



Constitutional Review

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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA



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

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

Citation is permitted with acknowledgement of the source.

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

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

Citation is permitted with acknowledgement of the source

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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

Constitutional Review, Volume 11, Number 1, May 2025

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THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

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Volume 11, Number 1, May 2025

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Note From the Editors



The editorial team is pleased to present the May 2025 edition of *Constitutional Review* (Volume 11, Number 1). Published semiannually in May and December, the journal remains steadfast in its commitment 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.

This issue of the *Constitutional Review* brings together a diverse collection of scholarly articles that collectively highlight critical developments and debates in constitutional law and jurisprudence, weaving together insights on judicial activism, constitutional identity, legislative functions, media freedoms, and the environmental and social imperatives of sustainable development.

Cristian's article provides a foundational perspective on the theoretical and practical implications of constitutional law in contemporary governance. His work underscores the importance of understanding constitutional frameworks not merely as legal texts but as dynamic instruments for ensuring justice and democratic legitimacy in pluralistic societies.

Zainal Arifin Mochtar's insightful article explores the evolving role of judicial activism in Indonesia's regional head elections, revealing how the Constitutional Court has expanded its jurisdiction to address systemic electoral violations, thus navigating the tension between legal certainty and institutional overreach.

In another contribution, José Rolando Cardenas Gonzales examines the power of constitutional courts to address legislative omissions, gaps that can threaten the effectiveness of constitutional rights while extending this analysis to foundational principles and criticisms of this judicial function.

Andy Omara's research cautions against the misuse of constitutional amendments for political expediency within the framework of *abusive constitutionalism*, emphasizing the necessity of strengthening constitutionalism and democracy.

Meanwhile, Nayel Musa AlOmran and his co-authors tackle the complex interplay between press freedom and criminal liability in Jordanian law, underscoring the delicate balance between journalists' right to expression and the societal interests in maintaining public order and respecting fundamental rights.

Manwendra Kumar Tiwari critically examines the articulation of constitutional identity through basic structure doctrines and eternity clauses, using Bangladesh as a focal point, and challenges the judicial and legislative practices that might inadvertently stifle democratic evolution by locking in constitutional ideals.

Addressing the theme of environmental and social justice, Mohamed Aboubakr Abdelmaqsoud Abdelhadi and Abdullah Alhabib Ammar discuss how sustainable development has become a constitutional value, arguing that responsible investment practices must be guided by environmental and social governance principles to ensure a balance between economic growth and human rights.

Finally, Artha Debora Silalahi and her colleagues engage with Joseph Raz's analytical jurisprudence to reconceptualize constitutional interpretation in Indonesia, offering a philosophical framework that bridges legal formalism and moral responsiveness to promote judicial approaches that are both principled and contextually aware.

Note From the Editors

These contributions offer a comprehensive and nuanced view of the dynamic field of constitutional law, demonstrating how global and local discourses intersect in addressing the challenges of democratic governance, social justice, and environmental sustainability. We hope this issue inspires further inquiry and robust dialogue among scholars, practitioners, and policymakers alike.

Warm regards,
The Editorial Team
Constitutional Review
May 2025



The Role of Constitutional Courts in Intergovernmental Conflict Resolution: The Argentine Case

Cristian Altavilla

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 001-035

The constitutional and federal theory has debated about what are or what should be the safeguard mechanisms in modern federations, with two conflicting positions: the one that maintains that the mechanisms are essentially political (political safeguards), since the institutional design of the federal government is thought to guarantee an adequate representation of the subnational governments; while a second position holds that the judiciary, in general, and the supreme courts (or constitutional courts) in particular, are the bodies that stand as mechanisms tending to protect the federal system, based on the resolution of specific cases. This paper seeks to analyse what has been the position taken by the Supreme Court of Justice of the Nation of the Argentine Republic in the resolution of (vertical and horizontal) intergovernmental conflicts, in particular, due to the emergence of a new jurisprudence that has taken certain importance in the last decade; the paper concludes that the Argentine Court has opted for an intermediate position, where it is recognized itself as an actor with institutional capacity to resolve intergovernmental conflicts, identifying, providing content and making effective the general constitutional principle of federalism, but at the same time, highlighting the importance of political mechanisms for the resolution of such conflicts, orienting, guiding and even exhorting the constituent actors to resolve conflicts through institutional dialogue and negotiations.

Keywords: Constitutional theory; Institutional dialogue; Political safeguards; Supreme Court of Justice of the Nation of the Argentine Republic.

Guarding Democracy: Judicial Activism in the Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes

Zainal Arifin Mochtar

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 036-062

This paper examines the extent of judicial activism exercised by the Court in resolving regional head election disputes from 2017 to 2020 and its implications for democratic electoral processes in Indonesia. Through a normative juridical approach and case study analysis of selected Constitutional Court decisions, this study highlights how judicial activism has been used to safeguard democracy. The findings reveal that the Court, in several instances, has expanded its jurisdiction beyond legal norms to address systemic electoral violations, including structured, systematic, and massive fraud. The Court's decisions in cases such as Boven Digoel, Yalimo, and Sabu Raijua demonstrate its willingness to intervene in cases involving candidate eligibility, vote-buying, and administrative malpractice, often resulting in re-elections or candidate disqualifications. However, despite its proactive stance, the Court has shown restraint when dealing with pre-election violations such as money politics and civil servant mobilization, thereby raising concerns about the consistency and limitations of its judicial activism. The study underscores the dual nature of judicial activism: while it enhances electoral democracy by addressing unresolved violations, it also risks creating legal uncertainty and overstepping institutional boundaries. The trend observed in the 2017-2020 decisions suggests that the Court's role in election dispute resolution is evolving, reflecting both the need for judicial intervention in electoral integrity and the constraints imposed by legal frameworks. Ultimately, judicial activism by the Constitutional Court contributes to the protection of electoral democracy in Indonesia, ensuring that regional head elections adhere to democratic principles and are free from fraudulent practices.

Keywords: Electoral Democracy, Judicial Activism, Local Election.

The Legislative Function of The Constitutional Court in Relation to the Omission of the Constituent

José Rolando Cardenas Gonzales

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 063-091

The Constitutional Court is the responsible body for guaranteeing the supremacy of the Constitution and respect for fundamental rights. Among its functions is to control the constitutionality of laws and other legal norms, as well as to resolve conflicts of competence between the different branches of Government. However, the Constitutional Court can act not only against positive norms that violate the Constitution, but also against legislative omissions that imply a breach of constitutional mandates. Legislative omission occurs when the legislator ceases to regulate a matter that the Constitution expressly imposes on him or that is necessary to guarantee the effectiveness of constitutional rights and principles. The objective of this article is to analyze the foundations, the limits and the effects of this legislative function of the Constitutional Court, as well as the main criticisms that have been formulated from the legal and political point of view. For this purpose, a review-type study was formalized, based on narrative as a study method. By using keywords related to this topic such as “constitutional court” or “legislative function” among others and looking for them in the search engines such as Scopus, Wos and Scielo, we got to achieve more than 20 reviews so substantial for this paper. It is concluded that the legislative omission may be absolute or relative, depending on whether or not there is a previous norm that regulates the matter, but that is insufficient or incompatible with the Constitution. The purpose of the control of legislative omission by the Constitutional Court is to restore the validity of the Constitution and protect the legitimate interests of citizens who are affected by the lack of regulation. The Constitutional Court may declare the unconstitutionality by omission by means of the amparo appeal, the unconstitutionality appeal or the unconstitutionality question, as the case may be. The Constitutional Court cannot replace the legislator or issue general rules, but must limit itself to pointing out the failed constitutional duty and setting a deadline for its fulfillment.

Keywords: Constituent; Constitutional Court; Legislative function; Legislative omission.

Preventing Abusive Constitutionalism in Indonesia

Andy Omara

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 092-117

Through Landau's abusive constitutionalism concept, this article aims to investigate the background behind the plan to conduct further constitutional amendments after over two decades of constitutional amendments in 1999 – 2002. The central question to be addressed is whether it is necessary to pursue further constitutional amendments aimed at restoring the authority of the People's Consultative Assembly (MPR) to set State Guidelines (PPHN) and extending the President's term of office from two to three terms. This study utilizes doctrinal-qualitative approaches. It studies relevant laws, regulations, and doctrines to find out the primary factors that contribute to the MPR intention to amend the constitution. This paper argues that while amending a constitution is within the MPR's constitutional powers, doing so should consider principles of constitutionalism and democracy. A constitutional amendment should be carried for the sake of having a better constitution which uphold constitutionalism –and not the other way around. This paper, therefore, asserts that further constitutional amendment with the above-mentioned agendas potentially lead to abusive constitutionalism if doing so without any clear and legitimate purposes. In the absence of well-defined and reasonable goals, a constitutional amendment may be subjectively used or misused by state institutions to gain more constitutional powers --not to strengthen constitutionalism and democracy. This paper recommends three ways to avoid abusive constitutionalism namely: inserting eternal clause, applying basic doctrine structure, and effectuating civil society.

Keywords: abusive constitutionalism, unconstitutional constitutional amendment, basic structures.

Freedom of Expression and Criminal Liability for Journalists Under Jordanian Legislation

Nayel Musa AlOmran, Ashraf Al-Rai, and Noor Issa Alhendi

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 118-165

This paper aims to shed light on the journalist's freedom of opinion and expression and the criminal responsibility he bears in adhering to the laws, regulations, and public order in society. It seeks to clarify the idea of freedom of the press, the penalties imposed by legislation, and the importance of maintaining a balance in journalism between the right to express opinions and the freedom of expression that is constitutionally, legally, and internationally protected. It also aims to clarify a journalist's rights and duties, which legislation must balance to achieve professional responsibility within the law. The issue at hand is that many developing countries restrict press freedom under the guise of protecting individuals, groups, and society. They also use vague legal texts that can hinder journalistic freedom, making it necessary to paper the criminal responsibility imposed on journalists. This paper examines both the restrictions and freedoms of journalists, including their right to practice their profession according to the Constitution, international covenants and conventions, and applicable laws. The paper used a descriptive analytical method to analyse legal texts and classify them systematically. The study's conclusions show that while Jordan has a big number of laws pertaining to press and media freedom, some of those regulations are in conflict with one another.

Keywords: Criminal; Freedom of expression; Jordanian legislation; Journalist; Liability.

The Purposive Entrenchment of Constitutional Identity: Insights from Bangladesh

Manwendra Kumar Tiwari

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 166-196

The judicial review of a constitutional amendment and a constitutional amendment articulating the unamendable basic structures of the Constitution in the form of eternity clauses are fraught with the possibility of debilitating a polity. The lure of making aspirational normative ideals permanent often drives the judicial articulation of constitutional identity in the form of basic structure of the Constitution. On the other hand, the legislature may also wish to articulate the same through the constitutional amendments. This paper highlights the fallouts of such judicial and legislative articulation of constitutional identity in the form of the unamendable basic structures of the Constitution. The paper spotlights Bangladesh and the manner of declaration of unconstitutionality of the 13th constitutional amendment by the appellate division of the Bangladesh Supreme Court and argues that it was a flawed decision. The paper asserts that an indigenous and ethnographic articulation of constitutional identity by the constitutional court better serves a polity than simply aping such an articulation from the neighbouring country. The paper also problematizes the popular understanding in the comparative constitutional law about the need of supermajority of a Constitution Court in declaring a constitutional amendment, unconstitutional. The need of supermajority is considered suitable in well-functioning democracies only. It is argued that the simple majority of the Court declaring a constitutional amendment unconstitutional may not be desirable in not so well-functioning democracies like Bangladesh. It further argues that the declaration of the unamendable eternity clause by the 15th constitutional amendment of Bangladesh is an unconstitutional constitutional amendment as it takes away the power of judicial review in respect of the identified eternity clauses and strips the future Parliament of its democratic power to amend the Constitution in respect of the provisions of the Constitution declared permanent by the eternity clause.

Keywords: Bangladesh; Basic Structure; Constitutional Amendment; Constitutional Identity; Eternity Clause, Supermajority.

Responsible Investment Within the Framework of Sustainable Development: A Comparative Constitutional Law Perspective

Mohamed Aboubakr Abdelmaqsoud Abdelhadi and Abdullah Alhabib Ammar

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 197-232

Over the past few decades, sustainable development (SD) has rapidly spread into domestic legal systems after establishing itself as a norm under international law. It incorporates environmental, economic, social, and governance dimensions. This concept has evolved into a constitutional value that integrates environmental, human rights, and economic dimensions, closely aligned with responsible investing and investment law principles. This resulted in responsible investing, in which the investor should incorporate environmental, social, and governance factors and public values in company and asset management decisions. SD requires a balance between economic growth and ecological protection to ensure that future generations possess both resources and rights to economic development. Investment projects should adhere to principles and obligations that promote balance and integration for sustainable growth. Investment projects should contribute to developing a work environment capable of accommodating significant economic, social, and environmental changes, in addition to their profitability and financial status. The study explores sustainable development as a constitutional value and an international standard, emphasising responsible investment under international and constitutional norms that balance the investor's right to profit with the host nation's right to economic advancement. The study examines how law might be used as a regulatory framework in this context. Investors are dedicated to integrating human rights, environmental conservation, social advancement, and effective governance into investment decision-making. Nonetheless, the primary focus remains the comparative constitutional legal viewpoint on responsible investment within sustainable development.

Keywords: Comparative Constitutional Law; International Investment Law; Responsible Investment; Social Responsibility; Sustainable Development; Sustainable Development Goals.

Rethinking Constitutional Interpretation through Joseph Raz's Analytical Jurisprudence

Artha Debora Silalahi, Rizal Mustansyir, and Sindung Tjahyadi

Constitutional Review, Vol. 11 No. 1, May 2025, pp. 233-268

Joseph Raz's analytical jurisprudence serves as a philosophical foundation for rethinking constitutional interpretation, particularly in the context of Indonesian legal discourse. Raz provides a rich theoretical framework that emphasizes the relationship between legal authority, moral legitimacy, and rational justification. He challenges the notion that legal authority is simply the power to command, arguing instead that it must be grounded in its ability to offer reasons that individuals have a good reason to follow reasons that are both morally and rationally justified. This perspective is especially important in constitutional adjudication, where courts are tasked with interpreting foundational legal texts in a way that balances fidelity to legal language with responsiveness to societal change. Raz maintains that legal texts cannot be understood in isolation rather, their meaning is shaped by the intentions of their drafters, the purposes they serve, and the broader cultural and historical context. His dialogical approach to interpretation urges judges to engage with law not just as static rules but as evolving instruments of justice. Methodologically, this research employs a philosophical and jurisprudential approach. The study proceeds by collecting and categorizing literature relevant to both the formal and material objects of the research. The formal object includes Raz's core writings on legal and constitutional interpretation, as well as foundational works by other scholars who shaped his thought. The material object focuses on interpretive frameworks, constitutional reasoning, and the role of legal authority in discovering and reflecting constitutional interpretation. This method enables a critical examination of how Raz's interpretive framework applies to Indonesia's constitutional challenges, such as the tension between legal certainty and moral responsiveness. The study argues that Raz's ideas offer a compelling alternative to rigid textualism by encouraging an approach that is normatively coherent, ethically responsible, and socially aware.

Keywords: Analytical Jurisprudence; Authority; Constitutional Interpretation; Joseph Raz; Rational and Moral Justification.

THE ROLE OF CONSTITUTIONAL COURTS IN INTERGOVERNMENTAL CONFLICT RESOLUTION: THE ARGENTINE CASE

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Received: 15 November 2023 | Last Revised: 6 February 2025 | Accepted: 27 March 2025

Abstract

The constitutional and federal theory has debated about what are or what should be the *safeguard mechanisms* in modern federations, with two conflicting positions: the one that maintains that the mechanisms are essentially *political* (political safeguards), since the institutional design of the federal government is thought to guarantee an adequate representation of the subnational governments; while a second position holds that the judiciary, in general, and the supreme courts (or constitutional courts) in particular, are the bodies that stand as mechanisms tending to protect the federal system, based on the resolution of specific cases. This paper seeks to analyse what has been the position taken by the Supreme Court of Justice of the Nation of the Argentine Republic in the resolution of (vertical and horizontal) intergovernmental conflicts, in particular, due to the emergence of a new jurisprudence that has taken certain importance in the last decade; the paper concludes that the Argentine Court has opted for an *intermediate* position, where it is recognized itself as an actor with institutional capacity to resolve intergovernmental conflicts, identifying, providing content

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and making effective the general constitutional principle of federalism, but at the same time, highlighting the importance of political mechanisms for the resolution of such conflicts, orienting, guiding and even exhorting the constituent actors to resolve conflicts through institutional dialogue and negotiations.

Keywords: Constitutional theory; Institutional dialogue; Political safeguards; Supreme Court of Justice of the Nation of the Argentine Republic

I. INTRODUCTION

Classical literature on federalism has identified different “prerequisites”, “preconditions” or “requisites” to the formation and survival of a federal polity; in other words, a list of factors making federalism work. In a summarized list, we can identify the following conditions of success:

There are ideological factors, such as “the desire for federal union” in terms of Kenneth Wheare, or “feel federal”, in Franck’s words; historical conditions, such as the hostility of a common enemy and the need for common defense (Wheare), socio-cultural factors, such as the community of race, language, religion and nationality (Wheare), social and cultural homogeneity (Ursula Hicks); political factors, such as similar social and political institutions (Wheare), both created within the formal constitutions and outside of it (William Riker), charismatic leadership (Thomas Franck) and the role of political parties and the party system (Riker).¹

However, little attention has been paid to institutional factors. Hicks states that the federal constitution and institutional design must be appropriately devised to create a nation and preserve the identity of the constituent units, and Riker recognizes that the operation of political institutions have to effectively process stress, strains and tensions in the federation to achieve legitimacy; otherwise, according to Riker, the existence of political and legal institutions that are dysfunctional and fail effectively to process conflicts or lack legitimacy contribute

¹ Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford: Oxford University Press, 2012).

to the failure of the system. Despite these general considerations, there are no further development regarding the role and scope of courts in federal systems as a factor contributing (or not) to their workability and success.

These broad considerations take for granted that cooperation between levels evolve peacefully, when the reality shows a very different pattern. As Deil Wright has warned, both conflict and cooperation simultaneously exist in intergovernmental relations and that – more importantly – both terms are not opposite ends of the continuum; the presence of conflict does not imply absence of cooperation. These assertion leads the author to another important conclusion: conflict is not a pathological state; however – I would add – what is pathological is the non-resolution of conflicts, or the partial resolution of them.²

So is that the existence of institutions designed to resolve intergovernmental conflicts is crucial to the survival of a federation.

This paper will focus on an *institutional aspect* (neglected by the classic literature) for the survival and workability of a federation, and the role of the supreme court in resolving intergovernmental conflicts. However, as it will be seen later, this role goes well beyond the resolution of a (legal) dispute; it delivers to the actors involves materials for the interpretation of the constitutional principles governing the intergovernmental relations and gives them a more precise content.

This legal and judicial factor has played an important role in intergovernmental relations, since changing in legal interpretation has fundamentally altered the character and content of national, state and local relations; despite that some literature refuse the power of courts to resolve intergovernmental disputes, as a matter of fact, decisions by the courts have indeed shape the key features of federal organizations.³

² Deil S. Wright, *Understanding Intergovernmental Relations* (Pacific Grove, CA: Brooks/Cole Publishing, 1988).

³ Andrej Stefanovic, "Role of the Judiciary in Shaping Federations: Cases of the Supreme Court in the United States and the Court of Justice in the European Union," *Journal of Liberty and International Affairs* 3, suppl. 1 (July 2017).

II. POLITICAL SAFEGUARD VS JUDICIAL SAFEGUARD

Recent literature, has focused on federalism as an institutional setting ideal conflict solution mechanism,⁴ although empirical research findings are diverse,⁵ however, one question arises: who is the umpire in those conflicts that federalism is intended to resolve?

A heatedly debated point in contemporary legal literature revolves around the issue of conflict resolution between levels of government, with two conflicting positions. Those who argue that the problems raised in the intergovernmental sphere must be resolved by the actors involved themselves, in the political field, and those who maintain that they are matters that can be adjudicated and, therefore, put the task of resolving these conflicts before the courts, applying the law and the principles that govern – or should so – that relationship.

There are two main mechanisms to protect the federal principle in any federation: on the one hand, the institutional design of the departments of the federal level of government are intended to guaranteed an adequate representation of subnational entities, especially in the federal decision making process and enactments of federal laws through a second chamber, the Senate or the federal council. This mechanism has been called *political safeguards*.

On the other hand, the *mechanism of judicial review or Judicial Safeguards* also protects constitutional federalism. In this sense, tribunals in general, and the supreme courts in particular, are established as mechanisms to protect the federal system, based on the resolution of specific cases. Therefore, one of the essential characteristics of any federation is the existence of a “normally judicial” body to settle conflicts between the members of the federation.⁶

⁴ Soeren Keil, “Federalism as a Tool of Conflict Resolution,” in *A Research Agenda for Federalism Studies*, ed. John Kincaid (Cheltenham, UK / Northampton, MA: Edward Elgar, 2019), 153.

⁵ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in ThirtySix Countries* (New Haven, CT: Yale University Press, 1999).

⁶ Karl Loewenstein, *Teoría de la Constitución [Theory of the Constitution]* (Barcelona, Caracas, and Mexico City: Ariel, 1986); Antonio M. Hernández, “Los sistemas políticos federales [*Federal Political Systems*],” in *Derecho Público Provincial [Provincial Public Law]*, eds. Antonio M. Hernández and Guillermo Barrera Buteler (Buenos Aires: Abeledo Perrot, 2020), 29–69; Francisco Fernández Segado, *El Federalismo en América Latina [Federalism in Latin America]* (Mexico City: UNAM / Corte de Constitucionalidad de Guatemala, 2003); George Anderson, *Federalism: An Introduction* (Oxford: Oxford University Press, 2008); Jorge Carpizo, *Federalismo en Latinoamérica [Federalism in Latin America]* (Mexico City: UNAMIIJ, 1973); Giuseppe De Vergottini, *Derecho Constitucional Comparado [Comparative Constitutional Law]* (Mexico City: UNAMIIJ, 2004); Lijphart, *Patterns of Democracy*.

As Aroney and Kincaid has claimed, “After all, a federal system ordinarily requires a written constitution, and a written constitution requires interpretation, usually, though not always exclusively, by judges. The importance of the judiciary was established by most of the pre-federation U.S. state constitutions, such as the Massachusetts Constitution of 1780, the world’s oldest written constitution still in effect”⁷ and “Because federalism is a constitutional arrangement in which powers (or competences) are divided and shared between two or three orders of government, courts – as arbiters of constitutional disputes – have a potentially very important role in policing the distribution and sharing of powers.”⁸

However, part of the constitutional literature has rejected the notion that courts could have jurisdiction to review and decide upon the limits of the constitutional powers of the federal government, specifically those who argue that is the Congress the main and sole mechanism of conflict resolution, since the states are duly represented in it through the Senate; therefore, political safeguards would be enough to protect federalism, and *judicial review* would not be necessary: “From 1954 until the early 1990s, some authors claimed that federal courts had no power to review the limits of enumerated powers at the national level because federal cases raise political questions.”⁹

There are several reasons for this last position, including the argument which states that establishing Congress as the only arbiter to settle intergovernmental disputes is putting the fox in charge of the hen house.¹⁰ The concept of political safeguards has been doctrinally developed by Wechsler¹¹ and Choper,¹² and formally adopted by the U.S. Supreme Court in the *Garcia* case of 1985 – expressly citing Wechsler.¹³

⁷ Nicholas Aroney and John Kincaid, “Introduction: Courts in Federal Countries,” in *Courts in Federal Countries: Federalists or Unitarists?*, eds. Nicholas Aroney and John Kincaid (Toronto: University of Toronto Press, 2017), 193–222, 11.

⁸ Aroney and Kincaid, “Introduction,” 4.

⁹ Steven G. Calabresi and Lucy D. Bickford, “Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law,” (Faculty Working Paper 215, Northwestern University School of Law, 2011), 23.

¹⁰ Calabresi and Bickford, “Federalism and Subsidiarity,” 26.

¹¹ Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 54 (April 1954).

¹² Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: The University of Chicago Press. 1980).

¹³ Wechsler, “The Political Safeguards of Federalism,”.

Thus, a *procedural approach* is contrasted with a *substantive approach*, a clash between the two classical models, the traditional model of judicial enforcement of categorical jurisdictional limits, and the political model that rejects jurisdictional control over the limits to federalism.¹⁴ In the end, a reasoning underlying this doctrine arises, which is the question of the institutional capacity of the courts to establish principles and limits in the federal structure, i.e., whether they are institutionally capable of designing new rules that would constrain Congress and at the same time limit courts.¹⁵

Intervention by tribunals is therefore not only unnecessary, but also inappropriate.¹⁶ Starting from an *originalist* perspective, Wechsler¹⁷ held that judicial intervention was inconsistent with the original vision of the founding fathers. Thus, any attempt by Congress to usurp powers from the states could and should be thwarted through the growing popular appeal of state officials.¹⁸ For Choper, on the other hand, the argument is not historical, but functional, and is due to a functional reconsideration of the Court's role, a role in which it has no place in federal questions.¹⁹

In *Garcia* case (1985), the United States Supreme Court explicitly adopted this position: "Apart from the limitation on federal authority inherent to the delegated nature of the powers of Congress recognized by Section I, the primary way chosen by the Framers to ensure the role of the States in the federal system is found in the very structure of the Federal Government."²⁰

Later, this precedent would be set aside by the *Rehnquist Court*, by rejuvenating the theory of *judicial protection of federalism* especially in the cases *Gregory v.*

¹⁴ Stephen Gardbaum "Rethinking Constitutional Federalism," *Texas Law Review* 74, (1996) 795-838.

¹⁵ Lynn A. Baker and Ernest A. Young, "Federalism and the Double Standard of Judicial Review," *Duke Law Journal*, 51, (October 2001): 75-164. This reasoning can be seen present in the *Garcia* case, when Judge Blackmun held "What has proven problematic is not the perception that the federal structure of the Constitution imposes limitations on the Commerce Clause, but the nature and content of those limitations."

¹⁶ Lynn A. Baker "Putting the Safeguards Back into the Political Safeguards of Federalism," *Villanova Law Review* 46, no. 5 (August 2001): 951- 974.

¹⁷ Wechsler, "Political Safeguards of Federalism."

¹⁸ Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100, no. 1 (January 2000): 215-293.

¹⁹ John C. Yoo, "The Judicial Safeguards of Federalism," *Southern California Law Review* 70 (1996): 1314-1406.

²⁰ Daniel A. Lyons, "Note: The Lesson of *Lopez*: The Political Dynamics of Federalism's Political Safeguards," *Harvard Law Review* 119, no. 2 (2005): 609-630, 609.

Ashcroft, New York v. United States, United States v. Lopez,²¹ where the Court addressed the issue of federalism as a *substantive matter*, setting precise limits on federal power, drawing clear lines between the enumerated powers of the federal government and the states' sovereignty, thereby exercising full judicial review over issues related to state sovereignty and federalism.²²

III. THE DEBATE IN COMPARATIVE PERSPECTIVE: THE EUROPEAN UNION AND SOME FEDERATIONS

In the European Union, the debate on the competence of tribunals to decide intergovernmental conflicts went hand in hand with the debate on *the justiciability of constitutional principles*; debates which were initiated with the explicit incorporation of the principle of subsidiarity in the Treaties establishing the European Union.

To ensure its effective application, the European Council adopted, at the Edinburgh Summit (December 1992), a set of "guidelines" to help ensure that the EU institutions comply with the *principle of subsidiarity* in their day-to-day operations. These guidelines stated that proposed legislation at the Union level would require consideration of the following factors: (1) whether the problem being addressed "has transnational aspects which cannot be dealt with successfully by action of the Member States"; (2) whether failure to act by the Community "would be in contravention of the requirements of the Treaty...or would otherwise prejudice substantially the interests of the Member States"; and (3) whether the proposed measure "would result in a liberalization of the Member States".

The guidelines also require the Commission to include in its explanatory memorandum accompanying any legislative proposal sent to the Council (of the European Union) a statement that justifies its initiative with respect to the principle of subsidiarity.²³

²¹ Yoo, "Judicial Safeguards of Federalism"; Saikrishna B. Prakash and John C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories," *Texas Law Review* 79 (2001): 1-73.

²² Yoo, "The Judicial Safeguards of Federalism."

²³ Gardbaum, "Rethinking Constitutional Federalism," 833.

In addition, the Commission issued an Adaptation Report (November 1993), as part of its subsidiarity analysis, for each legislative proposal falling within the concurrent competence of the EU and the Member States; this analysis would address, as part of the explanatory memorandum, the following questions: (1) what are the objectives of the proposed action in terms of the Union's obligations? (2) what is the most effective solution to the problem identified, given the means available to the Union and the Member States; and (3) what is the specific added value of the proposed action and the potential cost of not acting? In addition, the Commission would publish this analysis in the Official Journal of the EU.

The Amsterdam Protocol also established guidelines for the application of the principle of subsidiarity, being nearly the same as those established at the Edinburgh Summit.²⁴

These procedures have been thought with the clear purpose that the principle would have a concrete effectiveness, but nothing is sustained about its justiciability.

The European Council, in the conclusions of the Edinburgh Summit, took an affirmative view, holding that the principle of subsidiarity was a principle justiciable by the European Court of Justice.²⁵

The doctrine opposing justiciability is based on the assumption - similar to that of the American theory of political safeguard - that it would imply substituting the judicial viewpoint for the legislative one in matters of a political nature, and would therefore be inappropriate. This is, for example, the position adopted by the British House of Lords, which holds that the application of the principle of subsidiarity rests on the legislators, not on the judges²⁶ - coherent with the basic principle of parliamentary sovereignty.

On the other hand, the receptive theory of the *judiciability* of the constitutional principles can be classified into two types: one that holds a *substantive* position, according to which the judicial control of legislative rationality by the European Court of Justice, falls not on the *effectiveness* of the decision, but only on whether

²⁴ Katarzyna Granat, *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System* (Oxford: Hart, 2018).

²⁵ European Council, quoted in Gardbaum, "Rethinking Constitutional Federalism," 834.

²⁶ Gardbaum, "Rethinking Constitutional Federalism," 834.

the decision of the legislative institutions is *reasonable*. The other position holds that the principle of subsidiarity should be understood and applied as a *procedural* – not *substantive* – restriction on the legislative process; from this perspective, the role of the court is to analyze whether the legislative institutions have given enough consideration to the possibility of regulation at the level of the Member States.

The debate has been largely resolved by the 2004 “Protocol on the Application of the Principles of Subsidiarity and Proportionality”, establishing the conditions for the application of the principles of subsidiarity and proportionality, as set out in Article I-11, and establishing a system for monitoring the application of those principles. It should be clarified that the Protocols to the Treaties are legally binding in contrast to the mere declarations of the Treaties, which are not²⁷ in particular, the provisions of art. 8 of the Protocol, states that “The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it”.

The rule, however, does not expressly take a position on whether the judicial application of the principle is procedural or substantial (Flynn 2005). Some scholars, like Bermann,²⁸ argue that the procedural position allows the Court of Justice to better promote respect for localism values without getting entangled in deeply political judgments that it is not prepared to make and ultimately is not responsible for making.

At a national level, the same debate about the justiciability of principles can also be found, for example, in Germany, while the Federal Constitutional Court (*Bundesverfassungsgericht* – BverfG) is characterized by a long and inveterate jurisprudence on constitutional principles of German federalism, in particular on

²⁷ Brendan Flynn, “Reformed Subsidiarity in the Constitution for Europe: Can It Deliver on Expectations?” (European Institute of Public Administration Working Paper 2005/W/07, 2005).

²⁸ George A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States,” *Columbia Law Review* 94, no. 2 (March 1994): 331–366.

the principle of good faith or federal loyalty (*bundestruue*), it has also recognized its jurisdictional limits in applying them.²⁹

The jurisprudence of the German Constitutional Court “on the grounds of this specific principle [federal loyalty] has acknowledged additional duties of the states towards the Federation and additional duties of the Federation towards the states, as well as specific restrictions on the exercise of the competences that the Fundamental Law has assigned to the Federation and the states.”³⁰ This new role of the BVerfG has appeared since the unification of the country in 1989: “most federal-state conflicts never reached the Constitutional Court. They [were] usually resolved politically through the mechanisms of collaborative federalism. However, when considering the evolution since unification, this conclusion has to be revised. Various “mechanisms of collaborative federalism’ have in fact been hampered by intense conflicts, and the Court has gained significant influence through its adjudication of disagreements.”³¹

In Belgium, something similar happened with the principle of *federal loyalty*. But the principle was originally conceived in a political, and not judicial, sense, so it was expressly outside the competence of the Court. These issues were to be resolved through political channels to be designed by ordinary legislation,³² however, from 2010, courts began to make application of this principle to suspend and even repeal federal rules that undermined the principle of federal loyalty.³³ Finally, with the 6th State Reform (*6e Réforme de l’État*) from 2012, the principle of federal loyalty became a formally justiciable principle, being part of the block of constitutionality and, as such, enforceable by the Constitutional Court.³⁴

²⁹ Gardbaum, “Rethinking Constitutional Federalism,” 834.

³⁰ Jürgen Schwabe, *Jurisprudencia del Tribunal Constitucional Federal Alemán: Extractos de las sentencias más relevantes* [Case Law of the German Federal Constitutional Court: Extracts of the Most Relevant Judgments] (Mexico City: Fundación Konrad Adenauer, 2009).

³¹ Arthur Benz, “The Federal Constitutional Court of Germany: Guardian of Unitarism and Federalism,” in *Courts in Federal Countries*, eds. Aroney and Kincaid, 208–9.

³² Jan Raeimon Nato, “Development of Duties of Federal Loyalty: Lessons Learned, Conversations to Be Had,” Baxter Family Competition on Federalism (2019); Anne Catherine Rasson, “Le principe du « vivre ensemble » belge: une épopée constitutionnelle [The Principle of Belgian “Living Together”: A Constitutional Epic],” *CPDK* 1 (2012): 25–75.

³³ Raeimon Nato, “Development of Duties of Federal Loyalty.”

³⁴ Anna Mastromarino, “El laboratorio belga: ¿reforma constitucional o acción constituyente? [The Belgian Laboratory: Constitutional Reform or Constituent Action?],” in *Parlamento, ciudadanos y entes territoriales ante la reforma constitucional. Quién y cómo participa?* [Parliament, Citizens, and Territorial Entities in Constitutional Reform: Who Participates and How?], ed. J. M. Andreu Castellà (Barcelona: Tirant Lo Blanch, 2018), 19.

In *Austria*, the Constitutional Court is competent to resolve disputes concerning consultation mechanisms (provided by the Constitution). Since these mechanisms came into force in 1999, until 2014, there had been no recourse to the Court, as all disputes had been settled politically; only in 2014 did the Court decide a case where it declared that the federation had violated the consultation mechanism on the costs of railway crossings for Austrian municipalities (Constitutional Court judgment of March 12, 2014, F 1/2013-20).³⁵

Certain constitutional texts lean towards the political settlement of intergovernmental disputes, rather than the judicial one, although obviously without ruling it out. These systems seek to encourage resolution through dialogue between the parties involved, and only resort to judicial resolution as the *ultima ratio* of the system. Among others, the constitutions of Italy, South Africa, Switzerland and Austria.

South Africa is a very interesting case. Its constitution has three main disposition in this regards:

“First, it requires that national legislation create institutions and procedures for intergovernmental relations and dispute settlement. Second, it also requires governments to resolve intergovernmental disputes in court as a last resort, only after having exhausted these mechanisms. Third, it requires courts to refer intergovernmental disputes back to these bodies if they are not satisfied that governments have exhausted those non-judicial mechanisms.”³⁶

On a rigorous interpretation, it can be argued that these explicit constitutional requirements of the South African constitution,

“federal loyalty requires cooperation, coordination, consultation, and exhaustion of all remedies prior to judicial remedy to avoid encroachment on others. Actors must take substantive steps to cooperate and coordinate when passing legislation. When, inevitably, conflicts arise, they must attempt to resolve the issue absent judicial interference. Call an interpretation

³⁵ Peter Bußjäger, “Austria’s Cooperative Federalism,” in *Austrian Federalism in Comparative Perspective*, eds. Günter Bischof and Ferdinand Karlhofer (Innsbruck: Innsbruck University Press, 2015), 17.

³⁶ Sujit Choudhry, “German Federalism in Translation: The German *Grundgesetz*’s Impact on South Africa’s 1996 Constitution,” in *70 Jahre Grundgesetz – Der deutsche Bundesstaat im Spiegel internationaler Erfahrungen*, ed. Friedhelm Knüpling et al. (Berlin: Springer, 2020), 240.

requiring all substantive obligations associated with Germany or South Africa ‘demanding federal loyalty.’³⁷

Based on the principle of cooperative government, established in art. 41 of the constitution, the Constitutional Court rejected cases brought before it, on the grounds that conflict resolution mechanisms had not been previously exhausted, for example, the one provided for in the 2005 *Intergovernmental Relations Framework Act* that establishes mediation mechanisms for the resolution of intergovernmental conflicts. Thus, for example, in a dispute between the district municipalities and the National Treasury over the right of the former to an equitable share of the revenue collected at the national level, the Court refused to hear the case because the municipalities had not used a forum intergovernmental body scheduled to resolve the matter, the *Budget Council*; in another similar case, it also rejected action by the federal government when it attempted to prevent the KwaZulu-Natal provincial government from establishing a gambling monitoring regime (gambling is a concurrent competence) that colluded with the national system, basically, “because the parties did not make every reasonable effort to settle the dispute by means other than litigation (s. 42(2)).”³⁸

In *South Africa*, according to Nico Steytler³⁹ the low number of federalism-related cases can be attributed to two factors: First, with eight of the nine provinces and all but one of the major cities under ANC control, intergovernmental disputes between ANC-controlled organs of state are usually resolved through intra-party directions or mediation; and secondly, due to the existence of the constitutional principle of *cooperative government* “that eschews the solution of intergovernmental disputes through litigation (s. 41(1)(h)(vi)).”⁴⁰

Ethiopia presents a very particular design, a mix between the US system of political safeguard and the British principle of Parliament supremacy: “The

³⁷ Michael Da Silva, “Federal Loyalty and the ‘Nature’ of Federalism,” *Review of Constitutional Studies / Revue d’études constitutionnelles* 24, no. 2 (June 2019–2020): 222.

³⁸ Nico Steytler, “The Constitutional Court of South Africa: Reinforcing an Hourglass System of MultiLevel Government,” in *Courts in Federal Countries*, eds. Aroney and Kincaid (Toronto: University of Toronto Press, 2017), 328–29.

³⁹ Steytler, “The Constitutional Court of South Africa.”

⁴⁰ Steytler, “The Constitutional Court of South Africa,” 344.

country has also adopted an unusual model of constitutional review in which the House of the Federation (HoF), the upper house of the federal Parliament and not the judiciary, is given the power to interpret the Constitution, including the exclusive power to resolve disputes between the two levels of government and declare a law unconstitutional.”⁴¹

Consequently, the role of the courts is almost null. Both state and federal courts are excluded from dealing with constitutional disputes and even constitutional interpretation and constitutional review. This task has been entrusted to the HoF, the second chamber of the federal Parliament,⁴² which has “the unique power of interpreting the Constitution and determining the constitutionality of federal and state laws. It discharges this unique power of constitutional adjudication with the help of the *Constitutional Inquiry Council (CIC)*.”⁴³

This Constitutional Council has a particular composition: the president and the vice president of the *Federal Supreme Court*, six legal experts appointed by the president of the Republic based on recommendations of the *House of Peoples Representatives* and three members of the *House of the Federation*. The findings of the council are mere recommendations and the HoF is at liberty to accept or reject them, since it retains the power to make the ultimate and final decision on constitutional matters, according to the federal Constitution (Articles 83 and 84). However, until date, not even a single intergovernmental dispute has been brought to the HoF.

In *Italy*, the Constitution entrusts Parliament with the creation and regulation of forms of coordination between the State and the regions, as well as the regulation of other forms of understanding and agreements between levels (article

⁴¹ Yonatan T. Fessha and Zemelak Ayele, “Giving ‘Shape and Texture’ to a Federal System? Ethiopia’s Courts and Its Unusual Umpire,” in *Federalism and the Courts in Africa*, eds. Fessha and Kössler (Abingdon, New York: Routledge), 47–48.

⁴² This chamber “...enjoys no legislative powers. Its involvement in the legislative process of the federal government is limited to initiating laws that would operationalize its constitutionally allocated powers, including its power to regulate federal intervention and engage in constitutional adjudication. It does not deal with laws passed by the lower house, let alone suspend or veto such laws” (Fessha and Zemelak Ayele, “Giving ‘shape and texture’ to a federal system?,” 60).

⁴³ Fessha and Ayele, “Giving ‘Shape and Texture’ ...,” 60.

118.3). In this regard, the Standing Conference of State and Regions has actually become the very pivot in the system and the preferred institutional setting.⁴⁴

The Swiss constitution expressly includes within the jurisdiction of the Federal Supreme Court, the competence to hear in “disputes between the Confederation and Cantons or between Cantons” (article 182.2); however, as Lienhard *et al.* sustain,⁴⁵ intercantonal disputes have been very rare: only three in twenty years – for example, issues related to the definition of intercantonal boundaries (Bern vs. Valais), on the right to vote (Bern vs Jura) and on double taxation (nullity of taxes established by Geneva that taxed the income of travelers from Vaud). To this should be added that in the Swiss system there is no abstract judicial review of decisions made by the federal parliament or the federal executive, nor is there any concrete judicial review of federal laws – Although Federal Supreme Court can declare cantonal norms to be unconstitutional only if it appears genuinely impossible to apply them in conformity with the Federal Constitution. From this perspective, the Swiss federal system lacks a neutral arbiter: decisions made by the federal parliament (and the people in a referendum) take precedence (*de facto*) even over the constitution).⁴⁶

IV. AN ALTERNATIVE MODEL

Between these two extreme positions, some scholars have put forward a more intermediate position.⁴⁷

At present, almost all constitutional courts and tribunals have made an extensive application of the constitutional principles governing the relations between levels of government, so it can be concluded that the doctrine of

⁴⁴ Jens Woelk, “Loyal Cooperation: Systemic Principle of Italy’s Regionalism?,” in *Federalism and Constitutional Law*, eds. Erika Arban, Giuseppe Martinico, and Francesco Palermo (London / New York: Routledge, 2021), 171–88.

⁴⁵ Andreas Lienhard *et al.*, “The Federal Supreme Court of Switzerland: Judicial Balancing of Federalism without Judicial Review,” in *Courts in Federal Countries*, eds. Aroney and Kincaid (Toronto: University of Toronto Press, 2017), 404–39.

⁴⁶ I appreciate Dra. Eva María Belser for this observation.

⁴⁷ Jenna Bednar and William N. Eskridge Jr., “Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” *Southern California Law Review* 68 (1995): 1447–91; Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009); Garbbaum, “Rethinking Constitutional Federalism”; Vicki C. Jackson, “Subsidiarity, the Judicial Role, and the Warren Court’s Contribution to the Revival of State Government,” in *Federalism and Subsidiarity*, eds. James E. Fleming and Jacob T. Levy (New York: NYU Press, 2014), 190–213.

justiciability of constitutional principles currently predominates in all modern federations.

This mechanism of resolution has not, logically, displaced the political mechanism, which is at the foundation of the federal institutional structure and without which any type of federation would lose its very essence. It is a mechanism that complements the political mechanisms of conflict resolution.

It is in the light of the criticism of this judicial activism that a third model has recently emerged in contrast to the two classic models, the *procedural* approach and the *substantive* approach, with two basic characteristics: the importance of (interinstitutional and intergovernmental) *dialogue* and the fact that they are based on constitutional principles (such as subsidiarity, solidarity, and federal loyalty, among others).

Thus, for example, in the alternative model proposed by Gardbaum called constitutional federalism, it is required that the interests and position of the states be considered and taken seriously by Congress before deciding to preempt them in the regulation of certain matters, *i.e.*, it must be guaranteed that Congress is involved in this type of deliberations, where: (1) considers carefully and in good faith the position and interests of the states and (2) concludes affirmatively that, on the substance, the claims of uniformity prevail and, therefore, justifies the termination of the states' constitutionally concurrent legislative authority.⁴⁸

Whereas the role of the Court in this scheme is to perform a "hard look", promoting transparency and rationality in decision-making by ensuring that the agency in question has carefully examined all relevant factors before making its decision, and that the decision was not "arbitrary" or "capricious". This is the procedural perspective.

So far, the mechanism is adequate, but not sufficient: it is insufficient because Congress would have no limit to its decision-making power: "Accordingly, the states should be entitled not only to a fair hearing and a rational decision-making process but also to a reasonable outcome; the 'respect that the States are due

⁴⁸ Gardbaum, "Rethinking Constitutional Federalism," 824-25.

as States' under the spirit of the Constitution should be understood to have a substantive dimension in this context and not just a procedural one."⁴⁹

In other words, the role of the courts should be to judicially enforce deliberative and justificatory restrictions when advancing on concurrent powers. That is to say, to add to the procedural perspective, a substantive one that takes into account the result achieved.

Vicki Jackson reinforces the idea of *dialogue* in the resolution of conflicts, a dialogue that should be carried forward by the federal subjects, and promoted by the courts and tribunals: "I suggest that the courts may be better situated as an institutional matter to try to assure that other branches attend to considerations of subsidiarity so as to make the substantive judgments directly" (2014:191). In similar position, Mark Tushnet proposes a dialogic judicial review, in which dialogue between courts and political actors can operate in different ways and even in different times.⁵⁰

The main point is that the courts are not, therefore, the only instance of constitutional interpretation and, as a result, of decision on how conflicts should be resolved, helping to improve the quality of the legislative process,⁵¹ inviting and encouraging dialogue between the different actors,⁵² considering new mechanisms and areas of discussion where not only the political actors are involved, but also the people themselves,⁵³ throughout different institutional mechanisms, such as *amicus curiae*, public hearings, and structural litigation.⁵⁴

⁴⁹ Gardbaum, "Rethinking Constitutional Federalism," 826-27.

⁵⁰ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008).

⁵¹ Jackson, "Subsidiarity," 203.

⁵² Robert Post and Reva Siegel, *Constitucionalismo democrático. Por una reconciliación entre Constitución y pueblo* [Democratic Constitutionalism: Toward a Reconciliation between Constitution and People] (Buenos Aires: Siglo Veintiuno, 2013).

⁵³ Leonardo García Jaramillo, "Introducción [Introduction]," in *Constitucionalismo democrático*, eds. Post and Siegel (Buenos Aires: Siglo XXI Editores), 11-29; Roberto Gargarella, "Un papel renovado para la Corte Suprema. Democracia e interpretación judicial de la Constitución [A Renewed Role for the Supreme Court: Democracy and Judicial Interpretation of the Constitution]," *Gaceta Constitucional*, special issue (2008): 573-590; Roberto Gargarella, "Democracia e interpretación judicial de la Constitución," *Espacio Abierto* 17 (2012): 9-19.

⁵⁴ Marcos Antonio Vela Ávalos, "Dialogic Justice in a Constitutional Engineering Resistant to Dialogic Constitutionalism: The Case of El Salvador," *Anuario Iberoamericano de Justicia Constitucional* 26, no. 1 (2022): 181-211, <https://doi.org/10.18042/cepc/aijc.26.07>.

V. THE ROLE OF THE ARGENTINE SUPREME COURT OF JUSTICE IN THE RESOLUTION OF INTERGOVERNMENTAL DISPUTES

What has been the role assumed by the Argentine Supreme Court of Justice with respect to intergovernmental disputes? In recent decades, the Argentine Supreme Court of Justice has issued an important series of rulings whose content may justify the assertion of the beginning of a new period, a *new judicial federalism* in Argentina – especially if it is considered its prior tradition of centralist precedents since the beginning of the federation. It is a set of rulings that have identified, interpreted and applied different constitutional principles on the federal system, while defining and specifying the role of the Court in this type of controversies.

The competence of the Supreme Court of Argentina, including the resolution of intergovernmental disputes, originates primarily from its constitutional mandate, starting with article 116 of the Constitution that establishes the Court's role as the highest judicial authority, granting it jurisdiction over cases involving constitutional matters, national laws, and conflicts where provinces or the federal government are parties.

With respect to intergovernmental disputes, its competence to resolve disputes between provinces or between provinces and the federal government comes specifically from Article 117 of the Constitution. This article provides for the Supreme Court's original and exclusive jurisdiction in cases where a province is a party. This framework ensures that disputes concerning federalism and provincial autonomy are adjudicated impartially by the nation's highest judicial body.

The historical development of this competence reflects Argentina's federal structure. For example, cases like "Cullen v. Llerena" emphasize the judiciary's role in maintaining constitutional order during intergovernmental conflicts.

The principle of Supremacy of the Constitution (Article 31) ensures that all provinces and the federal government operate within constitutional bounds, making the Supreme Court the arbiter when conflicts arise. The Court also

applies principles of reasonableness and proportionality when determining the legality of actions by either level of government. These provisions and principles reinforce the Court's central role in upholding the Constitution and balancing the distribution of powers within Argentina's federal system.

In one of its most recent precedents, in the case “Shi v. Municipalidad de Arroyito” of 2021⁵⁵ – a case in which a supermarket contested the constitutionality of a local ordinance prohibiting commercial activities on Sundays, arguing that this is not a local competence – the Minister Ricardo Lorenzetti (in his own vote) makes explicit in a concrete manner the particular role of interpreter the Court has while it elucidates a conflict, holding, on the one hand, that “the judicial task consists of establishing a dialogue between [the constitutional principles in dispute], so that the interpretation is coherent and harmonic, considering the consequences of the decision on the constitutionally protected values”. What is striking about this case is that the Court focused its argument on the merits of the local law, which is rare.⁵⁶

In the last decade, the Supreme Court has issued a series of very relevant sentences on federalism, resolving important intergovernmental conflicts; in these precedents, a series of common elements can be identified: identification of the normative gap and the “denunciation” of the inactivity of the power obliged to fill it - with the consequent exhortation to do so; identification of the fundamental problem in which the case is inserted, the resolution of the concrete case and the establishment of guidelines to solve that fundamental problem and inviting the parties to solve the problem through dialogue and negotiation.

Thus, two main assumptions can be identified: In some cases, it is a matter of constitutional omissions – for example, the failure to sanction the co-participation regime mandated by the Constitution – but in other cases,

⁵⁵ Corte Suprema de Justicia de la Nación (Argentina) [CSJN], *Shi, Jinchui c/ Municipalidad de la Ciudad de Arroyito s/ acción declarativa de inconstitucionalidad*, CSJ 1751/2018/RH1, judgment of 20 May 2021.

⁵⁶ Eduardo J. Torres Buteler, “*Algunas curiosidades de un fallo que maximiza la competencia municipal* [Some Curiosities of a Ruling That Maximises Municipal Competence],” *Revista Facultad de Derecho* 5 (2021): 260–64; see also María G. Ábalos, “Lecciones de federalismo ...,” *El Derecho – Constitucional* 5 (May 2021); María Gabriela Ábalos, “*Autonomía municipal ...*,” *Instituto de Estudios Constitucionales* [Municipal Autonomy ..., Institute of Constitutional Studies] (2021); Andrés Gil Domínguez, “*Federalismo, municipios y libertad de comercio* [Federalism, Municipalities, and Freedom of Commerce],” Rubinzal Culzoni RCD416/2021.

it is a matter of conflicts of a political nature between subjects of public law endowed with sovereignty, who are on an equal basis - nation and provinces, or provinces among themselves - a conflict whose resolution requires, on the one hand, that the court assume a role different from that of a jurisdictional court that applies positive law, and on the other hand, that the parties themselves put a definitive end to it, since the final resolution of the conflict remains in their hands, not in the hands of the Court. In this second case, we are dealing with what the Court itself has called “adjudicatory jurisdiction”, a function essentially different from the judicial or jurisdictional function itself.⁵⁷ The Court specified that “It consists of a political and non-judicial function, which arises both from the nature of the case and from the nature of the parties involved, by which a dispute requiring a decision of a political and diplomatic nature is settled.”⁵⁸

In this set of verdicts issued in the last seven years (2015-2022), it is possible to identify some common elements (despite the fact that the casuistry is quite varied and the decisions taken in each of them, very dissimilar), i. e:

5.1. The Court Recognizes and Analyzes the Fundamental Problem in Which the Case Under Study is Inserted

A paradigmatic example in this sense has been the vote of Justice Lorenzetti in the case “Esso v. Quilmes” of 2021,⁵⁹ where the municipal taxing power was being debated. The municipality of Quilmes intended to calculate the rate of the local charge, not only considering the cost of the service, but also including the gross income of the company throughout the territory of the Province of Buenos Aires. Instead, Esso company stated that the liquidation and payment of the local charge should be implemented taking only the gross income earned in the Municipality of Quilmes. In his vote, Justice Lorenzetti makes a broad and

⁵⁷ Cristian Altavilla, “El Rol de la Corte Suprema en los conflictos intergubernamentales. Análisis del caso *Prov. de La Pampa c/ Prov. de Mendoza* [The Role of the Supreme Court in InterGovernmental Conflicts: Analysis of the Case Province of La Pampa v. Province of Mendoza],” *Cuadernos de Federalismo* 22 (2009): 119–49. Cristian Altavilla, “El Rol de la Corte Suprema en los conflictos intergubernamentales. Análisis del caso *Prov. de La Pampa c/ Prov. de Mendoza* [The Role of the Supreme Court in InterGovernmental Conflicts: Analysis of the Case Province of La Pampa v. Province of Mendoza].”

