ties to the modern rule of law stem from its role in upholding human rights in modern states. Judicial independence is crucial for safeguarding freedom and sustaining constitutional democracy.[9]

Independence can be mapped in three perspectives, namely functional, institutional, and personal perspectives.[10] Functional independence ensures courts can perform judicial functions free from interference by other institutions, prohibiting external influence in case examination and decision-making. Structurally, independence requires judicial institutions to safeguard impartiality and protect themselves from external intervention.[11]

The notion of independence originally emerged from jurists who held the view that judges should find the law, rather than merely interpret it, although at the same time, judges do not make the law.[12] This conception emphasizes the doctrine that the nature of the legislation is facultative, rather than merely substantive. This means that a regulation may be applied or not depending on the purpose of ensuring a better situation. Under liberal principles, a judge cannot even have personal preferences. The judge can only decide based on the facts following the law.[13]

Judges must be able to balance the intellectual and moral dimensions. In carrying out their profession, judges are not only incarnated as human beings

6 Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Courts, Judges, & Politics: An Introduction to the Judicial Process* (New York: McGraw-Hill, 2006), 38–39.

7 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (Geneva: International Commission of Jurists, 2007), 18.

8 Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* [*Introduction to the Science of Constitutional Law*], 2nd ed. (Jakarta: Konstitusi Press, 2006), 44–45.

9 M. P. Singh, "Securing the Independence of the Judiciary—The Indian Experience," *Indiana International & Comparative Law Review* 10, no. 2 (2000): 246, https://doi.org/10.18060/17703.

10 Singh, "Securing", 246.

11 Matthew C. Stephenson, "When the Devil Turns . . .: The Political Foundations of Independent Judicial Review," *The Journal of Legal Studies* 32, no. 1 (January 2003): 60, https://doi.org/10.1086/342038.

12 Isharyanto, *Ilmu Negara* [*State Theory*] (Karanganyar: Oase Pustaka, 2016), 137.

13 International Commission of Jurists, *International Principles*, 24.

who work and think (*home Faber*), but more than that judges must also maintain ethical principles and values (*homo ethicus*).[14] Judges as 'authors of their own opinions' must be able to apply both principles with courage. A judge can be said to be independent when his/her judicial process reflects sincere judicial preferences.[15]

The independence of judges is a fundamental aspect that should not be diminished in the slightest. Intervention and pressure, both external and internal, must be eliminated in the nuances of a judge's thinking.[16] Impartiality is a principle born from the nature of the judge's duty to examine and decide cases that require neutrality and objectivity. In fact, in law review cases at the Constitutional Court, the position of judges is related to the triadic relationship between the state, the market, and citizens or society.[17] Therefore, judges must be impartial with an appreciation of the balance between interests in a case.[18]

2.2. Constitutional Judge Selection

The selection of constitutional judges is regulated by the Constitutional Court Act as mandated by Article 24C paragraph (6) of the 1945 Constitution. Article 18 paragraph (1) of the Constitutional Court Act stipulates that constitutional judges are nominated by the DPR, the President, and the Supreme Court. Provisions on the procedures for selection are regulated by each authorized institution.

The Constitutional Court Act does not detail selection procedures but grants the DPR, the President, and the Supreme Court the authority to regulate them (Article 20(1)). It mandates that selections be objective and accountable (Article 20(2)) and emphasizes transparency and participation during the nomination stage (Article 19).

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[14] Arbijoto, "Pengawasan Hakim dan Pengaturannya dalam Perspektif Independensi Hakim [Supervision of Judges and Their Regulation from the Perspective of Judicial Independence]," in *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial Republik Indonesia* (Jakarta: Komisi Yudisial Republik Indonesia, 2006), 58.

[15] William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *The Journal of Law & Economics* 18, no. 3 (1975): 875, https://www.journals.uchicago.edu/doi/epdf/10.1086/466849.

[16] Bernard L. Tanya, Yoan N. Simanjuntak, and Markus Y. Hage, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi* [*Legal Theory: Strategy for Human Order Across Space and Generations*] (Yogyakarta: Genta Publishing, 2013), 40.

[17] Asshidiqie, *Pengantar Ilmu Hukum* [*Introduction to the Science of Constitutional Law*], 45.

[18] *Constitutional Court Judges Declaration on Code of Ethic and Conduct of Indonesian Constitutional Court Judges*, Chapter 2.

The regulation on constitutional judge recruitment was once governed by Perppu (Act in Lieu) Number 1 of 2013, amending the Constitutional Court Act. It required candidates proposed by the Supreme Court, DPR, and President to undergo a fit and proper test by an Experts Panel established by the Judicial Commission. According to Article 18A, candidates—up to three times the number of positions needed—were submitted for assessment. The panel comprised one representative each from the Supreme Court, DPR, and President, and four members selected by the Judicial Commission from public nominations, including former constitutional judges, community leaders, legal academics, and practitioners.

The provision for the Experts Panel was nullified by Constitutional Court Decision Number 1-2/PUU-XII/2014, which reviewed Perppu Number 1 of 2013. The Court held that the authority of the DPR, President, and Supreme Court to nominate constitutional judges is absolute and cannot be restricted or conditioned by involving other institutions. The requirement for candidate assessment by a Panel of Experts formed by the Judicial Commission was deemed to undermine the constitutional authority of these institutions.

Three patterns have become the general model of recruitment of constitutional judges in Indonesia, namely: (i) internal and closed selection mechanisms; (ii) appointment and extension of judges' terms of office; and (iii) formation of a panel of experts.[19] The first pattern tends to be applied by the Supreme Court. Meanwhile, the second and third patterns tend to be applied by the DPR and the President. The second pattern has been applied by the DPR in extending judge's term of office.[20]

[19] Fence M. Wantu, Novendri M. Nggilu, Suwitno Imran, Supriyadi A. Arief, and Rahmat Teguh Santoso Gobel, "Proses Seleksi Hakim Konstitusi: Problematika dan Model Ke Depan [The Process of Constitutional Court Judge Selection: Problems and Future Models," *Jurnal Konstitusi* 18, no. 2 (2021): 250–252, https://doi.org/10.31078/jk1820.

[20] Winda Wijayanti, Nuzul Quraini M., and Siswantana Putri R., "Transparansi dan Partisipasi Publik Dalam Rekrutmen Calon Hakim Konstitusi [Transparency and Public Participation in the Recruitment of Constitutional Court Judge Candidates]," *Jurnal Konstitusi* 12, no. 4 (2015): 673–674, https://doi.org/10.31078/jk1241.

2.3. The Effect of Judge Selection Mechanisms on the Position of Judges

Independence and impartiality are certainly influenced by many factors, one of which is the mechanism and institutions that select constitutional judges. Recruitment of judges is the initial gate in presenting the independence, impartiality, and integrity of judges. This opinion is in line with the thoughts of John Marshall who stated "What is that makes us trust our judges? Their independence in office and manner of appointment".[21] The selection or recruitment mechanism is related to the independence of judges.

The appointment mechanism can be done in two ways, namely the autocratic method and the democratic method. The autocratic method is carried out by a small group of power-holding actors and in general, the candidates come from members of the group itself so that it inevitably distances itself from popular participation. Democratic method, on the other hand, is a mechanism that involves and maximizes popular participation. Autocratic methods include determination through descent, submission or co-option, drawing lots, appointment by higher officials, and determination by a power struggle. Meanwhile, democratic methods include elections.[22]

Judicial independence depends on several factors: the appointment and tenure of judges, guarantees against external pressure, and the court's perceived independence. Independence requires a selection process free from specific interests. The more politically tied the selection mechanism, the less independent the judge's role. To prevent political entanglements, the proposing institution must ensure a transparent selection process, allowing public monitoring and using objective, accountable criteria.

From the explanation above, two assumptions emerge regarding the impact of constitutional judge selection mechanisms on their independence and impartiality: (1) A more transparent and participatory selection process enhances

[21] John Marshall, "Article 3, Section 2, Clause 1, Virginia Ratifying Convention," *Press-Pubs*, accessed September 9, 2024, https://press-pubs.uchicago.edu/founders/documents/a3_2_1s26.html.

[22] Susi Dwi Harijanti, "*Pengisian Jabatan Hakim: Kebutuhan Reformasi dan Pengekangan Diri* [*Filling Judicial Positions: The Need for Reform and Self-Restraint*]," *Jurnal Hukum Ius Quia Iustum* 21, no. 4 (2014): 6, https://doi.org/10.20885/iustum.vol21.iss4.art2.

the independence and impartiality of constitutional judges; (2) Conversely, a less transparent and participatory recruitment process weakens their independence and impartiality.

Judicial independence and impartiality can be assessed by examining a judge's stance on cases involving the interests of the proposing institution. A judge's alignment with the proposing institution, particularly when differing from other judges' opinions, indicates reduced independence and impartiality. Conversely, frequent divergence from the proposing institution, especially in dissenting opinions, reflects greater independence and impartiality.

1) Transparent and Participatory Criteria

To evaluate whether the selection mechanism for constitutional judges has met the qualifications of transparency and participation, it is necessary to determine the variables of transparency and participation. Transparent means open, not limited to certain people.[23] Transparency is interpreted as something without a hidden agenda by conveying all information. Based on the meaning of the word "transparent", it can be explained that transparency relates to information about something that is known not by certain people only. Information can be in the form of plans, stages, mechanisms, committee, and the criteria or basis for determining something in the certain stages or mechanisms.

Transparency is a necessity in a democracy where the people are the ultimate power holders. People must know and even participate in determining what is done in the administration of the state. Transparency is a prerequisite for public oversight, participation, and accountability.[24] Some indicators of transparency in governance include the provision of clear information, easy access to information, complaint mechanisms, and increased information through mass media.[25]

[23] "*Transparan* [*Transparent*]," *Kamus Besar Bahasa Indonesia*, accessed October 5, 2023, https://kbbi.kemdikbud.go.id/entri/transparan.

[24] Nuno Ferreira da Cruz, Yahua Zheng, and Susana Jorge, "Measuring Local Government Transparency," *Public Management Review* (2015), accessed September 5, 2023, http://eprints.lse.ac.uk/62312/.

[25] Krisna L. P. L., *Indikator dan Alat Ukur Prinsip Akuntabilitas, Transparansi, dan Partisipasi [Indicators and Measurement Tools of the Principles of Accountability, Transparency, and Participation]* (Jakarta: Badan Perencanaan Pembangunan Nasional, 2003), 17.

Based on the concept of transparency above, in the context of the selection of constitutional judges the word "transparent" can be interpreted as the availability and delivery of information relating to the selection process conducted by the DPR. Indicators of transparency in the selection of constitutional judges include the announcement of stages, candidate requirements, test or examination substances, scores for each stage, track records of candidates, and announcement of decision-making.

The indicator for the announcement of the stages and candidate requirements is absolute because the absence of this information has the consequence of the absence of other information. If there is no announcement of the stages and requirements, then the whole does not qualify as transparent and public participatory is imposible. Therefore, these two indicators have a greater weight (2) than the other indicators. The indicators and weights of the transparency criteria are presented in the table below.

Table 1
Transparent Indicator

No.	Indicators	Weight
1.	Announcement of stages	2
2.	Announcement of candidate requirements	2
3.	Announcement of test or selection materials	1
4.	Candidate score at each stage	1
5.	Announcement of candidate's track record	1
6.	Decision-making announcement	1
	Total	**8**

A transparent selection mechanism is essential for public participation. Without it, citizens cannot engage meaningfully. Greater transparency in the selection of constitutional judges increases opportunities for public involvement, which includes joining the selection committee, nominating candidates, providing information, or monitoring the process. Key participatory indicators include forming a selection committee and opening registrations, each weighted at 2.

The committee ensures judicial independence by reducing political influence, while registration enables public access to the candidacy process.

Table 2
Participatory Indicators

No.	Indicators	Weight
1.	Selection committee from outside the House	2
2.	Acceptance of applications from public	2
3.	Applications can be submit by another party	1
4.	Selection stages can be followed by the public (fit and proper test)	1
5.	Receiving input from the public on candidates' track records	1
6.	Decision-making can be followed by the community	1
	Total	**8**

Based on these scores, classifications range from "very transparent and participatory" to "not transparent and participatory." If no announcement is made regarding stages or candidate requirements, the process is classified as "not transparent and participatory," as other indicators cannot be fulfilled. Conversely, while initial announcements and registration may occur, subsequent closed and non-participatory stages lower transparency and participation scores. The classifications, along with indicator fulfillment ranges, are outlined below.

Table 3
Transparent and participatory classification

No.	Classification	Value
1.	Highly transparent and participatory	14 – 16
2.	Transparent and participatory	7 – 13
3.	Less transparent and participatory	3 – 6
4.	Not transparent and participatory	0 - 2

2) Selection of Constitutional Judges by the House of Representatives

The selection mechanism of constitutional judge candidates by the DPR can be divided into several parts according to the period of office. Each period reflects a different selection pattern.

Selection of Constitutional Judges for the First Period (2003-2008)

The selection of constitutional judges for the first term conducted by the House of Representatives through Commission II provided space for the public to recommend or critize on the names of candidates. There were 14 candidates, three of whom were elected judges of the Constitutional Court in the first period, namely Jimly Asshidiqie, I Dewa Gede Palguna, and Achmad Roestandi.[26] The recruitment process starts from the stages of (i) ratification of the rules of procedure, mechanism and schedule of recruitment, (ii) registration or screening, (iii) submitting the names of candidates to Commission II of the House of Representatives, (iv) administrative selection, (v) publication of judge candidates to the mass media, (vi) input from the public, (vii) fit and proper test, and (viii) election through voting mechanism. The following is a brief description of the selection of constitutional judges in the first period:

The task of the faction that collects candidates for judges is to submit the list to Commission II of the DPR. At this stage, announcements in the mass media are made to provide an opportunity for the public to submit the names of candidates for constitutional judges through factions in the DPR . A small team chaired by the Vice Chairman of Commission II of the House of Representatives is tasked with checking the completeness of the administration of constitutional judge candidates.[27] At the administrative stage, candidates for constitutional judges who have passed are published in the mass media by the DPR. Meanwhile, the fit and proper test mechanism is carried out the same as that of the Supreme Court judges.

The above stages if assessed based on transparency and participatory criteria are as follows.

[26] Indramayu, Jayus, and Rosita Indrayati, "*Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi yang Berkualifikasi* [*Reconceptualization of Constitutional Court Judge Selection as an Effort to Realize Qualified Constitutional Court Judges*]," *Lentera Hukum* 4, no. 1 (2017): 80, https://doi.org/10.19184/ejlh.v4i1.5267.

[27] Wijayanti, Quraini, and Putri R, "*Transparansi* [*Transparency*]", 677.

Table 4
Transparent and Participatory Indicators
First Period Judge Selection

Aspects	Description	Weight
Transparent	Announcement of stages	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community	1
	Total	**13**

Thus the score of the transparent and participatory indicator in the selection of constitutional judges in the first period is 13. This category of selection fulfills the criteria as transparent and participatory selection. Jimly Assiddiqie (1)[28], I Dewa Gede Palguna, and Achmad Roestandi in the first period were selected through transparent and participatory selection.

Selection of Constitutional Judges for the Second Period (2008-2013)

On 4 October 2007, the deliberative body of DPR assigned Commission III to form a small team tasked with (i) administrative selection and (ii) determination of paper titles. In this period, the selection of constitutional judges was followed

[28] For the first term of office.

by 21 candidates and 18 candidates passed the administrative selection. The 18 candidates consisted of 16 candidates through personal registration and 2 candidates through factions[29]. As in the previous period, the selection of constitutional judges this period also involved public participation in Commission III of the House of Representatives.

Some weaknesses in this period's selection of constitutional judges include: (i) delays in the fit and proper test due to the lack of nominations from House of Representatives; (ii) special processes for incumbent judges nearing the end of their term; (iii) unpublished stages and timelines of the selection process; (iv) the absence of clear recruitment standards; (v) limited time to assess candidates' track records; and (vi) inconsistent changes in faction-based selection procedures.[30] In the final stage, three names with the highest number of votes, namely Mahfud MD with 38 votes, Jimly Asshiddiqie (2)[31] with 37 votes and M. Akil Mochtar with 32 votes, were finally inaugurated as constitutional judges for the second period[32].

Based on the data collected, it was found that the recruitment mechanism for constitutional judges in the second period: (i) registration was opened, and requirements and criteria were published on February 25–27, 2008[33]; (ii) there was publication regarding the acceptance of registration of candidates for constitutional judges both from candidates and other institutions such as academics and lawyers; (iii) there was acceptance of input from the public; (iv) the establishment of a panel of experts in the recruitment process to conduct a fit and proper test; (v) and the conformity between the names of candidates for constitutional judges and the names submitted by the selection committee. Fulfillment of the transparent and participatory indicators is as follows:

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29 Wijayanti, "*Transparansi* [*Transparency*]", 673.

30 "*Setiap Fraksi Boleh Usulkan Tiga Nama* [*Each Faction May Propose Three Names*]," *Hukumonline*, accessed September 12, 2023, https://www.hukumonline.com/berita/a/setiap-fraksi-boleh-usulkan-tiga-nama-hol18618.

31 Second term of office.

32 Indramayu, Jayus, Rosita Indrayati. "*Rekonseptualisasi Seleksi Hakim Konstitusi* [*Reconceptualization of Constitutional Court Judge*]."

33 Wijayanti, "*Transparansi* [*Tranzsparency*]," 673.

Table 5
Transparent and Participatory Indicators
Second-period Judge Selection

Aspects	Description	Weight
Transparent	Announcement of stages	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	Total	**13**

Based on the fulfillment of the indicators of transparency and participation, the score for the selection of constitutional judges in the second period is 13. With this score, the category is transparent and participatory. A different category occurred for Jimly Asshiddiqie (2) who was treated specifically and only asked for willingness without going through selection. Therefore, for Jimly Asshiddiqie (2) in the second period the category is not transparent and participatory.

Selection of Constitutional Judges for the Third Period (2013)

The third period of constitutional judge selection was the extension of constitutional judge Akil Mochtar. The DPR at this stage had a very significant deterioration when compared to the selection of judges in the previous period. Public participation was not implemented as it had been in previous stages of

the selection of constitutional judges. Therefore, inputs from the public were not accommodated in the selection of constitutional judges in the third period[34].

The selection of constitutional judge Akil Mochtar was the shortest and most closed process compared to previous periods. His extension was granted merely by asking for his consent to continue as a constitutional judge. The fulfillment of transparency and participatory indicators is outlined as follows:

Table 6
Transparent and Participatory Indicators
Third-Period Judge Selection

Aspects	Description	Weight
Transparent	Stage announcement	0
	Announcement of candidate requirements	0
	Announcement of test or selection materials	0
	Candidate score at each stage	0
	Announcement of candidate's track record	0
	Decision-making announcement	0
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	0
	Registration can be done by another party	0
	Selection stages can be followed by the public (fit and proper test)	0
	Receiving input from the public on candidates' track records	0
	Decision-making can be followed by the community.	0
	Total	**0**

Selection of Constitutional Judges for the Fourth Period (2009-2014)

After the resignation of constitutional judge Jimly Asshiddiqie on November, 1st 2008[35], constitutional judge Harjono who was previously a constitutional judge proposed by the President replaced Jimly Asshidiqie. The selection of judges in

[34] Indramayu, Jayus, Rosita Indrayati. "*Rekonseptualisasi Seleksi Hakim Konstitusi* [*Reconceptualization of Constitutional Court Judge*]," 8.

[35] "Harjono Gantikan Jimly Jadi Hakim MK [Harjono Replaces Jimly as Constitutional Court Judge] ," *Hukumonline*, February 13, 2009, http://www.hukumonline.com/berita/baca/hol21191/harjono_gantikan-jimly-jadi-hakim-mk.

this period went through 4 stages, namely internal meetings, the announcement of the registration of constitutional judges through the print media, the ability test at Commission III of the House of Representatives, and finally the fit and proper test stage.

The selection process began with the DPR holding a consultation meeting with the Constitutional Court to discuss judge replacements. In the second stage, Commission III of the DPR announced the registration of judicial candidates. After receiving eight candidates, Commission III conducted a *fit and proper test*, accompanied by publications in mass media. The publications highlighted that Commission III could only select four new constitutional judge candidates. Following a written ability test, voting determined the candidates who passed through to the final stage of the selection process.[36] Harjono was then elected as a constitutional judge for period IV proposed by the DPR.

Some information is obtained related to the recruitment mechanism of constitutional judges for the fourth period, namely: (i) the publication of the registration requirements for constitutional judge candidates; (ii) the publication of the selection stages; (iii) the acceptance of candidate registration from candidates and other institutions; (iv) the acceptance of input from the public; (v) the existence of an expert panel in the selection process; (v) input from the public and track records of candidates; and (vi) the existence of an expert panel in the fit and proper test process[37]. The selection mechanism above represents the composition of the transparent and participatory indicator points as follows.

Table 7
Transparent and Participatory Indicators
Fourth Period Judge Selection

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0

[36] Indramayu, Jayus, Rosita Indrayati. "*Rekonseptualisasi Seleksi Hakim Konstitusi* [*Reconceptualization of Constitutional Court Judge*]," 8.

[37] Wijayanti, "*Transparansi* [Transparency]", 677.

Aspects	Description	Weight
	Announcement of candidate's track record	0
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	Total	**12**

Thus, the selection of constitutional judges in the fourth period (Harjono) was transparent and participatory.

Selection of Constitutional Judges for the Fifth Period (2013-2018)

The selection of constitutional judges for the fifth term was conducted through an open selection process. Six candidates for constitutional judges registered and underwent selection on February, 27th 2013[38]. In this period, the House of Representatives did not form a selection committee as it did in the previous period. Commission III of the House of Representatives was the only organ that conducted the selection of constitutional judges.

Registration for constitutional judges was announced in the mass media. There were six candidates for constitutional judges who registered. However, three candidates, Patrialis Akbar, Lodewijk Gultom, and Nimatul Huda[39], eventually decided to resign. The names that survived until the end of the selection were Arief Hidayat with 42 votes, who defeated Sugianto with 5 votes, and Djafar Albram who only received 1 vote. The fulfillment of the transparent and participatory indicators in this period's selection is as follows.

[38] Wijayanti, "*Transparansi* [Transparency]", 677.

[39] Carlos K. Y. Paath, "*Tiga Calon Hakim Konstitusi Mengudurkan Diri* [*Three Constitutional Court Judge Candidates Resign*]," *BeritaSatu*, accessed August 26, 2023, https://www.beritasatu.com/nasional/99295/tiga-calon-hakim-konstitusi-mengudurkan-diri.

Table 8
Transparent and Participatory Indicators
Fifth Period Judge Selection

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	Total	12

Thus, the selection of constitutional judges in the fifth term (Arief Hidayat)[40] was transparent and participatory.

Selection of Constitutional Judges for the Sixth Period (2014-2019)

In this period, The DPR formed a team of experts to carry out the task of conducting selection of constitutional judges.[41] The expert team consisted of Syafii Maarif, Hasyim Muzadi, Laica Marzuki, Zein Badjeber, Andi Matalatta, Natabaya, Lauddin Muzani, and Saldi Isra.[42] Public participation was organized by making announcements through the media regarding the track records of candidates (Wijayanti, Quraini, and Putri, 2015).

[40] For the first term of office.
[41] Wijayanti, "*Transparansi* [Transparency]", 677.
[42] "DPR Didesak Segera Rekrut Calon Hakim MK," *Hukumonline*, accessed September 12, 2023, https://www.hukumonline.com/berita/a/dpr-didesak-segera-rekrut-calon-hakim-mk-lt52fod3ecbofao.

There were 12[43] candidates for constitutional judges who registered.[44] A series of tests were conducted by the panel of experts that eventually led to Wahiduddin Adams with 46 votes and Aswanto with 23 votes. The weakness of the selection in this sixth period was the delay in sending representatives of the expert panel by the DPR, which narrowed the selection time.

The recruitment mechanism for constitutional judges during this period included: (i) publication of registration requirements and criteria, (ii) publication of selection stages, (iii) receipt of public input, and (iv) the involvement of an expert panel in the recruitment process. However, some data were unavailable, including examination materials, announcements of candidates' track records, stage scores, the involvement of a selection committee outside the DPR, and the names of candidates submitted to the selection committee. The fulfillment of transparency and participatory indicators is outlined as follows:

Table 9
Transparent and Participatory Indicators
Sixth-Period Judge Selection

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	0
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	2
	Acceptance of applications from candidates	2
	Registration can be done by another party	1

[43] The twelve candidates are: Dr. Sugianto, SH. MH., Dr. Wahiduddin Adams, SH. MA., Dr. Ni'matul Huda, SH. MHum., Dr. Ir. Franz Astaani, SH. MKn. SE. MBA. MM. MSi. CPM., Atip Latipulhayat, SH. LLM. Phd., Prof Dr. Aswanto, SH. MSi. DFM., Dr. H. RA Dimyati Natakusumah, SH. MH. MS., Prof Dr. Yohanes Usfunan, Drs. SH. MH. Dr. Atma Suganda, SH. M.Hum., Prof Dr. HM Agus Santoso, SH. MH., Dr. Edie Toet Hendratno, SH. MSi., dan Dr. Drs. Ermansjah Djaja, SH. MSi.

[44] Carlos K. Y. Paath, "*Ketua DPR Apresiasi Pembentukan Tim Pakar Seleksi Hakim MK* [*Chairman of the House of Representatives Appreciates Formation of Expert Team for Selection of Constitutional Court Judges*]," *BeritaSatu*, accessed September 15, 2023, http://www.beritasatu.com/nasional/168071-ketua-dpr-apresiasi-pembentukan-tim-pakar-seleksi-hakim-mk.html.

Aspects	Description	Weight
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	Total	**14**

Based on the fulfillment of the transparent and participatory indicators, the score for the selection of constitutional judges in the second period is 14. With this score, the category is very transparent and participatory.

Selection of Constitutional Judges for the Seventh Period (2018 - 2023)

The first term of constitutional judge Arief Hidayat ended in April 2018. This term was extended by the House of Representatives for a second term of 2018-2023. The extension was carried out through a fit and proper test process in the DPR conducted by Commission III of the DPR. The extension of this term of office was colored by information about the lobbying of constitutional judge Arief Hidayat for the extension of his term of office.[45] Even the Chairman of Commission III of the House of Representatives at the time stated that there were political nuances in the selection of Arief Hidayat as the sole candidate for constitutional judge.[46]

The extension of Arief Hidayat's term of office was carried out without any announcement, registration, or other selection mechanism.[47] Therefore, none of the indicators of transparency and participation were fulfilled, resulting in a score of 0 with a category of non-transparent and non-participatory.

[45] Nabila Tashandra, "*DPR Sahkan Perpanjangan Arief Hidayat sebagai Hakim* Konstitusi [*House of Representatives Approves Extension of Arief Hidayat as Constitutional Court Judge*]," *Kompas*, accessed October 8, 2023, https://nasional.kompas.com/read/2017/12/07/16533091/dpr-sahkan-perpanjangan-jabatan-arief-hidayat-sebagai-hakim-konstitusi.

[46] Priska Sari Pratiwi, "Ketua *MK Pasrahkan Perpanjangan Masa Jabatan ke DPR* [*Chief Justice of the Constitutional Court Submits Extension of Term to the House of Representatives*]," *CNN Indonesia*, accessed October 8, 2023, https://www.cnnindonesia.com/nasional/20171205084919-12-260188/ketua-mk-pasrahkan-perpanjangan-masa-jabatan-ke-dpr.

[47] Syamsudin Rajab, "Cacat Hukum Pemilihan Hakim Konstitusi [Legal Flaws in the Selection of Constitutional Court Judges]," *antikorupsi.org*, accessed October 8, 2023, https://antikorupsi.org/id/article/cacat-hukum-pemilihan-hakim-konstitusi.

Selection of Constitutional Judges for the Eighth Period (2022 -)

The seventh period of judge selection to replace constitutional judge Aswanto did not use the methods applied in the previous period which tended to involve the public. Starting from a judicial review case with Decision Number 96/PUU-XVIII/2020,[48] which granted the review of Article 87 letter a of Law No. 7 of 2020 regarding the term of office of the chairman and deputy chairman of the Constitutional Court, on July, 21st 2022, the Constitutional Court sent a copy of the decision to the DPR. The DPR held a deliberation meeting to decide on constitutional judge Guntur Hamzah to replace constitutional judge Aswanto.

Constitutional judge Aswanto was officially dismissed because he often annulled DPR legislation.[49] Some of the main things that are important to note in the selection of constitutional judges for this seventh period are the lack of transparency and public participation. There are at least 4 fundamental reasons: (i) the unannounced registration of constitutional judges; (ii) the absence of procedural mechanisms involving public participation; (iii) the absence of an expert panel/selection team in the recruitment process; and (iv) the appointment of Guntur Hamzah who was the sole candidate appointed by the DPR. The fulfillment of the transparent and participatory indicators is 0 because there is no selection mechanism. Therefore, the category of selection of constitutional judge Guntur Hamzah is not transparent and participatory.

Table 10
Transparent and Participatory Indicators
Eighth-Period Judge Selection

Aspects	Description	Weight
Transparent	Stage announcement	0
	Announcement of candidate requirements	0

[48] Wildan Ansori Nasution, "*Konstitusionalitas Pengangkatan dan Pemberhentian Hakim Konstitusi dalam Sistem Ketatanegaraan Indonesia* [*Constitutionality of the Appointment and Dismissal of Constitutional Court Judges in the Indonesian Constitutional System*]" (Thesis, Universitas Muhammadiyah Malang, 2003), 23.

[49] Muhammad Fawwaz Farhan Farabi and Tanaya, "*Polemik Legalitas Pemecatan Hakim Konstitusi oleh Lembaga Pengusul: Tinjauan Kasus Pemecatan Hakim Aswanto dan Implikasinya Terhadap Kemandirian Kekuasaan Kehakiman* [*The Legal Polemic of the Dismissal of Constitutional Court Judges by Nominating Institutions: A Case Study of Judge Aswanto's Dismissal and Its Implications on Judicial Independence*]," *Hukum dan HAM Wara Sains* 2, no. 04 (April 2023): 296, https://doi.org/10.58812/jhhws.v2i04.291.

Aspects	Description	Weight
	Announcement of test or selection materials	0
	Candidate score at each stage	0
	Announcement of candidate's track record	0
	Decision-making announcement	0
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	0
	Registration can be done by another party	0
	Selection stages can be followed by the public (fit and proper test)	0
	Receiving input from the public on candidates' track records	0
	Decision-making can be followed by the community.	0
	Total	0

Based on the description of constitutional judge selection practices above, there have been 10 constitutional judges from the DPR. Three of the 10 constitutional judges were nominated for a second term, resulting in a total of 13 selections conducted by the DPR to obtain candidates for constitutional judges.