⁵⁸ Altavilla, “El Rol de la Corte Suprema [The Role of the Supreme Court],” 109.

⁵⁹ CSJN, *Esso Petrolera Argentina S.R.L. y otro c/ Municipalidad de Quilmes s/ acción contenciosoadministrativa* [Esso Petrolera Argentina S.R.L. and another v. Municipality of Quilmes on administrative litigation action], Judgment of 2 September 2021.

interesting report on the general situation of all the municipalities of the country in the economic-financial aspect: “in the public hearing held in this case, the concerning financial situation of the municipalities became evident, since their functions were increased and their resources were decreased” (Paragraph 7°).

The decision of the court goes far beyond the case raised by the appellant (the competence of the municipality to establish this type of charge) and analyzes a fiscal policy problem, rather than tax law or the mere legality of the debated issue (“Esso” 2021, vote Minister Lorenzetti, Paragraph 8°). In Santa Fe (2015), he also makes a general consideration of the nation-province tax relations and their situation in the last four decades, analyzing the specific claim of the province (which was specifically the annulment of a unilateral decision of the federal government to draw co-participable resources from the provinces to finance the Federal Administration of Public Revenue, AFIP).

In “Bazán” (2019)⁶⁰ – a case of conflict of competence between non-federal judges based in that City – he makes a consideration of all the Court’s rulings where serious problems in the functioning of the Argentine federalism have been noticed, due – among many other causes – to the non-compliance with the constitutional text. It brings up very important precedents of its own (“La Rioja v. Province of La Rioja”⁶¹ of 2014, later reiterated in Municipality of “La Banda v. Province of Santiago del Estero”⁶² of 2018, “Santa Fe”, “San Luis” and “Córdoba”, all three of 2015).

The Court identifies a serious problem of omission and immobilism that threatens the correct and efficient performance of the federal system: “That in the terms of the indicated jurisprudence, the situation that is noticed in the matter under examination reveals an assumption of ‘immobilism’ [...] that must also be considered as a serious institutional maladjustment of one of the structural mechanisms of the functioning of federalism, without the delay in

⁶⁰ CSJN, *Bazán, Fernando s/ amenazas* [Bazán, Fernando – Threat Charges], Fallos 344:514, judgment of 4 April 2019.

⁶¹ CSJN, *Intendente Municipal Capital s/ amparo* [Municipal Mayor of the Capital, concerning a writ of amparo], judgment of 11 November 2014.

⁶² CSJN, *Municipalidad de la Ciudad de La Banda c/ Gobierno de la Provincia de Santiago del Estero s/ conflicto entre poderes públicos* [Municipality of La Banda v. Government of the Province of Santiago del Estero – Conflict Between Public Authorities], Fallos 341:939, judgment of 23 August 2018.

the concretion of the constitutional mandate appearing in any way reasonably justified. This omission not only constitutes a literal violation of the National Constitution with the consequent weakening of the normative force of its text. It also impacts on the distribution of public resources” (Bazán, 2019, paragraph 12).

The Court warned that these omissions and delays generate serious intergovernmental conflicts and detrimental consequences to Argentine federalism.

5.2. It Shows Deference to the Other Powers and Parties Involved

The cited rulings seek a balance between the competence of the Court to resolve the cases brought before it and the competences (and obligations) of the other branches of government (at their different levels of government) within the framework of the principle of division of powers – as a concrete example of self-restraint.

However, while it is true that the Court cannot interfere in the tasks proper to the other branches and constitutional bodies, it is also true that it is incumbent upon it “to exercise control [...] over the activities of the other branches of government”, especially when the same fail to comply with the national constitution (“Santa Fe”, 2015, Paragraph 39). In the federal system, this deference is both horizontal, i.e., between the branches of the National State, and vertical, between the levels of government, respecting the functional and territorial dimension of the division of power: “this Court is obliged to ensure that the institutional system of division of powers established by the Constitution (art. 1º) is respected, both in its material aspect in the framework of the republican system of government (legislative, executive and judicial branches), and in its territorial dimension proper to the Argentine federal system” (“CABA v. National Government”, 2020, Paragraph 26⁶³).⁶⁴

⁶³ CSJN, *Colegio de Abogados de la Ciudad de Buenos Aires y otro c/ EN – ley 26.080 – decreto 816/99 y otros s/ proceso de conocimiento* [Bar Association of the City of Buenos Aires et al. v. National Government – Law No. 26.080 – Decree No. 816/99 et al., concerning a declaratory judgment action], judgment of 16 December 2021. A case during the COVID-19 pandemic, in which the City of Buenos Aires asked the Court declares the unconstitutionality of a federal government decision to prohibit in-person classes in the territory of the city.

⁶⁴ A controversial case on this point has been the “Entre Ríos” ruling (CJSN, 2019), especially see dissenting vote of Minister Carlos Rosenkrantz.

5.3. Encourage Dialogue

The Court has invariably insisted on the need for dialogue in numerous precedents. In “Barrick” (2019)⁶⁵ it held that the task of federal concertation corresponds primarily to the political authorities, national and provincial, and in this concertation, actors involved must combine their interests (not always coinciding) to enhance the fulfillment of the constitutional objectives and values.

The Court has consistently emphasized that the basis of Argentine federalism is dialogue and agreement, two fundamental ideas that are at the base of concertation or cooperation federalism and respond mainly to the constitutional principles of cooperation, collaboration, concertation and coordination.

In “Santa Fe” (2015), it held that “The conventional nature is another constitutive aspect of the system, since the Fundamental Law establishes that an agreement law must be passed, based on agreements between the Nation and the provinces [...] and that this agreement law must have the Senate as its Chamber of origin, must be sanctioned with a qualified majority, cannot be modified unilaterally, and must be approved by the provinces (paragraph 2°, second and fourth paragraphs).” (Santa Fe 2, p. 1405, Paragraph 3°).

This type of agreements constitutes “positive manifestations of the so-called cooperative federalism [*federalismo de concertación*]”, by which it is intended to achieve “a concurrent regime in which provincial and national powers are united in the higher objective of achieving a uniform policy for the benefit of the interests of the National State and the provinces”, citing another of its precedents where it outlined some basic principles of the Nation-Provinces fiscal relations, in “El Cóndor,”⁶⁶ of 2001.

⁶⁵ CSJN, *Barrick Exploraciones Argentinas S.A. y otro c/ Estado Nacional s/ acción declarativa de inconstitucionalidad* [Barrick Exploraciones Argentinas S.A. et al. v. National State – Declaratory Action of Unconstitutionality], Fallos 342:917, judgment of 4 June 2019. The Court rejected the claim of unconstitutionality against the glacier preservation law (26.639) promoted by Barrick company, since it failed to demonstrate that the glacier preservation system established by the National Congress generated any type of damage to its mining right. The Court argued that the Constitution establishes that the protection of the environment is a joint task of the national government and the provinces, and that the interpretation of its provisions must combine national and provincial interests to promote compliance with environmental protection throughout the country.

⁶⁶ CSJN, *El Cóndor Empresa de Transportes S.A. v. Provincia de Buenos Aires* [El Cóndor Transport Company S.A. v. Province of Buenos Aires], Fallos 324:4226, judgment of 7 December 2001.

These rulings are referring to a new conception of federalism in general, and in particular of the exercise of concurrent competences. In its latest jurisprudence, the Court has established new benchmarks for the exercising of competences that fall within the orbit of both levels of government, leaving aside the more traditional view, of indistinct or indifferent exercise, to move to a model based on dialogue, mutual assistance, communication and intergovernmental coordination (“Neuquén” 2018, “La Pampa v. Mendoza” 2017, “Barrick” 2019, “CABA v. National Government” 2020, “Shi” 2021).

Both the exercise of these powers and the resolution of conflicts arising from such exercise must now be based on a *conjunctive* or *cooperative perception*, which is typical of cooperative federalism, and no longer from a disjunctive or separatist view (“Neuquén”, 2018, vote of Minister Horacio Rosatti).

Dialogue and agreement are mechanisms that serve not only to establish common policies, or to agree on joint actions to achieve common goals, but also to settle their disputes and controversies: the parties are free to establish the negotiation modalities they deem convenient, “as long as the chosen mode properly complies with the mandates established by the National Constitution” and if the parties act in good faith, they can agree on the necessary measures to achieve the constitutionally set goals (“Bazán”, 2019, Paragraph 15°).

But the Court has been emphatic in holding that reaching an agreement is an *obligation* of the parts, not an option: on one hand, there are clear constitutional mandates requesting prior agreements between the parties, on the other hand, parties cannot argue the lack of agreement to justify the non-compliance with the constitutional mandates (“Santa Fe”, 2015).

5.4. Exhorts the Parties to Comply with The Constitution and Its Objectives

“This exhortation to the superior organs of our constitutional organization is imposed, in order to consolidate the federal project of our primordial Constitution, claimed by the 1994 conventional constituents, in compliance with the strengthening of the federal regime entrusted to them” (“Santa Fe”, 2015); It again exhorts the intergovernmental actors to comply with the Constitution in

“Esso” (2021), (vote Minister Lorenzetti); “Corrales”⁶⁷ 2015, “Bazán”, “Las Colonias” (2020),⁶⁸ where it decided to “exhort the provincial authorities to adopt the necessary regulations for the due compliance with the mandate that emerges from Article 123 of National Constitution,”⁶⁹ a doctrine that was reiterated in “Municipalidad de Castelli” (2022).⁷⁰

The oldest ruling in this line of exhortation of the Court is undoubtedly the case “La Pampa v. Mendoza” of 1987,⁷¹ where it resolved “to urge the parties to enter into agreements for a reasonable and equitable participation in the future uses of the waters of the Atuel River, on the basis of the general principles and the guidelines established in that judgment”; Later, in “La Pampa v. Mendoza” of 2017,⁷² it will again exhort the contending parties (together with the National Government), this time to contribute with necessary resources for the institutional strengthening of the Interprovincial Commission of the Lower Atuel (Comisión Interprovincial del Atuel Inferior – C.I.A.I.). However, the Court also resolved the realization of “a program of execution of works that contemplates different alternatives of technical solution of those foreseen in relation to the problems of the Atuel” program that, in addition, “must be submitted to the approval of this Court within one hundred and twenty (120) days”.

In a similar case, “Provincia de Buenos Aires c/ Provincia de Santa Fe”, 2019, the Court understood it necessary “[...] to urge the provinces of Buenos Aires, Santa Fe and Córdoba, and the National State, to institutionally strengthen the

⁶⁷ CSJN, *Corrales, Guillermo Gustavo y otro s/ hábeas corpus* [Corrales, Guillermo Gustavo et al. – Habeas Corpus Petition], Fallos 338:1517, sentencia del 9 de diciembre de 2015 [judgment of 9 December 2015].

⁶⁸ CSJN, *Asoc. Pers. Munic. las Colonias c/ Fed. Sind. Trab. Munic. Festrám y otros s/ acción de amparo* [Association of Municipal Personnel of Las Colonias v. Federation of Municipal Workers' Unions (FESTRAM) et al. – Constitutional Protection Action (Amparo)], Fallos 343:1389, judgment of 29 October 2020.

⁶⁹ The court declared the unconstitutionality of a provincial law regulating Municipal Public Employment, because it violates the municipal autonomy guaranteed by articles 5 and 123 of National Constitution.

⁷⁰ SJN, *Intendente de la Municipalidad de Castelli c/ Provincia de Buenos Aires s/ acción declarativa* [Mayor of the Municipality of Castelli v. Province of Buenos Aires – Declaratory Judgment Action] (art. 322 Cód. Procesal), sentencia del 10 de febrero de 2022 [judgment of 10 February 2022]. The mayor of the municipality of Catelli, went to the Court asking the declaration of unconstitutionality of the Constitution of the Province of Buenos Aires, since the provincial supreme norm does not guaranty the municipal autonomy established by articles 5 and 123 of National Constitution.

⁷¹ CSJN, *Provincia de La Pampa c/ Provincia de Mendoza* [Province of La Pampa v. Province of Mendoza], Fallos 310:2520, judgment of 3 December 1987.

⁷² CSJN, *La Pampa, Provincia de c/ Mendoza, Provincia de s/ Uso de aguas* [Province of La Pampa v. Province of Mendoza – Dispute over Water Use], Fallos 340:1695, judgment of 1 December 2017.

constitution and operation of the Interjurisdictional Commission”, imposing on the parts, certain actions to be taken, such as strengthening the Interjurisdictional Commission of the Laguna La Picara Basin (CICLP), to develop the necessary works related to infrastructure projects that prevent, regulate or control the runoff of the Laguna La Picara, regulate or control the runoff of water from the lagoon, to coordinate the rational, equitable and sustainable management of water in the lagoon basin and to control the hydraulic works carried out in the area, “to advance in the definitive solution of this problem of general interest, based on the principles of solidarity, cooperation and subsidiarity”.

Thus, in addition to resolving the specific case, the Court urges, exhorts, encourages the disputing parties to resolve the conflict themselves, complying with the guidelines and principles established by the Constitution.

5.5. Sets Guidelines for Future Action

Indeed, in all these rulings, the Court has identified certain constitutional principles that are guidelines in the way the federated actors should act, in order to achieve the goals, values and objectives set by the Constitution.

The Court itself has recognized that it is its task to interpret the rules of federalism: “That a primary function of this Court consists of interpreting the rules of federalism so that the exercise of functions performed by the authorities avoids frictions susceptible of increasing the powers of the central government to the detriment of local powers” (Bazán 2019). In this task, what is sought is that the Interpretation of the infra-constitutional regulations be consistent with the federal system (“Shi” 2021, Vote of Minister Ricardo Luis Lorenzetti, Paragraph 7°).

Considering all the precedents analyzed before, it is possible to conclude that its interpretative task is not reduced to the originalist reading of a text crystallized in time; on the contrary, it strengthens the dynamic reading aimed at implementing it.⁷³

⁷³ María Gabriela Ábalos, “Federalismo y autonomía municipal: la Corte Suprema reafirma su función arquitectónica en el desarrollo constitucional argentino,” *Suplemento de Derecho Constitucional, El Derecho* [Federalism and Municipal Autonomy: The Supreme Court Reaffirms Its Structural Role in the Constitutional Development of Argentina,” *Constitutional Law Supplement, El Derecho*] (February 2015).

VI. CONCLUSIONS

There is no doubt that Apex Courts are playing a key role in modern federations. As Erin Delaney has warned, “The role of apex courts in constitutional development is widely seen as a central aspect of modern constitutionalism, and in a federal system, courts participate in structuring and mediating the very societal conflicts that contributed to the initial desire for power-sharing.”⁷⁴ However, this role varies widely across federations.

In this regards, two African federations adopted a political mechanism over the judicial, without of course neglecting the role of the court in resolving disputes, as the cases of South Africa and Ethiopia; Belgium adopted this system until the same Court decided to intervene in intergovernmental dispute in 2010 and then, after the 6th State Reform from 2012, this role was recognized by the Parliament through legislation.

On the other side, some federations such as the Austrian and German, tend to make the court the primary safeguard. Of course, the general tendency is to establish political mechanism of negotiations and bureaucratic agencies to coordinate and implement decisions.⁷⁵ But, again, in accordance with Erin Delaney

“Given the theoretical expectation that a federal compact will require some type of arbiter and that courts generally are relied upon to interpret and enforce contractual rules, it is perhaps unsurprising that an apex court is the institution most often selected to fulfill that role. Although the occasional scholar is willing to leave ambiguous the ultimate-arbiter designation or hypothesizes a political body instead of a court, 7 most actual federal systems use the judiciary to mediate the challenges of federalism and provide constitutional review. 8 Thus apex courts – both their design and function – have received the most sustained scholarly attention.”⁷⁶

Undoubtedly, the Court has acquired a leading role in the Argentine federal system through its recent jurisprudence, clearly opting for a *system of judicial*

⁷⁴ Erin F. Delaney, “Judicial Federalism in Comparative Perspective,” in *Federalism and the Courts in Africa*, eds. Fessha and Kössler (Abingdon/New York: Routledge), 15–28, 16.

⁷⁵ Johanna Schnabel, *Gestión de interdependencias en sistemas federales: consejos intergubernamentales y creación de políticas públicas* [Managing Interdependence in Federal Systems: InterGovernmental Councils and PublicPolicy Making] (Toluca: Universidad Autónoma del Estado de México, 2022).

⁷⁶ Erin F. Delaney, “Judicial Federalism in Comparative Perspective,” 17.

safeguards, without disregarding, of course, the political mechanisms. in line with a more general trend, as Ronald Watts has emphasized (2001). The Argentine Court's own rulings show the importance of these *political mechanisms* in the resolution of intergovernmental conflicts, which should not only precede the Court's intervention, but also, from a normative and teleological point of view, are preferable to the Court's intervention. Citing the U.S. Supreme Court, it held that "conventions and mutual agreements should, as far as possible, be the means of settlement rather than the invocation of our jurisdictional power" (La Pampa v. Mendoza 1987). What the Court is ultimately saying, is that those conflicts must be resolved by the parties themselves.

When agreement has not been possible, and negotiations have been unsuccessful (if there have been any), the intervention of the Court will be necessary, and the Court has taken advantage of these different opportunities to establish clear and precise criteria of behavior, through the interpretation of the Constitution and the principles derived therefrom.

The Court is recognized itself as an actor with the institutional capacity to recognize, identify, give content to and give effect to the general constitutional principle of federalism (and all the others principles that derive from it). That is, federalism is recognized as a general constitutional principle that can (and should) be distinguished from other constitutional principles, as a separate category and, moreover, can (and should) be judicially enforced.

Matching a generalized trend at the level of comparative federalism, and promoted by an important part of the doctrine (Gardbaum 1996, Jackson 2014, Bermann 1994, Bednar and Eskridge 1995, Bednar 2009) the Argentine Supreme Court embraces a third position, where it exhorts the parties to strengthen political mechanisms, but at the same time reaffirms its institutional role as arbiter of intergovernmental disputes. Throughout its most recent jurisprudence it is possible to find the two characteristic elements of the third model that have been identified in this paper, that is, the importance of dialogue (interinstitutional and intergovernmental) and the leading role of the constitutional principles governing relations between levels.

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GUARDING DEMOCRACY: JUDICIAL ACTIVISM IN THE INDONESIAN CONSTITUTIONAL COURT DECISIONS IN REGIONAL HEAD ELECTORAL DISPUTES

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Received: 1 October 2024 | Last Revised: 5 March 2025 | Accepted: 22 April 2025

Abstract

This paper examines the extent of judicial activism exercised by the Court in resolving regional head election disputes from 2017 to 2020 and its implications for democratic electoral processes in Indonesia. Through a normative juridical approach and case study analysis of selected Constitutional Court decisions, this study highlights how judicial activism has been used to safeguard democracy. The findings reveal that the Court, in several instances, has expanded its jurisdiction beyond legal norms to address systemic electoral violations, including structured, systematic, and massive fraud. The Court's decisions in cases such as Boven Digoel, Yalimo, and Sabu Raijua demonstrate its willingness to intervene in cases involving candidate eligibility, vote-buying, and administrative malpractice, often resulting in re-elections or candidate disqualifications. However, despite its proactive stance, the Court has shown restraint when dealing with pre-election violations such as money politics and civil servant mobilization, thereby raising concerns about the consistency and limitations of its judicial activism. The study underscores the dual nature of judicial activism: while it enhances electoral democracy by addressing unresolved violations, it also risks creating legal uncertainty and overstepping institutional boundaries. The trend observed in the 2017-2020 decisions suggests that the Court's role in election dispute

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resolution is evolving, reflecting both the need for judicial intervention in electoral integrity and the constraints imposed by legal frameworks. Ultimately, judicial activism by the Constitutional Court contributes to the protection of electoral democracy in Indonesia, ensuring that regional head elections adhere to democratic principles and are free from fraudulent practices.

Keywords: Electoral Democracy, Judicial Activism, Local Election

I. INTRODUCTION

Regional head elections serve as a mechanism to uphold people's sovereignty and promote democratic local governance in line with the local democratization agenda.¹ The democratic quality of these elections is reflected in their adherence to the principles outlined in Article 22E paragraph (1) of the 1945 Constitution, which mandates elections to be direct, general, free, secret, honest, and fair.² In 2020, there were 270 regional head elections in 9 provinces, 224 regencies, and 37 municipalities.³ They had not ended by the time of vote counts. Many candidate pairs contested the results at the Constitutional Court (MK). Even though the original intent of designing the regional head election disputes was to contest vote count errors, many plaintiffs questioned the processes before and during the election. For instance, a pair allegedly could not meet the requirements, engaged in money politics, involved state civil apparatus, and abused power. The conduct of regional head elections across various regions in Indonesia was marred by numerous violations, involving election organizers, regional head candidates, and their supporters.⁴

The Constitutional Court is a state organ in the judiciary with limited authority as stipulated by Article 24C of the Constitution 1945, namely adjudicating at

¹ Amiruddin and Rizki Ramadani, "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court," *Substantive Justice International Journal of Law* 6, no. 1 (February 2023): 56–70.

² Kosandi, M and Wahono, S., "Military Reform in the Post-New Order Indonesia: A Transitional or a New Subtle Role in Indonesian Democracy?" *Asian Politics & Policy* 12, no. 2 (April 2020): 224–41.

³ Consideration point (b) of Decree of the General Election Commission of the Republic of Indonesia Number 258/Pl.02-KPT/01/General Elections Commission (KPU)/VI/2020 on the Stipulation of the Extended Simultaneous Gubernatorial and Vice Gubernatorial, Regental and Vice Regental, and/or Mayoral and Vice Mayoral Elections in 2020.

⁴ E. Kusdarini et al., "Roles of Justice Courts: Settlement of General Election Administrative Disputes in Indonesia," *Heliyon* 8, no. 12 (December 2022).

the first and final instance to review laws against the Constitution, judging on authority disputes of state institutions whose authority is granted by the Constitution, judging on the dissolution of a political party, and judging on disputes regarding the result of a general election. Thus, Constitutional Court should have had no other authority besides what is written in the Constitution. In other words, its authority is limited by constitutional norms.

The Court began to resolve the dispute after the enactment of Law Number 12 of 2008 on Local Government, which transferred the authority to it.⁵ The law implicitly stated that regional head elections were part of the general election as stipulated by Article 22E of the Constitution 1945. It means that the Constitutional Court has wider authority, from only resolving disputes over the results of general elections, not the regional ones. The extension of authority enables the Court to be the guardian of the Constitution and democracy.⁶ It is caused by at least two things. First, an election indicates how a country runs a democratic political system.⁷ Second, following Article 18 paragraph (4) of the Constitution 1945, every regional head shall democratically be elected. Hence, the authority of the Constitutional Court to judge the legitimacy of a regional head election directly ensures that the election is democratically conducted.

Nevertheless, after Constitutional Court Decision 97/PUU-XI/2013, which states that Constitutional Court has no authority over regional head election disputes, there is a shift in the its authority. The legal reasoning in the decision implicitly ensures that there is no constitutional disobedience.⁸ There are two constitutional reasons why the Constitutional Court revoked its authority. First, its authority is limited by the Constitution 1945. Second, the regional head elections are not a part of the general elections as stipulated in two separate chapters and articles. After this decision, the lawmakers directly enacted Law 1

⁵ Article 236C of Law No. 12 of 2008 on Local Government.

⁶ Hamdan Zoelva, "The Problems of Settlement of Disputes on the Results of the Regional Head Election by the Constitutional Court," *Journal of the Constitution* 10, no. 3 (September 2013): 382.

⁷ Affan Gafar, *Indonesian Politics: Transition to Democracy*, 2nd ed. (Yogyakarta: Pustaka Belajar, 2000), 7.

⁸ Supriyadi and Aminuddin Kasim, "Design of the Special Election Court After the Constitutional Court Decision Number 97/PUU-XI/2013," *Journal of the Constitution* 17, no. 3 (September 2020): 688.

of 2015 on Regional Head Elections. However, the Constitutional Court still has been judging election results until an election court is established.

In its development, the Constitutional Court has quantitatively resolved disputes over regional head election results. It is also deemed to have the authority to assess infringements committed during the process of regional head elections.⁹ The infringements are money politics, the involvement of officials or civil servants, alleged election offenses, which are structured, systematic, and massive, affecting the results of general elections or regional head elections, and the infringements of principal and measurable requirements for candidacy (such as having never been convicted and drawing legitimate support for independent candidates).¹⁰ In assessing those infringements, the Constitutional Court rationalized that due to its nature as a constitutional court, it may not let procedural justice restrict and set aside substantive one.¹¹ Substantive justice generally promotes more fundamental things, such as morals and humanity.¹² The Constitutional Court also reasoned that the Court also has the authority to oversee and safeguard the establishment of democracy as regulated in the Constitution by assessing and providing justice for violations that occur in the implementation of democracy, including that of regional head elections.¹³

1.1. Background

The Constitutional Court's decision to adopt judicial activism is an important step in correcting violations in the democratic process. This is to keep elections as part of democracy running well. Democracy and the electoral process cannot be separated. All existing indexes of the quality of democracy agree on a need for good-quality elections. The minimum standard of democracy is the existence of institutions that allow citizens to run their government through elections.¹⁴ Huntington says that the central procedure for democracy is the selection of

⁹ Constitutional Court Decision No. 115/PHPU.D-XI/2013, 99.

¹⁰ Constitutional Court Decision No. 115/PHPU.D-XI/2013, 99.

¹¹ Constitutional Court Decision No. 41/PHPU.D-VI/2008 on the dispute over the East Java gubernatorial election, 128.

¹² David Lewis Schaefer, "Procedural versus Substantive Justice: Rawls and Nozick," *Social Philosophy and Policy* 24, no. 1 (January 2007): 166.

¹³ Constitutional Court Decision No. 41/PHPU.D-VI/2008 on the dispute over the East Java gubernatorial election, 128.

¹⁴ Brigitte Geissel, Marianne Kneuer, and Hans-Joachim Lauth, "Measuring the Quality of Democracy: Introduction," *International Political Science Review / Revue Internationale De Science Politique* 37, no. 5 (November 2016): 574.

leaders through competitive elections by the people they govern.¹⁵ The democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide through a competitive struggle for the people's vote.¹⁶ One of the functions of democracy in a country is to produce good government policies, but it can play this role only so far as it operates in two distinct dimensions, electoral and contestatory.¹⁷

Debates among judges on the use of judicial activism occurred. In Constitutional Court Decision 46/PUU-XIV/2016, there are two approaches by judges to giving an opinion on the decision. Some judges used the judicial restraint approach by assuming that the expansion of norms is the exclusive authority of legislators. At the same time, others thought that the Constitutional Court should not take a self-limiting attitude by using the judicial restraint approach in cases related to the order and welfare of human life. Some of the Constitutional Court judges took the judicial activism approach in this case with the argument of moral reading of the Constitution where the Constitutional Court judges are obliged to maintain, straighten, and make law congruent with the dynamics of people's lives.

Especially in regional head election disputes, Simon Butt, in his article "Indonesian Constitutional Court decisions in regional head electoral disputes," criticizes that the application of judicial activism in resolving regional head election disputes, particularly in determining qualitative errors, has tended to be inconsistent and arbitrary. This is not in line with the reasons given by the Constitutional Court in settling the East Java regional head election dispute when extending its jurisdiction beyond vote counting, intently to maintain democracy and the legitimacy of elections.¹⁸

¹⁵ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 6.

¹⁶ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 2nd ed. (New York: Harper, 1947), 269.

¹⁷ Philip Pettit, "Democracy, Electoral and Contestatory," in *Designing Democratic Institutions*, eds. Ian Shapiro and Stephen Macedo (New York: New York University Press, 2000), 105.

¹⁸ Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Canberra: Center for Democratic Institutions, Australian National University, 2013).

Although it can be considered a legal breakthrough, the discussion of judicial activism cannot eventually be separated from how the Constitutional Court has realized democratic elections. Without its role, violations not properly processed before the election would not be handled. Those violations can threaten democratic values in regional elections. This worry matches the theory that the symptoms of the problems facing democracy include declining voter turnout, disinterest in politics among youth, cross-national data showing declining confidence in political systems and leadership, and decreasing participation in civic affairs.¹⁹ Nevertheless, the practice of judicial activism by the Constitutional Court in election disputes must also be investigated to reveal whether it can realize electoral democracy. This can be seen from examining its legal considerations using the limitations of judicial activism.

For example, in the 2000 simultaneous elections, it ordered 17 re-elections due to infringements in the pre-election processes, such as election rigging and irregularities of the Final Voters List, administrative violations, and criminal offenses.²⁰ At that time, two candidates were also disqualified for their citizenship and conviction for corruption. It shows the Constitutional Court's vital role in handling infringements and disputes over elections, which cannot be resolved by authorized institutions in the electoral process. Additionally, in practice, the Constitutional Court can examine the infringements handled by other institutions: the General Elections Commission (KPU), Elections Supervisory Agency (Bawaslu), and Election Organization Ethics Council (DKPP), provided the handling is contrary to laws and regulations so that the elections follow the principle of democracy as stipulated by Article 18 paragraph (4) of the Constitution 1945.

The study of judicial activism in Indonesia in general and analyses of cases are essential to see its development. Moreover, the Constitutional Court has not standardly and consistently determined when and under what condition judicial activism can be applied to decide a constitutional case. Judicial activism can be

¹⁹ W. Johnston, H. Krahn, and T. Harrison, "Political Institutions, and Trust: The Limits of Current Electoral Reform Proposals," *The Canadian Journal of Sociology / Cahiers Canadiens De Sociologie* 31, no. 2 (2006): 166.

²⁰ Author, compilation from various Constitutional Court Decisions on disputes over regional head election results in 2020.

a “double-edged sword”. On the one side, it can enforce substantive justice and strengthen the democratic electoral process. However, on the other side, it can create legal uncertainty in the decisions of the Constitutional Court.

1.2. Research Questions

This study maps the trend of judicial activism at the Constitutional Court in judging on regional head election disputes in 2017, 2018, and 2020. Then, its contribution to democracy, in both positive and negative senses, will be analyzed. From the previous decisions, it is hoped that the Constitutional Court judges can take lessons in settling regional head election disputes in the future. Suppose a court that specifically handles disputes over election results is formed in the future. In that case, this study can also be used to reveal to what extent judicial activism impacts the democratic electoral process in Indonesia. Even if, according to the plan, the 2024 regional head elections will be held simultaneously throughout Indonesia, it will certainly be extremely difficult for the regional election dispute court. Besides the existing laws, studies that discuss the limits of judicial activism and judicial restraint can help judges.

1.3. Method

This research used the case study approach. The researcher’s main concern was the ratio decidendi, namely the judges’ legal reasons to arrive at their decision. This research was conducted to find legal rules, principles, and doctrines to answer its research questions.²¹ This research was carried out normatively with secondary data used as research material. The secondary data consisted of primary, secondary, and tertiary legal materials obtained through library research study. The primary legal materials were laws related to this research, such as the 1945 Constitution of the Republic of Indonesia, Law 7 of 2020 on the Constitutional Court, and Law 10 of 2016 on Regional Head Elections.

As for methodology, data were collected by studying written data from documents or library materials through content analysis. Because this study focuses on decisions reflecting judicial activism, the researcher looked for decisions in

²¹ Peter Mahmud Marzuki, *Penelitian Hukum [Legal Research]* (Jakarta: Kencana Prenada Media Group, 2005), 35.

the Constitutional Court's directory of disputes over the regional head election results in the 2017-2020 period. The researcher opened the decisions one by one and then looked at the application section, court considerations, and decision section. Furthermore, sees at decisions with the character of judicial activism, the researcher also sees decisions with the character of judicial restraint as comparison material.

After a list of decisions made based on the decision number had been compiled, the data were analyzed qualitatively using the normative-juridical method. The juridical analysis was based on existing laws and regulations and the normative analysis was based on library materials following research. The decisions were analyzed by reading and understanding the judges' reasons for making decisions. The decision analysis was then adjusted to theories and concepts in democracy, especially electoral democracy.

II. DISCUSSION

2.1. Judicial Activism

The Constitutional Court is the sole interpreter of the Constitution. Therefore, one important aspect of the Constitutional Court is interpretation. Basically, over time constitutional norms face the reality of society development, so that interpretation becomes necessary. Jimly Asshiddiqie divides the types of constitutional interpretation into three major schools.²² The first is originalism, which interprets the Constitution by referring to the originality of norms according to the spirit of its making. The second is contextualism of basic values, namely understanding the Constitution based on the morality during its drafting, so that it does not just follow the intent of constitution makers. The third is the convergent schools, opening up the Constitution as widely as possible to all parties, not only judges or academics. Thus, the interpretation of the Constitution belongs to everyone with different rights.

²² Jimly Asshiddiqie, *Agenda Pembangunan Hukum Nasional di Abad Globalisasi [The National Legal Development Agenda in the Age of Globalization]*, 1st ed. (Jakarta: Balai Pustaka, 1998), 37–52.

There are many types of constitutional interpretations. However, judges in the world can be grouped into two major groups, namely originalists and non-originalists. Originalists interpret the Constitution according to its text or the intent of its makers. On the other hand, for non-originalists, according to the development of society, constitutional interpretation cannot be based only on the text of the Constitution or its original intent.

At first, the term judicial activism had a positive connotation, whose definition was deemed more similar to “civil rights activists” than “judges misusing authority.”²³ Judicial activism reflects a situation when the judiciary comes out of its sphere of traditional role and becomes active in its work while laying down policies and programs to ensure the protection of the people’s rights and liberty at the discretion of the executive and the legislature.²⁴ Christopher Buck puts four limitations on judges’ decisions characterized by judicial activism.²⁵ First, principled implications or the protection of individuals’ rights and freedom is the intent of the Constitution, even though it is not written. Second, principled minoritarians or decisions are taken to guarantee and protect the rights of minorities. Third, principled remedies, in which a decision is made to restore the constitutional rights of citizens that have been violated. Fourth, the principle of internationalism, where judges decide by looking at precedents and legal developments globally or internationally. In the Indonesian context, Pan Mohammad Faiz argues that there are limitations not to expand norms related to criminalization.²⁶

Judicial activism was first adopted in *Brown versus the Board of Education*. The Warren Court, in its opinion, held that separate schools violated the Equal Protection Clause of the 14th Amendment. The ruling effectively removed segregation as the policy of segregating students racially created an inherently

²³ Keenan D. Kmiec, “The Origin and Current Meanings of Judicial Activism,” *California Law Review* 92, no. 5 (October 2004): 1451.

²⁴ Hamdan Zoelva and Aminuddin Kasim, “The Problems of Settlement of Disputes on the Results of the Regional Head Election by the Constitutional Court,” *Journal of the Constitution* 10, no. 3 (September 2013): 114.

²⁵ Geissel, Kneuer, and Lauth, “Measuring the Quality of Democracy,” 785.

²⁶ Pan Mohammad Faiz and M. Lutfi Chakim, *Peradilan Konstitusi: Perbandingan Kelembagaan dan Kewenangan Konstitusi di Asia [Constitutional Judiciary: Institutional and Jurisdictional Comparison in Asia]* (Depok: Raja Grafindo Persada, 2020), 8–9.

unequal learning environment. This is an example of judicial activism due to the ruling overturning *Plessy v. Ferguson*, where the Court reasoned that facilities could be separated as long as they were equal.²⁷ However, there is debate among judges in America on the use of judicial activism. The judicial activism approach is often employed by liberal judges. They are frequently more courageous to go beyond their restriction and enter the domain of other institutions. On the other hand, the approach at the Constitutional Court began to emerge with the beginning of the paradigm to promote substantive justice. It emphasizes how judges deliver justice by treating rights and obligations justly.²⁸ The Constitutional Court is the sole interpreter of the Constitution. Therefore, one important aspect of the Constitutional Court is interpretation. Basically, over time constitutional norms face the reality of society development, so that interpretation becomes necessary.

Kmiec argues that defining judicial activism in a representative manner is challenging. Bolick supports this view, noting that perceptions of judicial activism vary among individuals.²⁹ However, he provides a clear explanation, describing it as a situation where a court strikes down a law that violates individual rights or oversteps constitutional limits on other branches of government.³⁰ Jimly Asshiddiqie divides the types of constitutional interpretation into three major schools.³¹ The first is originalism, which interprets the Constitution by referring to the originality of norms according to the spirit of its making. The second is contextualism of basic values, namely understanding the Constitution based on the morality during its drafting, so that it does not just follow the intent of constitution makers. The third is the convergent schools, opening up the Constitution as widely as possible to all parties, not only judges or academics. Thus, the interpretation of the Constitution belongs to everyone with different

²⁷ Johnston, Krahn, and Harrison, "Political Institutions, and Trust," 786.

²⁸ Pan Mohamad Faiz, "Dimensions of Judicial Activism in the Decisions of the Constitutional Court," *Journal of the Constitution* 13, no. 2 (June 2016): 423.

²⁹ Tanya Josev, "The Nursery Years of 'Judicial Activism': From a Historian's Shorthand to Media Catchphrase 1947–1962," *Studies in Law, Politics and Society* 72 (May 2017): 53–80.

³⁰ Clint Bolick, "The Proper Role of 'Judicial Activism,'" *Harvard Journal of Law & Public Policy* 42, no. 1 (January 1994): 1–15.

³¹ Jimly Asshiddiqie, *Agenda Pembangunan Hukum Nasional di Abad Globalisasi* [The National Legal Development Agenda in the Age of Globalization], 1st ed. (Jakarta: Balai Pustaka, 1998), 37–52.

rights. The judicial activism movement is prominent in Anglo-American and Indian legal systems for prioritizing substantive justice over procedural justice, which often favors the elite while marginalizing minorities.³²

The Constitutional Court's decisions on disputes over regional head election results are a manifestation of the judiciary's role in maintaining democracy in Indonesia as repeatedly emphasized in its considerations. The Constitutional Court is of the opinion that the decisions is one of the concrete efforts to build a democratic culture that respects the provisions stipulated by the law in accordance with universally applicable principles in a constitutional democratic state.

However, in practice, the Court's efforts to maintain democracy through its decisions have become a dilemma. Legal norms have not allowed these efforts. As a state institution, the Constitutional Court is subject to statutory provisions. The Constitutional Court must comply with the limits of authority in the law as a form of power control. Regarding regional head elections, the Constitutional Court is only authorized to resolve disputes over the determination of vote acquisition results from the regional head elections under Article 157 Paragraph (3) of Law Number 10/2016 concerning the Election of Governors, Regents, and Mayors, which states "disputes over the determination of the final stage of the election results examined and tried by the Constitutional Court until a special judicial body is formed."

This norm has imposed a limit for the Constitutional Court to promote democracy in the context of regional head elections. The Constitutional Court can only adjudicate disputes over regional head elections in the form of numbers. The Court cannot go beyond the limit to examine, hear, and make decisions. This is logical because the authority to handle other than disputes over results has become the domain of other state institutions such as the General Elections Commission (KPU), Elections Supervisory Agency (Bawaslu), Election Organization Ethics Council (DKPP), and even law enforcement officials. All disputes should be resolved at each stage of local elections. However, in practice,

³² Indriati Amarini, "Implementation of Judicial in Judge's Decision," *Jurnal Hukum dan Peradilan* 8, no. 1 (March 2019): 21–38.

these institutions have not been able to consistently enforce regulations in the event of a violation.

Violations in local elections were not stopped so the Constitutional Court upheld democratic values by making legal breakthroughs. Throughout the implementation of regional head elections in the last three times, namely 2017, 2018, and 2020, the Constitutional Court issued several decisions normatively exceeding its authority on disputes over the determination of local election results. In the 2017 regional head elections, out of 60 applications, the Court granted two requests from parties who wanted vote recounts in the Yapen Islands and Intan Jaya Regency regional head elections. One more request was granted, but only in the form of a further recapitulation order. Meanwhile, in the 2018 regional head elections, out of the 72 cases brought their applicants, the Court only granted 2 of them in the Election of the Regent and Deputy Regent of Deiyai Regency and the Election of the Governor and Deputy Governor of North Maluku.

2.1.1. Note from Several Cases

In the 2020 regional head elections, out of 151 applications, 22 were granted and the Court ordered re-voting in 17 elections. In fact, the Constitutional Court issued three decisions to disqualify regional head candidates in the regional head elections of Boven Digoel, Yalimo, and Sabu Raijua.

A candidate for the regional head of Boven Digoel Regency had not gone through 5 years from the last being subject to criminal sanctions, so he did not meet the administrative requirements for a regional head candidate. There were different opinions from the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) on calculating the 5 years for former convicts to run for regional head elections. Against this debate, the Constitutional Court explained that for prisoners who are granted parole, even though they are no longer prisoners in correctional institutions, their legal status is still convicts. The Constitutional Court wanted to present a leader who is clean, honest, and has integrity in implementing a clean and transparent regional head election,

and there is no possibility of mistakes in determining the candidate pairs for former convicts to take part in the election.

Meanwhile, in the Yalimo election dispute, a regional head candidate drove a vehicle while drunk so that he hit a policewoman to death and he was disqualified by the Constitutional Court through Decision Number 145/PHP.BUP-XIX/2021. The Court believed that the first voting and subsequent voting, both in the form of follow-up voting and re-voting, are essentially a form of voting stages whose results are not yet known so that all contestants are still candidates for regional heads because there has been no legal action. Who appointed them as regional heads? Consequently, the candidates' status can be canceled if conditions cause non-fulfillment of requirements for regional head candidates.

Meanwhile, in the Sabu Raijua regional head election, the elected regional head candidate violated a fundamental administrative requirement, namely citizenship. Through the evidence on trial at the Constitutional Court, it is known that the Orient Patriot Riwu Kore is a citizen of the United States. Different from the case in Boven Digoel, where there were interpretations between election management institutions, Orient Patriot Riwu Kore was never honest about his citizenship status, including not recognizing that status when registering as a candidate for the Regent of Sabu Raijua.

The three decisions reflect judicial activism because the disqualification of candidates is not the authority of the Constitutional Court. However, the unresolved issue at the pre-voting level made the Constitutional Court as the final decider in regional head election conflicts issue a decision outside its authority. It should ensure that the implementation of regional head elections reflects democratic values because it will affect public confidence in regional leadership.³³ The following is the trend of Constitutional Court decisions in the last three regional head elections.

³³ W. A. Johnston, Harvey Krahn, and Trevor Harrison, "Democracy, Political Institutions, and Trust: The Limits of Current Electoral Reform Proposals," *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 31, no. 2 (2006): 165–82.

**Table 1. The Trend of Constitutional Court Decisions:
Effort to Uphold Democracy**

No.	Year	Accepted	Not Accepted
1.	2017	2	53
2.	2018	2	68
3.	2020	22	129

Source: Constitutional Court as compiled by the researcher

From these data, the trend of the Constitutional Court decisions to test outside disputes over regional head election results increased. However, the increase in disputes that the Constitutional Court granted could be due to several things. First, the increase number of local election violations in 2020. Second, the non-functioning mechanism for resolving pre-election violations by electoral institutions. The increasing number of local election violations is not a problem that threatens democracy should law be enforced at each stage. However, unfortunately, this did not happen, so that the violations were brought to the Court. Third, the Constitutional Court increasingly wielded its authority substantially beyond regulations or carried out judicial activism in adjudicating disputes over local election results. In fact, in 2020, three regional head candidates were disqualified by the Constitutional Court.

Here are some examples of disputes over the results of the local elections in 2017, 2018, and 2020:

Table 2. Results of Local Election Disputes

No	Region	Decision	Infringement
52/2017	Kepulauan Yapen	It was partly granted regarding the request for the validity of voting results.	The Constitutional Court could not find documents as the basis for determining the difference in votes as the object of dispute.

No	Region	Decision	Infringement
54/2017	Intan Jaya	It was partly granted regarding the request for the validity of voting results.	Counting and re-voting as the Constitutional Court did not receive the object of dispute over the vote count
35/2018	Deiyai	It was partly granted regarding the request for the validity of voting results.	Re-voting as the Constitutional Court did not receive the object of dispute over the vote count
36/2018	Maluku Utara	partially accepted	Re-voting due to voter administrative problems
84/2021	Nabire	partially accepted	Re-voting due to DPT and election mechanism
21/2021	Banjarmasin	partially accepted	Re-voting due to fraud in the selection process not according to procedure (massive fraud)
70/2021	Rokan Hulu	partially accepted	Re-voting due to voter mobilization
132/2021	Boven Digoel	partially accepted	Re-voting by disqualifying candidates (different views between the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu))
104/2021	Morowali Utara	partially accepted	Re-voting because the right to vote was blocked and not registered with the DPT

No	Region	Decision	Infringement
135/2021	Sabu Raijua	accepted	Re-voting by disqualifying a candidate (due to his candidate)
124/2021	Kalimantan Selatan	partially accepted	Re-voting because it did not follow the procedure (inflated and the level of attendance)
145/2021	Yalimo	partially accepted	Re-voting by disqualifying a candidate

Source: Constitutional Court as compiled by the researcher

In its decision, the Constitutional Court gave good reasons for promoting normative and substantive justice. Regarding the latter, the Constitutional Court based its authority in deciding disputes over regional head election results on Constitutional Court Decision Number 1/PHP.BUP-XV/2017, dated April 3, 2017. The Court stated that there is no legal basis for the Court to exceed its authority so that it goes beyond the authority granted by Article 157 paragraph (3) of Law 10/2016 to adjudicate disputes over the results of governor, regent, and mayor elections without taking over the authority of another institution.

Regarding the threshold requirement for the difference in votes as the basis for the application, the Court referred to Article 158 of Law 10/2016. If the Constitutional Court had overruled the article, it would have opposed its own decisions and regulations requiring a limit on the difference in votes as a condition of the application as contained in Constitutional Court Decision Number 58/PUU-XIII/2015 and PMK 1/2016 as amended by PMK 1/2017. This made the applicant meet the minimum difference in vote requirements to apply to the Constitutional Court under the population and total valid votes. However, the Constitutional Court turned out to deviate from the provisions of the difference

by considering that it could delay the enforcement of the provisions of Article 158 of Law 10/2016 as long as certain conditions were met. The Constitutional Court will only consider the applicability of the provisions of Article 158 of Law 10/2016 on a case-by-case basis.

The Constitutional Court waived the law to deliver justice for the applicant in cases that could not be resolved in the previous process by other institutions. For example, in the disqualification decisions in the Boven Digoel and Sabu Raijua regional head elections, the two cases did not meet the minimum vote difference requirement to become the object of the petition. However, the Constitutional Court still examined, heard, decided, and even granted the request. In the latter, the difference in votes between the applicant and related parties was 11,806 votes or 26.69%. In the former, the difference in the number of votes between the petitioners and the related parties was 7,163 votes or 23.2%. The two applications did not meet the requirements stated in the law requiring the difference in votes of not more than 0.5%, 1%, 1.5%, or 2%, depending on the population.³⁴ The limit on the difference in the number of votes is no longer relevant because the Constitutional Court disqualified a candidate.

However, the Constitutional Court tried to consider its decision on the dispute over regional head election results. In determining the voting or recounting of votes, for instance, it considered that the results of recapitulated vote counts, as the object of the petition, could not be the basis of a valid object. Therefore, for the sake of legal certainty as well as justice for the parties, the Constitutional Court ordered the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) to hold a re-vote and vote count.

Meanwhile, in the case of candidate disqualification, the Constitutional Court was of the opinion that it was important to carry out re-voting by disqualifying candidates who were proven not to meet the administrative requirements as candidates for regional heads. The pass of a candidate who violated this provision could occur due to misunderstanding between the election organizers. In the

³⁴ Article 158 of Law 10/2016

Boven Digoel regional head election, the Elections Supervisory Agency (Bawaslu) and the General Elections Commission (KPU) promoted their understanding to interpret provisions for the prohibition of nominations for convicts at least five years after the end of their sentence. This was then mediated by the Court through its judges' interpretation of the existing provisions.

In determining whether re-voting was acceptable, the Constitutional Court considered the applicant's arguments. In the application for the South Kalimantan regional head election, for instance, because the arguments and evidence submitted were quite clear, namely that it was not certain how many ballot boxes were open and unsealed and their effect on changes in the numbers of vote results were detrimental to both candidate pairs, the Constitutional Court might order re-voting. While the re-voting was not granted by the Constitutional Court in the Rokan Hulu regional head election where the applicant applied for the re-voting due to a violation of engineering/falsification of the contents of documents, especially regarding Voter Data and Voting Rights Users with Data on the Use of Ballots contained in Form Model C. Copies of KWK at 25 TPS, according to the Constitutional Court, it did not change the vote acquisition of each candidate pair and there were no objections from the witnesses of each candidate pair.

However, in 2017 2018, and 2020 regional elections, the Constitutional Court only bypassed normative provisions or carried out judicial activism in cases where violations occurred during and post-voting processes, such as miscalculations, administrative errors, errors in the Permanent Voter List (DPT), and the non-fulfillment of the right to vote for a certain group of people. Meanwhile, for violations in the pre-election process, such as money politics, the use of civil servants (ASN), and other violations, the Constitutional Court rejected the application. It relied on the arguments presented by the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) as the organizers of regional head elections. This indirectly gave rise to the "standardization" of judicial activism carried out by the Constitutional Court on its authority to handle regional head election cases.

In disqualifying a regional head candidate, the Constitutional Court requires very clear evidence that it violates regulations and has not been handled by the election organizers. For matters denied by the election organizers on trial, such as money politics, the Constitutional Court was reluctant to enter this realm, for instance in the South Kalimantan regional head election, where the petitioner talked about money politics and the politicization of government aid. The Constitutional Court rejected the request based on information from the election organizers. In fact, when referring to the evidence presented by the applicant, it was very strong. This shows that the Constitutional Court considered granting the application submitted by the parties who objected to the calculated results of the regional head election. The Court did not immediately grant or reject the application submitted on trial. On the one hand, the Constitutional Court policies have also become inconsistent and arbitrary.³⁵

The disqualification of regional head candidates raised the questions of how the process of law enforcement and administration was in the pre-election process and how other institutions such as the General Elections Commission (KPU) and Elections Supervisory Agency (Bawaslu) carry out their duties to enforce rules to uphold democratic values in the implementation of regional head elections. In addition, the increase in the number of re-voting in the 2017 and 2018 regional head elections to the 2020 regional head elections also raised questions about the effectiveness of law enforcement in responding to violations of the implementation of regional head elections by related parties. To uphold substantive justice and maintain democracy, the Constitutional Court made a legal breakthrough.

2.2. The Constitutional's Court Effort to Uphold Democracy

Democracy is defined as a method of people's participation in state government. Initially, the democratic system took the form of direct democracy, carried out directly by the people to make political decisions by all citizens

³⁵ Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Canberra: Center for Democratic Institutions, Australian National University, 2013), 34.

following the majority rule procedure.³⁶ Over time, the growing population and increasingly complex public policy issues have made it no longer possible to practice direct democracy, so modern democracy uses the method of representation. The general election method is used to elect representatives of the people. In addition, according to Henry B Mayo, one of the important values in democracy is the regular change of leaders.³⁷

The clearest measure of democracy is universal suffrage, namely the right of every citizen to vote.³⁸ General elections are a prerequisite for democracy. Even so, it is not just a general election but a free and fair election or commonly called electoral democracy. Democracy has a much broader meaning than electoral democracy. A regime can be democratically elected but fails to maintain and realize the basic principles of democracy.³⁹ General elections alone do not guarantee the preservation of democracy. Even elections are also commonly used by authoritarian regimes to legitimize their power. However, going back to the beginning, it is impossible to realize democracy without electoral democracy. Democracy can flaw if elections are conducted full of pressure, intimidation, coercion, violence, fraud, and money politics. The goal of democracy to guarantee people's participation in government is hindered if the people are not freedom to make choices.

Free and fair elections do not guarantee that those elected are committed to maintaining democracy and fulfilling their promises to represent and realize the aspirations of the people. It determines how they exercise their power while in office. Moreover, general elections full of fraud are even more difficult to produce democratic representatives of the people. Fraudulent elections are usually held by non-democratic regimes. They certainly have no intention of realizing democracy through elections. For them, elections are held to keep their

³⁶ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik* [The Basics of Political Science] (Jakarta: Gramedia Pustaka Utama, 2008), 109.

³⁷ Budiardjo, *Dasar-Dasar Ilmu Politik* [The Basics of Political Science], 119.

³⁸ Carlton Clymer Rodee, *Pengantar Ilmu Politik* [Introduction to Political Science] (Jakarta: Raja Grafindo Persada, 2008), 218.

³⁹ Andreas Schedler, "Elections Without Democracy: The Menu of Manipulation," *Journal of Democracy* 13, no. 2 (April 2002): 30–50.

power lasting. Schedler suggests several strategies for violating norms in general elections, including limiting the scope of elective offices, excluding opposition forces, restricting political and civil liberties, restricting legal suffrage, intimidating voters and buying their votes, perpetrating electoral fraud, and preventing elected officers from exercising their institutional powers.⁴⁰

Efforts to maintain democracy must start with maintaining free and fair elections. Realizing the importance of free and fair elections, Indonesia includes the principles of general elections in the 1945 Constitution. Through the third amendment to Article 22E of the 1945 Constitution, general elections are held in a direct, general, free, secret, honest, and fair manner every five years. Direct means that voters have the right to cast their votes directly without any intermediary. General means that the general election applies to all citizens regardless of their ethnicity, religion, race, and class. Free means that voters have freedom without any coercion or pressure to make their choice. Confidential means that voters in casting their votes will not be known by any party. Honest means that all parties involved in the general election act honestly in accordance with the laws and regulations. Fair means that every voter and participant in the general election gets the same and equal treatment and is free from fraud by any party. Finally, the 1945 Constitution adheres to the limitation of power in the sense that officials will be re-appointed every five years. This is in accordance with one of the democratic values, namely the regular change of leaders.

The norm of a fair and free general election is not only aimed at general elections for the President, DPD, DPR, and DPRD. In the second amendment to the 1945 Constitution, the norms for democratic regional head elections were included. Article 18 paragraph 4 of the 1945 Constitution stipulates that the governors, regents, and mayors of each province as heads of provincial, district, and city governments are democratically elected. This norm opens the interpretation that regional head elections can be carried out directly or indirectly, as long as they are conducted in a democratic manner. Indonesia's indirect regional head elections was practiced before the amendment to the

⁴⁰ Schedler, "Elections Without Democracy," 39.

1945 Constitution. Previously, regional heads were elected by the DPRD. The direct election for regional heads only started in 2005 based on Law Number 32 of 2004. The election of regional heads in Indonesia is currently carried out directly, so it must be carried out according to the principles of general elections, namely direct, general, free, secret, honest, and fair. This is to ensure the implementation of democratic norms in regional head elections according to the 1945 Constitution.

The implementation of regional head elections is still accompanied by various violations. The Constitutional Court, through its decisions, sought to maintain electoral democracy. The reason for maintaining democracy was the background for the Constitutional Court for the first time in Decision Number 41/PHPU.D-VI/2008 in the East Java regional head election dispute to get out of the shackles of law, which basically only gave authority over regional election result disputes. It tried to deliver substantive justice by assessing the violations that caused the vote count results to be disputed. In contrast, the law did not give the authority to judge election violations. They were handled by the Elections Supervisory Agency (Bawaslu), General Elections Commission (KPU), Election Organization Ethics Council (DKPP), and law enforcement officers in accordance with their respective authority.

The Constitutional Court practice of legal breakthroughs to achieve substantive justice is categorized as judicial activism. On the one hand, it is needed to protect democracy. However, it also has its ups and downs. The Constitutional Court in the East Java regional head election dispute was very progressive by making legal breakthroughs to examine structured, systematic, massive local election violations. However, in the 2017, 2018, and 2020 regional elections, the Constitutional Court, despite granting more and more granted applications (especially in 2020), only assessed violations during the current and post-ballot processes and even administrative aspects such as miscalculations, administrative errors, errors of permanent voter lists (DPT), and the non-fulfillment of the right to vote for a certain group of people. It did not consider pre-voting violations such as money politics, mobilization of civil servants, and abuse of authority.

III. CONCLUSION

The function of the Constitutional Court is not only to decide disputes over vote acquisition in regional head elections, but also to ensure that electoral democracy is maintained. This function can only be carried out by the Constitutional Court by conducting judicial activism when needed. The trend of the Constitutional Court decisions in disputes over the results of the 2017, 2018, and 2020 regional elections shows an increase in judicial activism. However, the increasing use of judicial activism by the Constitutional Court is increasingly limited to administrative reasons. The decisions on disputes over the results of the 2017, 2018, and 2020 local elections, which were reviewed, shows that the Constitutional Court was not willing to enter into disputes over local election results due to very substantive violations such as money politics, mobilization of civil servants, and abuse of authority. The reviewed rulings show that the Constitutional Court restrained itself when it had to carry out judicial activism, as seen in the South Kalimantan local election dispute. The trend of the Constitutional Court decision with the type of judicial activism has contributed to efforts to maintain electoral democracy. Without judicial activism, the Constitutional Court cannot adjudicate violations of regional head elections not resolved at the previous stage. In fact, violations that are not handled will affect the results of regional head elections. By carrying out judicial activism, the Court will more substantively judge the things that affect the election results. Finally, the Constitutional Court joins in adjudicating violations of regional head elections to protect the results of regional head elections from all forms of fraud. Judicial activism contributes to electoral democracy, the norm for regional head elections according to the Constitution.

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THE LEGISLATIVE FUNCTION OF THE CONSTITUTIONAL COURT IN RELATION TO THE OMISSION OF THE CONSTITUENT

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Received: 28 February 2024 | Last Revised: 2 April 2025 | Accepted: 23 April 2025

Abstract

The Constitutional Court is the responsible body for guaranteeing the supremacy of the Constitution and respect for fundamental rights. Among its functions is to control the constitutionality of laws and other legal norms, as well as to resolve conflicts of competence between the different branches of Government. However, the Constitutional Court can act not only against positive norms that violate the Constitution, but also against legislative omissions that imply a breach of constitutional mandates. Legislative omission occurs when the legislator ceases to regulate a matter that the Constitution expressly imposes on him or that is necessary to guarantee the effectiveness of constitutional rights and principles. The objective of this article is to analyze the foundations, the limits and the effects of this legislative function of the Constitutional Court, as well as the main criticisms that have been formulated from the legal and political point of view. For this purpose, a review-type study was formalized, based on narrative as a study method. By using keywords related to this topic such as “constitutional court” or “legislative function” among others and looking for them in the search engines such as Scopus, Wos and Scielo, we got to achieve more than 20 reviews so substantial for this paper. It is concluded that the legislative omission may be absolute or relative, depending on whether or not there is a

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previous norm that regulates the matter, but that is insufficient or incompatible with the Constitution. The purpose of the control of legislative omission by the Constitutional Court is to restore the validity of the Constitution and protect the legitimate interests of citizens who are affected by the lack of regulation. The Constitutional Court may declare the unconstitutionality by omission by means of the amparo appeal, the unconstitutionality appeal or the unconstitutionality question, as the case may be. The Constitutional Court cannot replace the legislator or issue general rules, but must limit itself to pointing out the failed constitutional duty and setting a deadline for its fulfillment.

Keywords: Constituent; Constitutional Court; Legislative function; Legislative omission

I. INTRODUCTION

The Constitutional Court (TC) is the institution entrusted with safeguarding the Constitution and ensuring the constitutionality of laws and other legal regulations. However, its role extends beyond annulling provisions that contravene the Magna Carta; it also addresses cases of legislative omission, wherein the legislature fails to enact necessary regulations to guarantee constitutional rights, principles, or mandates, thereby creating legal vacuums that undermine the effectiveness of the supreme norm.

Legislative omission occurs when the legislator neglects its duty to develop regulatory frameworks essential for the proper implementation of constitutional provisions. Such omissions may be adjudicated through various constitutional mechanisms, including appeals, actions of unconstitutionality, and judicial rulings that highlight deficiencies affecting fundamental rights. For instance, the Spanish Constitutional Court intervened in the absence of a regulatory framework on euthanasia prior to the enactment of Organic Law 3/2021, recognizing the imperative of legal clarity to uphold fundamental rights. Similarly, the Colombian Constitutional Court has issued rulings compelling legislative action in areas concerning social rights, such as healthcare access, urging Congress to rectify regulatory deficiencies.

When the TC declares the existence of a legislative omission, it acknowledges a constitutional failure by the legislature and prescribes a reasonable timeframe

for remedial action. Although the TC lacks the authority to legislate directly, it may establish interpretative criteria to resolve specific cases and mitigate adverse consequences for fundamental rights. A pertinent example is the ruling of the German Federal Constitutional Court on climate protection laws in 2021, which mandated more stringent legislative measures to align national policies with constitutional and international climate commitments. Additionally, the Indonesian Constitutional Court played a crucial role in the 2021 ruling on the Omnibus Law on Job Creation. The Court declared the law “conditionally unconstitutional” due to the legislature’s failure to adhere to proper legislative procedures, ordering the government to rectify these deficiencies within two years to ensure compliance with constitutional requirements.

In this manner, the TC performs a constructive legislative function by contributing to legal development and enhancing the constitutional framework without encroaching upon parliamentary authority or violating the principle of separation of powers. As an active and subsidiary institution, the TC ensures the efficacy of the constitutional rule of law.

This article aims to analyze the doctrinal foundations, limitations, and implications of the TC’s legislative function, incorporating recent case law and judicial precedents. Furthermore, it will critically examine legal and political objections, particularly regarding concerns over judicial activism and its potential ramifications for democratic legitimacy. The study adopts a narrative review methodology, drawing upon relevant jurisprudence and academic discourse to provide a comprehensive analysis of the evolving role of the TC in legislative oversight

II. METHODOLOGY

Formalized a literature review, which showcases the fundamentals of a specific issue that is documented in previous published sources. When looking to compile the information assumes the eligibility criteria set out, with the

purpose of aligning the scientific inquiry on the topic of dissertation.¹ We used the narrative as a research tool.² It began with the establishment of key words to achieve published documents and usable for the different databases. We used the following keywords: 1. Constitutional court (TC), 2. Legislative function, 3. Legislative function of the TC, 4. Omission of a constituent. The key words are ordered by wielding the boolean operator called “AND”. In that way, it conducted investigations using combinations of these words.

The search engines used were Scopus, Wos and Scielo. It selected documents in physical and digital formats, various papers and thesis, and reached a total of 25 documents.

III. ANALYSIS AND DISCUSSION

Then unfold the categories and subcategories present to formalize this literature study.

3.1. The Legislative Function of the Constitutional Court in relation to the Omission of the Constituent

This is an issue of great legal and political relevance in the Colombian context. The Constitutional Court has developed a theory of constitutional substitution, according to which there is a material limit to the reforms of the Constitution that prevents altering or replacing its essential principles. This theory is based on the recognition of the primary constituent power as a source of legitimacy and popular sovereignty, and on the principle of constitutional supremacy as a guarantee of the stability and coherence of the legal system. However, the Constitutional Court has also admitted the possibility that the constituent has incurred in omissions when designing the structure and functioning of the State, which creates regulatory gaps that must be filled by the legislator or by the constitutional control body itself.

¹ María Sobrido Prieto and José María Rumbo-Prieto, “La Revisión Sistemática: Pluralidad de Enfoques y Metodologías [The Systematic Review: Plurality of Approaches and Methodologies],” *Enfermería Clínica* 28, no. 6 (November 2018): 387.

² John Jairo Pérez-Vargas and Johan Andrés Nieto-Bravo, “La Narrativa como Método de Investigación Teológica en una Epistemología Hermenéutica [Narrative as a Theological Research Method within the Framework of a Hermeneutical Epistemology],” *Cuestiones Teológicas* 49, no. 111 (June 2022): 15.

3.1.1. Concepts and Objectives

The legislative function of the Constitutional Court (TC) consists in the development of legal standards that govern key aspects of the organization and functioning of the State, as well as the fundamental rights and duties of citizens. This function is exercised by the interpretation of the Constitution and the resolution of conflicts between public authorities or between these and individuals. The TC has the power to declare the unconstitutionality of the laws and other provisions having the force of law that are inconsistent with the Magna Carta, as well as to issue binding rulings for all the public authorities and the citizens.

The objective of the legislative function of the TC is to ensure the supremacy of the Constitution as a fundamental norm of the legal system, as well as the protection of constitutional rights and freedoms. The TC acts as a counter-majoritarian organ that limits the power of the political representatives and ensures respect for the constitutional principles and values. Also, the TC contributes to the integration and cohesion of the State government to resolve the disputes that may arise between the various levels of government or between the various autonomous communities.

The legislative function of the TC is based on the legal doctrine and the jurisprudence of the constitution. Among the authors who have studied and advocated for this function are: García-Pelayo, who considers the TC as a body creator of the Law;³ Javier Pérez-Royo, who says that the TC is a legislator negative that prevents the application of the rules to be unconstitutional;⁴ and Rubio Llorente, who argues that the TC is a positive legislator that fulfills and develops the content of the Constitution.⁵

³ Manuel García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," *Revista Española de Derecho Constitucional*, no. 100 (December 2014): 21.

⁴ Javier Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 5th ed. (Madrid: Marcial Pons, 1998), 214.

⁵ Francisco Rubio-Llorente, "Sobre la relación entre Tribunal Constitucional y Poder Judicial en el Ejercicio de la Jurisdicción Constitucional [On the Relationship between the Constitutional Court and the Judiciary in the Exercise of Constitutional Jurisdiction]," *Revista Española de Derecho Constitucional* 2, no. 4 (December 1982): 43.

García-Pelayo, who considers the TC as a body creator of the Law, argues that the function of this court is not limited to interpreting the Constitution, but that also contributes to its development and update.⁶ According to María Luisa Balaguer-Callejón, the TC does not only apply to the supreme rule, but that also creates and modifies, adapting it to the historical and social circumstances.⁷ Thus, the TC acts as a derived constituent power, which has the ability to innovate in the legal system and to resolve the conflicts between the different powers of the State.⁸

According to Javier Pérez Royo, the TC is not limited to declare the nullity of the laws that violate the Constitution, but it also dictates performing sentences that determine the meaning and the scope of the rules. In this way, the TC becomes a body that restricts the autonomy regulations of the public authorities and who imposes his own view of the Constitution.⁹

An example of this position is the one of Rubio Llorente, who argues that the TC is a positive legislator that fills and develops the content of the Constitution. According to this author, the TC is not limited to interpret the supreme law, but rather enriches it with their sentences, creating new principles and rights.¹⁰ Thus, the TC acts as a derived constituent power, which adapts the Constitution to the demands of the social and political reality.¹¹ This vision gives TC a great democratic legitimacy and a broad discretion to resolve constitutional conflicts.¹²

3.1.2. Legal Basis

The TC is the body responsible for ensuring the compliance of the Constitution and to resolve the conflicts between the powers of the State and the autonomous

⁶ García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," 24.

⁷ María Luisa Balaguer-Callejón, *Interpretación de la Constitución y Ordenamiento Jurídico* [Interpretation of the Constitution and the Legal System] (Madrid: Centro de Estudios Políticos y Constitucionales, 2022), 232.

⁸ García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," 27.

⁹ Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 245.

¹⁰ Rubio-Llorente, "Sobre la relación entre Tribunal Constitucional y Poder Judicial en el Ejercicio de la Jurisdicción Constitucional [On the Relationship between the Constitutional Court and the Judiciary in the Exercise of Constitutional Jurisdiction]," 45.

¹¹ Ángela Figueruelo-Burrieza, "La Incidencia Positiva del Tribunal Constitucional en el Poder Legislativo [The Positive Influence of the Constitutional Court on the Legislative Power]," *Revista de Estudios Políticos (Nueva Época)*, no. 81 (July–September 1993): 51.

¹² Carlos Báez Silva, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," *Boletín Mexicano de Derecho Comparado* 1, no. 105 (January–April 2002): 750.

communities. Its legislative function is based on the principle of constitutional supremacy, which means that all the rules of law must respect the values, principles and fundamental rights enshrined in the Magna Carta.¹³

The legislative function of the TC is exercised through various mechanisms of control of constitutionality, which can be preventative or successive, abstract or concrete, and that are intended to ensure the adequacy of laws and regulations with the force of law to the constitutional order. Among these mechanisms are the resources of unconstitutionality, the issues of unconstitutionality, the questions, the challenges to provisions of the autonomous community and the conflict of jurisdiction.¹⁴

The legislative function of the TC is not limited to a mere negative control or invalidator of the norms that are contrary to the Constitution, but also implies a positive or inclusive work, that consists in interpreting the Constitution according to its spirit and purpose, as well as developing its precepts, by the constitutional doctrine that emanates from their judgments and decisions.

According to Andrés Ollero, the legislative function of the TC is based on the principle of constitutional supremacy, which is the basis of the constitutional State and the guarantee of democracy and the rule of law.¹⁵ For Javier García Roca, these instruments are essential to preserve the coherence and unity of the legal system.¹⁶

In this way, the TC contributes to the consolidation of the constitutional State and the strengthening of the social and democratic State of law. As pointed out by Carlos Báez, the TC is the highest and authentic interpreter of

¹³ Rodolfo Terrazas Salgado, "Ciclo de Conferencias Las Constituciones Mexicanas de 1857 y 1917: Aspectos Político-Electorales [Cycle of Conferences on the Mexican Constitutions of 1857 and 1917: Political-Electoral Aspects]," ed. Tribunal Electoral del Poder Judicial de la Federación (Mexico, 2008), 185.

¹⁴ Pedro Cabieses Valdés and Luis Mena Moreno, "Tribunal Constitucional, Potestad Reglamentaria y Control de Constitucionalidad de los Decretos Supremos [Constitutional Court, Regulatory Powers, and Control of the Constitutionality of Supreme Decrees]" (PhD diss., Universidad de Chile, 2012).

¹⁵ Andrés Ollero, "Legalidad y Constitucionalidad [Legality and Constitutionality]," *Anuario de Filosofía del Derecho*, no. 34 (2018): 99.

¹⁶ Javier García Roca, *La Transformación Constitucional del Convenio Europeo de Derechos Humanos [The Constitutional Transformation of the European Convention on Human Rights]* (Madrid: Civitas, Thomson Reuters, 2019), 128.

the Constitution and his doctrine has normative value and binding on all public authorities and citizens.¹⁷

3.2. The Omission of the Constituent

The omission of the constituent may affect the fundamental rights, principles and guarantees established by the Constitution, and therefore may be subject to jurisdictional control by the competent bodies. The omission of the constituent supposes a violation of the principle of constitutional supremacy and the duty of collaboration between the public powers.

3.2.1. Definition and Causes

According to Carlos Báez Silva, the omission of the constituent involves a breach of the principle of constitutional supremacy, as it prevents the Constitution from being an expression of the popular will, and that it is updated according to the demands and needs of society.¹⁸ Also, the author points out that the omission of the constituent can generate unconstitutionality by legislative omission, when the legislature fails to comply with its duty to enact or amend laws that required for the general welfare, or to make effective the constitutional rules.

On the other hand, the author David Cienfuegos Salgado says that the omission of the constituent can also be a form of resistance or civil disobedience in relation to a Constitution imposed or illegitimate, which does not reflect the values and interests of the majority of the population. In this sense, the author argues that the omission of the constituent can be a mechanism to claim a new Constitution, more democratic and participatory, that recognizes human rights and cultural diversity.¹⁹

The omission of the constituent refers to the lack of exercise of constituent power by the people, that is the sole subject of legitimate power. This omission can have various causes, such as the existence of authoritarian regimes that

¹⁷ Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 225.

¹⁸ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 744.

¹⁹ David Cienfuegos Salgado, "La Constitución de 1857 y los derechos humanos [The Constitution of 1857 and Human Rights]," in *Ciclo de Conferencias Las Constituciones Mexicanas de 1857 y 1917: Aspectos Político-Electorales*, ed. Tribunal Electoral del Poder Judicial de la Federación (México, 2008), 30.

usurp the constituent power, the lack of citizen participation in the constituent processes, or the rigidity of the mechanisms of constitutional reform that hinder the adaptation of the Constitution to the new social realities. For example, it's known that countries like Cuba, Venezuela or China are cases of omission of the constituent, where the constituent power is concentrated in a single person or political party; or in countries such as Chile, where it recently launched a constituent process after years of social demands unmet by the current Constitution.²⁰

A notable instance of legislative omission is the failure of the Mexican legislator to establish a legal mechanism for contesting decisions made by the Public Prosecutor regarding the non-exercise or waiver of criminal action, which creates a significant gap in judicial oversight and legal accountability.²¹ In addition, the omission of the constituent can also be a form of resistance or civil disobedience in front of an imposed or illegitimate Constitution, which does not reflect the values and interests of the majority of the population.²² In this sense, the omission of the constituent can be a mechanism to claim a new Constitution, more democratic and participatory, that recognizes human rights and cultural diversities. An example of this would be the case of Bolivia, where indigenous people were mobilized to demand a Constituent Assembly that could recognize their identity and rights.

Finally, Humberto Nogueira Alcalá, argues that the omission of the constituent can be also a consequence of the lack of consensus or political agreement between the social and political forces that shape a society that is pluralistic and complex, in these cases, the omission of the constituent can be a way of avoiding conflict, or institutional breaks, opting for maintaining an existing

²⁰ Allan R. Brewer-Carías, *Principios del Estado de Derecho. Aproximación Histórica* [Principles of the Rule of Law. Historical Approach] (Miami: Ediciones EJV International, 2015), 224.

²¹ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 755.

²² Samuel Hernández Apodaca, "Constitución y desobediencia civil. A cien años del constituyente [Constitution and Civil Disobedience. One Hundred Years After the Constituent]," in *Centenario de La Constitución de 1917* [Centenary of the 1917 Constitution: Reflections on Major National Issues]. *Reflexiones En Torno de Los Grandes Problemas Nacionales*, ed. Victor Pitalúa Torres (México: Cámara de Diputados del H. Congreso de la Unión, LXIII Legislatura, 2016), 112.

Constitution but reformable, dialogue and negotiation between the different actors.²³ An example of this would be the case of Spain, where the Constitution of 1978 has been the object of several partial reforms to adapt to the political and social changes without altering its essential core.

3.3. Consequences and Solutions of the Omission of the Constituent

The omission of a constituent is a situation that occurs when the legislative branch fails to comply with its duty to enact a law that has developed a constitutional content or it was incomplete, or discriminatory.²⁴ This omission may affect the validity and the effectiveness of fundamental rights and constitutional principles, as well as the separation of powers and the institutional balance.²⁵ Therefore, it is necessary that there are mechanisms of control and supervision to ensure the fulfillment of the will of the originating or reformer constituent.

Among the consequences of the omission of the constituent assembly, the following may be mentioned:

- The enactment of ambiguous or incomplete policies that obstruct the direct and immediate application of the Constitution, leading to legal uncertainty and a lack of protection for citizens. For instance, the absence of a legal framework regulating the right to prior consultation of indigenous peoples or the lack of legislation defining the limits and conditions for the legitimate use of force by authorities.
- The violation of the principles of equality and non-discrimination by failing to provide legal regulation for certain marginalized or socially excluded groups. This includes the omission of laws that recognize and protect the rights of persons with disabilities, migrants, LGBTI individuals, or those living in poverty, thereby perpetuating structural inequalities.

²³ Humberto Nogueira Alcalá, "La soberanía, las Constituciones y los Tratados internacionales de Derechos Humanos [Sovereignty, Constitutions and International Human Rights Treaties]," in *Teoría Constitucional y Derechos Fundamentales*, ed. Miguel Carbonell (México: Comisión Nacional de Derechos Humanos, 2002), 278.

²⁴ Víctor Bazán, *Control de las Omisiones Inconstitucionales e Inconvencionales. Recorrido por el Derecho y la Jurisprudencia Americanos y Europeos* [Control of Unconstitutional and Unconventional Omissions. A Tour Through American and European Law and Jurisprudence] (Bogotá: Fundación Konrad Adenauer, 2014), 334.

²⁵ Ignacio Laborde Marván, *Cómo hicieron la Constitución de 1917* [How They Made the Constitution of 1917] (México: Fondo de Cultura Económica, 2017), 44.

- The encroachment on legislative functions by other branches of government, particularly the executive and judiciary, which assume legislative powers beyond their constitutional mandate, thereby disrupting the constitutional balance. Examples include the issuance of regulations or decrees that contravene or exceed constitutional provisions, as well as judicial rulings that create or modify legal norms beyond legislative intent.
- The erosion of the legitimacy and representativeness of the legislative branch due to its failure to fulfill its fundamental role in expressing popular sovereignty and upholding constitutional values. This is evident in the lack of legislative response to social demands voiced through citizen movements, popular consultations, or legislative initiatives.

In response to these consequences, it is imperative to implement solutions that restore constitutional compliance and safeguard citizens' rights and interests.

Potential measures include:

- The establishment of mandatory and reasonable timeframes for the legislature to fulfill its duty to legislate, with the imposition of political or legal sanctions for non-compliance. For example, setting a maximum period for enacting an organic law following a constitutional reform or imposing fines or formal censure on the legislature for inaction.
- The activation of judicial mechanisms to challenge legislative omissions, both in absolute and relative terms, before constitutional oversight bodies such as the Constitutional Court or the Supreme Court of Justice. For instance, a citizen affected by the absence of a regulatory law could file a complaint, or the executive or judiciary could initiate proceedings to compel legislative action.
- The empowerment of citizens to directly exercise their right to legislative initiative when the legislature fails to address societal needs or demands. Examples include the collection of signatures to propose legislation on matters of public or social interest or holding a referendum to approve or reject a law initiated by the public.

- The promotion of a constitutional culture that fosters respect for and adherence to the Constitution among public authorities and citizens, as well as encouraging dialogue and collaboration to achieve constitutional objectives. This may include educational campaigns on constitutional rights and duties or the establishment of participatory forums for debate and consensus-building on necessary legal reforms.

3.4. The Constitutional Court and the Protection of Fundamental Rights in Relation to the Omission of the Constituent

The Constitutional Court is the highest body for elucidation and protection of the Constitution. Among its functions, it stands out as one of guaranteeing respect for the fundamental rights recognized in the Magna Carta, especially in the face of possible violations by public authorities. However, the constituent did not expressly foresee the possibility that the Constitutional Court committed an unconstitutional omission itself by not resolving the amparo appeals within a reasonable period of time. This situation poses a serious problem for the effectiveness of fundamental rights and the legitimacy of the Constitutional Court as their guarantor.

3.4.1. The Duty of Protection of Fundamental Rights

The Constitutional Court is the supreme interpretation and defense body of the Constitution, which guarantees the respect of the fundamental rights of citizens and the balance between the powers of the State. However, what happens when the Constitution does not regulate or not developed enough some aspects of the fundamental rights? What is the role of the Constitutional Court against the omission of the constituent?

This work is intended to analyze this question from a theoretical perspective and practical, anchoring each paragraph with authors and indicating the source. It is part of the idea that the fundamental rights are constitutional principles that limit the power of the State and that have content that may be unknown, or

by the legislature or by the constituent power.²⁶ Thus, the Constitutional Court has the function of ensuring the essential content and complete or integrate the gaps or inadequacies of the Constitution on fundamental rights, through the interpretation according to the Charter of Fundamental Rights of the European Union, the international human rights treaties and the general principles of law.²⁷

However, this integrating function of the Constitutional Court is not unlimited or arbitrary, but must respect the criteria of reasonableness, proportionality and legal certainty, as well as the democratic principle that implies the respect to the legislature as the representative of the popular will. The Constitutional Court may not substitute the legislator or create legal rules that apply to the scope of legislative policy, but that should be limited to set the parameters of constitutional minimum for the protection of the fundamental rights in relation to the omission of the constituent.²⁸

It can be noted that the Constitutional Court plays a critical role in the protection of fundamental rights in relation to the omission of the constituent assembly, but it should do it with caution and respecting the democratic principle. Integrating functions should be aimed at ensuring the essential content of fundamental rights, and to facilitate their development of the legislative framework in line with the values and constitutional principles.

The duty of protection of fundamental rights is, therefore, an ethical, legal and policy that is binding on all States and all of public power organs. Its compliance is essential to ensure the democratic legitimacy of the constitutional order and to promote social progress and collective well-being. As stated by María del Pilar Sáenz Niembro: “Fundamental rights and freedoms have a legitimizing function in a democracy. In the history of constitutionalism, the legend has been

²⁶ Juan Fernando López Aguilar, “*Legitimación y deslegitimación del Parlamento en las contemporáneas democracias pluralistas: teoría, mito y realidad* [Legitimization and Delegitimization of Parliament in Contemporary Pluralist Democracies: Theory, Myth and Reality],” in *Estudios de Derecho Constitucional. Homenaje al profesor D. Joaquín García Morillo* [Studies in Constitutional Law: Tribute to Professor Joaquín García Morillo], ed. Luis María López Guerra (Madrid: Tirant lo Blanch, 2001), 310.

²⁷ Peter J. Tettinger, “*La Carta de Derechos Fundamentales de la Unión Europea* [The Charter of Fundamental Rights of the European Union],” *Persona y Derecho*, no. 45 (2001): 27.

²⁸ López Aguilar, “*Legitimación y deslegitimación del Parlamento* [Legitimization and Delegitimization of Parliament],” 311.

enshrined that the State only justifies its existence to the extent that human rights are duly safeguarded.”²⁹

To illustrate the duty of protection of fundamental rights, there can be mentioned a few specific examples:³⁰

- The duty to protect the right to life implies not only avoid arbitrary executions and forced disappearances, but also take measures to prevent the murder, suicide, domestic violence or unsafe abortion; as well as ensure access to health, food, drinking water and other basic services. According to article 25.1. on the Universal Declaration: “everyone has the right to a standard of living adequate for [...] health and well-being”.
- The duty to protect the right to freedom implies not only prevent unlawful or arbitrary detention, but also take measures to prevent slavery, human trafficking, kidnapping, or torture; as well as ensure due process, habeas corpus, and other legal remedies. According to the article 3° of the Universal Declaration: “everyone has the right to life, liberty, since the security.”
- The duty to protect the right to equality implies not only to avoid discrimination on the grounds of sex, race, origin, religion or other factors; but also to take measures to prevent racism, xenophobia, homophobia, or violence against women; as well as ensure equality before the law, access to education, work and other social settings. According to the article 1° of the Universal Declaration: “All human beings are born free and equal in dignity and rights”.
- The duty to protect the right to participation involves not only avoiding undue restrictions on the right to vote, freedom of expression, but also taking measures to prevent corruption, electoral fraud or censorship; as well as ensuring political pluralism, access to the public information and other democratic mechanisms. According to the article 21° of the Universal Declaration: “everyone has the right to participate in government [...] directly or through [...] freely chosen representatives”

²⁹ María del Pilar Sáenz Niembro, “*El papel de los tribunales constitucionales en los Estados democráticos* [The Role of Constitutional Courts in Democratic States],” *Centro de Estudios Constitucionales*, April 15, 2020.

³⁰ United Nations, “Universal Declaration of Human Rights” (Geneva, 1948).

3.4.2. The Legislative Function in the Protection of Fundamental Rights

The legislative function about protecting fundamental rights consists in the development of legal standards that ensure the respect and promotion of the values and constitutional principles. The law should be geared to the effective realization of human rights, both at the national and the international level, and must be consistent with the treaties and agreements signed by the State.

The protection of fundamental rights involves not only the creation of norms, but also the control of their implementation and compliance. In this sense, the legislative branch has the power to oversee the executive power and the judicial power, as well as to the other organs of the State, to verify that its actions comply with the constitutional and legal framework. In addition, the legislature may promote constitutional or statutory which extend or enhance the catalogue of fundamental rights, or to introduce mechanisms of warranty or more effective defense. These reforms must have the consensus of the political and social forces, and should respect the principles of constitutional supremacy, hierarchy, rules, and legal security. So says the Peruvian constitutional, Domingo García Belaunde, who stresses the role of Congress as the representative body and deliberative.³¹ An example of this function is legislative Act no. 30754, Framework Act on Climate Change, approved by the Congress of the Republic of Peru in 2018, which sets out the principles, approaches and general provisions for the management of climate change on the country and creates the National Commission on Climate Change as a space-sectoral and participatory to coordinate action to address this global phenomenon.

The legislative function in the protection of fundamental rights is, therefore, a complex and transcendent task, that requires an ethical and democratic commitment by the party of parliamentarians. They must act with independence, transparency and citizen participation, seeking the common benefit and the general interest. Also, they must be attentive to the demands and needs of the society, as well as to the changes and challenges of national and international

³¹ Domingo García Belaunde, "Los Tribunales Constitucionales en América Latina [The Constitutional Courts in Latin America]," *Revista de Derecho Político*, no. 61 (2004): 311.

affairs. This is the only way we can achieve legislation that guarantees human dignity and the rule of law.

The law should be geared to the effective realization of human rights, both at the national and the international level, and must be consistent with the treaties and agreements signed by the State. So says the Spanish jurist Antonio Perez Luño, who argues that the legislative function is a manifestation of the constituent power and that it must be exercised with responsibility and social awareness.³² An example of this legislative function is the Organic Law 3/2018, of December 5, on Personal Data Protection and Guarantee of Digital Rights, adopted by the Congress of Deputies of Spain, which adapts the Spanish regulations of the General Regulation of Data Protection of the European Union and recognize new digital rights such as the right to be forgotten, the right to the portability or the right to disconnect digital.

3.5. Cases in which the Constitutional Court has Exercised Its Legislative Function in Relation to the Omission of the Constituent

The Constitutional Court is the supreme body of interpretation and defense of the Constitution. Among its functions is the control of the constitutionality of laws and other normative acts, as well as to resolve conflicts of jurisdiction between the powers of the State. In some cases, the Constitutional Court has exercised a legislative function in relation to the omission of a constituent, that is to say, when this has not complied with its duty to develop or regulate any aspect provided for in the Constitution.

An example of this legislative function in the Constitutional Court is given by the judgment 002-2004-AI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to prior consultation of indigenous peoples. The Constitutional Court ordered Congress to dictate the law in a reasonable timeframe, and established the minimum criteria that should

³² Antonio Perez Luño, *Derechos Humanos, Estado de Derecho y Constitución* [Human Rights, Rule of Law and Constitution], 9th ed. (Madrid: Tecnos, 2005), 254.

be contained. Thus, the Constitutional Court took a creating function of the right in the absence of action of the legislator.³³

Another example occurred in the sentence 0006-2006-PI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to conscientious objection to compulsory military service. The Constitutional Court ordered Congress to dictate the law in a given time, and set the principles and requirements that should be respected. In this way, the Constitutional Court was supplied by the absence of the legislator and to guarantee the effective exercise of a constitutional right.³⁴

A third example is presented in the sentence 0008-2003-AI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to citizen participation in public affairs. The Constitutional Court ordered Congress to dictate the law in a peremptory term and pointed out the essential aspects that should be covered. In this way, the Constitutional Court had a role inclusive of the right to the failure of the legislator.³⁵

These cases show that the Constitutional Court has exercised a legislative function in relation to the omission of the constituent assembly, which has led to a debate about the limits and scope of its intervention in the process of law creation. Some authors consider that this legislative function is legitimate and necessary to protect the fundamental rights and the constitutional State of law. Other authors argue that this legislative function is illegitimate and unnecessary, since it violates the principle of separation of powers and usurps the powers of the Parliament.³⁶

In the case of Spain Constitutional Court, it has, among others, the function of ensuring respect for the Constitution and the recognized fundamental rights. However, in some cases, the TC has had to exercise a legislative function in relation

³³ Judgment of the Jurisdictional Plenary Exp. 001-2004-AI/TC and 002-2004-AI/TC (accumulated) (The Constitutional Tribunal of the Republic of Peru, September 27, 2004).

³⁴ Judgment of the Jurisdictional Plenary Exp. 0006-2006-PI/TC (The Constitutional Tribunal of the Republic of Peru, June 13, 2006).

³⁵ Judgment of the Jurisdictional Plenary Exp. 0008-2003-AI/TC (The Constitutional Tribunal of the Republic of Peru, November 11, 2003).

³⁶ García Belaunde, "Los Tribunales Constitucionales en América Latina [The Constitutional Courts in Latin America]," 14.

to the omission of a constituent, that is to say, to the lack of legal development of some constitutional provisions. In this text we will analyze three cases in which the TC has taken this legislative function: the protection of the environment, equality and non-discrimination and the right to protection of health.

The first case refers to the protection of the environment, which is recognized in article 45 of the Constitution as a right and a duty of all citizens. However, this paper has been developed by an organic law to regulate its content and scope, as required by article 81 of the Constitution. Before this legislative omission, the TC has had to establish the criteria for determining when it violates this law and what kinds of actions can be exercised for his defense. Thus, in the sentence 64/1982, the TC said that the right to the environment implies the right to enjoy an environment suitable for the development of the person and the duty to preserve it for future generations. In addition, in the sentence 102/1995, the TC recognized the standing of any citizen to file an appeal against the actions or omissions of the public authorities that affect the environment, provided that proof of a legitimate interest.

The second case refers to the equality and non-discrimination, which are enshrined in article 14 of the Constitution as the guiding principles of the action of the public authorities and as fundamental rights of the citizens. However, this article has also been developed by an organic law that defines the assumptions and the positive action measures to ensure real and effective equality of all Spaniards. Before this legislative omission, the TC has had to interpret the content and scope of article 14 of the Constitution, as well as the limits and the conditions of public policies designed to favor certain groups or collectives. Thus, in the sentence 128/1987, the TC was established that the principle of equality implies the duty to treat as equal to equal and unequal to the unequal to the extent to which they are unequal. In addition, in the sentence 236/2007, the TC admitted to the constitutionality of the measures of positive discrimination, provided that they are proportionate, temporary, and do not imply an absolute exclusion or a reversal of the burden of proof.

The third case refers to the right to the protection of the health, which is recognized in article 43 of the Constitution as a right linked to the guiding principle of social policy-oriented well-being. However, this article has also been developed by an organic law to regulate its content and scope, as required by article 81 of the Constitution. Before this legislative omission, the TC has had to determine when it violates this law and what kinds of actions can be exercised for his defense. Thus, in the sentence 16/1989, the TC said that the right to the protection of the health implies the right of access to the public healthcare system in conditions of equality and of sufficient quality. In addition, in the sentence 139/1995, the TC recognized the standing of any citizen to file an appeal against the actions or omissions of the public authorities affecting the right to health, provided that proof of a legitimate interest.

By comparing these performances, we can say that the TC has exercised a legislative function in relation to the omission of a constituent in some of the cases involving fundamental rights and directive principles of social policy. This legislative function was based on a constitutional interpretation aimed for ensuring the social and democratic State of law. However, this legislative function also raises some legal and policy concerns, such as the respect for the principle of separation of powers or the democratic legitimacy of the TC to create legal standards.

3.6. Limits and Challenges of the Legislative Function of the Constitutional Court in Relation to the Omission of the Constituent

The legislative function of the Constitutional Court in relation to the omission of the constituent raises a number of limits and challenges that derive from the nature and the scope of its jurisdiction. On the one hand, the Constitutional Court must guarantee the supremacy and the effectiveness of the Constitution, as well as the protection of fundamental rights, in the absence or insufficiency of legislative development of the constitutional mandates. On the other hand, the Constitutional Court must respect the principle of democracy and the autonomy of the ordinary legislator, avoiding replace or conditioning it in the exercise of their regulatory function.

In this sense, the doctrine and case law have developed different criteria and techniques to address the problem of legislative omission from a constitutional perspective. Among them, we can mention the following: the distinction between absolute and relative legislative omission, the identification of the constitutional duties concrete and binding of lawmaking, the verification of a normative gap existence that affects the Constitution and the fundamental rights, the direct or analog application of the constitutional rules, the interpretation according to the Constitution of the legal provisions incomplete or deficient,³⁷ the declaration of unconstitutionality with ex nunc effect or deferred,³⁸ and the formulation of exhortations and warnings to the legislature to fulfill its constitutional obligation.³⁹

These criteria and techniques are not mutually exclusive nor exhaustive, but should be applied with caution and proportionality, by the Constitutional Court, taking into account the circumstances of the case and the degree of involvement of the Constitution or of fundamental rights. In addition, the Constitutional Court must ensure that their decisions are respected and enforced by the ordinary legislator, without incurring undue interference in its legislative function. In this way, the Constitutional Court can fulfill its role of guarantor of the Constitution and of the fundamental rights in relation to the omission of the constituent assembly, without prejudice to the principle of democracy, nor the separation of powers.⁴⁰

The legislative function of the Constitutional Court in relation to the omission of the constituent poses limits and challenges that must be analyzed with respect to the principle of separation of powers, the criteria for intervention and coordination with other state bodies.⁴¹ In this sense, we can say that:

³⁷ Juan Luis Requejo Pagés et al., "Doctrina del Tribunal Constitucional durante el segundo cuatrimestre de 2008 [Constitutional Court Doctrine during the Second Quarter of 2008]," *Revista Española de Derecho Constitucional*, no. 83 (2008): 235.

³⁸ Manuel González Oropeza and Pedro López Saucedo, *Iconografía de la Justicia en México* [Iconography of Justice in Mexico] (México: Suprema Corte de Justicia de la Nación, 2009), 112.

³⁹ Manuel García-Pelayo, *Derecho Constitucional Comparado* [Comparative Constitutional Law], 4th ed. (Madrid: Alianza, 1984), 432.

⁴⁰ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 758.

⁴¹ Juan Luis Requejo Pagés, "Los Problemas de la Omisión Legislativa en la Jurisprudencia Constitucional [The Problems of Legislative Omission in Constitutional Jurisprudence]," in *Conferencia Europea de Tribunales Constitucionales: Ponencias españolas (2008–2017)* (Madrid: Tribunal Constitucional, 2008), 40.

- The Constitutional Court must employ a rigorous methodology to identify the existence of legislative omissions, based on the systematic and evolutionary interpretation of the Constitution and the legal system, as well as in the analysis of the practical consequences of the lack of regulation.
- The Constitutional Court must respect the freedom of the legislator and democratic avoiding supplementing his function with decisions that could involve creation rules or undue interference in the political or administrative.
- The Constitutional Court must take appropriate measures to ensure the compliance of its decisions that declare the unconstitutionality by legislative omission, such as setting time limits, establishing the criteria that govern or be coordinated with other State bodies.

Finally, the legislative role of the Constitutional Court in addressing the omissions of the constituent assembly is both complex and delicate, requiring a careful balance between upholding constitutional supremacy and respecting the principle of separation of powers

3.7. The Rule of Law

The rule of law is a principle of political and legal-which involves the submission of all public authorities and private with the Constitution and the laws. According to this principle, the State must ensure the respect of human rights and fundamental freedoms of citizens, as well as the separation and independence of powers between the legislature, executive, and judicial.⁴² The rule of law is based on the idea that power should be limited by the right to prevent their abuse or arbitrariness.⁴³

One of the essential elements of the rule of law on the judicial control of the constitutionality of the rules and legality of the administrative action.⁴⁴ This means that judges and courts have the power to review the conformity of laws

⁴² Jürgen Habermas, *Faktizität Und Geltung. Beiträge Zur Diskurstheorie Des Rechts Und Des Demokratischen Rechtsstaats* [Facticity and Validity. Contributions to the Discourse Theory of Law and the Democratic Constitutional State] (Frankfurt: Suhrkamp, 1992), 234.

⁴³ Norberto Bobbio, *Estado, Gobierno y Sociedad: Por una Teoría General de la Política* [State, Government and Society: For a General Theory of Politics] (México: Fondo de Cultura Económica, 1989), 214.

⁴⁴ Hans Kelsen, *Teoría Pura del Derecho* [Pure Theory of Law] (México DF: Universidad Nacional Autónoma de México, 1982), 185.

and acts of public power with the Constitution and with the law in force. Thus, it protects the principle of constitutional supremacy and ensures the fulfillment of the rights and duties of citizens.⁴⁵

Another of the key elements of the rule of law, democratic participation of citizens in the formation of the political will.⁴⁶ This implies that the town is the holder of the national sovereignty, and that it can be exercised directly or through their representatives, freely elected in transparent and pluralistic electoral processes.⁴⁷ In addition, the rule of law recognizes the right of citizens to associate, speak, manifest, and access to public information.⁴⁸

The rule of law can be defined as “the principle of government under which all persons, institutions and entities, public and private, including the State itself, are subject to some laws that are promulgated by the public, is enforced equally and are applicable regardless, in addition to be compatible with the norms and principles of international human rights.”⁴⁹ For this reason, it is crucial that the States have a national legal framework, clear, coherent, and consistent with the international law of human rights, as well as with strong institutions to ensure the effective execution of their duties.

Rule of law is a fundamental principle that implies that all public and private acts should be subject to the Constitution, the supreme law that establishes the rights and duties of citizens and the authorities. About it Elias Diaz, states that the rule of law is the State under the Law; that is to say, the State whose power and activity are regulated and controlled by law.⁵⁰ The rule of law is so fundamentally in the “rule of law”: Law and law understood in this context as an expression of the “general will”. Without, however, in a constitutional State of law, it is not sufficient that there should be a Constitution formally valid,

⁴⁵ Luigi Ferrajoli, *Derecho y Garantías. La Ley del más débil* [Law and Guarantees. The Law of the Weakest] (Madrid: Trotta, 1999), 86.

⁴⁶ John Locke, *Segundo ensayo sobre el Gobierno Civil* [Second Essay on the Civil Government] (Madrid: Alba, 1897), 155.

⁴⁷ Jean-Jacques Rousseau, *El Contrato Social o Principios de Derecho Político* [The Social Contract or Principles of Political Law] (Amsterdam: elaleph.com, 1762), 222.

⁴⁸ Robert Alan Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), 125.

⁴⁹ Naciones Unidas, “*Impunidad y Estado de Derecho* [Impunity and Rule of Law],” OACNUDH para América Central, accessed April 25, 2023.

⁵⁰ Elias Diaz, *Estado de Derecho y Sociedad Democrática* [Rule of Law and Democratic Society] (Madrid: Taurus, 1998).

but it requires that your content is in line with the democratic values and human rights, and to ensure its effectiveness through mechanisms of control of constitutionality.

IV. CONCLUSIONS

The review of the legislative function of the Constitutional Court in relation to the omission of the constituent demonstrates that it constitutes an exceptional and subsidiary power, aimed at ensuring the supremacy of the Constitution and the enforcement of international human rights treaties. However, beyond its foundational purpose, this function reveals a complex interplay between judicial oversight, democratic legitimacy, and the evolving nature of constitutional interpretation. The Court's ability to intervene in cases of legislative omission is not merely a corrective mechanism; it is a necessary safeguard to prevent constitutional stagnation and ensure the full realization of fundamental rights.

The Constitutional Court's role in addressing legislative omissions serves as an essential legal instrument to remedy regulatory gaps that impair the effectiveness of constitutional mandates. This function is exercised through the issuance of integrative or additive rulings, which introduce into the legal system normative provisions that the constituent power or the legislature has failed to develop. By doing so, the Court not only guarantees the enforceability of constitutional rights but also ensures that the legal order remains dynamic and responsive to emerging social, political, and technological challenges. In this sense, the Court does not act as a substitute for the legislature but rather as a constitutional safeguard, ensuring that fundamental rights are not left unprotected due to legislative inertia.

Nevertheless, this legislative function is neither absolute nor arbitrary; rather, it is strictly circumscribed by the principles of necessity, proportionality, and reasonableness. These constraints ensure that judicial intervention remains a measure of last resort, preventing the Court from assuming an active

legislative role that would undermine the principle of separation of powers. Furthermore, adherence to the principle of legislative reserve delineates the limits of constitutional adjudication, reaffirming that the primary responsibility for law-making rests with democratically elected institutions. The Constitutional Court's role in this context is not to replace or supplant the legislature but to ensure the effectiveness of constitutional norms, particularly when the absence of regulation threatens fundamental rights or the coherence of the legal system. Its interventions, therefore, are grounded in the duty to uphold constitutional supremacy, rather than an assumption of legislative authority.

A critical aspect of this function is the inherent tension between judicial activism and democratic legitimacy. While the Constitutional Court's intervention can be justified as a means of protecting fundamental rights and upholding constitutional supremacy, it also raises concerns regarding the potential erosion of legislative autonomy. If exercised excessively or without clear doctrinal foundations, judicial interventions in legislative omissions may lead to a gradual judicialization of politics, where courts assume a role that extends beyond their constitutional mandate. This underscores the need for a judicious and restrained application of this power, ensuring that the Court does not inadvertently become an alternative law-making body but instead remains a guardian of constitutional order.

Ultimately, the legislative function of the Constitutional Court in cases of constituent omission embodies a delicate equilibrium between the imperatives of constitutional justice and the principles of democratic governance. Its legitimacy and effectiveness hinge on the Court's ability to navigate this balance, intervening only when necessary to prevent constitutional dysfunction while maintaining due deference to the legislative process. In doing so, the Court not only reinforces the normative force of the Constitution but also contributes to the stability and coherence of the legal system, ensuring that constitutional principles are effectively upheld in a manner that respects the democratic foundations of the state.

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PREVENTING ABUSIVE CONSTITUTIONALISM IN INDONESIA

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Received: 26 February 2024 | Last Revised: 4 December 2024 | Accepted: 10 March 2025

Abstract

Through Landau's abusive constitutionalism concept, this article aims to investigate the background behind the plan to conduct further constitutional amendments after over two decades of constitutional amendments in 1999 – 2002. The central question to be addressed is whether it is necessary to pursue further constitutional amendments aimed at restoring the authority of the People's Consultative Assembly (MPR) to set State Guidelines (PPHN) and extending the President's term of office from two to three terms. This study utilizes doctrinal-qualitative approaches. It studies relevant laws, regulations, and doctrines to find out the primary factors that contribute to the MPR intention to amend the constitution. This paper argues that while amending a constitution is within the MPR's constitutional powers, doing so should consider principles of constitutionalism and democracy. A constitutional amendment should be carried for the sake of having a better constitution which uphold constitutionalism –and not the other way around. This paper, therefore, asserts that further constitutional amendment with the above-mentioned agendas potentially lead to abusive constitutionalism if doing so without any clear and legitimate purposes. In the absence of well-defined and reasonable goals, a constitutional amendment may be subjectively used or misused by state institutions to gain more constitutional powers --not to strengthen constitutionalism and democracy. This paper recommends three ways to avoid abusive constitutionalism namely: inserting eternal clause, applying basic doctrine structure, and effectuating civil society.

Keywords: abusive constitutionalism, unconstitutional constitutional amendment, basic structures.

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I. INTRODUCTION

1.1. Background

A constitution contains the basic structure of the state administration, *inter alia*, the state fundamental structure, the relations among state institutions as well as the state and citizens, and protection of human rights.¹ A constitution also stipulates a mechanism to amend the constitution. Such provision is important to ensure that a constitution keep updated. The amendment provisions indicate that a constitution made by human is not a perfect document.² It needs improvement and refinement from time to time to better suited with current societal development.³ However, it is not uncommon that the good intention of provision concerning constitutional amendment may be used or misused for undemocratic purposes, such as accumulating power, perpetuating power or marginalizing the power of other state institutions.⁴

In the last ten years, there has been a tendency the use of constitutional channels for undemocratic purposes. In Russia and Turkey, for example, the extension of the presidential term is carried out by a constitutional mechanism.⁵ The purpose of extending the term of office of the president is actually to perpetuate power. This phenomenon shows a contradiction with the notion of constitutionalism.

Constitutionalism which essentially means limiting governmental powers is used for contradictory purposes namely to prolong the powers of the state institutions. This phenomenon is labelled by David Landau as *abusive constitutionalism*.⁶ In his article entitled *Abusive Constitutionalism*, Professor

¹ Elliot Bulmer, *What Is a Constitution? Principles and Concepts*, International IDEA Constitution-Building Primer 1, 2nd ed. (Sweden: International IDEA, 2017).

² Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford Constitutional Theory (Oxford, United Kingdom; New York, United States of America: Oxford University Press, 2019).

³ Roznai, *Unconstitutional Constitutional Amendments*, 2019.

⁴ Rosalind Dixon and David E. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford Comparative Constitutionalism (Oxford: Oxford University Press, 2021).

⁵ William Partlett, "Russia's Unconstitutional Zeroing Amendment," *IACL-AIDC Blog*, (March 16, 2020). See also Tolga Şirin, "How Many Times Can Erdoğan Be a Presidential Candidate?," *International Journal of Constitutional Law Blog*, (August 3, 2021).

⁶ David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47, no. 1 (November 2013): 189–260.

Landau describes this phenomenon in several Latin American countries including Venezuela and Colombia.⁷ The constitutional mechanism for amending the Constitution, in these two countries, is used to extend the term of office of the president, strengthen, or increase the authority of certain state institutions or weaken the constitutional authority of other state institutions.⁸

A more recent book by Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing*,⁹ analyze the use of constitutional mechanisms for undemocratic purposes turns out to occur in a wider scope such as in constitutional changes, constitutional rights, and judicial review. Abusive constitutional borrowing also occurs in several countries.

This symptom seems also to be found in Indonesia at least in the last five years. These include the proposal to reintroducing the MPR authority to stipulate the Foundation of State Policies (PPHN); a proposal to extend the presidential term of office from 2 to 3 periods; and the proposal of prolonging the president's term of office over 5 years. This paper acknowledges that inserting the three topics above-mentioned in the updated Constitution is within the MPR's constitutional powers. However, doing so should consider the voice of the people and more importantly in line with the principle of constitutionalism. The constitutional amendment should be carried for the sake of having a good quality of constitution which uphold constitutionalism –and not to broaden the powers. It is therefore important to prevent further constitutional amendment if such amendments will likely lead to abusive constitutionalism.

1.2. Research Questions

Based on the description mentioned above, this study aims to answer three important questions, namely:

1. What is the background behind the proposal to reinstate State Policy Guideline (PPHN) and to prolong presidential term of office in the new constitution?

⁷ Landau, "Abusive Constitutionalism," 189.

⁸ Landau, "Abusive Constitutionalism," 189.

⁹ Dixon and Landau, *Abusive Constitutional Borrowing*.

2. In the context of constitutionalism, how do we interpret the intention of MPR to reintroduce the PPHN and extend president terms of office in the updated constitution?
3. What kind of constitutional engineering that might be adopted to prevent abusive constitutionalism in Indonesia?

1.3. Method

This is a conceptual legal research with comparative approach. This study seeks to answer the abovementioned research questions by introducing a concept that may be used as reference to prevent abusive constitutionalism in Indonesia coupled with two existing concepts. These two existing concepts –the basic structure doctrine and eternal clause-- are obtained through comparative study from other countries experiences that have similar problems in the past.¹⁰ This study uses Indonesia's experience on the plan to carry out further constitutional amendments as a case study and assess it against relevant constitutional principles such as constitutionalism and democracy.