Table 11
Categories of Constitutional Judge Selection by the House of Representatives

No.	Judge's name	Selection Value	Category
1.	Jimly Assdiddiqie (1) (2003 – 2008)	13	Transparent and Participatory
2.	I Dewa Gede Palguna (2003 – 2008)	13	Transparent and Participatory
3.	Achmad Roestandi (2003 – 2008)	13	Transparent and Participatory
4.	Jimly Asshiddiqie (2) (2008 – 2009)	0	Not Transparent and Participatory
5.	M. Akil Mochtar (1) (2008 – 2013)	13	Transparent and Participatory

No.	Judge's name	Selection Value	Category
6.	Moh. Mahfud MD. (2008 – 2013)	13	Transparent and Participatory
7.	Harjono (2008 – 2016)	12	Transparent and Participatory
8.	M. Akil Moctar (2) (2013)	0	Not Transparent and Participatory
9.	Arief Hidayat (1) (2013 – 2018)	12	Transparent and Participatory
10.	Wahiduddin Adam (2014 – 2019)	14	Highly Transparent and Participatory
11.	Aswanto (2014 – 2019)	14	Highly Transparent and Participatory
12.	Arief Hidayat (2) (2018 – 2023)	0	Not Transparent and Participatory
13.	Guntur Hamzah (2022 - hingga sekarang)	0	Not Transparent and Participatory

Based on the table above, there are 7 judges selected through transparent and participatory selection, 2 judges selected through highly transparent and participatory selection, and 4 judges selected through non-transparent and participatory selection. The judges who were selected through non-transparent and participatory selection were elected in the second term, except Guntur Hamzah.

III. THE POSITION OF CONSTITUTIONAL JUDGES NOMINATED BY THE HOUSE OF REPRESENTATIVES IN LAW REVIEW DECISIONS RELATING TO THE AUTHORITY AND INTERESTS OF THE HOUSE OF REPRESENTATIVES

Laws eligible for review by the Constitutional Court include all laws jointly enacted by the DPR and the President, as stipulated in Article 20 of the 1945 Constitution. Laws related to DPR authority involve regulations on its powers and the rights of its members. The 1945 Constitution assigns the DPR three

functions: legislative, budgetary, and supervisory, as outlined in Article 20A. Institutionally, the DPR has rights, including: (i) the right of interpellation, to request information from the government on significant and impactful policies; (ii) the right of inquiry, to investigate the implementation of laws or policies suspected of conflicting with regulations; and (iii) the right to express opinions on government policies. Additionally, Article 20A(3) grants DPR members the rights to ask questions, propose bills and opinions, and enjoy immunity.

Other criteria for a law that relates to the interests and authority of the DPR are laws that contain the requirements to become a member of the DPR, the dismissal of members, and the mechanism for the resignation of DPR members. In addition, there is also the authority of the DPR to conduct fit and proper tests for candidates for public office.[50]

The analysis of law review decisions in this study is limited to two specific criteria that are relevant to the conclusions that will be presented, namely the interests of the DPR and members of the DPR, including political parties as participants in elections for DPR members. In the decisions on judicial review of laws, the position of constitutional judges nominated by the DPR will be analyzed, whether they are in favor of or against the interests of the DPR. There are 37 decisions on judicial review of laws that relate to the interests of the DPR.

To see the position of constitutional judges proposed by the DPR, the decisions selected from the 37 decisions above are those have dissenting opinions. For unanimous decisions, it is not possible to analyze the position of the judges against or in favor of the interests of the DPR because there is no alternative opinion as a comparison. Even if the judge's opinion is entirely in line with the interests of the DPR, it cannot be said to be in favor given that judges who were not nominated by the DPR also held the same opinion.

Of the 37 decisions on judicial review of laws relating to the interests of DPR, 8 decisions were not unanimous, with one or more constitutional judges submitting dissenting opinions. The 8 decisions are.

[50] I Ketut Bayu, "*Kewenangan DPR dalam Melaksanakan Uji Kepatutan dan Kelayakan Bagi Calon Pejabat Publik dari Aspek Ketatanegaraan* [*The Authority of the DPR in Conducting Fit and Proper Tests for Candidates of Public Officials from the Constitutional Perspective*]," *IUS* 2, no. 5 (2014): 20.

Table 12
Decision with Dissenting Opinion

No.	Decision Number	Law Examined	Legal Issues
1.	011/PUU-I/2003	Law 11/2003 (Election Law for DPR, DPD,[51] and DPRD[52])	Candidates must not be former members of the PKI[53] or involved in G 30/S PKI.[54]
2.	008/PUU-IV/2006	Law 22/2003 (Parliament Law)	Dismissal of members of the House of Representatives on the recommendation of political parties.
3.	22-24/PUU-VI/2008	Law 10/2008 (Election Law)	Determination of elected candidates based on BPP (voter divisor number)
4.	10/PUU-VI/2008	Law 10/2008 (Election Law)	Political party membership requirements for DPD candidates
5.	56/PUU-VI/2008	Law 42/2008 (Presidential Election Law)	Individual Candidates in Presidential Elections
6.	21/PUU-IX/2011	Law 27/2009 (Parliament Law)	Determination of the seat of the new local government
7.	36/PUU-XV/2017	Law 17/2014 (Parliament Law)	House of Representatives inquiry right
8.	53/PUU-XV/2017	Law 7/2017 (Election Law)	Presidensial Treshold

[51] *Dewan Perwakilan Daerah* [Regional Representative Council or Senat].
[52] Dewan Perwakilan *Rakyat Daerah* [Local House of Representative].
[53] Indonesian Communis Party.
[54] Coup de etat in 1965th that allegly supported by Indonesian Communis Party.

Decision Number 011/PUU-I/2003

Case No. 011/PUU-I/2003 was filed by several individual community leaders and non-governmental organizations. This decision tested the provisions of Article 60 letter g of Law No. 12/2003 on General Elections for Members of DPR, DPD, and DPRD, which stipulates that one of the requirements for candidates is "not a former member of the banned organization the Indonesian Communist Party, including its mass organizations, or not a person directly or indirectly involved in G.30.S./PKI, or other banned organizations". The Constitutional Court stated that it granted the applicant's petition. Article 60 letter g of Law 12 Year 2003 is contrary to the 1945 Constitution and has no binding legal force.

This decision is based on the argument that the 1945 Constitution and international human rights legal instruments prohibit discrimination based on religion, ethnicity, race, ethnicity, group, social status, economic status, language, and political beliefs. Article 60 paragraph g of Law 12/2003 prohibits a group of citizens from being nominated and exercising their right to be elected based on their political beliefs. Restrictions on the right to vote are usually only made based on considerations of incompetence (for example, age and mental health factors) and impossibility because the right to vote has been revoked by a court decision. Article 60 letter g of Law 12 Year 2003 contains nuances of political punishment without a court decision (Decision No. 11/PUU-I/2003).

As the legislator, Article 60 letter g of Law 12 Year 2003 is a product of DPR's authority and therefore has an interest in maintaining the norm. Constitutional judges who believe that the petition should be rejected are in favor of the interests of Parliament. Conversely, constitutional judges who find that the petition should be granted are in a position that is contrary to the interests of Parliament.

In this decision, the judges from the DPR were Jimly Assiddiqie (1), I Dewa Gede Palguna, and Achmad Roestandi. Jimly Asshiddiqie and I Dewa Gede Palguna were part of the constitutional judges who granted the petition so their position was against the interests of the DPR. On the other hand, Achmad Roestandi delivered a dissenting opinion that the petition should be rejected so that his position is in favor of the interests of the DPR.

Decision Number 008/PUU-IV/2006

Case No. 008/PUU-IV/2006 was filed by a member of DPR, Djoko Edhi Soetjipto Abdurahman, who was proposed by his political party to be dismissed as a member of the DPR based on Article 85 paragraph (1) letter c Law No. 22/2003 (Parliament Law) which stipulates that members of DPR cease to exist intermittently because they are proposed by the political party concerned (political party recall rights). The interests of the DPR in this case overlap with the interests of political parties to be able to regulate and discipline members of the DPR who come from these political parties. Therefore, the DPR's interest is to maintain the norm of Article 85 paragraph (1) letter c of Law No. 22/2003.

The verdict rejected the petition in its entirety. The verdict is based on the argument that political parties as political infrastructures must be empowered to be able to carry out their roles and functions. One of them is to give them the authority to discipline their members, including those who become members of DPR so that they can realize the campaigned programs. This is also to avoid "jumping fleas" within political parties. Protection of members still exists but through internal mechanisms regulated in the articles of association and bylaws of political parties. Political parties have the authority to propose recalls based on their position as participants in general elections as stipulated in Article 22E paragraph (3) of the 1945 Constitution (Decision, No. 008/PUU-IV/2008.

The constitutional judges from the DPR in this decision were Jilmy Asshiddiqie, I Dewa Gede Palguna, and Achmad Roestandi. Two of the three judges were in the majority position, rejecting the petition, thus siding with the interests of the DPR. Jimly Asshiddiqie, on the other hand, filed a dissenting opinion, arguing that the petition should have been granted, thus siding with the interests of the DPR.

Decision Number 10/PUU-VI/2008

Case No. 10/PUU-VI/2008 was filed by DPD institutions, individual DPD members, individual citizens, and individuals living in certain provinces. The proposed provisions are Article 12 and Article 67 of Act No. 10/2008 on Elections

which does not contain the requirement of not being a member of a political party for DPD candidate. This means that the provisions of the Election Law allow DPD candidates to be members of political parties. This is argued by the applicant contrary to the provisions of Article 22E paragraph (4) of the 1945 Constitution which states that participants in the election of DPD members are individuals. The applicant also argued that the membership of DPD candidates in political parties is contrary to the intent of the establishment of DPD as a regional representative institution.

For DPR, the interests that exist in the provisions are of course the interests of political parties themselves, namely for the distribution of political party cadres and to influence the formation of laws and policies that require the role of DPD. DPD has the constitutional authority to propose and participate in discussing certain bills, supervise the implementation of the Act, especially those relating to the region, as well as the selection process of BPK members (Article 22D of 1945 Constitution). Thus, the position of the judge who favors the interests of DPR is the one who rejects the petition, while the opposing position is the one who argues in favor of the petition.

The verdict rejected the applicant's petition. The Court stated that the non-political party requirement for DPD candidates is not a constitutional norm that is implicitly attached to Article 22E paragraph (4) of the 1945 Constitution. The provision only regulates the nomination process that must be done individually, not by a political party.

The constitutional judges nominated by the DPR in this decision were Jimly Asshiddiqie, I Dewa Gede Palguna, and Moh. Mahfud MD. In this decision four constitutional judges filed dissenting opinions, namely H. A. S. Natabaya, I Dewa Gede Palguna, Moh. Mahfud MD, and Harjono. Constitutional Judge Jimly Asshiddiqie was part of the majority of judges and thus took sides. Judges from the House of Representatives who filed dissenting opinions were I Dewa Gede Palguna and Moh. Mahfud, MD. However, the substance of the dissenting opinion was not against the interests of the DPR but contained an argument that the petition should not be accepted because the matter submitted was

something that did not exist in the norms of Article 12 and Article 67 of the Election Law. The Constitutional Court's authority is to test the provisions of laws against the 1945 Constitution. If the proposed provision does not exist in the norms of the law, then the test cannot be conducted.

Decision Number 22-24/PUU-VI/2008

The Decision No. 22 - 24/PUU-VI/2008 was against Article 55 paragraph (2) and Article 214 letters a b, c d, and e of Law No. 10/2008 on Elections for Members of the DPR, DPD, and DPRD. According to the applicant, Article 55(2) and Article 214(a) to (e) of Law 10/2008 had the potential to cause the applicant not to be elected as a member of the DPRD and was considered to violate his constitutional rights. The articles are detrimental to the applicant because if the vote is less than 30% of the BPP (voter divisor number) then the determination of the elected candidate will be based on the candidate's serial number.

According to the Constitutional Court, the provision of determining elected candidates as stipulated in the Election Law is unconstitutional because it contradicts the substantive meaning of popular sovereignty. It is a violation of the will of the people, which is reflected in their choices but is not used in the determination of elected candidates. This decision is contrary to the interests of the DPR, especially political parties because it negates the meaning of serial numbers, which are the authority of parties and in previous elections determined the chances of electing DPR candidates.

The constitutional judges from the DPR in this decision were Mahfud MD and M. Akil Mochtar. Both judges agreed with the majority judges, granting the applicant's request, which was thus against the interests of the DPR.

In this decision, there was one constitutional judge who filed a different opinion, namely Maria Farida Indrati. The substance of the dissenting opinion is that the determination of elected candidates based on the majority vote is considered detrimental to efforts to increase women's representation through affirmative action.

Decision Number 56/PUU- VI/2008

This case was filed by an individual Indonesian citizen against the provisions of Article 1 paragraph (4), Article 8, Article 9, and Article 13 paragraph (1) of Law Number 42/2008 on the General Election of the President and Vice President relating to the provision that candidates for President and Vice President can only be nominated by political parties and/or coalitions of political parties that obtain 20% of the seats in the House of Representatives or obtain 25% of the national valid votes. This provision is seen as blocking the right of individuals to run for office as part of their right to participate in government. The provision was also seen as contradicting the 1945 Constitution, which does not prohibit individuals from running as candidates for President and Vice President.

The interests of the DPR and political parties, in this case, are to monopolize the authority to nominate candidates for President and Vice President. If individual candidates are allowed, then political parties will not only compete with other political parties but also with individual candidates. Therefore, the position in favor of the DPR is to reject the petition, and against the interests of the DPR is the opinion that grants the petition.

The Constitutional Court stated that Article 6A paragraph (2) of the 1945 Constitution means that only a political party or a coalition of political parties can propose a pair of candidates for President and Vice President in a general election. The provision does not allow for other interpretations. This is not discriminatory because anyone who meets the requirements can be registered and nominated by a political party or a coalition of political parties without having to be an organizer or member of a political party. Therefore, the Constitutional Court's verdict rejects the petition.

The DPR judges who decided the case were Moh. Mahfud MD. and M. Akil Mochtar. Judge Moh. Mahfud MD, who was also the Chief Justice of the Constitutional Court at the time, was part of the majority of judges, so his position favored the interests of the DPR. Meanwhile, M. Akil Mochtar expressed a different opinion along with 2 other constitutional judges, namely A. Mukthie Fadjar and Maruarar Siahaan. M. Akil Mochtar stated that the provisions in the

1945 Constitution only regulate matters of principle that cannot be interpreted as inhibiting the rights of citizens. Individual candidates must be accommodated and enforced in the 2014 elections. Thus, Judge M. Akil Mochtar's position is contrary to the interests of the DPR.

Decision Number 21/PUU-IX/2011

Decision No. 21/PUU-IX/2011 was about the judicial review of Article 354 paragraph (2) of Law No. 27/2009 on Parliament Law, which stipulates that the chairman of the DPRD of the new local government (expansion) after the General Election is determined to come from the political party that wins the most seats.

The provision was seen as obstructing the applicant's rights as Chairman of the DPRD in the origin local government because he could no longer become Chairman of the DPRD in the new local government. This was argued to be contrary to, among other things, the right to equal opportunity in government and the right not to be prosecuted under retroactive laws as guaranteed in Article 28D(1) and Article 28I(1) of the 1945 Constitution.

The interests of the DPR, in this case concerning political parties, are to obtain the chairmanship of the DPRD if they obtain the most seats. This conflicts with the applicant's interest in having the opportunity to become the leader of the DPRD even though his political party does not have the most seats.

The verdict rejected the petition because the provision was in line with the 1945 Constitution. Members of whichever political party wins the most seats in the DPRD are entitled to occupy the position of DPRD leader. This provision was considered fair because the acquisition of seats also reflected the rank of the people's choice as the holder of sovereignty. The Constitutional Court considered that this provision did not violate the principle of fair legal certainty and equal treatment before the law for DPRD leaders who had been appointed as leaders and then, due to expansion as the aspiration of the sovereign people, had to end their positions as leaders because the ranking of their political parties' seats had been reduced. The legal certainty of the regulation lies precisely in the provision that if the order of political party seats changes in the new local government

due to regional expansion, as a result of the aspirations of the sovereign people, then the composition of the leadership position must also change.

The constitutional judges nominated by the DPR in this decision were Moh. Mahfud MD, M. Akil Mochtar, and Harjono. Moh. Mahfud MD and Harjono were part of the majority opinion and thus sided with the interests of the DPR. M. Akil Mochtar, along with three other judges, expressed a different opinion. They stated that the composition of the DPRD leadership should not change despite changes in the number of seats of political parties for the sake of legal certainty. Therefore, M. Akil Mochtar's position was against the interests of the DPR.

Decision Number 36/PUU-XV/2017

Decision No. 36/PUU-XV/2017 is about the testing of Article 79 paragraph (3) of Law 17/2014 on Parliament Law, which is related to the DPR's right of inquiry whether it can also be conducted against the KPK (Commission for Corruption Eradication). This relates to the legal issue of whether the KPK is included in the category of implementing agencies of the Act or part of the executive. This issue stems from the action of the DPR in exercising the right of inquiry against the KPK, which is considered by the applicant as an attempt to obstruct the eradication of corruption by the KPK. Thus, the interpretation that the KPK is part of the executive and the object of the right of inquiry as used by the DPR is in favor of the DPR. Conversely, the opinion that the KPK is not part of the executive and therefore not the object of the right of inquiry is contrary to the interests of the Parliament.

Decision 36/PUU-XV/2017 rejected the petition. In the legal considerations, it was stated that KPK is an institution that carries out the task of investigating and prosecuting corruption crimes because government institutions that handle corruption cases have not functioned effectively and efficiently. KPK is an institution in the executive domain that carries out functions in the executive domain. KPK is not in the judicial domain, so it can be the object of the DPRs right of inquiry.

The constitutional judges nominated by the DPR during this decision period were Arief Hidayat (2nd term), Aswanto, and Wahidudin Adam. The three constitutional judges were the majority judges who sided with the interests of the DPR, namely declaring the KPK as part of the executive and thus the object of the DPR's right of inquiry. Judges who dissented were Maria Farida Indrati, I Dewa Gede Palguna (who was elected for a second term from the Presidential line), Suhartoyo, and Saldi Isra.

Decision Number 53/PUU-XV/2017

Case Number 53/PUU-XV/2017 was filed by the Islamic Peace and Security Party (IDAMAN). One of the provisions submitted for review was Article 222 of Law No. 7/2017 on General Elections related to the minimum threshold requirement for to propose a candidate pair for President and Vice President, 20% of DPR seats or 25% of national valid votes. The petitioner argues that the presidential threshold provision contradicts the logic of the simultaneous 2019 elections, damages the presidential system, eliminates the evaluation function of the elections, and contradicts the principle of One Person, One Vote, One Value (OPOVOV).

The legal reasoning of the decision states that one of the directions of the 1945 Constitution amendment is to strengthen the presidential system. The presidential institution is idealized to reflect the sense of belonging of all the people and represent the reality of the diversity of Indonesian society. This is the basis of the spirit of constitutional engineering contained in Article 6A paragraph (3) of the 1945 Constitution.

This case is closely related to the interests of the DPR and political parties, especially major parties, as it gives them the right to nominate candidates for President and Vice President. With the presidential threshold, only major parties can nominate their candidates, and only parties that have obtained seats in the DPR or obtained nationally valid votes can form coalitions to nominate candidates for President and Vice President. Therefore, constitutional judges who argue against the petition are in favor of the interests of the DPR. Meanwhile,

constitutional judges who believe in granting the petition have a position that is contrary to the interests of the DPR.

In this decision, two constitutional judges expressed different opinions regarding the presidential threshold, namely Suhartoyo and Saldi Isra. Suhartoyo is a constitutional judge proposed by the Supreme Court and Saldi Isra is a constitutional judge proposed by the President. Meanwhile, the constitutional judges nominated by the DPR, namely Arief Hidayat (2), Aswanto, and Wahiduddin Adam, all sided with the interests of the DPR.

Based on the data on the position of constitutional judges nominated by the DPR in 8 decisions related to the interests of the DPR, it can be seen that out of all constitutional judges nominated by the DPR, there are several constitutional judges whose position cannot be seen, namely Jimly Asshiddiqie in his second term, M. Akil Mochtar in his second term, Arief Hidayat in his first term, and Guntur Hamzah. Jimly Asshiddiqie in his second term was nominated through a selection process that was not transparent and participatory, but he did not serve long because he resigned. M. Akil Mochtar in the second term was selected through a selection process that was not transparent and participatory but was dismissed in the same year due to a corruption case. Arief Hidayat did not participate in the first eight decisions analyzed. Guntur Hamzah also did not participate in the eight decisions analyzed because he was only appointed as a constitutional judge in 2022.

The selection of constitutional judges and the position of judges in decisions related to DPR interests can be presented in the following table.

Table 13
Judge selection and position in judgment

No	Judge's Name	Selection	Position	
			Pro	Cons
1	Jimly Asshiddiqie (1)	Transparent and Participatory	1	2
2	I Dewa Gede Palguna	Transparent and Participatory	2	1
3	Achmad Roestandi	Transparent and Participatory	2	0
4	M. Akil Mochtar (1)	Transparent and Participatory	0	3

No	Judge's Name	Selection	Position	
			Pro	Cons
5	Moh. Mahfud MD.	Transparent and Participatory	3	1
6	Harjono	Transparent and Participatory	1	0
7	Wahiduddin Adam	Highly Transparent and Participatory	2	0
8	Arief Hidayat (2)	Not Transparent and Participatory	2	0

Note: Pro: In favor; Con: Contrary.

There are five constitutional judges whose overall position is in favor of the interests of the DPR, namely Achmad Roestandi, Harjono, Wahiduddin Adam, Aswanto, and Arief Hidayat (2). The constitutional judge whose position is always against the interests of the House is M. Akil Mochtar, who was nominated through a transparent and participatory selection process. The other constitutional judges, namely Jimly Asshiddiqie, I Dewa Gede Palguna, and Moh. Mahfud MD, have each taken sides and been in conflict.

Achmad Roestandi is one of the first-term Constitutional Judge proposed by the DPR. Before becoming a constitutional justice, Achmad Roestandi was a military officer who was appointed as member of the people consultative assembly.[55] In the case of the judicial review of the Election Law in Case Number 011/PUU-I/2003, he submitted a dissenting opinion against the opinion of the majority of judges who granted the request to grant voting rights to former Communis Partys' members or those involved in the G.30.S./PKI incident. Achmad Roestandi submitted a different opinion in accordance with the position of the DPR, namely by stating that the revocation of voting rights is indeed possible and permitted by the 1945 Constitution. Meanwhile, the majority of judges from the DPR are Jimly Asshiddiqie and I Dewa Gede Palguna who have a different position from the DPR's view, namely stating that the restriction is a form of discrimination.

[55] Rizky Darmawan, "*Mengenal Achmad Roestandi, Sosok Jenderal TNI yang Pernah Duduki Jabatan Hakim MK* [*Getting to Know Achmad Roestandi, the TNI General Who Once Held the Position of Constitutional Court Judge*]," *SindoNews*, accessed August 24, 2024, https://nasional.sindonews.com/read/1442221/14/mengenal-achmad-roestandi-sosok-jenderal-tni-yang-pernah-duduki-jabatan-hakim-mk-1724501317.

In the second case, Decision number 008/PUU-IV/2006, Achmad Roestandi together with I Dewa Gede Palguna were in the position as one of the majority judges who rejected the applicant's request to limit the power of political parties to recall members of the DPR because the authority was considered as the power needed to carry out the role and function of political parties. This is certainly in line with the interests of political parties in the DPR. Meanwhile, the dissenting judge from the DPR was Jimly Asshiddiqie who stated that the authority was a form of restriction on the freedom possessed and needed by members of the DPR even though the opinion differed from the opinion of political parties and the DPR.

Judge Harjono is always in the same position as the interests of the DPR. In Case Number 21/PUU-IX/2011, he was part of the majority of judges who stated that the DPRD chairman's seat is permanent even though there is a change in the composition of DPRD members. Likewise, Constitutional Justices Wahiduddin Adam, Aswanto, and Arif Hidayat, in Case Number 36/PUU-XV/2017 and Case Number 53/PUU-XV/2017 were part of the majority of judges whose positions are in line with the interests of the DPR. In Case 36/PUU-XV/2017, the three judges, as part of majority judges, stated that the KPK is part of the executive which is the object of the DPR's investigation rights. Meanwhile, the dissenting judge stated that the KPK is not part of the executive and is independent and not the object of the DPR's investigation rights.

Judge Akil Mochtar has always been in a position that is at odds with the DPR, namely in Case Number 22-24/PUU-VI/2008 and Case Number 56/PUU-VI/2008. In Case Number 22-24/PUU-VI/2008, Akil Mochtar together with Mahfud MD were part of the majority of judges who granted the applicant's request and stated that the determination of elected legislative candidates was based on the larges votes not based on the list number candidacy position. This reduces the power of political parties that determine the list number of a political party's candidates.

Meanwhile, in case No. 56/PUU-VI/2008, constitutional judges Akil Mochtar and Mahfud MD were in different positions. Mahfud MD was part of the majority

of judges who were in line with the interests of the DPR, namely rejecting the petitioners' request regarding the provision on submitting presidential and vice presidential candidate pairs only through political parties or coalitions of political parties. Meanwhile, Akil Mochtar submitted dissenting opinion that in the election of the President and Vice President, an opportunity should also be given to individual candidates.

If the position of the constitutional judge from the DPR in the above decisions is correlated with the selection category, the judge who was selected through a very transparent and participatory selection process, namely constitutional judge Wahiduddin Adam, in two decisions was positioned as a majority judge who was in line with the interests of the DPR. The orientation of the position of constitutional judge Wahiduddin Adam cannot be separated from his background before serving as a constitutional judge who had a career in the government bureaucracy at the Ministry of Law and Human Rights, especially at the National Legal Development Agency, until serving as Director General of Legislation.[56]

Judges who were selected transparently and participatively, namely Jimly Asshiddiqie, I Dewa Gede Palguna, Achmad Roestandi, Akil Mochtar, Mahfud MD, and Harjono, each have varying positions. Constitutional Justice Achmad Roestandi is always in a position that is in line with the interests of the DPR. This is influenced by his background as a military officer and member of the MPR. In contrast, Constitutional Justice Akil Mochtar is always in a position that is at odds with the interests of the DPR in the three cases that have been described. Akil Mochtar's position is unique considering his background before becoming a constitutional justice was a politician and member of the DPR.

Other constitutional judges, namely Jimly Asshiddiqie, I Dewa Gede Palguna, and Mahfud MD have been in positions both in line with and against the interests of the DPR, both as majority judges and as judges who expressed dissenting opinions. Meanwhile, constitutional judges who were elected through a mechanism

[56] Ruhma Syifwatul Jinan, "*Jejak Rekam dan Profil Wahiduddin Adam Selama Jadi Hakim MK* [*Track Record and Profile of Wahiduddin Adams During His Tenure as Constitutional Court Judge*]," *Tirto*, accessed September 17, 2024, https://tirto.id/jejak-rekam-dan-profil-wahiduddin-adams-selama-jadi-hakim-mk-gUCF#google_vignette.

that was not transparent and participatory, namely constitutional judge Arif Hidayat, have always been in positions that are in line with the interests of the DPR. Arif Hidayat's background is an academician[57] who should be able to take positions both in line with and against the interests of the DPR. However, the election of Arif Hidayat for a second term, in addition to being non-transparent and participatory, was also colored by information about the lobbying he did to members of the DPR. Constitutional's Etic Council has decided that Arif Hidayat violated Code of Ethic.[58]

Based on above analysis, judges who are nominated through a selection process that is highly transparent and participatory or transparent and participatory may be in favor of or against the interests of the DPR. However, judges who were nominated with a selection process that was not transparent and participatory in all their decisions were in favor of the interests of the DPR. That can be an initial conclusion that judges selected by the DPR through a transparent and participatory mechanism tend to be more independent, both in their position that support or contradict the DPR's interest. On the other hand, judges selected through a process that is not transparent and participatory tend to be in a position that is in accordance with the interests of the DPR. However, to have a stronger conclusion, further research is needed by analysing larger number of decisions. Another factor that influences a judge's decision that can be studied is the ideological[59] and professional background before becoming a judge.

III. CLOSING

The practice of selecting constitutional judge candidates conducted by the DPR varies from non-transparent and participatory, transparent and participatory, to highly transparent and participatory. The opinions and positions of constitutional judges nominated by the DPR in decisions related to the

[57] "Prof. Dr. Arief Hidayat, S.H., M.S.," *Mahkamah Konstitusi Republik Indonesia (MKRI)*, accessed September 17, 2024, https://testing.mkri.id/hakim/hakim-periode-sebelumnya/669/prof-dr-arief-hidayat-s-h-m-s-.

[58] *Decision of Constitutional Court Ethic Council Number 18/Lap-V/BAP/DE/2018*, accessed September 17, 2024, https://www.mkri.id/public/content/dewanetik/Berita%20Acara%2018.pdf.

[59] Bjorn Dressel and Tomoo Inoue, "Megapolitical Cases before the Constitutional Court of Indonesia Since 2004: An Empirical Study," *Constitutional Review* 4, no. 2 (December 2018): 166.

authority and interests of the DPR vary. In general, some have taken sides, and some have reverse position. There are two constitutional judges whose positions are always in favor and two judges always reverse.

Judges who are nominated through a highly transparent and participatory selection process or a transparent and participatory process may rule in favor of or against the interests of the Parliament. However, judges who were nominated with a selection process that was not transparent and participatory in all their decisions were in favor of the interests of the DPR. That pattern indicate that the judge nominated through transparent and participatory selection process tend to be more independent form the DPR than the judge nominated through less transparent and participatory selection process. Further research is needed with a larger number of decisions to be able to confirm the relationship and influence of the constitutional judge selection mechanism on the position of judges in the Constitutional Court's decision. Further research alson can be conducted for judges nominated by the President to review laws related to the interests of the President or the government.

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The Removal of the Constitutional Chamber Justices in El Salvador: A Story About the Fragility of Judicial Independence

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Abstract

The work discusses a significant event that occurred on May 1, 2021, when the Legislative Assembly of El Salvador removed the Justices of the Constitutional Chamber of the Supreme Court of Justice before their term expiration, violating legal procedures. This action was facilitated by a combination of populist rhetoric from the President and abuse of power by the Legislative Assembly. Referred to as Constitutional Authoritarian-Populism, this trend undermines the rule of law. The text outlines the Salvadoran constitutional framework and discusses concepts like judicial independence, populism, abusive constitutionalism, and authoritarianism in the Latin American context. It then examines instances of Constitutional Authoritarian-Populism in El Salvador from 2019 to 2023, demonstrating that the removal of the Justices wasn't spontaneous. Finally, it analyzes the process of removal, the response from the removed Justices, and the subsequent decision by newly appointed Justices to authorize presidential re-election in El Salvador.

Keywords: Constitutional Authoritarian-Populism; Constitutional Chamber; Judicial Independence; Presidential Re-election; Removal

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I. INTRODUCTION

Contemporary democratic constitutional systems are characterized by their flexibility, allowing for various ideologies and manifestations of political power to coexist within the constitutional framework. However, all of these manifestations have conceptual and normative limits within the triumphs of liberalism, now known as constitutionalism. Constitutionalism or democratic constitutionalism is characterized by at least the following distinctive features: the principle of the rule of law, the separation of powers, the protection of fundamental rights, and the democratic ideal that the legitimacy of the state rests upon the consent of its citizens.[1]

Both the principle of separation of powers and the guarantee of fundamental rights largely depends on the optimal functioning of an institution that, although relatively recent, is considered one of the most successful and influential legal inventions of the 20th century: constitutional courts. Few checks and balances on power have been as effective in Western democracies as constitutional courts. Through their main function, which is the declaration of unconstitutionality of laws and other public acts, they have proven to be true guardians of the Constitution.