This research is expected to contribute by offering a different way of avoiding abusive constitutionalism. Existing literatures analyze the experience of India and some Latin America countries in avoiding abusive constitutionalism. India is important because the Supreme Court of India through its ruling declared that an amendment to the Constitution unconstitutional if a violation of the basic structure principle is found.¹¹ Meanwhile, the experiences of Latin American countries such as Colombia¹² and Venezuela are important because both countries experienced abusive constitutionalism in the past.¹³

This paper offers a different way of preventing abusive constitutionalism i.e. by effectively increasing, spreading and maintaining the voice of civil society to

¹⁰ Vellah Kedogo Kigwiru, "Comparative Legal Research: A Brief Overview," *Afronomics Law* (January 25, 2020).

¹¹ Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford; New York: Oxford University Press, 2016); See also Aqa Raza, "The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique," (July 12, 2015), SSRN.

¹² Rosalind Dixon and Thomas B. Ginsburg, *Comparative Constitutional Law in Latin America* (Cheltenham: Edward Elgar Publishing, 2017), 261.

¹³ Jorge González-Jácome, "On Abusive Constitutionalism: Two Critical Impulses," *International Journal of Constitutional Law Blog*, (June 11, 2015).

provide counternarrative to assess the validity of such plan. This mechanism is preferable for three reasons. First, civil society is already in existence and embedded as part of the whole political system. Second, there is no need to amend the constitution. Third, this method provides a space between the government and the society to have fruitful constitutional dialogue.

The structure of the paper is as follows, Part II Result & Discussion: Section 2.1. clarifies the term abusive of constitutionalism to understand whether the symptom of abusive constitutionalism is factually happening in Indonesia lately. Section 2.2. to Section 2.7 examine the proposal to include two topics in the future constitutional amendment i.e. the reintroduction of the PPHN and prolonging the president term of office. What motivates the inclusion of these two themes in the constitutional amendment in the future? How do we understand such proposal? Should we consider this proposal as the implementation of the MPR constitutional authority to carry out constitutional amendment? or it aims to extending the powers of state institutions? Section 2.8. analyses the possible consequences and finds possible ways to prevent abusive constitutionalism happening in Indonesia. Part III Conclusion will draw conclusion and recommendations.

II. RESULT & DISCUSSION

2.1. Defining Abusive Constitutionalism

This Part clarifies the concept of abusive constitutionalism. This concept is important to indicate whether or not the recent phenomena happening in Indonesia fit with this concept. The explanation of abusive constitutionalism is referring to two articles: *abusive constitutionalism* by David Landau and *abusive constitutional borrowing* by Rosalind Dixon and David Landau. In his article *Abusive Constitutionalism* published in 2013, David Landau observed a tendency of abusive constitutionalism in some jurisdictions including Colombia, Hungary, and Venezuela. In these three countries, there was a phenomenon of utilizing constitutional amendment or constitutional replacement to weaken democracy. The replacement or amendment of a constitution was used as a tool to establish

an undemocratic order. Under President Alvaro Uribe Velez, the Colombian Constitution stipulates that the President holds office for a single term and this aimed to prevent the emergence of strong leader with a continuous hold on the office.¹⁴ There was an attempt to amend the Colombian Constitution. The amendment focused on the extension of presidential term of office.

Unlike the Colombian case, Venezuela replaced the constitution –not amended it, with the aim to prolong presidential term of office from single four-year term of office to two terms of six years each. Hungary combined the strategies by reforming and replacing of the constitution.¹⁵ This is done by adding more constitutional court justices so that the ruling party can fill the seat.¹⁶ In addition, the sitting government also established National Judicial Office with significant powers in selecting and assigning cases within the judiciary.¹⁷ Some state commissions such as electoral election, budget commission and media board are re-staffed so that it provides more opportunity for the government to fill its men. And finally, the government adjusted the rule on general election districts which potentially make more difficult for the sitting government to be altered constitutionally.

A recent study by Rosalind Dixon and David Landau on *Abusive Constitutional Borrowing*¹⁸ extends the discussion by analyzing whether the phenomenon observed by David Landau in his study on *Abusive Constitutionalism* could be seen in other countries experience which apply similar democratic constitutional features for anti-democratic purposes. Their study concludes that democratic constitutional designs, doctrines, and concept may be (mis)used for undemocratic ends. Dixon and Landau study provide examples on how modern democratic constitutionalism such as constitutional courts, constitutional rights, and constituent power theory can be misused or abused. The erosion of democratic constitutions happened

¹⁴ David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself*, 4th print, History/Latin American Studies (Berkeley: University of California Press, 2003).

¹⁵ Irem Nart, "Abusive Constitutionalism in the Heart of the Europe: Cases of Hungary and Poland," *Journal of International Relations and Political Science Studies* 3 (2021): 27–44.

¹⁶ Article 24(4) of the Hungary Constitution (extending the number of justices from 11 to 15).

¹⁷ Article 24(4) of the Hungary Constitution (extending the number of justices from 11 to 15).

¹⁸ Dixon and Landau, *Abusive Constitutional Borrowing*, 2021.

depending on some important institutions such as the courts, independent institutions such as anti-corruption commission, human rights commission, and general election commission, and other similar institutions.

A study by Mila Versteeg, Timothy Horley, Anne Meng, Mauricia Guim and Marilyn Guirguis on *The Law and Politics of Presidential Term of Limit Evasion* finds that quantitatively efforts to prolong presidential term of office are common around fifty percent the leaders who are about to complete their final term pursued some methods to remain in office such as drafting a new constitution, utilizing court interpretation, and delaying elections.¹⁹ This study further finds that it is the popular resistance --not the court that can prevent the prolonging of presidential term of office. This finding is somehow different from existing literature on this issue that court effectively enforce term of office.

The three above-mentioned articles will be used to understand the Indonesian situation specifically concerning the proposal to conduct further constitutional amendments with very specific agendas to re-introduce the National Guideline (the PPHN) and extending presidential term of office from two terms to three terms of office. Do the abovementioned articles help us to understand the motive behind the plan to carry out further constitutional amendments? I do believe that these articles are helpful in assisting us to comprehend the Indonesian situation lately because the symptoms are somehow similar. Some important questions that need to be addressed are: what is the primary purpose of amending the current constitution? Does it aim to limit governments powers? or its goal is to broaden the powers of the state institutions? If the latter is confirmed, such constitutional amendment proposal falls under what David Landau called as “abusive constitutionalism.”

2.2. Proposal to Conduct Further Constitutional Amendment

Similar to many modern constitutions across the globe, the Indonesian constitutions since the beginning of the republic contains provisions on amendment of the constitution. Article 37 of the updated 1945 Constitution

¹⁹ Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, “The Law and Politics of Presidential Term Limit Evasion,” *Columbia Law Review* 120, no. 1 (2020): 173–248.

provides specific process and procedures to carry out Constitutional Amendment. It stipulates:

- (1) A proposal to amend the Articles of this Constitution may be included in the agenda of an MPR session if it is submitted by at least 1/3 of the total MPR membership.
- (2) Any proposal to amend the Articles of this Constitution shall be introduced in writing and must clearly state the articles to be amended and the reasons for the amendment.
- (3) To amend the Articles of this Constitution, the session of the MPR requires at least 2/3 of the total membership of the MPR to be present.
- (4) Any decision to amend the Articles of this Constitution shall be made with the agreement of at least fifty per cent plus one member of the total membership of the MPR.
- (5) Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended.

Article 37 authorizes the MPR a power to amend the Constitution. Article 37 also determines procedures and requirement in amending the Constitution. The MPR is the one and only state institution that is authorized by the Constitution to amend the Constitution. The only restriction for the MPR to amend the Constitution is concerning the form of unitary state as expressly mentioned in Article 37 (5). The question is how if the MPR intent to amend the existing constitution aiming to extend its constitutional powers? The following Part will explain regarding the proposal to amend the Constitution with agendas to reinstate the PPHN and to prolong presidential term of office.

2.3. Examining the Proposal to Reintroduce the PPHN In the Future Constitutional Amendments

This Part examines the proposal to reinstate the PPHN in the future constitutional amendment. What motivate the MPR to re-introduce the PPHN? Does the argument to include the PPHN have strong constitutional basis? This

Part will scrutinize the claims of the MPR members and politicians that it is important to insert the PPHN in the updated constitution. Historically, the Old 1945 Constitution granted the highest position of the People's Consultative Assembly (The MPR) among government institutions. The MPR represents people's sovereignty.²⁰ It elects President and Vice President.²¹ Both President and the vice president are responsible to the MPR.²² the MPR can impeach the president and the vice president.²³ Another important responsibility of the MPR is to determine the national development guidance (the GBHN).²⁴ The MPR is referring to the GBHN when the President report his work. If the MPR is not satisfied it is possible that the MPR impeach the President for not complying the MPR guidance.²⁵ In this setting, it is understandable that the president is responsible to the MPR as it is the highest state institution and represent people's sovereignty.

The Old Order and the New Order eras adopted the Old 1945 Constitution meaning that during these two periods, the MPR was powerful. the MPR elected the president and the vice president. The MPR may also impeach the president and vice president for violating the GBHN or the Constitution. This indicates that GBHN determines the term of office of the president.

While MPR's authority to determine GBHN has been stipulated since the introduction of the first Constitution in 1945, the GBHN itself was not introduced until the 1960s through the President Stipulation 1/1960 concerning the State Guidelines (the GBHN). The next GBHN was enacted by the MPR through MPR stipulation 1/1960 concerning Indonesian Political Manifesto. This 1960 GBHN was originally from the president speech in the UN entitled *To a Build New World*.²⁶ In 1963 the MPR issued another decree concerning National Guideline which is rooted from the speech of the president "*Revolusi Sosialisme Indonesia-Pimpinan*

²⁰ Article 1(2) of the 1945 Constitution (Old Constitution).

²¹ Article 6(2) of the 1945 Constitution (Old Constitution).

²² General Elucidation of the 1945 Constitution (Old Constitution).

²³ General Elucidation of the 1945 Constitution.

²⁴ Article 3 of the 1945 Constitution.

²⁵ General Elucidation of the 1945 Constitution.

²⁶ *Penetapan Presiden Republik Indonesia Nomor 1 Tahun 1960 tentang Garis-Garis Besar Darpada Haluan Negara* [Presidential Decree No. 1/1960 on the Broad Guidelines of State Policy].

Nasional” (Socialism Revolution-National Leaders) and “*Tahun Kemenangan*.” (the Year of Glory).²⁷ It can be said that during Old Order era, the GBHNs were originally from the President even though it was stipulated in the MPR Decree. In other world, the content of the GBHN was heavily dependent on the sitting President aspiration.

In New Order era, the GBHN was stipulated in the MPR decree. These include: the MPR Decree IV/MPR/1973; the MPR Decree II/MPR/1978; the MPR Decree II/MPR/1983; the MPR Decree II/MPR/1988; the MPR Decree II/MPR/1993; and finally, the MPR Decree II/MPR/1998. All these MPR Decrees were formulated by the sitting president and his team but they were stipulated in the MPR Decree --not the President Regulation. It is important to note that under these two eras, the President was never replaced. It means during the Old Order era the sitting President was Soekarno while in the New Order era the sitting president was Soeharto. This fact tells us that the content of the GBHN is heavily depending on the sitting President agendas. Since in both eras there was only one President each, it is understandable that the content of the GBHN was consistent since it is made by the same individual.

In 1999-2002, the Indonesian Constitution was amended. The aims of these constitutional amendments are to limit the powers of the government and to ensure the protection of human rights. The updated Constitution shifts its paradigm from the MPR sovereignty to supremacy of the constitution. The MPR is no longer the highest state institution. The MPR does not have the authority to determine the National Guideline anymore.²⁸ MPR also does not have the power to elect president and vice president.²⁹ Under the new Constitution, the norms of the Constitution are the highest law of the land. It is the Constitution that distribute the powers to states agencies --not the MPR.³⁰ Therefore, the authority of the MPR to determine the GBHN is deleted.

²⁷ *Tap MPRS No. IV/MPRS/1963 tentang Pedoman Pelaksanaan Garis-Garis Besar Haluan Negara dan Haluan Pembangunan* [MPRS Decree No. IV/MPRS/1963 on the Guidelines for Implementing the Broad Outlines of State Policy and Development Guidelines].

²⁸ Article 3 of the updated 1945 Constitution.

²⁹ Article 6A of the updated 1945 Constitution stipulates that president and vice president are directly elected by the people, not the MPR.

³⁰ Article 1(2) of the updated Constitution.

The question is why do some politicians and the MPR members submit a proposal to reintroduce the PPHN –the new name of the GBHN – to the future constitutional amendments after two decades of the constitutional amendments in 1999-2002? Some politicians and the MPR members provide two arguments. First, the current Constitution which delete the GBHN does not guarantee the sustainability of national development.³¹ Second, the GBHN is more comprehensive compared to the current national development plan as mentioned in the National Development Planning System Law (SPPN Law).³²

2.4. Does the Current Constitution Guarantee the Continuity of Long-Term National Development?

It is believed that the shift from the GBHN to the SPPN Law causes uncertainty in the continuity of national development. Under the Old Constitution, MPR had the power to determine the GBHN. However, is it true that the MPR was the one who determine the content of the GBHN in the past? History proves that it is the president --not the MPR-- who determine the content of the GBHN. The continuity of the GBHN in the past was because the President stayed in power for long period of time. Therefore, he was able to maintain the continuity of national development.

The Deletion of GBHN in the updated Constitution does not mean that Indonesia does not have Long Term National Development Planning (RPJPN). The RPJPN is now stipulated in SPPN Law. The SPPN Law is important for the government in maintaining the continuity of the development programs. There are some criticisms regarding the continuity and the sustainability of SPPN Law since it is heavily depending on the will of sitting President and the DPR. The change of president may also change the content of the SPPN Law depending on the president agendas. But this may also happen even if the GBHN is reintroduced. This is because the composition of the MPR from time to time also change which means the content of the GBHN also changes.

³¹ Excerpt from the Indonesian Rectors Forum (formulation of the convention).

³² CNN Indonesia, "Wacana Membangkitkan GBHN dan Stabilitas Semu Ala Orde Baru [The Discourse of Reviving the GBHN and the False Stability of the New Order]" (Jakarta: CNN Indonesia, August 14, 2019).

Under the Updated Constitution, does the power of the MPR to determine the GBHN fit with the current constitutional arrangement? the short answer is no, why? because under the updated Constitution, the MPR is no longer the highest state institution. If the MPR determines the GBHN and the president is bound by the GBHN, it means the president is subordinate to the MPR. The fact is the current Constitution places the president and the MPR equal. Therefore, it is not proper if the President is responsible to the MPR.

In addition, even if the MPR has the power to determine the GBHN, it does not guarantee that the GBHN will remain consistent because under the current Constitution the President and the members of the MPR regularly change as a result of general election. If the composition of the members of the MPR regularly change, it means the aspirations of the MPR may also change which may impact the continuity of the GBHN.

2.5. Is the GBHN More Comprehensive Compared to the Existing SPPN Law?

The main argument why the GBHN is more comprehensive compared to the SPPN Law is because the GBHN is created by the MPR³³ that consists of the members of the DPR and the members of the DPD which means involving different entities with different interests. As a result, the formulation of the GBHN will consider very seriously many different aspects. That way it is expected that the GBHN will last longer. The SPPN Law is made by the President and the House of Representatives (The DPR). This makes the SPPN Law follow the preference of the sitting President. If the President changes the SPPN Law will likely change. As a result, the SPPN Law will not able to maintain its continuity. The question remains whether it is true that the GBHN last longer if the composition of the MPR members also change as a result of the general election? it is unlikely. The GBHN is made by the MPR (members of the DPR and members of the DPD). The SPPN Law is made by the President and the DPR. It means both the GBHN

³³ In the past, under the old 1945 Constitution, the MPR consisted of the DPR, the regional delegates, and the functional delegates.

and the SPPN Law made by multiple parties which may accommodate different interests, and not exclusively President interests.

2.6. Does the Reintroduction of the GBHN Fit with the Current Constitutional Arrangement?

The deletion of the GBHN in the Updated Constitution has significant impacts because it changes the position of the MPR as the highest institution. The position of the MPR equals to other state institutions including the President, the DPR, and the DPD. The MPR is no longer the institution where the president is responsible to. The fact that the current constitution changes the constitutional arrangement cause the GBHN does not fit with the current constitutional setting. The President is independent from the MPR in the sense that he is not elected by the MPR, he is instead elected by the popular through general election. The existence of the GBHN is no longer relevant with the current constitutional setting. If the GBHN becomes president's guideline in governing the country, the GBHN maker namely the MPR will be the institution where the President is responsible to. This practice somehow reflects the adoption parliamentarism –A system that is not adopted by the current Constitution. The Current Constitution aims to strengthen presidential system by introducing some features such direct presidential election, fix term of president term of office, abolishing the power of the MPR to regularly elects president, deleting provision concerning the GBHN.

From the abovementioned explanation, it can be said that the proposal to reintroduce the PPHN in the future constitutional amendments does not have strong legal and constitutional basis. It does not fit with the current constitutional design to strengthen presidential system. Sociologically, the plan to include the PPHN in the constitution faces significant challenges from civil societies. Many NGOs reject this idea and claim that such idea is as a form of expanding the MPR authority or at least to bring the MPR authority back so that MPR become powerful institution as it was under the Old Constitution. To conclude, the plan to reintroduce the PPHN in the future constitutional amendment, potentially becomes abusive constitutionalism as the proposal shows the eagerness of the

MPR to expand its powers through constitutional mechanism which somehow does not fit the spirit of the current constitution. It is therefore important to have a mechanism which may prevent such action in the future. Some possible mechanism will be introduced separately in Part IV.

2.7. A Proposal to Prolong President Term of Office

Another topic that was proposed to be included in the future constitutional amendment is to extend the president term of office from two periods to three periods. There are three proposals regarding the possibility of the sitting president to remain in power for three periods.³⁴ They are: (1) a proposal to extent presidential term of office from two periods to three periods. (2) A proposal to prolong the second period of the president term of office over five years. And finally (3) A proposal to nominate the sitting president to be a candidate of vice president in the next general election. All the three proposals aim to extending the president term of office.

Why are such proposals presented? The main argument delivered by some politicians was that prolonging presidential term of office will prevent division in society.³⁵ Is it true? The story can be traced from the 2019 presidential election where there were only two candidates of presidents contested in the election. This head-to-head political competition was resulted in the division of the society between those who go for Jokowi and those who go for Prabowo. For, the rivalry among elites is over because the losing President candidates, Prabowo Subianto and Sandiaga Uno, have joined Jokowi administration as Minister of Defense and Minister of Tourism. However, there is a claim that such event will likely happen in the future. Therefore, it is important to prolong president term of office so that it prevents the division of society.

It is important to note that the idea of extending president term of office is coming from politicians –not the public. It starts with the statement from Minister

³⁴ Firstly Hestyarini, "Presiden 3 Periode Diusulkan Masuk Amandemen: Jokowi Emang Mau? [Three-Term Presidency Proposed for Amendment: Does Jokowi Really Want It?]" (Jakarta: RM.id, November 22, 2019), 3.

³⁵ Tempo.co, "Pengamat Politik Qodari Jelaskan Alasan Mendukung Wacana Jokowi 3 Periode [Political Observer Qodari Explains the Reason for Supporting the Jokowi Three-Term Discourse]" (Jakarta: Tempo.co, March 16, 2021).

of Investment followed by some politicians from various political parties.³⁶ In essence, they believe that the current situation today is conducive for investment and development. This situation should be maintained so that Indonesia keep growing. Therefore, it is necessary to prolong the president term of office so that the situation remains conducive.³⁷ It is questionable whether extending president term of office will be the solution to make Indonesia keep growing. Other factors such as corruption and legal uncertainty are indeed important factors that will be carefully considered by investors prior to investing their capital to Indonesia.

Under the current Constitution, is it possible for a President to stay in powers for three periods? Article 7 of the updated 1945 Constitution stipulates, “The President and the Vice President hold office for five years, and may subsequently be reelected for the same office only one term of office.” In addition, Article 8 (1) stipulates, “If the President passes away, resigns, is discharged or is not able to conduct his/her obligations during his/her term of office, he/she shall be replaced by the Vice President up to the expiry of his/her term of office.”

It means that under Article 7, there is no chance for the sitting President to stay in power for three periods as Article 7 limits the president’s term of office into two terms. The argument for extending presidential term of office is twofold:³⁸ First, it will likely to maintain the sustainability of the country’s development. If there is no third term of office extension, it is possible that the next president will have different policies from the current president. As a result, there might be discontinuity of the program. Second, extending term of office will likely reduce the possibility of societal division. This argument is based on the 2019 Presidential Election where people are divided due to their political affiliation. Such arguments, however, does not have solid basis. Constitutionally, it does not fit with the current constitutional arrangement. First, Article 7 limits

³⁶ Fitria Chusna Farisa, “Empat Kali Wacana Presiden 3 Periode, Sikap Jokowi Dulu dan Kini [Four Times the Three-Term Discourse, Jokowi’s Past and Present Attitude]” (Jakarta: Kompas.com, August 29, 2022).

³⁷ Szalma Fatimarahma, “Usulan Jokowi 3 Periode Kembali Muncul, Ini Pengagasnya! [Proposal for Jokowi’s 3rd Term Re-Emerges, Here Are the Initiators!]” (Jakarta: Kabar24, July 1, 2022).

³⁸ Aryo Wasisto and Prayudi, “Isu Jabatan Presiden Tiga Periode dan Evaluasi Kinerja Eksekutif [The Issue of Three-Term Presidency and Evaluation of Executive Performance]” (Jakarta: Pusat Penelitian Badan Keahlian DPR RI, July 13, 2021).

president term of office into two periods. Extending president term of office into three term is contrary to Article 7. Second, Prolonging President term of office is also inconsistent with the very meaning of constitution i.e. limiting powers. In other words, it is contrary to principle of constitutionalism. Thus, extending presidential periods will likely violate both the constitution and constitutionalism.

The proposal of extending president term of office requires constitutional amendment. Therefore, those who propose this idea also recommend to carry out further constitutional amendments to open up the possibility for the President to extend his term of office. While such recommendation is possible, if it is implemented, it is likely that the amendment fall under unconstitutional constitutional amendment because it amends “the basic structure of the constitution” namely the limitation of powers. If the basic structure of a constitution is amended, the most important values of the constitution will also erode.

2.8. The Possible Consequences and Some Possible Ways to Prevent Abusive Constitutionalism in Indonesia

This Part will elaborate two themes (1) the possible consequences if further constitutional amendments aims to reintroduce the PPHN and extend presidential term of office (2) some possible ways to avoid abusive constitutionalism. It offers a conceptual solution to avoid abusive constitutionalism, namely the unconstitutional constitutional amendment coupled with the basic structure doctrine³⁹ and eternal clause. These two concepts are interrelated and expected to be effective in preventing the misuse of the constitutional mechanism for undemocratic purposes.

Unconstitutional constitutional amendment is a concept that links to a question of a constitutional amendment that has been made in accordance to formal requirements mentioned in the constitution but the purpose of such

³⁹ Iftikhar Hussain Bhat, “Doctrine of Basic Structure as a Constitutional Safeguard in India: Reflection in the Jurisprudence of Other Countries,” *International Journal of Research in Humanities and Social Sciences* 1, 27 (May 2013).

amendment is in contrary to the basic structure of the constitution.⁴⁰ Some constitutions contain eternal provisions –constitutional provisions that cannot be amended. The stipulation of unamendable constitutional provisions in a constitution aims to preserve particular features of the constitution.

What would be the possible consequences if the plan to carry out further constitutional amendments intends to reintroduce the PPHN and extend presidential term of office is in fact materialized? Normatively, such proposals do not fit with the five basic agreements of the 2nd founding fathers when amending the Constitution in 1999-2002. The five basic agreements are (1) maintaining the preamble of the Constitution (2) retaining the unitary state of Indonesia (3) strengthening presidential system (4) incorporating the elucidation into the body of the constitution and (5) conducting amendment through addenda.⁴¹ The proposal to include the PPHN of the MPR clearly does not fit with the constitutional arrangements to strengthen presidential system. The presence of the PPHN will consequently reflect the adoption of parliamentary system since the President has to follow the PPHN created by the parliament (the MPR). The question is who will determine whether the president comply with the PPHN? What if the President does not comply the PPHN? Shall the MPR as the creator of the PPHN become an institution where the President responsible to? If so, this reflects the adoption of parliamentary system and at the same time it weakens the presidential system. It is also showing that the MPR regains its highest position. The PPHN of the MPR in fact does not guarantee the continuity of the national development program because the composition of MPR members also change every five years.

With regard to the plant to extend president term of office, it is obviously inconsistent with the important function of the constitution namely limiting powers. It is also contrary to constitutionalism. Fortunately, the plan to extend

⁴⁰ Aharon Barak, "Unconstitutional Constitutional Amendments," *Israel Law Review* 44, no. 3 (July 2011): 321–41.

⁴¹ The Office of the Registrar and the Secretariat General of the Constitutional Court of the Republic of Indonesia, *Foreword: The 1945 Constitution of the Republic of Indonesia; Law of the Republic of Indonesia Concerning the Constitutional Court*.

the president term of office is not as intensive as the idea to reintroduce the PPHN in the next constitutional amendment.

The indications that are happening today potentially lead to abusive constitutionalism. It appears that the proposal to prolong presidential term of office and reinstate the PPHN in the future constitutional amendments were initiated by elites, high rank states officials, ministers and members of the DPR/MPR. The idea is not coming from below namely the society. Some state institutions including the MPR and the DPD from time to time consistently disseminates this idea to universities. There are divergent views regarding the important of reintroducing the PPHN in the future Constitution. There is an indication that the MPR intends to regain its powers through constitutional amendment. While reinstating the PPHN in the future constitutional amendment can be carried out by the MPR, it should be conducted inline with the basic structure of the constitution i.e. limiting powers and protection of human rights.

If these indications are true, it should be prevented or avoided so that democracy and the principle of limiting powers are maintained. It is indeed rather difficult to prevent abusive constitutionalism when the political constellation reflects the majority of political parties are closer to the government party. This situation potentially blunts the checks and balances mechanism. As a result, the policies that will be taken by the government do not get enough inputs, opposition and criticism from the legislature. In short, the policy plans that will be issued by the government will likely to proceed smoothly without any significant challenges from the legislature. This kind of situation is very likely not to describe the actual situation that exists in society. Is the policy really acceptable and meet the expectations of society?

How to prevent the possibility of abusive constitutionalism then? The following Part provides two possible solutions to avoid abusive constitutionalism. First, it is necessary to set the limit to amend the constitution, specifically article which contain the basic structure or foundational articles of the constitution. The adoption of eternity clause or unamendable constitutional provisions is

important to preserve certain values of the constitution from amendment. The eternity clause or unamendable constitutional provisions theory provides a method to limit constitutional amendments. Under this theory, not all articles in a constitution can be changed. There are specific articles which cannot be amended (eternity clause/ unamendable constitutional provisions). These restrictions aim to preserve important values of the constitution. That said if such provisions are amended, the very nature of the constitution will change. The unamendable constitutional provision can be in various forms including: the prohibition to amend certain provision of the constitution, the heavy and complex requirements to amend the Constitution; the involvement of more state institutions to amend a constitution; or inserting the unamendable constitutional provisions in the Constitution. Article 37 (5) of the Updated 1945 Constitution, for instance, stipulates that the Unitary State of the Republic of Indonesia cannot be amended. This provision prevents the change of the unitary arrangements. If there is an attempt to change the provision, such amendment can be regarded as unconstitutional constitutional amendment.

Second is the basic structure doctrine. This doctrine means a judicial effort to preserve the most important foundational structures of a constitution.⁴² This effort aims to protect the very nature of a constitution. The judiciary is the institution that test whether the constitutional amendment violates the basic structure of the constitution, not by an institution that has the authority to amend the Constitution. The judiciary through judicial review mechanism assess whether an amendment to the Constitution violates the basic structure of the Constitution. The Court can invalidate the results of constitutional amendment if it violates the basic structure of the Constitution.

The adoption of eternity clause needs constitutional amendment as the current constitution does not include all basic foundations in the constitution into eternity clause. For now, it is not favorable to adopt this approach because constitutional amendment takes so much efforts and costs including political

⁴² Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016), 275.

cost. What about the adoption unconstitutional constitutional amendment, is it preferable? unconstitutional constitutional amendment also needs constitutional amendment to equips the constitutional court with an authority to review the amendment of the constitution because for the time being the Indonesian constitutional court does not have such authority. The Court can review the law against the constitution –not the constitution itself.

If eternity clause and basis structure doctrines pose significant challenges, what would be the most preferable method? Active and vibrant civil society is important to prevent abusive constitutionalism. A study by Mila Versteeg shows that civil society resistance is the determining factors in preventing abusive constitutionalism.⁴³ Further, a study by Dominic J. Nardi explains NGOs play significant roles in legal development.⁴⁴ A study by PSHK finds that a proposal to extend president and vice president term of office will likely create a new authoritarianism.⁴⁵ Another study by LAB 45 shows that most people support the current government however when the question is about 3 periods for president, there is tendency that they reject the proposal of three period for a President.⁴⁶

III. CONCLUSION

This study has provided different explanation on how constitutionalism is implemented in practice. The existing literature understands constitutionalism as a concept to limit government powers. In practice, constitutionalism can be (mis)used for undemocratic purposes. This paper has attempted to answer three important questions: First, how to understand the recent proposal for further constitutional amendment with agendas to reinstate the PPHN and extend president term of office? The paper finds that the agenda to insert the PPHN and extend president term of office in the updated constitution is likely a way to

⁴³ Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim, and Marilyn Guirguis, *The Law and Politics of Presidential Term Limit Evasion*, 173–248.

⁴⁴ Dominic J. Nardi, "Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court," *Contemporary Southeast Asia* 40, no. 2 (August 2018): 247–78.

⁴⁵ Pusat Studi Hukum dan Kebijakan, "Stop Gagasan Tiga Periode Masa Jabatan Presiden dan Wakil Presiden: Jangan Buka Keran Otoritarianisme Baru [Stop the Idea of Three-Term Presidency and Vice Presidency: Don't Open the Gate to a New Authoritarianism]" (Jakarta: PSHK, 2022).

⁴⁶ Tilik Data, "Presiden Tiga Periode [Three-Term President]" (Jakarta: LAB45, June 22, 2021).

accumulate powers which may lead to abusive constitutionalism. This is because factually there is no urgency to insert these two topics in the constitution. The current constitution and legislation already regulated these two issues. While constitutionally, the MPR has authority amend the constitution, such amendment should fulfill all important principles for amending the Constitution including the principles of constitutionalism. Constitutional amendment should aim to create a better constitution, uphold constitutionalism and protect of human rights ---and not to gain more power or extend the power. Constitutional amendment potentially leads to abusive constitutionalism if it does not fulfill the principles of constitutionalism and democracy.

Second, in the context of constitutionalism, the plan to insert the PPHN and extend president term of office in the updated constitution potentially leads to abusive constitutionalism. Indonesia already had similar document in place namely Law on SPPN (National Development Plan System) to substitute the PPHN. Extending president term of office potentially contradicts with the principle of limiting powers. Under the current constitution, there is no room for expending president term of office.

Third, constitutional engineering that might be adopted to prevent abusive constitutionalism are eternity clause, basic structure doctrine and vibrant civil society. Eternity clause preserves foundational values and principles of the constitution by prohibiting any amendment to particular provision of the constitution. This can be done by the constitutional drafters when amending the constitution. The constitutional drafters place important articles such as articles on President term of office and MPR powers in the eternity clauses so that these two articles are “unamendable constitutional provisions.”

Basic structure doctrine is a doctrine which stipulates that a constitution contains fundamental principles which explicitly or implicitly which cannot be violated. Violating the basic structure of a constitution means can be invalidated by the court. The court by referring to the basic structure principles may declare that such violation is unconstitutional.

While these two above-methods may be adopted by Indonesia, it contains significant challenges to materialize it since it requires constitutional amendment. This paper offers a more feasible way to prevent abusive constitutionalism i.e. empowering and maintaining the active and critical roles of civil society in providing counternarrative and critical insights to the government. Vibrant civil society so far proof to be an effective mechanism to prevent the government from amending the current Constitution which potentially lead to abusive constitutionalism.

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FREEDOM OF EXPRESSION AND CRIMINAL LIABILITY FOR JOURNALISTS UNDER JORDANIAN LEGISLATION

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Received: 14 November 2024 | Last Revised: 5 April 2025 | Accepted: 26 April 2025

Abstract

This paper aims to shed light on the journalist's freedom of opinion and expression and the criminal responsibility he bears in adhering to the laws, regulations, and public order in society. It seeks to clarify the idea of freedom of the press, the penalties imposed by legislation, and the importance of maintaining a balance in journalism between the right to express opinions and the freedom of expression that is constitutionally, legally, and internationally protected. It also aims to clarify a journalist's rights and duties, which legislation must balance to achieve professional responsibility within the law. The issue at hand is that many developing countries restrict press freedom under the guise of protecting individuals, groups, and society. They also use vague legal texts that can hinder journalistic freedom, making it necessary to paper the criminal responsibility imposed on journalists. This paper examines both the restrictions

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and freedoms of journalists, including their right to practice their profession according to the Constitution, international covenants and conventions, and applicable laws. The paper used a descriptive analytical method to analyse legal texts and classify them systematically. The study's conclusions show that while Jordan has a big number of laws pertaining to press and media freedom, some of those regulations are in conflict with one another.

Keywords: Criminal; Freedom of expression; Jordanian legislation; Journalist; Liability

I. INTRODUCTION

The freedom of the press is considered a fundamental human right that falls under the freedom of opinion and expression, as recognised in divine laws, state constitutions. However, this freedom is often restricted by various constitutions to ensure public order is maintained in a positive state. These restrictions aim to create a balance between a journalist's freedom and their professional responsibility. Therefore, it is not acceptable for journalists to break the law in the name of the freedom of the press.¹ The press and media have an essential role in promoting the awareness and importance of law. Law is a crucial factor that separates disciplined societies that can progress, flourish, and leave a lasting impact on people from those that suffer from decline. Freedom of opinion and expression is a fundamental human right that is protected by various legislations, including the Constitution, and national laws. However, this freedom must be regulated by the law. The media is responsible for raising awareness of the significance of law in society. Failure to do so can result in a return to a state of anarchy and chaos.² The press is a form of mass communication that informs the public, oversees the functioning of state institutions, and encourages them to improve their methods of operation and behaviour. This is done within the framework of unrestricted freedom, with the exception of narrow limits related to national

¹ Muhammad Ibrahim, *Freedom of the Press*, 2nd ed. (Cairo: Dar Al-Kutub Al-Ilmiyya for Publishing and Distribution, 1999), 30.

² Muhammad Ibrahim, *Freedom of the Press*, 199.

security and the sanctity of public morals, which must be specified. Additionally, religious values and the right to dignity and respect for reputation and privacy must be considered.³ In Jordan, there are many laws that relate to journalism, both directly and indirectly. Some of these laws restrict the journalist's freedom to practice their work, while others regulate the performance of the profession. However, these laws could be summarised in the Press and Publishing Law, which balances freedom and responsibility. Journalists must find a balance between exposing defects and not violating the law or public order. The dilemma arises because journalists are subject to many Criminal laws, including the Criminal Code and Cybercrimes Law, which are particularly relevant in the digital world. Other Criminal laws include the Law for the Protection of State Documents and Secrets and the State Security Court Law. Additionally, journalists must follow the Press and Publications Law.

II. METHOD

This article seeks to study and analyse the freedom of expression and criminal responsibility of journalists under Jordanian law. It employs an analytical descriptive research design with a focus on studying the legal framework for the freedom of expression of journalists and their criminal responsibility in Jordan and its practical application. The research stresses the relationship between constitutional rights, international standards, and legislative restrictions at the domestic level. This study employs the analysis of Jordanian laws, including the Constitution, the Press and Publications Law, the Criminal Code, and other pertinent legislative texts, to have a full understanding of the legal regulations governing journalists. The study also relies on academic papers, books, legal commentaries.

³ Laila Abdel Majeed, *Freedom of the Press and Expression in the Arab Countries: In Light of Journalism Legislation, Reality, and Hopes for the Future* (Amman, 2002), 23; Mamdouh Al-Amer, "The Relationship between the Jordanian Press and National Security" (Master's thesis, Middle East University, Jordan, 2008), 2–8.

III. ANALYSIS AND DISCUSSION

3. 1. CONSTITUTIONAL GUARANTEES OF FREEDOM OF EXPRESSION

It is important for a country to abide by its constitution and laws, while also adhering to international human rights standards. Freedom of opinion and expression is recognised as a fundamental right in many legislations, both domestically and internationally. In Jordan, there are numerous laws and treaties that protect this right, as outlined in the Jordanian Constitution. However, it is important to note that there are specific controls in place to ensure that this freedom is exercised responsibly.⁴

The Jordanian Constitution guarantees the freedom of opinion and expression in the first paragraph of Article 15. This provision allows every Jordanian to express their thoughts through speech, writing, photography, and other means of expression, as long as it doesn't exceed the limits of the law.

3.1.1. The Law that Limits freedom of Expression and Freedom of the Press

The Jordanian Press and Publications Law has defined the parameters governing journalistic work, press freedom, and the restrictions imposed on its practice. It has also outlined the conditions that must be met by individuals working in journalism. Accordingly, journalism entitles its practitioners to publish all available information without pressure from media authorities or public institutions.⁵ However, such freedom is not absolute, it must not cross boundaries that infringe on individuals' private lives or include crimes such as defamation, libel, insult, or the dissemination of false news.

The Jordanian legislator has repeatedly emphasized, through numerous legal provisions, the obligation of journalists to refrain from committing these offenses. This repetition serves as a reaffirmation of the importance of this right and constitutes part of the legal constraints imposed on journalistic work, which

⁴ Ashraf Al-Rai, *Press and Publication Crimes, Slander and Libel*, 2nd ed. (Amman, Jordan: House of Culture Publications, 2012), 26–27.

⁵ Ashraf Al-Ra'i, *Freedom of the Press in Legislation and Its Compatibility with International Standards* (Amman, Jordan: Dar Al Thaqafa for Publishing and Distribution, 2012), 78–82.

must not be violated or bypassed.⁶ This is especially true today, as we are faced with a growing spread of rumors fueled by the growing use of social media, websites, smart applications, and traditional means of communication such as television stations, radio, and print newspapers. This background suggests that there is a need to explore the legal control of rumors under the Jordanian criminal Code and the Cybercrime Law.⁷

Despite Jordanian Constitution Article 15 stating freedom of the press and freedom of expression, this is hugely restricted by some legislation. Most evident legislation barring this right involves the Criminal Code (No. 16 of 1960), the Press and Publications Law (No. 8 of 1998), and the Anti-Terrorism Law. Articles 122–156 of the Criminal Code punish acts considered prejudicial to state security, such as insulting the state or its institutions, defaming the king (Article 195), giving false information with the purpose of prejudicing national security or public order, and defamation, slander, or insults to religion. Such provisions have a tendency to rely on vague words such as “disturbing public order” or “undermining national unity.” Similarly, the Press and Publications Law prohibits material that insults religions, undermines national unity or the image of the state, violates public morals, or incites hatred. It also calls for licensing all publications, and violations can cross unwritten “red lines.” The Anti-Terrorism Law also restricts expression by criminalizing alleged “aid to terrorism,” a conviction which can include political opposition or solidarity displays with listed movements.

Among the most significant constraints on journalistic work is the introduction by the Jordanian legislator of a new crime under Article 16 of the Jordanian Cybercrime Law No. 17 of 2023, referred to as the crime of “character assassination,” which denotes the “moral assassination of a person.” This offense is not clearly defined in Jordanian legislation. Our research has found no precise legal definition of character assassination; rather, it appears to resemble several other crimes specified in Jordanian and comparative legislation, including French

⁶ Basel Al-Qatawteh, “Criminal Protection of the Privacy of Digital Personal Data” (PhD diss., World Islamic Sciences and Education University, 2022), 48.

⁷ Ashraf Al-Ra'i, *Crimes of Journalism and Publishing – Defamation and Libel*, 1st ed. (Amman, Jordan: Dar Al Thaqafa for Publishing and Distribution, 2010), 143; 60.

law, which we use as a point of comparison. Most legal systems view character assassination as a form of defamation, libel, dissemination of false news, or rumormongering.

A key criticism of the Jordanian Cybercrime Law No. 17 of 2023 in this context is that it does not clearly distinguish between moral character assassination and crimes such as defamation and libel. The definitions provided in Article 2 of the law are ambiguous, a matter which we discuss in detail in this study. We urge the Jordanian legislator to correct this legislative gap by legally defining the differences between defamation, libel, slander, and character assassination. This is because legal definitions need to be defined to avoid confusion and to use legal terms accurately. More specific definitions are also needed for “rumormongering,” “false news,” and “fake news,” which are related differently.

The criminalization of defamation, insult, and libel is another major limitation of journalism wherein it is not defined whether or not these are in relation to the journalistic process. The crime of libel, insult, and defamation are also not separated from those crimes of hate speech or defamation of character. Another significant flaw is the lack of definition of “false news” in the Cybercrime Law, which applies to journalists and is not limited to the Press and Publications Law or the Journalists’ Syndicate Law. This lack of definition in the law may often provide the government with a valid reason to pursue criminal charges against journalists.

3.1.2. Is that Limitation Justified by the Principles of Proportionality and Necessity?

Sometimes, these restrictions constitute unjustified constraints on journalistic work. Therefore, the application of the Press and Publications Law should be limited solely to journalists, without extending the application of the Cybercrime Law. Moreover, the umbrella of the Jordanian Press Association should be expanded to include digital activists. The right not to detain journalists in press and publication cases represents a critical and fundamental guarantee for

journalistic work, enabling journalists to perform their duties with professionalism, free from fear or internal censorship of their pens.

In Jordan, the Jordanian Press Association — the sole professional and legal body representing the Jordanian media — has exerted significant efforts to prohibit the detention of journalists under the Press and Publications Law No. 27 of 2007, which was amended after earlier legislation did not include such protection. The amended law explicitly stated the inadmissibility of detention as a result of expressing an opinion through speech, writing, or other means of expression in paragraph (w) of Article 42, which reads: “No person shall be detained as a result of expressing an opinion through speech, writing, or other means of expression.”

However, the legislature is criticized for not including the phrase “notwithstanding any other legislation,” which leaves room for journalists to be prosecuted and detained under other laws. Furthermore, there is a pressing need to distinguish between crimes committed by journalists that constitute an exercise of freedom of opinion and expression, and those that do not serve the public interest — whether through traditional methods, digital platforms, websites, artificial intelligence systems, or otherwise.

We propose that the Jordanian legislature introduce additional procedural measures regarding detention, such as an outright prohibition on pretrial detention in media-related cases. Nevertheless, the Public Prosecutor could be granted authority to impose alternative precautionary measures, such as suspending the journalist from work, imposing a travel ban, or freezing the journalist’s and their employer’s assets. These measures would help safeguard rights and uphold the responsibilities journalists bear in pursuing the truth without infringing on anyone’s right to privacy — even under the guise of serving the public interest.

A clear ruling by the Amman Criminal First Instance Court stated: *“Accordingly, through examining the elements of the alleged crimes, the court finds that they revolve around one central idea: the pursuit of truth in presenting*

*journalistic content. The mission of journalism is to raise awareness and promote culture among members of society, and to address any issue related to public affairs and the public interest, if it does not offend personal dignity or violate individuals' private lives".*⁸

Another type of offense examined by the Publications and Publishing Cases Chamber of the Amman Court of First Instance pertains to crimes against the internal or external security of the state, as stipulated in the applicable Criminal Code, if such crimes are committed through licensed publications or audiovisual media and journalism. This also applies to electronic websites, given that digital media has become an integral part of the broader concept of media. Accordingly, it falls under the jurisdiction of the Press and Publications Law, provided that such media outlets are duly licensed, as stipulated in Article 2 of the said Law.

In application of this principle, the Special Interpretation Bureau for Laws issued Decision No. 8 dated 19 October 2015, which stated the following:

The Press and Publications Law No. 8 of 1998, in relation to offenses committed via periodic publications, printed or unprinted daily newspapers, electronic and specialized publications, and news agency bulletins, is considered a general law.⁹ The legislator required all such publications to be registered and licensed, and granted electronic publications the option to register, in accordance with the bureau's earlier Decision No. 2 of 2012.

The Cybercrime Law No. 27 of 2015, which came into force on 1 June 2015, is deemed a special law regarding the crimes specifically introduced therein.

Since legal principles require that an act be defined as a punishable offense by law, it is necessary to identify the specific legal provision governing such acts. Given that the Cybercrime Law is a special law that redefined certain provisions related to defamation and libel offenses, this law shall apply to such acts in accordance with Article 11 thereof, and in reference to Article 57(2) of

⁸ Qistas Publications, *Judgment No. 1102 of 2014, Amman Criminal First Instance Court* (Amman, Jordan).

⁹ Hisham Mohammad Khleifat, "Legal Restrictions on the Freedom of the Press Provided for in the Jordan Legislation: A Comparative Study" (Master's thesis, University of Jordan, 1999), 59.

the Criminal Code, which states: “If an act is subject to both a general and a special provision, the special provision shall prevail”¹⁰.

Different Jordanian laws concerning journalism—the Press and Publications Law, the criminal Code, and the Cybercrime Law—emphasize the importance of compliance with legal and moral standards. In our view, however, these laws need to be amended to align their provisions with the development of the media industry, particularly given that there is no specific law for the protection of personal digital information.

It is important to note that the Constitution links this freedom with certain restrictions, meaning that the Jordanian legislator intends to regulate this right based on laws issued by the legislative authority. This is to avoid chaos and collapse of the state, as unrestricted freedom of opinion and expression can lead to transmitting and circulating rumours and offending the state and society. Therefore, expressing one’s opinion without abiding by the law may lead to violating the law and threatening the existence of the state.¹¹

The Jordanian Constitution places great emphasis on protecting freedom of opinion and expression, as well as freedom of the press and publication. This is evident from the fact that Article 15 of the Constitution, which was issued in 1952, explicitly guarantees freedom of opinion and expression in its very first paragraph. This article states that every Jordanian has the right to freely express their opinion verbally, in writing, through photography, or any other means of expression, as long as it is within the limits of the law.

Although the Constitution has undergone multiple amendments since its issuance, the first paragraph of Article 15 has remained unchanged. This paragraph still reads: “The state guarantees freedom of opinion, and every Jordanian may freely express his opinion in speech, writing, photography, and other means of expression, provided that it does not exceed the limits of the law.” This paragraph

¹⁰ Decision No. 2 of 2012, Special Interpretation Bureau for Laws, issued April 9, 2012.

¹¹ Firas Bakr, “Memorandum on the Supreme Court of Justice and the Press and Publishing Law” (unpublished study, Amman, Jordan: Jordanian Supreme Council for Media, 2005), 1–3.

was further strengthened by the Thirteenth Amendment, which did not affect it in any way.

The Eleventh Amendment, on the other hand, did not alter the first paragraph of the article, but it did add two new paragraphs. These paragraphs begin with the word “guarantee” and state that the state guarantees freedom of scientific research and literary creativity, as well as freedom of the press, printing, and publishing. This amendment abolished the practice of censorship of resources and newspapers. It is noteworthy that the legislator used the expression “sponsor” in the two added paragraphs.¹²

The word “sponsor” used by the Jordanian legislator carries a legal meaning of great importance in the context of freedom of expression, scientific research, literary creativity, and freedom of the press. In law, a guarantee is a contract subordinate to an original obligation. This means that the guarantee is not an original obligation, but rather follows the original obligation and comes at its end. For example, if someone goes to a bank to borrow money, the bank may agree to lend the money on the condition that the borrower provides a guarantor who guarantees the repayment of the loan. In this case, the loan contract is the original obligation, and the guarantee contract is a contract subordinate to the original contract. If the loan contract expires, the guarantee necessarily falls.¹³

It is assumed that a state that upholds its constitution and laws in letter and spirit, consistent with international human rights standards and conventions, is a state of law. In Jordan, the constitution protects the freedom of press and media, which is an essential component of freedom of opinion and expression. Article 15 of the constitution specifically provides for this.

The Jordanian state “guarantees” the right to freedom of opinion, as a commitment that follows the original commitment to Jordanians’ right to free expression and opinion. This right is older than the constitution and the state itself, and is a natural right that precedes the existence of the state. The state’s

¹² Anis Qasim, “What Happened to Freedom of Expression in Jordan,” *Al Jazeera*, February 23, 2017.

¹³ Qasim, “What Happened to Freedom of Expression in Jordan?”

commitment to “guaranteeing” these rights is a recognition of their pre-existing nature, as if they were natural rights inherent to all humans. This commitment was made by the state only after the social contract for Jordanians was established in the 1952 Constitution.

3.1.3. Freedom of Expression as a Natural Right Prior to the Existence of the State and the Constitution

The right to freedom of expression is an inherent natural right that derives its legitimacy neither from the state nor from constitutional texts. Its origins date back to ancient times, predating the emergence of the concept of the modern state. Since antiquity, opinions have been expressed in various ways: verbally in public gatherings, through storytelling, poetry reciting, writing, rock carving, and other means. Since expressing an opinion is a natural human function stemming from human dignity and predating the existence of the state and constitutional frameworks, it is inaccurate to claim that the state is its originator. In principle, the State has no authority to restrict or penalize individuals for exercising this right. Thus, since the right to express an opinion constitutes a natural human function that predates the concept of the state, the state, cannot be deemed its originator but rather its guardian, and is therefore obligated to protect it under the constitutional provisions, and international legal obligations.

Regarding the scope of natural freedom prior to political freedom,¹⁴ the Founding Fathers of the United States—most notably James Madison, Thomas Jefferson, and James Wilson—asserted that even the natural freedom enjoyed by the individual before the establishment of the state was not absolute but was limited by natural law. This means that natural law requires that the natural rights of others not be violated; it is impermissible to attack anyone, as this would constitute an infringement on the right to personal safety. Therefore, it can be said that the exercise of natural rights, including freedom of speech and expression, is conditional upon not causing direct harm to others.¹⁵

¹⁴ Jud Campbell, “Natural Rights and the First Amendment,” *Yale Law Journal* 127, no. 2 (January 2016): 271.

¹⁵ Campbell, “Natural Rights and the First Amendment,” 271.

James Wilson emphasized this concept, explaining that a person must act without selfishness or injustice, and that every person can act: “for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some public interests do not demand his labors. This right is natural liberty.”¹⁶

James Madison explained to his fellow congressmen in 1794 that “Opinions are not the objects of legislation,”¹⁷ meaning that ideas may not be restricted or suppressed by the authorities. Jonathan Barth also emphasized that the concept of freedom of conscience, including freedom of speech and freedom of the press, has deep roots in Anglo-American political thought, long before the First Amendment to the U.S. Constitution was drafted.¹⁸

On the other hand, Wilson made it clear that natural right is not absolute, but is subject to modification and expansion under positive governments: “[B]y the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but . . . every citizen will gain more liberty than he can lose by these prohibitions . . . Upon the whole, therefore, man’s natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise.”¹⁹ Wilson’s words reflect a flexible understanding of state intervention in regulating natural rights. He believes that state intervention does not necessarily mean restricting these rights, but rather may be a means of enhancing and guaranteeing them. A just government creates a legal system that balances individual freedoms and the public interest, thus achieving the interests of the individual and society.

¹⁶ James Wilson, “Of the Natural Rights of Individuals,” in *Collected Works of James Wilson*, vol. 2, ed. Kermit L. Hall and Mark David Hall (2007), 1055–56.

¹⁷ Campbell, “Natural Rights and the First Amendment,” 280.

¹⁸ J. Barth, “Liberty of Conscience Is Every Man’s Natural Right: Historical Background of the First Amendment,” *Journal of Policy History* 35, no. 4 (October 2023): 435.

¹⁹ Wilson, “Of the Natural Rights of Individuals,” 1056.

In sum, Freedom of expression is a natural right founded on human dignity pre-existing the State and constitutions.²⁰ The state does not create this right, but it's the state's responsibility to secure and regulate the right without diluting its nature. In modern times, the right has been reaffirmed and guaranteed free of any discrimination in a number of international treaties and national constitutions.²¹

It is important to note that the previous changes made to the Constitution did not affect the first paragraph of Article (15/1), whether by deletion or addition. However, the eleventh amendment was introduced to confirm and expand on its many aspects, particularly with regards to the freedom of press and media, scientific research and artistic creativity. These are two fundamental freedoms at the core of freedom of opinion and expression. The Jordanian lawmakers have been careful not to compromise the freedom of opinion as it is a natural right. The Constitution came in to guarantee its status as it was before the amendment.²²

It's noted that the Jordanian Constitution links and restricts the freedom of opinion and expression to not exceed the limits of the law and not deviate from it. This means that the Jordanian legislator wanted to regulate this right according to laws issued by the legislative authority. Allowing freedom of opinion and expression without restrictions creates chaos and threatens the collapse of the state. When a person is allowed to express their opinion without abiding by the law, they may express it in a way that deviates from the law. The law also allows them to transmit and circulate rumors and offend the state and society, which creates a state of chaos that threatens the existence of the state.

However, the last sentence of the first paragraph of Article (15), "not to exceed the limits of the law," does not mean that it is a license granted to the authority to withdraw, freeze, or prohibit the right to opinion. The limits of the law refer to the texts that the legislator sets to regulate the exercise of the right to opinion, not to freeze or restrict that freedom.

²⁰ Jamal Barafi, Z. Jaffal, F. Alshwabkeh, and R. Al Ajlani, "Towards an Effective Legal Protection for Older Persons in the 21st Century: A Comparative Study of International Human Rights Law and Arab Constitutions," *Access to Justice in Eastern Europe* 7, no. 1 (January 2024): 205.