However, this comes at a price. The valuable role of constitutional courts in preserving the rule of law has made them targets of illiberal movements that, once in power, seek to co-opt them through various means. One of these movements is populism, whose rise in the world, especially in Latin America, has put constitutional courts in their crosshairs. However, today's populist leaders are more sophisticated than those of the past. Once in power, they take advantage of the mechanisms provided by the legal system itself and use them for antidemocratic purposes. In many cases, these actions escalate, leading to the consolidation of authoritarian regimes.

[1] Carlos Bernal Pulido, "Constituciones sin constitucionalismo y la desproporción de la proporcionalidad. Dos aspectos de la encrucijada de los derechos fundamentales en el neoconstitucionalismo [Constitutions without Constitutionalism and the Disproportionality of Proportionality: Two Aspects of the Dilemma of Fundamental Rights in Neoconstitutionalism]," *Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional* no. 9 (2016): 43, https://www.unioviedo.es/constitucional/fundamentos/noveno/pdfs/03_carlosbernal.pdf.

In this essay, we will analyze the case of El Salvador. On May 1, 2021, the Legislative Assembly removed the Justices of the Constitutional Chamber, even though they had six years remaining in their terms. The reason given was that the decisions issued by the Constitutional Chamber during the COVID-19 pandemic had endangered the lives of the Salvadoran population.

While it is true that the Salvadoran Constitution allows for the removal of the Justices of the Constitutional Chamber, we will need to analyze whether this mechanism was used in a legitimate manner. The importance of said analysis will be fundamental to determine to what extent judicial independence is a guarantee – and a global constitutional principle – considered by some to be quasi-absolute. Or if, on the contrary, it is so fragile that it is at the mercy of temporary legislative majorities that, for purely political reasons, can end it in one night, as in the case of El Salvador.

Furthermore, we will examine how the concentration of power guided by populist rhetoric is leading to actions that could be characterized as authoritarian, such as the suppression of checks and balances on power. We will refer to this combination of abusive use of constitutional rules, populism, and authoritarian acts as Constitutional Authoritarian-Populism.

II. A BRIEF OVERVIEW OF THE SALVADORAN CONSTITUTIONAL DESIGN

The Salvadoran constitutional system is largely unknown beyond its own borders.[2] The current Salvadoran Constitution was enacted on December 16, 1983, while the country was going through a bloody civil war that would end in 1992, with an estimated death toll of one hundred thousand.[3]

[2] Marcos Antonio Vela Ávalos, "Justicia dialógica en una ingeniería constitucional resistente al constitucionalismo dialógico: El caso de El Salvador [Dialogic Justice in a Constitutional Engineering Resistant to Dialogic Constitutionalism: The Case of El Salvador]," *Anuario Iberoamericano de Justicia Constitucional* 26, no. 1 (2022): 185, https://doi.org/10.18042/cepc/aijc.26.07.

[3] The Commission on the Truth for El Salvador, "From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador" (United States Institute of Peace), accessed June 14, 2023, https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf.

The Constitution of El Salvador embodies a distinctly humanistic ideology, as it acknowledges the human being as the "source and purpose" of the State's activities in Article 1, and the dignity of the people as the source of national coexistence, in the Preamble. From there on, it encompasses an extensive catalog of fundamental rights, including the right to life, equality, physical and moral integrity, freedom of expression, assembly and association, as well as property rights, among others, which are prevalent in contemporary liberal democracies.[4]

In its organic part, the Constitution recognizes, among other matters that we cannot delve into here, that El Salvador has a republican, democratic, and representative form of government (Article 85). It also acknowledges the principles of limited popular sovereignty (Article 83) and separation of powers (Article 86). Regarding this last component, it is important to highlight how the Constitution organizes and distributes political power. Article 86 establishes that the fundamental organs of the State are three: the Legislative, the Executive, and the Judiciary.

The Legislative Body (Articles 121 to 132) is represented by a unicameral body composed of deputies, known as the Legislative Assembly, whose main functions include enacting laws and constitutional reforms. The Executive Body (Articles 150 to 171) is headed by the President of the Republic (elected by popular vote), but also includes the Vice President, Ministers, Vice Ministers, and their subordinate officials. Its competencies are primarily executive and regulatory in nature.[5] Finally, the Judicial Body (Articles 172 to 190) is responsible for the power to judge and enforce judgments in various matters, and is composed of the Supreme Court, Appellate Courts, and Ordinary Courts.

Speaking specifically about the judicial review of laws, this is exercised by the Constitutional Chamber, which is an organic part of the Supreme Court, composed by five Justices. The Constitutional Chamber was created by the current Constitution of 1983. It was conceived from the beginning as a genuine

4 Andrei Marmor, "Constitutionalism, Liberalism and Democracy," in *Constitutionalism: Old Dilemmas, New Insights* (Oxford: Oxford University Press, 2021), 40–41.

5 Vela Ávalos, "Justicia dialógica," 185.

constitutional court, primarily responsible for the judicial review of laws. This character as a constitutional court has been reaffirmed by the Chamber itself in its jurisprudence.[6]

Like any constitutional body, the competences of the Constitutional Chamber are defined by the Constitution. These are as follows: a) To hear cases of Unconstitutionality of laws, decrees, and regulations; b) To hear cases of Amparo; c) To hear cases of Habeas Corpus; d) To resolve disputes arising between the Legislative and Executive branches in the process of law formation; and e) To hear cases of suspension and loss of citizenship rights in the situations referred to in ordinal 2º and 4º of Article 74, and ordinals 1º, 3º, 4º, and 5º of Article 75 of the Constitution, as well as the corresponding restoration of rights.[7]

But judicial review of laws in El Salvador is not only practiced in a concentrated manner, carried out by the Constitutional Chamber, following the European-Kelsenian style. It also has a system of diffuse judicial review, following the American style, which authorizes all judges in the country to declare any law, decree, or international treaty that contravenes the content of the Constitution inapplicable (Article 85 of the Constitution).

In conclusion, the Salvadoran constitutional design is, at least formally, comparable to that of any other contemporary democratic State. It has a supreme and rigid Constitution, strongly protected by a Constitutional Chamber and by the power of all ordinary judges to exercise diffuse judicial review.[8] Additionally, it includes a comprehensive catalog of fundamental rights, a system of separation of powers, and checks and balances aimed at preventing the concentration of power.

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6 Manuel Adrián Merino Menjívar, "El control judicial de las reformas constitucionales en El Salvador: ¿Un control a medias? [Judicial Review of Constitutional Amendments in El Salvador: A Halfway Review?]," *UDA Law Review* 4 (2022): 46, https://prisma.uazuay.edu.ec/index.php/udalawreview/article/view/611. Also see Constitutional Chamber of El Salvador, *Judgment of Unconstitutionality 16-2011*, April 27, 2011.

7 Ibid. These competences are derived from Articles 138, 174, 182.7 (in relation to Articles 74 and 75), and 183 of the Constitution.

8 Regarding the qualities of the Salvadoran Constitution, see Rodolfo Ernesto González Bonilla, "Cualidades de la Constitución [Qualities of the Constitution]," in *Teoría de la Constitución. Estudios en Homenaje a José Albino Tinetti* (San Salvador: Corte Suprema de Justicia, 2020), 109–132.

III. REGARDING THE NOTIONS OF JUDICIAL INDEPENDENCE, POPULISM, ABUSIVE CONSTITUTIONALISM AND AUTHORITARIANISM

3.1. Judicial Independence in the Latin American Context.

The notion of judicial independence as an essential feature of the doctrine of separation of powers has been present since the very origins of constitutionalism.[9] It is well known that Montesquieu asserted that there could be no genuine freedom if the Judiciary was not separated from the Legislative and Executive powers. If the Judiciary merged with the Legislative Branch, it would be arbitrary, as the judge would also be a legislator. If the Judiciary merged with the Executive Branch, it would be an oppressive power.[10]

This idea was echoed by Alexander Hamilton in The Federalist, asserting that judicial independence is necessary in a limited Constitution. This means that the limits of the Legislative Branch can only be ensured through the courts, whose role is to declare null and void any acts that are contrary to the Constitution. Without this, the preservation of fundamental rights is illusory.[11]

The international community has always been aware of the need to ensure and strengthen the principle of judicial independence through binding instruments for the States parties. This is evident in Article 14.1 of the Universal Declaration of Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights, Article 8.1 of the American Convention on Human Rights, and Article 6 of the European Convention on Human Rights, among others.

Entire treatises have been written on judicial independence throughout history, and it would not make sense to extensively delve into its historical and normative development on a global level here. Therefore, we will proceed to study its regulation within the framework of the Inter-American System of Human Rights, and particularly in the case of El Salvador.

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9 Martin Loughlin, *Against Constitutionalism* (Cambridge: Harvard University Press, 2022), 44–48.

10 Montesquieu, *El espíritu de las leyes [The Spirit of the Laws]*, vol. 1 (Madrid: Librería General de Victoriano Suárez, 1906), 227–228

11 Alexander Hamilton, "The Federalist Papers: No. 78 and 79," (United States: Library of Congress), accessed June 21, 2023, https://guides.loc.gov/federalist-papers/full-text.

In Latin America, the transition from dictatorships to democracies in the 1980s had two essential components: a) The role that the Judicial Branch would play in the new democratic regimes, and b) That all efforts should be made to ensure judicial independence.[12] As seen before, this led to the creation of strong judicial bodies (Courts, Supreme Courts, or Constitutional Chambers), capable of effectively limiting political power and ensuring relative democratic stability in the countries of the region. The paradigmatic cases of these strong Courts are Colombia, Brazil and, recently, Ecuador.

The Inter-American Court of Human Rights, based in San José, Costa Rica, from its earliest jurisprudence[13] has emphasized that the autonomous exercise of the judicial function must be guaranteed by the State, both institutionally in relation to the Judicial Branch as a system, and individually in relation to the specific judge. The objective dimension of judicial independence is related to essential aspects of the Rule of Law, such as the principle of separation of powers and the important role played by the Judiciary in a democracy. It goes beyond the individual judge and has a collective impact on society.

Separation and independence of public powers limit the scope of power exercised by each State organ, preventing undue interference and ensuring the effective enjoyment of greater freedom. The separation of powers aims to guarantee the independence of judges, and different political systems have devised strict procedures for their appointment and removal. The United Nations Basic Principles on the Independence of the Judiciary affirm the State's responsibility in guaranteeing judicial independence, and all governmental and non-governmental institutions must respect and uphold judicial independence.

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[12] Owen M. Fiss, "The Limits of Judicial Independence," *The University of Miami Inter-American Law Review* 25, no. 1 (1993): 57, https://www.jstor.org/stable/40176330.

[13] Inter-American Court of Human Rights, *Cases*: *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") vs. Venezuela*, August 5, 2008; *Argüelles y otros vs. Argentina*, November 20, 2014; *Acosta y otros vs. Nicaragua*, March 25, 2017; *Chocrón Chocrón vs. Venezuela*, July 1, 2011; *Colindres Schonenberg vs. El Salvador*, February 4, 2019; *Cordero Bernal vs. Perú*, February 16, 2021; *Corte Suprema de Justicia (Quintana Coello y otros) vs. Ecuador*, August 23, 2013; *Cuya Lavy y otros vs. Perú*, September 28, 2021; *López Lone y otros vs. Honduras*, October 5, 2015; *Moya Solís vs. Perú*, June 3, 2021; *Palamara Iribarne vs. Chile*, November 22, 2005; *Reverón Trujillo vs. Venezuela*, June 30, 2009; *Rico vs. Argentina*, September 2, 2019; *Ríos Avalos y otro vs. Paraguay*, August 19, 2021; *San Miguel Sosa y otras vs. Venezuela*, February 8, 2018; *Tribunal Constitucional (Camba Campos y otros) vs. Ecuador*, August 28, 2013; *Tribunal Constitucional vs. Perú*, January 31, 2001; *Villaseñor Velarde y otros vs. Guatemala*, February 5, 2019. Advisory Opinions: *OC-8/87*, January 30, 1987 and *OC-28/21*, June 7, 2021.

The right to be judged by an impartial judge or tribunal is a fundamental guarantee of due process. The independence of judges requires an adequate appointment process, a defined term in office, safeguards against external pressures, and guarantees of stability. The objective of protecting judicial independence is to prevent undue restrictions on the judiciary and its members by external organs. Judges have specific guarantees due to the necessary independence of the Judiciary, which is essential for the exercise of their function. The removal of judges by the Executive Branch before the expiration of their term, without specific reasons and without effective judicial protection to challenge the removal, is incompatible with judicial independence.

The guarantee of stability and tenure for judges means that their removal should only occur for permitted causes, through a process that meets judicial guarantees, or upon completion of their term. Judges can only be dismissed for serious disciplinary offenses or incompetence, and any proceedings against judges must comply with established judicial behavior standards and fair procedures ensuring objectivity and impartiality according to the Constitution or the law.

The jurisprudence of the Constitutional Chamber of El Salvador has also dealt with the issue of judicial independence.[14] The Chamber has stated that judicial independence can be understood as the absence of any kind of legal subordination and undue interference in the exercise of the judicial function by the Executive and Legislative powers, the parties to the proceedings, social actors of any nature, or other organs of the legal and political framework, presupposing the attachment of magistrates and judges solely to the Constitution and the law, as indicated in Article 172 of the Constitution of El Salvador. This "freedom" must be understood as the absence of subordination of the judge or magistrate to any legal or social power other than the Constitution and the law, as its purpose is to ensure the purity of the technical criteria that will influence the judicial elaboration of the irrevocable specific norm that resolves each case under trial.[15]

[14] *Judgment of Unconstitutionality 56-2016*, November 25, 2016; and *Mandamiento Judicial de Inconstitucionalidad [Judicial Order of Unconstitutionality] 1-2021*, May 1, 2021.

[15] At the secondary legislation level, this is regulated in Article 26 of the Judicial Career Law and Article 7 of the Judicial Code of Ethics.

The Constitutional Chamber has also recognized that judicial independence contributes to the legitimization of the judge, a legitimacy that cannot be of an electoral nature but is indeed democratic, justified to the extent that it is strictly technical or "argumentative", as Robert Alexy would refer to it.[16] One of the main concerns of the Constitutional Chamber has been to reaffirm that judges must be independent, particularly from partisan politics, as they should not have any material or formal affiliation with political parties. This requirement is even more pronounced in the case of Justices of the Constitutional Chamber, as the cases they will have to resolve will have, to a greater or lesser extent, political components.

In summary, judicial independence has at least two dimensions: an objective dimension, which serves as a principle or value that permeates the entire legal system, imposing on the State and, consequently, on each judge, the obligation to administer justice independently; and a subjective dimension, which translates into a fundamental right (subjective guarantee) of individuals to have their cases, regardless of their nature, resolved by independent judges.

3.2. Populism + Abusive Constitutionalism + Authoritarianism = Constitutional Authoritarian-Populism: A very Latin American Formula

Populism is not a new phenomenon. The emergence of this concept dates back to the late 19th century, represented by two emblematic movements: the Russian narodnichestvo and the American People's Party movement.[17] Defining populism is not an easy task. In fact, several legal scholars speak of "populisms" in the plural form. However, for our purposes, we will start with a definition proposed by Cas Mudde and Cristóbal Rovira, which is useful. They define populism as a *thin-centered ideology that views society as fundamentally divided into two homogeneous and antagonistic camps: "the pure people" versus*

[16] Jorge Ernesto Roa Roa, "No(s) Representan los jueces Constitucionales? [Do Constitutional Judges Represent Us?]," in *Democracia, representación y nuevas formas de participación: una mirada en prospectiva. XXI Jornadas de Derecho Constitucional. Constitucionalismo en transformación. Prospectiva 2030* (Bogotá: Universidad Externado de Colombia, 2021), 279–281.

[17] Guadalupe Salmorán Villar, *Populismo. Historia y geografía de un concepto [Populism. History and Geography of a Concept]* (México: UNAM, 2021), 13.

"the corrupt elite". Populism argues that politics should be an expression of the general will of the people.[18]

Populist movements are often characterized by the presence of a leader (typically a man) who embodies the voice and will of the people. This leader is charismatic, strong, and possesses great persuasive power. He is a man of action rather than words, unafraid to make difficult decisions swiftly, even against expert advice. He presents himself as one of the people, showing disdain for intellectualism. In the case of male leaders, they may project an image of virility, almost resembling a superhero.[19] We can find classic examples of these leaders in Juan Domingo Perón (Argentina), Silvio Berlusconi (Italy), Hugo Chávez (Venezuela), Rafael Correa (Ecuador), Evo Morales (Bolivia), Donald Trump (U.S.A.) and Santiago Abascal (Spain), among others.

Populism can be seen as a parasitic ideology that often targets liberal democracies as its preferred host. It undermines these democracies in at least two ways: in its characterization of "the people" and its treatment of opposition. Firstly, as evident from the adopted definition of populism in this work, the notion of "the people" as a homogeneous entity contradicts the idea of pluralism inherent in liberal democracies. The populist leader's intention to homogenize the popular will leads to the annulment and repression of dissent, resulting in severe consequences for fundamental rights and the substantive dimension of democracy. This is closely related to the second way populism erodes liberal democracy, which is its refusal to recognize the legitimacy of any opposition. From the populist perspective, only the voice of "the people" is deemed legitimate in a democracy, rendering dissenting opinions from the opposition as invalid and unacceptable. Populists claim to have exclusive access to the "true" voice of "the people".[20]

[18] Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 6.
[19] Kaltwasser, *Populism: A Very Short Introduction*, 62-66.
[20] Benjamin Mofffitt, *Populismo. Guía para entender la palabra clave de la política contemporánea [Populism: A Guide to Understanding the Keyword of Contemporary Politics]* (Argentina: Siglo Veintiuno Editores, 2022), 135–137.

Populism found fertile ground in Latin America since the late 20th century. The turbulent social and political history of Latin America, marked by poverty, inequality, and corruption, provided the perfect breeding ground for the emergence of messianic figures, both from the left and the right, who promised to end political polarization and give the people the rightful place, making their voices heard. However, the Latin American reality indicates that all these leaders had a different intention than the one they proclaimed: to solidify power indefinitely from the Executive Branch and eliminate any mechanisms of control against them. These are the cases of Álvaro Uribe in Colombia, Hugo Chávez in Venezuela, Daniel Ortega in Nicaragua, Rafael Correa in Ecuador, Evo Morales in Bolivia, Jair Bolsonaro in Brazil, and Nayib Bukele in El Salvador.[21]

The final intention of the populist is not as noble as it may seem, that is, not only to give a voice to the historically forgotten people, but ultimately to bring about a transformation of the existing constitutional and democratic order, a change in the rules of the game that allows the populist leader to carry out their epiphanies. These changes must take place at all costs, while seemingly respecting the formal rules of the legal system. Such changes may require the elimination or co-optation of institutional obstacles that hinder the realization of the true will of "the people". These obstacles are often represented by constitutional courts and political opposition. Populism does not tolerate control or dissent.[22]

The populist's rhetoric is of no use if, at the end of the day, they do not seize power. In modern times, populists come to power through legitimate means such as popular elections,[23] so they do not need to resort to violence (coups) or revolutions to achieve their purpose. Their charisma and, in some cases, their proposals are enough. Once power has been constitutionally obtained, the stage is set for the populist to begin disrupting the democratic regime at will.

[21] Juan Pablo Sarmiento Erazo, "Populismo constitucional y reelecciones, vicisitudes institucionales en la experiencia suamericana [Constitutional Populism and Reelections: Institutional Vicissitudes in the South American Experience]," *Estudios Constitucionales* no. 1 (2013): 569–602, http://www.estudiosconstitucionales.cl/index.php/econstitucionales/article/view/71.

[22] Nadia Urbinati, *Yo, el pueblo. Cómo el populismo transforma la democracia [Me the People: How Populism Transforms Democracy]* (México: Instituto Nacional Electoral-Grano de Sal, 2020), 21–36.

[23] This is the case in all the Latin American countries mentioned earlier.

This "transformation" is typically carried out through the use of constitutional change mechanisms that, despite being formally valid, result in a significantly less democratic State than before. This practice is referred to by David Landau as "Abusive Constitutionalism".[24]

Despite Landau's focus on formal constitutional change mechanisms (constitutional reform and replacement) for the realization of abusive constitutional practices, the reality is that Abusive Constitutionalism now encompasses a broader spectrum and can also materialize through informal practices, as understood by the Constitutional Chamber of El Salvador. According to the Chamber, Abusive Constitutionalism occurs when any branch of the State attempts to break with the form and system of government through authoritarian means or under the cover of democratically distorted institutions. These, the Chamber argues, are seemingly legitimate constitutional changes that undermine the fundamental pillars of democracy.[25]

Indeed, Landau argues that there is a conceptual link between Abusive Constitutionalism and Authoritarianism (or its variants), with the latter being the final stage of democratic degradation. For instance, Landau suggests that competitive authoritarian regimes often have constitutions that outwardly resemble democratic systems, complete with structural features like the separation of powers, but they employ informal tactics to undermine the effectiveness of those checks and balances. Rulers in such regimes can appoint sympathetic judges to the courts and can neutralize judges representing opposing interests through means such as bribery or threats. These practices erode the independence and integrity of the judiciary, allowing rulers to consolidate power and neutralize any significant opposition.[26]

Landau makes a final remark, which is relevant to our study:

> The weakening or removal of opposition figures is instrumental to the construction of competitive authoritarian regimes because it gives incumbents a greatly increased power to rework the state to their advantage. The trick,

[24] David Landau, "Abusive Constitutionalism," *Davis Law Review* 47, no. 1 (2013): 195.
[25] *Mandamiento Judicial de Inconstitucionalidad [Judicial Order of Unconstitutionality] 1-2021.*
[26] Landau, "Abusive Constitutionalism," 212.

> as well, is that packing or dismantling a single institution will rarely have serious consequences for democracy, but sweeping away large parts of the institutional order — as was done in all of these cases — may allow rulers to entrench themselves in power for long periods of time.

In Latin America, the formula "Populism + Abusive Constitutionalism + Authoritarianism", which could well be called "Constitutional Authoritarian-Populism"[27], has been the preferred mechanism for some leaders in recent history to achieve a common objective: staying in power for an extended or indefinite term, even when the constitutions expressly prohibit it. Authoritarian populists may choose to change or reform the constitution, as in the cases of Ecuador and Venezuela, but if that is not possible, highly politicized (and often non-independent) constitutional courts seem to be a perfect ally to achieve the same purpose, as has happened in Nicaragua, Honduras, Costa Rica, Bolivia[28] and El Salvador[29].

IV. THE DEMOCRATIC DEGRADATION IN EL SALVADOR: A TOUR OF SOME PRACTICES OF CONSTITUTIONAL AUTHORITARIAN-POPULISM BETWEEN 2019 AND 2023

4.1. The Context

After the signing of the Peace Accords on January 16, 1992, the Salvadoran political landscape could be characterized by three significant phenomena: political polarization, corruption, and insecurity. Between 1989 and 2019, El Salvador was governed by two political parties: the *Alianza Republicana Nacionalista* [Nationalist Republican Alliance] (ARENA), a right-wing party historically representing the

[27] José Ignacio Hernández G., "The Constitutional Chamber in El Salvador and Presidential Reelection: Another Case of Constitutional Authoritarian-Populism," *Int'l J. Const. L. Blog*, September 10 (2021), http://www.iconnectblog.com/2021/09/the-constitutional-chamber-in-el-salvador-and-presidential-reelection-another-case-of-constitutional-authoritarian-populism/

[28] In the cases of Nicaragua, Honduras, Costa Rica and Bolivia see Roberto Viciano Pastor and Gabriel Moreno González, "Cuando los jueces declaran inconstitucional la Constitución: la reelección presidencial en América Latina a la luz de las últimas decisiones de las Cortes Constitucionales [When Judges Declare the Constitution Unconstitutional: Presidential Reelection in Latin America According to the Latest Decisions of the Constitutional Courts]," *Anuario Iberoamericano de Justicia Constitucional* no. 22 (2018): 165–198, https://doi.org/10.18042/cepc/aijc.22.06.

[29] In the case of El Salvador see Manuel Adrian Merino Menjivar, "When Judges Unbound Ulysses: The Case of Presidential Reelection in El Salvador," *Int'l J. Const. L. Blog*, September 9, 2021, http://www.iconnectblog.com/2021/09/when-judges-unbound-ulysses-the-case-of-presidential-reelection-in-el-salvador/.

interests of the socially privileged classes in the country, and on the other hand, the *Frente Farabundo Martí para la Liberación Nacional* [Farabundo Martí National Liberation Front] (FMLN), a left-wing party formed by former members of the revolutionary forces (guerrilla). ARENA governed from 1989 to 2009, while the FMLN governed from 2009 to 2019.

Beyond those two political parties, other minor political parties did not have a significant impact on the decision-making process, allowing the traditional parties to use and abuse their power without much opposition. Out of the six former presidents from the post-war period, five have been or are currently being prosecuted, either criminally or civilly, for acts of corruption during their terms in office.[30]

The third phenomenon that caused devastation in Salvadoran society was the issue of crime and insecurity. For many years, El Salvador was considered the most violent country in the Americas and one of the most violent in the world. This resulted in a high number of deaths, economic extortion, robberies, sexual assaults, and forced displacements both internally and across borders. No government was able to contain the wave of violence that plagued the Salvadoran people day by day.[31] Furthermore, the last governments of the FMLN were accused of making deals with the largest gangs in the country (MS 13 and Barrio 18), granting them benefits in exchange for reducing the number of murders and extortions.[32]

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[30] La Prensa Gráfica, "Los cuatro expresidentes salvadoreños señalados por la justicia [The Four Former Salvadoran Presidents Indicted by the Justice System]," *La Prensa Gráfica*, August 24, 2021; Fiscalía General de la República, "Fiscalía salda deuda histórica al intervenir diferentes propiedades del expresidente Cristiani [Prosecution Settles Historic Debt by Intervening Various Properties of Former President Cristiani]," *Fiscalía General de la República*, June 2, 2023.

[31] Roberto Valencia, "El Salvador, el país más violento de América: un asesinato cada 2 horas [El Salvador, the Most Violent Country in the Americas: One Murder Every 2 Hours]," *El Mundo.es*, January 3, 2010; Europapress, "El Salvador cerrará 2015 como el año más violento de su historia, con más de 6.600 homicidios [El Salvador Will Close 2015 as the Most Violent Year in Its History, with Over 6,600 Homicides]," *Europapress*, December 30, 2015; CNN Español, "¿Qué países tienen las tasas de homicidios más altas del mundo? El Salvador, entre los que encabezan la lista [Which Countries Have the Highest Homicide Rates in the World? El Salvador Among the Highest]," *CNN Español*, May 18, 2022.

[32] Óscar Martínez et al., "Gobierno negoció con pandillas reducción de homicidios [Government Negotiated a Reduction of Homicides with Gangs]," *El Faro*, March 14, 2012; Carlos Martínez, "Pandillas admiten por primera vez que negociaron tregua con el Ejecutivo [Gangs Admit for the First Time That They Negotiated a Truce with the Executive]," *El Faro*, May 30, 2016.

The frustration of the population with the political class of that time was such that there was almost a plea for the emergence of a new political figure, young, without a political past, and with great leadership power. A spark of hope to achieve real change in the country. At that time, a young mayor of the Municipality of Nuevo Cuscatlán, called Nayib Bukele, affiliated with the FMLN at the time, began to draw attention (taking advantage of the rise of social media) for his good work in the administration of that small municipality. His rise was swift. By 2015, he was already the mayor of San Salvador, the capital of El Salvador. In 2017, he was expelled from the FMLN due to disagreements with its leaders, and he concluded his term as mayor of San Salvador in 2018.

Without a political party behind him, he decided to found his own political movement, called Nuevas Ideas [New Ideas], which later became a political party, the long-awaited new option for the Salvadoran people. Bukele ran for President of the Republic in 2019, and his campaign slogan, which led to a resounding victory over his rivals, was "*devuelvan lo robado*" [return what was stolen], referring to the corruption allegations against previous governments. To this day, the Salvadoran President enjoys unprecedented approval ratings in Latin American statistics.[33] The leader that the people had been waiting for had arrived.

The political party Nuevas Ideas was the necessary and ideal vehicle to access another branch of the State: The Legislative. On February 28, 2021, as a historical event, the political party Nuevas Ideas won 56 out of the 84 seats of the Legislative Assembly, that is the majority required by the Constitution to take ––almost–– any important decision, as to: a) Elect the Attorney General, the Ombudsman and the Public Defender Officer (Article 192 of the Constitution); b) Elect the Justices of the Supreme Court of Justice, including the five Justices of the Constitutional Chamber (Article 186 of the Constitution); c) Elect the Magistrates of the Supreme Electoral Tribunal (Article 208 of the Constitution); d) Elect the Magistrates of the Court of Accounts (Article 131 n. 19°); e) Ratify

[33] Edwin Segura, "Bukele arranca 2023 con 91% de aprobación [Bukele Starts 2023 with a 91% Approval Rating]," *LPG Datos*, March 15, 2023

international treaties (Article 131 n. 7°); and f) Ratify constitutional amendments (Article 248); to mention a few.[34]

With the Executive and the Legislative on his side, the Judiciary was the only obstacle. However, the concentrated power was enough to undertake certain actions that would ultimately lead, as will be seen later, to the removal of the Justices of the Constitutional Chamber. But before that, let's take a look at some practices of Constitutional Authoritarian-Populism that took place between 2019 and 2023, which paved the way for the fateful date of May 1, 2021, for the young and fragile Salvadoran democracy.

4.2. Practices of Constitutional Authoritarian-Populism between 2019 and 2023

4.2.1. The Armed Takeover of the Legislative Assembly

Article 167.7° of the Salvadoran Constitution authorizes the Council of Ministers, under the command of the President of the Republic, to convene the Legislative Assembly "when the interests of the republic so require". Thus, through Agreement of session number 2 on February 6, 2020, it was agreed to convene the Legislative Assembly to hold an extraordinary session at 3:00 p.m. on February 9, 2020. The purpose of this requirement was the approval of a loan for 109 million dollars, to address public security issues.

On the appointed date, only a few deputies of the Legislative Assembly attended the convocation, failing to reach the necessary quorum for a vote, while the rest of the deputies who did not attend argued that the topic to be discussed was already scheduled for the following day, that is, Monday, February 10, 2020. Faced with this act of "disobedience", the President of the Republic chose to militarize the Legislative Assembly and enter it. Once seated in the position of the President of the Legislative Assembly, he expressed that he would be patient, offered a prayer to God, and left the place. The symbolic significance of this act was evident.

[34] Manuel Adrián Merino Menjívar, "El Salvador," in *The 2021 Global Review of Constitutional Law* (November 2022), https://ssrn.com/abstract=4285035.

The controversy, with many more details than can be narrated here[35], reached the Constitutional Chamber. The Chamber had to rule on whether the agreement by which the Council of Ministers had called the Legislative Assembly for an extraordinary session was unconstitutional. In the judgment of unconstitutionality No. 6-2020/7-2020/10-2020/11-2020, dated October 23, 2020, the Constitutional Chamber declared (*ex post facto*) that the aforementioned convocation was unconstitutional, as it did not fit within the assumption of urgency provided for in Article 167.7° of the Constitution. Additionally, the court took the opportunity to make a series of assessments on the rule of law, democracy, the principle of separation of powers, the right to insurrection, and the constitutional purposes of the armed forces and the National Civil Police, among other topics.

It is pertinent to transcribe the following assessment from the court:

> It must not be overlooked that, although our political form of government is presidentialist, the exercise of powers by the Executive Branch cannot give rise to a *de facto* hyper-presidentialism, as the excessive dominance of this branch over the rest —and especially over the Legislative Branch— historically has led in Latin America to one of the worst forms of authoritarianism: low-intensity authoritarianism, which hides behind the exercise of democratic functions and thus manages to perpetuate itself and become immune to criticism.

4.2.2. Abuse of Power during the COVID-19 Pandemic

It would be redundant to discuss the well-known havoc caused by the COVID-19 pandemic worldwide. However, beyond the health crisis, a phenomenon occurred, more pronounced in some states than in others (especially in Latin America), regarding abuses of power and the violation of fundamental rights.[36] Here, we are interested in recounting specific events that took place in El Salvador and can be characterized as Constitutional Authoritarian-Populism.

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[35] Valeria Guzmán et al., "Bukele mete al Ejército en la Asamblea y amenaza con disolverla dentro de una semana [Bukele Sends the Army into the Legislative Assembly and Threatens to Dissolve It Within a Week]," *El Faro*, February 10, 2020.

[36] Roberto Gargarella and Jorge Ernesto Roa Roa, "Diálogo democrático y emergencia en América Latina [Democratic Dialogue and Emergency in Latin America]," *MPIL Research Paper Series* No. 2020-21 (2020): 1–30, http://dx.doi.org/10.2139/ssrn.3623812.

The issue is that the activation of a "state of exception", as referred to in the Salvadoran Constitution, is subject to rules, both formal and substantive, that limit such an extraordinary situation. Among the formal rules is the fact that it can only be decreed by the Legislative Assembly and, only in its absence, by the Executive Branch, in the event that the Legislative Assembly is unable to convene. Among the substantive rules, it can be mentioned that only certain rights can be suspended, and at no time can they be completely abolished, and the democratic system does not have to be affected.

In El Salvador, the pandemic exposed an abuse of power by the Executive Branch in two ways: the disregard for constitutional rules that allow for the declaration of a state of exception, and, on the other hand, the widespread violation of human rights through the practice of arbitrary detentions (disguised as quarantine measures) based solely on being present in a prohibited time or space.[37]

Regarding the first point, through a series of Decrees, the Executive Branch sought to usurp the powers of the Legislative Branch by ordering mandatory home quarantines and movement restrictions within the territory of the republic. As for the second point, the same Decrees stipulated that those who violated the established rules would be transferred to confinement centers for quarantine, which in practice resulted in arbitrary detentions.

Once again, the matter reached the Constitutional Chamber. The tribunal ruled that Executive Decrees No. 5, 12, 14, 18, 19, 21, 22, 24, 25, and 26 were unconstitutional since the suspension of one or more fundamental rights in the whole or in part of the national territory is only possible through a state of exception adopted through constitutionally established channels.[38] In another decision, the Chamber granted Habeas Corpus in favor of "*all persons who have been deprived of their liberty since the night of Saturday, March 21, 2020, based on Executive Decree No. 12…*".[39]

[37] Human Rights Watch, "El Salvador: Abusos Policiales en la Respuesta a la Covid-19 [El Salvador: Police Abuses in Response to COVID-19]," *Human Rights Watch*, April 15, 2020.
[38] *Judgment of Unconstitutionality 21-2020/23-2020/24-2020/25-2020*, June 8, 2020.
[39] *Judgment of Habeas Corpus 148-2020*, March 26, 2020.

These decisions did not sit well with the Executive. The President of the Republic expressed on several occasions that he would not comply with the rulings of the Constitutional Chamber because, in his opinion, these rulings "ordered him to kill thousands of Salvadorans".[40] Furthermore, on one occasion, he stated that if he were a dictator, he would have already ordered the execution of the Justices of the Constitutional Chamber, stating, "saving thousands of lives in exchange for five".[41]

V. THE REMOVAL OF THE CONSTITUTIONAL CHAMBER JUSTICES IN EL SALVADOR

The essence of constitutional courts lies in their counter-majoritarian nature. Their function of declaring laws and other acts unconstitutional clashes directly with the will of those who hold political power and with the will of the majority, whose interests are often represented by the members of the Parliament or Legislative Assembly who were democratically elected. The questioning of the democratic legitimacy of constitutional courts, known as the "counter-majoritarian objection", is not new and can be summarized in the question: Why should judges have the power to overturn decisions made by democratically elected representatives?[42] This is not the space to theorize about it, but rather to establish a starting point: Constitutional courts are inconvenient for political power, and their optimal functioning is a key component of the principle of separation of powers. Constitutional courts are often seen by authoritarian leaders as an obstacle that must be removed at all costs.

[40] BBC News Mundo, "Coronavirus en El Salvador: la polémica por la negativa de Bukele a acatar la orden de la Corte Suprema que prohíbe 'detenciones arbitrarias' durante la cuarentena [Coronavirus in El Salvador: The Controversy Over Bukele's Refusal to Comply with the Supreme Court's Order Prohibiting 'Arbitrary Detentions' During the Quarantine]," *BBC News Mundo*, April 16, 2020.

[41] H. Sermeño and Eugenia Velásquez, "Bukele contra la Sala: 'Si fuera un dictador, los hubiera fusilado a todos. Salvas miles de vidas a cambio de cinco' [Bukele Against the Chamber: 'If I Were a Dictator, I Would Have Executed Them All. You Save Thousands of Lives at the Cost of Five']," *elsalvador.com*, August 10, 2020.

[42] Alberto Macho Carro, "De la dificultad contramayoritaria al diálogo interinstitucional: mecanismos de equilibrio en la relación justicia constitucional – poder legislativo [From the Counter-Majoritarian Difficulty to Inter-Institutional Dialogue: Mechanisms of Balance in the Relationship Between Constitutional Justice and the Legislative Power]," *Anuario Iberoamericano de Justicia Constitucional* 1, no. 23 (2019): 235.

In its recent history, especially from the period of 2009-2018, the Constitutional Chamber of El Salvador was characterized by playing an active role in controlling political power. To mention a few examples, through its judgments: a) It authorized the participation of independent candidates for the position of deputy in the Legislative Assembly[43]; b) Declared unconstitutional a constitutional amendment that aimed to reverse the aforementioned decision[44]; c) Declared unconstitutional a constitutional amendment that sought to extend the term of mayors and deputies[45]; d) Declared unconstitutional the General Budget of the Nation[46]; e) Declared unconstitutional the appointment of public officials based on their affiliation with political parties[47]; d) Recognized new rights, such as access to public information[48] and informational self-determination[49]; e) Declared a state of unconstitutionality due to the overcrowded conditions in the country's prisons[50]; f) Declared the Amnesty Law unconstitutional[51]; g) Declared the figure of substitute deputies unconstitutional[52]; h) Granted amparos, obligating the public healthcare system to provide adequate medical treatments[53], among many other relevant decisions.

All political actors became aware that an independent and technical Constitutional Chamber was the greatest obstacle to fulfilling purposes that deviated from the framework of constitutionality.

5.1. The Fateful Night for Democracy

As mentioned before, in the general elections, to select the deputies of the Legislative Assembly, on February 28 of 2021, the political party Nuevas Ideas won 56 seats. The first session of this completely renewed

[43] *Judgment of Unconstitutionality 61-2009*, July 29, 2010.
[44] *Judgment of Unconstitutionality 7-2012*, December 16, 2013.
[45] *Judgment of Unconstitutionality 33-2015*, November 24, 2017.
[46] *Judgment of Unconstitutionality 1-2017/25-2017*, July 26, 2017.
[47] *Judgment of Unconstitutionality 122-2014*, April 28, 2015, among others.
[48] *Judgment of Amparo 713-2015*, September 1, 2016.
[49] *Judgment of Amparo 934-2007*, March 4, 2011.
[50] *Judgment of Habeas Corpus 119-2014 ac*., May 27, 2016.
[51] *Judgment of Unconstitutionality 44-2013/145-2013*, July 13, 2016.
[52] *Judgment of Unconstitutionality 33-2015*, July 13, 2016.
[53] *Judgment of Amparo 166-2009*, September 21, 2011 and *Judgment of Amparo 701-2016*, July 2, 2018.

Legislative Assembly (for the period 2021-2024) took place on May 1st. In a session that lasted more than 6 hours, between the evening of May 1st and the early morning of the following day, a surprising proposal was made by some deputies of the majoritarian party: to remove the Justices of the Constitutional Chamber.[54]

The arguments in which they based their proposal were, in summary, that the Constitutional Chamber issued a series of arbitrary judgments out of the range of its competence, that they violated the separation of powers, and that they put into risk the health of all Salvadorans by ruling against the measures taken by the Government to fight COVID-19.[55] No due process of law was followed for their removal. In the incredulous gaze of the entire population, who were following the session of the Legislative Assembly through various media outlets, in the blink of an eye, the new lawyers were already being sworn in to occupy (or usurp) the positions of Justices of the Constitutional Chamber.

Did the Legislative Assembly have the power to remove the Justices from the Constitutional Chamber? In a normative sense, the answer is yes. Article 186 of the Constitution grants the Legislative Assembly not only the authority to elect Justices of the Supreme Court (including those of the Constitutional Chamber), but also to remove them, with the vote of 56 deputies. The same Article 186 establishes that the causes for which the Justices can be removed must be previously established by law.[56] This is a case of what constitutional theory have called a constitutional mandate. Constitutional mandates are orders directed by the primary constituent power[57] to the constituted powers ––predominantly to the

[54] Menjivar, "El Salvador," 119-120.
[55] Menjivar, "El Salvador."
[56] Menjivar, "El Salvador."
[57] Following Yaniv Roznai, I refer to "primary constituent power" instead of "original constituent power" and to "secondary constituent power" instead of "constitutional amendment power". The argument maintains that it is wrong to call constituent power "original" since it never arises from nothing, from the mere vacuum, there are always political institutions or institutional situations that already exist previously. Consequently, since the constitutional amendment power derives from the primary constituent power and is subordinate to it, it is viable to call it secondary constituent power. See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2019), 120–122.

Legislative–– for the issuance of acts that make certain constitutional norms fully applicable and thus the rights or situations provided in them become effective in practice.[58]

The law that should regulate the causes for which Justices could be removed from the Supreme Court did not exist at the time the Legislative Assembly decided to remove them, and still does not exist, at the time of writing this work (July, 2023). The argument used by the Legislative Assembly to apply Article 186 of the Constitution, even when there was no regulatory law, was the direct application of the Constitution. This argument does not apply to those cases in which the primary constituent power expressly decided to leave some matters for legislative development. Despite this, it was applied.[59]

Later that same day, the Constitutional Chamber issued a judgment declaring their removal unconstitutional, but it was not carried out and the new "Justices" took office that same day. These acts carried out by the Legislative Assembly have been characterized as a typical case of Constitutional Authoritarian-Populism. In one way or another, constitutional democracy in El Salvador has been weakened, as one more case of the democratic erosion that has plagued Latin America since the mid-20th century.[60]

5.2. The Reaction of the Removed Constitutional Chamber

At 8:20 p.m., on May 1st, the recently removed Justices of the Constitutional Chamber issued an unprecedented decision in the history of the country: an unconstitutionality judgment *ex officio*. The arguments given by the Constitutional Chamber can be summarized as follows. Article 174 of the Constitution grants the Constitutional Chamber the power to judge the cases described in Part II of this work. But this case was not referred to an Unconstitutionality process [*proceso de inconstitucionalidad*]

[58] José Alfonso da Silva, *Aplicabilidad de las normas constitucionales [Applicability of Constitutional Norms]* (México: UNAM, 2003), 153
[59] Menjivar, "El Salvador."
[60] Menjivar, "El Salvador."

in the strict sense, because no person filed a lawsuit to start it, it was issued *ex officio*, then the Constitutional Chamber called *it Mandamiento judicial de inconstitucionalidad* [Judicial order of Unconstitutionality].

The Constitutional Chamber argued that this practice was not their invention. And said that other constitutional courts have done it before in similar cases, when the form and system of government have been put at risk to favor the President of a Republic. In 1993, in Guatemala, President Jorge Serrano Elías issued certain provisions to suspend certain fundamental rights, dissolve Congress, and dissolve the Supreme Court of Justice and the Constitutional Court. The Constitutional Court issued an *ex officio* ruling declaring those provisions unconstitutional.[61]

In another argument, the Constitutional Chamber said that the Legislative Assembly's decision to remove them was greatly influenced by the President of the Republic, so there was an imbalance in the balance of power. Finally, the Constitutional Chamber argued that it would be useless to follow a regular Unconstitutionality process in which, surely, the Legislative Assembly would ignore the authority of the decision issued.[62]

Once its competence to issue said judgment was justified, the Constitutional Chamber continued its arguments explaining the context in which its decision was being issued. Following Cass Sunstein, it considered that the President and his officials had been carrying out a series of nudges to turn public opinion against them and thus undermine their legitimacy. All these actions led the people to "validate" the decision of the Legislative Assembly to remove the Justices from the Constitutional Chamber.[63]

The Constitutional Chamber considered that all this had the purpose of breaking the form and system of government and monopolizing power in the hands of the President as a "popular triumph", even knowing that,

[61] Menjivar, "El Salvador."
[62] Menjivar, "El Salvador."
[63] Menjivar, "El Salvador."

in reality, he was trying to obtain unlimited power, as has happened in recent Latin American history.[64]

Also, the scenario presented was one in which a presidential system degenerated into a hyper-presidential one. The political party related to the President had a qualified majority in the Legislative Assembly, so it did not represent a real counterweight to his power. From the foregoing, the Constitutional Chamber concluded that the real purpose of the President was to suppress the only real counterweight that remained: The Constitutional Chamber. Thus, when electing new Justices related to the President, judicial review would formally continue to exist, but it would be inoperative in practice.[65] This would also imply that the guarantee of judicial independence for those judges would be basically non-existent.

The Constitutional Chamber considered that the decision made by the Legislative Assembly negatively affected the form of government and the political system established in Article 85 of the Constitution, which cannot be altered because it is one of the eternity clauses established in Article 148 of the Constitution. First of all, the government would no longer be, in practice, republican. The system of checks and balances would be non-existent in reality, since the three powers of the State would be in the hands of the Executive Branch, even though this is contrary to the Constitution.[66]

On the other hand, the Chamber said that the democratic character of the government would be affected. Without an effective countermajoritarian organ that can override legislative or executive decisions, democracy will operate in practice without any insurance for its substantial element. In this sense, only its formal component, the majority, will remain effective, but not the substantial one.[67]

[64] Menjivar, "El Salvador," 120-121.
[65] Menjivar, "El Salvador," 121.
[66] Menjivar, "El Salvador."
[67] Menjivar, "El Salvador."

The judgment also considered that fundamental rights, as one of the main elements of the Salvadoran political system (Article 85 of the Constitution), would be affected by not having an independent Constitutional Chamber, whose decisions in defense of the rights of the majority, but also of minorities, could be influenced by the Executive Branch. Finally, after making a much broader theorization than can be summarized here, the Constitutional Chamber declared that the Legislative Decree by which their removal was decided was unconstitutional. Consequently, the decision must be complied with immediately. Unlike Guatemala in 1993, in El Salvador that never happened.[68]

5.3. History Repeats Itself: The New Constitutional Chamber Authorized Presidential Re-Election

Articles 174 and 182.7 of the Constitution confer on the Constitutional Chamber the competence to declare the loss of their political rights to persons who "*sign acts, proclamations or accession to promote or support the re-election or continuation of the President of the Republic, or use direct means to that purpose*". The case 1-2021[69] began with a lawsuit filed by a citizen before the Constitutional Chamber in which he demanded the loss of political rights of a person who, being a pre-candidate for deputy for the ruling party of El Salvador, promoted the re-election of the current President of the Republic.[70]

The Salvadoran Constitution considers as an eternity clause, that is, that it cannot be reformed by the secondary constituent power, everything related to the alternation in the exercise of the Presidency of the Republic. The protection of this clause by the Constitution reaches such a point that, as a unique case in Latin America, whoever intends to alter it may lose their political rights.[71]

[68] Menjivar, "El Salvador."
[69] *Judgment of Pérdida de los derechos de ciudadanía [Loss of Political Rights] 1-2021,* September 3, 2021.
[70] Menjivar, "El Salvador," 121.
[71] Menjivar, "El Salvador."

The case 1-2021 was rejected. Nonetheless, the new Constitutional Chamber took the opportunity to stablish a new interpretation about the presidential term limits in El Salvador. For the Salvadoran primary constituent power, the prohibition that the president could be reelected immediately and continuously was a fundamental decision. Another series of provisions confirm it. Article 152.1 of the Constitution maintains that a person who has held the presidency for more than six months, consecutive or not, during the immediately preceding period or within the last six months prior to the beginning of the presidential term, cannot be a candidate for President.[72]

Article 88 of the Constitution maintains that the alternation in the exercise of the presidency of the Republic is essential for the maintenance of the form of government and the political system, and that the violation of said norm forces the insurrection of the people. On the other hand, article 75.4 of the Constitution contemplates that the fact of promoting or encouraging presidential re-election is a cause of loss of political rights.[73]

Finally, the Constitutional Chamber had interpreted in its jurisprudence that the prohibition of immediate presidential re-election covered not only leaving a presidential term in between, but two, since the prohibition includes the nomination as a candidate in the period immediately following the one in which it was exercised the presidency. [74]

Apparently, and from a strictly normative point of view, all the avenues of access to presidential re-election were constitutionally closed. Nonetheless, in case 1-2021, the new members of the Constitutional Chamber reinterpreted the previous criteria to change it completely. In their opinion, article 152.1 of the Constitution what actually prohibits is that whoever has already been president in a first period, and being in a second period, can run for a third period. Consequently, re-election is not

[72] Menjivar, "El Salvador."
[73] Menjivar, "El Salvador."
[74] *Judgment of Unconstitutionality 163-2013*, June 25, 2014.

prohibited for those who, being in a first term of the presidency, decide to opt for a second term. If it seems confusing, that's because it is.[75]

I will try to graph it as follows: P is president at time t_1, therefore, when the Constitution speaks of the "immediately preceding period", it refers to time t_{-1}, that is, when P was not yet president. Hence, P can run for his re-election at time t_2. Nevertheless, already being in t_2, since P was president in t_1, and that would be his "immediate previous term", he could no longer run for a third term at time t_3.[76]

The decision also appeals to the sovereignty of the people, who "will have among their range of options the person who at that time holds the presidency, and it is the people who decide whether to place their trust in him again or if they opt for a different option". The problem with the previous interpretation is that it contradicts what the primary constituent power shielded through an eternity clause and another series of constitutional norms, that is, the clear intention to prohibit consecutive presidential re-election.[77]

This is one more case in Latin America of the modification of the presidential term limits through the interpretation of the constitutional courts (it is added to the cases of Bolivia, Costa Rica, Honduras and Nicaragua). A clear case of Abusive Constitutionalism.

VI. CONCLUSION

An independent Constitutional Court is often the greatest counterbalance to power in a constitutional democracy. That is why both domestic and international regulations ensure special guarantees for those holding the positions of judges, specifically for constitutional judges. Among these guarantees is stability and tenure in office, which means that they can only be removed for legally established reasons and through due process of law.

[75] Menjivar, "When Judges Unbound."
[76] Menjivar, "When Judges Unbound."
[77] Menjivar, "El Salvador," 122.

What happened on May 1, 2021 in El Salvador is a perfect example of how power, under the influence of authoritarian populism that simulates acting within constitutional rules, can undermine any remaining democratic elements that pose obstacles to complete concentration of power. But what role does judicial independence play in all of this? We have seen that judicial independence has at least two dimensions: An objective one, which functions as a functional principle of the legal system and as a guarantee of the separation of powers; and a subjective one, as a guarantee to individuals that their disputes will be adjudicated by judges who are not constrained by any external mandate or power.

Indeed, judicial independence is seen as a nuisance by those in power. In this paper, a descriptive and critical analysis was conducted on how populist narratives, combined with the concentration of power and its arbitrary use under the guise of certain constitutional rules, facilitate the consolidation of illiberal regimes, such as authoritarianism in any of its manifestations.

In El Salvador, this combination, which we refer to as Constitutional Authoritarian-Populism, has manifested itself in various forms in recent years, with the most serious, in our opinion, being the removal of the Justices of the Constitutional Chamber. The populist rhetoric began paving the way well in advance, aiming to turn the majority of the population against the Constitutional Chamber, portraying them as enemies who hindered the execution of actions in the people's best interest. Subsequently, a Legislative Assembly with a supermajority held by a single political party aligned with the Executive Branch relied on a constitutional provision that allows for the removal of Supreme Court Justices to make that decision regarding the Justices of the Constitutional Chamber. As we have seen before, the Constitution requires that the grounds for removal be clearly defined by law, a requirement that is currently not met, as well as the normative requirement to allow the accused to exercise their right to defense, which was also not fulfilled.

The elimination of the last check on the powers of the State is not just an act of Abusive Constitutionalism, as described by David Landau, but it goes beyond that to the rapid advancement of the consolidation of an authoritarian regime, where there is no genuine system of separation of powers, checks and balances, and respect for fundamental rights.

It might seem like too much of a coincidence that, once the new members of the Constitutional Chamber were installed, their first significant decision shortly thereafter was to authorize presidential re-election, despite the Salvadoran Constitution having several Articles, including eternity clauses, that sought to prohibit it at all costs. This is one of the purposes of appointing judges who are aligned with those in power. These judges do not appear to act independently from external agents because, on the one hand, on the day of the removal of the legitimate Justices of the Constitutional Chamber, they were already prepared to be sworn in (which leads us to infer prior communication and agreements), and on the other hand, they have not made a single decision (since May 2021) that puts any brakes on the exercise of Executive or Legislative power.

In the aforementioned judgment of Judicial order of Unconstitutionality 1-2021, the Constitutional Chamber concluded:

> That the decision of the Legislative Assembly of El Salvador to remove the Justices of this Constitutional Chamber is unconstitutional because it violates Article 85 of the Constitution by aiming to suppress one of the effective controls on the actions of the Executive and Legislative branches, and subsequently, with the existing correlation, elect new officials aligned with the figure of the President. Consequently, this act is an abuse of right —a clear example of Abusive Constitutionalism— that seeks to allow the exercise of power without any effective control. This is incompatible with the republican, democratic, and representative character of the government and with the pluralistic political system.

In conclusion, the removal of the Justices of the Constitutional Chamber was a defeat not only for judicial independence but also for the democratic system in El Salvador and for the guarantee of the fundamental rights of its citizens.

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Constitutional Court Regression in Post-Democratic Transition: A Comparison of Court Packing in Hungary, Poland, and Indonesia

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Abstract

Over the past two decades, the constitutional court established in the post-democratic transition has begun to face regression. The Constitutional Courts in Hungary, Poland, and Indonesia have evidence, carried out intensively through court packing. This article investigates the regime's undermining of the constitutional court against constitutional judges in selected countries. In addition, this article will also describe the regime's motives and objectives in undermining the independence of the constitutional court. This study argues that regression of the constitutional court occurs through several patterns, such as increasing and decreasing the number of constitutional judges, politicizing the appointment and dismissal of constitutional judges, and rearranging the requirements and selection procedures of constitutional judges. The regime uses court packing to place judges who are loyal or have the same political preferences as the regime to provide control over their independence.

Keywords: Constitutional Court; Court Packing; Judicial Independence

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I. INTRODUCTION

Several legal and political scholars have intensively compared constitutional regression, including Aziz Huq, Tom Ginsburg,[1] Rosalind Dixon, and David Landau.[2] Regression refers to how the quality of constitutional supremacy is undermined, corrupted, or reduced. The studies were explained with contexts and factual practices. In them, constitutions were the objects of study. Eventually, they conclude that anti-democratic measures may also undermine constitutions. To make matters worse, democratic constitutions were amended to be authoritarian by adopting legally formal measures.

In Hungaria, Kim Lane argues that since winning the 2010 election, the Fidesz Party has influenced the supremacy of law and the principle of constitutionalism in Hungary. Fidesz Party has won four consecutive elections, including the last one in April 2022. According to Schepelle, the victory of Orban and Fidesz in the last four elections cannot be separated from three things: first, ensuring an unfair and uncompetitive electoral system through engineering laws, such as manipulating the number of parliamentary seats and determining voter requirements; second, controlling the press and limiting its role, especially in discussing government issues that are counterproductive for government policies; third, crushing the role of the opposition in the parliament.[3]

In Poland, Sadurski also claims that there are three patterns of undermining the Polish constitutional supremacy. The first is undermining the constitutional court's and its judges' independence. Only judges sharing the same political preference as the government were chosen. The second is disabling the opposition's role by means of the coalition to control all state resources in making policy and supervising or controlling policies. The third is coopting the media to maintain the pro-government narrative under the control of the President and the major party in the parliament.[4]

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1 Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (March 2018): 79–169.
2 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021), 11.
3 Kim Lane Scheppele, "How Viktor Orbán Wins," *Journal of Democracy* 33, no. 3 (July 2022): 45–61.
4 Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding," *Sydney Law School Legal Studies Research Paper* No. 18/01 (January 2018).

Like Hungary and Poland, the development of democracy and constitutionalism in Indonesia has been regressed over the last five years. This study is of the position to view that democratic regression reached its peak under the leadership of Jokowi-Amin from 2019 to 2024. As the opposition, i.e., the Greater Indonesia Movement Party (Gerindra –*Gerakan Indonesia Raya*) joined the government coalition led by the Indonesian Democratic Party in Struggle (PDIP –*Partai Demokrasi Indonesia Perjuangan*), constitutional supremacy in Indonesia started to be undermined. The huge support from the majority in the parliament has led to several controversial and unpopular policies. For instance, "*autocratic legalism*" was shown in making laws[5] and undermining the independence of Constitutional Court judges.[6]

Like the previous paper, this article discusses the undermining of constitutions. However, this study focuses on how judicial independence has been undermined. This article emphasized that constitutions have often been weakened by undermining the independence of the judiciary, i.e., constitutional courts. Dixon and Landau concepts indicate a decline in constitutional supremacy (*constitutional decline*) always carried out by "dwarfing" the constitutional court through the tenure of judges (*court packing*) and institutional organization (*court crubbing*). The differences between the two models of undermining the judiciary can be seen in the table below.

Table 1: Types of Undermining the Judiciary[7]

Technique for Undermining the Judiciary	
Court Packing	***Court Crubbing***
Decreasing or increasing the number of judges in their panels	Cutting the budget of the judiciary
Dismissing judges during their term of office for political reasons	Reducing the facilities for judges and the judiciary

[5] Zainal Arifin Mochtar and Idul Rishan, "Autocratic Legalism: The Making of Indonesian Omnibus Law," *Yustisia Jurnal Hukum* 11, no. 1 (April 2022): 29–41.

[6] Idul Rishan et al., "Amendment to Term of Office of Constitutional Court Judges in Indonesia: Reasons, Implications, and Improvement," *Varia Justicia* 18, no. 2 (2022): 141–155.

[7] See Dixon and Landau, *Abusive Constitutional Borrowing*, 92.

Technique for Undermining the Judiciary	
Court Packing	***Court Crubbing***
Changing the retirement age	Restricting court jurisdiction
Politicizing judicial appointment	Controlling judicial interpretation
Taking disciplinary measures through administrative sanctions	Restricting court authority

Source: *reviewed by the author*

The comparative context in this article uses the conceptualization developed by Dixon and Landau by limiting the study to the court packing method in constitutional courts in selected countries. As noted by Thusnet, there are three perspectives on comparative studies. First, the functionalist perspective emphasizes comparative studies to identify various models, arrangements, and practices to attain the same objective. Second, expressivism identifies differences to contextualize what a nation needs as a political entity. Third, *bricolage* works in a markedly different manner. Experiences and practices in other countries are not necessarily preferred, but they give lessons in building a model and system in the constitution.[8]

This study takes the functionalist view. This article discusses how the independence of constitutional courts in several countries has been undermined. The scope of comparison is Hungary, Poland, and Indonesia due to the same form of constitutions,[9] form of states and government,[10] and constitutional adjudication model. Therefore, this article has two issues: How are those countries undermining the constitutional court by the regime through court packing? And what are the regime's motives and objectives in undermining the independence of the constitutional court?

[8] Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *The Yale Law Journal* 108, no. 6 (April 1999): 1225–1309.

[9] In terms of their forms, there are codified and uncodified constitutions. All the countries compared in this chapter have codified constitutions. The conceptual boundaries of constitutions refer to Albert's view. See Richard Albert, "How Unwritten Constitutional Norms Change Written Constitutions," *Dublin University Law Journal* 38, no. 2 (2015): 1–26.

[10] In this article, the form of states is unitary and the form of government is republic. Thus, this study refers to Kelsen's view which defines forms of states, forms of government, and systems of government. See Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1971), 255.

II. ANALYSIS & DISCUSSION

2.1. Constitutional Court in Hungary, Poland, & Indonesia

2.1.1. Hungary Constitutional Court (HCC)

The Hungarian constitutional amendment in 1989 has significantly influenced Hungary's constitutional system. The phase was the starting point of the transition from communism to democracy. Hungarian political reform made a breakthrough by adopting the multi-party system, strengthening the parliamentary system, and establishing the constitutional court. In addition, *judicial review* was institutionalized to review laws against the constitution.[11]

In 1989, the *Hungarian Constitutional Court* (HCC) was established as Hungarian constitutional tribunal. Since its onset, it has played an important role under the constitution amended in 1989. Due to institutionalized "*judicial review*" in Hungary, the HCC has been vital in assessing the validity of laws made by the parliament (*house*) against the new constitution of 1989. The communist parliament chose the first five HCC justices in April 1989. However, the new parliament appointed the other five because of the 1990 election. In 1993, one of the judges, Herczegh J, left his office to join the International Court of Justice in The Hague, and the parliament had to choose two justices. In Hungary, appointing constitutional court justices was a complicated political process. How the first judges of HCC were chosen was not separated from political tension. In addition, it took seven years until all 11 judges were inaugurated in 1996 and 1997.[12]

Laszlo Solyom was the first Chief Justice of the HCC in the history of the Hungarian constitutional tribunal. During the transition, the HCC transformed political issues into legal ones in which final and binding decisions could resolve.[13] In the history of how constitutional adjudication established in post-communist states, the HCC was the finest example, and it was publicly legitimate in its first

[11] Ferenc Hörcher and Thomas Lorman, eds., *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe* (London and New York: I.B. Tauris, 2018), 23.

[12] Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford and Portland, OR: Hart Publishing, 2003), 35.