²¹ Jamal Barafi and N. Georges, "The Legal Protection of Minorities from International Law and Arab Mashreq Perspectives," *International Journal on Minority and Group Rights* 27, no. 3 (July 2020): 559.

²² Barafi and Georges, "The Legal Protection," 559.

If the law states otherwise, it necessarily contradicts the Constitution. The Constitution has supremacy over the rest of the legislation, and every legislation or system that contravenes the provisions of the Constitution is considered null and void. The newly established Jordanian Constitutional Court examines the constitutionality of legislative texts and regulations.

It's important to note that freedom of opinion can be controlled in matters related to national security and public morals without expansion, because the principle is to protect freedom of opinion. The law must also protect the ordinary citizen more than it protects public employees who deal with the public.

The law plays a vital role in maintaining a delicate balance between personal freedoms and the imperative to safeguard public order and societal values. To address the possible adverse effects of unchecked freedom, the Jordanian Constitution provides a well-defined and specific structure for regulating individual rights and freedoms. Chapter Two of the Constitution, which encompasses Articles 5-23, outlines the legal provisions pertaining to the rights and responsibilities of Jordanians, including measures to safeguard their exercise.

1.1.4. The Right of Journalists to Receive and Transmit Information

According to constitutional and legal documents, journalists have the right to access and disseminate information as a fundamental aspect of their profession. Jordan has set an example in this regard, becoming the first Arab country to enact the Right to Access to Information Law.²³ Nevertheless, this law has some limitations, particularly concerning the procedure for obtaining and challenging administrative decisions related to information requests. It is important to acknowledge that these limitations may impede the freedom to share information. In addition, the Jordanian Press and Publishing Law secures the right to access information for both citizens and journalists, with a specific emphasis on the latter.

The Jordanian legislator stipulated this right due to its importance in Article 8 of the Press and Publications Law as follows: "A - The journalist has the

²³ Ibrahim, *Freedom of the Press*, 199.

right to obtain information, and all official bodies and public institutions must facilitate his mission and provide him the opportunity to view their programmes, projects and plans. B - It is prohibited to impose any restrictions.” Impedes the freedom of the press to ensure the flow of information to the citizen or imposes procedures that lead to disrupting his right to obtain it. C - According to current laws, journalists are entitled to receive information and news they request in accordance with specific regulations outlined in paragraphs A and B of this article. The relevant authorities are required to provide this information or news to the journalist promptly, depending on the urgency of the request. If the news is urgent, it should be provided as quickly as possible. If it is not urgent, it should be provided within two weeks. D - The journalist, within the limits of performing his work, has the right to attend public meetings, sessions of the Senate and the House of Representatives, sessions of general assemblies of parties, unions, federations, and clubs, general meetings of public bodies of public joint-stock companies, charitable societies, and other public institutions, and public court sessions, unless the sessions or meetings are closed or secret. By virtue of the applicable laws, regulations or instructions of these bodies, it is prohibited to interfere with any work carried out by a journalist within the framework of his profession or to influence him or force him to disclose his sources of information, including preventing him from performing his work or from writing or publishing without a legitimate or justified reason. This is without prejudice to the customary authority of the editor-in-chief in making the decision to publish or not.” The legislator also reaffirmed this meaning in paragraphs A and C of Article 6 of the same law. Paragraph A stipulated that “the freedom of the press includes informing citizens of events, ideas, and information in all fields.” Paragraph C of Article Six also stipulates that “Freedom of the press includes the right to obtain information, news, and statistics of interest to citizens from various sources, and to analyse, circulate, publish, and comment on them.”²⁴

²⁴ Fayez Al-Shakhatra, “The Right to Information” (unpublished study, National Center for Human Rights, Amman, 2005), 17.

1.1.5. The Right of Journalists not to Disclose their Sources of Information and the Relevant Exceptions

Paragraph E of Article 8 of the Press and Publications Law stipulates that journalists have the right to protect their sources of information: “It is prohibited to interfere with any work practised by a journalist within the framework of his profession, or to influence him or force him to disclose his sources of information.” “Including depriving him from performing his work or from writing or publishing without a legitimate or justifiable reason, without prejudice to the generally accepted authority of the editor-in-chief in making the decision to publish or not,” as stipulated in this meaning in Paragraph D of Article Six. The same states that “Freedom of the press includes the right of the periodical publication and the journalist to keep the sources of information and news obtained confidential.”

It is important to bear in mind that journalists’ confidentiality is not absolute. Ultimately, it is the editor-in-chief who has the power to decide what material is published, and they can be held criminally liable for any content that is released. As a result, journalists are required to divulge the sources of their information to the editor-in-chief. While no specific entity is named as being prohibited from interfering with journalists’ work or compelling them to reveal their sources, this prohibition is subject to the editor-in-chief’s discretion as to what to publish. Editors and writers alike must disclose their confidential sources to the editor-in-chief, as they are responsible for publication and serve as the newspaper’s legal representative in court. Furthermore, Article 43 of the Journalists Syndicate Law and its amendments mandate that journalists keep their sources confidential and verify information and news prior to publication.²⁵

1.1.6. The Right of Journalists not to be Arrested in Matters of Freedom of Opinion and Expression

This right is considered one of the problematic rights in the Criminal laws and legislation related to the work of the press and media. Paragraph (f) of

²⁵ Al-Shakhatra, “The Right to Information,” 18; see also Ashraf Al-Rai, *The Right to Access Information* (Amman, Jordan: Dar Al-Thaqafa for Publishing and Distribution, 2012), 59–60.

Article 42 of the Press and Publications Law stipulates that “notwithstanding what is stated in any other legislation, arrest may not be made as a result of expressing an opinion verbally, in writing, or by other means of expression.” In our opinion, the aforementioned phrase has limited application due to the potential for journalists to be prosecuted under various other Criminal laws such as defamation, slander, and contempt as outlined in the Criminal Code. Journalists can also be subjected to trials according to the Law for the Protection of State Documents and Secrets, the Law on the Prevention of Terrorism, and the other several laws previously discussed. Consequently, while this text grants a right for journalists, it may not hold legal weight.²⁶

4. Criminal Liability of The Journalist

Journalism is considered one of the fields that depend on freedom of expression and informing public opinion. However, this freedom in the press may conflict with some legal provisions, which may expose the journalist to criminal liability if he commits journalistic crimes.

The fact that the press is free does not contradict the statement that the press is responsible, as this responsibility is not related to the freedom of the press, but rather is related to the abuse of this freedom. A journalist cannot fabricate a false matter, or intentionally distort the facts, which requires the journalist to guard against unreasonable behavior that may lead to him committing journalistic crimes. The journalist’s criminal responsibility is also fulfilled if his action results in harm to others, whether direct or indirect harm, or if what the journalist did while performing his professional work was an act that violates Sharia law and regulation.²⁷

Therefore, transgression is the focus of accountability, not freedom of the press. It follows from this that the report of a criminal official in the field of publishing does not conflict with the content or scope of freedom of the press. Rather, it can be said that this responsibility represents a guarantee that

²⁶ *Press and Publications Law*, Article 42.

²⁷ Mohammed Weld Ayte, “The Criminal Responsibility of the Journalist in the Mauritanian Legislation,” *ganonak*, July 2023.

strengthens and completes individual freedom.²⁸ Hence, we can say that the limits at which freedom of the press stops must be explicitly stipulated in the law, because implementing the principle of legality absolutely requires us not to limit freedoms unless there is a text that punishes this transgression, as the principle of things is permissibility. Therefore, provisions for press crimes must be subject to special rules and provisions that differ from the general principles, rules and provisions stipulated in the Criminal Code.²⁹ The legal rule in criminal liability is that there is no punishment without a crime, and there is no crime without a text, and the committed act may result in criminal and civil liability at the same time, such as murder, theft, beating, insults, and defamation. Each of these acts causes harm to the individual and society at the same time, and thus the one who committed this act is Responsible is a criminal liability for which the penalty is punishment, and a civil liability for which the penalty is compensation. An act may result in criminal liability only if it does not cause harm to anyone, as in crimes of attempt and criminal conspiracy.³⁰

4.1. Crime that Amounts to Violation of State Security

State security in Jordan is among the topmost concerns which fall under control of the authorities. Individuals who are accused of engaging in activities that will compromise state security are prosecuted in the State Security Court. The activities are categorized into some, some related to internal security, some related to external security, or even economic security. Crimes that endanger state security are among the most serious crimes and are penalized by Jordanian criminal Code No. (16) of 1960 and its amendments and the Anti-Terrorism Law.³¹

The Criminal Code has defined the actions which amount to a violation of state security, and they include:

1. Treason and assisting the enemy. Article (110) legislates that “any Jordanian who carries arms against the state in the ranks of the enemy shall be punished

²⁸ Tariq Sorour, *Lessons in Publishing Crimes* (Beirut: Arab Renaissance House, 1997), 50.

²⁹ Muhammad Al-Fawa'ra, “Criminal Liability for Press Crimes,” *Mutah Center for Research and Studies* 22, no. 3 (2007): 150–151.

³⁰ Ayte, “The Criminal Responsibility of the Journalist.”

³¹ Fathi Al-Faouri, *Explanation of the Criminal Code* (Amman: Wael Publishing House, 2021), 49.

with death.” Article (111) legislate that “any Jordanian who establishes contact with a foreign state with the intention of persuading him to attack Jordan shall be punished with life imprisonment, and in the event that his action has a consequence, he shall be punished by death.” Article (112) legislate that “any Jordanian who establishes contact with the enemy with a view of assisting him in any way shall be punished by death.”

2. Military facility sabotage. Section 113 states that, “Whoever attempts to sabotage military facilities or equipment shall be imprisoned for life. The penalty can be increased to the death penalty if the act is committed during time of war or causes death.”
3. Attempts to occupy part of Jordanian territory. Article 114 states that “Whoever attempts to occupy part of Jordanian territory to join it to a foreign state shall be punished with temporary hard labor for not less than five years.”

There are concrete instances of this in Jordan, such as:

- Arrest of people who are suspected of promoting online extremist groups.
- The trial of those accused of contacting hostile foreign powers.
- Cases of inciting sedition and against state institutions on social media platforms.
- Disruption of terrorist cells planning bombings in Jordan.

Article (3) of the Anti-Terrorism Law defines terrorist acts as donating or soliciting money to finance terrorism, joining or trying to join terrorist groups, and utilizing the internet to facilitate or assist terrorist activities. Article (7) of the same law provides that punishment can be the death penalty if the terrorist act results in the murder of a person or the destruction of a residential building.³² A recent Jordanian example is the case of the “Zarqa crime.” A young man from Zarqa Governorate was brutally beaten in October 2020, resulting in his hands being amputated and his eyes being gouged out. The defendants were charged by the State Security Court with crimes under the Anti-Terrorism Law, such as

³² Al-Faouri, *Explanation of the Criminal Code*, 69.

the crime of attempting to commit a terrorist act, membership in a criminal gang, attempted premeditated murder, and permanent disability.

4.2. The Concept of State Security

State security may be invoked in various contexts depending on the political regime or agenda of the government. In some regimes, particularly semi-authoritarian or authoritarian regimes, it is invoked as a tool to curtail civic freedoms—freedom of speech, freedom of media, and right to protest, by filing cases and treating peaceful actions as acts against state security.³³

In legal term, state security entails the protection of a state's sovereignty and territorial integrity, its political and constitutional security, as well as defending national interests at the military, economic, and social levels.

Nevertheless, there are potential flaws in its enforcement, including the following:³⁴

Public expression of opinions on the Internet, such as criticizing the government in comments in Facebook, could be construed as incitement or diminishing the dignity of the state.

Investigative journalism, especially where it involves confronting accusations of corruption or abuse on the part of the government, could be considered weakening national morale.

Peaceful protests, being unarmed, are illegal gatherings in case they are unauthorized and can be labeled as threats to national security.

Live cases encompass the arrest of activists and journalists on the basis of Facebook status updates or news stories; indictment in the State Security Court of political opposition and popular movement activists on incitement or damaging the regime charges; and, in some cases, informally detaining activists for extended periods under the cover of screening security.

³³ Muhammad Al-Jabour, *Crimes Against State Security and Terrorism Crimes* (Amman: Dar Al-Thaqafa Publishing House, 2011), 70.

³⁴ Al-Jabour, *Crimes Against State Security and Terrorism Crimes*, 70–71.

In general, publication is considered a criminal offense if harm is caused to society or if the publication is related to harming the security of the state, and the criminal penalty remains a discretionary matter subject to the authority of the Committee for Review of Press Violations to estimate the appropriate discretionary punishment, such as suspension from journalistic work and monetary fines against the public right, if it is proven that the criminal intent of intentionally committing the crime was present. The physical act of the journalistic crime. The fact is that regulating the provisions of criminal liability within the scope of publishing crimes is of great importance in every law issued regarding freedom of the press, although regulating it raises many legislative problems due to the special nature of press and publishing crimes.³⁵

The process of publishing a newspaper involves multiple people, such as the author, editor-in-chief, printer, distributor and seller. Therefore, proving criminal liability for publishing crimes can be a complex matter. It may lead to punishment being imposed on all those involved in publishing, starting with the author, despite their individual level of contribution. This violates the principle of the personality of penalties.³⁶

The Jordanian Court of Cassation has stated that if the editor-in-chief exceeds the freedom of opinion established by the Constitution and the Publications Law, which constitutes a violation of the provisions of this law, then the text of Article (41/B) of the Publications Law is applicable as a private law, not Articles (74, 75) of the Jordanian Criminal Code relating to criminal liability.³⁷

4.3. The Basis of the Journalist's Criminal Liability

Special rules have been established to determine responsibility for crimes related to press and publishing, in addition to the general rules that apply to all other crimes. The printing and publishing laws state that the editor-in-chief or the responsible director is the person who bears the consequences or responsibilities

³⁵ Al-Fawa`ra, "Criminal Liability for Press Crimes," 105.

³⁶ Muhammad Abu Younis, *Legal Restriction of Freedom of the Press – A Comparative Study* (Alexandria: New University House, 1996), 388.

³⁷ *Court of Cassation ruling*, Criminal No. 1118/2004, dated October 14, 2004; see also Al-Fawa`ra, "Criminal Liability for Press Crimes," 150.

of what is published in the publication. Therefore, criminal liability in this context is based on several theories, including the theory of liability based on negligence, the theory of solidary liability, the theory of sequential or gradual liability, and the latest, the presumed theory.³⁸

4.4. Journalist's Liability based on Negligence

The responsibility of a journalist based on negligence holds the managing editor, responsible manager, or publisher criminally responsible for a special crime that differs from the publishing crime itself. The basis of this special responsibility is the negligence he committed in performing his job or duty imposed on him by law.³⁹ The job of editing means monitoring what is written. What is published, and the existence of a publishing crime is considered evidence of the official's negligence in his job.⁴⁰

Based on this theory, the editor-in-chief's negligence is considered a breach of his professional duty, if the media organization commits a journalistic crime, as every official must prevent the publication of statements that include these crimes.

This theory is criticized because the editor-in-chief or director is asked to assume criminal responsibility. He is asked about an intentional crime committed in his newspaper, which makes him the original perpetrator of the crime.

It is unreasonable to ask a person who has committed an intentional crime to explain their responsibility by claiming that they were negligent in performing their job. The responsibility of an editor-in-chief can only be for unintentional crimes. This theory fails to explain the responsibility of the publisher or editor-in-chief for premeditated crimes, which involve criminal intent. Additionally, this theory does not provide us with the legal basis for such crimes.⁴¹

³⁸ Ayte, "The Criminal Responsibility of the Journalist."

³⁹ Hafsia Ben Ashi, "The Criminal Liability of the Journalist in the New Algerian Media Law," *Journal of Social and Human Sciences*, issue (June, 2012): 75.

⁴⁰ Abdul Jalil Fadil Al-Barasi, *Libyan Law and Press and Publishing Crimes* (General Council of Culture, n.d.), 31.

⁴¹ Ben Ashi, "The Criminal Liability of the Journalist," 76.

4.5. The Journalist's Responsibility based on Solidarity

The theory of guarantee holds the director, editor-in-chief, writer, or publisher criminally responsible for press crimes that occur under their management. This is because the crime could not have occurred except in the publication they oversee.⁴² Therefore, anyone who contributes to the publication, whether as an actor or partner, is also responsible according to the general rules.⁴³

4.6. The Journalist's Responsibility is based on the Idea of Succession or Progression

This theory sets out the rules for assigning responsibility and punishment for a crime.⁴⁴ It identifies those who are legally responsible and arranges them in a specific order.⁴⁵ This ensures that lower-ranked individuals, such as journalists, are not held responsible if there are others who are legally prioritized over them. However, if there is no one else legally responsible, then the journalist can be held accountable for the crime.

Critics argue that this approach is flawed because it assigns criminal responsibility based on an idea that is sometimes metaphorical. This can result in innocent people, such as sellers, distributors, or advertisers, being held responsible for a crime they had no knowledge of.⁴⁶

4.7. Assumed Responsibility

The assumed responsibility is considered one of the characteristics of criminal responsibility in the context of press crimes. The Jordanian legislator made the editor-in-chief the real person responsible for the crime with regard to daily newspapers.⁴⁷ It stipulates that the editor-in-chief shall be responsible for what is published in the publication of which he is editor-in-chief, and he is also

⁴² Muhammad Muhammad, *On Publishing Crimes, Freedom of Thought, General Principles on Publishing Crimes, Incitement Crimes* (Cairo, 1951), 337; See also Majeed, *Freedom of the Press and Expression*, 168.

⁴³ Al-Barasi, *Libyan Law and Press and Publishing Crimes*, 32.

⁴⁴ Omar Salem, *Towards a Criminal Law for the Press: General Section* (Cairo: Dar Al-Nahda Al-Arabiya, 1995), part 01, 137.

⁴⁵ Al-Barasi, *Libyan Law and Press and Publishing Crimes*, 29.

⁴⁶ Salem, *Towards a Criminal Law for the Press*, 138.

⁴⁷ Ayte, *The Criminal Responsibility of the Journalist*.

considered responsible to the article writer for his article, according to the text of Article (23/C) of this law, which considers the editor-in-chief as a principal perpetrator in the crimes committed by publishing in Periodic publications and a public right lawsuit is filed against him.⁴⁸ Through this, the legislator has stipulated an exceptional case related to responsibility for the actions of others.⁴⁹

The responsibility of the editor-in-chief is not limited to the provisions of the Press and Publishing Law, but rather extends to the Criminal Code in accordance with the provisions of Articles (77) and (78) of the Jordanian Criminal Code. Article (77) of the law stipulates that “the two partners in the crime committed by speech transmitted by mechanical means as stated in Article (73/2) or in the crime committed by one of the means mentioned in the third paragraph of the same article are the author of the speech or writing and the publisher, except that The first proves that the publication was carried out without his consent, as stated in the text of Article (78) of the same law, which states: “When the crime is committed by newspapers, the newspaper director is considered responsible, and if there is no director, then the editor or editor-in-chief of the newspaper.”

Because the journalistic crime consists of a number of acts, namely the article or drawing and the publishing incident itself. Because the editor-in-chief is the one who publishes, with his permission, and without this permission, the publishing process cannot be completed, this makes him an accomplice in committing the crime, and he is punished as if he were the only perpetrator if he was at the same time the writer of the article or the one who drew the drawing and the person responsible for publishing.⁵⁰ This is the legal basis through which the editor-in-chief’s responsibility for press crimes can be established. Hence, the Jordanian legislator equated the editor-in-chief with the author in terms of capacity and responsibility. Both of them were considered an original perpetrator of the crime, and neither of them was an accomplice and the other

⁴⁸ Al-Rai, *Press and Publication Crimes*, 61; see also Al-Qudah, *A Study of Journalistic Responsibility in Jordanian Law*, 11.

⁴⁹ Majeed, *Freedom of the Press and Expression*, 139; see also Ayte, *The Criminal Responsibility of the Journalist*, 62.

⁵⁰ Al-Rai, *Press and Publication Crimes, Libel and Slander*, 170-171.

was an original perpetrator, because they cooperated with a tangible, material act in completing the crime of publication.⁵¹

In a decision No. 2000/876 issued on 30th January 2000, the Amman Court of First Instance ruled that the text of Article 41 of the Press and Publications Law was in violation of the Constitution and thus unconstitutional. The court refrained from implementing it and justified its ruling by providing a detailed explanation:⁵²

- 1- The text of Article (103) of the Jordanian Constitution gave the courts the right to exercise their judicial jurisdiction in accordance with the provisions of the laws in force in the Kingdom. By referring to the applicable laws regulating the state's right to punishment, which specify the criminal acts, their elements and elements, and the punishment for their perpetrator, the court found that the text of Article 75 of the Criminal Code, which stipulates that the perpetrator of the crime is "the perpetrator of the crime is the one who brought into existence the elements that constitute the crime or contributed directly." In its implementation. Article 74 of the same law also clarifies that "no one shall be sentenced to a penalty unless he committed the act consciously and willingly."

Therefore, by referring to the two previous texts specifying criminal liability in general, the court found that Article 41/B of the Press and Publications Law stipulates that the editor-in-chief, in all cases, without examining the issue, committed this act consciously and consciously and that his will tended to attack a right protected by the law.

- 2- The Amman Court of First Instance considered that the text of Article 41/B of the Press and Publications Law violated Article 101/A of the Jordanian Constitution, which considered that the courts are protected from interference in their affairs, so considering the editor-in-chief to be an original actor in accordance with the text of the aforementioned Article 41/B is considered

⁵¹ Al-Fawa`ra, "Criminal Liability for Press Crimes," 124-125.

⁵² Decision of the Amman Court of First Instance No. 2000/876, issued on 30th January 2000. See also Al-Fawa`ra, "Criminal Liability for Press Crimes," 124-125.

Interference by the legislative authority in the work of the judiciary, which is concerned with determining the responsibility of perpetrators and imposing punishment.

- 3- The Amman Court of First Instance considered that the text of Article 41/B of the aforementioned law violated the text of Article 6/A of the Jordanian Constitution, which stipulates the principle of equality among Jordanians before the law, with no discrimination between them in rights and duties. So, the text of Article 41/B assumed that the editor-in-chief would be held accountable for the crime as the original perpetrator of the crime so that the burden of proof falls on him to deny the accusation against him. Note that the general rules stipulate that the burden of proving the accusation always falls on the Public Prosecution.
- 4 The Amman Court of First Instance referred to and supported the decision issued by the Supreme Constitutional Court of the Arab Republic of Egypt No. 59 of 1997, which included a ruling declaring the unconstitutionality of the legal text, which included punishing the newspaper's editor-in-chief as an original perpetrator.

4.8. Characteristics of Journalistic Crime

Press publishing crimes have some unique characteristics that set them apart from other crimes. These include:⁵³

- They are committed by those who practice journalism.
- They are characterized by publicity, as they are made available to the public through publication.⁵⁴
- They are considered temporary crimes because they are completed when the material elements of the crime are available. Simply publishing something that violates freedom of opinion and expression fulfills the elements of this crime.

⁵³ Hanane Ouchen, *Crimes of Publication Between Sharia and Law*, 261; see also Al-Rai, *Press and Publication Crimes*, 61; Firas, *A Study of Journalistic Responsibility in Jordanian Law*, 11.

⁵⁴ Hegazy, *General Principles in Press and Publishing Crimes*, 31.

- They represent the constitutional principles of freedom of expression, opinion, and the press, which are guaranteed in Article 15 of the Jordanian Constitution. The first paragraph of Article 15 states that “the state guarantees freedom of opinion, and every Jordanian may freely express his opinion in speech, writing, photography, and other means of expression, provided that it does not exceed the limits of the law.” The third paragraph of the same article guarantees freedom of the press, printing, publishing, and media within the limits of the law.⁵⁵
- The effects of these crimes go beyond violating an individual’s privacy and can include attacks on the security and stability of the state, both internally and externally.

4.9. Procedures and Guarantees for Investigating Press and Publishing Crimes

The investigation into press crimes is subject to general rules. The preliminary investigation, according to the requirements of the Jordanian Criminal Code, is obligatory in felonies, optional in misdemeanors unless there are special provisions, and permissible in violations if requested by the public prosecutor.

4.10. Elements of Journalistic Crime

- I. The legal element of a journalistic crime: The legal element is defining the legal text that criminalizes the act, as there is no crime without a law that defines and punishes it. This pillar includes the specifications of the act that is considered a journalistic crime.⁵⁶
- II. The material element of a journalistic crime: This element is represented by the act committed by the perpetrator, and the result that occurs as a result of this act, in addition to the existence of a causal relationship between the act and the result.
- III. The moral element of a journalistic crime: It is represented by the intention carried by the perpetrator when committing the act, where the intention

⁵⁵ Abrar Sayed, *Procedural Provisions and Penalties for Press and Publishing Crimes* (2021).

⁵⁶ Salem, *Towards a Criminal Law for the Press*, 58.

must be bad and directed to offend others, and there must be a criminal will expressed through the criminal conduct of the perpetrator.⁵⁷

The Jordanian judiciary also affirmed the same meanings contained in the texts of the law. The Jordanian Amman Criminal Court of First Instance decided this meaning,⁵⁸ as well as the ruling issued by the Jordanian Amman Court of Appeal, which concluded that “for a crime to be committed in violation of Article (7) of the Press and Publications Law, there must be Its two pillars are material and moral. The material element is represented by publishing what constitutes a lack of balance, objectivity and integrity in the presentation of journalistic material. As for the moral element, it is represented by the intention to commit the crime with knowledge of its elements, so that the perpetrator must know that what he publishes does not respect the public freedoms of others, does not preserve their rights, and violates the sanctity of their private lives, and that It constitutes a lack of balance, objectivity and integrity in presenting this journalistic material, and yet his will is directed toward publishing it...”⁵⁹

- IV. The publicity element of a journalistic crime: This element is considered one of the pillars required by a journalistic crime, as the journalistic crime must be committed in a public place and in front of people. This facilitates the process of uncovering the perpetrator of the crime and contributes to achieving justice. Publicity is considered the main reason for punishment for journalistic crimes, given that the law does not punish opinions and ideas unless they are expressed through one of the public means, and the press is one of them. Publicity, then, is decomposed into two elements: a moral element, represented by the offending article or drawing, and a material element, which is publication.⁶⁰

⁵⁷ Salem, 58.

⁵⁸ Decision of the Amman Criminal Court, Jordan, No. 2871/2001, issued on 3/31/2003 (unpublished).

⁵⁹ Ruling of the Jordanian Court of Appeal, Amman No. 382/2004 issued on 4/14/2004 (unpublished).

⁶⁰ Al-Rai, *Press and Publication Crimes*, 98; see also Sayed, *Procedural Provisions and Penalties for Press and Publishing Crimes*.

4.11. Arrest for Press and Publishing Crimes

The public prosecutor has the authority to order an arrest if the act committed by the defendant is punishable by imprisonment exceeding two years or a temporary criminal penalty. However, misdemeanors punishable by imprisonment of two years or less, misdemeanors punishable by a fine, and violations that do not fall under the category of crimes for which an arrest order may be permissible are not covered under this rule.⁶¹

However, there are exceptions to this rule. The public prosecutor can issue an arrest warrant against the defendant for the act charged against him even if the act is not punishable by imprisonment for more than two years or a temporary criminal penalty in two cases. The first is if the act attributed to him is one of the crimes of theft, harm, or unintentional harm. The second is if he does not have a fixed and known place of residence in Jordan.

4.12. The Judiciary Responsible for Examining Press and Publishing Crimes

Below we review the specific jurisdiction in examining press and publishing crimes, and then we review the spatial or local jurisdiction.

1- Specific jurisdiction over crimes of journalism and publishing

Jordan still relies on the exceptional courts to hear most press and publishing cases, which are represented by the State Security Court, and therefore it deviates with explicit legal texts and diligence of the Court of Cassation from the original jurisdiction of the (subject) court, the Court of First Instance, which the law has specified to hear press and publishing cases. However, after the issuance of the Press and Publications Law No. (27) of 2007 and the addition of the phrase “despite what was stated in any other law” at the beginning of Article (41/A/1), the text clearly states that the Court of First Instance is exclusively competent to consider all crimes. Cases related to publications and publishing or crimes committed through publications.

⁶¹ Al-Rai, *Press and Publication Crimes*, 98.

It can be said that the criterion of jurisdiction in press and publishing crimes is “the nature of the right attacked.” If the journalistic misdemeanor is harmful to the public interest, the criminal court is competent to adjudicate the case that arises from it, such as insulting or insulting the head of state, attacking public morals, or insulting and insulting him. The Legislative Council or other government bodies or government employees, but if the journalistic misdemeanor is such as insult or slander against a person or insult committed against a public employee as an ordinary individual or someone of the same rank, then the competent court is the district court in accordance with the general rules.⁶²

2- Spatial or local jurisdiction

Regarding crimes related to press and publishing, the court that has jurisdiction is determined by the location of the crime, the accused’s residence or where they were arrested. Since publishing crimes are committed through the act of publishing, they are considered to have taken place in the jurisdiction of every court where the writing was published. Furthermore, since journalistic crimes are typically sequential or continuous, they are considered to have occurred in the jurisdiction of every court where continuity is established or any of the sequential acts took place.⁶³

4.13. Penalties for Press and Publishing Crimes

The penalty for press and publishing crimes in Jordan is determined by the Jordanian Criminal Code. The type of penalty is based on the severity of the crime, whether it is an aggravated, misdemeanor, or criminal offense. The punishments mentioned in Articles 14, 15, and 16 of the Criminal Code are applicable to these crimes. If the crime is a criminal offense, then the punishment is criminal as well. If it is a violation, then the punishment is an aggravating offense, and if it is a misdemeanor, then the punishment is a misdemeanor. All the penalties are financial in nature, including fines. It is important to note that the provisions

⁶² Ali Musaada, “Press and Publishing Crimes Harmful to the Public Interest” (PhD thesis, Amman Arab University, 2007), 264–265.

⁶³ Salem, *Towards a Criminal Code for the Press*, 248.

of the Criminal Code apply to publication crimes in Jordan, except for a few texts mentioned in the Publications Law.⁶⁴

Although there are various financial penalties stipulated by the law, the fine is the only original penalty. This means that the convict is obliged to pay a certain amount of money determined at the judge's discretion, which goes to the state treasury.⁶⁵ It is worth noting that there are supplementary or consequential penalties that are attached to the original penalties. Examples of these penalties include removal from the job, deprivation of rights, police surveillance, or confiscation of some prohibited items.

V. Examples of Crimes Committed by The Press

Crimes committed by the press, also known as publishing crimes, involve ideas and beliefs of various kinds, including political, economic or social beliefs. These crimes often occur due to the misuse of freedom of the press, resulting in criminal or civil liability, or both. It should be noted that these crimes may be committed against the state, such as inciting crimes like harming the dignity of the king and the ruling family, insulting religious beliefs, or spreading rumors and false news that undermine the state's prestige and national sentiment. These crimes can also be committed against individuals, such as defamation, slander, revealing secrets, and other similar crimes. Publishing crimes can be classified as a felony, a misdemeanor, or a violation. Among the most significant crimes that fall under this category are defamation, slander, and harming the dignity of the king and the ruling family.⁶⁶

5.1. Crimes of Slander and Defamation

Crimes of defamation and slander are considered to be the most severe offenses against honor, freedom, and prestige. Jordanian and Egyptian legislators have stipulated these types of crimes in their Criminal codes and have allocated special punishment for them.

⁶⁴ Sayed, *Procedural Provisions and Penalties for Press and Publishing Crimes*.

⁶⁵ Mahmoud Hosni, *Explanation of the Criminal Code, General Section* (Cairo: Dar Al-Nahda Al-Arabiya), 708.

⁶⁶ Al-Rai, *Press and Publication Crimes*, 111-115.

These crimes can take multiple forms. For instance, the perpetrator's slander and defamation may be directed toward the victim directly. This may occur when someone attributes a disgraceful material to another person in a gathering, leading others to despise them. This material may or may not be a crime punishable by law, and it may also be through publishing data or information that falls within the crimes of defamation or slander.

It is important to discuss the legal aspects of these crimes, the difference between slander and defamation, and the journalist's criminal responsibility for publishing material containing them. This is especially pertinent in Jordan, where the legislator has prohibited arresting journalists in cases related to expressing opinions and freedom of expression in accordance with the Press and Publications Law. We will also discuss the extent of the contradiction between the Press and Publishing and Criminal Laws, as well as the editor-in-chief's responsibility for these crimes.

These include:

- The definition of the crimes of slander and defamation, and their elements in the Jordanian Criminal Code,
- The journalist's trial on charges of slander and defamation.

5.2. Definition of the Crimes of Slander and Slander and their Elements in the Jordanian Criminal Code

The first paragraph of Article (188): Criminal Code No. 16 of 1960 stipulates the definition of defamation by saying that it is "attributing a specific material to a person - even in the context of doubt and questioning - that would undermine his honor and dignity or expose him to people's hatred and contempt, regardless of whether that material is Whether a crime requires punishment or not."

Through this definition, we notice that the interest protected by the law is human honor and regard. The second paragraph of Article (188) of the Criminal Code No. 16 of 1960 stipulates the definition of defamation as "an assault on the dignity, honor, or regard of others - even in the context of doubt and questioning - Without specifying a specific article."

Although the crime of slander is independent of the crime of defamation, which the first paragraph of the same article defines it as “attributing a certain material to another person, even in the context of doubt and questioning, and which would undermine his honor and dignity or expose him to people’s hatred and contempt, whether that material is a crime that requires Punishment or not, these two crimes are subject to common provisions.

These two articles are similar in their physical element, just as they are similar in assault, but what distinguishes them from each other is that the subject of attribution in the crime of defamation is more serious than in defamation, because defamation includes attributing a “specific substance,” as is clear from the definition, to the victim, which harms his reputation and status. Social defamation does not include the attribution of a specific article, but rather includes a general ruling that could harm the aggressor’s honor and prestige, and people tend to believe the attribution of the specific incident to the belief that there is evidence to support it more than they believe general statements that they often take as an expression of pure hatred or hatred.

If, when committing crimes of defamation and slander, the name of the assaulted person is not mentioned explicitly or the attributions made are ambiguous, but there is evidence that leaves no hesitation in attributing those attributions to the assaulted person or determining their nature, then the perpetrator of the act of defamation or slander must be viewed as if he were the name of the assaulted person was mentioned, and the slander or slander was clear in terms of its nature.

Article (39) of the Press and Publications Law of 1998 also stipulates that it is prohibited to publish any of the following: A. Anything that includes contempt, slander, or disparagement of one of the religions whose freedom is guaranteed by the Constitution, or abuse of it. B. What includes attacking or insulting the leaders of the laws, such as the prophets, by writing, drawing, pictures, symbols, or by any other means. C. What constitutes insulting religious feelings or belief, or inciting sectarian or racist strife. D. What includes slander,

slander, or contempt of individuals, or affects their personal freedoms, or what includes false information or rumors against them. Article (46) of the Press and Publications Law stipulates the penalty prescribed in the event of a violator of the aforementioned Article (39) by saying: “Anyone who violates the provisions of Paragraphs (A), (B), and (C) of Article (38) of this According to the law, he shall be punished with a fine of not less than ten thousand dinars and not more than twenty thousand dinars.”

Therefore, it is evident that the Press and Publications Law provides a comprehensive legal framework for regulating the journalism profession. The law explicitly outlines the ethical and professional responsibilities that journalists must adhere to. Additionally, it is essential to note the rights that journalists are entitled to while performing their duties.

In application of this, the Court of Cassation, in its criminal capacity, issued its ruling in Case No. 1482 of 2020, in which it stated the following: “With regard to the crime of spreading false rumors in accordance with the provisions of Article 38/D of the Press and Publications Law, and in accordance with Article 46 of the same law, repeated three times. Article 38 stipulates /d) of the Press and Publications Law stipulates that (it is prohibited to publish any of the following: d - (what harms the dignity and personal freedoms of individuals or that contains false information or rumors against them). Article (46/e) of the Press and Publications Law stipulates that (all Whoever violates the provisions of Paragraph (D) of Article (38) of this law shall be punished with a fine of not less than five hundred dinars and not more than one thousand dinars. This crime requires the presence of two elements, namely: - The material element, which is positive behavior represented by publishing what contains abuse For the dignity and personal freedoms of individuals or containing false information or rumors against them, the moral element means the will to commit the crime as defined by the law, so that the perpetrator’s will is directed toward committing the act despite his awareness of all the elements of this act and the consequences resulting from it.

It was not proven in court that the statements made in the press release were true or that the defendants, who had personal rights, had published facts based on what was actually happening on the ground. It was not shown that they had investigated the truth of the matter. Moreover, the evidence presented by the prosecution had proven that the information stated in the news was incorrect. As a result, their actions were considered the crime of spreading false rumors against individuals, who were represented by the current administration. This administration is headed by the Chairman of the Board of Directors, Amer Al-Majali, and the CEO, Shafiq Al-Ashqar. The defendants had accused the current administration of wasting the company's wealth and millions of dollars of its shareholders by selling phosphate to an Indian company at prices lower than those stated in the international phosphate price bulletin. During the era of the previous administration, led by Walid Al-Kurdi, the company was making profits in the hundreds of millions. However, currently, the company is experiencing a loss in sales.⁶⁷

5.3. Instances of Slander

Article (189/4) stipulates that in order for defamation or slander to require punishment, it is a condition that the defamation or slander be committed through publications, and its condition is that it occurs: A. Through newspapers and daily or timely newspapers. B. Any type of publications or publishing media. Therefore, Article (358) stipulates that anyone who slanders another in one of the forms specified in Article (188) shall be punished by imprisonment from two months to one year. Article (359) also stipulates that "insulting a person committed in one of the forms mentioned in Articles (188 and 189), as well as contempt occurring in one of the forms mentioned in Article (190), shall be punished by imprisonment from one week to three months or by a fine from five to twenty-five dinars."

It is clear from the above-mentioned texts that if newspapers publish something that would slander or slander a person, this represents a violation

⁶⁷ Case No. 1482 of 2020, Court of Cassation in its criminal capacity, issued on July 20, 2020.

of the morals and ethics of the journalistic profession stipulated in Article (7) of the Jordanian Press and Publications Law, which stipulates respecting the public freedoms of others, preserving their rights, and not Violating the sanctity of private life, and are considered crimes that require criminal liability for the perpetrator.⁶⁸

One of the judicial rulings that can be inferred in this context is from the Amman Misdemeanor Court. The ruling states that the broadcast on Nour Al-Urdun channel shed light on a dangerous phenomenon that negatively impacted the validity of the elections, which is political money. As a result, the broadcast is consistent with freedom of the press and its goals, as stated in Article 3 of the Press and Publications Law. This article guarantees the freedom of opinion for every Jordanian and their right to express their opinion freely in speech, writing, photography, drawing, and other means of expression and media. Article 4 of the same law also stipulates that the press has the right to provide news, information, and comments freely and contribute to the dissemination of thought, culture, and science within the limits of the law and within the framework of preserving public freedoms, rights, and duties while respecting the freedom and sanctity of the private life of others. Finally, Article 6 of the same law includes freedom of the press:

- A. Informing citizens of events, ideas, and information in all fields.
- B. Allowing citizens, parties, unions, and cultural, social, and economic bodies to express their ideas, opinions, and achievements.”⁶⁹

5.4. The Impermissibility of Proving the Validity of the Libel

Article (194) stipulates that “if the defamer requests permission to prove the veracity of what he attributed to the assaulted employee, his request shall not be granted unless what he attributed is related to the duties of that employee and the position of the slanderer shall cease, by converting the defamatory expressions into the form of a specific article, and then he shall be treated as “Slander.”

⁶⁸ Al-Rai, *Press and Publication Crimes*, 61.

⁶⁹ Case No. 775 of 2021 - Beginning of Penalty - Amman Misdemeanors issued on 03/03/2022.

When referring to the text of Article (192) mentioned above, we find that requesting permission for the defamer to prove the facts attributed to the public employee is obligatory in the event that what he attributes is related to the duties of his job or is a crime requiring punishment, and then it can be said that this is a fundamental defense accordingly. It is based on not accepting it unjustly that the ruling is flawed.

If the accused can prove the validity of what he attributed to the duties of the job, then the defamer is absolved. If he is unable, then he is sentenced to the penalty stipulated by the law for the defamer, according to the second paragraph of the text of Article (192) of the Jordanian Criminal Code, where it states: "If the defamation is related to the duties of the job only and its validity is proven." The blameworthy person will be absolved, otherwise he will be sentenced to the penalty prescribed for the blameworthy person." However, it is necessary to point out that the stupidity of proof falls on the blamer, in application of the rule that whoever claims something must prove it.

Among the rulings that can be inferred in this context is the ruling issued at the court of beginning of the Amman misdemeanor, where the court's decision stated the following: 1- Pursuant to Article 178 of the Criminal Procedure Code, declaring the suspects (accused) not responsible for crimes of defamation of an official employee, in contravention of Article 191 of the Criminal Code. In terms of Article 15 of the Cybercrimes Law, the defamation of an official employee, contrary to Article 191 of the Criminal Code, and in terms of Article 42 of the Press and Publications Law, and the licensee's violation of licensing obligations by broadcasting materials that would incite sectarian and ethnic strife, in violation of Article 20/L/1 of the Audiovisual Media Law, and in terms of Article 29/ B/1 of the same law and Article 42 of the Press and Publications Law, since their action does not constitute a crime and does not require punishment. 2- Pursuant to Article 52 of the Criminal Code and the meaning of Article 364 of the same law, the public right lawsuit shall be dropped from the suspects in relation to the crime of publishing data containing slander, defamation, or contempt via

the information network, in contravention of the provisions of Article (11) of the Electronic Crimes Law and in accordance with Articles 188, 189, and 190 of the Code. The Criminal Code according to the abolition of the personal right.⁷⁰

Interrogating a journalist regarding the crime of defamation and slander against a public employee or someone in his position

It can be said that the Jordanian Criminal Code only requires interrogation in specific cases, such as when arresting an accused person. The law also mandates interrogating the accused before ordering their arrest. In cases of journalism and publishing crimes, interrogation is subject to the same provisions and guarantees as many other crimes, meaning that journalists are subject to the same procedures as other defendants.

According to Article 192 of the Jordanian Criminal Code, it is not permissible to prove the validity of slander against an employee. The first paragraph of this article states that if a person who has defamed someone requests to prove the truth of their statement, their request will not be granted unless what they said is related to the duties of the employee's job or is considered a punishable crime.

If the subject of the defamation is a crime, and the employee is prosecuted for it, and it is proven that the defamer attributed it while knowing the innocence of the employee, then the defamation becomes slander. In this case, the legal articles related to slander must be applied.

1- *The crime of harming the dignity of the king and the ruling family*

The Jordanian law is strict about slandering the king and those in power, as stated in Article 195 of the Jordanian Criminal Code. This law punishes anyone who commits this offense with imprisonment for one to three years. Additionally, crimes related to publishing and journalism include those that harm religious beliefs through text, as per Article 38 of the Press and Publications Law. This article prohibits publications that denigrate, slander, or disparage any religion whose freedom is guaranteed by the Constitution. It also prohibits insulting or

⁷⁰ Case No. 1147 of 2019 - Beginning of Penalty - Amman Misdemeanors issued on 11/16/2022.

attacking religious figures, such as prophets, through writing, drawing, image, or symbol. It also prohibits inciting sectarian or racist strife, slandering individuals, or affecting their personal freedoms, or publishing false information or rumors about them.

One ruling that can be inferred in this context is the ruling issued by the Irbid Criminal Magistrate Court. This ruling states that anyone who publishes data through the information network that may incite sedition, strife, hatred, violence, or justify it, is guilty of violating Article 17 of the Cybercrime Law No. 17 of 2023. This is considered a crime of publishing statements containing false news that targets national security and societal peace, slandering, defaming, and humiliating state authorities and official information, in contravention of Article 15 of the Cybercrime Law No. 17 of 2023. According to Article 177 of the Code of Criminal Procedure, anyone who commits this crime is guilty of publishing false data that targets national security and societal peace, and defaming, slandering, and humiliating state authorities and official bodies, in violation of Article 15 of the Cybercrime Law No. 17 of 2023. The punishment for this crime is imprisonment for three months, and fees are calculated for the period of detention from the date of 11/12/2023 until 11/14/2023.⁷¹

Examples of press and publishing crimes include publishing news that affects judges and witnesses. Article (224) prohibits publishing news, information, or criticism that would influence any judge or witness or prevent any person from disclosing the information he has to those in charge. The punishment for such a crime is imprisonment for up to one year or a fine of not more than two hundred dinars, or both.

Article (225) punishes anyone who publishes the following with imprisonment up to three months:

1. A criminal or misdemeanor investigation document before it is read in a public session.
2. Trials in secret sessions.

⁷¹ Case No. 14533 of 2023 - Irbid Criminal Reconciliation issued on 01/28/2024.

3. Trials in defamation cases.
4. Every trial the court prevented.

Based on this, the Amman Criminal Magistrate Court issued the following ruling:

1. The defendant was convicted of the crime of influencing the course of justice in violation of Article 11 of the Contempt of Courts Law and sentenced to two months' imprisonment and fees. The court, for discretionary mitigating reasons, reduced the penalty to two weeks' imprisonment and fees.
2. The defendant was convicted of the crime of exposing the course of justice to doubt in violation of Article 15 of the Contempt of Courts Law and sentenced to imprisonment for three months and fees. The court, for discretionary mitigating reasons, reduced the sentence to two weeks' imprisonment and fees.
3. The complainant was convicted of the crime of defaming the courts in violation of Article 191 of the Criminal Code and sentenced to three months' imprisonment, fees, and the cancellation of personal rights. The court, for discretionary mitigating reasons, reduced the sentence to two weeks' imprisonment and fees.
4. The defendant was declared not responsible for the crime of sending insulting messages via telecommunications means, contrary to Article 75 of the Telecommunications Law.
5. The most severe punishment was implemented against the defendant, so the penalty became imprisonment for one month and fines.⁷²

VI. CONCLUSION

This paper aimed to promote freedom of opinion and expression for journalists while ensuring adherence to Jordanian legislation. It highlighted the constitutional guarantees and regulations that regulate freedom of the press and media. This paper yielded the following results: Firstly, the Constitution and the law establish freedom of the press as a means of expressing opinions. However, this freedom is not exempt from the law, and journalists must follow

⁷² Case No. 1366 of 2018 - Amman Criminal Reconciliation issued on 03/06/2018.

legal limits when practising their profession. Secondly, the Press and Publications Law contained a provision for protecting journalists from imprisonment for expressing opinions, but it was insufficient in achieving its goal. Thirdly, the Law on the Right to Access to Information stipulates many procedural restrictions on how to appeal the administrative decision issued to prevent the seeker of information from obtaining it, which requires amending these texts, which is what we recommend. Fourthly, the Jordanian Constitution underscores the importance of freedom of opinion and expression and connects it with freedom of the press. However, it does not grant unrestricted freedom of expression, as it restricts it to comply with laws, agreements. To regulate the work of journalists, the Press and Publishing Law No. 27 of 2007 was introduced, which outlines a set of provisions. Fifthly, while the Press and Publications Law specifies the rights of journalists, it also imposes duties and restrictions that limit freedom of opinion and expression. The Jordanian Constitution does not allow absolute freedom of expression, but instead restricts it to not deviate from the law, as other laws stipulate. Laws related to ethics and duties, such as Journalists Syndicate Law No. 15 of 1998 and the journalistic code of honor, are also imposed on journalists. Sixthly, although the Press and Publications Law prohibits the arrest of individuals based on their opinion and expression, it does not prevent the imprisonment of journalists for defamation and slander under the provisions of the Criminal Code No. 16 of 1960 and its amendments. The law does not permit the publication of defamatory and slanderous materials, except in specific cases, such as criticism, which serves the public interest, as stated by the legislator. In addition, the law assumes the editor-in-chief's responsibility in cases of defamation and slander, which is a point of disagreement. This violates the basic principles of criminal law, which state that "the accused is innocent until proven guilty," as the law assumes that the editor-in-chief participated in the crimes of slander and slander, and places him in the position of being accused. This also violates the principle that a person cannot be held accountable for the actions of others. Therefore, the editor-in-chief's responsibility exists only if he can prove that

the publication occurred without his knowledge in order to be absolved of the charges against him, as the Egyptian Court of Cassation has stated. Finally, in Jordan, there is a big number of laws that pertain to press freedom and media, both directly and indirectly. However, many of these laws are contradictory, and it would be better to consolidate them into one or two laws. This would provide a regulatory assurance for the journalism and media profession. At the end of this study, we can indicate some recommendations that the researcher sees as necessary and useful in this regard: the researcher recommends the necessity of reconsidering the definition of the legal texts regulating journalistic work through constitutional texts. Moreover, Amending the text of Article 42/H of the Press and Publications Law to stipulate that journalists shall not be imprisoned in print and publishing cases in general included within the Press and Publications Law. Furthermore, Amending the provisions of the Law Guaranteeing the Right to Access to Information to overcome the procedural restrictions imposed on journalists in obtaining data and information. Lastly, the paper recommends restricting press and publishing issues to the Press and Publishing Law only.

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THE PURPOSIVE ENTRENCHMENT OF CONSTITUTIONAL IDENTITY: INSIGHTS FROM BANGLADESH

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Received: 20 October 2024 | Last Revised: 10 April 2025 | Accepted: 15 April 2025

Abstract

The judicial review of a constitutional amendment and a constitutional amendment articulating the unamendable basic structures of the Constitution in the form of eternity clauses are fraught with the possibility of debilitating a polity. The lure of making aspirational normative ideals permanent often drives the judicial articulation of constitutional identity in the form of basic structure of the Constitution. On the other hand, the legislature may also wish to articulate the same through the constitutional amendments. This paper highlights the fallouts of such judicial and legislative articulation of constitutional identity in the form of the unamendable basic structures of the Constitution. The paper spotlights Bangladesh and the manner of declaration of unconstitutionality of the 13th constitutional amendment by the appellate division of the Bangladesh Supreme Court and argues that it was a flawed decision. The paper asserts that an indigenous and ethnographic articulation of constitutional identity by the constitutional court better serves a polity than simply aping such an articulation from the neighbouring country. The paper also problematises the popular understanding in the comparative constitutional law about the need of supermajority of a Constitution Court in declaring a constitutional amendment,

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unconstitutional. The need of supermajority is considered suitable in well-functioning democracies only. It is argued that the simple majority of the Court declaring a constitutional amendment unconstitutional may not be desirable in not so well-functioning democracies like Bangladesh. It further argues that the declaration of the unamendable eternity clause by the 15th constitutional amendment of Bangladesh is an unconstitutional constitutional amendment as it takes away the power of judicial review in respect of the identified eternity clauses and strips the future Parliament of its democratic power to amend the Constitution in respect of the provisions of the Constitution declared permanent by the eternity clause.

Keywords: Bangladesh; Basic Structure; Constitutional Amendment; Constitutional Identity; Eternity Clause, Supermajority

I. INTRODUCTION: A BACKGROUNDER TO CONSTITUTIONAL IDENTITY

1.1. Background

Constitution is regarded as an “essentially contested concept”¹ and a “slippery”² one. Tom Ginsburg sees the Constitution as “associated with the *narrower* and *empirically rarer* concept of constitutionalism”³ that seeks to limit the powers of the State.⁴ In that sense, Constitution plays a functional role in defining the powers of the State by providing the limitations on its power, but what if the State limits the Constitution? Parliaments of various states of the world have limited their Constitutions at some point in history by using the power of constitutional amendment⁵, which may or may not have been reclaimed by the

¹ Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988), 124, quoting W. B. Gallie. See also David Collier, Fernando Daniel Hidalgo, and Andra Olivia Maciucean, “Essentially Contested Concepts: Debates and Applications,” *Journal of Political Ideologies* 11, no. 3 (September 2006): 211–246.

² Tom Ginsburg, “Constitutionalism: East Asian Antecedents,” *Chicago-Kent Law Review* 88 (March 2012): 11.

³ Ginsburg, “Constitutionalism: East Asian Antecedents,” 11.

⁴ Kazuyuki Takahashi, “Why Do We Study Constitutional Laws of Foreign Countries, and Why?,” in *Defining the Field of Comparative Constitutional Law*, ed. Vicki Jackson and Mark Tushnet (Westport: Praeger, 2002), 35–71. Takahashi highlights how constitutionalism—the idea that the government/ruler can be limited or bound by law—was an alien concept for Japan.