[13] László Sólyom, "The Hungarian Constitutional Court and Social Change," *Yale Journal of International Law* 19 (1994): 223–237.

years. Kim Lane Scheppele says that the HCC was "*courtcracy*" or an institution evolving into a pillar of protecting citizens under the constitution, particularly in the early 90s. It played a prominent role in protecting the fundamental rights of citizens against unpopular policies in the parliament. In its years, the HCC was particularly aggressive. It invalidated laws due to their articles, which conflicted with the constitution despite several constitutional articles.[14]

According to Imre Voros, the institutionalization of constitutional courts in Central and Eastern Europe was a new trend in the transition from communism to democracy. He adds that the HCC has broad authority. It assesses the constitutionality of legal norms made by the parliament, central government, and local governments. In addition, it has the authority to preview acts approved by the parliament. It even has the authority to interpret the constitution to resolve constitutional disputes between state institutions and impeach the President.[15]

2.1.2. Constitutional Tribunal

Following the same pattern as other post-communist countries, the idea to establish the *Constitutional Tribunal* (CT) already emerged in 1981. Then, it began to have several authorities in 1989 as the totalitarian regime fell. Compared to Hungary, the political transition in Poland took a longer time. The amendment to the *Polish* Constitution was adopted in 1997, strengthening the role of the CT in constitutional adjudication in Poland. It follows the "*Kelsenian*" model, having the authority to assess the constitutionality of laws.[16]

It seems that the Polish CT shows that political transition often results in a constitutional court. Political configuration shifts eventually lead to the need for legal development due to social, political, and economic crises it causes.[17] At first, the CT was designed to be a strong institution. Furthermore, its institutional

[14] James T. Richardson, "Religion, Constitutional Courts, and Democracy in Former Communist Countries," *The Annals of the American Academy of Political and Social Science* 603 (January 2006): 129–138.

[15] Imre Vörös, "Contextuality and Universality: Constitutional Borrowing on the Global Stage—The Hungarian View," *University of Pennsylvania Journal of Constitutional Law* 1, no. 3 (1999): 651–660.

[16] George Sanford, *Democratic Government in Poland: Constitutional Politics since 1989* (New York: Palgrave Macmillan, 2002), 210.

[17] Ruti Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014), 4–5.

and judicial independence was ensured by the constitution. It is separated from the Supreme Court to ensure the bifurcation of the Polish judiciary. [18]

In Poland, the CT has promoted judicial activism to expand human rights, particularly since the totalitarian system fell in 1989 and the need to build a democratic state under the rule of law. It was even encouraged to interpret standards of rights and freedom indirectly enshrined by the constitution and complete existing constitutional provisions according to new democratic values and systems. Almost like the HCC, the establishment of the CT in the early 90s was called "*courtcracy*".[19]

According to Sadurski, after 18 years since the Polish constitution was amended (1997- 2015), under Marek Safjan's leadership, the CT has played a vital and constructive role in protecting human rights. The CT has been the symbol of the history of Polish democracy by proving the judiciary can be an effective control instrument during and after the political transition. Several of its *landmark* decisions have contributed to legal development in Poland after the political transition. They made some communist criminal laws congruent with the development of democracy and the constitution. Second, the CT helped make the Polish legal system congruent with EU laws and standards by invalidating the ratification of the Treaty of Accession and the Treaty of Lisbon. Third, the CT made important and positive contributions toward democratic government by reaffirming governmental organization's power limits, constitutional amendment, and presidential prerogatives.[20]

2.1.3. Constitutional Court

After economic and political crises hit Indonesia in 1998, the constitution was amended gradually from 1999 to 2002, laying the foundation for the Constitutional Court. Simon Butt says that the institutionalization of the Constitutional Court was associated with how global democracy changed. During the political transition,

[18] Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (New York: Hart Publishing, 2019), 131.

[19] Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (New York: Cambridge University Press, 2011), 57.

[20] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019), 60.

constitution framers learned the phenomenon of constitutional adjudication institutionalized by South Africa, South Korea, and other countries in the face of the democratization phase.[21]

In Indonesia, the existence of the Constitutional Court aligns with the extraordinary transition from Soeharto's strong regime to liberal democracy. From the legal point of view, the transition was completed through a series of constitutional amendments passed by the People Consultative Assembly from 1999 to 2002. Even though the third amendment was approved in 2001, the Constitutional Court was established two years later. The Constitutional Court was designed as the final interpreter of constitutional values and norms to address mega-political issues based on principles of constitutionalism. In reaching the consolidation stage, the Constitutional Court catalyzed democracy.[22]

As noted by Hendrianto, three factors were responsible for the establishment of the Constitutional Court in Indonesia. First, in terms of history and politics, the Constitutional Court was established in response to the continuous demand from civil society for institutionalizing constitutional review. Second, the fall of the military government allowed democratic reform, including strengthening the role of judicial control through *judicial review*. Third, the theory of political diffusion indicates that the introduction of *judicial review* is a response to constitutional development in other states.[23]

The establishment of the Constitutional Court in 2003 was in line with constitutionalism, where no laws may contradict the constitution. Thus, judicial review is necessary. If citizens, individuals, communities, or legal entities think that a law infringes on their constitutional rights, they can file a constitutional review of the law to the Constitutional Court.[24] Constitutional review by the Constitutional Court plays an important role in upholding the rule of law and

[21] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), 18

[22] Hongyi Chen and Andrew Harding, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 12.

[23] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 41.

[24] Saldi Isra, "Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia," *Jurnal Konstitusi* 11, no. 3 (September 2014): 410–427

protecting citizens' rights fully, including protecting them from policies made by majoritarianism in the parliament.[25]

Appointed by the Indonesian House of Representatives, Jimly Asshiddiqie was the first Chief Justice of the Constitutional Court. Theunix Roux shows that in its first ten, the court was known to be strong and responsive under the leadership of Ashiddiqie and Mahfud M.D. Roux states that their leadership left enduring legacies to the establishment of the Constitutional Court. Under his leadership, Constitutional Court was accountable and moderate. Ashiddiqie introduced syllogism in the court's decisions, *dissenting opinions*, and conditional rulings to maintain a non-confrontational relationship between the judiciary and legislative branches.

During Mahfud M. D.'s era, the court promoted substantive justice in each ruling. It can be seen from the doctrine of Structured, Systematic, and Massive in electoral violations, rejection of the liberalization and privatization of education, and protection of the independence of the Corruption Eradication Commission from various interventions threatening its role and authority. According to Dixon, during the two eras, the court responsively prevented threats or dysfunctional democracy. Constitutional Court even played a vital role in resolving conflicts of interest between lawmakers and citizens. According to Dixon, the public put the greatest trust in the court in those eras.[26]

2.2. Comparative Court Packing

2.2.1. Experience of Hungary Constitutional Court

Since 2010, Fidesz has been the majority with two-thirds of the total seats in the National Assembly. Unsurprisingly, the Orban government can significantly amend laws and the Constitution of Hungary. The Orban government implemented its first anti-democratic policy after the election on 5 July 2010, when it abolished the requirement of 4/5 of the lawmakers for amending the

[25] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 21.

[26] Rosalind Dixon, "Responsive Judicial Review in Indonesia" (paper presented at Konferensi Nasional Hukum Tata Negara, "20 Tahun Mempertahankan Hasil Perubahan Undang-Undang Dasar," Malang, 1–3 December 2022), 3.

Hungarian constitution. As a consequence, removing the requirement drew criticism because, with just a 2/3 vote, Fidesz does not need the opposition to amend the constitution. Unsurprisingly, several scholars deem the Hungarian Constitution (Fundamental Law (FL)) of 2011 to be the "*Fidesz Law*". Despite [27] Fidesz's maneuvers under the Orban government are like "*window dressing*" policy.[28]The government seems to have reformed FL 2011 but has been weakened or experienced regression.

In addition to making highly elitist procedures for constitutional amendment, Fidesz attacked the HCC, which had played a very strategic role in overseeing government policies for more than twenty years. It is crucial to see the majority's response under the Fidesz Party to the HCC after the fall of communism in Central and Eastern Europe. Bugaric reveals several ways to weaken the HCC. First, the Fidesz Party changed the rules on appointing HCC judges. Second, it changed the composition of judges by increasing the number of constitutional judges. Third, it limited the role of the HCC by amending the law on it.[29]

In terms of procedures for appointing constitutional judges, the parliament under the Fidesz Party amended the constitution, allowing the winning party to propose nominated candidates and giving two-thirds of its votes to choose HCC judges. Thus, Fidesz can appoint judges without multi-party support. Regarding the composition of judges, the Fidesz Party changed the rules by increasing the number of constitutional judges from eleven to fifteen. It allowed the ruling party to appoint new judges directly. In addition, the Chief Justice and Deputy Chief Justice of the HCC are now voted by the majority in the parliament instead of the internal mechanism of the HCC.[30]

Then, the role of the HCC is more limited. The amendment to the HCC Law has restricted constitutional review of laws on taxes and state budget if

[27] Stefano Fella, *Hungary: Viktor Orban's Government and European Reaction*, Commons Library Research Briefing (London: House of Commons Library, 2022), 10.

[28] See Dixon and Landau, *Abusive Constitutional Borrowing*, 36.

[29] Bojan Bugaric, "A Crisis of Constitutional Democracy in Post-Communist Europe: Lands In-Between Democracy and Authoritarianism," *International Journal of Constitutional Law* 13, no. 1 (January 2015): 219–245.

[30] Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, "Hungary's Illiberal Turn: Disabling the Constitution," *Journal of Democracy* 23, no. 3 (July 2012): 138–146.

the petition is directly related to the right to life, the dignity of citizens, and the protection of personal data. It shows how the parliament fought back after the HCC frequently invalidated taxes and state budget laws. Interestingly, after limiting HCC's authority, the Hungarian parliament unilaterally claimed that all HCC decisions made before the constitutional amendment did not apply to the amended constitution (*Fundamental Law* of 2011).[31]

In addition, the Fidesz Party undermined judicial independence by dismissing judges by changing their retirement age. Consequently, several judges were laid off. As noted by Kosar, until the end of 2012, 277 out of 2,996 judges were pensioned off. Even Andras Baka (the Chief Justice of the *Hungarian Supreme Court*) was dismissed for frequently criticizing the Orban regime's judicial reform.[32]

2.2.2. Experience of Constituional Tribunal Poland

After Andrejz Duda won the presidential election 2015, Polish democracy experienced regression. After holding office for two terms, President Duda was re-elected in the 2020 election after being proposed by the same party supporting him in the first term, namely the Law and Justice Party (*PiS*). When the party won the 2015 election, a constitutional amendment was high on President Duda's agenda. However, the formal procedures for a constitutional amendment have very definitive rules, making it impossible to amend the Polish constitution.[33]

After the attempt to amend the constitution failed, the CT experienced distortion as the majority of parties had tried to change the composition of Polish constitutional judges by-law amendment. The practice in Poland is almost like the "*midnight appointment*" carried out by Quincy Adam at the end of his term. President Adams had appointed Marshall as the Chief Justice of the Supreme Court, several judges, and ambassadors before Thomas Jefferson succeeded him the next morning. As Adams appointed them at midnight, James

[31] Krisztina Juhász, "Abusive Constitutionalism in Hungary," *Politics in Central Europe* 18, no. 4 (2022): 573–601.
[32] David Kosar and Katarina Šipulová, "The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law," *Hague Journal on the Rule of Law* 10, no. 1 (October 2018): 83–110.
[33] Aleksandra Kustra-Rogatka, "The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts," *European Constitutional Law Review* 19, no. 1 (March 2023): 25–58.

Madison, Jefferson's Secretary of State, did not receive the documents.[34] Hence, Marbury, Robert Townseen, and William Harper were not inaugurated under Jefferson's presidency.[35]

Despite the difference, the political crisis in Poland arose at the end of 2015 when the parliament chose five constitutional judges because their terms were about to expire. Under the previous CT law, a candidate for a judge was proposed three months before the term of office ended. Five candidates were proposed and appointed by the old parliament under the major party (*Governing Party*) as the parliamentary election was held 30 days after the presidential election. Five judges were elected by the parliament, known as "*October Judges.*"[36]

After the parliamentary election, the Law and Justice Party (*PiS*) began to dominate the parliament, which rejected the appointment of those five constitutional judges. In addition, the President inaugurated them, although the old parliament had appointed in October. To strengthen its legitimacy, the parliament amended the CT Law in 2016 to reorganize the procedures for appointing judges by the parliament (*sejm*). Under the transitional provisions of the new CT law, constitutional judges whose terms expired should be proposed, selected, and appointed no later than three months after the law was enacted. Therefore, the winning party (*PiS*) appointed five constitutional judges to delegitimize the old candidates.[37]

One of the appointed judges is Julia Przyłębska, who was chosen by (*PiS*) as a constitutional judge and controversially appointed as the Chief Justice of the CT by the President of Poland. The leadership of Julia Przyłębska is the beginning of CT's dark days. She was openly accused of illegally manipulating the composition of judges in strategic cases to decide in line with the government's political thinking, for instance, constitutional review of the pension system for

[34] Wolfgang Hoffmann-Riem, "Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe," *German Law Journal* 5, no. 6 (June 2004): 685–701

[35] See also William W. Van Alstyne, "A Critical Guide to Marbury v. Madison," *Duke Law Journal* 1969, no. 1 (January 1969): 1–45.

[36] David Parra Gómez, "Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain," *Athens Journal of Law* 7, no. 3 (July 2021): 379–398.

[37] Miroslav Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland," *Hague Journal on the Rule of Law* 11, no. 2 (November 2019): 417–422.

citizens working in state security institutions. It became a very populist issue as the government tightened control over pension savings and ended state-guaranteed private investment schemes. Przyłębska, the Chief Justice of the CT, made six changes to the composition of judges settling the case.[38]

It was criticized by the European Commission for the political and legal crises after the 2015 election. The Duda government, according to the commission, has undermined the CT and disregarded European standards on judicial independence. It should be emphasized that such a situation resulted in a significant decline in public trust in the constitutional court (CT).[39]

2.2.3. Experience of Indonesian Constitutional Court

Interestingly, after the rule of law has been weakened, the independence of constitutional judges is always undermined. Indonesia, Hungary, and Poland have faced similar situations. The Constitutional Court is the primary victim of the rise of *illiberal democracy*. There are stages of undermining the independence of the Constitutional Court over the last five years. The first stage is the third amendment to the Constitutional Court Law. The second is the dismissal of Justice Aswanto. And the third is the proposal for the fourth amendment to the Constitutional Court Law.

In early 2020, the government developed a new blueprint to change the requirements and tenure of constitutional judges. The government's legal policy *shifted* or was in transition. After strengthening the institutional independence of the court, it attempted to maintain and legitimize the maximum age of 70 for constitutional judges and to maintain the leadership composition of Anwar Usman as the Chief Justice of the Constitutional Court.[40] Here are the impacts of the amendment to the Constitutional Court Law on the tenure of constitutional judges.

[38] Adam Ploszka, "It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional," *Hague Journal on the Rule of Law* 15 (June 2022): 51–74.

[39] Laurent Pech et al., "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action," *Hague Journal on the Rule of Law* 13 (March 2021): 1–43.

[40] Idul Rishan, "Doubting the Impartiality: Constitutional Court Judges and Conflict of Interest," *Jurnal Jurisprudence* 12, no. 1 (2022): 92–105.

Table 2: Controversial Clauses in the Third Amendment to Constitutional Court Law

Issue	Before the Amendment to Constitutional Court Law		After the Amendment to Constitutional Court Law	
Minimum Age Limit	Article 16 point c	Shall be of the age of at least 40 when appointed	Article 15 paragraph (2) point d	Shall be of the age of at least 55
Term of Office for Justices	Article 22	5 years and can be reapponted for another term	Article 23 paragraph (1) point c	70 years
Term of Office for the Chief Justice and Deputy Chief Justice	Article 4 paragraphs (3) and (3)a	2 years and 6 months and can be reelected for the same office for 1 term	Article 4 paragraphs (3) and (3)a	Five years since appointed as the Chief Justice and Deputy Chief Justice
Transitional Provisions	-	-	Article 87 point a	The chief justice and deputy chief justice serve for a 5-year term based on the provisions of the law.
			Article 87 point b	the constitutional justices currently serving shall complete their term of office until the age of 70 as long as the term does not exceed 15 years

Source: *reviewed by the author*

In 2022, House of Representatives was arrogant when dismissing Justice Aswanto from the Constitutional Court. Theoretically speaking, the House of Representatives made *rude intervention* in judicial independence. The tactic of law politicization was designed to undermine the court's independence and make the Constitutional Court judges unable to work well. Justice Aswanto was deemed to be frequently against laws made by the House of Representatives. Thus, the House of Representatives replaced Guntur Hamzah. Instead of being legitimate, it infringed on the independence of the judiciary enshrined in the constitution (UUDN). According to Power and Warburton, this phenomenon is *lawfare*.[41]

[41] Thomas Power and Eve Warburton, "Kemunduran Demokrasi Indonesia [The Decline of Indonesian Democracy"]," in *Demokrasi di Indonesia dari Stagnasi Ke Regresi [Democracy in Indonesia: From Stagnation to Regression]*, ed. Thomas Power and Eve Warburton (Jakarta: Public Virtue and Kurawal Foundation, 2021), xxii.

Additionally, if the *draft* of the Fourth Amendment to the Constitutional Court Law is approved, political parties will have a high chance to evaluate the tenure of constitutional judges. By doing so every five years, they can influence the judges as public officials. The evaluation carried out by the proposing institution undermines the independence of the Constitutional Court as a court.

The logic of *checks and balances* is not relevant in this context. Instead, it is replaced by *striking the balances* or inequality between political intervention and the independence of the judiciary. The evaluation processes every five years will subordinate the independence and impartiality of constitutional judges, particularly in hearing and deciding cases. Through the evaluation process, constitutional judges can be dismissed not due to ethical reasons but because differences in the scientific preferences of judges contradicting the political preferences of political parties or the government.[42]

2.3. Comparative Analysis

In Hungary, Poland, and Indonesia, constitutional courts have been undermined by court packing. The emergence of a populist leader is the main contributor to *constitutional* court packing. In this article, populism refers to support given by the majority of political parties in the parliament to the head of government (*chief executive*). Landau says that democratic countries adopting the principle of constitutionalism at first tended to be weak under populist leaders. With strong support, populist leaders tend to make anti-democratic policies (*illiberal democracy*).[43]

By eliminating the opposition or controlling the parliament, they make state policies at will. Legal rules are established to serve the state and those in power without adhering to the principles of constitutionalism.[44] In Hungary, Poland, and Indonesia, each of the regimes are supported by the majority in

[42] Idul Rishan, "Robohnya Independensi Mahkamah Konstitusi: Pembonsaian dan Alternatif Pemulihannya [The Collapse of the Constitutional Court's Independence: Stunting and Alternatives for Its Restoration]", *a paper in Konferensi Hukum Tata Negara Ke-7, 1-3 December 2022*, Malang, p. 6.

[43] David Landau, "Populist Constitutions," *The University of Chicago Law Review* 85, no. 2 (March 2018): 521–544.

[44] Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85, no. 2 (March 2018): 549.

the parliament. Viktor Orban is supported by Fidesz, Andrejz Duda by the *PiS*, and Joko Widodo by the PDIP and its coalition.

Instead of strengthening constitutionalism, the Hungarian constitution has been amended under the populist power to legitimize the regime. The amendment has increased the number of HCC judges from 11 to 15. Hungary did it perfectly by changing the constitutional amendment rules so that court packing was easily done through the constitution (FL).[45] To make matters worse, a constitutional amendment has also restricted the HCC's jurisdiction over judicial review. Hungary is the only country where court packing and crubbing have been done simultaneously.

In Polandia, court packing was not done through amending the constitution. Considering the Polish bicameralism, making political decisions is far more difficult. For this reason, court packing was only done through law amendment was court packing in Indonesia. However, it was done during Joko Widodo's presidency, not after the election results were confirmed. In Indonesia, judicial independence has been undermined by amending the Law on the Constitutional Court and removing its judge during his term of office.

This study views that court-packing is often done in two moments. The first is the beginning of a government after the announcement of election results. If the winning party has different political preferences from constitutional judges, court packing is carried out by rearranging the number of judges, terms of office, retirement age, or judicial selection procedures. It aims to appoint loyal judges so that the constitutional court and lawmakers cooperate more. The second is the midterm of governments. Through this moment, regimes have two aims. They legitimize government policies and ensure that all regulations on implementing elections align with the interests of those in power, including potential conflicts that may arise after election results are announced.

Kosar shows that regimes more frequently used court packing to appoint loyal judges or those having the same political preferences as the government.

[45] James E. Moliterno and Peter Čuross, "Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious," *German Law Journal* 22 (2021): 1159–1191.

Thus, they could control judicial decision-making to legitimize themselves. [46] This study agrees with Kosar. Because through the politicization of office, the independence of constitutional judges becomes weak and results in judges not being able to act impartially in cases involving the interests of power. This context is also in line with the results of the study of Ginsburg and Mustafa, governments often use the judiciary to counter many dysfunctions disrupting their regimes. The judiciary helps exert social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and legitimize those regimes.[47] The court packing is compared in the table below:

Table 3: Comparative Court Packing

Indicators	HCC	CT	CC
Changing the composition of judges	✓	✓	-
Dismissing judges with no ethical and legal process	-	-	✓
Changing terms of office	-	-	✓
Politicizing judicial appointment	✓	✓	✓

Source: *reviewed by the author*

Table 4: Court Packing in Selected Countries

The Cause	The emergence of populist leader
	Elimination of the opposition movement
Subject	Political Party
	Government
Procedure	Abusive Law making/amendment
	Abusive Constitutional making/amendment
	Abusive policy making
Moment	the early of a government after the announcement of election results
	the midterm of governments before the election

[46] David Kosar and Katarina Šipulová, "Comparative Court Packing," *International Journal of Constitutional Law* 21, no. 1 (January 2023): 80–126.

[47] Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008), 21.

Goals	frequently used by regimes to appoint loyal judges or those having the same political preferences as the government
	Undermining judicial independence

Source: *reviewed by the author*

This comparison also shows that protecting judges under the constitution cannot always preserve judicial independence. To some extent, the protection of judges in the constitution can also be undermined if the constitution is flexible and does not have rigid limits to its amendment. It can be seen in court packing in Hungary. Even though the constitution protects judicial independence, court packing can be done by amending the supreme law of the land. This article reveals the strong correlation between political parties' role and constitutional courts' independence. The comparative study shows the high risk of court packing due to the influence of political parties over constitutional court justice appointments.

III. CONCLUSIONS

Based on the discussion and analysis, the constitutional courts adopted by Hungary, Poland, and Indonesia has experienced regression after twenty years following the democratic transition. The three countries show the same symptoms. There is a significant correlation between the declining quality of democracy and the rule of law and the independence of the constitutional court. The emergence of populist leaders born through democratic procedures tends to place the constitutional court as subordinate to government power. This effort was carried out using the court-packing technique by reorganizing the position arrangements for constitutional judges, starting from changing the composition of the number of judges, dismissing judges without legal and ethical processes, changing the term of office to politicizing the appointment of constitutional judges.

The results also show that the independence of judges is weakened through court-packing carried out by abusive procedures such as changes to the

constitution and the laws or through government policies. The governments use the momentum with the aim of placing judges who are loyal or at least have the same political preferences as those in power to undermine the independence of judges. Therefore, they are unable to act impartially in examining and settling cases, especially those related to the interests of power. Further research needs to formulate limits on the role of political parties in the constitutional court so that the level of exposure to the independence of the constitutional court can be minimized.

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Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court

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Abstract

This article discusses issues regarding constitutional interpretation in general, and the interpretation of human rights provisions in the constitution in particular. The setting of the discussion is the role of the Constitutional Court of Indonesia in reviewing the constitutionality of laws based on Chapter XA of the 1945 Constitution. Constitutional interpretation is pivotal in deciding the constitutionality of laws. Therefore, this article aims to propose an interpretive principle to the Constitutional Court when interpreting human rights provisions in deciding the constitutionality of laws. The interpretive principle is the universality of rights. In other words, this article suggests the Constitutional Court adopt the universality of rights principle in interpreting Chapter XA of the 1945 Constitution. The principle of universality of rights departs from the understanding that human rights are natural rights. The interpretive principles that can be derived from the principle of universality of rights are as follows. First, recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting

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constitutional human rights norms. These interpretive principles are discovered through a comparative approach, in this case referring to judicial practices in other countries as well as regional and international judicial bodies that are considered relevant. The rationale behind this proposal is that human rights interpretation using the universality of rights principle can enhance the protection of human rights. Suppose judicial review of the constitutionality of laws is dedicated to enhancing human rights. In that case, constitutional interpretation should be dictated by the universality of rights principle as the interpretive principle.

Keywords: Constitutional Interpretation; Human Rights; Universality

I. INTRODUCTION

This article discusses the theory of constitutional interpretation, specifically the interpretation of constitutional provisions of human rights. The main point of the discussion is constitutional adjudication by the Constitutional Court of Indonesia (the Constitutional Court), where human rights provisions in Chapter XA of the 1945 Constitution often form the basis of constitutional review.[1] Therefore, the ideal interpretive principles for interpreting these constitutional human rights provisions are urgently needed. The article argues for the adoption of universal human rights as the ideal interpretive principle rather than cultural relativism.[2]

[1] Titon Slamet Kurnia, *Interpretasi Hak-Hak Asasi Manusia oleh Mahkamah Konstitusi Republik Indonesia: The Jimly Court 2003–2008* [Interpretation of Human Rights by the Constitutional Court of Indonesia: The Jimly Court 2003–2008] (Bandung: Mandar Maju, 2015). Pan Mohamad Faiz, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia" (PhD diss., University of Queensland, 2016), 87–108. I.D.G. Palguna, Saldi Isra, and Pan Mohamad Faiz, *The Constitutional Court and Human Rights Protection in Indonesia* (Jakarta: RajaGrafindo Persada, 2022).

[2] Note that in the context of a literature review it is quite difficult to find specific literature that speaks comprehensively about the universality of human rights as a principle, especially the specific principles outlining interpretive principles in the interpretation of human rights provisions. See for example: Rainer Arnold, ed., *The Universalism of Human Rights* (Dordrecht: Springer, 2013). To the extent that we have been able to find, the universality of human rights as a principle is discussed in passing, or discussed in a more limited context, namely related to the concept of universality itself, or some are even being drafted that the universality of human rights has proven itself so instead of discussing the universality of human rights then a more strategic issue is, so that the universality of human rights can be applied, what human rights are universal. See for example: William J. Talbott, *Which Rights Should Be Universal?* (Oxford: Oxford University Press, 2005). Relatively easy to find is the meta-principle discussion of human rights universality, which focuses on the foundations of human rights universality. See for example: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 655–724; Neomi Rao, "Three Concepts of Dignity in Constitutional Law," *Notre Dame Law Review* 86, no. 1 (2011): 183–271. While specifically on the issue of human rights adjudication, issues that tend to be very technical are related to doctrinal issues regarding how a judicial body builds its judicial opinion on the case based on very technical human rights law doctrines, for example: application of limitation clauses, application of proportionality tests, and so on. See in general · Liora Lazarus, Christopher McCrudden, and Nigel Bowles, eds., *Reasoning Rights: Comparative Judicial Engagement* (London-Portland: Hart Publishing, 2014).

The writing of this article was inspired by Ronald Dworkin's Moral Reading. Dworkin developed Moral Reading as an interpretive principle for the Bill of Rights of the United States Constitution.[3] Like Dworkin, this article is plagued by theoretical questions about how the interpretation of the constitutional provisions of human rights in Chapter XA of the 1945 Constitution should be carried out. Therefore, although addressed to the Constitutional Court, this article is not intended as a response to the Constitutional Court's problematic practice in interpreting human rights. The starting point of this article is purely theoretical about how to provide the best interpretation of the constitutional provisions of human rights with benchmarks of interpretation that are more capable of providing protection for human rights.

However, as factual background, the Constitutional Court's performance in interpreting human rights can also be provided with necessary information. The Constitutional Court's practice in interpreting human rights still ebbs and flows – and this is a common phenomenon in adjudication where apart from the best examples, contrary examples can also be shown. The Constitutional Court's positive judicial performance in interpreting human rights is often found in the field of political rights, such as: cases of political rights of former Indonesian Comunist Party,[4] individual candidates for chief of regional government,[5] and decriminalization of defamation to the president/vice president.[6] Meanwhile, the Constitutional Court's less positive contribution to human rights is the Constitutional Court's interpretation of the right to life in reviewing the constitutionality of death penalty provisions,[7] as well as the issue of the constitutionality of blasphemy in relation to the right to freedom of religion and opinion.[8]

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3 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 1–12.

4 Constitutional Court of the Republic of Indonesia, *Judicial Review of General Election Law*, Decision No. 011-017/PUU-I/2003 (2003).

5 Constitutional Court of the Republic of Indonesia, *Judicial Review of Local Government Law*, Decision No. 5/PUU-V/2007 (2007).

6 Constitutional Court of the Republic of Indonesia, *Judicial Review of Criminal Code Law*, Decision No. 013-022/PUU-IV/2006 (2006).

7 Constitutional Court of the Republic of Indonesia, *Judicial Review of Narcotics Law*, Decision No. 2-3/PUU-V/2007 (2007).

8 Constitutional Court of the Republic of Indonesia, *Judicial Review of Blasphemy Law*, Decision No. 140/PUU-VII/2009 (2009).

The normative issue of adopting the universality of rights or cultural relativism as an approach to human rights adjudication has been introduced previously. However, it is contextualized by the capacity of the Constitutional Court to provide human rights protection, given the dominance of human rights provisions as the basis for constitutional review. While this issue is more prevalent in the field of international relations as a response to the monitoring of State compliance with human rights norms (especially in the 1990s),[9] it remains relevant in the context of constitutional review by the Constitutional Court, as the best interpretation of human rights provisions is believed to be based on the principle of the universality of human rights. Therefore, the universality of rights serve as the standard for the Constitutional Court in deciding the constitutionality of laws based on human rights.

The article defends adopting the universality of rights as an approach to human rights adjudication by the Constitutional Court in the context of interpretative principles in constitutional human rights provisions (Chapter XA of the 1945 Constitution). The approach is the most functional to enhance human rights protection through constitutional review. To justify the claim, the article elaborates on the interpretive principles of human rights provisions derived from the concept of universal human rights. The concept of universal human rights departs from the understanding that human rights are natural rights. This means that human rights are rights that are inherent in all human beings. The discussion will start with the concept of the universality of rights[10] and then derive interpretive principles from this concept to support the claim that the universality of rights is an adequate approach to advancing human rights protection through constitutional review.[11] These interpretive principles are as follows. First, recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting

[9] R.J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 2001); Peter R. Baehr, *Human Rights: Universality in Practice* (London: MacMillan Press, 1999); Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (London: Palgrave, 2004).

[10] *Infra* Part 2.1.

[11] *Infra* Part 2.2.

constitutional human rights norms. These interpretive principles are discovered through a comparative approach, in this case referring to judicial practices in other countries as well as regional and international judicial bodies that are considered relevant.

II. DISCUSSION

2.1. On Universality of Rights

Every 10th of December, the world commemorates Human Rights Day. The basis for the commemoration is the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly. The document itself, a General Assembly Resolution, needs to meet the criteria as an authoritative legal document according to Legal Positivism standards. Therefore, the document was elaborated to formally create binding obligations in two international treaty instruments (for countries willing to become parties): the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three documents are collectively known as the International Bill of Rights.[12]

What is the essential meaning behind the commemoration of Human Rights Day, based on the birth of the UDHR? The recognition of the universality of rights principle as the foundation of human rights by the UDHR, not just in the name of the Universal Declaration. Therefore, regarding the concept of universality, we need to be aware of the possibility of confusion in meaning: the universality of rights itself with the implications of the universality of rights (regarding the scope of the validity of human rights norms). The recognition of the universality of rights as the foundation of human rights is evident in Article 1 of the UDHR, which states, "All human beings are born free and equal in dignity and rights."[13] Meanwhile, the term "universal", which explains "declaration", essentially only contains a meaning that is an implication of the universality of human rights

[12] John P. Humphrey, "The International Bill of Rights: Scope and Implementation," *William and Mary Law Review* 17, no. 3 (1976): 527–41.