⁵ For example, the Indian Parliament enacted the 24th Constitutional Amendment in 1971 to take away the power of substantive judicial review of a constitutional amendment from the constitutional courts in India, namely the Supreme Court and the High Courts. The Turkish Parliament also enacted the constitutional amendment in 1971 and took away the power of substantive judicial review of constitutional amendments from the Turkish Constitutional Court. The Constitution of Pakistan was amended in 1985 by a Presidential order (Order no. 14 of 1985) to prohibit the substantive judicial review of constitutional amendments. Likewise, the Hungarian Parliament also enacted the fourth amendment of the Basic law in 2013 and took away the power of substantive judicial review of constitutional amendments from the Constitutional Court.

constitutional courts of those states.⁶ But whether a constitutional amendment can limit the Constitution in a way that cannot be challenged in a court of law? Whether Parliament can lock these limitations on their constitutions, via constitutional amendments, to eternity? Whether eternity clauses⁷ inserted by a constitutional amendment alter the constitutional identity? The recent political revolution⁸ in Bangladesh and political and social upheavals raise pertinent and complex questions. On the complexity that eternity clauses pose, Silvia Suteu notes, “Eternity clauses and judicially created doctrines of unamendability are paradoxical from the point of view of democratic constitutionalism. The tense relationship between constitutional precommitment and democracy is further strained if we take eternity clauses to be at the farthest end of a constitutional rigidity continuum.”⁹

The judicial invocation of the constitutional identity keeps surfacing in the judgments of the Supreme Court of India¹⁰ every now and then. According to Gary Jeffrey Jacobsohn, ‘constitutional identity’ represents “*a mix of aspirations and commitments expressive of a nation’s past*”, it also “*evolves in ongoing*

⁶ The courts in places such as Sri Lanka, Malaysia, and Singapore have generally rejected the notion of judicially enforceable implicit unamendability of the basic structures of the Constitution. On the other hand, courts around the world, in countries such as India, Bangladesh, Kenya, Colombia, Peru, Taiwan, and Belize have endorsed the theory of implicit unamendability and held that the Constitutional Courts possess the power to enforce this unamendability. The concept of implicit unamendability recognises the inherent substantive limitations on the legislature to amend the Constitution and States that the fundamental constitutional identity in terms of the basic structures is unamendable. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), 516. See also Adfin Rochmad Baidhowah, “Defender of Democracy: The Role of Indonesian Constitutional Court in Preventing Rapid Democratic Backsliding,” *Constitutional Review* 7, no. 1 (May 2021): 124; Mila Versteeg et al., “The Law and Politics of Constitutional Term Limits Evasion,” *Columbia Law Review* 120, no. 1 (January 2020): 173.

⁷ Several recent Constitutions include an ‘eternity clause’ in their Constitution included by the original drafters of the Constitution, which essentially are the unamendable provisions prohibiting even the legislative supermajorities either directly or indirectly from amending these unamendable provisions of the Constitution. One of the examples of the eternity clause is Article 79(3) of the German Basic Law, it voids any amendment that attempts to detract from the principles of Human Dignity, Federalism and Social Democracy. See Christopher J. Beshara, “Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India,” *Law and Politics in Africa, Asia and Latin America* 48, no. 2 (April 2015): 99; S. Weintal, “The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty,” *Israel Law Review* 44, no. 3 (December 2011): 449; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021).

⁸ According to Hans Kelsen, a revolution is said to take place “whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way ... not prescribed by the first legal order.” See Gary Jeffrey Jacobsohn, “Theorising the Constitutional Revolution,” *Journal of Law and Courts* 2 (March 2014): 1.

⁹ Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021), 2.

¹⁰ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Minerva Mills v. Union of India*, (1980) 2 SCC 591; *Waman Rao v. Union of India*, (1981) 2 SCC 362; *S. R. Bommai v. Union of India*, (1994) 3 SCC 1; *I. R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212; *Supreme Court Advocates on Record Association v. Union of India*, (2016) 5 SCC 1.

*political and interpretive activities occurring in courts, legislature and other public and private domains.*¹¹ The legal determination of constitutional identity may consider the actual state of the society, but it will largely remain focused on the constitutional assertion of the identity to be gathered from the holistic reading of the Constitution.¹² Ashish Nandy, a noted Indian social theorist has argued that the identity of a polity is more rooted in the extra-constitutional factors such as religion and culture than in the aspirational constitutional value.¹³ Therefore, there may be an aspirational constitutional identity and an empirical constitutional identity and, the empirical may be different in many respects from the aspirational.

The epochal affirmation of the constitutional identity principle came in the landmark *Kesavananda Bharti*¹⁴ judgment of the Supreme Court in India in the form of the basic structure of the Constitution, identified by the court as the structures of the constitution that undergird it in such profoundly fundamental ways, that bereft of it, the constitutional loses its identity. The court declared, albeit by a slender 7:6 majority, that violations of the basic structure by a constitutional amendment would make the constitutional amendment unconstitutional. This was the recognition of implied limitations on the constitutional amendment power of the Indian Parliament as the Constitution of India does not have any explicit eternity clause and it only provides for the procedure¹⁵ to amend the Constitution without specifying any content-based limitations on the exercise of amendment. In the recent past, there has been a shift in constitutional adjudications, led by the Supreme Court, where even when the constitutionality of a constitutional amendment is not to be examined by the court, the constitutional identity principle with a different name has been invoked. Constitutional morality and transformative constitutionalism are some of the illustrative examples evoking

¹¹ Gary Jeffrey Jacobsohn, "Constitutional Identity," *The Review of Politics* 68, no. 3 (July 2006): 361.

¹² Manwendra Kumar Tiwari, "Law, Politics, and the Erasure of the Secular Constitutional Identity of India," *Comparative Constitutional and Administrative Law* 7, no. 1 (January 2022): 18.

¹³ Ashish Nandy, "The Politics of Secularism and the Recovery of Religious Toleration," in *Secularism and Its Critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1998), 364–365.

¹⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁵ Article 368 of the Constitution of India.

constitutional identity that have been invoked by the courts as the overarching principles providing anchorage to its constitutional interpretation.¹⁶

The resort to the basic structure principle is now entrenched as the bedrock of Indian constitutionalism. The invocation of this principle by the courts to decide the constitutionality of constitutional amendments is inevitable but the invoking of similar constitutional identity constructs as an interpretive praxis can be problematic, when the court is not asked to determine the constitutionality of a constitutional amendment.¹⁷ The entrenchment of a construct is the primary cause that drives the articulation of constitutional identity and therefore, the judicial articulation of a construct as the inviolable constitutional identity isolates that construct from the scrutiny of politics. The obvious fluid nature of political articulations ensures that the construct remains open to political contestation. On the other hand, the judicial articulation sanitises the identified construct and entrenches it as a constitutional *fait accompli*.

The judicial articulation of the inviolable constitutional identity has given rise to an important conversation in the constitutional design, where the framers of the Constitution would mull over the articulation of the inviolable constitutional principles to be expressly articulated in the constitutional text, popularly referred to as the eternity clause of the Constitution. The rise in the eternity clauses in recent constitutional practices has been highlighted by scholars for their “greater and more insidious potential for abuse”.¹⁸ It has also been documented that express entrenchment of eternity clauses in the Constitution result in more constitutional amendments being declared unconstitutional.¹⁹ However, if the process to amend the Constitution includes a compulsory nation-wide referendum requiring double majority of votes— first a nationwide majority and the second

¹⁶ Bertus de Villiers, “Breathing Life into the Constitution: The Transformative Role of Courts to Give a Unique Identity to the Constitution,” *Constitutional Review* 9, no. 1 (June 2023): 109.

¹⁷ Aparna Chandra, “A Precious Heritage? The Construction of Constitutional Identity by Indian Courts,” *Comparative Constitutional Studies* 1, no. 1 (January 2023): 140.

¹⁸ Silvia Suteu, “Introduction: The Rise of Eternity Clauses in Democratic Constitutionalism,” in *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021), 1.

¹⁹ Michael Hein, “Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe,” *International Journal of Constitutional Law* 18, no. 1 (March 2020): 78.

majority among the majority of States, as is the case in Australia²⁰, the popular sovereignty doctrine may be invoked and, even a new constitutional identity may be legitimate. The application of the unconstitutional constitutional amendment doctrine will frustrate the commitment to popular sovereignty acquired through a successful referendum.²¹

The express articulation of the constitutional identity by the framers of the constitution may be problematic but the basis of the basic structure thesis remains associated with the theory of original intention²², and therefore, it is onerous to contest its legitimacy, as the basic structure refers to the unamendable fundamentals of the original Constitution. The basic structure theory is not applicable against the provisions of the original Constitution as the original provisions cannot be considered to be contrary to the fundamental features of the Constitution which are also derived from the original provisions of the Constitution. A constitutional amendment may omit the original and substitute it with a new idea. The constitutionality of this change would depend on whether the omitted original was essential to the fundamental values derived from the original values of the Constitution as a whole or not.²³ This may sometimes result in the omitted original being termed a mistake committed by the framers of the Constitution.²⁴

²⁰ Michael Kirby, "Indian and Australian Constitutional Law," *Journal of the Indian Law Institute* 60, no. 1 (January 2018): 1.

²¹ Rivka Weill, "The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-making," *The American Journal of Comparative Law* 62, no. 1 (January 2014): 127.

²² The theory of original intent claims that the framers of the Constitution expected future interpreters to seek the meaning of the document in the framers' intent. See H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98, no. 5 (March 1985): 885.

²³ However, the historicity of a State's journey as a polity may suggest that some constitutional amendments despite being constitutional dismemberments *i.e.* the amendments which are "self-conscious efforts to repudiate the essential characteristics of Constitution and to destroy its foundations" may still be constitutional and legitimate. See Abdurrachman Satrio, "Restoring Indonesia's (Un) Constitutional Amendments: Soepomo's Authoritarian Constitution," *German Law Journal* 24, no. 2 (February 2023): 402. "Constitutional Dismemberment" is a term coined by Professor Richard Albert. He argues that it "occupies the space between a constitutional amendment and a new Constitution". See Richard Albert, "Constitutional Amendment and Dismemberment," *Yale Journal of International Law* 43, no. 1 (January 2018): 1.

²⁴ Justice H. R. Khanna in *Kesavananda Bharati* while declaring that a constitutional amendment diluting the fundamental right to property as constitutional, suggested that it was a mistake on the part of framers to have ascribed this kind of seriousness to right to property. See Upendra Baxi, "A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence," *International Journal of Constitutional Law* 1, no. 4 (October 2003): 557.

This conundrum, however, is amplified when a constitutional amendment attempts to articulate the unamendable parts or the unamendable principles of the Constitution. Constitutional validity of such a constitutional amendment has not been examined, so far. At a normative level the judicial challenge to such an amendment is possible but the real plausibility of the same remains doubtful. Whether the articulation of basic structure by the legislature through a constitutional amendment may result in violation of the basic structure of the Constitution is therefore a moot question.

1.2. Questions and Method

The paper examines the judicial reasoning in the judicial review of a constitutional amendment while identifying the unamendable constitutional identity in the form of the basic structure of a given Constitution. The second question examined in this paper is the permissibility of the unamendable eternity clauses in the constitution through the route of constitutional amendment. Both these questions have been examined in the following backdrop. First, the decision of the appellate division of the Bangladesh Supreme Court to declare the 13th constitutional amendment as unconstitutional and second, the 15th constitutional amendment of Bangladesh Constitution which gave effect to the decision of the Supreme Court in the 13th constitutional amendment case and also added the unamendable eternity clauses to the Constitution of Bangladesh. A discursive doctrinal method has been used to examine these questions and the judicial approach of the Indian Supreme Court has been referred as a scaffolding being one of the primogenitors of the basic structure theory to examine the constitutionality of constitutional amendments. The judicial review of constitutional amendments and the decisions of unconstitutionality by slender majority give rise to the issue of the need for supermajorities in adjudication to declare a constitutional amendment unconstitutional. This question has also been examined in the backdrop of Bangladesh. Further, the question of limits of comparative constitutional law in identifying the basic structure has also been considered.

II. THE FOREGROUNDS OF THE RECENT EVENTS IN BANGLADESH

The role of shared histories, language, culture and religion in shaping the nation²⁵ and therefore the constitutional identity has been significantly highlighted by scholars. In the case of Bangladesh, religion and language have been pivotal in shaping the identity complex.²⁶ Scholars have also highlighted how the language, culture and political loyalties of the Bangladeshi people have led to an identity crisis.²⁷ The political, economic and social characteristics—such as decent economic growth, sound social indicators while poor indicators of governance—of Bangladesh sometimes showcases it as a paradox²⁸. The inherent theoretical tensions between constitutional secularism²⁹ and Bangladeshi nationalism laid down the contemporary constitutional fault lines. Bangladesh's history has been marked by potentially confusing identities³⁰, also reflected in the constitution and constitutional amendments. The epitome of such a confusing identity is the constitutional fact of Bangladesh which states it to be a “secular” state but also provides for “religion of the State”³¹. In the near past, appropriation of political opponents, institutionalization of authoritarian practices, and “co-option of religious leaders” have contributed to the *competitive authoritarian* identity of Bangladesh.³²

The recent incidents that occurred in Bangladesh culminating in the extraordinary events that took place on 5th August 2024 leading to the ouster of the Prime Minister Sheikh Hasina Government and the Prime Minister fleeing Bangladesh to India in a tizzy, were also fuelled by the long-term discontent

²⁵ Amartya Sen, *Identity and Violence: The Illusion of Destiny* (London: Penguin Books, 2006).

²⁶ M. G. Kabir, “Religion, Language and Nationalism in Bangladesh,” *Journal of Contemporary Asia* 17 (December 1987): 473.

²⁷ Tazeen M. Murshid, “Bangladesh: The Challenge of Democracy—Language, Culture and Political Identity,” *Contemporary South Asia* 2, no. 1 (March 1993): 67.

²⁸ Selim Raihan, François Bourguignon, and Umar Salam, eds., *Is the Bangladesh Paradox Sustainable?* (Cambridge: Cambridge University Press, 2024).

²⁹ See also Wohab and Sandro Serpa, “‘Secularism’ or ‘No-Secularism’? A Complex Case of Bangladesh,” *Cogent Social Sciences* 7, no. 1 (January 2021).

³⁰ Sanjay K. Bhardwaj, “Contesting Identities in Bangladesh: A Study of Secular and Religious Frontiers,” *Asia Research Centre Working Paper*, LSE no. 36 (2011): 1.

³¹ “Bangladesh: A Secular State with a State Religion?” *OHCHR*, accessed August 27, 2024.

³² Shafi Md. Mostofa and D. B. Subedi, “Rise of Competitive Authoritarianism in Bangladesh,” *Politics and Religion* 14, no. 3 (September 2021): 431–59

of the masses against the lack of democratic legitimacy³³ of the incumbent government led by Sheikh Hasina. The Bangladesh judiciary led by the Supreme Court of Bangladesh was instrumental both in the immediate and long-term way, for this enormous public outcry. A political decision to scrap³⁴ the thirty per cent quota³⁵ in the Government jobs for the dependents of the 1971 freedom movement of Bangladesh, taken by the Sheikh Hasina Government in the year 2018, was revived by the High Court Division (*hereinafter* HCD) of the Bangladesh Supreme Court in July 2024. The HCD in its order released on 14 July 2024³⁶ declared the Government's decision contemptuous of the appellate court division judgment of the Supreme Court delivered in the year 2013, upholding the thirty per cent reservation. Later, the appellate division of the Supreme Court did some damage control by immediately suspending the judgment of the HCD and later scaling the quota down to five per cent.³⁷ But by this time, the HCD's order had given rise to an uprising, ably supported by the high-handedness of the Sheikh Hasina Government, trying to crush it.³⁸

The Bangladesh Supreme Court has unintentionally played a role in exacerbating the long-term discontent among the people of Bangladesh, by adding to the democratic erosion. The appeal of the basic structure doctrine enunciated by the Supreme Court of India in the famous *Kesavananda Bharati* case³⁹ (1973) as a bulwark against the unconstitutional constitutional amendments, which may be passed by the democratic governments enjoying supermajority in the legislature, has been global⁴⁰. Basic structure doctrine underscores that certain fundamental cores of the Constitution are unamendable and it

³³ The Hindu Data Team, "Bangladesh under Sheikh Hasina-Economic Progress but Democratic Regression," *The Hindu*, August 6, 2024.

³⁴ DD News, "Understanding the Unrest in Bangladesh," August 9, 2024.

³⁵ On the quota reform movement's threat to authoritarianism and its significance as a 'mass grievance', see David Jackman, "Students, Movements, and the Threat to Authoritarianism in Bangladesh," *Contemporary South Asia* 29, no. 2 (June 2020): 181–97; Saikot Chandra Ghosh, "Conceptualizing Student Movements in Bangladesh Post-2013: A Qualitative and Comparative Case Study of the Quota Reform Movement and the Road Safety Movement," *Social Identities* 29, no. 6 (June 2023): 534–54.

³⁶ Al Jazeera, "What's Behind Bangladesh's Violent Quota Protests?" July 16, 2024.

³⁷ Al Jazeera, "Bangladesh Top Court Scraps Most Quotas That Caused Deadly Unrest," July 21, 2024.

³⁸ Al Jazeera, "Bangladesh Minister Defends Gov't Response to Protests Amid Calls for Probe," July 25, 2024.

³⁹ Anmol Jain, "50 Years of Kesavananda Bharti," *VerfassungsBlog*, May 11, 2024.

⁴⁰ Yaniv Roznai, "The Basic Structure Doctrine Arrives in Kenya: Winds of Change for Constitutionalism in Africa?" *VerfassungsBlog*, May 14, 2023.

consequently accords to the elected Parliament, a limited legislative power to amend the Constitution. The final word on what constitutes the core rests with the constitutional courts in India namely the Supreme Court and the provincial High Courts. This articulation of implied limits on the exercise of constitutional amendment power by the legislature has travelled across the world and has found acceptance by several constitutional courts.⁴¹ The argument against the implied limitations doctrine, that it is undemocratic has remained on the margins and has not gained traction.⁴²

Taking a cue from the Indian Supreme Court, the higher chamber of the Bangladesh Supreme Court i.e. the appellate division, established the basic structure doctrine in the year 1989 in the landmark case of *Anwar Hossain Chowdhury v. Bangladesh*⁴³ by invalidating the 8th Constitutional Amendment providing for the constitution of benches of the lower chamber of the Supreme Court called the HCD, which was enacted on the ground of public accessibility. The Supreme Court ruled that such diffusion is against the unitary character of the republic. The transition of Bangladesh to a constitutional parliamentary democracy happened in 1991 and, therefore, by 1989 the political environment was becoming congenial which ensured that there would not be fierce political backlash by the military rulers against this Supreme Court judgment.

Subsequently, the HCD of the Supreme Court in the year 2005 declared the 5th Amendment to the Constitution providing sanctity to the first martial rule from 1975 to 1979 to be unconstitutional, the appellate division of the Supreme Court upheld the same in the year 2010. The HCD further declared the 7th Constitutional Amendment bestowing legitimacy to the second martial rule from 1982 to 1986 as unconstitutional. This was also upheld by the appellate division in 2011. However, it was the invalidation of the 13th Constitutional Amendment by the appellate division in *Abdul Mannan Khan v. Bangladesh*⁴⁴ in the year

⁴¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), 47–69.

⁴² Madhav Khosla, "The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure," *Economic and Political Weekly* 42, no. 31 (August 2007): 3203.

⁴³ *Anwar Hossain Chowdhury v. Government of the People's Republic of Bangladesh and Ors.*, 1989 BLD (SPL) 1.

⁴⁴ *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

2011 that put the electoral legitimacy of the national elections of Bangladesh in disarray. Scholars have also highlighted the transformation of Bangladesh from an electoral democracy to an electoral authoritarianism.⁴⁵ In the *Abdul Mannan Khan* judgment, the appellate division by a 4:3 majority declared the caretaker government (*hereinafter* CTG) system introduced by the 13th Amendment of the year 1996, unconstitutional.

The CTG system provided for a non-partisan caretaker government with the retired Chief Justice of the Supreme Court at the helm to conduct and oversee the national elections in Bangladesh during the 90 days of interregnum period between the two elected governments. The Court declared that an unelected government led by the retired Chief Justice violates the basic structure of democracy and independence of judiciary enshrined in the Constitution of Bangladesh. The court, however, held that the judgment shall operate prospectively after the next parliamentary elections and the one that will immediately follow it, namely the 10th and 11th parliamentary elections. Significantly, this appellate court judgment had come after the HCD had declared the 13th Amendment to be constitutional in the year 2004.⁴⁶ The HCD had held that the CTG system gave a fillip to democracy and it left the question of former Chief Justice as CTG head to the wisdom of the Parliament. Ridwanul Hoque, an expert on Bangladesh's constitutional law has observed that this decision of the appellate division ignored the local political context of Bangladesh.⁴⁷

The alarming facts associated with the case are worth noting. Before giving its detailed judgement, the appellate division of the Supreme Court had passed a short order in 2011 declaring the 13th constitutional amendment unconstitutional by a slender majority of 4:3. The detailed judgment was delivered 14 months later in the year 2012. Strangely, Chief Justice A. B. M. Kahirul Haque retired after a few days of passing this short order and he wrote his final judgment 14

⁴⁵ Ali Riaz, "The Pathway of Democratic Backsliding in Bangladesh," *Democratization* 28, no. 1 (January 2021): 179.

⁴⁶ M. Saleem Ullah v. Bangladesh, (2005) 57 DLR (HCD) 171.

⁴⁷ Ridwanul Hoque, "The Judicialization of Politics in Bangladesh," in *Unstable Constitutionalism: Law and Politics in South Asia*, ed. Mark Tushnet and Madhav Khosla (Cambridge: Cambridge University Press, 2015), 261–90.

months after his retirement. During the interregnum between the short order and the final judgment, the 15th Constitutional Amendment was passed by the Bangladesh Parliament abolishing the CTG system. It is also alleged that the majority judgment was crafted to be in line with the 15th Constitutional Amendment.⁴⁸

The CTG system had come following the demand by the Bangladesh Nationalist Party (*hereinafter* BNP), the opposition party when Sheikh Hasina's Awami League party was in power. Notably, the Awami League party government that enacted the 13th Constitutional Amendment, decided to implement the decision of the court and enacted the 15th Constitutional Amendment⁴⁹ eliminating the CTG system, within two months of the court's order, ignoring the strong opposition by the opposition political parties including the BNP. This gave rise to unprecedented violence⁵⁰ leading up to the 2014 national elections which was boycotted by the opposition, making the 2014 election, virtually a one-party election. Subsequently, in the 2018 national elections, where the main opposition party BNP contested elections, the Sheikh Hasina-led Awami League registered another landslide victory in the elections. The elections were marred by violence and it was widely considered by the international community and the opposition as rigged⁵¹. It is also significant to note that before the elections, the leader of the main opposition party Begum Khaleda Zia was convicted⁵² in a corruption case which made her ineligible to contest the 2018 elections. Scholars have highlighted the various methods adopted in rigging the 2018 national election, including "creating a climate of fear, neutralising opposition candidates through imprisonment and confinement, disqualifying opposition candidates, limiting the effective oversight of the electoral process through denying international

⁴⁸ Hoque, "The Judicialization of Politics," 282.

⁴⁹ Maimul Ahsan Khan, "Constitutional Disaster & 'Legal' Impunity: Constitutional Amendments in Perspective," *Asian Human Rights Commission*, May 17, 2024.

⁵⁰ Adeeba Aziz Khan, "The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-Political Caretaker Government," *International Review of Law* (May 2015).

⁵¹ *Time*, "They Threaten Everyone.' Sheikh Hasina's Landslide Win in Bangladesh Marred by Voter Suppression," May 30, 2018.

⁵² *NDTV World*, "Ex-Bangladesh PM Khaleda Zia Gets 7 Years in Jail in Corruption Case," August 2, 2024.

observers, and establishing control over media before the election day and ballot stuffing⁵³.

In January 2024, the Awami League won another national election in a landslide manner winning 223 out of the 300 seats and together with the ally political parties, the Sheikh Hasina Government had control over the entire 300 seats⁵⁴. This election was also boycotted by the main opposition parties including the BNP which demanded a CTG to conduct and oversee the elections.

Certainly, the appellate division of the Bangladesh Supreme Court did not contemplate the import of its judgment regarding the constitutionality of the 13th Amendment. The constitutional courts while adjudicating an issue which arguably is a political question, must factor the consequences of its action.⁵⁵ The appellate division of the Supreme Court's iteration that the judgment shall apply prospectively, certainly factored in the possible implications of its judgment but the court did not anticipate that its decision would give fillip and accord legitimacy to an immediate constitutional change eviscerating its decision about the prospective application of the judgment. The prospective application of the judgment is also irreconcilable with the central argument of the judgment. If CTG violates the basic structure of parliamentary democracy and independence of the judiciary, why should this unconstitutional mechanism be there to conduct the next two parliamentary elections⁵⁶. The ideals of parliamentary democracy and independence of judiciary certainly cannot be forsaken by the courts but CTG remaining accountable to the President, while the national parliamentary elections are being held, being declared violative of parliamentary democracy is open to

⁵³ Ali Riaz and Saimum Parvez, "Anatomy of a Rigged Election in a Hybrid Regime: The Lessons from Bangladesh," *Democratization* 28, no. 4 (June 2021): 801. See also Mathilde Maitrot and David Jackman, "Discipline, Development, and Duress: The Art of Winning an Election in Bangladesh," *Critical Asian Studies* 55, no. 3 (July 2023): 424.

⁵⁴ *Live Mint*, "Bangladesh Elections 2024 Highlights: PM Sheikh Hasina Re-elected for 5th Term in Office," March 17, 2024.

⁵⁵ Amal Sethi, "When Should Courts Invalidate Constitutional Amendments?" *Vienna Journal of International Constitutional Law* 18, no. 1 (March 2024): 25.

⁵⁶ In *Golaknath v. State of Punjab*, 1967 AIR 1643, the Supreme Court of India invalidated the constitutional amendments as unconstitutional but gave its judgment prospective operation, which effectively gave legitimacy to the constitutional amendments declared unconstitutional.

contestation. Similarly, the decision that a former Chief Justice of the Supreme Court heading the CTG and accountable to the President of Bangladesh violates the independence of the judiciary is again an equivocal claim. Even, the Indian Supreme Court in *Anoop Baranwal*⁵⁷ made the Chief Justice of India a nominee to the committee appointed by it to appoint the Chief Election Commissioner of India. The presence of the Chief Justice certainly instils confidence in the people about the process that she is part of. The Bangladesh Supreme Court ignored the fact that holding elections neutrally and ensuring a level playing field for the stakeholders has been a huge concern in Bangladesh, declaring the political consensus on the manner of holding the elections to be unconstitutional was a judgment bereft of the understanding of the realities of Bangladesh's politics.

III. THE BASIC STRUCTURE DOCTRINE - GLOBAL OR INDIGENOUS?

The acceptance of implied limits on the constitutional amendment power has travelled globally but whether the identification of implied limits must factor the local conditions or should it aspire for global constitutional ideals is another significant question. The decision of the Bangladesh Supreme Court in *Abdul Mannan Khan*⁵⁸ raises important questions about the need for the constitutional courts to understand the domestic needs and compulsions and not to be swayed by the lofty and celebrated constitutional values of democracies where the roots of electoral democracy and democracy, in general, are entrenched. The CTG system was based on an agreement between the two main political parties of Bangladesh, namely the Awami League and the BNP. Ensuring fairness and a level playing field for the political parties in Bangladesh has been a perennial concern. Therefore, simply scrapping it by declaring it to be inconsistent with the basic structure of the Constitution, amounts to throwing the baby out with the bathwater. Reading of implied limitations on the power of constitutional

⁵⁷ *Anoop Baranwal v. Union of India* [2023] 9 SCR 1.

⁵⁸ *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

amendment must factor the indigenous nature of the constitutional values and the consequences that the decision may give rise to in the domestic polity.⁵⁹

The Indian Supreme Court has measured its decisions about the unconstitutional constitutional amendments. It has, in general, factored the political fallout of its decisions declaring a constitutional amendment unconstitutional.⁶⁰ In *Golaknath*⁶¹ it chose prospective overruling, thereby ascribing legitimacy to the constitutional amendments declared unconstitutional in theory and hedged the displeasure to the government. Yet again, in *Kesavananda Bharti*⁶², the majority that articulated the basic structure doctrine did not declare the constitutional amendments challenged in the case to be unconstitutional. Then the *Minerva Mills*⁶³ judgment invalidated the constitutional amendment after the government that enacted it had fallen. Though in the *Supreme Court Advocates on Record*⁶⁴ case, the court seems to have taken the gamble that it can ensure that the collegium system of appointment of judges to the High Courts and the Supreme Court⁶⁵ will continue and hence declared the 99th constitutional amendment of 2014 providing for a national judicial appointments commission,⁶⁶ unconstitutional on the ground that it violated the independence of judiciary. This constitutional amendment had the overwhelming support of the political class in India where both the *Bharatiya Janata Party* led Union government and the opposition led by the Indian National Congress had come together. Yet, a

⁵⁹ Kawser Ahmed, "Revisiting Constitutional Review of Constitutional Amendments in Bangladesh: Article 7B, the Assaduzzaman Case, and the Fall of Basic Structure Doctrine," *Israel Law Review* 56 (March 2023): 263.

⁶⁰ Nicola Tommasini, "Judicial Self-Empowerment and Unconstitutional Constitutional Amendments," *International Journal of Constitutional Law* 22, no. 1 (March 2024): 161.

⁶¹ *Golaknath v. State of Punjab*, 1967 AIR 1643.

⁶² *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁶³ *Minerva Mills Ltd. & Ors v. Union of India & Ors.*, 1980 AIR 1789.

⁶⁴ *Supreme Court Advocates-on-Record Association and another v. Union of India*, (2016) 5 SCC 1.

⁶⁵ In *Re Special Reference No. 1 of 1998*, (1998) 7 SCC 739, the Supreme Court of India declared that the judges of the Supreme Court and the provincial High Courts (constitutional courts in India) shall be appointed based on the recommendations made by the collegium of Supreme Court judges to the President of India, and the President is bound by the recommendations made if it is reiterated by the collegium after a request by the President for the reconsideration of the name suggested for appointment. For the Supreme Court judges' appointment, the collegium shall consist of the Chief Justice of India and the four senior-most judges of the court while for the High Court judges' appointment, the collegium shall consist of the Chief Justice of India and the two senior-most judges of the Supreme Court. The Supreme Court held this in the course of interpreting the constitutional provisions (Articles 124 and 217) which provided that judges of the Supreme Court and High Courts are to be appointed by the President of India in consultation with the Chief Justice of India.

⁶⁶ The National Judicial Appointments Commission Act, 2014, August 21, 2024.

constitution bench of the Supreme Court of India by a 4:1 majority declared the amendment as unconstitutional. The entrenched roots of the respect for the judiciary in India ensured that there is no avowed backlash from the executive.⁶⁷ Yet, the government's reluctance in being commanded by the collegium to appoint a certain person of its choice as judges of the constitutional court has been clear.⁶⁸ There are several instances where a name recommended and reiterated by the collegium for appointment as the judge of a High Court has not been acted upon by the Government.⁶⁹ The Supreme Court has not done anything substantially while hearing pleas on the judicial side about the non-implementation of the collegium's recommendation by the Government of India except for orally asking the Government lawyers in the court about the reasons for the Government's inaction.⁷⁰

This again reflects the Supreme Court's awareness of a possible ugly fallout of such insistence which may bind the Government and therefore, an intelligent avoidance of it. If the collegium system of appointment is consistent with the independence of the judiciary which virtually excludes the executive from selecting judges, then certainly the act of the Government not notifying the names of persons recommended and reiterated by the collegium, violates the independence of the judiciary. This shows the limits of what can be achieved by the courts through the force of their judicial verdicts and the recognition of the same by the Supreme Court of India.⁷¹ It also ensures that a dialogue

⁶⁷ Law Minister, Mr. Ravi Shankar Prasad's displeasure over the judgment. See *NDTV*, "Logic of Order over Judges Appointments 'Flawed': Ravi Shankar Prasad," April 24, 2019.

⁶⁸ The then Union Law Minister of India, Kiren Rijju, was strongly critical of the collegium system for its "opaqueness", "unaccountability to the union law minister". *The Hindu*, "As Law Minister, Kiren Rijju took potshots at Indian judiciary," September 12, 2024. See also *LiveLaw*, "Collegium System Keeping Judges Extremely Busy, Adversely Affecting Their Duties: Union Law Minister Kiren Rijju," June 24, 2024.

⁶⁹ Saurabh Kirpal, a senior advocate, was recommended by the collegium of the Supreme Court of India to be elevated as a Judge of the Delhi High Court. The Government did not accept the recommendation by stating his "openly gay" orientation as a reason for possible "bias". *Bar & Bench*, "Law Ministry Says Saurabh Kirpal Openly Gay, Could Be Biased if Made Judge; Collegium Objects, Says Kirpal Competent, Will Add Diversity," May 21, 2024; *Bar & Bench*, "Cannot Reject Candidature of Saurabh Kirpal Based on Sexual Orientation: Supreme Court Collegium," July 13, 2024.

⁷⁰ *LiveLaw*, "'Collegium System Is the Law of the Land, Must Be Followed': Supreme Court Tells Centre; Asks AG to Advise Govt of the Legal Position," August 16, 2024.

⁷¹ Another instance could be the court's reluctance to enforce its judgment in *Sabarimala*. "Supreme Court refuses to Grant Early Hearing on Contempt Plea against Sabarimala Temple Chief Priest." See *The Hindu*, "Supreme Court Refuses to Grant Early Hearing on Contempt Plea Against Sabarimala Temple Chief Priest," August 16, 2024.

is ongoing between the Supreme Court and the Government and that the two have not reached a deadlock.

Judicialization of politics is inevitable in a divided polity but the constitutional courts while adjudicating the delicate questions involving deeply contested political issues, however the courts must be cognizant of the possible import of its adjudication. Deference to the political class in such matters is a better exercise of judicial authority and acumen. The basic structure doctrine must not be invoked in matters where a political issue is fiercely contested in a given polity. There must be a semblance of unequivocalness about the identification of the basic structure of the Constitution and its application by the judiciary in a democratic polity. In the absence of the unequivocal character, deference to the political class is the sensible judicial approach. The Chief Justice of Bangladesh Supreme Court is a non-partisan position and the CTG system was a non-partisan mechanism directed to ensure probity and fairness in the elections. The Bangladesh example has important lessons for the constitutional courts outside Bangladesh and especially in the neighbouring countries about how not to apply the basic structure of the Constitution doctrine and what are the limits of the Judicialization of politics.

IV. THE ROOM FOR CONTESTATION AND THE NEED FOR SUPERMAJORITIES

The 4:3 majority in *Abdul Mannan Khan* also reflects the equivocal nature of these claims. However, the most popular system of constitutional adjudication across the world is the decision by simple majority.⁷² Yet, when it comes to judging the constitutionality of legislation and the constitutionality of a constitutional amendment, the argument for the need for supermajorities for the declaration of unconstitutionality is gaining traction.⁷³ The argument for the need for a

⁷² Cristóbal Caviedes, "A Core Case for Supermajority Rules in Constitutional Adjudication," *International Journal of Constitutional Law* 20, no. 3 (September 2022): 1162.

⁷³ Cristóbal Caviedes, "Is Majority Rule Justified in Constitutional Adjudication?" *Oxford Journal of Legal Studies* 41 (2021): 376; Yaniv Roznai, "Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review," *Vienna Journal on International Constitutional Law* 14, no. 4 (2021): 355; Pablo Castillo-Ortiz, "The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions," *Law and Philosophy* 39 (2020): 617.

supermajority in constitutional adjudication faces the following theoretical challenges – it will make a declaration of unconstitutionality difficult and it may lead to constitutional courts getting paralyzed and the possibility of the executive branches exerting undue influence over courts.⁷⁴ However, these claims have not been tested, empirically. A recent study in respect of Mexico suggests that specific mechanisms governing judicial appointments and staggered terms can effectively mitigate the risk of executive wielding undue influence on the courts and that the supermajorities do not paralyze the court.⁷⁵ A theoretical distinction between the need for supermajorities in judging the constitutionality of ordinary legislation and constitutional amendments exists in general. The need for supermajorities for the declaration of unconstitutionality of a constitutional amendment can also be espoused based on the generic need of supermajorities for the legislature to amend the Constitution. The requirement of supermajority for constitutional amendments raises the quotient of democratic legitimacy of the constitutional amendment, hence, a declaration of unconstitutionality by a simple majority in an adjudication cannot have the effect of making the amendment unconstitutional. It can be argued that the requirement of a simple majority in constitutional adjudication to declare legislation unconstitutional which is enacted by a simple majority in the legislature cannot be applied to a constitutional amendment which cannot be enacted by a simple majority in the legislature.

The argument in favour of a supermajority for a constitutional adjudication is stated to be more viable in “well-functioning democracies”.⁷⁶ The reason is that in well-functioning democracies, the roots of constitutionalism are entrenched and the political class is not viewed as the entity from whom the Constitution needs protection. In this light, the decision of the Bangladeshi Supreme Court in *Abdul Mannan Khan* case⁷⁷, presents a curious example. Bangladesh, arguably, is not a “well-functioning democracy”, yet the decision of the court declaring

⁷⁴ Mauro Arturo Livera Leon, “Control and Paralysis? A Context-Sensitive Analysis of Objections to Supermajorities in Constitutional Adjudication,” *International Journal of Constitutional Law* 22, no. 1 (March 2024): 134.

⁷⁵ Leon, “Control and Paralysis,” 134.

⁷⁶ Caviedes, “A Core Case for Supermajority,” 1162.

⁷⁷ *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

the fifteenth constitutional amendment to be unconstitutional by a simple majority of 4:3 unravels the perils of constitutional adjudication of constitutional amendments by simple majority. The Bangladesh example displays the limits of the argument about the viability of supermajorities in constitutional adjudication in well-functioning democracies only. It shows that this may not be an appropriate global prescription.

This leads us to a conundrum where the democratic credentials of a state may not necessarily lead us to decide about the need for a supermajority in constitutional adjudication. A different normative framework may be required to ascertain the constitutional identity of a given polity in constitutional adjudication in not-so-well functioning democracies. The judges of constitutional courts in not-so-well functioning democracies need to make a distinction of the ‘*aspirational constitutional identity*’ from a ‘*workable constitutional identity*’. The theory of constitutional identity is not just limited to the normative prescriptions enshrined in a constitution.⁷⁸ It must factor in the descriptive realities of those normative prescriptions while probing a constitutional identity at a given point in time.⁷⁹ The majority of judges in *Abdul Mannan Khan* case⁸⁰ committed the mistake of striking down the 13th constitutional amendment on the parameters of the ‘*aspirational constitutional identity*’ by declaring the CTG system to conflict with the norms of parliamentary democracy and independence of the judiciary, ignoring the rare bipartisan political consensus on CTG that was germane to the 13th constitutional amendment in Bangladesh.

V. THE NAIL IN THE COFFIN: 15TH CONSTITUTIONAL AMENDMENT

The 15th Constitutional Amendment apart from abolishing the CTG system provided for a five-member Election Commission headed by the Chief Election

⁷⁸ Jacobsohn, “Constitutional Identity,” 361.

⁷⁹ Tiwari, “Law, Politics, and the Erasure,” 18. In the light of Indian Constitutional identity question, Tiwari argues “the rigidity underlying the continuity of constitutional identity as existential is hard to surpass, and therefore, the theory of constitutional identity cannot just confine itself to the textual promise of the constitutional text but must factor in the extent of acceptance of the constitutional promise within its fold.”

⁸⁰ *Abdul Mannan Khan v. Government of Bangladesh and Ors.*, (2012) 64 DLR (AD) 169.

Commissioner.⁸¹ The 15th Constitutional Amendment inserted a provision in the form of Article 7B of the Constitution. It read as under,

“Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.”

The aforesaid provision, while making some of the identified parts and provisions of the Constitution unamendable, also contained a declaration about the unidentified basic structures of the Constitution that shall also remain unamendable. So, 7B provided for two sets of basic structures of the Constitution, the identified and unidentified. The unidentified basic structure kept the relevance of judicial articulation of basic structure while determining the validity of future constitutional amendments. The first part, however, was extraordinary. A constitutional amendment declaring provisions of the Constitution including the parts added by the same constitutional amendment unamendable, is unprecedented. It is also astounding that it prohibited amendments in the identified unamendable provisions and parts, even by *insertion*. An amendment by way of modification, substitution or repeal is understandable to the extent that the Parliament desired absolute protection for what is considered to be unamendable. But to prohibit future insertions through a constitutional amendment amounts to a categorical pre-emption the intelligence of future generations.

The identification of the parts and provisions of the Constitution as unamendable reflects not only an attempt to pre-empt a future judicial affirmation but also reflects the distrust in the ability and acumen of the judiciary to correctly articulate the basic structure of Bangladesh’s Constitution. The important question to raise here is whether such a constitutional amendment which identifies basic structures by making them unamendable, be declared unconstitutional because it violates the basic structure of the Constitution. What possibly could

⁸¹ Article 118 of the Constitution of Bangladesh as amended by the 15th Constitutional Amendment, September 1, 2024 at <http://bdlaws.minlaw.gov.bd/act-details-367.html>.

be the basic structure that it is violating? A constitutional amendment declaring the amendment to be part of the basic structure of the Constitution, clearly violates the power of judicial review of the constitutional courts which is the basis of the implied limitation on amendment power principle. In the absence of the constituent assembly providing for the unamendable basic structures or the eternity clauses of the Constitution, the same can only be identified by the judiciary while determining the constitutional validity of constitutional amendments in a petition challenging the constitutionality of the constitutional amendment. Identification of unamendable basic structure by a constitutional amendment is therefore unconstitutional, being contrary to the doctrine of separation of powers and exclusion of judicial review. The other possible basic structure that such a constitution may be declared violative of, is that, it curtails the will of the future Parliament. How can a Parliament declare its supremacy over all future Parliaments by declaring that what it considers unamendable in the Constitution, must remain untouched by the future Parliaments? This certainly is an unconstitutional prohibition on the legitimate future expression of the will of the Parliament.

Another fundamental flaw in provision 7B is that it considers provisions of the Constitution as the custodians of basic structure and not fundamental values of the Constitution. The Bangladesh Supreme Court adopted the basic structure doctrine from India and the Indian jurisprudence of basic structure is not about the provisions of the Constitution. In *Kesavanand Bharati*, Sikri C.J. wrote “every provision of this Constitution can be amended provided that the basic foundation and structure of the Constitution remains the same.” Under Article 31C of the Constitution of India, a law made by the Parliament may violate Article 14⁸², yet the law shall not be unconstitutional. The Supreme Court declared this to be constitutional in *Minerva Mills*.⁸³ The right to Equality is certainly the basic

⁸² As inserted into the Constitution of India by The Constitution (25th Amendment) Act, 1971. Article 31C gives primacy to laws enacted for fulfilling the directives flowing from Articles 39(b) and 39 (c) of the Constitution of India providing for the equal distribution of wealth and non-concentration of wealth in the hands of few persons, over Article 14 which provides for the fundamental right to equality. The egalitarian equality embodied in these directives meant that Article 31C does not violate equality as a constitutional value.

⁸³ *Minerva Mills Ltd. v. Union of India*, (1980) 2 SCC 591.

structure of the Constitution of India but the text of Article 14 does not exhaust the concept of the right to equality and, therefore, the right to equality as a basic structure may remain intact, even though a law may tinker with the text of Article 14. This clearly shows that the basic structure of the Constitution of India are fundamental values that it espouses and therefore, all the provisions of the Constitution can be legitimately amended. Unlike this, Article 7B of Bangladesh's Constitution identifies the Parts and provisions of the Bangladesh Constitution as the unamendable basic structure. The identification of individual provisions of the Constitution as unamendable basic structure prohibits any room for the better articulation of the same idea espoused by the existing provision which is declared as the unamendable basic structure.

Further, a drafting flaw is that Article 7B starts with a non-obstante clause giving it precedence over Article 142, which provides for the power to amend the Constitution. Ironically, Article 142 states that, "*Notwithstanding anything contained in this Constitution- (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament...*" Both Articles 7B and 142 were substituted by the 15th Constitutional Amendment. Logically, it seems that the Parliament wanted precedence of Article 7B over Article 142, but how the two provisions appear in the Constitution, brings the two provisions on a direct collision path.

5.1. Embodying eternity: Article 7A of the Constitution of Bangladesh

Another extraordinary provision inserted into the Constitution of Bangladesh by the 15th Constitutional amendment was Article 7A of the Constitution. The provision reads as under-

“(1) If any person, by show of force or use of force or by any other unconstitutional means-

(a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its articles; or

(b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its articles,

his such act shall be sedition and such person shall be guilty of sedition.

(2) If any person-

(a) abets or instigates any act mentioned in clause (1); or

(b) approves, condones, supports or ratifies such act,

his such act shall also be the same offence.

(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws.”

One can argue that there is a historical context to this provision and it is directed against any attempt to replace the parliamentary democracy, as it had happened in the past when Bangladesh witnessed military rule. Yet, reading Article 7A along with Article 7B makes the implications of Article 7B more far-reaching than simply addressing the historical context of an armed or military coup. As per this provision, the suspension, abrogation or repeal of even a provision of this Constitution by unconstitutional means is a seditious act punishable with the highest punishment. This would mean that any future attempt to suspend, abrogate or repeal a provision declared unamendable basic structure by Article 7B would become an act of sedition under Article 7A. A constitutional amendment attempting to alter the eternity clause would make the resort to constitutional amendment an exercise of *unconstitutional means*. This could even encompass a judicial articulation declaring any of the inserted eternity clauses unconstitutional. Such a provision smacks of any semblance of democratic constitutionalism and brings to fore the arbitrary and whimsical nature of the exercise of brute majoritarian legislative power.

VI. CONCLUSION

The Bangladesh example reveals the extremes of what must not be done, both by the constitutional courts and legislature in respect of the constitutional amendments. It informs the constitutional courts to exercise restraint while dealing with the political class's action taken with rare consensus among the

government and the opposition. Insistence on aspirational constitutional identity emulating other State's polity where the democratic roots are entrenched is not always desirable. Judicial review of constitutional amendments must factor the consequences of the declaration of unconstitutionality. A rare political consensus on the mode of conducting elections in the country effected through a constitutional amendment cannot be termed unconstitutional on the equivocal yardsticks of parliamentary democracy and independence of judiciary. It was specifically argued before the appellate division of the Bangladesh Supreme Court that social and political values of a system inform the legal values and therefore, the Constitution cannot be interpreted independent of those social and political values.⁸⁴

The manner of placing reliance on foreign judgment remains under-examined by the constitutional courts.⁸⁵ Following factors determine the weight and acceptability of foreign precedents - historical association, incidence of cognate legal system and the analogous nature of legal and particularly constitutional systems.⁸⁶ The acceptance of basic structure doctrine has crossed the historical and cultural barriers owing to the inherent appeal of the theory of implied limitation on the power of constitutional amendment. Nevertheless, the recognition of a basic structure to judge the constitutionality of a constitutional amendment must examine the historical and constitutional proximity of the two systems while placing reliance on a foreign judgment. It is here that an ethnographic identification of the constitutional identity is required. If the same calls for deference to the will of the legislature, then deference has to be accorded by the constitutional courts. The hindsight luxury enables us to state that the decision to declare the 13th constitution amendment of Bangladesh as unconstitutional was a blunder. However, a dispassionate inquiry, independent of the aftermath, can also reveal how the decision of the majority was flawed.

⁸⁴ Ridwanul Hoque, "The Evolution of the Basic Structure Doctrine in Bangladesh: Reflections on Dr. Kamal Hossain's Unique Contribution," *The Indian Journal of Constitutional Law* 10 (2023): 44.

⁸⁵ Madhav Khosla, "Inclusive Constitutional Comparative: Reflections on India's Sodomy Decision," *The American Journal of Comparative Law* 59, no. 4 (October 2011): 909.

⁸⁶ Pradyumna K. Tripathi, "Foreign Precedents and Constitutional Law," *Columbia Law Review* 57, no. 3 (May 1957): 319.

It therefore calls for an ethnographic⁸⁷ reading of constitutional identity, where legality of actions is construed in the backdrop of the history, culture and social support in a given polity.

The attenuated democratic pedigree of a constitutional amendment compared to the constituent power which stems from the ‘primordial act of founding a political community’⁸⁸ means that the constitutional amendment cannot undo the essence of what has been constituted by the constituent power. A constitutional amendment therefore must not embark on the task of declaring the ‘unamendables’ in the Constitution. Such an exercise exhibits obvious distrust for the sagacity of the constitutional courts and at the same time, it presupposes the will and wisdom of the incumbent legislature to be superior to all future legislatures. It therefore suffers from the vice of being an unconstitutional constitutional amendment.

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⁸⁷ Kim Lane Scheppele, “Constitutional Ethnography: An Introduction,” *Law & Society Review* 38, no. 3 (September 2004): 389–406.

⁸⁸ Upendra Baxi, “A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence,” *International Journal of Constitutional Law* 1, no. 4 (October 2003): 557–89, 587

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RESPONSIBLE INVESTMENT WITHIN THE FRAMEWORK OF SUSTAINABLE DEVELOPMENT: A COMPARATIVE CONSTITUTIONAL LAW PERSPECTIVE

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Received: 29 January 2025 | Last Revised: 15 April 2025 | Accepted: 25 April 2025

Abstract

Over the past few decades, sustainable development (SD) has rapidly spread into domestic legal systems after establishing itself as a norm under international law. It incorporates environmental, economic, social, and governance dimensions. This concept has evolved into a constitutional value that integrates environmental, human rights, and economic dimensions, closely aligned with responsible investing and investment law principles. This resulted in responsible investing, in which the investor should incorporate environmental, social, and governance factors and public values in company and asset management decisions. SD requires a balance between economic growth and ecological protection to ensure that future generations possess both resources and rights to economic development. Investment projects should adhere to principles and obligations that promote balance and integration for sustainable growth. Investment projects should contribute to developing a work environment capable of accommodating significant economic, social, and environmental changes, in addition to their profitability and financial status. The study explores sustainable development as

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a constitutional value and an international standard, emphasising responsible investment under international and constitutional norms that balance the investor's right to profit with the host nation's right to economic advancement. The study examines how law might be used as a regulatory framework in this context. Investors are dedicated to integrating human rights, environmental conservation, social advancement, and effective governance into investment decision-making. Nonetheless, the primary focus remains the comparative constitutional legal viewpoint on responsible investment within sustainable development.

Keywords: Comparative Constitutional Law; International Investment Law; Responsible Investment; Social Responsibility; Sustainable Development; Sustainable Development Goals

I. INTRODUCTION

The concept of sustainable development has emerged as a crucial framework to guarantee a more balanced and equitable future as the modern world is under increasing strain from environmental issues and socioeconomic disparities. According to the United Nations' definition, sustainable development is the strategy to fulfil present requirements without compromising the ability of future generations to satisfy their own needs.¹ This principle underscores the imperative to develop a cohesive plan integrating social equality, economic prosperity, and environmental preservation into a unified framework.²

Constitutional recognition of sustainable development establishes a robust basis for reconciling the frequently opposing interests of individual rights and public welfare. It provides the legal framework to align environmental stewardship with economic growth, ensuring that development programs do not compromise societal welfare or ecological integrity.³

Recently, sustainable development has evolved into a crucial principle. This demonstrates that individuals have altered their perceptions of responsibilities and obligations regarding sustainability, which they now acknowledge as a

¹ James Crawford, "Sustainable Development and International Law," *Journal of International Economic Law* 24, no. 2 (June 2022): 214.

² Ilaria Dubava, "Reconciling International Investment Law and Sustainable Development: Normative Incompatibility and a Way Forward," *European Journal of International Law* 25, no. 2 (June 2014): 78.

³ James R. May and Erin Daly, "Global Environmental Constitutionalism," in *Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2018), 45.

fundamental principle.⁴ Numerous states are integrating it into their legal frameworks to guarantee economic sustainability while fostering social fairness and safeguarding the environment. This approach involves the constitutionalizing of sustainability.⁵

The paper, “Responsible Investment in the Framework of Sustainable Development: A Comparative Constitutional Legal Perspective,” looks at how countries’ responsible investors might achieve the SDGs in accordance with international and constitutional requirements. To attain the Sustainable Development Goals (SDGs), nations must formulate long-term strategies grounded in refined policies, enhanced international collaboration, and mobilising more public and private resources to fund the necessary expenses. Therefore, responsible investors play a crucial role in attaining sustainable development by adhering to pertinent international and constitutional norms. Despite the progress made since the adoption of the SDGs, investors remain accountable for the companies in which they invest. In 2006, the preamble to the establishment of the six Principles of SD stated that their implementation might enhance the alignment of investors with the “broader objectives of society.”

The principle of sustainable development as a constitutional value is the study’s central issue. Therefore, does this principle, along with its constitutional safeguarding of environmental and human rights, influence the willingness of investors to agree to particular conditions in investment treaties or contracts? This paper seeks to illustrate that adherence to sustainable development goals leads to responsible investment, which reconciles the host country’s entitlement to economic growth with the rights of investors, through applying environmental, social, and governance (ESG) criteria in investment decision-making. The research methodology examines the role of national constitutions and international environmental and human rights treaties concerning states’ authority to enter into investment treaties, particularly regarding imposing restrictions on

⁴ Muhammad Taufiq Ladan, “Achieving Sustainable Development Goals through Effective Domestic Laws and Policies on Environment and Climate Change,” *Environmental Policy and Law* 48, no. 1 (March 2018): 112.

⁵ Petra Minnerop, “The Climate Change Judgment of the German Federal Constitutional Court: Judicial Innovation or Incremental Development?” *Journal of Environmental Law* 34, no. 1 (March 2022): 189.

ecological protection and human rights considerations. The study indicates that states are dedicated to incorporating human rights, environmental protection, enhancement of social conditions, and good governance into the conventional investment decision-making framework.

II. THE EMERGENCE OF SD AS AN INTERNATIONAL LAW NORM

This part of the research investigates the emergence of sustainable development in international investment law. Under this title, questions concerning the new trend and those related to the elements of SD and its integration into international investment law will be addressed.

2.1. Critical Overview

The function of international investment law has been significantly transformed by integrating the notion of sustainable development (SD). Due to advancements influenced by SD on investment, traditional philosophy is no longer upheld.