[13] Firmer statements are *Preamble* ICCPR and ICESCR: "*Recognizing that these rights derive from the inherent dignity of the human person*."

itself, in this case, the hope that the declaration (including human rights within it) can have universal validity in line with the universality of human rights as a principle.[14] The second meaning is evident in the opinion of René Cassin, the French delegation, prior to the adoption of the UDHR: "The chief novelty of the declaration was its universality … because it was universal, it could have a broader scope than national declarations and drew up the regulations that were essential to a good international order."[15]

In this article, as the primary issue, we will explain the universality of rights in the first sense, the universality of rights as a legal principle for the foundation of human rights. The universality of rights here means that "human rights must be universal" as a prerequisite for their existence. Eric Engle describes the functional meaning of the universality of rights: "Not in the sense of being the same positive laws, at all times and places, but rather as being aspirational goals, at all times and places."[16] This opinion is consistent with the opinion of William Talbott: "To say that some basic human rights should be universal is to make a normative moral claim. It is different from the purely descriptive (and false) claim that basic human rights are universally respected; and it is different from the purely descriptive (and also false) claim that everyone agrees that basic human rights should be universally respected."[17]

As a principle, understanding the universality of rights is normative, not descriptive, in relation to human rights provisions. This statement is consistent with the understanding of principles in legal theory, which according to Humberto Ávila, are "norms whose up-front quality is exactly to determine the realization of a legally relevant purpose."[18] Based on this, the conclusion as an implication of the role of universality of rights as a principle is that the universality of rights is a standard that underlies, or serves as the foundation for, the existence of

[14] This conclusion appears in the preamble to the UDHR which states: "Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations … to secure their universal and effective recognition and observance …"

[15] As quoted in Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intents* (Philadelphia: University of Pennsylvania Press, 1999), 33.

[16] Eric Engle, "Universal Human Rights: A Generational History," *Annual Survey of International and Comparative Law* XII, no. 1 (2006): 219.

[17] Talbott, *Which Rights*, 19.

[18] Humberto Ávila, *Theory of Legal Principles* (Dordrecht: Springer, 2007), 138.

human rights provisions. In this sense, the universality of rights as a principle has two functions. First, it provides a prescription for the existential basis of human rights. Second, as a consequence, it provides a prescription for the scope of applicability of human rights norms that determines that human rights norms should be applied equally to all human beings everywhere.[19]

Analytically, the universality of rights has a meaning as a prescription for the basis of human rights existence: "every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone."[20] Considering this understanding, when we turn to other issues, in this case, the issue of the concept of human rights, it is transparently apparent that the standard definition, which has been mutually agreed upon, for the concept of human rights by experts is a definition of human rights formulated based on the principle of universality of human rights.[21] Not only at the theoretical level but also at the juridical level, for example; Law Number 39 of 1999 formulates the definition of human rights based on the principle of universality of rights.[22]

The basis of the existence of human rights or the requirement for ownership of human rights indicates that all human beings must possess human rights.

[19] As a comparison, Donnelly uses the term conceptual universality for the first meaning, and substantive universality for the second meaning. Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007): 282–83. https://doi.org/10.1353/hrq.2007.0016. Meanwhile, for the first sense, Arnold called it the inner dimension of universality. For the second meaning, Arnold calls it propensity towards global acceptance. Rainer Arnold, "Reflections on the Universality of Human Rights," in *The Universalism*, ed. Rainer Arnold, 1.

[20] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 8.

[21] The following is an enumeration for the definition of human rights put forward by experts for illustration purposes only. Henkin, "rights that all human beings everywhere have – or should have – equally and in equal measure by virtue of their humanity." Louis Henkin, *The Rights of Man Today* (New York: Center for the Study of Human Rights – Columbia University, 1988), 3. Rhoda E. Howard, *HAM: Penjelajahan Dalih Relativisme Budaya [Human Rights: An Exploration of the Argument of Cultural Relativism]*, trans. Nugraha Katjasurkana (Jakarta: Pustaka Utama Graffiti, 2000), 1. Vincent, *Human Rights*, 13. Jack Donnelly, *Universal Human Rights* (New York-Ithaca: Cornell University Press, 2013), 7.

[22] Article 1 number 1 Law Number 39 of 1999 concerning Human Rights defines "Human rights are a set of rights that are inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and Government, and everyone for the honor and protection of human dignity." The definition of human rights in Law Number 39 of 1999 emphasizes the element of religiosity with God Almighty as the highest authority that bestows these human rights on human beings. Of course the universality of this definition can be reduced if it is related to the critical question of its applicability to human beings who do not acknowledge or recognize the existence of God: do they not have human rights because no one provides them?

Based on this understanding, it can be identified that the basis of universality is the concept of human nature, or more precisely, the nature of being human, which is universal.[23] Because the basis of human rights is humanity, which is the human nature of human beings, conceptually, human rights per se are universal rights - as universal as human nature itself. Therefore, human rights are nothing but natural rights. This understanding is explicitly stated by Jack Donnelly: "A natural right is one which is, by definition, possessed simply by virtue of being a human being. Since it is grounded in human nature, it is held universally and equally by all people, in that human nature is possessed equally by all human beings."[24]

On this basis, just as James Nickel claims, characteristics such as race, gender, religion, social status or citizenship are irrelevant to questioning whether someone has human rights.[25] In positive proposition form, all human beings, everywhere, must have human rights: "regardless of sex, race, perhaps also of age; regardless of high or low 'birth', social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment."[26] Such understanding does not mean that all human beings are the same, but all human beings are the same only in terms of their nature as human beings. Therefore, the more specific meaning of the principle of universality of human rights is that all human beings are entitled to the same protection of their human rights, as emphasized by Paul Sieghart: "regardless of their many differences, they are entitled to protection from those man-made and avoidable impositions of oppressive power which would restrict the development of the individual potentials."[27]

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[23] In general see Donnelly, *Universal*, 13-7; Ana Maria Guerra Martins and Miguel Prata Roque, "Universality and Binding Effect of Human Rights from a Portuguese Perspective," in *The Universalism*, ed. Rainer Arnold, 299-300.

[24] Jack Donnelly, "Human Rights as Natural Rights," *Human Rights Quarterly* 4, no. 3 (1982): 397, https://doi.org/10.2307/762225. See also Mortimer Sellers who specifically talks about the universality of human rights from a constitutional perspective in the United States. Mortimer Sellers, "Universal Human Rights in the Law of the United States," in *The Universalism of Human Rights*, ed. Rainer Arnold, 13–14.

[25] James W. Nickel, *Refleksi Filosofis atas Deklarasi Universal Hak Asasi Manusia [Philosophical Reflection on the Universal Declaration of Human Rights]*, trans. Titis Eddy Arini (Jakarta: PT. Gramedia Pustaka Utama, 1996), 4.

[26] Henkin, *The Rights*, 3.

[27] Sieghart, *The International*, 18.

Next, it is regarding about the relationship between the principle of universality of rights and the scope of the applicability of human rights norms. The principle of universality of rights implies that human rights norms should be applied equally to all human beings, regardless of where they are located. However, the universality of the applicability of human rights provisions, as an implication of the universality of rights, does not automatically correspond to the universality as the foundation of human rights.[28] The universal applicability of human rights, based on the principle of universality of rights, is an aspirational statement. However, realistically, not all human rights can be universally applied. This is in line with Donnelly's statement: "conceptual universality says nothing about the central question in most contemporary discussions of universality, namely, whether the rights recognized in the Universal Declaration of Human Rights and the International Human Rights Covenants are universal. This is a substantive question."[29] Donnelly further explains that the universality of a particular conception or list of human rights refers to substantive universality.[30]

Here, concerning the universal applicability of human rights, the general agreement among experts on the universality is narrower than the universality in the first sense. Donnelly explicitly calls it relative universality.[31] Other experts, such as Talbott, attempt to develop a list of human rights that should be universal by adding special qualifications to the concept of human rights with the term "basic human rights", which includes their justification.[32] Peter Baehr uses the term "core rights" to indicate that the demanded human rights must be capable of being universally applied:

> Core rights are rights that are indispensable for an existence in human dignity and therefore need absolute protection. They include the right to life and the right to the inviolability of the human person, including the prohibition of slavery, serfdom, and torture, wrongful detention, discrimination and other acts that violate human dignity. In addition, the right to freedom of religion is often mentioned in this list.[33]

[28] Nickel, *Refleksi*, 65-7 and 85-7.
[29] Donnelly, "The Relative," 283.
[30] Donnelly, "The Relative," 282.
[31] Donnelly, "The Relative," 299.
[32] Talbott, *Which Rights*, 48-206.
[33] Baehr, *Human Rights*, 4.

What is the meaning of our defense that human rights must be universal - a principle that we call the principle of universality of rights? By claiming that human rights must be universal, we do not want to leave room for the possibility of "human beings without human rights" - including no government action that can legitimize conditioning human beings not to have human rights - or lose their human rights.[34] Based on this, the precondition for universal human rights is that human rights must be independent of positive law.[35] With this precondition, the universality of human rights is nothing but a "rebranding" of the concept of natural rights applied to human rights.[36] Human rights must be constructed as natural rights so that universal human rights exist without any authority of the State or government to create or eliminate human rights. Therefore, in addition to being universal, human rights are also inalienable - as an implication.[37]

The authoritative opinion of Judge Kotaro Tanaka of the International Court of Justice in the South West Africa Cases between Ethiopia & Liberia v. South Africa (1966) is considered the vigorous defense of the universality of rights associated with the concept of natural rights. Regarding the construction of human rights as natural rights, Judge Tanaka explained: "A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory."[38] Furthermore, to explain the essence of his statement, Judge Tanaka stated: "If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to 'positive law'."[39] Human rights, as

[34] Nickel, *Refleksi*, 63.
[35] Nickel, *Refleksi*, 56.
[36] On historical explanations for the foundation of human rights based on natural rights, see in particular Henkin, *The Rights*, 5-13.
[37] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critic of Non-Western Conceptions of Human Rights," *The American Political Science Review* 76, no. 2 (1982): 303-6, https://doi.org/10.2307/1961111.
[38] Shiv R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (London-Portland: Hart Publishing, 2007), 57.
[39] Bedi, *The Development*, 129-30.

natural rights, have a pre-existing status - they exist prior to the existence of the State or government, a concept developed by John Locke.[40]

As mentioned above, the universality of rights cannot only be justified by normative arguments. For instance, Rhoda Howard justifies the universality of human rights based on factual or sociological reasons, taking into account the phenomenon of the existence of modern States and their tendency towards authoritarianism.[41] However, Howard's argument is weak because it is consequentialist. If such phenomena do not exist, then discussing the universality of rights would not be relevant.[42] Nevertheless, whether such phenomena exist or not, the universality of rights is the starting point when discussing human rights (because its basis is human nature).

How can the validity of the universality of the human rights principle be justified without being considered naive by stating that it is self-evident based on human nature? We do not fully agree with the Realist approach used by Louis Henkin in his attempt to justify the validity of the universality of human rights, not as a self-evident morality, but rather empirically through State acceptance or at least the absence of explicit rejection of the existence and applicability of human rights.[43] This approach is more suitable for addressing the issue of the scope of the applicability of human rights norms as an implication of the universality of human rights based on the principle of universality of human rights.[44] If the validity of the principle of universality of human rights is questioned, a more elegant approach is Bertrand Ramcharan's factual approach called the "democratic test of universality":

> There is an irrefutable democratic test that confirms the concept of the universality of rights. It is a simple matter. Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved?

[40] This conception will be explained infra Part 2.2.

[41] Howard, *HAM*, 2.

[42] This was also realized by Howard, who firmly stated that his position was to defend the universality of human rights because of weaknesses at the practical level where human rights in practice (in reality) did not belong to everyone. Howard, *HAM*, 1.

[43] Louis Henkin, "The Universality of the Concept of Human Rights," *Annals of the American Academy of Political and Social Science* 506 (1989): 10-6.

[44] Compare with Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law* 25, no. 1 (1995/96): 287-397.

> Would you like to live freely or in bondage? Would you like to have a say in how you are governed? If there is any critic of universality who would argue that an individual would choose execution to life, and bondage or serfdom to freedom, let him or her come forth.[45]

The explanation above shows a very close functional relationship between the universality of rights principle and the concept of natural rights. However, the concept of natural rights here has a contemporary meaning that is different from its classical meaning – as Locke originally put it – because it is more egalitarian, less individualistic, and is an international right.[46] Of course, the construction of human rights based on natural rights so that it is universal does not please adherents of communitarianism or communalism, which departs from the view that the concept of rights should be constructed by society, cannot be separated from society – by relying on human nature. Human rights with such construction have made human beings into a-social beings, regardless of society. This background explains why the universality of rights is controversial in some societies.[47]

Why is the universality of human rights, as a principle, controversial so that it is responded with counterarguments called cultural relativity to deny the legitimacy of their existence? The emergence of counterarguments against the universality of human rights is based on the assumption that human rights are identified as an exclusive product of Western culture – in this case, the concept of natural rights as the basis for the existence of human rights – with the implication, as Donnelly said, "Human rights are inherently 'individualistic'; they are rights held by individuals concerning, even against, the State and society."[48] Therefore, not all people are familiar with the concept of such human rights.[49] Especially over the possibility that individuals with human rights can claim their rights to society and the State without fulfilling their obligations.[50] Such misunderstanding

[45] Bertrand G. Ramcharan, "The Universality of Human Rights," *The Review – International Commission of Jurists* 53 (1994): 106.
[46] Nickel, *Refleksi*, 9-18.
[47] Rhoda E. Howard, *HAM*, 28-32; Vincent, *Human Rights*, 37-9.
[48] Jack Donnelly, "Cultural Relativism and Universal of Human Rights," *Human Rights Quarterly* 6, no. 4 (1984): 411, https://doi.org/10.2307/762182.
[49] Nickel, *Refleksi*, 97-118; Talbott, *Which Rights*, 39-47.
[50] Howard, *HAM*, 17.

was sponsored by the American Anthropological Association, which made a counter statement on June 24, 1947, before the UDHR was passed, as follows:

> Because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America.[51]

The above statement explains rationally the pejorative claim that the universality of human rights, referring to their formalization into the UDHR, is a new imperialist practice.[52]

In its original sense, we must reject the response of the establishment of cultural relativity to the issue of the basis for the existence of human rights, especially the view that requires the existence of human rights to be based on a particular societal culture with the assumption that there are no universal norms.[53] The establishment of cultural relativity opens up space for negating the existence of human rights – cultures that are not "close" to human rights, for example, collectivism or communalism, have the potential to reject the existence of human rights.[54] This understanding is quite relevant if it is associated with, for example, Soepomo's opinion when rejecting demands for constitutional protection of human rights in the process of forming the 1945 Constitution because it was based on the teachings of individualism, which contradicted the stance he believed in, namely an integralistic State.[55] Furthermore, the establishment of

[51] Quoted in Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT. Gramedia Pustaka Utama & Yayasan SPES, 1993), 20.

[52] Baehr, *Human Rights*, 9-10.

[53] Fernando R. Teson, "International Human Rights and Cultural Relativism," *Virginia Journal of International Law* 25, no. 4 (1985): 870-1; Baehr and Castermans-Holleman, *The Role*, 25.

[54] In reality, this argument tends to be elitist, used mainly by those in power for cultural reasons to refuse to monitor their compliance with human rights norms. Such rulers are usually rulers who rule authoritarianly. Therefore, such arguments are arguments that abuse the concept of cultural relativity. Donnelly, "Cultural," 411-4.

[55] Marsillam Simanjuntak, *Pandangan Negara Integralistik [Integralistic View of the State]* (Jakarta: Pustaka Utama Grafiti, 1997), 227-30; Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959 [Aspirations of Constitutional Government in Indonesia: A Socio-Legal Study of the Constituent Assembly 1956-1959]*, trans. Sylvia Tiwon (Jakarta: Pustaka Utama Grafiti, 2009), 91-3; Lubis, *In Search*, 91-6.

cultural relativity harms international oversight mechanisms if universal norms are not recognized.[56]

The view of cultural relativity, especially what Donnelly calls weak cultural relativism, can play a role in determining the range of applicability of specific human rights norms. Suppose the view of weak cultural relativism prevails. In that case, it will have implications for the universality of the applicability of specific human rights norms, which can be relaxed – and protection for certain human rights can be carried out according to culture or local conditions.[57] Nevertheless, Todung Mulya Lubis provides conditionality for this position: "The diversity of cultures is preserved as long as the right to life, liberty, security and property are not threatened."[58] It means: "to avoid permissible killings of other gross violations of human rights in certain cultures."[59] On that basis, in the final analysis, we need to return to the priority issue regarding the scope of applicability of human rights norms as an implication of the universality principle of human rights as previously mentioned above: there are certain human rights whose application must be universal, and there are certain human rights whose application can be adjusted with the local culture.

In the context of human rights law, the universality of rights and cultural relativity is challenging to separate because the two form a dialectical relationship strictly. The universality of rights approach determines the substantive aspects of human rights. While the cultural relativity approach has had much influence on issues regarding the implementation of human rights, in particular, being one of the justifiable reasons for human rights limitation (on the exercise).[60] Such dialectics is unavoidable. The regulation on human rights in Chapter XA of the 1945 Constitution explicitly describes this phenomenon.

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[56] Baehr, *Human Rights*, 9.
[57] Donnelly, "Cultural," 417-9.
[58] Lubis, *In Search*, 21.
[59] Lubis, *In Search*, 21.
[60] Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14, no. 3 (2014): 494. https://doi.org/10.1093/hrlr/ngu021.Spano, following Lord Hoffman's opinion, differentiates the concept of "level of abstraction," where human rights are universal, with "level of application," where domestic conditions can influence the application of human rights.

As for pre-conditions for implementing human rights, Article 28J paragraph (1) of the 1945 Constitution stipulates: "Every person shall respect human rights of others in the order of life of society, nation and State."[61] This provision adheres to a principle known as a duty-based approach – similar to the American Declaration of the Rights and Duties of Man.[62] Then, regarding the standard for the legitimacy of restrictions on human rights by the government, Article 28J paragraph (2) of the 1945 Constitution stipulates: "In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society."[63] The two provisions of the 1945 Constitution prove that the cultural relativity approach has found a place in the Constitution – at the same time, the Constitution is talking about substantive human rights provisions whose basis is the universality of human rights itself.[64] Therefore, when this article discusses specifically the defense of the universality of rights to describe our preference for prioritizing the interests of protecting human rights instead of other considerations – while recognizing that, as a normal provision, the application of restrictions in implementing of human rights is always possible. In such a position, restrictions on implementing of human rights should be implemented at the minimum level.

As a restatement, this section focuses on explaining the concept of universality of rights. This explanation functions to provide an understanding of the universality of rights so that on that basis a set of interpretive principles for the interpretation of human rights can be deductively derived. Reaffirming the understanding previously explained, based on the concept of universality of

[61] United Nations, *Universal Declaration of Human Rights*, Article 29, no. 1: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

[62] Lubis, *In Search*, 25-6.

[63] United Nations, *Universal Declaration of Human Rights*, Article 29, no. 2: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

[64] So that the discussion does not drag on, we deliberately do not specifically criticize Article 28J paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution.

rights, human rights are natural rights so that as an implication, according to Paul Sieghart, the underlying principles are "universal inherence" and "inalienability".[65] The next part of this article will elaborate this understanding into interpretive principles in the interpretation of human rights.

2.2. Universality of Rights As an Interpretive Principle

This part will discuss the universality of rights as an interpretive principle in constitutional interpretation, precisely the interpretation of human rights provisions in the Constitution. Prior to that, we will explain the universality of rights in general. The interpretive principle prescribes how a constitutional interpretation should be made.[66] The interpretive principle functions as "legitimize interpretive activity".[67] The interpretive principle in constitutional interpretation ensures that constitutional interpretation products contain "truth", whether according to the Constitution or vice versa. This understanding is concluded from pre-understanding, called the supremacy of the constitution principle. Due to the supremacy of the Constitution, the constitutional interpretation "shall not conflict with the Constitution." The constitutional interpretation should represent fidelity to the Constitution,[68] where the interpretation of the constitutional human rights provisions must strengthen human rights protection.

So, how does the universality of rights direct the interpretive activity in interpreting the constitutional human rights provisions? Based on the definition of the universality of rights, which covers human rights' existential basis and the scope of human rights enforceability, the interpretation of the constitutional human rights provisions, which is based on the universality of rights, must represent those aspects. As a starting point, we will begin with the natural rights concept as a general theoretical basis on the interpretive principle in interpreting constitutional human rights norms. Next, we will break down the general theoretical basis to derive four specific interpretive principles. First,

[65] Sieghart, *The International*, 17.
[66] William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review* 130, no. 4 (2017): 1083–1084. Both authors use the term the law of interpretation with a description of the meaning as stated above.
[67] Aharon Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005), 40–41.
[68] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford: Oxford University Press, 2007), 13–15.

recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting constitutional human rights norms.

For the general theoretical framework related to the application of the principle of universality of human rights as an interpretive principle for human rights provisions in the Constitution, we will start specifically from the theory of natural rights put forward by John Locke, whose teachings contain the prescription "rights first – government second".[69] The contextual meaning of this theory, which is the theoretical basis for the principle of universality of human rights as an interpretive principle, is that the interpretation of human rights provisions is burdened with demands to promote human rights protection further rather than being oriented towards considering the interests of the government - or society. This conclusion refers to a general restatement of Locke's natural rights teachings carried out by Randy Barnett: "Government is not seen as the source of rights, but rather the legal protection of pre-existing rights is seen as the reason why a government is created."[70] This understanding has the implication: "If government is a cure for some malady involving the legal protection of individual rights, it must be a cure that is better than the disease. The Standard for assessing government performance is its efficacy in enforcing the preexisting rights of individuals."[71]

As explained above, the theory of natural rights has specific consequences in responding to human rights protection with an enumeration approach by positive law. Because starting from the definition of "rights first - government second", the enumeration of human rights by positive law is an opened list - rather than a closed list - which in the United States Constitution is represented by the Ninth Amendment - that the existence of human rights is not only those

[69] The concept of natural rights, in this sense, as stated by John Locke, refers to the protection of natural rights as a goal for the existence of government. John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. C.B. Macpherson (New Haven, CT: Yale University Press, 2003), *Second Treatise*, "An Essay Concerning the True Original, Extent and End of Civil Government."

[70] Randy E. Barnett, "Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom," *Harvard Journal of Law and Public Policy* 10, no. 1 (1987): 103..

[71] Barnett, "Are Enumerated," 103.

enumerated by the constitution but also those that are not enumerated.[72] The first interpretive principle here, by implication, provides an incentive for judicial bodies to "discover" unenumerated rights. A well-known concrete example of applying this interpretive principle is the case of Griswold v. Connecticut by the United States Supreme Court. After Griswold, the Supreme Court of the United States, until 1988, succeeded in elaborating unenumerated rights under the authorization of the Ninth Amendment to the United States Constitution by adding 13 new types of rights outside the enumeration of the Bill of Rights of the United States Constitution.[73]

The role of the judiciary in "discovering" unenumerated rights is described by Barnett as having a positive function as a source of legitimation for legislation because otherwise: "A constitutional process that ignored unenumerated rights when evaluating legislation would give citizens no reason to believe that such legislation did not violate the rights retained by the people. Without this review, legislation would enjoy a weaker presumption that it is bound in conscience or perhaps no such presumption at all."[74] However, what if the opposite view prevails – constitutional protection of human rights using a positivist perspective that requires an enumeration approach as a closed system of listing human rights? This will force us, including the judiciary, to accept that human rights do not exist because, in this way, the government – the framer of the Constitution – is above the Constitution (i.e. human rights itself). Judge Diarmuid O'Scannlain put forward this conclusion: "the view that the government created constitutional rights could elevate the government above the Constitution."[75]

The technical question is: Can the Constitutional Court "discover" unenumerated rights even though the 1945 Constitution does not provide authorization like the Ninth Amendment to the United States Constitution?

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[72] Randy E. Barnett, "Foreword: The Ninth Amendment and Constitutional Legitimacy," *Chicago-Kent Law Review* 64, no. 1 (1988): 56. *The Ninth Amendment* of the United States Constitution states: "*The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retain by the people.*"

[73] Barnett, "Foreword," 58; Randy E. Barnett, "Reconceiving the Ninth Amendment," *Cornell Law Review* 74, no. 1 (1988): 32.

[74] Barnett, "Foreword," 64.

[75] Diarmuid O'Scannlain, "The Natural Law in the American Tradition," *Fordham Law Review* 79, no. 4 (2011): 1527.

Even without authorization, a similar approach like that of the United States Supreme Court is very open to being carried out because there is no signal that Chapter XA of the 1945 Constitution was intended by its drafters to be constitutive. We believe the Chapter follows the human rights basis as a pre-condition to human rights based on natural rights, so the enumeration is only declarative.[76] Therefore, if practices such as Griswold v. Connecticut wants us to adopt it, so this practice reflects our adherence to the principle of universality of rights, namely the natural rights that are the basis of universal human rights.

Second, with the theoretical basis explained above, the interpretive principle applying the principle of universality of human rights is that the interpretation of human rights provisions in the constitution has priority to minimize the application of provisions limiting human rights. Restrictions on applying provisions restricting human rights are a strategic issue in protecting human rights following the rights first – government second principle. Human rights are not a gift from the State or government but are inherent in all human beings, and therefore, human rights are universal rights whose existence, theoretically, precedes that of the State i.e. government. Therefore, the interpretive principle offered as a prescription is that the State's authority to limit human rights is objectively limited, so it must not reduce the essence of human rights, which aims to benefit human beings as rights holders.[77] Applying the natural rights conception of human rights is important because the interpretation of human rights provisions is based on the nature of human rights themselves as natural rights.

Limitations in the application of constitutional provisions aimed at limiting human rights should refer to the case of Söring v. United Kingdom (1989) where the European Court of Human Rights stated the interpretive principle: "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied

[76] Titon Slamet Kurnia, *Konstitusi HAM: Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Mahkamah Konstitusi Republik Indonesia* [*Human Rights Constitution: The 1945 Constitution and The Constitutional Court of Indonesia*] (Yogyakarta: Pustaka Pelajar, 2014), 85–97.

[77] Kurnia, *Interpretasi [Interpretation]*, 324.

so as to make its safeguards practical and effective."[78] This interpretive principle contains two prescriptions. First, "This excludes a narrow interpretation in favour of State sovereignty and the freedom of State organs whenever effective protection necessitates restrictions on State power." Second, "the Convention permitting restrictions of the individual freedoms must be interpreted narrowly."[79]

Dieter Grimm, regarding the German Constitutional Court decision in the case BverGE 19, 342 holds as a principle related to the limitation of human rights: "human rights were superior to the law. Laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests."[80] On that basis, as an implication, "any restriction of human rights not only needs a constitutionally valid reason but also has to be proportional to the rank and importance of the right at stake."[81] This opinion also provides a specific signal regarding the form of restrictions on the authority of legislators to implement provisions limiting human rights in law, better known as the principle of proportionality.[82]

Third, priority in protecting minorities. If the principle of representation works as it should, we will get aspirational legislation. Laws, the product of democratic political decisions, cannot please all. Under democratic principles, the minimum we can obtain, and the most realistic, is a law that is aspirational (only) for the majority. In such a situation, the law can create tension in majority-minority relations. This issue was addressed very well by the United States Supreme Court in paragraph 3, footnote 4 of the case of United States v. Carolene Products Co. (1938), which describes the proper role of the judiciary in responding to this situation, the working of representative democratic mechanisms, related to constitutional restrictions on laws, in protecting minorities from the majority. Paragraph 3, footnote 4 of Carolene case for specifics states:

[78] Rudolf Bernhardt, "Human Rights and Judicial Review: The European Court of Human Rights," in *Human Rights and Judicial Review: A Comparative Perspective*, ed. David M. Beatty (Dordrecht: Martinus Nijhoff Publishers, 1994), 306.

[79] Bernhardt, "Human Rights," 306.

[80] Dieter Grimm, "Human Rights and Judicial Review in Germany," in *Human Rights and Judicial Review: A Comparative Perspective*, ed. David M. Beatty, 275.

[81] Grimm, "Human Rights," 275.

[82] Alec Stone Sweet and Jud Matthews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 72–164.

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious … or national … or racial minorities …; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political process ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[83]

What are the essential juridical points of understanding from the statement above? John Hart Ely explained, "the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national, and racial minorities and those infected by prejudice against them."[84] Paragraph 3, footnote 4 Carolene case describes the commitment of the judiciary to apply the strictest control over laws (strict judicial scrutiny) when the laws contain prejudice against: "religious, national, and racial minorities." Specifically for the issue of discrimination based on race, Paul Brest emphasized that the sensitivity of the role of the judicial body, with a strict judicial scrutiny approach, contains the consideration: "It prevents and rectifies racial injustices without subordinating other important values."[85] Brest specifically refers to the judicial opinion of the United States Supreme Court in the case of Korematmu v. United States (1948), which uses a strict judicial scrutiny approach states: "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect … Courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[86]

How can the strategic meaning of paragraph 3 footnote 4 of the Carolene case be theoretically understood in the context of the judicial body's role in reviewing the constitutionality of laws related to the majority-minority relationship in the democratic legislative process in general? Tom Ginsburg's opinion, which presents the insurance model of judicial review as a justification for the constitutional

[83] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 76.
[84] Ely, *Democracy*, 76.
[85] Paul Brest, "The Supreme Court 1975 Term – Foreword: In Defense of the Antidiscrimination Principle," *Harvard Law Review* 90, no. 1 (1976): 5. https://doi.org/10.2307/1340306.
[86] Brest, "The Supreme Court," 7.

judicial review institution with a background in democracy, is highly relevant here. According to Ginsburg:

> By ensuring that losers in the legislative arena will be able to bring claims to court, judicial review lowers the cost of constitution making and allows drafters to conclude constitutional bargains that would otherwise be unobtainable. As democratization increases electoral uncertainty, demand for insurance rises. Although other institutions can also serve to protect minorities, judicial review has become particularly focal. This theory goes a long way toward explaining the rapid spread of judicial review in recently adopted constitutions.[87]

Ginsburg appreciates the constitutional court as a counter-majoritarian institution in a positive sense: "judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself."[88] Based on that, Ginsburg claims: "Judicial review may be countermajoritarian but is not counterdemocratic."[89]

By encouraging a greater role for the judicial body as the protector of minorities - an opinion that is not represented in the majority opinion of legislators - then such interpretive principles explicitly depart from the anti-utilitarian premise for the role of the judicial body. The anti-utilitarian premise is that "one cannot maximize utility at the expense of rights" - in this case, the rights of the few/least.[90] Legislators are very likely to do this because "legislatures tend towards utilitarianism because of their: (a) desire for a common metric; (b) majoritarian nature; (c) representative nature." The judicial body's position is the opposite because "(a) courts are not majoritarian, not representative. The judiciary is independent; (b) courts are used to reasoning by norms."[91] Therefore, prioritizing the protection of minorities is best done by the judicial body, which, because it is independent, must be able to distance itself from the majority.

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87 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 33.

88 Ginsburg, *Judicial Review*, 22.

89 Ginsburg, *Judicial Review*, 31.

90 Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69, no. 5 (2001): 2108.

91 Moore, "Justifying," 2105.

The priority in protecting minorities demonstrates the importance of the role of the judicial body in endorsing the principle of the universality of human rights, as it emphasizes (1) human rights as natural rights based on human nature, and (2) human rights as inalienable rights based on human nature. If legislators have a role in shaping policies oriented towards the common good, then the judicial body is the opposite. The judicial body must be sensitive to the gap in those policies concerning the legitimate interests of individuals whom legislators potentially ignore because they are oriented towards the common good (the interests of the majority). Michael Moore describes the unique institutional character of the judicial body as follows:

> what courts do is decide particular cases involving particular people. If courts are tempted to create or enforce some generally desirable social policy, they can do so only through imposing the costs of such a policy on the flesh-and-blood litigants before them. If it is tempting to sacrifice the rights of some innocent so that the rights of others will be left inviolate, a court must stare into the eyes of that innocent person as it sacrifices his rights.[92]

Unlike the judicial body, legislators do not face such discipline. It is natural to think the legislative role is necessarily consequentialist about rights. Since there is no particular person whose rights are at issue before a legislature, it is natural to regard all people's rights as interchangeable, meaning that some can be sacrificed to minimize rights violations in total.[93]

Human rights, even if they belong to only one person, are fundamental to uphold vis-à-vis the majority's interests. Here, we agree with Ronald Dworkin, who stated: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[94] An interesting example of applying an anti-utilitarian rights approach is the case of Pub. Comm. Against Torture in Isr. v. Gov't of Israel (1994), where the issue was the legality of interrogation practices involving violence by security forces

[92] Moore, "Justifying," 2106-7.
[93] Moore, "Justifying," 2107.
[94] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), xi.

against terrorism suspects. Israel faced a highly latent terrorism issue, but the Israeli Supreme Court's response was more pro-human rights than security-oriented, so "violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impeding terrorist acts." The Israeli Supreme Court acknowledged the implications of its judicial opinion, which could hamper the government's efforts in combating terrorism. However, this position is undoubtedly a form of compliance with "the rule of law and recognition of individual liberties."[95]

Fourth and finally, the application of a comparative approach is based on the assumption that the interpretation of human rights provisions should not hesitate to refer to the best practices of other jurisdictions in providing the best protection of human rights through the adjudication process. This practice may be controversial if we adopt a nationalist stance,[96] but it is positive if we are willing to have an open mind.[97] This interpretive principle addresses the issue of the implications of human rights universality for the scope of the applicability of human rights norms, especially for certain human rights whose universality is no longer in question. The universality of human rights provides the most substantial incentive for using a comparative approach in interpreting the constitution, i.e., human rights provisions, because of the similarity of the constitutional issues faced, as emphasized by Ian Cram.

> the existence within liberal democracies of broadly similar constitutional problems that require a balancing of competing individual and societal interests according to certain values. To a greater or lesser extent, individuals in all liberal democracies enjoy fundamental human rights to equality, liberty of the person, expression etc. and benefit from institutional arrangements such as the separation of powers and a commitment to the rule of law.[98]

[95] Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review* 116, no. 1 (2002): 148. https://doi.org/10.2307/1342624.

[96] This practice has become a problem in the United States, even causing debates outside the courtroom between Justice Antonin Scalia whose nationalist orientation and Justice Stephen Breyer whose internationalist orientation was sparked by the Roper v. Simmons and the Lawrence v. Texas. Hadar Harris, "'We Are the World' – Or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions," *Human Rights Brief* 12, no. 1 (2005): 6–8.

[97] Margaret H. Marshall, "'Wise Parents Do Not Hesitate to Learn from Their Children': Interpreting State Constitutions in an Age of Global Jurisprudence," *New York University Law Review* 79, no. 5 (2004): 1635–1641.

[98] Ian Cram, "Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence With Reference to Terrorism Case," *Cambridge Law Journal* 68, no. 1 (2009): 127. See also Mark C. Rahdert, "Comparative Constitutional Advocacy," *American University Law Review* 56, no. 3 (2007): 614–635.

The opinion above is reinforced by Judge Margaret Marshall, who stated:

> the key factor giving rise to global interest in individual rights is the growing recognition that every person ... is endowed with fundamental rights that no government can extinguish. Coupled with this understanding is a development I consider to be one of the most striking and profound in world politics over the last several decades: the emerging consensus in the world's democracies that a written charter of rights, enforced by an independent judiciary, is central to the protection of personal liberty.[99]

The application of universal human rights as a universally applicable norm means that best practices in interpreting human rights provisions by judicial bodies in other jurisdictions should be a reference for interpreting human rights provisions in Indonesia by the Constitutional Court.

The four interpretive principles offered - and generally called the principle of universality of rights - as interpretive principles for Chapter XA of the 1945 Constitution can contribute positively in providing protection for human rights through the constitutional adjudication process for the following reasons. First, the incompleteness of constitutional provisions regarding human rights is no longer a problem. Second, protecting human rights becomes more meaningful if the government's capacity to limit human rights can be monitored to a minimum level by the Constitutional Court so that limitations on human rights are only carried out in conditions that are absolutely necessary. Third, the Constitutional Court can make an important contribution to safeguarding the principle of inalienability by paying great attention to minorities (especially ethnic, race and religion) that even though laws are the product of majority decisions, they must not ignore their existence. Fourth, the Constitutional Court can use best practices in interpreting human rights in other countries as a reference, so that using this opportunity can make judicial protection of human rights even more meaningful.

[99] Margaret H. Marshall, "Interpreting," 1639.

III. CONCLUSION

This article proposes the thesis that the universality of rights should be a judicial approach in the reviewing of laws by the Constitutional Court, particularly as an interpretive principle in interpreting Chapter XA of the 1945 Constitution, with the expectation that the Court can play a more significant role in advancing human rights protection in Indonesia. To justify the thesis, this article elaborates on interpretive principles for interpreting Chapter XA of the 1945 Constitution derived from the principle of the universality of rights (after explaining the concept of the principle itself). The universality of rights departs from the understanding that human rights are natural rights. This means that human rights are rights that are inherent in all human beings. Based on the principle of the universality of rights, the interpretation of human rights provisions in the Constitution should be based on principles such as (1) recognition of unenumerated rights, (2) the application of human rights limitation provisions at the minimal level; (3) the priority of minority protection; and (4) the application of comparative approach.

We believe that if these four interpretive principles based on the universality of rights are consistently applied, the result will provide the best protection for human rights. Therefore, we encourage the Constitutional Court to adopt the approach of the universality of rights in interpreting human rights provisions that form the basis for reviewing the constitutionality of laws.

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Initiating Constitutional Morality: Political Intervention, Ethical Reinforcement, and Constitutional Court Decisions in Indonesia

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Abstract

Constitutional morality is essential for the branches of power (Parliament and Government) to ensure impartiality, political insularity, and institutional stability for the judicial power, especially the Constitutional Court and constitutional morality as a guide and benchmark for constitutional judges to form ethics and decisions that reflect the Constitution. This article seeks to answer crucial questions about how forms of intervention and ethical problems in the Constitutional Court do not reflect constitutional morality and how the idea of limiting intervention and strengthening the ethics and decisions of the Constitutional Court through constitutional morality. The author uses normative legal research methods with statutory, conceptual, comparative, and case approaches. The results of this study are in line with the hypothesis of the argumentation that the author builds, showing that the lack of application

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of constitutional morality by Parliament, Government, and Constitutional Court Judges has threatened the independence of the Constitutional Court, has damaged the judicial dignity of the Constitutional Court, and making the Constitutional Court a means of political insurance. Several cases have shown that parliamentary and government intervention in the Constitutional Court is inevitable. Likewise, ethical violations and decisions of the Constitutional Court that do not reflect the Constitution add to the complexity of the current problems of the Constitutional Court. For this reason, the author recommends that the elaboration of the concept of limiting intervention and strengthening the ethics and decisions of the Constitutional Court can be accomplished in several ways, including statutory provisions regarding the prohibition of conflicts of interest and the ethics of state administrators, the construction of ethical institutions/courts as external institutions in enforcing and supervising ethics, reconstructing the process of selecting and dismissing constitutional judges fairly and transparently by involving public oversight, and guaranteeing and legitimizing the Constitutional Court in exercising administrative and financial autonomy independently.

Keywords: Constitutional Court Decisions; Constitutional Morality; Ethics; Independence; Political Intervention

I. INTRODUCTION

1.1. Background

History records the case of Marbury vs Madison in 1803 in the United States as the forerunner of reviewing the Constitutionality of laws against the Constitution. Although Marbury pleaded with the Writ of Mandamus to order Madison to issue a Letter of Appointment of Marbury as a judge, Marshall as a chief justice invalidated Article 13 of the Judiciary Act of 1789, which was the basis of Marbury's application because it was considered contrary to Article III Section 2 of the United States Constitution.[1] Section 13 of the Judiciary Act 1789 is an overly broad judicial power provided for in the United States Constitution. One of the valuable lessons to be remembered and even widely discussed among the public and academics is the spirit of constitutional morality practised by

[1] Zainal Arifin Mochtar, *Kekuasaan Kehakiman Mahkamah Konstitusi Diskursus Judicial Activism Vs Judicial Restraint* [*Judicial Power of the Constitutional Court: A Discourse on Judicial Activism vs. Judicial Restraint*] (Jakarta: PT Raja Grafindo, 2021), 28.

Marshall in deciding the case. Marshall considered that in exercising authority, he should not only look at the general law and turn a blind eye to the Constitution because he has been bound by the "oath" (morality) of duty, which is to carry out the Constitution, so according to him it is not justified for any law or political decision to contradict the Constitution.

Constitutional morality is not an abstract thing that is impossible to realize. However, basic principles must be inherent in each branch of power. Constitutional morality in this study is the attachment of state officials (HoR, Government, and judges) to the oath of duty to implement the Constitution in exercising authority. The oath of duty produces morality to carry out the Constitution consistently. Constitutional morality in the House of Representatives (HoR) affirms that every political policy formulation, especially those that impact judicial power, is constructed to protect impartial and independent judicial power. The over-power of HoR is a new symptom in the development of statehood in Indonesia, which has shown to dominate parliamentary dominance over all sectors of the branch of power, including the dominance of parliament to appoint and dismiss Constitutional judges. Constitutional morality in government positions limits executive power, which interferes too much with judicial power—especially the Constitutional Court—because the judicial atmosphere is impartial and independent. Executive interference with judicial power leads to a totalitarian[2] System of Government and can stop the pulse of a country's democracy.[3] While Constitutional morality of the prominent judge who tests the Constitutionality of laws against the Constitution has an essential role so that every decision always reflects the supremacy of the Constitution, not just ignoring and even changing the Constitution, Dixon and Landau (2019), in "Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy", mention that sometimes in practice, judges deliberately change the Constitution through interpretation.[4] It shows that the nature of the Constitution is no longer supreme.

[2] Jimly Asshiddiqie, *Oligarki, dan Totalitarianisme Baru* [*Oligarchy and the New Totalitarianism*] (Jakarta: LP3ES, 2022).
[3] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Viking, 2018).
[4] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021).

McGuire (2004) stated that one indicator to measure a stable judicial institution is the application of the principle of differentiation, which is a clear limit to the judiciary's role.[5] The limitation of this role is not limited to the distinction of absolute competence possessed by the judiciary but also needs to limit other branches of power to interfere with the unique role of the judiciary. It is in line with AV Dicey's notion of Constitutionalism[6], C.F Strong[7], and K.C Wheare[8] each postulates that one element in the rule of law at least has a limitation on power. This footing reflects the independence of the Constitutional Court, which was determined mainly by constitutional morality by other branches of power in limiting themselves to interfering with judicial power.

On the other hand, constitutional judges must maintain morality in line with the Constitution (constitutional morality) to create the spirit of the Constitutional Court and rulings that reflect the spirit of the Constitution. Constitutional judges must avoid conflicts of interest in any decisions made. If there is a conflict between Constitutional morality and personal morality, Constitutional judges, in carrying out interpretations, must come out of the construction of subjectivity (personal) and enter into the objective construction (Constitutional) as written in the Constitution. Although in that context, it is undeniable that in the interpretation of texts—including Constitutional texts—one is often trapped in impersonal conditions, including cultural and historical backgrounds, beliefs, and psychological conditions of the interpreter[9], but especially in the interpretation of Constitutional texts. According to the author, Constitutional judges must be equipped to overcome these traps.

Constitutional morality to maintain the independence of judicial power—in the context of the Constitutional Court in Indonesia—is carried out by branches

[5] Kirill M. Bumin, et al., "Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States," *Australian Journal of Political Science* 44, no. 1 (2009): 129, https://doi.org/10.1080/10361140802657052.

[6] A.V. Dicey, *Pengantar Studi Hukum Konstitusi-Terjemahan* [*Introduction to Constitutional Law Studies*] (translated by [Translator's Name], Bandung: Nusa Media, 2015).

[7] C.F. Strong, *Konstitusi-Konstitusi Politik Modern-Terjemahan* [*Modern Political Constitutions*] (translated by [Translator's Name], Bandung: Nusa Media, 2015).

[8] K.C. Wheare, *Konstitusi-Konstitusi Modern-Terjemahan* [*Modern Constitutions*] (translated by [Translator's Name], Bandung: Nusa Media, 2018).

[9] Hans Georg Gadamer, *Kebenaran Dan Metode* [*Truth and Method*] (translated by [Translator's Name], Yogyakarta: Pustaka Pelajar, 2010).

of power (HoR and the Government) under the mandate of the 1945 Constitution, namely Article 24 paragraph (1) "Judicial power is an independent power to administer justice to uphold law and justice". The government and HoR must uphold these provisions to not interfere with the independent judicial power. The mandate is attached to the oath of HoR and the government when inaugurated to exercise its authority under the 1945 Constitution—including implementing Article 24 paragraph (1). Constitutional morality for Constitutional judges in determining decisions must be contained in upholding the supremacy of the 1945 Constitution. Constitutional judges are not allowed to make rulings that exceed the 1945 Constitution on grounds of interpretation.

Nevertheless, this ideal condition is inversely proportional to the problem of the intervening judicial power practice: first, the intervention of the HoR. The case of the issuance of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. The change is considered an indirect intervention in the existence of the Constitutional Court as a form of legislative aggression. Similarly, in 2022, the recall of Constitutional Judge Aswanto was a blatant intervention made by the HoR against the Constitutional Court. Second, government intervention. The issuance of a Government regulation instead of Law Number 1 of 2013 concerning the Constitutional Court. However, it aims to save the institution of the Constitutional Court against corruption cases involving Constitutional Judge Akil Mochtar; in principle, the Government regulation instead of the Constitutional Court is not appropriate to be applied in the realm of deliberative democracy by Jurgen Habermas.[10]

Likewise, it was found that some Constitutional morality was not carried out by several Constitutional judges such as First, several cases of ethical violations committed by Constitutional judges, such as unilateral changes by Constitutional judges to Constitutional Court Decision Number 103/PUU-XX/2022 related to judicial review of the Constitutional Court Law. Likewise, there are many cases of ethical violations and even severe criminal violations committed by unscrupulous

[10] F. Budi Hardiman, *Deliberative Democracy*, 3rd ed. (Yogyakarta: PT Kanisius, 2023).

Constitutional judges. Second, it is often found that the Constitutional Court's decisions indirectly exceed and change the meaning of the text in the 1945 Constitution, such as in the decisions: 1) Constitutional Court Decision Number 008/PUU-II/2004 regarding the Constitutionality of Law No. 23/2003 on the General Election of the President and Vice President. 2) Constitutional Court Decision Number 005/PUU-IV/2006 regarding the Constitutionality of Law No. 22 Year 2004 on the Judicial Commission. 3) Constitutional Court Decision Number 2-3/PUU-V/2007 regarding the Constitutionality of Article 80 paragraph (1), Article 80 paragraph (2) letter (a), Article 80 paragraph (3) letter (a), Article 81 paragraph (3) letter (a), Article 82 paragraph (10) letter (a), Article 82 paragraph (2) letter (a) and Article 82 paragraph (3) letter (a) of Law No. 22/1997 on Narcotics which regulates the Death Penalty. 4) Constitutional Court Decision Number 85/PUU-XX/2022 on the case of judicial review of Law Number 10/2016 on the Second Amendment to Law Number 1/2015 on the Stipulation of Government Regulation instead of Law Number 1/2014 on the Election of Governors, Regents, and Mayors into Law.[11] Based on this, this study is considered essential to discuss in depth the causes of the problems that have been described and initiate Constitutional morality concretely to maintain the independence and dignity of the Constitutional Court in the future.

1.2. Research Questions

Based on the background of these problems, the identification of problems in this study is formulated as follows:

1.2.1. What are the forms of intervention and ethical problems in the Constitutional Court that do not reflect Constitutional morality?

1.2.2. How is the idea of limiting intervention and strengthening the ethics and decisions of the Constitutional Court through Constitutional morality?

[11] S. Isra and F. Amsari, " Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change Through Judicial Interpretation]," *Bphn. Go. Id* 12 (2019), accessed [Month Day, Year], http://bphn.go.id/data/documents/makalah_fgd.rtf. See F. Jurdi and A. Yani, "Legitimacy of Non-Formal Constitutional Reform and Restrictions on Constitutionalism," *Jurnal Konstitusi* 20, no. 2 (2023): 241, https://doi.org/10.31078/jk2024.

1.3. Research Method

This study uses normative legal research with systematic review techniques. The approaches used are statutory, conceptual, comparative, and case approaches.[12] The statutory approach relates to the 1945 Constitution of the Republic of Indonesia, Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court and regulations relating to the selection of Constitutional judges. The conceptual approach relates to Constitutional morality, independence of judges, and political insurance. The comparative approach relates to comparisons in several countries implementing Constitutional morality in judicial power. The case approach relates to Constitutional Court decisions that do not reflect Constitutional morality, cases of Government or HoR intervention in the Constitutional Court, and cases of ethical violations of Constitutional judges. The data sources in this study are secondary data with primary legal materials (legislation and jurisprudence), secondary legal materials (journals, research results, and books), and tertiary legal materials (legal dictionaries and encyclopedias).[13] All data sources are collected and identified systematically to be analyzed prescriptively to obtain solutions to the submitted problems.[14]

II. RESULTS AND DISCUSSION

2.1. Intervention and Ethical Problems of the Constitutional Court

2.1.1. Intervention from Political Actors (Parliament)

The issuance of Law Number 7 of 2020 on the Constitutional Court received so much attention that it resulted in 3 (three) case numbers at the Constitutional Court (excluding the inadmissibility verdict), namely Case Numbers 90/PUU-XVIII/2020, 96/PUU-XVIII/2020, and 100/PUU-XVIII/2020. However, one of the critical applications in this study is the decision in Case Number 100/PUU-

[12] Peter Mahmud Marzuki, *Penelitian Hukum* [*Legal Research*] (Jakarta: Prenada Media, 2005), 35.
[13] Marzuki, 35.
[14] Maria S.W. Sumardjono, *Bahan Kuliah Metodologi Penelitian Ilmu Hukum*, Edisi Revisi [*Course Material for Legal Research Methodology*, revised ed.] (Yogyakarta: Universitas Gadjah Mada, 2019), 23.

XVIII/2020, with the verdict rejecting the applicant's application. Formally, the "Koalisi Selamatkan Mahkamah Konstitusi" (starting now referred to as KSMK) as the petitioner in the case a quo at least based its argument on 6 (six) points, namely: First, the legislators committed legal smuggling under the pretext of following up on the Constitutional Court's decision. Second, the Constitutional Court Law revision needs to fulfil the carry-over requirement. Third, the legislators violated the principles of good legislation formation when discussing the revision of the Constitutional Court Law. Fourth, the Constitutional Court Law revision cannot be academically accounted for, and the academic paper is a mere formality. Fifth, the discussion process was conducted behind closed doors, did not involve the public, was hasty, and did not show a sense of crisis during the COVID-19 pandemic. Sixth, the revision of the Constitutional Court Law is based on invalid laws.

As argued, the revision of the Constitutional Court Law is not included in the 2020-2024 Medium-Term National Legislation Program. Hence, the revision of the Constitutional Court Law uses an open cumulative list of points due to the Constitutional Court's decision to be still able to revise the Constitutional Court Law. However, KSMK considers that several substances have never been mandated in any decision. KSMK considers that the revision of the Constitutional Court Law smuggles several substances based on political interests in the name of following up on the Constitutional Court's decision. The substances in question include [Vide: Constitutional Court Decision Number 100/PUU-XVIII/2020]:

1. The extension of the term of office of Constitutional judges is a maximum of 15 (fifteen years) until the retirement age of 70 (seventy) years and is intended for Constitutional judges who are incumbent;
2. Increasing the minimum age of Constitutional judges from 47 (forty-seven) years old to 55 (fifty-five) years old;
3. Elimination of periodization of judges' tenure;
4. Extension of the term of office of the chairman and vice chairman of the Constitutional Court from two years and six months to five years;

5. The addition of 1 (one) academic with a legal background as a member of the MK Honorary Council and
6. Candidates for constitutional judges proposed by the Supreme Court must come from within the Supreme Court and temporarily serve as high or supreme court judges.

The court considered that KSMK did not have legal standing in the material test of the Constitutional Court Law. It is because KSMK is considered unable to describe a causal relationship (*causal verband*) to the assumption of potential constitutional losses or factual losses against the articles requested in Law 7/2020. Indeed, the case above is a case that tests the existence of the Constitutional Court itself, which is very sensitive. However, the absence of legal considerations from Constitutional judges makes this case absurd because the material for the third amendment to the Constitutional Court Law has very clearly deviated from its path, namely the follow-up path to the Constitutional Court's decision.

To realize Constitutional morality in every decision and action issued by the Constitutional Court, the Constitutional Court needs to uphold the principle of judicial independence. The idea of judicial independence consists of two aspects, namely impartiality and political insularity. For Fiss (1993), impartiality is a condition where a dispute must be decided by a judge who has no relationship with the parties involved and has no interest in the outcome of the case. The second aspect of judicial independence is "political insularity", or the notion that actors outside the judiciary should not influence judges' decisions.[15] It is crucial because, with some notable exceptions, judges tend to be appointed rather than elected, and there are often significant checks and balances involved in their appointments.

Other jurists have added one more aspect to test judicial independence, namely institutional stability, as Larkins (1996) proposed. Similarly, McGuire (2004) measured the underlying concept of judicial institutionalization using indicators that he categorized into three crucial qualities of a viable/stable

[15] Shannon Ishiyama Smithey and John Ishiyama, "Judicious Choices: Designing Courts in Post-communist Politics," *Communist and Post-Communist Studies* 33, no. 2 (2000): 165, https://doi.org/10.1016/S0967-067X(00)00002-7.

institution: differentiation, durability, and autonomy. According to McGuire, judicial differentiation from the political environment is a crucial indicator of institutionalized political organization. First, differentiation is the establishment of clear boundaries that mark and define the unique role of the judiciary. With a clear identity distinct from other political organizations, it is easier for citizens to see the judiciary as a viable and influential institution.[16]

The second is durability. Durability is the ability to survive and adapt to change. If the judiciary can maintain its role in the ebb and flow of democratization, this serves as a measure of its integration into the political system.[17] Finally, standardized courts must be appropriately insulated from other branches of the national government. McGuire (2004) argues that autonomy is operationally demonstrated by "the existence of procedures protecting the institution's independence vis-a`-vis other political actors and institutions." Calibrating judicial capacity and institutional goals depends on the court's ability to chart its policy course independently of the legislature or executive.[18]

If tested with the elements of independence mentioned above, this case leaves a question mark. Regarding impartiality, however, the Constitutional Court must still be responsible for the cases registered to it even though it is related to itself. The Indonesian Constitutional construction, at least, does not provide an alternative institution that can test cases about changes to laws directly related to the Constitutional Court.

Regarding political insularity, this case is closely related to the intervention of political actors (HoR) as an external judicial party that changes the substance of the Constitutional Court Law. So, there are better alternatives than the choice of the Constitutional Court to remain silent for this case rather than expanding the meaning of the Constitutional loss to accept the KSMK application as the applicant. Regarding institutional stability, through this case, the Constitutional Court does not stand autonomously but has a close relationship with political

[16] Kirill M. Bumin, Randazzo, and Walker, "Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States," *Australian Journal of Political Science* 44, no. 1 (2009): 129–30.
[17] Bumin, Randazzo, and Walker, "Institutional Viability and High Courts."
[18] Bumin, Randazzo, and Walker, "Institutional Viability and High Courts," 130

actors as lawmakers (HoR). It is because (HoR) provided a substance that, at that time, favoured the incumbent Constitutional judges and accelerated the entire process of changing the law by ignoring the sense of crisis and meaningful participation that should have been present in changing it at that time. The court's moves to accept the petition will be highly considered because if the court announces the product formed by the HoR, the relationship between the HoR and the court will become spanning.

Constitutional morality requires non-transactional loyalty to the Constitution. It requires patience with the possibility that what ultimately emerges differs from what citizens envisioned.[19] A judge who believes in the doctrine of judicial activism will apply moral standards by expanding individual rights and personal freedoms. In contrast, one who believes in judicial restraint and the judiciary's limited role will interpret the Constitution narrowly.[20] In this case, the Constitutional Court is inclined to judicial restraint by narrowing the applicant's opportunities and rights to review the Constitutional Court law's third amendment. If associated with Constitutional morality, of course, this is odd because the Constitutional Court is the guardian of the Constitution.

2.1.2. Intervention from the Executive (Government)

Flashback to the bribery case that befell the former chairman of the Constitutional Court, Akil Mochtar, in 2013, who was proven to have practised bribery in buying and selling decisions on disputes over regional head election results (Pilkada) in Gunung Emas Regency, Central Kalimantan, and Lebak Regency, Banten. This case resulted in Akil being sentenced to life imprisonment by the Jakarta Corruption Court. If examined, this case is indeed a personal problem, not an institutional problem.

Not long after, then President Susilo Bambang Yudhoyono signed a government regulation instead of law (Perppu) Number 1 of 2013, which contained 3 (three) essential substances, namely first, to get good and trusted Constitutional judges,

[19] Richa Dwivedi and Abhinav Shrivastava, "Constitutional Morality: A Tool for Judicial Governance?" *Think India Journal* 22, no. 4 (2019): 6080, https://thinkindiaquarterly.org/index.php/think-india/article/view/10012.

[20] Dwivedi and Shrivastava, "Constitutional Morality: A Tool," 6082.

the requirements for Constitutional judges, added the phrase 'not being a political party for at least seven years before being proposed as a Constitutional judge', second, clarifying the mechanism of the selection process and the submission of Constitutional judges, third, an improvement in the supervision system of Constitutional judges that is more effective.

If viewed, then this Perppu does contain a noble goal: to improve the institution of the Constitutional Court. However, by regulating it through Perppu, this step becomes a form of executive intervention against the Constitutional Court. The substance of judicial power is only suitable to be regulated in legal products except the law. This is because the judicial power must be independent of any direction and power. As is known, the issuance of Perppu is the president's exclusive authority as granted through Article 22 of the 1945 Constitution. Furthermore, Perppu also needs to reflect public participation. As a result, the president can only regulate the institution of the Constitutional Court by providing space for the public to be actively involved.

The president's power could be an executive intervention, and the parliament's power to enact laws concerning constitutional court. Their powers can directly and significantly affect the Constitutional Court. Their decision can contribute to adding or reducing the Constitutional Court's authorities, as stipulated in some laws. Tom Ginsburg has described this relationship between the judiciary and the executive as political insurance. Political insurance is the idea that political elites can use the Constitution and Constitutional law review, exceptionally, to provide insurance against the risk that they will lose office and influence in future democratic elections.[21] As is known, political actors or the president, if no longer in office, will experience at least 3 (three) risks, namely first, the risk of reduced access to political power; second, the risk of reduced policy influence; and third, the risk of individual persecution or mistreatment.[22] Insurance theory emerged as part of an effort to understand why political actors would tie their hands by empowering independent courts.

[21] Rosalind Dixon and Tom Ginsburg, "The Forms and Limits of Constitutions as Political Insurance," *International Journal of Constitutional Law* 15, no. 4 (2018): 989, https://doi.org/10.1093/icon/moxo80.

[22] Dixon and Ginsburg, 989.

2.1.3. Ethics Violation Cases and Decisions Beyond the Constitution as a Reflection of the Immorality Constitution

The case of unilaterally changing the substance of the decision by Constitutional Judge Guntur Hamzah in Decision Number 103/PUU-XX/2022 related to the judicial review of the Constitutional Court Law, which discussed the removal of Constitutional Judge Aswanto is one of the events of immorality. This event resulted in imposing a written warning sanction from the Constitutional Court Honor Council (MKMK) through MKMK Decision Number 1/MKMK/T/02/2023. The incident of changing the phrasing of this decision is classified as a direct (personal) intervention from a Constitutional Judge. As is known, Constitutional Judge Guntur Hamzah changed the phrase "thus, the dismissal of Constitutional judges before the expiration of their term of office can only be carried out for reasons of resignation at their own request submitted to the chairman of the Constitutional Court, physical or spiritual illness continuously for 3 (three) months so that they cannot carry out their duties as evidenced by a doctor's certificate, and dishonourable dismissal for reasons as stated in Article 23 paragraph 2 of the Constitutional Court Law. In the future, the dismissal of Constitutional judges before the expiration of their term of office can only be done for reasons of resignation…." which resulted in the decision experiencing a change in meaning. One of the sources of the problem of changing the phrase of this decision is the need for a standard operational procedure (SOP) for Judges to change the phrase of the decision while it is being read to the public.

If associated with the Constitution, of course, this event does not reflect the character of Constitutional judges as described in Article 24C paragraph (5) of the 1945 Constitution,[23] even if tested with the concept of Constitutional morality, this event seems far from the core concept of Constitutional morality itself, namely the moral obligation of every individual to uphold the values of the Constitution with uncompromising dignity and loyalty to it.[24] The principles

[23] Mahkamah Konstitusi RI, Naskah Komprehensif Perubahan UUD NRI Tahun 1945, Buku VI, Kekuasaan Kehakiman [*Comprehensive Manuscript of Constitutional Amendments of 1945, Book VI: Judicial Power*] (Jakarta: Mahkamah Konstitusi RI, 2010), 592.

[24] Soma Gupta, "Constitutional Morality: A Critical Study," *Impact: International Journal of Research in Humanities, Arts and Literature* 10, no. 3 (2022): 1.

of non-discrimination, democracy, and equal protection before the law are the boundaries of constitutional morality, which becomes constitutional morality.[25] Meanwhile, changing the phrasing of this decision does not reflect democratic values. The community is no longer the holder of the government, but a handful of rulers drive the government to perpetuate power.

In addition to the ethical cases above, several Constitutional Court decisions reflect constitutional immorality. In a concurring judgment delivered in 2003, Justice S.B. Sinha held that although a measure of affirmative action may be lawful under Articles 15(4) and 16(4) of the Constitution, the action will violate "constitutional morality" if it violates the doctrine of equality.[26] Briefly, constitutional immorality occurs when state officials violate the doctrine contained in the Constitution.