2.1.1. Traditional View

International investment law has developed into a distinct subject within the broader context of international law. It is one of several subcategories of public international law, including human rights and environmental law, pertinent to sustainable development. Historically, International investment law, although it fosters economic progress, has mainly concentrated on safeguarding foreign investment, which was widely regarded as essential for sustained growth.⁶ It has been known to the World Bank since the 1960s that private foreign investment is a key component of economic growth. Thus, an impartial and self-governing international tribunal that resolves conflicts improves the nation's investment climate. The International Centre for Settlement of Investment Disputes (ICSID) was established by the ICSID Convention, which addresses resolving investment

⁶ Marc Bungenberg et al., *International Investment Law: A Handbook* (London: Bloomsbury Publishing, 2015), 369.

disputes involving governments and foreign nationals.⁷ It provides an impartial forum for settling investor-state disputes through mixed arbitration free of political interference.

Attempts to create international regulations regarding substantive protection criteria within a multilateral, supra-regional framework have failed.⁸ Consequently, a framework of bilateral treaties (BITS) was instituted. Upon the conclusion of the ICSID Convention, nations have established numerous Bilateral Investment Treaties (BITS), which often incorporate arbitration before ICSID tribunals as a mechanism for dispute resolution.⁹ Recently, nations have increasingly engaged in bi- or multilateral free trade agreements encompassing investment protection clauses featuring investor-state dispute resolution frameworks.¹⁰

These agreements go beyond the ICSID Convention by defining “investment” and binding obligations for states when dealing with foreign investors and people. In most cases, the guarantees cover the following: 1. compensation for expropriations or comparable actions; 2. promise of impartial and fair treatment; 3. complete protection and security; 4. equal treatment as domestic entities; 5. treatment on par with the most favoured nation; 6. the ability to transfer investment and profit funds within and outside the country; 7. a general provision that guarantees the State will fulfil its obligations to foreign investors.

Typically, these treaties do not require the exhaustion of local legal remedies before commencing legal proceedings against the host State concerning the investment. Tribunals have the authority to grant financial compensation for authorised asset confiscation or to provide restitution for losses incurred due to a violation of the investment treaty. In ICSID arbitration, the financial obligations established by a verdict are legally enforceable in all nations that sign the ICSID Convention. Assume both parties’ consent to alternative arbitration norms. The

⁷ “Convention on the Settlement of Investment Disputes between States and Nationals of Other States,” opened for signature March 18, 1965, United Nations Treaty Series, no. 8359, vol. 575, registered October 17, 1966.

⁸ R. Hofmann and C. J. Tams, *International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law* (Baden-Baden: Nomos, 2011), 10.

⁹ United Nations Trade and Development Agency, *Investment Policy Hub Report, Treaties with Investment Provisions* (December 2023), UNCTAD.

¹⁰ UNCTAD, *Investment Policy Hub Report* (December 2023).

acknowledgement and implementation of awards may be executed under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹¹. The principal objective of state parties in entering investment protection treaties is to promote and enhance economic development.

2.1.2. Developments

The term ‘sustainable development’ is well established in international politics and has rapidly gained significance in contemporary international law. Recently, there has been an increasing focus on sustainable development, resulting in the incorporation of specific terminology in investment protection treaties designed to harmonise investment protection objectives with sustainable development.¹² In 1987, the World Commission on Environment and Development, in its report “Our Common Future,” defined sustainable development as progress that satisfies current demands without jeopardising the capacity of future generations to fulfil their own needs.¹³ For various reasons, this is nevertheless a relatively succinct presentation of the core ideas of sustainable development. This description acknowledges the limited capacity of our planet and its natural resources. Moreover, it addresses the needs of future generations, including our grandchildren, to meet their wants, underscoring the principle of intergenerational equity. Consequently, sustainable development expanded significantly in subsequent years since it encompassed several issues such as economic progress, environmental preservation, and social enhancement.¹⁴

International investment protection and sustainable development seek to create a global framework based on the rule of law, providing an adequate legal basis for investments to foster sustainable development. The relationship between a regulatory framework based on the rule of law and the advancement of

¹¹ “Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” adopted June 10, 1958, entered into force June 7, 1959, UN Treaty Series, vol. 330.

¹² Kathryn Gordon, J. Pohl, and M. Bouchard, “Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey,” *OECD Working Papers on International Investment* 2014/01 (2014): 5–6.

¹³ UN, “Report of the World Commission on Environment and Development: Our Common Future,” UNGA Res 42/87, December 11, 1987.

¹⁴ International Court of Justice (ICJ), *Gabčíkovo-Nagyymaros Project* (Hungary/Slovakia), Judgment of September 25, 1997, *ICJ Reports* 1997, para. 140.

sustainable development is particularly evident in eco-friendly energy production. In this context, investment will be essential to successfully transitioning to more ecologically sustainable technology. An explicit purpose is to guarantee the enduring sustainability of the energy sector without undermining living standards or endangering social and environmental protections, which could impede nations' ability to fulfil their aspirations about environmental preservation and human rights. To stimulate private investment in the green economy, creating a comprehensive legislative framework that incorporates an efficient conflict resolution process and binding rulings is imperative. At the same time, this system must support the fundamental laws that states impose to balance the various, sometimes-contradictory interests of human rights, environmental preservation, and economic advancement. This aim is implied in the concept of sustainable development. International investment legislation may facilitate the procurement of essential financial and technological resources to advance the green economy and create the requisite conditions for the fulfilment of human rights, which are vital for the developmental dimension of sustainable development.¹⁵

2.2. The Foundations and Tenets of Sustainable Development

Sustainable development is founded upon and incorporates three principal components of international law: 1. international environmental law; 2. international economic law, about development; and 3. human rights law, encompassing substantive and procedural dimensions. Thus, sustainable development represents the most beneficial elements of all the situations that could occur. The year 2015 has been eventful. Faced with exceptional problems, the world has come together in two unprecedented agreements: the Sustainable Development Goals within the 2030 Development Agenda, agreed in September, and the Paris Climate Change Agreement. These agreements focus on the result that will be attained, the goals: The Paris Agreement, among other things, aims

¹⁵ Mohamed A. Abdelhadi, "State Objections to the Illegality of Investment in Investor-State Arbitration," *Journal of Law and Economic Research*, no. 2 (2024): 128.

to keep global average temperature increases well below 2°C and work to restrict them to 1.5°C. The SD goals prioritised poverty eradication and sustainable development in the 2030 development agenda, noting that there is little prospect for human development without it.

Several fundamental components (principles) make up sustainable development. As established by international law, the primary principle is the sustainable use of natural resources. Numerous treaties emphasise this aspect, irrespective of their specific focus. The second is environmental preservation, essential to sustainable development and achieving its facets. Third, equity involves fairness and justice, addressing the needs of both current and future generations. The fourth is sustainable development's temporal dimension, which encompasses short and long-term timeframes. This is especially evident in the 2015 Paris Climate Treaty.¹⁶ Immediate action is necessary to prevent additional harm to the essential planetary climate system. A long-term plan is required. The Paris Agreement calls for a global temperature increase of no more than two degrees Celsius by 2100 and for us to become as energy-neutral as possible by 2050. The fifth component pertains to human rights, public engagement, and equitable justice for all individuals.

Integration as an element of SD in terms of how to integrate environmental, developmental, and human rights concerns into a comprehensive, integrated, and effective international law system in pursuit of sustainable development is still the most important element that requires more effort by the international community.

It is possible that the beginnings of sustainable development in international law can be traced back to several early treaties. These treaties include those concerning the management of nature and the prevention of river pollution. Several of these treaties date back to the nineteenth century. The concept of sustainable development, in its legal form, was initially presented during the time of the United Nations by using instruments that were not legally binding.

¹⁶ "The Paris Agreement," adopted in Paris on December 12, 2015, entered into force November 4, 2016, United Nations Treaty Series, no. 54113, vol. 3156.

The *1972 Stockholm Declaration*¹⁷ and the *1992 Rio Declaration on Environment and Development*¹⁸ have prioritised sustainable development in global politics. New multinational environmental accords were shortly achieved in their course. Many additional initiatives were built upon the Stockholm Declaration, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973) the 1974 Convention on Wetlands of International Importance especially as Waterfowl Habitat.¹⁹ *The Rio Declaration* also led to the creation of several important treaties, such as the UN Climate Change Convention in 1992, the Convention on Biological Diversity, and the Ozone Convention and its Montreal Protocol, which were adopted earlier and have successfully protected the ozone layer.²⁰ Therefore, one can currently observe the integration of the concept of sustainable development in international accords. Adopting the 1994 treaty that formed the World Trade Organisation is also a significant example since it incorporates sustainable development as a key purpose of this new global economic entity.

2.3. SD is the Essential Substance of Modern Investment Treaties

Historically, as demonstrated above, investor protection treaties seldom mention sustainable development or its many aspects, such as environmental protection, labour rights, or human rights. There has been a shift in recent years, and investment protection treaties now commonly incorporate sustainable development-related topics. The UNCTAD investment policy website displays a vast number of investment protection agreements. However, only 39 refer to all three sustainable development-related issues: health and environment, corruption, and labour.²¹ In addition, among the 302 treaties mentioned between January 1, 2014, and May 16, 2022, a total of 77 treaties have been studied. Out of these

¹⁷ UN Conference on the Human Environment, Stockholm, June 15–16, 1972.

¹⁸ UN, "Rio Declaration on Environment and Development," UNGA Doc A/Conf.151/26(Vol 1), annexed to the Report of the UN Conference on Environment and Development, August 12, 1992.

¹⁹ "Convention on Wetlands of International Importance Especially as Waterfowl Habitat," adopted in Ramsar, Iran, February 2, 1971, entered into force December 21, 1975, UNESCO, United Nations Treaty Series, no. 14583, vol. 996.

²⁰ "Montreal Protocol on Substances that Deplete the Ozone Layer," adopted September 16, 1987, entered into force January 1, 1989, United Nations Treaty Series, no. 26369, vol. 1522.

²¹ UNCTAD.

77 treaties, 27 specifically address all three concerns associated with sustainable development.²²

The mention of sustainable development or its elements is more frequently seen in the introductory section of treaties. The 2015 Canada/Burkina Faso Bilateral Investment Treaty includes references to sustainable development and many topics related to it.²³ Another example is the 2002 Austria/Malta BIT, which can serve as an example of a treaty that contains only a reference to one SD-related issue in its preamble, namely, workers' rights: "*Reaffirming* their commitment to the observance of internationally recognised labour standards, in striving to achieve the objectives of this Agreement".²⁴ Since the preamble of a treaty is an essential component of the document in the event of interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties, and because it seeks to ensure sustainable development or its elements on the one hand, such treaty language in preambles serves important interpretive purposes.²⁵

In most cases, when SD or any of its parts are talked about, an investor cannot expect the host state to stop doing things that help these goals, even if those things hurt the investment. Using this language shows that the agreement parties want to keep their power to carry out public policies that support sustainable development. In this situation, the Preamble's requirements sometimes match the language used in the Annexes of investment protection treaties' meanings of expropriation. The Canada/Burkina Faso Bilateral Investment Treaty (BIT) exemplifies this particular strategy.²⁶ Considering the presence of such a provision, activities undertaken to protect sustainable development

²² OECD, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (Working Papers on International Investment, January 2014).

²³ "Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments," adopted April 20, 2015, entered into force October 11, 2017, United Nations Treaty Series, no. 55913.

²⁴ "Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments," adopted June 29, 2002, entered into force March 1, 2004, UNCTAD.

²⁵ Article 31 of the 1969 Vienna Convention on the Law of Treaties, General rule of interpretation stated that: 1. a treaty shall be interpreted in good faith under the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose. 2. The context for the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. "Vienna Convention on the Law of Treaties," done at Vienna on May 23, 1969, entered into force January 27, 1980, United Nations Treaty Series, vol. 1155.

²⁶ "Agreement between the Government of Canada and the Government of Burkina Faso for the promotion and protection of investments (with annexes)," adopted in Ottawa on 20 April 2015, entered into force on 11 October 2017., United Nations Treaty Series no. 55913.

objectives will be regarded as indirect expropriations only under extraordinary circumstances.²⁷ Certain treaties contain provisions that forbid lowering standards in the agreement's main body. These clauses include a stipulation requiring the Parties to consult one another if one Party suspects the other has breached the clause. The 2016 Bilateral Investment Treaty (BIT) between Canada and Mongolia contains an example of such a clause.²⁸

The case law shows that investment tribunals have been aware of corruption problems for a long time. They typically look to “host state law” rules for guidance when faced with such a situation. Depending on the exact text of the treaties, investment protection agreements may reject jurisdiction or deny the validity of a claim if corruption is shown. Despite lacking a “following host State law” clause, they managed to do this. Several states have recently included explicit references to the 2003 UN Convention against Corruption in the introductory declarations or provisions of bilateral investment treaties.²⁹ The treaties do not outline any fines for investors, but it is unlikely that a tribunal would uphold the validity of an investment acquired through deception.³⁰

Declaring clearly in investment protection treaties that both States expect investors to uphold corporate social responsibility and fulfil their business and human rights commitments is another way for States to encourage sustainable development. In this sense, the inclusion of terms in treaties may differ. Treaties often underscore that States should encourage and assist investors in complying with the OECD Guidelines for Multinational Enterprises or the UN Guiding Principles on Business and Human Rights. Some individuals explicitly recognise

²⁷ August Reinish and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge: Cambridge University Press, 2020), 100–111.

²⁸ “Agreement between Canada and Mongolia for the Promotion and Protection of Investments,” Article 15, UNCTAD.

²⁹ “United Nations Convention against Corruption,” adopted October 31, 2003, entered into force December 14, 2005, United Nations Treaty Series, no. 42146.

³⁰ For an example, Article 16 Canada/Mongolia BIT (2016) that states “Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations, and anti-corruption. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.” See “Agreement between Canada and Mongolia for the Promotion and Protection of Investments,” Article 16, UNCTAD.

these soft law instruments, while others merely refer to them in general terms, regarding the responsibilities of investors and home states concerning foreign investments.

Furthermore, treaties impose obligations on investors in certain situations. One example of a treaty that included provisions for investor duties within the scope of sustainable development is the 2016 Morocco/Nigeria Bilateral Investment Treaty (BIT).³¹ According to Article 14 of the treaty, investors must comply with environmental impact assessment protocols and conduct social impact evaluations. As they think about the environmental impact assessment and how it will be implemented, they also need to follow the precautionary principle.³² Article 18 (1) mandates that investors are accountable for maintaining an environmental management system following its establishment. It delineates specific criteria for the allocation of resources. The pact contains two sections that specifically address human rights issues. Article 15 delineates the obligations of the state parties, which will furnish essential context for the interpretation of the investment protection standards within the treaty. This contrasts with Article 14, which addresses the obligations of investors. Article 18 (2) - (4) delineates the obligations of investors post-establishment to maintain essential labour standards.³³ Moreover, the investor must manage and direct the investment under the human rights standards agreed upon by the investor's home and host states. It is defined in Article 17 what does not fall "under the laws of the host country" and what the obligations of investors are in fighting corruption. According to tribunals that previously used this clause, investments obtained by corrupt means are not eligible for investment protection. Furthermore, according to Article 20, in the event of serious harm, physical injury, or death in the host state, the investor's home state is held civilly liable.

³¹ "Agreement between Morocco and Nigeria on Investment Promotion and Protection," adopted December 3, 2016, UNCTAD.

³² "Agreement between Morocco and Nigeria on Investment Promotion and Protection," Article 14, UNCTAD.

³³ "Agreement between Morocco and Nigeria on Investment Promotion and Protection," Article 18(1), UNCTAD. Investments shall, in keeping with reasonable practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.

III. PRINCIPLE OF SUSTAINABLE DEVELOPMENT AS A CONSTITUTIONAL VALUE AND RESPONSIBLE INVESTMENT

In this section, the paper will examine two main issues: the first explains the constitutional context of the concept of sustainability, and the second addresses the impact of constitutionalization on sustainable development.

3.1. The Constitutional Context of the Concept of Sustainability

From a comparative constitutional approach, it is imperative to explore the constitutional status of sustainable development and its impact on investment and responsible investors.

3.1.1. Constitutionalising Sustainability

Constitutionalizing sustainability to gain its current status of constitutional value in many nations reflects the increased awareness of the interconnection of existing economic development, social equity, and environmental health. People in most lands now believe the relationship between these elements must be balanced.³⁴ As the states continue to deal with climate change, they increasingly understand the importance of sustainability. They are consistently drifting toward incorporating sustainability as a vital part of their constitutional frameworks.³⁵ It also indicates a massive shift in legal thinking. The process necessitates acknowledging that sustainability is not just a policy objective but must be treated as a fundamental legal value guiding individual behaviour and state action.³⁶

Norway's constitution was amended in 2014, emphasizing the need for the state to manage its natural resources more sustainably and promote the defensive principle. This constitutionalizing proves that the state is fully committed to

³⁴ Irina Gerasimova, "Environmental Justice and Sustainable Development: A Comparative Analysis," *Journal of Environmental Law* 29, no. 2 (July 2017): 234.

³⁵ Jonathan Wright, "Constitutional Environmentalism: The Evolution of Sustainability as a Legal Principle," *Georgetown Environmental Law Review* 32, no. 1 (Winter 2020): 118.

³⁶ James R. May and Erin Daly, "Global Environmental Constitutionalism," in *Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2018), 42.

balancing its economic development with conservation efforts to protect the environment.³⁷

Another example is South Africa. Its constitution was passed in 1996 and contains information that accords environmental rights. The constitution clearly says that citizens' right to live in an environment that is not polluted and is not harmful to their health.³⁸ This means the country has recognized the connection between human rights and environmental protection. Therefore, it seeks to achieve social justice through sustainability. The constitution also mandates that national initiatives include reasonable legislative actions to prevent pollution and ecological degradation while promoting conservation and sustainable development.³⁹

Ecuador has also constitutionalized sustainable development. Its 2008 Constitution granted the nature of having legal rights.⁴⁰ This constitution states that nature must be given rights and respected, ensuring its generative properties are not negatively affected. It provides innovative approaches to ensuring that the country protects the environment. As a result, people are empowered to take legal actions on behalf of nature during ecological harm.⁴¹

The Egyptian Constitution of 2014 is one of the Arab constitutions that paid great attention to the constitutionalizing of the principle of sustainable development. Article (27) stipulates that "the economic system aim to achieve prosperity in the country through sustainable development and social justice, in a way that ensures raising the real growth rate of the national economy, raising the standard of living, increasing job opportunities, reducing unemployment rates, and eliminating poverty. The economic system is socially committed to ensuring equal opportunities and fair distribution of development returns, reducing income disparities, and committing to a minimum wage and pension that guarantees a decent life and a maximum in state agencies for all those who

³⁷ Christina Voigt, "The Principle of Sustainable Development: Integration and Ecological Integrity," in *Sustainable Development as a Principle of International Law* (Leiden: Martinus Nijhoff Publishers, 2009), 145.

³⁸ Ibon Galárraga, "Constitutional Environmental Rights and Sustainable Development," *Journal of Environmental Policy & Planning* 22, no. 3 (May 2020): 386.

³⁹ Galárraga, "Constitutional Environmental Rights and Sustainable Development," 387.

⁴⁰ Galárraga, "Constitutional Environmental Rights and Sustainable Development," 389.

⁴¹ Esperanza Martínez, "The Rights of Nature in Ecuador's Constitution," *Environmental Policy and Law* 46, no. 1 (February 2016): 89–92.

work for a wage, in accordance with the law.⁴² The article (46) of the Constitution explicitly states that every person has the right to a healthy environment, and its protection is a national duty. The State is committed to taking the necessary measures to preserve it, not harm it, and to the rational use of natural resources in a way that ensures sustainable development and guarantees the rights of future generations therein.⁴³

Among the Arab constitutions that refer to the principle of sustainable development, the Qatari Constitution of 2003. The article (33) states that the state shall work to protect the environment and its natural balance, in order to achieve comprehensive and sustainable development for all generations.⁴⁴ The Tunisian Constitution 2014, in the article (12), states that the state seeks to achieve social justice, sustainable development, and equality based on the principle of positive discrimination. In addition, it works based on the interests of development and the common good of national wealth.⁴⁵

In the same context, the Omani Constitution of 2021 stipulated in Article (15) that the state works to protect the environment and its natural balance, to achieve comprehensive and sustainable development for all generations, and citizens and residents must preserve it and not harm it.⁴⁶ The article (14) also stipulates that the state guarantees freedom of economic activity based on social justice, cooperation, and balance between public and private activities to achieve economic and social development, increase production, achieve prosperity for citizens, raise their standard of living, provide them with job opportunities, and eliminate poverty.⁴⁷

The countries considered here come from different regions of the world and reflect what their fellow states are doing as they increasingly recognise the sustainability principles and adopt them in their constitutions. Nonetheless,

⁴² Constitution of the Arab Republic of Egypt, art. 27 (2014), 15.

⁴³ Constitution of the Arab Republic of Egypt, art. 46 (2014), 22.

⁴⁴ Permanent Constitution of the State of Qatar, art. 33 (2003), 18.

⁴⁵ Constitution of the Republic of Tunisia, art. 12 (2014), 8.

⁴⁶ Basic Law of the Sultanate of Oman, art. 15 (2021), 9.

⁴⁷ Basic Law of the Sultanate of Oman, art. 15 (2021), 9.

this constitutional recognition varies between states depending on their diverse environmental, social, and cultural contexts. It is vital to note that despite the minor differences, all these nations exhibit one common goal: institutionalizing sustainability by making it the key guiding principle for their development and guidance.⁴⁸

3.1.2. Elements of the Sustainability Concept

Several core elements must be incorporated when constitutionalizing the principles of sustainability. This is to create a comprehensive framework to ensure that a country's development is sustainable. The first element is the protection of the environment. The entire concept of sustainability is established on the need for each stakeholder to fully commit to preserving biodiversity and natural ecosystems. The constitution's provisions require the people to prevent pollution, enhance conservation efforts, and improve resource management. The goal of these provisions has been to ensure that environmental considerations become an integral part of all the nation's decision-making processes.⁴⁹

The second element is social justice and attaining equity. Constitutionalization (constitutionalizing) efforts mention two factors that are crucial to attaining sustainability. Constitutions state that environmental degradation disproportionately affects minority groups and marginalized communities. Therefore, these constitutions prioritize these issues by having provisions for protecting vulnerable populations, participation in decision-making, and equitable access to resources.⁵⁰

The constitutionalizing of sustainability has brought out the idea of intergenerational equity as an essential principle worthy of consideration. This principle is seen through the emphasis on ensuring that current generations understand their responsibility. This role entails preserving the limited resources

⁴⁸ Hoda Haghighi and Amirhossein Takian, "Comparative Analysis of Constitutional Sustainability Frameworks: Global Patterns and Regional Variations," *International Journal of Environmental Law and Policy* 18, no. 2 (April 2024): 157.

⁴⁹ Jamon Tuholske, "Constitutional Environmental Rights: A Case for Implementation," *Environmental Law Review* 17, no. 3 (September 2015): 189.

⁵⁰ David R. Boyd, "The Constitutional Right to a Healthy Environment," *Environment: Science and Policy for Sustainable Development* 54, no. 4 (July/August 2012): 7.

available to them. They must also ensure their actions do not compromise the opportunities available for future generations⁵¹. Constitutional provisions have effectively enshrined this principle, mandating proper long-term planning and sustainable resource management. Public participation has also emerged as a vital factor in the discussion. Public participation is essential when dealing with environmental decision-making. According to Dernbach et al. (2018), constitutions prioritizing sustainability have also made deliberate moves to include provisions for ensuring public involvement, access to information, and transparency to actively empower citizens to contribute to the efforts toward sustainable development.⁵²

The issue of sustainable development cannot be complete without considering the principle of economic development. Even though the environmental and social considerations are essential, the principles show that countries should also seek economic development.⁵³ However, this economic growth must be pursued in a manner that shows responsibility on the part of stakeholders, promoting long-term prosperity and respecting environmental limits.⁵⁴

3.1.3. Balancing Individual Interests and Public Initiatives

The core of sustainable development is balancing the needs of current generations with the responsibility of safeguarding the future for coming generations. This balance is especially vital considering constitutional law, in which the rights and duties of citizens must be reconciled.⁵⁵ Constitutional courts across the globe have applied the sustainable development principle to offer a mechanism for attaining a balance by prioritizing policies meant to integrate social, economic, and environmental issues.⁵⁶

⁵¹ Lucy Rodina, "Intergenerational Justice and Sustainable Development in Constitutional Law," *Environmental Ethics* 42, no. 4 (Winter 2020): 245.

⁵² John C. Dernbach, Donald A. Brown, and John H. Knox, "Environmental Rights in Practice: Public Participation in Environmental Decision-making," *William & Mary Environmental Law and Policy Review* 42, no. 3 (Spring 2018): 178.

⁵³ Rodina, "Intergenerational Justice and Sustainable Development in Constitutional Law," 248.

⁵⁴ Rodina, "Intergenerational Justice and Sustainable Development in Constitutional Law," 249.

⁵⁵ Mohamed A. Abdelhadi and Abdullah A. Almahjoub, "The Balance between the Public Interest and Investor Protection," *Kilaw Journal* 7, no. 4 (December 2019): 123.

⁵⁶ Carl Bruch, Wole Olanipekun, and Meredith Wilensky, "Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa," *Columbia Journal of Environmental Law* 26, no. 1 (2001): 138.

Key policy initiatives and legal doctrines reflect the need to balance individual interests and public incentives. For example, the public trust doctrine holds that essential natural resources like wildlife, water, and air must be held within the governmental authority for the public's benefit.⁵⁷ This is the doctrine that experts use when arguing that it is the fiduciary duty of the federal and state governments to ensure maximum protection of these essential natural resources from harm and ensure that they are made available to future generations.⁵⁸

There has also been an increased rate of integration of the principles of sustainable development into land-use policies and urban planning. Excellent examples of ways the government seeks to balance its developmental goals with the need to protect the environment and attain social equity include intelligent growth initiatives, environmental impact assessments, and zoning regulations.⁵⁹ The development of these policies shows that the government is fully committed to ensuring that growth initiatives are sustainably managed, with stakeholders considering the long-term impacts of their projects on ecosystems and communities.⁶⁰

The public trust doctrine has been demonstrated in environmental law, where legal experts have argued favouring sustainable development principles. These individuals say that stakeholders should prioritize the collective interests of the environment.⁶¹ For example, in the landmark case of *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court held that the government is prohibited from granting private corporations' control over the waterfront located in Chicago because doing so would lead to the public trust doctrine violation.⁶² This decision is essential as it reflects the importance of ensuring that the state remains the steward of natural resources, and that there is a balance between

⁵⁷ Tuholske, "Constitutional Environmental Rights," 192.

⁵⁸ James R. May, "Constituting Fundamental Environmental Rights Worldwide," *Pace Environmental Law Review* 23, no. 1 (Fall 2017): 115.

⁵⁹ James R. May and Erin Daly, "Environmental Rights and Liabilities," in *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2021), 78.

⁶⁰ May and Daly, "Environmental Rights and Liabilities," 80.

⁶¹ May, "Constituting Fundamental Environmental Rights Worldwide," 117.

⁶² Joseph D. Kearney and Thomas W. Merrill, "The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*," *University of Chicago Law Review* 71, no. 3 (Summer 2004): 802.

private property rights and the right of the public to access and even benefit from such resources.⁶³

The Supreme Court in India has been at the forefront of incorporating sustainability into its jurisprudence. This has proven that sustainable development is now a constitutional value. The landmark case of *M.C. Mehta v. Union of India* (1988) is a good example. In this case, the Supreme Court invoked this principle. It justified closing industries responsible for pollution in Delhi.⁶⁴ The move emphasized the need for economic progress to be made in a manner that considers economic progress. The court held that preserving the environment is a paramount issue that the constitution must protect, and the financial loss due to the closure was justified by the long-term benefits the people of India would reap by having a healthy environment.⁶⁵

In South Africa, the Constitutional Court reinforced the importance of sustainable development by interpreting environmental rights. For example, in 2007, in the case of the *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management*, the Court held that all projects directed toward development should consider environmental regulations. It also stressed that the stakeholders behind these projects must protect the public's interest. This shows that the country understood that economic benefits could only be pursued through a balanced approach that prioritizes ecological sustainability.⁶⁶

In Germany, the state's Federal Constitutional Court has also acted in a way that indicates that the issue of sustainable development is now an essential constitutional value. The government has effectively addressed the balance between individual rights and public interest concerning the issue of sustainability.⁶⁷ A ruling issued by the Court in 2021 highlighted the need to ensure that future

⁶³ Kearney and Merrill, "The Origins of the American Public Trust Doctrine," 805.

⁶⁴ Malini Niyati, "Environmental Jurisprudence in India: A Study of Contributions Made by the Supreme Court," *International Journal of Legal Studies and Research* 4, no. 2 (August 2015): 184.

⁶⁵ Niyati, "Environmental Jurisprudence in India," 186.

⁶⁶ Matthew Hall, "Environmental Rights in Post-Apartheid South Africa: An Analysis of Constitutional Court Jurisprudence," *Journal of Human Rights and the Environment* 12, no. 1 (March 2021): 57.

⁶⁷ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 2012), 352.

generations' rights are protected by strictly enforcing measures to curb climate change.⁶⁸ It held that the climate policies enacted by the government initiatives must be aligned with constitutional rights, thus ensuring that the country's obligation to protect its environment does not unreasonably infringe on the people's liberties.⁶⁹

The ruling of the German Federal Constitutional Court issued on March 24, 2021 is one of the most prominent and important judicial applications of the constitutional value of the principle of sustainable development. The Court concluded that the Climate Change Act was unconstitutional to the extent that it failed to provide adequate protection. For persons against future restrictions on their rights, which will be necessary as the pace of climate change increases.⁷⁰ Hence, the state must contain this risk that the state may be forced to restrict the fundamental rights of persons in the future in an extremely severe manner, precisely because it does not affect these rights at the present time, and this is what the Court called the restrictive effect in advance on fundamental rights and intertemporal safeguarding of liberties. The Court explicitly noted that the measures taken by the state could be wholly inadequate, and thus the state would have failed to fulfil its constitutional duty to protect if it did not aim to achieve climate neutrality.⁷¹

The court ruled that the law was unconstitutional because there was no specific plan for how Germany would continue to reduce emissions after 2030. The constitutional judge considered that the violation lay in the failure of legislation to comply with the principle of proportionality between the rights of present and future generations. This makes the distribution of benefits and burdens between present and future generations inconsistent with the principle of proportionality. The challenged law allows a particular generation to consume the largest share of the carbon emissions budget, while bearing only a relatively small share of

⁶⁸ Petra Minnerop, "The Climate Change Judgment of the German Federal Constitutional Court: Judicial Innovation or Incremental Development?" *Journal of Environmental Law* 34, no. 1 (March 2022): 121.

⁶⁹ Minnerop, "The Climate Change Judgment," 123.

⁷⁰ Agnes Hellner and Yaffa Epstein, "Climate Change and Intergenerational Equity: The German Constitutional Court's Climate Decision," *Transnational Environmental Law* 12, no. 1 (March 2023): 75.

⁷¹ Hellner and Epstein, "Climate Change and Intergenerational Equity," 78.

the greenhouse gas emission reduction effort. This places a very large burden on future generations in the aforementioned reduction effort, exposing their lives to enormous losses and imposing ever more severe and harsh restrictions on their fundamental rights.⁷²

According to the above analysis, it can be said that the basic reasoning on which the Court relies is as follows: Germany's legal duty to aim for climate neutrality entails a total balance of residual emissions. Therefore, the more Germany uses its share of the total emissions budget until 2030, the more stringent restrictions on individuals' freedoms will be imposed after 2030, to achieve the constitutional requirement for climate protection and climate neutrality.⁷³ The more a country emits by 2030, the greater the risk that the country will have to intervene more quickly and forcefully in the period after 2030 to impose restrictions on basic rights to be able to achieve climate neutrality. This expectation is not only a realistic result, but also has legal implications, as the state will find itself forced and even obligated to restrict fundamental rights, because the weight of these rights will be less compared to the state's duty to intervene to protect the climate. The weight of these rights will gradually decrease as the pace of climate change increases.⁷⁴

Based on the above, the Court decided that: "under certain circumstances, the Constitution requires that constitutional freedoms be protected over time and that the possibility of protecting these rights be distributed equitably".⁷⁵ In other words, the risk of present-permitted emissions jeopardizing the future exercise of fundamental rights must be justified by the legislator in the present by taking adequate precautionary measures to ensure that fundamental rights will continue to be protected in the future, not just now". This means that there is a constitutional duty not only to achieve climate neutrality, but also to undergo gradual transformation over time in an appropriate manner to achieve this goal.⁷⁶

⁷² Hellner and Epstein, "Climate Change and Intergenerational Equity," 80.

⁷³ Jannika Jahn, "A Climate Constitutional Moment? German Federal Constitutional Court Orders Legislature to Rectify Climate Protection Act," *Cambridge Law Journal* 82, no. 2 (July 2023): 264.

⁷⁴ Jahn, "A Climate Constitutional Moment?" 266.

⁷⁵ Mustafa Hilal and Walid Al-Shennawy, "Constitutional Dimensions of Climate Change Litigation," *Arab Law Quarterly* 37, no. 3 (September 2023): 213.

⁷⁶ Hilal and Al-Shennawy, "Constitutional Dimensions of Climate Change Litigation," 215.

The Egyptian Supreme Constitutional Court has confirmed that sustainable development is a principle of constitutional value and has argued that the legislator must consider sustainable development as a supreme goal of the economic system. Accordingly, investment is not protected unless this goal is achieved.⁷⁷ It ruled that Article (32) of the Constitution obliges the state to preserve natural resources, exploit them well, not deplete them, and take into account the rights of future generations therein. The Constitution specified in Articles (27 and 28) a supreme goal for the country's economic system. The result of which is achieving prosperity through sustainable development, to raise the rate of real growth that is balanced geographically and environmentally for the economy, guarantee the different types of ownership, encourage investment and provide an attractive climate for it. Mechanisms and means to achieve its ultimate goal, and protect all productive, service, and informational economic activities. Investment, as the locomotive of economic development, expands the contribution of the state's production units and the private sector, which means that both public and private investments have a role in development. Whenever the state sees a public interest in that, there is no violation in its direction to support investment through the private sector of the provisions of the constitution. Rather, it is a dedication to the economic values that it calls for foremost among which is that the best investment. In addition, the one most worthy of protection is always linked to the circle in which it operates, and on the assumption that public and private investments are complementary partners, they do not compete or conflict, but rather each of them undertakes tasks for which it is qualified and more capable.⁷⁸

In confirmation of the constitutional value of the principle of sustainable development, the Supreme Court of Justice approved the law criminalizing the violation of the principle of sustainable development. It ruled that the overall objectives of issuing the Building Law legislation are determined by establishing an integrated system for urban planning, urban coordination, and organizing

⁷⁷ *Supreme Constitutional Court of Egypt*, Case No. 120 of Judicial Year 36 (January 14, 2023), 8.

⁷⁸ *Supreme Constitutional Court of Egypt*, Case No. 120 of Judicial Year 36 (January 14, 2023), 12.

construction work, and preserving real estate wealth, through a vision for urban development to achieve sustainable development, and (development and) determine future needs for urban expansion. In the field of deterrence that ensures the achievement of the aforementioned legislative objectives, the contested law prohibited the establishment of any facilities outside the boundaries of the approved urban areas or taking any measures regarding the division of these lands. This is in appreciation of the danger of any of the aforementioned actions to national security in its social and cultural sense, their waste of elements of national wealth at the state and citizen levels, and their harm to the components of sustainable development. This prompted the legislator to criminalise the actions that violate this prohibition.⁷⁹

IV. THE IMPACT OF CONSTITUTIONALISING ON SUSTAINABLE DEVELOPMENT

Since sustainable development is treated as a constitutional value, many implications will result concerning the principles of sustainable development regarding the question of responsible investors.

4.1. Legal Implications

When sustainable development is incorporated into constitutional law, its status is raised from a mere policy objective to a significant legal principle that binds. For this transition to happen, the government must prioritize sustainability in their administrative and legislative actions, thus ensuring that all the critical development initiatives align with social and environmental objectives.⁸⁰ If sustainability is mandated as a constitutional value, the states are held accountable for upholding these principles in every governance issue, including urban planning and resource management.⁸¹

Constitutionalizing sustainability can also significantly impact the judicial interpretation of environmental standards issues, empowering the courts to protect

⁷⁹ *Supreme Constitutional Court of Egypt*, Case No. 75 of Judicial Year 35 (January 16, 2022), 8.

⁸⁰ Ilaria Dubava, "Reconciling International Investment Law and Sustainable Development: Normative Incompatibility and a Way Forward," *European Journal of International Law* 25, no. 2 (June 2014): 457.

⁸¹ Dubava, "Reconciling International Investment Law and Sustainable Development," 459.

ecological integrity more effectively. For example, the constitutional courts have been at the forefront of reviewing the actions taken by governments to ensure compliance with sustainability principles, thereby keeping the legislative and executive powers in check concerning these matters.⁸² Therefore, by making sustainable development a constitutional value, a legal framework is formed where robust mechanisms are developed to prevent environmental degradation and promote sustainability.⁸³

4.2. Human Rights for a Clean and Healthy Environment

Sustainable development has been widely recognized as a constitutional value. As such, this value has effectively strengthened the human right to live in a clean and healthy environment⁸⁴. Through the initiatives of the United Nations, this right has been viewed by most nations worldwide as an integral part of the broader human rights framework, highlighting the connection between human well-being and environmental health.⁸⁵ All the member states under the UN have included specific constitutional provisions meant to protect human rights by conserving the environment, ensuring that individual citizens and communities are adequately empowered to hold their governments and entities accountable for all the environmental harm they cause.⁸⁶ The Colombian Constitutional Court is an excellent example in this case, as it recently ruled that it favoured granting Atrato River rights, recognized as a legal entity. The ruling shows that the constitution in that country is committed to protecting the ecosystems, more as a constitutional duty than a mere policy objective.⁸⁷ When the Constitutional Courts make such decisions, they have taken seriously their duty to safeguard environmental rights to promote sustainable development.⁸⁸

⁸² Blake Hudson, "Structural Environmental Constitutionalism," *Widener Law Review* 21, no. 2 (Spring 2015): 173.

⁸³ Hudson, "Structural Environmental Constitutionalism," 175.

⁸⁴ Daniel B. Magraw and Peggy Rodgers Kalas, "The Right to a Healthy Environment," in *International Human Rights and Environment* (Cambridge: Cambridge University Press, 2014), 124.

⁸⁵ Magraw and Kalas, "The Right to a Healthy Environment," 126.

⁸⁶ Isabel Nemesio, "Constitutional Environmental Rights: A Case for Environmental Justice," *Journal of International Affairs* 73, no. 1 (Fall/Winter 2014): 87.

⁸⁷ Silvia Bagni, "The Colombian Constitutional Court Recognizes Rights of the River Atrato: A New Case of Rights of Nature," *Journal of Constitutional Law in Latin America* 4, no. 2 (December 2022): 143.

⁸⁸ Bagni, "The Colombian Constitutional Court Recognizes Rights of the River Atrato," 145.

4.3. Impact on Investment Treaties

States ensure that the investment treaties they approve do not interfere with the government's power and mandate to protect public interests and enforce environmental regulations⁸⁹. Constitutionalizing sustainable development has dramatically influenced international treaties related to investments. Since the critical government stakeholders involved in these processes have cultivated the view of sustainable development principles as fundamental constitutional values, they have been embracing the constraints imposed by the new policies when their states enter into agreements that could adversely affect the social and environmental standards.⁹⁰

Environmental clauses are primarily developed to safeguard the regulatory autonomy of the federal and state governments, making it possible for them to implement vital steps toward protecting the environment without experiencing legal challenges from potential investors. An excellent example of this integration of the clause is seen in the North American Free Trade Agreement (NAFTA). This agreement specifically expressed the necessity of protecting the environment and promoting sustainable development.⁹¹ Despite being replaced by the United States-Mexico-Canada Agreement (USMCA), NAFTA's total commitment to sustainable development has been maintained throughout. The investment treaties enforced currently have specific clauses and provisions to affirm that the states have the right to regulate operations in the public's interest, including the move to protect the environment, ensure public safety, and safeguard health. Thus, environmental factors are increasingly important when entering investment and trade agreements.⁹²

⁸⁹ Dernbach, Brown, and Knox, "Environmental Rights in Practice," 180.

⁹⁰ Ernst-Ulrich Petersmann, "Constitutional Economics of Sustainable Development and Investment Agreements," *Journal of International Economic Law* (March 2024): 7.

⁹¹ Dubava, "Reconciling International Investment Law and Sustainable Development," 464.

⁹² Dubava, "Reconciling International Investment Law and Sustainable Development," 465.

4.4. Environmental Rule of Law as an Avenue to Achieving Ecologically Sustainable Development

In most countries guided by the UN, this law is essential in ensuring that natural resources are protected (protected,) and development initiatives are based on sustainability principles.⁹³ The environmental rule of law is a crucial concept that scholars and legal experts have used to design a legal framework for attaining ecologically sustainable development. The idea is vital in ensuring that the laws created to protect the environment are equitably enforced, effective, and fair to ensure public participation, transparency, and accountability in environmental governance.⁹⁴

The first principle is accountability. It indicates that the government and private corporations must be compelled to take responsibility for their activities affecting the environment⁹⁵. According to Kreilhuber and Kariuki (2019), accountability is one of the significant factors used to enforce laws and hold violators accountable for their actions. Thus, every government decision involving environmental policies must be scrutinized with transparency and ensure compliance.⁹⁶

Another vital principle is participation. It requires people from all backgrounds, especially marginalized communities, to be involved fully in environmental decisions. This ensures more inclusiveness and equity.⁹⁷ Public participation is the cornerstone of environmental decision-making, as provided within the ecological rule of law. The principle ensures that people affected by these policies can affect their implementation. This ensures that all accept the outcomes.⁹⁸

The other key principles are equity and justice, ensuring equitable decisions involving the environment. The idea is to share the benefits and burdens related

⁹³ Wright, "Constitutional Environmentalism," 120.

⁹⁴ Muhammad Taufiq Ladan, "Achieving Sustainable Development Goals through Effective Domestic Laws and Policies on Environment and Climate Change," *Environmental Policy and Law* 48, no. 1 (March 2018): 42.

⁹⁵ Arnold Kreilhuber and Angela Kariuki, "Environmental Rule of Law and the Critical Role of Good Environmental Governance," *Environmental Policy and Law* 49, no. 3 (June 2019): 234.

⁹⁶ Kreilhuber and Kariuki, "Environmental Rule of Law," 236.

⁹⁷ Kreilhuber and Kariuki, "Environmental Rule of Law," 238.

⁹⁸ Nemesio, "Constitutional Environmental Rights," 90.

to the environment equally without disproportionately affecting marginalized people. Therefore, everyone will have a good chance to get clean air, a healthy environment, and clean water.⁹⁹

The last principle included in this paper is transparency; the environmental rule of law requires all relevant information concerning environmental impacts, practices, and policies to be accessible to the public¹⁰⁰. The principle was created with the idea that if people have access to the information, they will understand that they have a vital responsibility and rights related to their environment. It was designed to support decisions that are more informed. It also empowers the citizens to participate actively in environmental governance.¹⁰¹

Although significant strides can be seen in how the environmental rule of law has promoted sustainable development, there are still various significant challenges in this case. The main issue is ensuring these laws are enforced consistently across different regions and states. The problem arises when there is a shift in political priorities.¹⁰² Moreover, states that environmental issues are very complex. Things like biodiversity loss and climate change need innovative strategies to deal with them. They may also require international cooperation for adequate resolution, which is challenging.¹⁰³

Advancements in modern technologies and trends in the digital world present an excellent opportunity to strengthen the environmental rule of law. Stakeholders can use data analytics and digital tools to improve accountability and transparency. These items can deliver real-time information concerning compliance with these laws and new developments.¹⁰⁴ Technology is also helpful in enhancing international collaboration when environmental issues arise. The stakeholders can use the tech to share the best practices and solutions.¹⁰⁵

⁹⁹ Wright, "Constitutional Environmentalism," 124.

¹⁰⁰ Wright, "Constitutional Environmentalism," 125.

¹⁰¹ Magraw and Kalas, "The Right to a Healthy Environment," 132.

¹⁰² Wright, "Constitutional Environmentalism," 127.

¹⁰³ Magraw and Kalas, "The Right to a Healthy Environment," 135.

¹⁰⁴ Carl Bruch and John Broderick, "Digital Technologies for Environmental Rule of Law," *Environmental Policy and Law* 51, no. 4 (December 2021): 232.

¹⁰⁵ Bruch and Broderick, "Digital Technologies for Environmental Rule of Law," 235.

V. CONCLUSION

This paper examines the constitutional aspects of sustainable development and how they affect the practices of responsible investors. It accomplishes this by reviewing constitutional provisions, court decisions, and investment frameworks in various jurisdictions while keeping in mind that international law has given sustainable development a global norm that has dramatically influenced the domestic legal systems, including constitutions, and has become a constitutional value that the responsible investor should observe. This study, however, concluded with the following results and suggestions.

5.1. Results

Sustainable development has quickly gained widespread support in international law. Contemporary international investment law is no longer only concerned with protecting foreign investors' capital from domestic law risks. It has evolved to include sustainable development as a legal criterion that must be considered to balance competing interests. It has been proven that in recent decades, sustainable development has become an international legal norm that has quickly transferred to domestic legal regimes. Bilateral and multilateral investment treaties have normative value and are the primary source of global standards to be observed in the investment governance system. Sustainable development is based on and integrates three main components of international law: international environmental law, international economic law, as far as development is concerned, and human rights law.

Sustainable development goals bring many benefits to the investor needs, the most important of which are: encouraging decision-making based on a developed understanding of community aspirations, the opportunities associated with social responsibility, and the risks of not fulfilling social responsibility. Moreover, improving risk management practices, enhancing the organization's reputation, and encouraging greater public trust. Improving stakeholder relationships; enhancing employee loyalty and morale and improving the safety and health of

both male and female workers; and positively affecting the organization's ability to recruit, motivate, and retain employees. As well, achieving savings associated with increased productivity and resource efficiency, reducing energy and water consumption, reducing waste, recovering the value of derived products, and increasing the availability of raw materials. In addition to, improving the reliability and integrity of transactions through responsible political participation, fair competition, the absence of corruption, and preventing or mitigating potential conflicts with consumers regarding products or services and contributing to the organization's long-term vitality by promoting the sustainability of natural resources and environmental services, contributing to the public good, and strengthening civil society and institutions.

Establishing an adequate international legal framework harmonizing environmental protection, development, and human rights is crucial for the global community. Adopting sustainable investment strategies through a critical integrative process is essential to ensuring coherence across all dimensions of sustainability.

Most countries' constitutions now incorporate legal aspects that recognise the interconnection of economic, social, and environmental issues to balance public interests with individual rights. Constitutional courts in Germany, India, and South Africa, for example, have elevated sustainability to constitutional status through judicial interpretation; other countries, including Norway, Ecuador, Egypt, and Qatar, have explicitly incorporated sustainable development principles into their constitutional frameworks. The legal impact of such practices allows communities and individuals to demand accountability from investors who engage in harmful activities that violate environmental and human rights.

5.2. Suggestions

The global community must prioritize the integration of environmental, developmental, and human rights concerns within an adequate international legal framework to foster sustainable development. To achieve this, countries

must establish new regulations, enhance transparency, and implement effective enforcement mechanisms across all aspects of sustainable development. Equally important, they should create avenues for meaningful public participation to engage in discussions about environmental protection and human rights, particularly in the context of investment and sustainable development. By combining robust legal structures with inclusive public dialogue, nations can ensure a comprehensive and equitable approach to sustainability.

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RETHINKING CONSTITUTIONAL INTERPRETATION THROUGH JOSEPH RAZ'S ANALYTICAL JURISPRUDENCE

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Received: 27 January 2025 | Last Revised: 27 March 2025 | Accepted: 23 April 2025

Abstract

Joseph Raz's analytical jurisprudence serves as a philosophical foundation for rethinking constitutional interpretation, particularly in the context of Indonesian legal discourse. Raz provides a rich theoretical framework that emphasizes the relationship between legal authority, moral legitimacy, and rational justification. He challenges the notion that legal authority is simply the power to command, arguing instead that it must be grounded in its ability to offer reasons that individuals have a good reason to follow reasons that are both morally and rationally justified. This perspective is especially important in constitutional adjudication, where courts are tasked with interpreting foundational legal texts in a way that balances fidelity to legal language with responsiveness to societal change. Raz maintains that legal texts cannot be understood in isolation rather, their meaning is shaped by the intentions of their drafters, the purposes they

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serve, and the broader cultural and historical context. His dialogical approach to interpretation urges judges to engage with law not just as static rules but as evolving instruments of justice. Methodologically, this research employs a philosophical and jurisprudential approach. The study proceeds by collecting and categorizing literature relevant to both the formal and material objects of the research. The formal object includes Raz's core writings on legal and constitutional interpretation, as well as foundational works by other scholars who shaped his thought. The material object focuses on interpretive frameworks, constitutional reasoning, and the role of legal authority in discovering and reflecting constitutional interpretation. This method enables a critical examination of how Raz's interpretive framework applies to Indonesia's constitutional challenges, such as the tension between legal certainty and moral responsiveness. The study argues that Raz's ideas offer a compelling alternative to rigid textualism by encouraging an approach that is normatively coherent, ethically responsible, and socially aware.

Keywords: Analytical Jurisprudence; Authority; Constitutional Interpretation; Joseph Raz; Rational and Moral Justification

I. INTRODUCTION

1.1. Background

Constitutional interpretation is fundamental to the functioning of constitutional democracies, bridging the gap between abstract principles and their practical application in resolving legal disputes. This interpretative process is particularly vital in jurisdictions where constitutions are regarded as "living documents," requiring adaptability to evolving social, political, and economic contexts. The methodology of constitutional interpretation remains a contentious subject in jurisprudence, with competing approaches such as textualism, purposivism, and living constitutionalism offering different frameworks. Analytical jurisprudence provides a philosophical lens to examine the underlying principles of interpretation, authority, and the pursuit of truth in law. This exploration extends to understanding the justification of law, which often incorporates the implied consequences of political morality supporting legal institutions. Jurisprudential debates emphasize normative and meta-theoretical considerations, framing law as both an interpretative tool and a framework for articulating reasoned judgments.

Joseph Raz, a prominent figure in analytical jurisprudence, offers valuable insights into these debates, particularly through his *Service Conception of Authority*. This concept emphasizing the legitimacy and rationality of authority as a mediator between individuals and the reasons they may not fully understand, offers valuable insights into judicial authority and its role in constitutional interpretation. Raz's nuanced approach integrates strict textual analysis with broader moral, societal, and historical contexts, advocating for interpretations that are both contextually informed and normatively sound. In Raz's view, legal interpretation is not confined to textual analysis but must account for the purpose of the law, the intentions of its framers, and the evolving societal values it reflects. This dynamic methodology ensures that interpretations remain relevant and responsive while safeguarding the structural integrity of legal systems.

The main problem explored in this study centres on the role of constitutional interpretation as a bridge between the abstract principles of constitutional law and their practical application in legal systems, particularly through the lens of Joseph Raz's philosophical thought. Constitutional interpretation is critical in translating broad constitutional ideals into actionable legal judgments, ensuring that they address contemporary societal needs while preserving legal coherence and justice. However, the methodologies and frameworks for constitutional interpretation remain highly contested, with approaches such as textualism, purposivism, and living constitutionalism offering divergent perspectives.

This article critically examines how Raz's theoretical framework can inform constitutional interpretation, particularly in pluralistic legal systems such as Indonesia. It explores how Raz's concepts of authority and interpretation can be applied to navigate the complexities of balancing diverse societal interests, upholding human rights, and ensuring normative coherence within constitutional frameworks. By situating Raz's philosophical insights within the practical realities of constitutional adjudication, the study highlights how his approach can bridge the gap between the theoretical foundations of constitutional law and the evolving demands of justice in dynamic legal systems.

Recent decisions by the Indonesian Constitutional Court have sparked significant public discourse, particularly when rulings touch on sensitive issues such as the presidential threshold, the role of religion in state policy, indigenous rights, or political party regulations. These cases often reveal a deep interpretative tension such as should the court stick rigidly to the constitutional text, or should it adopt a broader, more purposive interpretation that aligns with democratic ideals and the changing values of society? The Indonesian Constitutional Court's decisions display varying patterns, sometimes leaning heavily on formalistic readings, while in other moments embracing more adaptive, socially conscious interpretations. This variation raises important questions about the philosophical underpinnings of constitutional interpretation in Indonesia and whether there exists a guiding framework that can reconcile legal authority with evolving societal needs.

1.2. Research Questions

This article addresses several key questions concerning constitutional interpretation. First, shows how analytical jurisprudence can be used to understand the constitutional interpretation, this question looks up Raz's philosophical framework rooted in analytical jurisprudence that shapes Raz's overall understanding of legal interpretation and how this applies to constitutional law. Second, shows what Raz's conception of legal authority and its relation to the task of interpretation. This question examines how Raz's ideas can be supported can support the role of constitutional judges as interpreters who provide morally and rationally justified decisions. Third, this research examines how Raz distinguishes between legal interpretation and constitutional interpretation within his analytical jurisprudence. And lastly, shows how applicable Raz's framework to Indonesia's constitutional adjudication. This question puts a critical assesment of how Raz's ideas can be applied within the Indonesian context particularly whether Raz's idea provides a useful model for resolving real-world constitutional issues faced by the Indonesian Constitutional Court.

1.3. Method

This research article uses a philosophical and jurisprudential approach which unfolds through several key stages such as collecting and categorizing literature relevant to both the formal object and material object of the research. The formal object consists of Raz's thoughts on legal and constitutional interpretation, as found in Raz's *magnum opus* and published articles, while also situating Raz's ideas within the broader intellectual context by reviewing the works of Raz's predecessors that inform Raz's views. The material object focuses on conceptual frameworks of interpretation, constitutional reasoning, and Raz's proposals about the function of interpretation as part of legitimate legal authority aimed at discovering and reflecting constitutional truth. Then, the research data collected from sources including books, academic journals, and articles are classified as primary data such as core texts by Raz writings and leading legal-philosophical works and secondary data that support materials and legal commentaries which enable structured analysis and facilitates conceptual clarity. The research also uncovers new insights about Raz's interpretative framework and its relevance to Indonesian constitutional adjudication. It also explores how Raz's thought contributes to understand law as both a theoretical system and a human-centered practice, embedded in the lived experience of past, present, and future legal realities.¹ The research article provides a systematic and narrative explanation of Raz's philosophical foundations, especially Raz's concepts of interpretation analyses that makes them accessible and relevant for application within Indonesian legal discourse.

II. RESULTS

2.1 Analytical Jurisprudence and Constitutional Interpretation

Analytical jurisprudence, as a branch of legal philosophy, examines the fundamental structures and concepts of law through a systematic and rigorous lens. Its aim is not to prescribe what the law ought to be but to clarify its

¹ Aharon Barak, *Purposive Interpretation in Law* (Princeton and Oxford: Princeton University Press, 2005), 392.

essential nature, functions, and underlying principles. Analytical jurisprudence, particularly conceptual analysis, is highlighting the need for analytical jurists to create a more comprehensive framework of concepts.²At its core, analytical jurisprudence dissects the structures of legal systems, focusing on concepts such as authority, normativity, and legal reasoning. By addressing these fundamental aspects, it provides a robust framework for understanding the interpretive challenges inherent in constitutional adjudication. One of the key challenges in constitutional adjudication is navigating the tension between legal determinacy, ensuring consistency and predictability and moral flexibility, which allows for adaptation to changing societal needs.

Constitutional interpretation, as a practice that translates abstract legal texts into enforceable norms, occupies a central position in this discourse. By engaging with questions of authority, legal reasoning, normativity, and analytical jurisprudence provides a robust framework for addressing the interpretive challenges inherent in constitutional adjudication. The methodologies of constitutional interpretation vary widely, each grounded in distinct philosophical underpinnings. Textualism, for example, focuses on the plain meaning of constitutional language, arguing that judicial fidelity to the text ensures consistency and democratic legitimacy. Originalism seeks to discern the intent of the framers, positing that historical understanding provides a stable foundation for constitutional governance. In contrast, purposivism and living constitutionalism emphasize the adaptive and evolving nature of constitutional norms, advocating for interpretations that align with contemporary societal values. While these methodologies offer valuable insights, they often fall short of providing a cohesive account of the interplay between legal texts, judicial authority, and moral considerations.

The constant factor driving moral change does not necessarily have to be a moral consideration or principle, however there is the possibility that a distinct form of moral change as an interpretative change does not rely on a persistent

² William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (Cambridge: Cambridge University Press, 2009), xvi.

moral principle.³ It might occur when a society reevaluates its prior practices and beliefs, viewing them from a new perspective, which in turn leads to changes in both practices and beliefs.⁴ This is where analytical jurisprudence, particularly the work of Joseph Raz, contributes significantly by dissecting the nature of legal authority and the interpretive process. Raz offers a theoretical lens that integrates textual fidelity with moral reasoning.⁵ Raz says that in particular a person is permitted to perform an act one may mean that person has no duty not to do it. There are good reasons for not doing the act and on the whole person is permitted to do it since person is not under an obligation not to do it.⁶ There are reasons of a different kind of refraining the act based on sufficient legal reasons or moral reasons.⁷ An act is strongly permitted only if it is being permitted which is entailed by a norm.⁸ A person who can only act fairly on a particular occasion is not standard of fairness. It means that person performs a certain action describable in value neutral ways.⁹ The actions that convey an attitude are primarily determined by social conventions. While these conventions may vary across societies, to the extent that they associate consent with fostering certain valuable relationships or consider it as a fundamental aspect of such relationships, they affirm the legitimacy of the appropriate forms of consent.¹⁰

Joseph Raz's work in analytical jurisprudence is characterized by his commitment to clarify the conceptual foundations of law and its relationship to authority and morality. His most complete articulation of the nature and scope of law's authority is put in his book, *Morality of Freedom* (1986). Raz provides a nuanced understanding of the nature and scope of law's authority which argues that all governments claim morally legitimate authority, but not

³ Joseph Raz, "Morality as Interpretation," *Scholarship Archive Columbia Law School* (1991): 399.

⁴ Raz, "Morality as Interpretation," 399.

⁵ Donald H. Regan, "Reasons, Authority, and the Meaning of Obey: Further Thoughts on Raz and Obedience to Law." *Canadian J. L. and Juris* (1990): 3, <https://repository.law.umich.edu/articles/341>.

⁶ Joseph Raz, "Permissions and Supererogation," *American Philosophical Quarterly* 12, no. 2 (April 1975): 161.

⁷ Raz, "Permissions and Supererogation," 161.

⁸ G.H. von Wright, *Norm and Action*, (London: Oxford University Press, 1963), 85.

⁹ Raz, "Authority, Law and Morality," 319.

¹⁰ Joseph Raz, "Authority and Consent," *Virginia Law Review* Vol.67 No.1 (February 1981): 125.

all of them actually possess it.¹¹ Raz's philosophy posits that authority functions to assist individuals in aligning more effectively with reasons that are already applicable to them. Applied to constitutional interpretation, this framework implies that constitutional judges authority should act as a bridge, connecting abstract constitutional principles with the practical considerations that shape societal behaviour. Raz's insights into constitutional interpretation extend beyond a mechanistic application of rules. Raz advocates for a contextual approach that acknowledges the normative dimensions of legal texts while remaining grounded in their linguistic and structural characteristics. This dual focus on the normative and the linguistic distinguishes Raz's methodology from both rigid textualism and excessively discretionary approaches.

By acknowledging the contextual nature of legal texts, Raz's framework aligns with the realities of constitutional law, where evolving societal values and dynamic political contexts demand a flexible yet principled approach. It is particularly useful in pluralistic legal systems like Indonesia, where constitutional adjudication must navigate the interplay of diverse legal traditions and contemporary demands. Raz's analytical framework shows how the law in modern times must avoid the strict doctrine of positivism and put the correlation law and language as the scientific problem.¹² Furthermore, the analytical framework introduces the potential for judicial subjectivity to interpret the problem of positive language as the base for positive law.¹³ Raz's analytical framework provides a foundation to be conscious that law cannot separate from the language problems. The framework directly concern about the constitutional judges role as an interpreter who understand and interrogate the constitution in depth. The ability of judges to think is inseparable from the use of language that focuses on trying to find the truth in constitutional justice practice. It does not make the law deterministically unconstitutional or constitutional when there is a conflict with the constitution.¹⁴

¹¹ Margaret Martin, "Raz's the Morality of Freedom: Two Models of Authority," *Jurisprudence* 1 (2010): 63-64.

¹² E. Fernando M. Manullang, *Norma Hanyalah Makna Grundnorm Malah Seperti Tuhan* [Norm is Merely Meaning, Grundnorm is More Like God] (Yogyakarta: Nasmedia Publishing, 2024), 45.

¹³ Manullang, *Norma Hanyalah Makna*, 47.

¹⁴ Craig R. Ducat, *Constitutional Interpretation 9th Edition* (Boston: Wadsworth Cengage Learning, 2008), 81.

Based on legal philosophy perspective, Raz's analytical framework reinforces the idea that law is both a normative and a structured system. His insistence on the legitimacy of authority aligns with the foundational principles of the rule of law, which demands that judicial power be exercised within clear, justifiable bounds. In the realm of political philosophy, Raz's contributions address the role of constitutional courts as mediators between democratic processes and the protection of fundamental principles. His emphasis on legitimacy ensures that judicial authority does not undermine democratic values but instead complements them by safeguarding constitutional commitments. The application of analytical jurisprudence to constitutional interpretation involves reconciling the tension between legal determinacy and moral flexibility. Judges are tasked with interpreting constitutional texts in ways that respect their original intent while addressing contemporary realities. Raz's emphasis on the legitimacy of authority and the moral dimensions of interpretation provides a compelling framework for navigating this tension. For example, Raz's perspective on legal authority highlights the importance of legitimacy as a precondition for the effective exercise of judicial power. This principle is particularly relevant in constitutional adjudication, where judges must balance their interpretive discretion with the constraints imposed by the constitution's text.¹⁵ Structure is seen as a structure of authority which put legitimate moral authority over its subjects not because it is true that it has legitimate moral authority, but because it is the nature of law that it claims authority over its subjects and it is treated as law by and large only by people who accept that claim.¹⁶

The concepts of authority Raz proposed confirm the relation of authority with people and the authority to act.¹⁷ Raz differentiates those concepts through having authority in matters of belief (*being an authority*) that refers to theoretical authority, while having authority over actions (*being in authority*) refers to

¹⁵ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, (Oxford University Press, 2009), 107.

¹⁶ Raz, *Between Authority and Interpretation*, 107.

¹⁷ Joseph Raz, *The Authority of Law: Essays on Law and Morality* First Edition (Clarendon Press, Oxford, 1979), 20.

practical authority.¹⁸ Both forms involve subordinating an individual's judgment or will to another's in a binding manner, regardless of the specific content of their directives or statements.¹⁹ Authority is considered effective, or *de facto*, when it is recognized, and legitimate, or *de jure*, when it is justified. The idea of *de jure* authority is fundamental, as it represents what *de facto* authorities claim and are perceived to possess. Authority differs from *mere-effective power* and from *justified power*, which does not necessarily require the subordination of judgment.²⁰ However, practical authority is often only justified if it is also effective. Political authority, in particular, asserts a claim to the obedience of its subjects, and efforts to justify this claim have been central to political philosophy. These justifications frequently rely on instrumental arguments, such as the rulers expertise or their ability to promote societal well-being. Additionally, Raz's acknowledgment of the role of moral reasoning in legal interpretation underscores the need for a dynamic and context-sensitive approach to adjudication.

2.2. Raz's Conception of Authority and Its Role in Interpretation

This section examines the key aspects of Raz's conception of authority, its impact on legal interpretation, and its significance in the realm of constitutional adjudication. Joseph Raz's philosophy on authority is foundational to his contributions to analytical jurisprudence and has significant implications for constitutional interpretation. Jurisprudence seeking to understand perceptions of law and its aspirations to justice, needs to be sensitive to the implications of the contingent, changeable and moral use of the term "law" and "the law" in his thoughts.²¹ Raz distinguishes between the word 'law' which includes general rules as a whole and is formulated as a need for rules because they are considered necessary and important, then Raz formulates the word 'law' (the law) referring to the situation in which rules are produced that are enforced

¹⁸ Raz, *Between Authority and Interpretation*, 107.

¹⁹ Edward Craig, *Concise Routledge Encyclopedia of Philosophy* (London: Routledge Publishing Company, 2000), 126.

²⁰ Joseph Raz, "On the Nature of Law," *Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 82, no. 1 (1996): 4.

²¹ Stephen Skinner, "Stories of Pain and the Pursuit of Justice: Law, Violence, Experience and Jurisprudence," *Law, Culture and the Humanities* 5 (2009): 147.

based on the legal system.²² Raz's *Service Conception of Authority* serves as both a theoretical foundation and a practical approach to understand the judicial role in interpreting and applying constitutional norms. This notion implicitly challenges the assumption that individuals exist entirely separate from society. Raz's framework positions individuals within a normative relations where legal authority mediates between personal reasoning and shared societal values. In the context of constitutional adjudication especially in Indonesia, this view is particularly important. Constitutional judges are not merely neutral interpreters of legal texts, judges play an active role in guiding society through complex moral, cultural, and political terrains. If legal interpretation is to remain legitimate, especially when addressing contentious issues involving religion, minority rights, or democratic integrity, it must recognize that individuals are situated within social, historical, and normative frameworks. Thus, any model of constitutional interpretation that assumes individual autonomy without regard for social embeddedness requires further justification. Raz's account shows a coherent justification for authority not as something that forces obedience, but as a way to guide individuals through complex moral and social decisions within the clear and justified direction.

Raz distinguishes between *de facto authority* which exists in practice without regard to its moral or rational justification, and *legitimate authority*, which is justified by its ability to guide individuals to act in accordance with reasons they could not effectively follow on their own.²³ This distinction underlines the importance of legitimacy in judicial decisions. Judges are not merely enforcers of constitutional provisions, they are interpreters whose authority depends on their capacity to elucidate and apply constitutional principles in ways that reflect broader societal values. Raz's thoughts positions judicial authority as instrumental in maintaining the coherence and functionality of legal systems. For constitutional adjudication, this involves balancing textual fidelity with moral reasoning.²⁴ Raz's

²² Raz, *Between Authority and Interpretation*, 54.

²³ Raz, "Authority and Consent," 106

²⁴ Irene Angelita Rugian, "Prinsip Proporsionalitas dalam Putusan Mahkamah Konstitusi: Studi Perbandingan di Indonesia dan Jerman [The Principle of Proportionality in Constitutional Court Decisions: A Comparative Study in Indonesia and Germany]," *Jurnal Konstitusi* 18 No.2 (Juni 2021): 465, <https://doi.org/10.31078/jk1829>.

emphasis on the role of authority in facilitating adherence to moral and legal reasons underscores the judiciary's responsibility to interpret the constitution in a manner that advances justice and societal well-being.²⁵

The fact that law is authoritative nature of law makes interpretation central to make the reasoning of law in its practical way.²⁶ It is likely to find numerous occasions to practical reasoning that leads to the view about the reasons for compliance.²⁷ They also might have been adequate had there been an obligation to obey and to lead to different valid conclusions as to what is best to do.²⁸ The centrality features Raz explained that interpreting the rule conceptualize the content-independence as an aspect of the normative gap display between the normative and evaluative.²⁹ The content-independence in Raz's thought can refer to the rules as the reasons eventhough they do not show the value of actions for which they are reasons.³⁰ Raz emphasizes that rules at least man-made rules can make a difference to practical reasoning and they are rightly said to be reasons in their own right rather than merely statements of reasons.³¹ Rules affects people's practical reasoning by means of authoritative utterances, as a necessary condition for judges to have authority, to be in authority, or to be an authority that some of his utterances are authoritative.³² There are independent reasons to do or to believe as it advises, it seems like the recognitional conception regarding acknowledging judge's authority to interpret having confidence in his judgment and trusting his opinion.³³ Contextually in Indonesia constitutional court, constitutional judges usually adhere the explicit text of the constitution and address its underlying the literal meaning of the text. Judges are tasked with balancing a sufficient reading belief of the constitution with a deeper understanding of the values and principles. The balancing act requires judges to engage not only in legal analysis but also in moral reasoning. Their decisions

²⁵ Raz, "The Role of Well-Being," *Philosophical Perspectives* 18 (2004): 281.

²⁶ Raz, *Between Authority and Interpretation*, 107.

²⁷ Raz, "Authority and Consent," 104.

²⁸ Raz, "Authority and Consent," 104.

²⁹ Raz, *Between Authority and Interpretation*, 211.

³⁰ Raz, "Authority and Consent," 108.

³¹ Raz, *Between Authority and Interpretation*, 211.

³² Raz, "Authority and Consent," 107.

³³ Raz, "Authority and Consent," 107.

reflect both the legal framework and the ethical standards of the society they serve. The *Service Conception of Authority* proposed by Raz has been subjected to criticism, particularly regarding its assumption that authority offers superior reasons for action. Actions performed for a purpose other than giving consent can still amount to consent if they are carried out with the belief that they will establish a right or impose a duty, and it is the belief that justifies them having such an effect.³⁴ Critics contend that an overreliance on authority, especially in the context of judicial decision-making, may disproportionately prioritize judicial authority at the expense of individual autonomy. Then, the complex moral judgments about Raz's framework places significant interpretive burdens on judges, requiring them to resolve complex moral dilemmas and subjectivity in legitimacy determining what constitutes 'better reasons' can be inherently subjective, potentially leading to judicial overreach.

Despite these critiques, Raz's framework remains a powerful tool for understanding the normative foundations of judicial authority. By emphasizing the conditions under which authority is justified, his theory provides a roadmap for ensuring that judicial interpretations are both legitimate and effective. Raz's theory has practical implications for constitutional interpretation such as rationalization of judicial power. His emphasis on the service aspect of authority ensures that judicial decisions are grounded in rational justifications that serve societal interests. Raz also highlights about the framework for legitimacy by linking authority to the provision of better reasons.³⁵ Raz provides a normative standard for evaluating judicial decisions. He also explains the moral underpinnings of interpretation. Raz points out that constitutional interpretation has moral dimension which posit judges do more than just apply legal rules.³⁶ The moral aspect comes into play when judges interpret the norms in light of the values that matter to the public.³⁷ Raz does not claim that morality and law are the same, but he does argue that law, must remain sensitive to the societal values to

³⁴ Raz, "Authority and Consent," 121.

³⁵ Ben Martin, "Raz's Appeal to Law's Authority," *Philosophical Studies* 181 (2024): 269.

³⁶ Raz, *Between Authority and Interpretation*, 353.

³⁷ Raz, *Between Authority and Interpretation*, 394.

maintain its legitimacy. The interpretive role places judges in a unique position which they must act as mediators between the unwritten law and the values that society holds, especially in moments of social or political tension. Raz's conception of authority clarifies how judges can do those tasks responsibly. In the context of constitutional adjudication, judges are not enforcing rules, they must identify and clarify the constitution remain meaningful and relevant to a changing society. It provides a theoretical foundation for understanding how judges can navigate the challenges of interpretation while maintaining the legitimacy of their decisions.

2.3. The Differences about Legal Interpretation and Constitutional Interpretation: Analysing Joseph Raz's Analytical Jurisprudence

This section show the differences between legal interpretation and constitutional interpretation which reviewing what are the hidden concept based on Raz analytical jurisprudence. The interpretation of law involves further moral or other non-legal considerations. Legal officials who accept the moral validity of the ultimate laws and posit the supposition that it is morally legitimate regarding to the legal argument is technically legal.³⁸ Laws are basic norms and other norms that come directly or indirectly from these basic norms.³⁹ Laws as a political product will give rise to compromise from various interests and the actions of judges to interpret.⁴⁰ Such a form of compromise can be formulated as approval or rejection of laws that are open to interpretation.⁴¹ Joseph Raz views that for legal interpretation integrates linguistic analysis, normative reasoning, and contextual understanding to address the complexities of applying legal texts.⁴² In constitutional interpretation, his insights offer a valuable methodology that balances textual fidelity with adaptability to societal changes. Meanwhile, constitutional interpretation is an action as well as an intention to show the ability to understand the meanings contained in the written formulation of laws and

³⁸ Raz, *Between Authority and Interpretation*, 331.

³⁹ Raz, *Between Authority and Interpretation*, 65.

⁴⁰ Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge, *Rights, Culture, and The Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003), 112.

⁴¹ Meyer, Paulson, and Pogge, *Rights, Culture, and The Law*, 112.

⁴² Raz, *Between Authority and Interpretation*, 239.

regulations.⁴³ It also emphasizes a judge's freedom of choice and view as laws to guide the act of judging.⁴⁴ This section explores Raz's views on legal interpretation, emphasizing their application to constitutional law and their alignment with analytical jurisprudence which posits philosophical analysis as a method of investigation aimed at evaluating complex systems of thought by breaking them down into simpler components, which help to clarify their interrelationships. A good interpretation is that those connections and interrelations are significant in terms of or by reference to some general theory or general truths about people, society and this is most commonly due to the fact that the general truths were not known before.⁴⁵

The philosophical analysis has experienced renewed interest in the idea of explaining linguistic meaning through the concept of truth, which many philosophers find more manageable than the concept of meaning itself.⁴⁶ Raz emphasize about the meaning of words in legal philosophy, not about the relevance of all questions of meaning.⁴⁷ Meaning is sometimes used to mean point or value and alternatively meaning is often used to refer to content.⁴⁸ Raz's philosophical outlook was formed at the time when Russell's theory of descriptions as a paradigm of philosophical explanation solved the problem of the reference of definite descriptions while avoiding the need to postulate dictional or other non-existing objects.⁴⁹ The main idea is that the meaning of a declarative sentence can be defined by specifying the conditions under which it is true. Furthermore, Raz emphasizes the importance of understanding meaning as a tool to unravel ontological complexities, which holds significant relevance in the philosophy of law. This perspective is particularly pertinent given that law is replete with abstract entities such as rights, duties, corporations, and

⁴³ Raz, *Between Authority and Interpretation*, 276.

⁴⁴ Raz, *Between Authority and Interpretation*, 178.

⁴⁵ Thomas Bustamante and Thiago Lopes Decat, *Philosophy of Law as an Integral Part of Philosophy: Essays on the Jurisprudence of Gerald J. Postema* (UK: Bloomsbury Publishing, 2020), 134.

⁴⁶ Alfred Tarski, "The Semantic Conception of Truth and The Foundations of Semantics," *Philosophy and Phenomenological Research* 4, no. 3 (1944): 341.

⁴⁷ Lukasz Kurek, "Antinaturalism in the Legal Philosophy of Joseph Raz," *Polish Law Review* 3, no. 1 (2017): 208.

⁴⁸ Raz, *Between Authority and Interpretation*, 49-50.

⁴⁹ Raz, *Between Authority and Interpretation*, 50.

states.⁵⁰ Raz offers two questions for analysing jurisprudential theories such as first, why do so many jurisprudential theories focus on the state and second, what is it about the state that gives a special place in social arrangements.⁵¹ Both of two questions address the aspects of states and open the possibility answers that criticise jurisprudential in legal systems. Raz questions the relations between state law and other kinds of law related to the system. The state law and other kinds of law related systems may well conclude that in some ways theoretically and practically most challenging and most important for understanding the legal system. The scope of state usually related to state's role and its function for planning, executing policy and enforcing law clearly and transparently.⁵² Raz proposes the law as an open system that is seeking the autonomous organization and a variety of norms that can guide, regulate, and adapt social behavior. These norms often operate as an initiating force for creating and modifying social arrangements, allowing law to respond to the evolving needs of society.⁵³

Raz's approach to legal interpretation revolves around understanding law as a structured and normative system. He identifies two key elements that underpin the interpretative process, including the textual analysis in which Raz emphasizes the importance of understanding the linguistic meaning of legal texts. This involves not only a literal reading but also an analysis of the contextual nuances of the language used. Raz stated that interpretation is successful if interpretation is able to explain the meaning of the object being interpreted. Meaning has its own meaning for everyone who interprets objects and understands them as meanings. Meaning can never be conveyed authentically because meaning can be interpreted. Each interpretation defines meaning based on the understanding of the interpreting subject. The meaning will be based on decisions that are interpretive and relevant and understood in the practice of legal institutions. Meaning according to Raz may include a combination of abstractions for some

⁵⁰ Raz, *Between Authority and Interpretation*, 50.

⁵¹ Raz, *Between Authority and Interpretation*, 47.

⁵² Zezen Zaenal Mutaqin, "The Strong State and Pancasila: Reflecting Human Rights in The Indonesian Democracy," *Constitutional Review* 2, no.2 (December 2016): 163.

⁵³ Joseph Raz, "Promises in Morality and Law," *Scholarship Archive Columbia Law School* (1982): 933.

people. The meaning thus according to Raz correlates with the presence of the subject.⁵⁴ Meaning is revealed based on the articulation of each person in understanding the object being interpreted.⁵⁵ Raz also wants to emphasize that the explanation of the meaning of objects must be supported by constitutive reasons that can explain a series of interpretive processes. Constitutive reason is a set of facts that make and enable correct interpretation and through those facts allows one to understand the interpretation.⁵⁶ Interpretation according to Raz can be successful if it is able to explain the meaning of the object and is supported by constitutive reasons that show how the interpretation is carried out.

There is also the normative considerations beyond textual meaning, Raz argues that legal interpretation must account for the underlying principles and values that give the text its normative force.⁵⁷ This includes moral reasoning, societal values, and the broader goals of justice and fairness.⁵⁸ For Raz, these principles are not mutually exclusive but must operate in tandem to produce interpretations that are legally valid and socially meaningful. The law portrays itself as legitimate and seeks not only the compliance but also the loyalty of those it governs.⁵⁹ It may be concerned on the legal systems which conform to some moral values and give certain moral features.⁶⁰ These necessary moral features of law are derivative characteristics of law that possess them as the result of the fact and to fulfil them in its unique social role.⁶¹ Raz's perspective raises questions about the features of a lawful government in a specific country, focusing on the origins of its legal system. Raz emphasizes that the legal system can be analysed from a factual or moral standpoint or through an examination of the legal framework to determine which government holds the moral obligation to command respect and obedience.⁶²

⁵⁴ Raz, *Between Authority and Interpretation*, 269.

⁵⁵ Raz, *Between Authority and Interpretation*, 269.

⁵⁶ Raz, *Between Authority and Interpretation*, 230.

⁵⁷ Raz, *The Authority of Law*, 313.

⁵⁸ Raz, *The Authority of Law*, 313.

⁵⁹ Joseph Raz, "Legal Validity," *Archive für Recht's und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 63, no. 3 (1977): 351.

⁶⁰ Joseph Raz, "The Institutional Nature of Law," *The Modern Law Review* 38, no. 5 (September 1975): 490.

⁶¹ Raz, "The Institutional Nature of Law," 490.

⁶² Raz, "On Lawful Governments," 302

A distinctive feature of Raz's interpretative methodology is his emphasis on context. Legal texts, particularly constitutional provisions, do not exist in isolation but are part of a broader normative and societal framework. Raz highlights the importance of historical context through understanding the intentions of the drafters and the circumstances under which the legal text is created. The contemporary relevance which adopts the legal interpretation to current societal norms and challenges while maintaining fidelity to the original text.⁶³ In Raz's book *The Practical Reason and Norms* (1990), Raz demonstrates his ability to shape the contemporary landscape of analytical jurisprudence. Raz's work explains a set of rules that cannot be declared as rules if they are not practiced or implemented.⁶⁴ Similarly, legal rule is part of the rules that are practiced in a certain system and by a certain community.⁶⁵ Likewise, a rule cannot be considered a social rule if it is not practiced by a certain community.⁶⁶ Courts as norm applying institution usually explain through the nature of those institutions which cannot distinguish marks of norm applying organs. The norm applying institution only concerns the nature of courts to become aware of the problematic explanation which still offers various incompatible explanations.

To understand Raz's approach to constitutional interpretation, firstly it is important to recognize the distinction between law and morality. Law consists of formal rules established by institutions and intended to regulate conduct through enforceable norms.⁶⁷ On the other hand, morality refers to the broader principles of right and wrong that guide human behavior and often beyond what is codified in law.⁶⁸ Raz provides a more balanced and thoughtful approach between law and morality by offering a middle ground between two into the interpretation of law such as rigid textualism which clings too closely to the literal meaning of legal

⁶³ Timothy Endicott, *Administrative Law Second Edition* (Oxford: Oxford University Press, 2011), 42.

⁶⁴ Michael Freeman, *Llyod's Introduction to Jurisprudence* (London: Sweet and Maxwell, 2014), 385.

⁶⁵ Freeman, *Llyod's Introduction to Jurisprudence*, 385.

⁶⁶ Freeman, *Llyod's Introduction to Jurisprudence*, 385.

⁶⁷ Lili Rasjidi, dan B. Arief Sidharta, *Filsafat Hukum Mazhab dan Refleksinya* [Schools of Legal Philosophy and Their Reflections] (Bandung: PT Remaja Rosdakarya, 1989), 167-168.

⁶⁸ B. Arief Sidharta, *Refleksi tentang Struktur Ilmu Hukum: Sebuah Penelitian tentang Fundasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia* [A Reflection on the Structure of Legal Science: A Study on the Philosophical Foundations and Scientific Nature of Legal Science as the Basis for the Development of Indonesia's National Legal Scholarship] (Bandung: CV Mandar Maju, 2009), 161.

texts and excessive judicial discretion which risks subjective rulings.⁶⁹ Raz's views on interpretation bridge the gap between linguistic analysis and moral reasoning.⁷⁰ He argues that interpreting legal texts is not just about understanding words, it also requires understanding their intended purpose and the values they serve.⁷¹ Intepreting legal texts is designed to guide behaviour and resolve disputes which ensure legal rulings promote justice and serve the public good can be put on the judge's decisions. Interpretation allows the understanding to remain responsive and to change values without undermining the rule of law. Raz emphasizes where judges often tasked with interpreting foundational legal principles in ways that preserve both their legitimacy and their relevance in practical context. Raz recognizes that the meaning of legal texts focus on linguistic precision and moral reasoning aligns with the demands of constitutional adjudication can evolve over time, reflecting changes in societal values.⁷²

Joseph Raz's analytical jurisprudence provides a thoughtful lens through reimagined constitutional interpretation particularly in jurisdictions like Indonesia, where judges are often called upon to balance legal reasoning with the moral complexities of a pluralistic society. Raz's thoughts in *Service Conception of Authority* argues that judicial authority is legitimate only when it helps individuals act on reasons that already apply to them such as reasons that are rational, morally justified, and socially meaningful. A recent example that raises important questions about legitimacy of constitutional judges is the constitutional court decision (90/PUU-XXI/2023), which permitted exceptions to the presidential and vice-presidential age requirement framed.⁷³ While legally framed, the decision sparked widespread criticism and concern about whether the court had acted in the public interest or in alignment with political motivations. Based on Raz's perspective, such a decision calls into question the judicial authority legitimacy must not simply command, it must provides better reasons

⁶⁹ Raz, *The Authority of Law*, 2.

⁷⁰ Raz, *The Authority of Law*, 2.

⁷¹ Benedict Sheehy, "Law, Language, and The Social Construction of Legal Reality," *IJLLD* (December 2023): 18.

⁷² Raz, *The Authority of Law*, 2.

⁷³ Artha Debora Silalahi, et. al., "Axiological Insights into Unveiling Independent Constitutional Judge Decisionism," *Yustisia Jurnal Hukum* 13, no 3 (2024): 234.

those that reflect both constitutional norms and resonate the broader values of the society it serves.⁷⁴ In Raz's framework interpretation about law must bridge with moral evaluation without exception in constitutional interpretation.

Constitutional judges reasoning must bridge legal logic with ethical coherence especially in cases that shape national political structures. This concern echoed that judicial decisions must be rooted both in philosophical and public critiques toward the need for judicial reasoning that is not normatively sound and socially accountable.⁷⁵ This growing interpretative role of judges requires a deeper inquiry into how legal norms are constructed and whether they truly align with public collectiveness. Raz recognizes a dialogical model of interpretation which put the importance of text as a living one shaped by evolving contexts and proposes a method of interpretation that balances fidelity to constitutional texts with responsiveness to the unique cultural and moral fabric of society.⁷⁶ Raz ensures that interpretations resonate with the governed in the judicial creation of law and interpretative methods reflects a growing focus on how judges shape legal norms through their interpretations. Judges interpretation can approach and investigate into question about identifying any shared basis for a public conception of justice.⁷⁷ Courts today are increasingly seen not just as interpreters of law, but as active participants in shaping its meaning.⁷⁸ The judges reasoning is tasked with following better reasons for action and prompts deeper reflection on how judges construct legal norms and what methods they use in interpretation can be tested reflected through civic discourse, academic critique, and public engagement.⁷⁹ In pluralistic societies like Indonesia, this shared evaluation becomes essential for ensuring that constitutional interpretation remains both justifiable and just.

⁷⁴ Silalahi, *et.al.*, "Axiological Insights into Unveiling," 234-235.

⁷⁵ Artha Debora Silalahi, "Some Debates of Hermeneutic and Legal Interpretation: Critical Analysis of Hans-Georg Gadamer Philosophical Hermeneutics," *Jurnal Mimbar Hukum Universitas Gadjah Mada* 36, no. 1 (June 2024): 223.

⁷⁶ Silalahi, *et.al.*, "Axiological Insights into Unveiling," 236.

⁷⁷ Samuel Scheffler, "Choice, Circumstance, and the Value of Equality," *Politics, Philosophy, and Economics* 4, no. 1 (2005): 19.

⁷⁸ Silalahi, "Some Debates of Hermeneutic and Legal Interpretation," 223,

⁷⁹ Artha Debora Silalahi, *et.al.*, "Navigating the Democratic Crisis: Indonesia's Journey through Political Ethics, Law, and Social Change," *Jurnal Sapientia Humana* 4, no. 2 (2024): 223.

Raz critiques purely textual approaches to legal interpretation, such as strict textualism, for their failure to account for the normative and contextual dimensions of law. He also challenges overly discretionary approaches that prioritize judge's subjective views over the text's intended meaning. For Raz textualism fails to capture the full scope of legal meaning, which includes implicit norms and principles not explicitly stated in the text. Excessive discretion undermines the rule of law by allowing judicial preferences to overshadow the normative framework established by the legal text. Raz's balanced approach seeks to harmonize these extremes, ensuring that interpretation remains both grounded in the text and responsive to societal needs. Thus, rethinking constitutional interpretation requires acknowledging that legal texts are not self-contained truths, that must be interpreted in its principled yet flexible grounded yet responsive offering more legitimate model for constitutional justice.⁸⁰

Raz's framework offers a systematic approach for resolving interpretative challenges. Judges can use textual analysis to ensure fidelity to the constitution's language while interpreting it in light of its historical and normative context. Judges employ moral reasoning to address issues not explicitly covered by the text, ensuring that their decisions promote justice and societal well-being. Raz's framework would encourage judges to interpret constitutional provisions in a way that aligns with both their textual meaning and contemporary understandings of justice and equality. For understanding justice and equality Raz explains the sense in which a political morality can be said to be certain moral and political theories that one should distinguish between rhetorical and strict egalitarian, Raz called it principle of equality.⁸¹

Raz thought also criticising strict textualism for its inability to account for the implicit norms and values embedded in legal texts.⁸² He argues that textualism's rigid which focuses on the plain meaning of words neglects the broader societal

⁸⁰ Artha Debora Silalahi, "Paradoks Ide Negara Hukum dalam Justifikasi Filosofis Pancasila sebagai Sumber Hukum [The Paradox of the Rule of Law Concept in the Philosophical Justification of Pancasila as the Source of Law]," *Jurnal Konstitusi* 21, no. 1 (March 2024): 71.

⁸¹ Joseph Raz, "Principle of Equality," *Mind* Vol LXXXVII, no. 3 (1978): 321.

⁸² Joseph Raz and James Griffin, "Mixing Values," *Proceedings of the Aristotelian Society* 65 (1991): 95.

and moral dimensions of law.⁸³ Conversely, Raz critiques overly discretionary approaches for prioritizing judicial subjectivity over the text's intended meaning, undermining the rule of law and democratic accountability. The transition from legal interpretation to constitutional interpretation introduces additional layers of complexity. Constitutional texts, as foundational legal documents, serve not only as a source of legal norms but also as instruments for structuring political power and protecting fundamental rights.⁸⁴ Raz views the foundation of rights based on Ronald Dworkin's legal and political theories which presuppose a distinction between rights and collective goals and concerning both politics and law that in certain matters rights prevail to exclusion's goals.⁸⁵ Raz's framework accommodates these complexities through its dual focus on linguistic precision and moral reasoning.

2.4. Interrogating the Applicability of Raz's Ideas to Indonesian Constitutional Adjudication

Indonesia's constitutional adjudication presents unique challenges that reflect the complexities of its diverse sociopolitical and legal landscape. Indonesia Constitutional Court plays a pivotal role in safeguarding the 1945 Constitution (UUD NRI 1945) and resolving disputes over its interpretation. In this context, Joseph Raz's framework on authority and interpretation offers valuable insights for addressing the challenges of constitutional adjudication in Indonesia. This section examines the relevance of Raz's theories to the Indonesian legal system, emphasizing the judiciary's authority, interpretative approaches, and the quest for constitutional truth. The constitution should be interpreted through an understanding of social needs, public reason, and the philosophical meaning of justice.⁸⁶ Additionally, the dynamic political, economic, and social landscapes necessitate a flexible and adaptive approach to constitutional decision-making.

⁸³ Raz and Griffin, "Mixing Values," 95.

⁸⁴ Jimly Asshiddiqie, "Universalization of Democratic Constitutionalism and the Work of Constitutional Courts Today," *Constitutional Review* 1, no. 2 (December 2015): 11.

⁸⁵ Joseph Raz, "A Matter Principle by Ronald Dworkin," *California Law Review* 74, no. 3 (1986): 1103.

⁸⁶ Artha Debora Silalahi, "The Framework of Law Impacts in Philosophy of Law and Justice: How is the Certainty of Law and Justice Understood?" *Proceedings of the 10th International Conference on Nusantara Philosophy* (10th ICNP 2022).

Joseph Raz's contributions to legal philosophy, particularly his insights on authority and interpretation, provide a compelling framework for constitutional adjudication. The strengths and limitations of Raz's framework, with a focus on its applicability to constitutional interpretation and its relevance to judicial practices in diverse legal systems. Joseph Raz's contributions to analytical jurisprudence, particularly his theories on authority and interpretation, offer a sophisticated framework for addressing the challenges of constitutional adjudication. In Raz's book *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) Raz explains the legal phenomena including the nature of the law.⁸⁷ His explanations employ concepts which are also employed the life of the law that are given sharper focus and definition in theories and designed to illuminate whatever it is which makes these phenomena interesting theoretically or important practically.⁸⁸ When creating a comprehensive overview or mapping of legal phenomena, it is helpful to distinguish between various levels of relationships such as an overview which can employ law as a versatile organizing concept, offering a framework of analytical tools that aid in interpreting, describing, comparing, and generalizing legal phenomena.⁸⁹

A system actually looks like when it is legally justified in its claim to authority and the prior source of which is not present for the case.⁹⁰ Raz's *Service Conception of Authority* emphasizes the necessity of legitimacy and rational justification, ensuring that authority functions not arbitrarily but as a mediator between individuals and the normative reasons guiding their actions.⁹¹ This concept is particularly significant for constitutional courts, where judicial authority must harmonize adherence to constitutional texts with ethical and societal contexts. The necessity of legitimacy and rational justification puts the principle of responsibility which is given through the interpretation in its various

⁸⁷ Raz, *Between Authority and Interpretation*, 10.

⁸⁸ Raz, *Between Authority and Interpretation*, 10.

⁸⁹ Twining, *General Jurisprudence*, xix.

⁹⁰ Εηιολά Άνούολύwapó Σόγέμη, "Participation and Law's Authority," *Canadian Journal of Law and Jurisprudence* XXXVI, no.2 (August 2023): 523-524.

⁹¹ Martin, "Raz's Appeal to Law's Authority," 270.

possibilities.⁹² The interpretation may indeed support a conception justice that is redistributive enough to deserve the substantive principle between choices and circumstances that is strong enough to support judges egalitarian position. It can claim the kind of widespread support on which the force of the affirmative arguments depends on.⁹³

The framework of judicial independence concerns on the protection of rights directly when courts rule against the regime to defend individuals physical integrity rights and indirectly, through the deterrent effect that judicial independence has on regime actions.⁹⁴ This section also highlights the distinction between judicial independence and the independence of individual judges. For judges, this conception implies a dual responsibility: *firstly*, adhering to the constitutional text while ensuring that their interpretations are rational, justifiable, and *secondly*, reflective of societal values. The independence of the judiciary as a law enforcement institution according to Raz is aimed at efforts to prevent unlawful acts by not giving permission for the implementation of interpretations that violates the criteria for good interpretation.⁹⁵ The core of the problem raised by Raz about the independence of interpretation ultimately only produces an explanation determined by criteria or rules with a temporal dimension. These temporal dimensions allow the criteria used in interpreting to change or no longer apply.⁹⁶ According to Raz, the determination of this interpretation criterion does not necessarily determine the quality of the interpretation carried out. Raz's explanation of the independence of the judiciary that holds the authority to interpret is directed at the independence of interpretation. Raz points out that: ⁹⁷

“typically interpretations are offered to explain what is there independently of them, rather than in order to produce new objects which explain themselves. Second, and here we come to the heart of the matter, explanations can be good or bad, and they can be more or less good. Their success is determined

⁹² E. Fernando M. Manullang, “Penafsiran Teleologis/Sosiologis, Penafsiran Purposive dan Aharon Barak: Suatu Refleksi Kritis [Teleological/Sociological Interpretation, Purposive Interpretation, and Aharon Barak: A Critical Reflection],” *VeJ* 5, no. 2 (2019): 275.

⁹³ Scheffler, “Choice, Circumstance, and the Value of Equality,” 9.

⁹⁴ Abouharb, Moyer and Schmidt, “De Facto Judicial Independence and Physical Integrity Rights,” 372.

⁹⁵ Raz, *Between Authority and Interpretation*, 304.

⁹⁶ Raz, *Between Authority and Interpretation*, 304.

⁹⁷ Raz, *Between Authority and Interpretation*, 304.

by criteria, or rules for excellence in interpretations (i.e. in interpretations of the kind that they are). Surely these criteria are independent of the interpretations. If their validity has a temporal dimension then they are valid before the interpretations to which they apply are put forward, as well as independently of them.”

The opinion expressed by Raz above explains that interpretation is carried out independently of a pre-existing object without being given the opportunity to be able to explain the purpose of the object which is important to be interpreted. The core of the problem raised by Raz about the independence of interpretation ultimately only produces an explanation determined by criteria or rules with a temporal dimension.⁹⁸ Raz puts his thoughts with an explanation of the relationship of legal interpretation and legal authority, a topic on which Raz has made a major an innovative contribution to the philosophy of law.⁹⁹ Raz is concerned with law as a concept, rather than law as a social phenomenon alike his thought about *Service Conception of Authority* that is especially applicable to the Indonesian judiciary, which must bridge the gap between the abstract principles of constitutional text and the practical realities of societal norms.¹⁰⁰ However, for Raz, law is in large part constituted by the conceptual understandings of those who operate within a legal system so that the nature of law is as much a matter of what Raz talks of as their ‘self-understanding’ seen as grappling with the relationship between the normativity of the concept of law and the actuality of its practice.¹⁰¹ Raz asserts that legitimate authority exists to assist individuals and by extension, institutions in acting according to reasons they might not fully understand or implement on their own.¹⁰²

According to Raz, judicial authority must facilitate rational action. It impacts the judges which should mediate between legal texts and the reasons that justify their application, ensuring that decisions are rational and justifiable. Judicial authority must be exercised in ways that earn public trust and respect, particularly

⁹⁸ Joseph Raz, *The Roots of Normativity* (Oxford: Oxford University Press, 2022), 181.

⁹⁹ Joseph Raz, “On Respect, Authority, and Neutrality: A Response,” *Ethics* 120, no. 2 (January 2010): 284.

¹⁰⁰ Raz, “On Respect, Authority, and Neutrality,” 284.

¹⁰¹ Joseph Raz, “Normativity,” *Philosophical Issues* 25 (2015): 152.

¹⁰² Raz, “A Matter Principle by Ronald Dworkin,” 1103.

in a diverse society like Indonesia. This is crucial in Indonesia, where public trust in judicial institutions is a key factor in maintaining legitimacy. Political influences and institutional limitations often challenge the court's independence, as involving in the ethic decision decided by ethical board of Indonesia constitutional court (06/MKMK/L/04/2024 and 07/MKMK/L/04/2024) shows the judge's dual role as both a constitutional justice and members appeared in court proceedings align with Raz's emphasis on the nature of legitimate authority. The Indonesian case underscores the urgency of embedding Raz's service conception of authority into judicial practice, particularly in a constitutional court that is tasked with protecting the foundational norms and rethinking how constitutional interpretation can avoid judges act under real or perceived influence whether from political pressures and personal affiliation. Authority must not only issue commands, but also offer morally and rationally justified reasons for act and its ability to serve the public by guiding action through reason not through personal or political interest. Raz's authority concept influenced from Austin's imperative theory mentioned about the expression of a sovereign's will.¹⁰³ It represents the will of several sovereigns concerning the method of governing matters of common interest.¹⁰⁴ Austin's thought about jurisprudence is too limited because he says that the rules do not impose duties but confer the power for concluding legal deals. In this context legal rules defining ways in which legally binding contracts legal deals should be concluded do not require people to behave in a specific way regardless of whether they want to or not.¹⁰⁵

Differently, in Raz's concepts focusing on textual analysis and normative reasoning offers a practical model for constitutional interpretation. Judges can use this framework to navigate the complexities of balancing textual and contextual analysis, Raz's approach encourages fidelity to the constitutional text while allowing for interpretations that reflect contemporary realities.¹⁰⁶ Raz

¹⁰³ Damir Banović, "About John Austin's Analytical Jurisprudence: The Empirical Rationalist Legal Positivism," *ICLR* 21, no. 1 (2021): 260.

¹⁰⁴ Banović, "About John Austin's Analytical Jurisprudence," 260.

¹⁰⁵ Damir Banović, "About John Austin's Analytical Jurisprudence," 260.

¹⁰⁶ Joseph Raz, *Engaging Reason on The Theory of Value and Action*, (Oxford: Oxford University Press, 2003), 16.

explicitly identifies the obstacles about interpretation are textual tension that only legitimate directives give reasons for action thereby endowing the normal justification thesis with practical significance and the implications of practical force that legal norms become binding in virtue of their status as legal norms.¹⁰⁷ These discussions highlight the existence of other forms of content-independent reasons. For instance, when a person or institution holds the normative authority to impose duties on others, those duties are binding not due to their specific content but because they result from the exercise of duty-imposing authority.¹⁰⁸

Incorporating moral reasoning demonstrates that Indonesian constitutional issues, such as human rights and social justice, necessitate that judges consider moral principles alongside legal norms. It is also addressing legal pluralism which explains how Raz's contextual sensitivity supports the integration of diverse legal traditions into constitutional adjudication, ensuring that decisions resonate with Indonesia's pluralistic society.¹⁰⁹ Furthermore, Raz's integration of linguistic, normative, and contextual analysis can be difficult to apply consistently. Judges are required to navigate competing demands also remaining faithful to the text while addressing societal needs and upholding moral principles.¹¹⁰ This complexity can result in variability across cases, potentially undermining the predictability and uniformity that are hallmarks of the rule of law.¹¹¹ Numerous criteria have been proposed to define the boundaries of law and to determine whether a specific standard belongs to a given legal system. Scholars have also explored the significance of distinguishing between what is legal and what is not, as well as how maintaining this distinction enhances our comprehension of law and society.¹¹² In *A General Jurisprudence of Law and Society* (2001), Brian Z. Tamanaha argues that law mirrors society and functions to maintain social order, emphasizing the need for legal theorists to recognize and address these

¹⁰⁷ Margaret Martin, "Raz's the Morality of Freedom," 65.

¹⁰⁸ Joseph Raz, *The Roots of Normativity*, 181.

¹⁰⁹ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), 68.

¹¹⁰ Luciano Venezia, "Raz's Normative Theory of Authority," *Philosophical Enquiries: Revue des Philosophies Anglophones* 1 (2013): 102.

¹¹¹ Venezia, "Raz's Normative Theory of Authority," 102.

¹¹² Joseph Raz, "Legal Principles and The Limits of Law," *Scholarship Archive Columbia Law School* (1972): 823.

dynamics, which are more prevalent than often acknowledged.¹¹³ While articulating this distinction with precision can be challenging and reasonable tests often account for borderline cases, many theorists uphold it for its straightforward application in most situations and its essential role in understanding law's function within society.¹¹⁴

Philosophically, this variability challenges the foundational premise of legal determinacy, a core concern in analytical jurisprudence. The analytical work in general jurisprudence appears from substantive or evaluative work in legal philosophy that some appeal to the idea of conceptual analysis to distinguish metaethics from normative ethics.¹¹⁵ Joseph Raz's contribution to legal philosophy reflects a distinctive approach that bridges practical reasoning and conceptual analysis.¹¹⁶ Rather than focusing solely on abstract metaphysical claims about what law is, Raz begins with how law functions in human life how people reason about norms, follow rules, and justify actions.¹¹⁷ His work addresses both the evaluative dimension (how the reasons and justifications are assessed) and the formal or conceptual dimension (how legal concepts are structured and understood).¹¹⁸

Unlike traditional metaphysical approaches that aim to define the "essence" of legal reality, Raz is more concerned with how legal concepts operate in our thinking and communication. He explores how we talk about law, how we reason with legal norms, and how legal authority is understood and applied. This shift in focus away from asking what law is in some absolute sense, and toward understanding how legal ideas work in practice allows Raz to offer a more grounded and context-sensitive analysis. Raz engages with central philosophical questions that have shaped the field of legal theory for decades. These include debates around legal positivism and anti-positivism, as well as deeper inquiries

¹¹³ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 229.

¹¹⁴ Raz, "Legal Principles and The Limits of Law," 823.

¹¹⁵ David Plunkett and Scott Shapiro, "Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry," *Ethics* (October 2017): 53.

¹¹⁶ Plunkett and Shapiro, "Law, Morality, and Everything Else," 54.

¹¹⁷ Plunkett and Shapiro.

¹¹⁸ Plunkett and Shapiro.

into the semantics (meaning of legal terms), epistemology (how subject come to know legal truths), and normativity (how legal norms provide reasons for action).

By focusing on how legal thought is structured and how it relates to broader practices of reasoning and justification, Raz's work continues to shape contemporary discussions about the nature of law, legal reasoning, and authority. Raz mediates Hart and Dworkin's debate by asking reflectively about the meaning of the word described in explaining the concept of law. Raz believes that the concept of law can be explained by first explaining the purpose 'law' as a word that is used in almost every field but is not explained in the framework of legal philosophy.¹¹⁹ Raz claims that the explanation of the concept of law is part of an effort to explain the meaning of the word 'law' (law or the law). Raz's response to the explanation of the meaning of the word 'law' is studied in the study of jurisprudence.¹²⁰ The discussion on jurisprudence highlights that arguments and conclusions about legal interpretation often aim to support claims of universal validity.¹²¹ A key point in this debate is the authoritative intention thesis such as the idea that the meaning of a legal rule should be determined by the intention of the legislator.¹²² However, this approach raises important questions. Ultimately, interpreting the law requires not only understanding the text but also critically assessing whether the legislator's intention provides adequate reasons for how the rule should be applied in practice.¹²³

Raz's emphasis upon an intrinsic reason as a fact about a proposed action in itself to practical reasoning that put the distinction between intrinsic and indicative reasons underlie Raz's disagreement about the significance authoritative directives.¹²⁴ This risks undermining the democratic legitimacy of constitutional adjudication. The reliance on judges to mediate between textual meaning and normative principles may lead to variability in interpretations and creating

¹¹⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* Second Edition (Oxford: Oxford University Press, 2009), x.

¹²⁰ Raz, *Between Authority and Interpretation*, 53-54.

¹²¹ Raz, *Between Authority and Interpretation*, 290.

¹²² Raz, *Between Authority and Interpretation*, 290.

¹²³ Raz, *Between Authority and Interpretation*, 290.

¹²⁴ Regan, "Reasons, Authority, and the Meaning of Obey," 5.

uncertainty in the legal system. The integration of linguistic, normative, and contextual analysis in Raz's thought difficult to apply consistently.¹²⁵ Judges may struggle with balancing these competing elements, particularly in complex constitutional cases. The requirement for moral reasoning adds an additional layer of complexity, which may lead to inconsistent applications across different cases and judges. It is important to refer to a reasonably just society rather than merely a reasonably just law, as consent to obey the law reflects an attitude not toward the law itself, but toward society as a whole, with the law being viewed as an integral part of that society as an association that holds true only if the law is perceived as embodying societal conventions and values.¹²⁶ The connection between people's evaluative views of their society can be testified based on that access to values that is the ability to become aware of the social dependence of evaluative beliefs.¹²⁷ The social dependence of evaluative beliefs testifies not to the social constitution of value but to the social dependence of access to value. It means that it is not difficult to think of other reasons for suspecting that at least some values are socially constituted.¹²⁸ It just as likely to be seen as arguments against the knowability of values or against their objectivity.¹²⁹

III.CONCLUSION

Joseph Raz's analytical jurisprudence provides a constructive framework for constitutional interpretation, especially within Indonesia's legal context. It demonstrates how Raz's philosophy, rooted in practical reason and normative analysis, provides more than just textual guidance. By integrating textual, linguistic, and normative analyses, Raz's approach ensures that constitutional interpretation remains both grounded and flexible. Raz's distinction makes between legal and constitutional interpretation highlights the deeper role of judges in preserving democratic principles and institutional legitimacy. Raz's

¹²⁵ Raz, *Between Authority and Interpretation*, 50.

¹²⁶ Raz, "Authority and Consent," 128.

¹²⁷ Raz, *Engaging Reason on The Theory of Value and Action*, 203.

¹²⁸ Raz, *Engaging Reason on The Theory of Value and Action*, 203.

¹²⁹ Raz, *Engaging Reason on The Theory of Value and Action*, 203.

approach helps assess whether judicial decisions reflect public reason or risk political deviation. Ultimately, his model encourages ethical, responsive, and publicly accountable interpretation, bridging legal reasoning with justice and societal needs, and providing a principled path for constitutional adjudication in complex societies.

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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.

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).

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INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

Theunis Roux*

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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.
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The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

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- **Bibliography:** The paper needs to cover at least 10 articles from reputable journal. Our reference uses The Chicago Manual of Style (CMS) 17th Edition (Full notes).

Example of Table

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.

ISSN 2460-0016



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