These decisions exceed the Indonesian Constitution, including First, Constitutional Court Decision Number 008/PUU-II/2004 regarding the Constitutionality test of Law No. 23/2003 on the General Election of the President and Vice President against the 1945 Constitution of the Republic of Indonesia, there is an interpretation of the Constitutional Court that indirectly changes the text of the 1945 Constitution, especially Article 6 paragraph (1), namely the phrase "and able spiritually and physically" in Article 6 paragraph (1) of the 1945 Constitution of the Republic of Indonesia is defined by the Constitutional Court with the interpretation "'that the candidates for President and Vice President must be spiritually and physically healthy in carrying out the duties and obligations of the state".[27] This decision has changed the word "able" to "healthy," even though the two words have many different meanings. The implications of this decision caused Abdurrahman Wahid (Gusdur) to lose his Constitutional right to run as a presidential candidate in 2004.

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[25] Urvika Aggarwal, "Situating Dworkin in Indian Jurisprudence: An Analysis With Respect to Constitutional Morality," *SSRN*, May 1, 2020, https://ssrn.com/abstract=XXXXXXX.

[26] Abhinav Chandrachud, "The Many Meanings of Constitutional Morality," *SSRN*, January 18, 2022, https://doi.org/10.2139/ssrn.3521665.

[27] Isra and Amsari, "Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change through Judicial Interpretation]," 12.

Second, the Constitutional Court Decision No. 005/PUU-IV/2006 regarding the Constitutionality test of Law No. 2004 on the Judicial Commission against the 1945 Constitution of the Republic of Indonesia, there is an interpretation of the Constitutional Court that indirectly changes the 1945 Constitution, especially the wording of Article 24B paragraph (1) to mean: "The Judicial Commission is independent with authority to propose the appointment of Supreme Court judges and has other powers to maintain and uphold the honour, dignity, and behaviour of judges, except for Constitutional Judges".[28] The exclusion of "Constitutional Judges" narrows the meaning of "judge" and is contrary to the original intent of the establishment of Article 24B paragraph (1) of the 1945 Constitution, which never distinguishes between general judges and Constitutional judges.

Third, Constitutional Court Decision Number 2-3/PUU-V/2007 regarding the Constitutionality test of Article 80 paragraph (1), Article 80 paragraph (2) letter (a), Article 80 paragraph (3) letter (a), Article 81 paragraph (3) letter (a), Article 82 paragraph (10) letter (a), Article 82 paragraph (2) letter (a) and Article 82 paragraph (3) letter (a) of Law No. 22/1997 on Narcotics which regulates the Death Penalty. In this case, the Constitutional Court interpreted the text of Article 28A and Article 28I of the 1945 Constitution by providing a different understanding from the original intent of these articles. Against the 'right to life' which cannot be reduced under any circumstances, the Constitutional Court provides an interpretation based on the provisions of Article 28 J paragraph (2), so that the Constitutional Court believes that the death penalty is a restriction stipulated by Law No. 22/1997 to uphold public order. The Constitutional Court gives textual meaning to the provisions of Articles 28A and 28I based on the provisions of Article 28J of the 1945 Constitution.

Fourth, Constitutional Court Decision Number 85/PUU-XX/2022 on the case of judicial review of Law Number 10/2016 on the Second Amendment to Law Number 1/2015 on the Stipulation of Government Regulation instead of Law Number 1/2014 on the Election of Governors, Regents, and Mayors into Law. The decision states that Article 157 paragraph (1), paragraph (2), and the

[28] Isra and Amsari, "Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change through Judicial Interpretation]."

phrase "until the establishment of a special judicial body" in paragraph (3) of the Pilkada Law must be stricken or declared to conflict with Article 1 paragraph (3), Article 22E, Article 24C paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution. Thus, it should read, "The dispute over the determination of the final stage of the election results shall be examined and adjudicated by the Constitutional Court" [vide: Constitutional Court Decision Number 85/PUU-XX/2022]. The decision has indirectly changed Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia by adding to the authority of the Constitutional Court.

The above decision is no longer in principle in line with Constitutional morality. George Grote interpreted Constitutional morality as a culture of respect for the Constitution among the people, which would ensure peaceful governance.[29] Concerning its implementation, Chief Justice A.P. Shah of the Delhi High Court first used Constitutional morality rather than popular morality. Constitutional morality requires the court to disregard the people's morals while examining the validity of government actions.[30] Chief Justice Misra in India, who had previously used Constitutional morality in a different context, found that courts should not be "guided remotely by majority views or popular perceptions" and should be "guided by a conception of Constitutional morality and not by the morality of society".[31] The law should always be guided by Constitutional morality rather than popular or public morality. In other words, public morality, even if accepted by the majority, should not outweigh the principles of Constitutional morality.[32] The expression 'morality' has been used by the Supreme Court of India in many cases with issues like surrogacy, religious freedom, and sexual orientation.[33]

Raz describes constitutional morality as the notion of thick Constitutionalism, normative culture, and normative rationality found in constitutional moral principles more than in the text of written constitutional documents.[34]

[29] Chandrachud, "The Many Meanings," 2.
[30] Chandrachud, "The Many Meanings."
[31] Chandrachud, "The Many Meanings," 9.
[32] Ajay Kumar, "Two Different but Same Perspectives on Constitutional Morality," *ILI Law Review* (Winter 2022): 262.
[33] Kumar, Two Different but Same Perspectives, 259.
[34] J. Greenwood-Reeves, "The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality," *Asia-Pacific Journal on Human Rights and the Law* 21, no. 1 (2019): 5, https://doi.org/10.1163/15718158-02101003.

Furthermore, according to Grote, Constitutional morality means obedience to the rule of law by recognizing the ideals outlined in the Constitution.[35] The transformative Constitutional doctrine states that the Constitution is a forward-looking text aiming to keep itself dynamic. As practised in India, Constitutional values consider the future of Indian democracy and adapt it in the manner necessary to reform itself.[36] According to Justice Indu Malhotra, Constitutional morality means Constitutional moral values, guaranteeing the freedom to hold and practice personal religious beliefs.[37]

Constitutional morality requires state officials to defend and take action based on the Constitution's text and spirit.[38] In brief, Constitutional morality contains 2 (two) essential meanings: the opposite of public morality and the spirit and soul of the Constitution.[39] Meanwhile, as is well known, the limitation of power is a common feature of the Constitution. According to Carl J Friedrich, Constitutionalism is the idea that the government organized by and on behalf of the people is subject to some restrictions. These restrictions are expected to ensure that the power exercised is not abused by those who have to govern.[40] Kant expressed the premise that all morality is autonomous, as a form of freedom for intelligent beings. [41] The development of moral theory, Kant also believes that a person becomes a cause that is considered accurate for the emergence of judgments about moral actions. For this reason, an action by a commission is morally said to be good and right, with justification for producing excellent and suitable consequences.[42] To the extent that the resulting consequences are wrong and unrighteous is a form of harming constitutional morality.

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35 Gireesh Kumar and Arjun Philip George, "Constitutional Morality and Its Oracle," *PalArch's Journal of Archaeology of Egypt/Egyptology* 18, no. 08 (2021): 4311.

36 Kumar and George, Constitutional Morality, 4313.

37 Kumar and George, Constitutional Morality, 275.

38 Jay Kumar Bhongale, "Dr. B. R. Ambedkar's Constitutional Morality," *SSRN*, January 4, 2023, Bharati Vidyapeeth Deemed to be University, New Law College, Pune, 5, http://dx.doi.org/10.2139/ssrn.4312052.

39 Bhongale, Dr. B. R. Ambedkar's Constitutional Morality, 9.

40 M. Laica Marzuki, "Konstitusi Dan Konstitusionalisme [Constitution and Constitutionalism]," *Jurnal Konstitusi* 7, no. 4 (2016): 4, https://doi.org/10.31078/jk741.

41 Tria Noviantika, "Gagasan Peradilan Etik: Penataan Kelembagaan Penegakan Kode Etik Penyelenggara Negara [*Ideas of Ethical Adjudication: Institutional Structuring of the Enforcement of the State Officials' Code of Ethics*]" (Tesis, unpublished, Universitas Gadjah Mada, 2024), 29.

42 Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi: Perspektif Baru Tentang Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics* [*Ethical Adjudication and Constitutional Ethics: A New Perspective on Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics*] (2014), 44.

2.2. The Idea of Limiting Interventions and Strengthening the Ethics of the Constitutional Court through Constitutional Morality

The complexity of constitutional issues is not only about legal norms, but there is a relationship with morality.[43] The Constitution is seen as not only fixated on what is written but is full of implicit meanings, including values and norms that grow and develop in society.[44] In line with this, Ronald Dworkin argues that the Bill of Rights should be understood as a form of establishing general morals; at the same time, judges interpret and apply general principles by asking and trying to answer more concrete ethical questions.[45]

The existence of the Constitutional Court makes moral values and constitutional morality a benchmark in assessing conflicts of legal norms. The court examines laws from a philosophical, sociological, and juridical perspective and interprets them according to Constitutional morality.[46] The law cannot eradicate "moral decay", but with the awareness of morality through the judiciary by the Constitutional Court embodied through the decisions and behaviour of the Constitutional Court, judges will be able to implement and realize the morality of the Constitution itself. The author wants to provide an argument by outlining the idea of Constitutional morality and potential challenges in its application as rules and limits in realizing the law expected by society, one of which is through the judicial institution of the Constitutional Court.

2.2.1. Limitation of Intervention against the Constitutional Court through Constitutional Morality

With morality and ethics, the state can be run authoritatively, as Hobbes stated in Leviathan.[47] Thus, the democratic space for citizens is closed. Without

[43] Salman Khurshid, *Judicial Review: Process, Powers, and Problems* (Cambridge: Cambridge University Press, 2020), Chapter 20, "Constitutional Morality and Judges of the Supreme Court," 124.

[44] James E. Fleming, "Fidelity to Our Imperfect Constitution," *Fordham Law Review* 65, no. 4 (1997): 1,335–1,355.

[45] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 28. See also Ronald Dworkin, *Taking Rights Seriously* (1997).

[46] Tanto Lailam, "Building Constitutional Morality of Constitutional Judges in Indonesia," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 511–529.

[47] Jonathan Wolff, *Pengantar Filsafat Politik* [*Introduction to Political Philosophy* (translation)], Bandung: CV Nusa Media, 2013), 12.

ethics, rulers follow Machivelli's teachings in the Il Principle.[48] By justifying various means for the sake of personal interests and making the law a legitimate instrument to maintain power (*status quo*) without regard to the teachings of morality.

One reflection of the apparent intervention into the Constitutional Court is seen in Decision 90/PUU-XXI/2023[49] It was related to reviewing the minimum age limit for presidential and vice presidential candidates in Article 169 letter q of Law Number 7 of 2017 concerning General Elections. The existence of a conflict of interest in the decision resulted in the imposition of serious ethical violations against all Constitutional Court judges.[50] Under such conditions, it is urgent to regulate constitutional provisions to prevent HoR and the Government from making laws that erode the independence of the judiciary. This is a concrete manifestation of preventing the intervention and political interests of groups or individuals.

In reality, there are interventions from political actors and the government through the law made by HoR and the Government, to limit the power of HoR and the Government in intervening in the power of the Constitutional Court so that it remains impartial and independent, at least some efforts are needed. First, there need to be legislative provisions that specifically regulate the prohibition of conflict of interest and the ethics of state administrators, one of which is the prohibition of intervening in judicial power. When the HoR and the government carry out intervention practices, the actions are justified as a violation of the ethics of state administrators, which can lead to ethical enforcement through internal and external ethics courts. In this position, the ethical indicators that need to be applied for state officials (HoR and Government) not intervening in the judicial power are based on Article 24, paragraph (1) of the 1945 Constitution,

[48] Franz Magnis-Suseno, "Marchiavelli: Guru Benar Atau Guru Konyol? [Machiavelli: A True Teacher or a Foolish Teacher?]," in *Jika Rakyat Berkuasa Upaya Membangun Masyarakat Madani Dalam Kultur Feodal* [*If the People are in Power: Efforts to Build a Civil Society in Feudal Culture*], ed. Tim MUALA (Bandung: Pustaka Hidayah, 1999), 47.

[49] Yance Arizona, et al., "Skandal Mahkamah Keluarga: Kaminasi Publik Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Mengenai Batas Usia Calon Presiden Dan Wakil Presiden [Family Court Scandal: Public Condemnation of Constitutional Court Decision No. 90/PUU-XXI/2023 Regarding the Age Limit for Presidential and Vice-Presidential Candidates]" (Yogyakarta: Department of State Law, Faculty of Law UGM, 2023), 14–15.

[50] Noviantika, "Gagasan Peradilan Etik [Ideas of Ethical Adjudication]," 50.

that the judicial power is independent and impartial, so the ethics of state administrators must guarantee the provisions in the report.

The existence of legitimacy to reduce and avoid external influences and interventions that can affect independence and impartiality with standards set through Constitutional morality can be done by expressly prohibiting and regulating interventions from the executive, legislative, and political interests of certain groups in the judicial process. It is crucial to ensure accountability, transparency, and integrity in the judiciary as core elements.[51]

Second, the construction of an ethical institution or court. This institution or court is needed as an external institution that can enforce the ethics of state administrators when there is behaviour contrary to the 1945 Constitution of the Republic of Indonesia. Through the institution or ethics court, a lawsuit can be filed if there is behaviour by both the HoR and the government that intervenes in the power of the Constitutional Court. However, it is still necessary to limit the competence of this ethics institution or court by only assessing and enforcing the ethics of state administrators in implementing the Constitution, including when there is a conflict of interest of state administrators that does not reflect the Constitution and precisely when there are violations of the ethics of state administrators that violate the limits of the independence of the judicial power Constitutional Court.

Third, the reconstruction of selecting and dismissing Constitutional Court judges can be carried out fairly, transparently, and following the qualifications that have been determined. Referring to the provisions of the 1945 Constitution in Article 24C paragraph (5) contains the value of morality by stating that: "The requirements for constitutional judges must have integrity and an irreproachable personality; statesmen who master the constitution and state administration; and do not concurrently serve as state officials" and Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.[52]

[51] International Commission of Jurists, *Judicial Accountability: A Practitioner's Guide No. 13* (Geneva: International Commission of Jurists, 2016), 9.

[52] Constitutional Court of Indonesia, *Decision No. 005/PUU-IV/2006*. Set out in Article 15, paragraphs (1), (2), and (3).

The requirement that constitutional judges have integrity is an essential part of a reflection of attitudes that are outwardly reflected through wholeness and balance in personal relationships with the responsibilities that exist in themselves and cannot stand alone without independence and impartiality.[53] It is essential to do so, considering that Constitutional Court judges have other problems related to political independence to carry out their duties and authorities fairly and objectively, and this can be reflected through their actions and the results of their decisions. In this regard, AV Dicey stated that the morality of the court is much higher than that of politicians in parliament to establish a law with the justification that judges are considered to reflect the meaning of justice and truth. Likewise, concretely, the process of electing constitutional judges can be witnessed by the public and is open to the people in the context that the public can notice and oversee the process of election and dismissal.

Fourth, the Constitutional Court must have sufficient administrative and financial autonomy to carry out its duties without interference, pressure, and intervention from other branches of power, be it legislative, executive, or other political forces based on Constitutional morality. Effective and efficient budget management will have an impact in supporting the implementation of the duties and functions of the Constitutional Court judicial institution.[54] It is given that the state budget is a central instrument for implementing policies and usage based on applicable rules.[55] It is in line with the opinion of Jimly Asshidiqie, one of the conceptualizations of an independent judiciary is the guarantee of financial independence, which is independence in determining and managing its budget to ensure the freedom of the court.[56] Thus, to realize an independent and impartial Constitutional Court judiciary, it is necessary to regulate administrative autonomy standards regarding financial independence without intervention from other branches of power following Constitutional morality. It is essential

[53] Lailam, 516-520.

[54] Ismail Ramadan et al., "Budget Independence of The Supreme Court in The Implementation Of The Functions Of Judicial Power," *Jurnal Hukum Dan Peradilan* 10, no. 3 (2021), 421–29.

[55] Atep Adya Barata and Bambang Trihartanto, *State/Local Financial Management Power* (Jakarta: Elex Media Komputindo, 2004), 16-21.

[56] Muchsin, *Independent Judicial Power and Human Rights Policy* (Jakarta: STIH IBLAM, 2004), 32.

to underline that this upholds the supervisory function and the principle of checks and balances.

2.2.2. Ideas for Resolving Ethical Problems and Constitutional Court Decision

Constitutional morality is a paradigm that must exist in state officials, one of which is the Constitutional Court as the guardian of the Constitution and morality, the interpreter of the Constitution, and the protector in the sense that the Constitutional Court must position itself not only to guard legal norms but it is crucial to guard, interpret, and enforce Constitutional morality.[57] Moral judgment primarily concerns the fundamental structure of constitutional rights, not a secondary or derivative consequence of overly broad doctrines.[58] The potential for conflict arises when there are differences in the interpretation of moral values contained in the Constitution. It can occur due to different views or variations of constitutional judges on specific ethical issues, such as human rights, religious freedom, or individual rights.[59] In this context, it generally occurs as part of Dissenting Opinion; from the positive side, Dissenting Opinion can be used as a goal to build Constitutional morality and the living Constitution.[60] Referring to Simon Butt's opinion, the proper use of Dissenting Opinion can improve and realize the transparency and judicial accountability of the Constitutional Court.[61] The evolution of the debate has led some authors to recognize that judges can play a crucial role in interpreting fundamental rights in a democracy.[62]

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57 Muchsin, *Independent Judicial Power*," 518.

58 Cristopher L. Eisgruber and Lawrence G. Sager, "Religious Liberty and The Moral Structure Of Constitutional Rights," *Cambridge University Press* Legal Theory 6 (2000), 253–68.

59 Bhongale, "Dr. B. R. Ambedkar's Constitutional Morality," 5

60 Lailam, 521.

61 Simon Butt, "The Function of Judicial Dissent in Indonesia's Constitutional Court," *Constitutional Review* 4, no. 1 (2018), 1.

62 Mariano C Melero, "Weak Constitutionalism and the Legal Dimension of the Constitution," *Global Constitutionalism* 11, no. 3 (November 2022), 494–517, https://doi.org/10.1017/S2045381722000077.which will be referred to as 'political constitutionalism' and 'strong popular sovereignty'. Despite their important differences, both share a sceptical approach to the dominant constitutional practice in liberal democracies, hence they are brought together here under the term 'weak constitutionalism'. They both highlight the political dimension of the constitution, arguing that democratic legitimacy requires institutional arrangements that give the people and/or their representatives the last word in settling fundamental issues of political morality. By contrast, this article underlines the legal dimension of the constitution as the repository of the moral principles that make possible a practice of public justification in constitutional states. It is from this second constitutional dimension that the critical arguments are developed, both against the desire to take the constitution away from the courts and the aspiration to recognize the constituent power as pre-legal constitutionmaking faculty.","container-title":"Global Constitution alism","DOI":"10.1017/S2045381722000077","ISSN":"2045-3817, 2045-3825","issue":"3","journalAbbreviation":"Gl ob. Con.","language":"en","page":"494-517","source":"DOI.org (Crossref

In line with the above and several cases of ethical violations of constitutional judges, it is necessary to initiate honest enforcement by external institutions. It is crucial to consider that several constitutional judges have stumbled on moral issues, whether minor or significant violations, described in the previous discussion. So far, ethical enforcement within the Constitutional Court has existed. Based on the provisions of Constitutional Court Regulation Number 2 of 2014 concerning the Honorary Council of the Constitutional Court, the Constitutional Court Ethics institution is divided into the Ethics Council of the Constitutional Court and the Honorary Council of the Constitutional Court.[63] Meanwhile, the presence of the Judicial Commission as an external supervisor of (Supreme and Judges under the Supreme Court) reaped a variety of understandings, which considered that the existence of a Judicial Commission should conduct supervision based on a code of ethics and not intervene in the constitutional rights of judges, which led to the decision that Judicial Commission could not supervise the Supreme Court with the justification that the authority of the court would be disturbed and could not be impartial.[64] In the context of the construction of external supervision by the Judicial Commission against the Constitutional Court through the Judicial Commission Law, the paradigm used is that the concept and formulation of its meaning are all judges.[65]

According to the author, when it comes to ethics to maintain intervention and independence, it is necessary to consider the existence of an external independent supervisory institution with the task and authority to oversee the behaviour of judges and handle complaints related to ethical violations by establishing

[63] With the amendment of Law Number 7 of 2020, the Constitutional Court is in a status quo state; it looks helpless, considering that the Constitutional Court legally states that the presence of this law marks the end of the Ethics Council's existence.

[64] See further in Constitutional Court Decisions No. 005/PUU-IV/2006.

[65] For a similar discourse of opinion, see Jimly Asshiddiqie, *The Position of the Constitutional Court in the Structure of the Indonesian State Administration*, in *Constitutional Court, Collection of Constitutional Court of the Republic of Indonesia* (Jakarta: General Secretariat and Registrar of the Constitutional Court RI, 2005); Mohammad Fajrul Falaakh, *Some Thoughts on the Revision of Judicial Commission Law in Judicial Commission: A Compendium of Reflections on One Year of the Judicial Commission of the Republic of Indonesia* (Jakarta: Judicial Commission, n.d.); Wahyu et al., "Reformulation of Supervision of the Constitutional Court to Increase the Effectiveness of Enforcement of the Code of Ethics for Constitutional Judges," *Jurnal Studia Legalia: Jurnal Ilmu Hukum* 3, no. 2 (2022): 21–43; Titik Triwulan, "Supervision of Constitutional Judges in the Judge Supervision System According to the 1945 Constitution of the Republic of Indonesia," *Jurnal Dinamika Hukum* 12, no. 2 (n.d.), and compare with Natabaya's opinion and considerations in Constitutional Court Decision No. 005/PUU-VI/2006 on Judicial Review of Law No. 22 of 2004 and Law No. 4 of 2004 on Judicial Power.

a clear code of ethics and implementing an effective enforcement mechanism, one of which is honest enforcement against Constitutional Court judges.[66] Namely: The first alternative is to extend the current external institution––the Judicial Commission–morality–with the condition that it expands its duties and authority in carrying out ethical trials––with the consequence of amending the 1945 Constitution. The second alternative is a further idea for establishing a new institution, such as the Ethics Court, to enforce external ethics.[67] When referring to the idea of establishing an ethics court––the Ethics Court––will answer the issue of various ethical violations that occur in the Constitutional Court or other institutions; on the other hand, some ethical decisions that contain errors committed by each code of ethics enforcer in each agency can file legal remedies–such as appeals–in the context of ethics, considering that ethics and law are different entities, with the justification that ethically guilty people are not necessarily guilty in the eyes of the law, and vice versa.

Second, it encourages broader public participation in constitutional litigation by providing facilities for public scrutiny, public monitoring, expert opinions, and contributions from civil society in cases relating to human rights and other important constitutional issues. The Constitutional Court should provide ample opportunity for affected parties or other stakeholders to submit opinions or amicus curiae or "friends of the court" in some cases for judges to consider in deciding matters in the wider community's interest.[68] It will ensure broader representation and diverse perspectives in the judicial process.

Especially for Constitutional Court decisions that go beyond and are not in line with the Constitution, according to the author, there are alternative efforts that can be made by implementing: *the first* alternative solution, providing an appeal mechanism in constitutional cases by the Constitutional Court; this is

[66] Wiryanto, *Etik Hakim Konstitusi: Rekonstruksi Dan Evolusi Sistem Pengawasan* [*Constitutional Judges' Ethics: Reconstruction and Evolution of the Supervision System*] (Depok: Rajawali Pers, 2019), 1–17.

[67] MPR RI, "Konvensi Gagasan Dan Kesepahaman Tentang Pentingnya Keberadaan Mahkamah Etik [Convention of Ideas and Understandings on the Importance of the Existence of the Ethics Court]" (Jakarta: MPR RI, August 2020).

[68] Linda Ayu Pralampita, "The Position of Amicus Curiae in the Indonesian Judicial System," *Jurnal Lex Renaissance* 5, no. 3 (2020): 558–572.

needed as one of the solutions to various Constitutional Court decisions that do not offer or represent the wishes of the community at large. The author tries to outline an alternative procedural mechanism for resolving requests that can be carried out under the following conditions: 1) The existence of Ground for Appeal, where the appeal mechanism must be based on clear reasons,[69] For example, in the context of fundamental legal errors in the initial decision or critical constitutional questions that require further review through this appeal mechanism. 2) New facts that have been discovered and have yet to be considered during decision-making. 3) A transparent procedure with a set time limit for filing an appeal aims to ensure legal certainty and the technicality of the judicial process. 4) The final decision of the appeal becomes a binding and final decision and becomes the basis for resolving constitutional cases in the domestic sphere.

The second alternative solution is the existence of the International Constitutional Court. The opportunity to establish the International Court of Justice is an idea that arises to combat the strengthening forces of authoritarianism in various countries, which have caused distrust of domestic institutions that have extended and existed.[70] While there is no denying that there are challenges and significant efforts to reach a standard agreement and conception in various countries around the world, it is worth noting that the current development of a complex network of global and regional laws and judicial bodies provides an alternative blueprint for how international courts operate and function.[71] The project, purpose, importance, and direction of the International Constitutional Court have primary considerations. The First, as the guardian of 3 (three) significant texts of higher law in global governance, including the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

[69] Rosalind Dixon and Anthony Stone, "The Australian High Court and the Relationship between Appeals and References," *Sydney Law Review* 27, no. 4 (2005): 607–629.

[70] Yascha Mounk and Roberto Stefan Foa, "This is How Democracy Dies," *The Atlantic*, January 29, 2020, in Richard Albert, "Does the World Need an International Constitutional Court?," *Rutgers International Law & Human Rights Journal*, Jurisprudence Lecture by Edward J. Bloustein, 2023, 2–3.

[71] Albert, *Does the World*, 2-3.

Second, the need for an International Constitutional Court is urgent due to the many cases of evidence related to "Constitutional Fraud," which is used to justify building a democratic regime but does not fully reflect democracy.[72], so it is necessary to find new alternatives to "Autocratic Legalism" ––applying the law to achieve goals and then the onset of the coming autocracy––[73]. *Third,* the design of the International Constitutional Court from its composition, functions, jurisdiction, and powers. The court will have 21 judges selected by the UN General Assembly from a closed list of 42 candidates, including representatives from the International Court of Justice and the International Criminal Court. Its two main functions are to advise and resolve disputes with guidance on "Principles and rules relating to democracy and civil liberties that are universally and regionally applicable".[74]

On the other hand, establishing an International Constitutional Court is based on 5 (five) guiding principles of *Internationality*; this Constitutional Court should be housed in an international organization with members from all countries worldwide *and inclusiveness,* including democracies and autocracies countries. *Representativeness* is the way that the court's judges must be diverse and represent people around the world. *Independence* relates to the mechanism for electing judges and the terms and limits of the office of judges—*advice* by providing non-binding advice through advisory rulings.[75]

The author realizes that there is urgency in the existence of these two alternatives, considering that the various ethical problems and decisions that occur in the Constitutional Court today are also the same in the global context, so there is a lot of awareness and efforts from the worldwide community to combat various problems in resolving constitutional cases. Still, in some conditions, further study is needed to determine the most appropriate mechanism that can be used in the Indonesian context by looking further at the potentials that can arise from the two alternatives described above.

[72] Albert, *Does the World,* 5.
[73] Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85, no. 2 (2018): 545–584.
[74] Albert, *Does the World,* 4–11.
[75] Albert, *Does the World*, 19-20.

III. CONCLUSION

Constitutional morality is the soul of the Constitution that contains constitutional moral values. It means that it is reasonable and correct according to the moral values of the Constitution, with the justification that the resulting consequences are good and right. Constitutional morals contain the idea that the government organized by and on behalf of the people is subject to several restrictions. The existence of the Constitutional Court is central as a benchmark in assessing the conflict of legal norms by reviewing the law and interpreting it regarding constitutional morality. Constitutional morality is realized in every decision and action issued and carried out by the Constitutional Court, which must adhere to the principles of judicial independence (including impartiality, political insularity, and institutional stability). Given that the composition of the selection of judges tends to be appointed rather than elected, and there are often significant checks and balances involved in their appointment, there are consequences of intervention from various political actors (Executive and Legislative) accompanied by multiple cases of ethical violations and Constitutional Court decisions that go beyond so that some decisions reflect Constitutional Immorality.

The various problematic facts of political intervention, violations of judges' ethics, and decisions that reflect the Immorality Constitution, the author initiates a concept through Constitutional morality to limit the intervention of other branches of power against the Constitutional Court with efforts: The need for legislative provisions that specifically regulate the prohibition of conflict of interest and ethics of state administrators, the construction of institutions/ethics courts as external institutions that enforce the ethics of state administrators, the reconstruction of the process of selecting and dismissing Constitutional Court judges fairly and transparently, the Constitutional Court must have independent administrative and financial autonomy. Various problematic facts of political intervention, violations of judge ethics, and decisions that reflect constitutional immorality, the author initiates a concept through constitutional morality to limit the intervention of other branches of power against the Constitutional

Court with efforts: The need for legislative provisions that specifically regulate the prohibition of conflicts of interest and the ethics of state administrators, the development of ethical institutions/courts as external institutions that enforce the ethics of state administrators, the reconstruction of the process of selecting and dismissing Constitutional Court judges pretty and transparently, while problems related to decisions of the Constitutional Court that exceed and are not in line with the Constitution can provide an appeal mechanism or the establishment of the International Constitutional Court as an important institutional mechanism to strengthen constitutional morality. The urgency of the need for an International Constitutional Court is due to the many cases of evidence related to "Constitutional Fraud," which is used as a justification for building a democratic regime but, at the same time, does not fully reflect democracy itself.[76]It is necessary to find new alternatives to "Autocratic Legalism".

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[76] Albert, *Does the World*, 5.

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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*
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Example of the explanation of the asterisk:

of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

* Professor of Law at The University of New South Wales (UNSW) Sydney, former, Secretary-General of the International Association of Constitutional Law (IACL), and the Founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC).

III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.

- Font: Times New Roman, font size: 12, alignment: justify text, space: 1.5, margin: Normal.
- Total words: No more than 350 words.

IV. Keywords

- Preceded by the word "Keyword" in bold style (**Keywords**).
- Font: Times New Roman, font size: 12, lower case, alignment: justify text.
- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

V. Body

The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/ aim of the article.
- **Method:** It is an optional section for articles which are based on research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
- **Conclusion:** This section is the most important section of your article. It contains the overall explanation of your article. It should be clear and concise.
- **Reference:** The paper needs to cover at least 10 articles from reputable journal. Our reference uses The Chicago Manual of Style (CMS).

  Consult to: http://www.chicagomanualofstyle.org/ https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide- 1.html.

- **Example of Table:**

TABLE 2. Real-world magnitudes of the relationship between tort reform and death rates

Tort reform	Annual death rates (%)	Number of deaths in 2000	Deaths across all years
Cap on noneconomic damages	−3.54	−333	−5,242
Higher evidence standard for punitive damages	−2.57	−982	−11,798
Product liability reform	−3.83	−1,267	−16,841
Prejudgment interest reform	−4.88	−647	−9,060
Collateral source reform			
Offset awards	+4.71	+938	+14,160
Admit evidence	+2.43	+294	+4,468
Net effect		−1,998	−24,314

Note: Values presented are average changes. These computations are based on the coefficients from the primary regression (table 3) and the average annual populations and average annual death rates in the states that had each reform. The sums of the individual reforms differ by one from the net effects owing to rounding.

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